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No-Fault in a Fault Context: Tort Actions and Section 65B.51 of the Minnesota No-Fault Automobile Insurance Act

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Abstract
The passage of the Minnesota No-Fault Automobile Insurance Act has created new problems for the Minnesota lawyer. Some of the most pressing problems concern the effect of the Act on tort actions. This article analyzes the provisions of the No-Fault Act dealing with limitations on tort recovery and suggests solutions to come of the many interpretive problems created by the Act.

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Torts, Car insurance, No Fault Act, automobile accident, car accident, compensation, personal injury

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NO-FAULT IN A FAULT CONTEXT: TORT ACTIONS AND SECTION 65B.51 OF THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT

By MICHAEL K. STEENSON†

The passage of the Minnesota No-Fault Automobile Insurance Act has created new problems for the Minnesota lawyer. Some of the most pressing problems concern the effect of the Act on tort actions. This article analyzes the provisions of the No-Fault Act dealing with limitations on tort recovery and suggests solutions to some of the many interpretive problems created by the Act.

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I. INTRODUCTION

The pattern of compensation for automobile accident victims has been significantly altered by the advent of no-fault automobile accident legislation.\(^1\) In a no-fault state an injured individual now looks first to his own insurance company for the payment of his out-of-pocket loss rather than to the liability carrier of the person at fault in causing the accident.\(^2\) No-fault benefits provide a substitute for a negligence action for out-of-pocket loss, at least to the extent of the

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payable benefits. Consequently, recovery for such loss in a negligence action is limited, at least to the extent of the no-fault benefits received by the injured individual.

The pattern of recovery for noneconomic loss also has been altered in one significant respect. Because no-fault insurance does not compensate for noneconomic loss, an injured individual must still look to the person at fault for compensation. No-fault thus interposes a tort threshold which first must be met before the injured individual will be entitled to recover any damages for noneconomic detriment.  

The net effect of these limitations is to prohibit or to make unnecessary resort to litigation in cases involving insignificant injury. The tort limitations are designed to foster the purposes of no-fault by decreasing litigation and by using the resultant cost savings to defray the cost of the broad basic economic loss insurance made compulsory by no-fault legislation.

Although the basic changes no-fault makes are clear, as are the policies underlying those changes, the implementing legislation creates problems which must be resolved to facilitate the workability of the Act. The purpose of this article is to analyze the portions of the Minnesota No-Fault Automobile Insurance Act which deal with tort limitations on economic loss and noneconomic detriment and to resolve some of the substantive and procedural problems which they raise.

II. THE NATURE OF THE TORT LIMITATIONS ON ECONOMIC LOSS AND NONECONOMIC DETRIMENT; SECTION 65B.51 OF THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT

To understand the function of the tort limitations of the No-Fault Act, it first is necessary to understand the key elements of the Act. The Minnesota No-Fault Automobile Insurance Act requires all owners of motor vehicles which are required to be registered or licensed in Minnesota, or which are principally garaged in Minnesota, to maintain a plan of reparation security in effect during the period in which opera-

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3. See UMVARA § 5(a)(7), Comment.
7. "'Plan of reparation security' includes a contract, self-insurance, or other legal means under which there is an obligation to pay the benefits described in section 65B.49." MINN. STAT. § 65B.48, subd. 8 (1974).
tion or use is contemplated.\textsuperscript{8} Nonresident owners of motor vehicles not principally garaged in Minnesota or not required to be registered or licensed in Minnesota must also maintain a plan of reparation security in effect during the period of the operation, maintenance, or use in Minnesota with respect to accidents occurring in Minnesota.\textsuperscript{9}

The security required by the Act consists of liability insurance in the amount of $25/$50/$10,\textsuperscript{10} and basic economic loss insurance in the amount of $30,000 for basic economic loss sustained by each individual sustaining injury arising out of the maintenance or use of a motor vehicle.\textsuperscript{11} In addition, every owner of a motor vehicle which is registered or principally garaged in Minnesota must maintain uninsured motor vehicle coverage in the amount of $25/$50.\textsuperscript{12}

Subject to certain limitations, all individuals sustaining injury arising out of the maintenance or use of a motor vehicle have a right to receive basic economic loss benefits.\textsuperscript{13} The plan of reparation security which applies and whether recovery will be under the assigned claims plan depends on the type of vehicle involved in the accident, the status of the injured individual, and whether a plan of reparation security is identifiable and applicable to the injured person.\textsuperscript{14}

The basic economic loss benefits payable under the Act are primary to all other benefits an individual may receive from any other source, other than workers' compensation. Benefits paid or payable under a workers' compensation law will be subtracted in computing basic economic loss benefits,\textsuperscript{15} but only to the extent that they exceed any deductible applicable to basic economic loss benefits.\textsuperscript{16}

In return for the right to receive basic economic loss benefits, Sec-

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\textsuperscript{8} Id. § 65B.48, subd. 1 (Supp. 1975).

\textsuperscript{9} Id.

\textsuperscript{10} Minn. Stat. § 65B.49, subd. 3(1) (1974). The statute requires coverage of $25,000 for bodily injury to one person in any one accident. Subject to the per person limitation, the coverage is $50,000 per accident. In addition, coverage of $10,000 is required for property damage to others as a result of the accident.

\textsuperscript{11} Compare id. § 65B.49, subd. 2 with id. § 65B.44, subd. 1 (Supp. 1975).

\textsuperscript{12} Minn. Stat. § 65B.49, subd. 4 (1974). The statute provides for coverage of $25,000 per person for any one accident and, subject to the per person limitation, $50,000 per accident.

\textsuperscript{13} Id. § 65B.46. If the accident causing the injury occurs outside Minnesota the Act provides for a more limited recovery. See id. § 65B.46, subd. 2.


\textsuperscript{15} Minn. Stat. § 65B.61, subd. 1 (1974).

\textsuperscript{16} Id. § 65B.61, subd. 2.
tion 65B.51 restricts the damages the injured individual can recover in a negligence action. In brief, Section 65B.51, subdivision 1 indicates the actions to which the tort limitations will apply. Along with subdivision 2, it restricts tort recovery for economic loss by requiring that economic loss benefits be offset from any tort recovery. Subdivision 3 contains the tort thresholds which limit recovery for noneconomic detriment. Subdivisions 4 and 5 specifically preserve tort recovery for injuries other than those arising out of the maintenance or use of a motor vehicle; such actions are not subject to the limiting provisions of subdivisions 1, 2, and 3 of Section 65B.51.

Because the Act separates the treatment of economic loss and noneconomic detriment, they will be separated for purposes of analysis.

A. Economic Loss and Tort Limitations on Recovery of Economic Loss

All no-fault states limit tort recovery of economic loss for which no-fault benefits have been received. The nature and extent of the limitations differ from state to state. Some states grant a tort exemption to third parties to the extent of no-fault benefits paid, while others prevent an injured individual from pleading in a tort action any damages for which no-fault benefits are available. Still others will require reimbursement of a no-fault carrier for benefits paid from any tort recovery, with a right of credit or offset provided for against the obligation to pay no-fault benefits accruing in the future.

Although the approaches differ, the purpose of the provisions is the same, to avoid the waste and added cost to the no-fault system which would result if an injured individual is allowed a double recovery of economic loss, once through the receipt of no-fault benefits and once through a tort recovery.

17. See e.g., COLO. REV. STAT. ANN. § 10-4-713(1) (1973); MASS. GEN. LAWS ANN. ch. 90, § 34M (1975); MICH. COMP. LAWS ANN. § 500.3135(2) (Cum. Supp. 1976).


19. See CONN. GEN. STAT. ANN. § 38-325(b) (Cum. Supp. 1976). Instead of reimbursement, subrogation may be utilized. See HAWAII REV. STAT. § 294-7 (Supp. 1975). The general assumption made in this discussion is that the tort action arises out of the maintenance or use of a motor vehicle and is brought against a secured person. If these factors are not present the tort limitations will differ. See e.g., CONN. GEN. STAT. ANN. § 38-325(c) (Cum. Supp. 1976); KY. REV. STAT. ANN. § 304.39-070(2) (Cum. Supp. 1974); MASS. GEN. LAWS ANN. ch. 90, § 34M (1975); MINN. STAT. § 65B.53, subd. 3 (1974), as amended, Act of Mar. 25, 1976, ch. 79 § 1, [1976] Minn. Sess. Laws 202. In cases where the defendant is uninsured, or is not required to be insured for losses arising out of motor vehicle accidents, the considerations are different. In addition to preventing duplicate recovery, subrogation also shifts the loss outside the no-fault system.
The purpose of the Minnesota provisions limiting recovery of loss for which benefits have been paid is the same, although the Minnesota approach to the limitation appears to be unique.

To place the Minnesota provisions limiting recovery for economic loss in perspective, the benefits provided for in the Act and the limitations on benefits and exclusions from coverage first must be examined.

1. Economic Loss

In establishing basic economic loss benefits levels and imposing limitations on those benefits, the legislature attempted to provide for benefits which would cover the widest possible range of out-of-pocket losses, yet which could be offered to the public at reasonable rates. The nature of the benefits and the limitations on those benefits reflect the balancing process.

Most of the out-of-pocket losses which would be recoverable in a negligence action will be recoverable as basic economic loss benefits. There are some significant differences, however, because of the limitations on basic economic loss benefits and because of certain exclusions from coverage in the Act.

The starting point for examining basic economic loss is the concept of “loss” as defined in the Act. “Loss” is defined as economic detriment resulting from the accident causing injury. It consists only of medical expense, income loss, replacement services loss, funeral expense, survivor’s economic loss, and survivor’s replacement services loss. Basic economic loss benefits are limited to $20,000 for medical expense loss, unless optional added coverages are purchased. Benefits are limited to a total of $10,000 for income loss, replacement services loss, funeral expense loss, survivor’s economic loss, and survivor’s replacement services loss.

a. Medical Expense Loss

The Act provides for the payment of all reasonable expenses for

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20. See Tape of Debate on S.F. 96 Before the Minnesota House of Representatives (Jan. 31, 1974); Tape of Debate on S.F. 96 Before the Minnesota Senate (May 9, 1973); Tape of Meeting on S.F. 96 Before the Minnesota House-Senate Conference Committee (Mar. 18, 1974); id. (Mar. 11, 1974); id. (Feb. 28, 1974); id. (Feb. 18, 1974).
22. MINN. STAT. § 65B.43, subd. 7 (Supp. 1975). The definition specifically excludes non-economic detriment, although economic detriment is loss even though it is caused by pain and suffering or physical or mental impairment. Id.
23. MINN. STAT. § 65B.44, subd. 1(a) (Supp. 1975).
24. MINN. STAT. § 65B.49, subds. 6(a)-(b) (1974).
25. Id. § 65B.44, subd. 1 (Supp. 1975).
necessary medical, surgical, x-ray, optical, dental, chiropractic, and rehabilitative services. It includes prosthetic devices, prescription drugs, necessary ambulance, hospital, extended care and nursing services. Benefits will not be payable for incidental expenses incurred in obtaining medical treatment.

The medical expense benefits under the Act should compensate an injured individual for most of the loss which would be recoverable in a negligence action, although there are limitations on the benefits. Hospital room and board benefits may be limited by the reparations obligor to the regular daily semi-private room rate customarily charged by the institution in which the recipient of the benefits is confined.

b. Income Loss

Income loss benefits compensate an injured individual for eighty-five percent of his loss of present and future gross income, subject to a maximum of $200 per week. "Inability to work" is defined as "disability which continuously prevents the injured person from engaging in any substantial gainful occupation or employment, for wage or profit, for which he is or may by training become reasonably qualified." Benefits are not, apparently, payable for substituted services required for the continuation of income.

Benefits available for income loss are to be reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned in appropriate substitute work he was capable of performing but unreasonably failed to undertake.

Unlike other basic economic loss benefits, the definition of income loss benefits takes into consideration both present and future gross income loss. Because basic economic loss benefits are payable only

26. *Id.* § 65B.44, subd. 2.
27. *Id.*
28. *Id.*
29. MINN. STAT. § 65B.44, subd. 3 (1974).
30. *Id.*
31. The definition does not take into consideration the services required for the continuation of income. It seems to contemplate only payment for income loss. See *id.* As a contrast, UMVARA § 1(5)(ii) provides for the payment of "work loss" which is defined as:
[L]oss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.
32. MINN. STAT. § 65B.44, subd. 3 (1974).
33. *Id.*
as loss accrues, the Act does not seem to envisage the present payment of earnings loss likely to occur in the future, at least in absence of a provision for lump sum payments to an insured. It does seem to anticipate, however, that an injured individual will be allowed to establish permanency in a law suit. This would allow an injured individual to collect his wage loss monthly as the loss accrues, without necessitating the submission of medical evidence each month before benefits will be payable.

Since the concern of the Act is to compensate for actual accrued loss, an unemployed individual will not be entitled to recover for income loss until such time as he can establish that he would have obtained employment but for the injury.

The Act, since it compensates only for accrued loss, does not compensate for loss of earning capacity. Although future gross income loss may provide a significant portion of the damages that would, in absence of no-fault, be recoverable as loss of earning capacity, loss of earning capacity is a broader element of damage.

c. Funeral and Burial Expenses

The Act provides for the payment of funeral and burial expenses, including expenses for cremation or delivery under the Uniform Anatomical Gift Act. The benefits are limited to $1,250.

d. Replacement Service and Loss

Replacement service and loss benefits will reimburse all expenses

34. Id. § 65B.54, subd. 1.
35. See Keeton, supra note 2, at 9.
36. See id.
37. See UMVARA § 1(a)(5), Comment. UMVARA § 13 provides that “[i]f the injured person’s earnings or work are seasonal or irregular, the weekly limit shall be equitably adjusted or apportioned on an annual basis.” UMVARA § 13, Comment states:

If earnings or work are seasonal or irregular, the intent is to adjust or apportion the weekly limit on an annual basis so that persons falling in these categories are not treated unfairly. For example, if a person earned $10,000 a year, but all of his income was attributable to personal effort normally expended in a concentrated six month period, his work loss should not be reduced by the limit contained in this Section if his injury incapacitated him during the entire year. Without a special provision for apportionment or annualization, however, this recovery might be substantially less than a wage-earner incapacitated for the same period and with the same yearly income, but working throughout the entire year. The variety of situations involving irregular or seasonal earning or work is so great, however, that it is undesirable to draft a single comprehensive formula, and too complex to put all the appropriate formulae in the body of the statute. The principle of apportionment or annualization for seasonal or irregular earnings or work is stated here with the belief that through industry practice, administrative regulation, and the judicial process all such cases can be brought within it.
38. See UMVARA § 1(a)(5)(ii), Comment; R. Keeton & J. O'Connell, supra note 5, at 399-400.
reasonably incurred by or on behalf of a nonfatally injured person in obtaining usual and necessary substitute services in lieu of those he would have performed, except for the injury, for the direct benefit of himself or his household.\textsuperscript{40} If the full-time responsibility of the injured person is to provide for the care and maintenance of a home with or without children the benefits will be the reasonable value of the care and maintenance or the reasonable expenses incurred in obtaining substitute care and maintenance of the home, whichever is greater.\textsuperscript{41} The benefits are subject to a maximum of $15.00 per day, with the day of injury and the first seven days thereafter excluded from coverage.\textsuperscript{42} The benefits compensate for substituted services required for an individual in the care of either himself or his household.\textsuperscript{43} Benefits are not payable for substituted services required for the continuation of income.\textsuperscript{44}

e. Survivor’s Economic Loss; Survivor’s Replacement Services Loss

Survivor’s economic loss benefits are designed to cover loss accruing after the decedent’s death. The loss provided for is loss of contributions of money or tangible things of economic value, excluding services that the surviving dependents would have received for their support during their dependency from the decedent had he not suffered the injury causing his death.\textsuperscript{45} The benefits are subject to a maximum of $200 per week and are payable only if death occurs within one year of the date of the accident which resulted in the decedent’s death.\textsuperscript{46} Survivor’s replacement services loss benefits are designed to compensate surviving dependents for expenses reasonably incurred, after the decedent’s death, in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit had he not suffered the injury causing death.\textsuperscript{47} Expenses of the survivors avoided by reason of the decedent’s death must be subtracted in calculating loss.\textsuperscript{48}

Benefits are not payable for other elements of damage usually associated with death. Loss of the value of the comfort, assistance, guid-

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} MINN. STAT. § 65B.44, subd. 6 (Supp. 1975).
\textsuperscript{46} Id.
\textsuperscript{47} See MINN. STAT. § 65B.44, subd. 7 (1974).
\textsuperscript{48} Id.
ance, counsel, and companionship the decedent would have provided the surviving spouse or next of kin are not, therefore, recoverable as basic economic loss.49

Survivor's benefits will be payable only to surviving dependents. Although questions as to the existence and extent of dependency are questions of fact, considering the support which has been regularly received from the decedent by the individuals seeking to establish dependency, there is a presumption of dependency in certain situations.50 A wife is presumed to be dependent on a husband with whom she lives at the time of his death; a husband is presumed to be dependent on a wife with whom he lives at the time of her death,51 and any child under the age of 18, or over the age of 18 but physically or mentally incapacitated from earning, is presumed dependent on the parent with whom he is living or from whom he is receiving support regularly at the time of the parent's death.52

f. No-Fault Coverage and Exclusions from Coverage

Section 65B.46 of the Act guarantees every individual sustaining injury arising out of the maintenance or use of a motor vehicle the right to receive basic economic loss benefits. Basic economic loss benefits will be recovered either through a plan of reparation security, according to a priority of payment scheme established by the Act, or through the assigned claims plan,53 a gap-closing device designed to provide insurance coverage when there is no plan of security under which an injured person can make his claim.54

Except with respect to commercial vehicles, the first priority for the payment of basic economic loss benefits is the security under which the injured person is an insured.55 An uninsured individual who is a driver or occupant of an insured motor vehicle looks to the security covering

49. Damages compensable under the Minnesota wrongful death statute, MINN. STAT. § 573.02 (1974), are limited to pecuniary loss. Pecuniary loss, although it does include damages for the loss of counsel, guidance, advice, assistance, and protection which the beneficiaries would have received from the decedent had he not died, see Fussner v. Andert, 261 Minn. 347, 358-59, 113 N.W.2d 355, 362 (1961), is much broader than the expenses which will be compensable under the No-Fault Act. There is no limitation under the Act on the recovery of such losses. It would be irrelevant whether the pecuniary loss compensable in a wrongful death action would be labeled as a dignitary loss, because death would satisfy one of the specified tort thresholds.
50. See MINN. STAT. § 65B.44, subd. 6 (Supp. 1975).
51. See id.
52. Id.
54. See MINN. STAT. § 65B.64, subd. 1 (1974).
the vehicle for payment.\textsuperscript{56} An uninsured individual other than a driver or occupant of a motor vehicle, such as a pedestrian or bicyclist, looks to the security covering any involved motor vehicle.\textsuperscript{57}

The priorities are altered when a commercial or employer-furnished motor vehicle is involved. A driver or occupant of a commercial motor vehicle looks first to the security covering the vehicle rather than the security under which he is an insured.\textsuperscript{58} If there is no security covering the vehicle, the second priority is the security under which the injured person is an insured.\textsuperscript{59}

In a case involving injury to an employee, his spouse, or other relative residing in the same household, if the accident causing the injury occurs while the injured person is driving or occupying a motor vehicle furnished by the employer, the applicable security is the security covering the motor vehicle.\textsuperscript{60} If there is no security covering the motor vehicle, the applicable security is that under which the injured person is an insured.\textsuperscript{61}

In any case involving a commercial vehicle or an employer-furnished vehicle, any other person, other than a driver or occupant of another involved motor vehicle, looks to the security covering the vehicle, or if there is no security, the security under which he is an insured.\textsuperscript{62}

In any of these cases, if there is no security to which the injured person can turn, he may attempt to qualify for the recovery of basic economic loss benefits through the assigned claims plan.\textsuperscript{63} To qualify, one of three conditions must be met. First, basic economic loss benefits must be inapplicable for some reason other than an exclusion from coverage as specified in Sections 65B.58 to 65B.60 of the Act.\textsuperscript{64} Sec-

\textsuperscript{56} See Minn. Stat. § 65B.47, subd. 4(b) (1974).
\textsuperscript{57} See id. § 65B.47, subd. 4(c).
\textsuperscript{58} Id. § 65B.47, subd. 1, as amended, Act of Apr. 9, 1976, ch. 233, § 7, [1976] Minn. Sess. Laws 861.
\textsuperscript{59} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Minn. Stat. § 65B.47, subd. 3 (1974).
\textsuperscript{63} Id. §§ 65B.63-65 (1974), as amended, (Supp. 1975).
\textsuperscript{64} Minn. Stat. § 65B.64, subd. 1(a) (1974). These exclusions concern converted motor vehicles, races, and intentional torts. See notes 67-78 infra and accompanying text. As examples, this condition would cover an uninsured individual who is injured in an accident in Minnesota involving a motor vehicle in which he is a passenger and when neither he nor the owner had insurance. It would also cover an uninsured pedestrian who is struck by an uninsured motor vehicle in Minnesota. UMVARA § 18(a)(1), Comment.
ond, an individual will qualify if the plan of reparation security applicable to the injury cannot be identified.\textsuperscript{65} Finally, an injured person will be eligible if a claim for basic economic loss is rejected by a reparation obligor on some ground other than that the person is not entitled to basic economic loss benefits under the Act.\textsuperscript{66}

There are certain limitations on the right to recover basic or optional economic loss benefits, however, which preclude recovery of benefits either through the plan of reparation security which would otherwise provide coverage according to the priority of payment section, or through the assigned claims plan. The statutory disqualifications reflect a legislative determination that the cost of certain types of accidents is either not to be carried at all by the no-fault system or that the usual priorities will be inapplicable or altered.

First, a person who converts a motor vehicle in absence of a good faith belief that he is entitled to use the vehicle is disqualified from receiving basic or optional economic loss benefits, including benefits otherwise due him as survivor, from any source other than an insurance contract under which he is an insured.\textsuperscript{67} If he dies, his survivors are subject to the same exclusion.\textsuperscript{68} The practical effect is to deny coverage to an uninsured individual under the policy covering the converted vehicle.\textsuperscript{69} The exclusion is a conscious policy choice to place the loss resulting from other than a good faith conversion on the individual causing the loss, rather than requiring the loss to be borne by the plan of reparation covering the converted vehicle.

The second exclusion from coverage is for persons sustaining injuries in the course of official racing contests, or in the practice or preparation for those contests.\textsuperscript{70} The exclusion does not apply to rallies held in whole or in part on public roads.\textsuperscript{71} A person injured in such a race is disqualified from coverage, as are his survivors if he dies.\textsuperscript{72}

\begin{footnotes}
\item[65] \textit{Minn. Stat.} § 65B.64, subd. 1(b) (1974). This condition applies in cases where it cannot be shown that there is no security covering the accident, but that, although it is possible that the security does exist, it cannot be identified, as in situations involving hit-and-run drivers. \textit{UMVARA} § 18(a)(3), Comment.
\item[66] \textit{Minn. Stat.} § 65B.64, subd. 1(c) (1974). This condition applies in situations where, for example, an insurer refuses to pay benefits on the ground that they are due from another source, or where an insurer refuses to pay on the grounds that it cannot be constitutionally subjected to the requirement that it pay benefits as required by \textit{Minn. Stat.} § 65B.48, subd. 2 (1974). \textit{See generally} \textit{UMVARA} § 18(a)(5), Comment.
\item[67] \textit{Minn. Stat.} § 65B.58 (1974).
\item[68] \textit{Id.}
\item[69] \textit{See id.}
\item[70] \textit{Minn. Stat.} § 65B.59 (Supp. 1975).
\item[71] \textit{Id.}
\item[72] \textit{Id.}
\end{footnotes}
Since official races which do not use public roads do not entail the normal risks associated with usual motor vehicle travel, accidents arising from such races are excluded from the no-fault system which has as its principal concerns the ordinary risks of automobile travel.

The third exclusion concerns intentional injuries. A person who intentionally causes or attempts to cause an injury to himself or another person is disqualified from recovery of basic or optional economic loss benefits for injuries resulting from his acts. If a person dies as a result of intentionally causing or attempting to cause injury to himself, his survivors will be excluded from coverage. A distinction is made between recovery by the person and recovery by the survivors. Survivors are excluded only when death occurs when a person intentionally causes or attempts to cause injury to himself. The purpose for the differentiation is to avoid any possible incentive to suicide by a person for purposes of making insurance benefits available to his survivors. On the other hand, survivors are not penalized by exclusion from coverage when death results from an intent or attempt to injure another person. The apparent motivation behind the distinction is to avoid punishing survivors for the decedent's wrongdoing, particularly when benefits are payable without regard to fault under the Act.

These exclusions will also preclude recovery through the assigned claims plan to the same extent. If basic economic loss benefits are not payable for loss caused by the injury only because of these exclusions, an injured individual will be unable to meet the threshold requirement for participation in the assigned claims plan.

In addition, a person will not be entitled to recover basic economic loss benefits through the assigned claims plan as a result of injury sustained, if at the time of such injury the injured person was the owner of a private passenger motor vehicle for which he failed to have the required security in effect. Persons claiming benefits as a result of injury to members of the owner's household will also be disqualified from recovering benefits if the members knew or reasonably should have known that security covering the vehicle was not provided as

73. MINN. STAT. § 65B.60 (1974).
74. Id.
75. See id.
76. See UMVARA § 22, Comment.
77. See id.
78. See id.
79. MINN. STAT. § 65B.64, subd. 3 (1974).
required by the Act.\textsuperscript{80}

A final limitation on the right to recover benefits is contained in the lapse provisions of the statute. The Act allows a reparations obligor to provide in its plan of security that eligibility for benefits will be terminated after a prescribed period of lapse of disability and medical treatment.\textsuperscript{81} The period provided for may not be less than one year.\textsuperscript{82}

\textsuperscript{80} Id. The exclusion turns on the knowledge of the person sustaining the injury, rather than the knowledge of the person sustaining the loss. "Injury" is defined as "bodily harm to a person and death resulting from such harm." Id. § 65B.43, subd. 11. Quite clearly, then, the scheme makes coverage turn on the knowledge which the individual who sustains the injury has or should have about the lack of coverage.

Whether the legislature intended this result, however, is questionable. See Minnesota Automobile Liability Study Comm'n, Report to the 1973 Legislature 20 (1973). The statute has been interpreted as only barring recovery when the plaintiff himself should have known of the lack of insurance. See Minnesota State Bar Ass'n & Minnesota CLE, Minnesota No Fault Automobile Insurance Act 7 (1974). The issue, at the time of this writing, is being litigated in the Hennepin County District Court. See Distel v. Mutual Serv. Cas. Ins. Co., Civil No. 720391 (Hennepin County Dist. Ct., filed Nov. 13, 1975). In addition, if the section is read literally, an injured family member who had reason to know the owner's car was uninsured might be allowed recovery, because the statute does not specifically state the injured person cannot recover, but only states a person claiming damages because of the injured person's injuries is barred. Minn. Stat. § 65B.64(3) (1974). Such an interpretation, however, seems unlikely. More likely the statute will be interpreted as barring any person who had reason to know the owner's car was uninsured.

It is also unclear if coverage through the assigned claims plan is excluded for any injury sustained by the injured individual, or whether only injuries resulting from use of the uninsured motor vehicle will bar coverage. An argument can be made that participation should be barred only for the use of the uninsured motor vehicle. Such treatment would be consistent with the penalty provisions of the Act which provide penalties only in situations where the uninsured motor vehicle is driven without insurance by the owner or by an individual who knows or has reason to know that the vehicle is uninsured.

As the provision stands now, if it does apply to all injuries sustained by the members of the owner's household, whether the injuries are sustained while the injured person is a passenger of another uninsured motor vehicle or whether the injured person is a pedestrian, it could result in completely arbitrary applications. For example, a member of the owner's household who sustains injury from a motor vehicle accident as a pedestrian may or may not recover, depending upon whether he gets the license number of the vehicle that struck him. If he does, he would be entitled to recover basic economic loss benefits under the policy covering that vehicle. If he does not, he would receive no benefits because he would be barred from participation in the plan.

Injured individuals who are not insured under a plan of security, but who should have been secured, are not prevented from recovering benefits under the policy covering the vehicle in which they were riding at the time of injury or, if pedestrians, any of the motor vehicles involved in the accident which caused their injuries. Allowing uninsured individuals to recover under identifiable policies but not through the assigned claims plan appears to be arbitrary. Precluding recovery under the assigned claims plan only for those injuries arising out of the use of the vehicle which should have been insured would at least be consistent with the penalty provisions of the Act.

\textsuperscript{81} Minn. Stat. § 65B.55, subd. 2 (1974).

\textsuperscript{82} Id. For a summary of the benefits, limitations on benefits, and exclusions from coverage, see Appendix I.
2. Economic Loss and Tort Recovery

Initially, subdivision 1 of Section 65B.51 defines the type of action to which the limiting provisions of the section apply. In order for the limiting provisions of subdivisions 1, 2, and 3 to apply, the following requirements must be met: (1) the cause of action must be for negligence; (2) it must accrue as a result of an injury arising out of the operation, ownership, maintenance or use of a motor vehicle; and (3) the security required by the Act must have been provided with respect to the motor vehicle. 83

If these requirements are met, limiting provisions of the Act governing economic loss and noneconomic detriment will become operative. In order to understand the limitation on recovery for economic loss, subdivisions 1 and 2 of Section 65B.51 must be read together.

Subdivision 2 preserves the right to recover for economic loss which is uncompensated by reason of certain limitations on or exclusions from coverage under the Act:

A person may bring a negligence action for economic loss not paid or payable by a reparation obligor because of daily or weekly dollar limitations of section 65B.44, the seven-day services exclusion of section 65B.44, the limitations of benefits contained in section 65B.44, subdivision 1, or an exclusion from coverage by sections 65B.58 to 65B.60. 84

Subdivision 1 requires that there be deducted from any recovery, in an action of the type described in subdivision 1, the value of basic or optional economic loss benefits paid or payable or which would be payable but for any applicable deductible. 85

Both subdivisions appear to have the effect of preserving recovery for economic loss for which no compensation is received or receivable.

The approach to limitations on tort recovery of economic loss in subdivisions 1 and 2 seems to be a meshing of both the House and Senate approaches to the issues. The offset provision of subdivision 1 came from House amendments to Senate File 96. 86 Subdivision 2

86. See 2 Minn. H.R. Jour. 3510 (1973). Section 10 of the report of the Committee on Financial Institutions and Insurance read as follows:

In a negligence action brought as a result of bodily injury, sickness or disease arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by this act and arising out of an accident or occurrence within this state, there shall be deducted from any recovery the value of basic economic loss benefits paid or payable or which would be payable but for any deductible.

Id. The basic wording of this offset provision is much the same as Minn. Stat. § 65B.51, subd. 1
seems to have had its origin in Senate File 96 as initially passed by the Senate. The Senate approach to tort liability followed the Uniform Motor Vehicle Accident Reparations Act. Section 5(6) of the Senate bill read as follows:

Sec. 5. [PARTIAL ABOLITION OF TORT LIABILITY.] Tort liability with respect to accidents occurring in this state and arising from ownership, maintenance, or use of a motor vehicle is abolished except as to:

. . . (6) Damages for any work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss, not recoverable as basic reparation benefits by reason of the limitation contained in the provisions on standard weekly limit on benefits for those losses or by reason of the limit on total basic reparation benefits payable for loss arising out of injuries to one person. . . .

This section is similar to subdivision 2 of Section 65B.51, except that subdivision 2 allows a negligence action to be brought by an individual who is denied coverage by reason of the statutory exclusions for intentional torts, conversions, and races. In addition, subdivision 2 is phrased in permissive terms, stating that a person may bring a negligence action for the uncompensated economic loss, rather than restricting recovery only to the excess loss for which no compensation is received.

The distinction is important. If subdivision 2 is read as allowing recovery only for the economic loss which is uncompensated by reason of the limitations on or exclusions from coverage mentioned in the subdivision, recovery for uncompensated economic loss would be severely restricted, particularly in light of the fact that there are other limitations on or exclusions from coverage in the Act which are not mentioned in subdivision 2.

The $1,250 limitation of funeral and burial expenses is not mentioned in subdivision 2, nor is the limitation on the payment of survivor's economic loss to cases where death occurs within one year from the date of the accident resulting in the decedent's death. No mention is made of the allowable limitation on medical expense benefits to the daily semi-private rates for room and board charged by the hospital where the recipient of the benefits is confined. The termination of benefits allowable in the event of a lapse of disability or medical

(1974). Subdivision 1 differs only in that optional economic loss benefits are also taken into consideration.

88. MINN. STAT. § 65B.44, subd. 4 (1974).
89. MINN. STAT. § 65B.44, subd. 6 (Supp. 1975).
90. Id. § 65B.44, subd. 2.
treatment\textsuperscript{91} is also not mentioned. Finally, no mention is made of the uninsured individual who is precluded from recovering his loss under a plan of security or the assigned claims plan.\textsuperscript{92}

Allowing recovery for some elements of uncompensated economic loss, or by persons excluded in the Act would be arbitrary and impossible to justify. Most probably, however, these omissions were an oversight, particularly in light of the apparent purpose to preserve the right to recover in a negligence action all economic loss for which no compensation has been or will be received by reason of limitation on or exclusions from coverage required by the Act, and in light of the apparent lack of purpose for making any such distinction.

Subdivision 2 seems to have a twofold purpose, crucial to the interpretation of the offset provision of subdivision 1. First, it preserves recovery for uncompensated economic loss, thus avoiding any constitutional problems which could arise if the right to recover uncompensated economic loss would be limited without providing for an adequate substitute for the limitation on tort recovery. Second, it indicates an intent to limit recovery for economic loss to the excess economic loss for which no compensation has been or will be received. With these principles in mind, the offset mechanism of subdivision 1 can be considered.

The intent to require an offset of basic and optional economic loss benefits is clear, although interpretive problems are presented in determining how the offset is to be achieved. The first problem is in determining how the offset is to function in cases where the tort recovery is effected before the injured person’s basic or optional economic loss benefits have been exhausted. The second problem is in determining whether basic or optional economic loss benefits determined to be paid or payable are to be deducted from the total tort recovery or only from that portion of the tort recovery which compensates an injured individual for economic loss, and only to the extent necessary to prevent a duplicate recovery of economic loss.

As to the first issue, basic or optional economic loss benefits are the primary source of coverage under the Act,\textsuperscript{93} reduceable only by workers’ compensation benefits paid or payable.\textsuperscript{94} There is no provision in the Act which allows for a credit of a tort recovery against basic or optional economic loss benefits. This creates the possibility that an

\textsuperscript{91} Minn. Stat. § 65B.55, subd. 2 (1974).
\textsuperscript{92} Id. § 65B.64, subd. 3.
\textsuperscript{93} Id. § 65B.61, subd. 1.
\textsuperscript{94} See id.
injured individual may be able to recover for future economic loss in a negligence action, and also collect for that same loss through the receipt of basic or optional economic loss benefits which become due and owing following the tort recovery.

Whether or not such a duplicate recovery is allowable depends on the construction to be given to subdivision 1. Subdivision 1 requires that there be deducted from any recovery, in a negligence action described in subdivision 1, "the value of basic or optional economic loss benefits paid, payable or which would be payable but for any applicable deductible." 95

If only accrued basic or optional economic loss benefits are deducted from a tort recovery which fully compensates the injured person for economic loss, double recovery could result if the injured person claims benefits from his reparation obligor following the tort recovery. The problem is in determining if the offset words in subdivision 1 refer only to accrued loss or whether the words are meant to take into consideration future basic or optional economic loss benefits which have not yet become due.

Benefits are not "payable" under the Act until loss accrues. 96 The terminology of subdivision 1 seems, therefore, to consider only accrued benefits—those that have been paid and those that are due and owing.

Although such a construction is possible, it is inconsistent with one of the stated purposes of the Act. 97 Such a construction would also

95. Id. § 65B.51, subd. 1.

96. See Minn. Stat. § 65B.54, subd. 1 (1974) which provides, in part, as follows:

Basic economic loss benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as income loss, replacement services loss, survivor's economic loss, survivor's replacement services loss, or medical or funeral expense is incurred. ....

97. One of the stated purposes of the Act is "to provide offsets to avoid duplicate recovery." See id. § 65B.42, subd. 5. The Act is not perfect in achieving its purpose. For example, although basic economic loss benefits are primary according to Minn. Stat. § 65B.61, subd. 1 (1974), there is no deduction from benefits for any source of benefits other than workers' compensation benefits. See id. § 65B.61, subd. 2.

In dealing with tort actions however, the Act is much clearer. Aside from the offset provided for in Minn. Stat. § 65B.51, subd. 1 (1974), duplicate recovery is also prohibited by the subrogation provisions of the Act. Subrogation is confined to cases in which the injured person's claim against a person whose negligence in another state caused the injuries and to cases involving claims based upon intentional tort, strict or statutory liability, or negligence other than negligence arising out of the maintenance, use, or operation of a motor vehicle. See Act of Mar. 25, 1976, ch. 79, § 1, [1976] Minn. Sess. Laws 201-02, to be codified as Minn. Stat. § 65B.53, subs. 2-3.

In cases where subrogation is allowed, it exists only to the extent that basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss. Id. Either the offset
be inconsistent with subdivision 2 of Section 65B.51, which appears to have as its purpose insuring that an injured individual will be able to recover for uncompensated economic loss, and that recovery will be limited to the excess economic loss. If subdivision 2 is to be given effect, subdivision 1 will have to take into consideration accrued as well as future basic or optional economic loss benefits which are determined to be payable in the future.\footnote{98}

The only feasible construction which is consistent with the purposes of the Act, therefore, is one which construes the words “paid, payable or which would be payable but for any applicable deductible” as including accrued as well as future basic or optional economic loss benefits.\footnote{99}

Aside from the future loss problem, problems also arise in construing the subdivision 1 requirement that the deduction of basic or optional economic loss benefits be from “any tort recovery.” The wording of subdivision 1 in requiring a deduction of basic or optional economic loss benefits from “any recovery” in a negligence action described in subdivision 1 seems to indicate that the required deduction must be made from the actual recovery, rather than the judgment for damages. If no further refinement is made, this creates the possi-

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\footnote{98. \textit{Minn. Stat.} § 65B.51, subd. 2 (1974) was taken in part from the Uniform Motor Vehicle Accident Reparations Act. UMVARA § 5(a)(6) would allow recovery for the excess economic loss not paid or which would not be paid in the future because of the limitations on benefits. Although \textit{Minn. Stat.} § 65B.51, subd. 2 (1974) substituted the words “paid or payable” for the UMVARA term “recoverable,” \textit{Minn. Stat.} § 65B.51, subd. 2 (1974) seems to anticipate the proof of future loss for which no compensation will be received. In absence of such an allowance, an injured individual would be severely hampered in a negligence action, because there would be no recovery for the future excess economic loss. The injured individual has to be able to prove the future excess if he is to be entitled to full recovery.

\textit{If he is entitled to prove the future loss for which no compensation will be receivable, it should be no problem to determine what benefits will be collectible in the future by or on behalf of the injured individual.}

\footnote{99. Another arguable construction would be to construe \textit{Minn. Stat.} § 65B.51, subd. 1 (1974) as providing for a credit or offset against basic or optional economic loss which would otherwise be due and owing following the tort recovery. By analogy to workers’ compensation cases (see 2A A. LARSON, \textit{The Law of Workmen’s Compensation} § 74.31 (1976)) it could be argued that such a credit should be implied from the statute. The absence of any provision for subrogation in cases to which \textit{Minn. Stat.} § 65B.51, subd. 1 (1974) applies, however, would make such a construction conceptually unsound. If there is no subrogation, there should be no right of credit or offset against benefits coming due after the tort recovery. The absence of any provision for subrogation in cases to which \textit{Minn. Stat.} § 65B.51, subd. 1 (1974) applies, coupled with the fact that the offset provision requires a deduction from the damages paid by the defendant, makes it clear that the offset provision of \textit{Minn. Stat.} § 65B.51, subd. 1 (1974) is not to inure to the benefit of the reparation obligor of the injured individual bringing suit.}
ility that the offset will do more than limit duplicate recovery of economic loss; it could invade recovery for damages awarded for loss for which no basic or optional economic loss benefits have been paid or will be payable. There are at least three variations of the problem: (1) where the basic economic loss benefits paid or payable exceed the economic loss determined by the jury to have been sustained by the plaintiff; (2) where the tort recovery is insufficient to cover all damages awarded to the injured individual; or (3) where the tort recovery is insufficient to compensate the plaintiff fully because of the operation of the comparative negligence statute.

The first situation could arise where, for example, the injured individual is paid $10,000 in medical expense benefits for loss arising out of the maintenance or use of a motor vehicle, yet the jury determination is that the injured individual has sustained only $5,000 in accident-related losses. If the injured individual is also awarded $5,000 for pain and suffering, the total tort judgment would be for $10,000. If the

100. The choice of language creates perplexing problems of construction. Deduction of the basic or optional economic loss benefits paid or payable from the judgment rather than the recovery would avoid most of the problems. The effect of such a subtraction would be to allow recovery for loss for which no compensation has been or will be received. Under those circumstances, the plaintiff would be entitled to keep the entire tort recovery without deduction, since it would consist only of loss for which no compensation has been or will be received.

The statutes in the other no-fault states vary in their approaches to the question. The nature of the limitations on the recovery of economic loss will depend on the objectives to be achieved. If the only purpose is to limit double recovery of the economic loss for which benefits are payable, the simplest device is to limit the right to recover to loss for which no benefits have been or will be paid. See Colo. Rev. Stat. Ann. § 10-4-713(1) (1973); Mich. Comp. Laws Ann. § 500.3135 (Cum. Supp. 1976); N.J. Stat. Ann. § 39:6A-12 (1973). No problems arise with such provisions; the plaintiff is entitled to full recovery of all damages awarded, since the damage award will not include damages for loss for which benefits have been paid or will be payable.


The Minnesota Act does not provide for subrogation or reimbursement in cases to which Minn. Stat. § 65B.51, subd. 1 (1974) applies. If the intent underlying subdivision 1 is to allow the offset to operate indiscriminately on damages recoverable on loss other than economic loss, the rationale is not readily apparent in the absence of provisions for reimbursement or subrogation. In such a case the offset inures to the benefit of the defendant and the defendant's insurer. The defendant's liability would be lessened or eliminated, depending on the circumstances, even though the specific purpose of the liability insurance required by the Act is to cover loss based upon a fault determination. Although this may have been the intent, it seems unlikely.
The problem may be resolved by reference to the subrogation provisions of the Act.\textsuperscript{101} Where subrogation is permitted by the Act, the reparation obligor will be subrogated only to the injured person’s claim for economic loss.\textsuperscript{102} Subrogation is allowed only to the extent that basic or optional economic loss benefits have been paid or are payable, and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss.\textsuperscript{103} The effect is to preserve the right to recover damages for losses, including noneconomic detriment, for which no compensation is available.

Because the offset mechanism of subdivision 1 and the subrogation provisions of the Act both have as their purpose the avoidance of duplicate recovery by an injured individual, a strong argument can be made that, for purposes of consistency, the two devices should have the same results.\textsuperscript{104} The offset should thus work only against the tort recovery for economic loss.\textsuperscript{105}


\textsuperscript{103} Id.

\textsuperscript{104} The obvious difference between the offset and the subrogation provisions is that subrogation, in addition to avoiding duplicate recovery, also has as its purpose the shifting of the loss outside the no-fault system in actions other than negligence actions in Minnesota arising out of the operation, ownership, maintenance, or use of a motor vehicle with respect to which the security required by the Act has been provided. Whether the difference is of any importance depends on whether there is a justifiable reason for allowing the intrusion into the damages awarded for loss other than economic loss. See note 97 \textit{supra}. If there is no reason, and none seems readily apparent, the subrogation provisions state valid guidelines for interpretation of the offset provision.

\textsuperscript{105} A construction of the offset provision which would allow for the invasion of damages awarded for uncompensated loss, including noneconomic detriment, may create constitutional problems. The problem has arisen in Michigan. The Michigan no-fault act allows tort recovery for uncompensated economic loss and for noneconomic detriment if one of the tort thresholds has been met. See Mich. Comp. Laws Ann. § 500.3116 (Cum. Supp. 1976). The Michigan act also provides that:

\text{After recovery is realized upon a tort claim, a subtraction shall be made to the extent of the recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If personal protection insurance benefits have already}
As applied to the example, the problem is in determining whether or not there will be duplicate recovery of any loss for which benefits have been paid. The injured individual has received $10,000 in basic economic loss benefits, although the jury determination was that only $5,000 in medical expenses were accident-related. If the offset applies only to the recovery of economic loss, the deduction of benefits paid would be only from the $5,000 in economic loss which the jury determined the injured individual had incurred. Recovery for the $5,000 awarded for pain and suffering would be fully preserved, but there would be no duplicate recovery of economic loss.

If the purpose of the offset is to avoid duplicate recovery of economic loss through a negligence action, that purpose is fully served by deducting the benefits paid for economic loss from the tort recovery for economic loss.

Although it can be argued that the injured individual has received a windfall because of his receipt of $5,000 in basic economic loss benefits which the jury determined were not accident-related, it is questionable whether the damages awarded for pain and suffering should be applied to avoid any possible overpayment. Because there is a wide range of possibilities for the difference between the amount of benefits paid and the jury determination as to economic loss, it would seem to be inappropriate to utilize the tort action for purposes of readjust-

Id. In Goldner v. Detroit Auto. Interinsurance Exch., CCH AUTO. L. REP., INS. ¶ 8848, at 16.122 (Mich. Cir. Ct. Mar. 6, 1975), the court held the provision unconstitutional as a denial of equal protection. The basis for the court's determination was that the Michigan act creates an arbitrary classification, requiring those individuals with major injuries meeting the tort thresholds to reimburse their insurers out of any tort recovery, while not requiring those individuals with minor claims to reimburse their insurers. Whether or not this is sufficient to constitute a denial of equal protection of the laws is questionable. It seems obvious that individuals with minor claims would not be entitled to a tort recovery which would present them with funds to reimburse their insurers, so that there would be no duplicate recovery, the evil to be avoided by the reimbursement provision. The real gist of the court's opinion seems to be that the reimbursement provision required the plaintiff to repay "apples with oranges."

The real disparity in treatment would be between those individuals who would be allowed recovery for their economic loss in a tort action and those individuals who would be limited to recovery for uncompensated economic loss. The tort exemptions of the Michigan act would not apply to accidents in another state or accidents involving uninsured defendants. In the case of an out-of-state accident or an uninsured defendant, reimbursement would be from damages for uncompensated economic loss. In a case to which the tort limitations apply, reimbursement would be from damages for uncompensated economic loss and damages for noneconomic detriment. To avoid this problem, the court in Shavers v. Kelley, [1973-75 Transfer Binder] CCH AUTO. INS. CAS. ¶ 8308, at 14.601-02 (Mich. Cir. Ct. May 30, 1974), aff'd in part, rev'd in part sub nom. Shavers v. Attorney General, 65 Mich. App. 355, 237 N.W.2d 325 (1975), held that the reimbursement provision applied only to cases involving uninsured defendants and out-of-state accidents.
The second problem arises when the actual tort recovery is less than the judgment. As an example, assume that the injured individual has received a judgment for $55,000, consisting of $30,000 for economic loss and $25,000 for pain and suffering, and that the defendant is able to pay only $25,000 of that judgment. The tort recovery of $25,000 is plainly insufficient to cover the damages awarded for both economic loss and noneconomic detriment. If the determination is made that the injured individual has received or will be entitled to receive in the future the full amount of basic economic loss benefits payable under the Act, $30,000, deduction of the basic economic loss benefits paid or payable first from the tort recovery would result in no payment being made to the injured individual, depriving him of any compensation whatsoever for pain and suffering. Such a result is not consistent with the purpose of the offset provision. Because the purpose is the avoidance of duplicate recovery of economic loss, there is no necessity of reducing a tort recovery where no such duplication is possible. In the example, full award of the $25,000 to the injured individual would result in no duplicate recovery. The $25,000 would provide compensation for pain and suffering, fully compensating the individual for the loss for which no benefits have been paid or will be payable.

The final problem concerns a situation where the offset could result in an underpayment of damages for pain and suffering by reason of the operation of the comparative negligence statute. As an example, assume that the injured individual receives a judgment for $10,000, consisting of $5,000 for economic loss and $5,000 for noneconomic detriment, and that he has been paid $5,000 in basic economic loss benefits by his reparation obligor. If it is assumed that the injured

106. The overpayment, if it is really an overpayment, could be due to mistake on the part of the reparation obligor or it could be due to an intentional misrepresentation on the part of the claimant. In the latter case the Act provides for the recoupment of benefits paid as a result of the misrepresentation. See Minn. Stat. § 65B.54, subd. 4 (1974). If the insured submits reasonable proof of the fact and amount of loss to his reparation obligor, see id. § 65B.54, subd. 1, and benefits are paid for those losses, it is questionable whether or not those payments could be recouped. Proof of loss has been furnished, however, at least to the reparation obligor’s satisfaction, for loss sustained. Whether or not the insured is to receive compensation for uncompensated economic loss or noneconomic detriment in his negligence action should not depend on the possibility of differing findings with respect to economic loss. The economic loss sustained by the insured will have to be proved by a preponderance of the evidence in the negligence action. There is no such standard for the collection of basic economic loss benefits. Readjustment through use of the offset could have a detrimental impact on the insured who makes his claim in good faith.

individual is found to be 49% negligent and that the defendant is 51% negligent, reducing the damages award of $10,000 by 49%, would leave a judgment of $5,100 for the injured individual. As in the second example, the tort recovery of $5,100 is insufficient to cover both items of loss, economic loss and noneconomic detriment.

Deduction first of the $5,000 in basic economic loss benefits which have been paid will disproportionately reduce the damages awarded for pain and suffering; payment first to the injured individual of the full $5,000 for pain and suffering would completely negative the impact of the fault system. Consistent with the purpose of avoiding duplicate recovery of economic loss and of preserving the relevance of the fault determination, there should be some middle ground.

The comparative negligence statute requires that any damages allowed “shall be diminished in the proportion to the amount of negligence attributable to the person recovering.” 108 By applying the fault determination to each category of loss, economic loss and noneconomic detriment, the injured individual would obtain a total judgment of $5,100, consisting of $2,550 for economic loss and $2,550 for noneconomic detriment. The $2,550 award for economic loss would be offset by the $5,000 in basic economic loss benefits paid to the plaintiff. The $2,550 awarded for noneconomic detriment would be the injured individual’s net tort recovery. Duplicate recovery of economic loss is avoided, the offset does not invade the tort recovery for noneconomic detriment, and the plaintiff’s recovery for uncompensated loss is reduced by his percentage of negligence. The no-fault and fault interests are fully accommodated.

In conclusion, the basic theory advanced is that the offset is designed only to eliminate duplicate recovery of economic loss. 109 If there is no duplication of economic loss, the offset should not, consistent with the theory, invade a recovery which will provide compensation for uncompensated loss.

Such a construction of the offset provision avoids duplicate recovery, yet ensures that the first priority for the tort recovery is for

108. Id. § 604.01, subd. 1.
109. The intent to prevent a duplicate recovery of economic loss would apply whether the claim for economic loss is made directly by the injured person or derivatively by the person responsible for the payment of the expenses incurred because of the injury. See Barker v. Scott, 81 Misc. 2d 414, 415-17, 365 N.Y.S.2d 756, 758-59 (Sup. Ct. 1975); Robinson v. Sparta, 80 Misc. 2d 525, 530-31, 363 N.Y.S.2d 235, 240 (Sup. Ct. 1975).

Because claims for economic loss and noneconomic detriment are subjected to differing limitations by the Act, the claim for economic loss would not be conditioned on the injured person’s satisfaction of the tort thresholds.
loss other than economic loss for which benefits will be payable by the
injured person's reparation obligor. The interests of the fault and no-
fault systems are fully accommodated.

3. Summary

The Minnesota No-Fault Automobile Insurance Act provides for
the payment of comprehensive basic economic loss benefits to persons
sustaining loss as a result of injury arising out of the maintenance or
use of a motor vehicle. These benefits are, however, subject to certain
limitations and exclusions from coverage. While the tort limitations
relating to economic loss are designed to prevent a double recovery of
loss for which compensation has been received through the payment of
basic economic loss benefits, the Act also ensures that loss for which
compensation has not been received because of the limitations on and
exclusions from coverage will be recoverable in a tort action.

Only those elements of loss for which basic economic loss benefits
are received will be subject to the offset. The right to recover for un-
compensated economic loss is specifically preserved by the Act. By
definition, there is no prohibition on the recovery of loss not defined
as economic loss unless it constitutes noneconomic detriment.

There are two principal problems presented by the treatment of eco-
nomic loss in a tort action: whether the offset must include future basic
economic loss benefits; and whether the offset operates only after there
has been tort recovery for loss for which no benefits have been received
or will be receivable under the Act. If the purpose in preventing double
recovery of economic loss is to be achieved, the offset has to take into
consideration future basic and optional economic loss benefits. If in-
consistencies are to be avoided, and if tort recovery for uncompen-
sated loss is to be preserved, the offset from "any recovery" must be
applicable only after the tort recovery is applied to the uncompensated
loss.

Such a construction of the offset provision avoids duplicate re-
covery, yet ensures that the first priority for the tort recovery is for
loss other than economic loss for which benefits will be payable by the
injured person's reparation obligor. The interests of the fault and
no-fault systems are fully accommodated.

B. Limitations on Recovery of Noneconomic Detriment

The statutes limiting recovery for damages for noneconomic detri-
ment vary in their approaches to the limitation.\(^{110}\) Once the determina-

\(^{110}\) See Appendix II for a breakdown of the methods utilized in limiting recovery for non-
 economic detriment. Sixteen state no-fault plans limit recovery for economic loss. See note 1
tion is made to limit recovery for general damages, the basic problem is how much of a limitation there should be. Numerous approaches to the question have been suggested, ranging from a complete abolition of the common law action, as in workers’ compensation schemes, to a dollar amount exemption from claims for general damages, to descriptive thresholds conditioning the right to recover for pain and suffering on the presence of certain types of injuries or a specified dollar amount of medical expenses. Only the descriptive thresholds have thus far been deemed acceptable by the states adopting tort thresholds as part of their no-fault schemes. The choice in each state has depended, in large part, on the political feasibility or economic necessity of restricting the common law tort action for damages.

As a result, the tort thresholds in the states which exempt tortfeasors from liability for pain and suffering are diverse. There are, however, some similarities. All of the states, except Michigan, and now Florida, following a recent amendment, allow recovery of general damages if a specified amount of medical expenses is incurred. The medical expense thresholds range from $200 in New Jersey to $2,000 in Minnesota, although there are variations in the manner in which the medical expense computation is made.

\[supra\].

111. See Columbia Univ. Council for Research in the Social Sciences, Report by the Committee to Study Compensation for Automobile Accidents 143 (1932); L. Green, Traffic Victims 87 (1958).


114. See Appendix II.


116. See Appendix II.


121. As an example of the variations, Minnesota excludes from consideration diagnostic
have adopted descriptive thresholds as standards for determining whether or not common law damages for noneconomic detriment will be restricted.\textsuperscript{122}

The most restrictive threshold provisions are in the Michigan statute, where recovery for noneconomic detriment is disallowed unless the injury results in death, serious impairment of body function, or permanent serious disfigurement.\textsuperscript{122} The rigidity of the Michigan act lies in the absence of medical expense threshold and in the limited ways in which an injured individual can qualify for a tort recovery for noneconomic detriment. Although similar descriptive thresholds are used in other states, the thresholds are expanded by the addition of other thresholds. Some states, patterned after the initial Florida approach,\textsuperscript{124} allow recovery for noneconomic detriment if the injury results, in addition to permanent disfigurement or death, in a fracture of weight-bearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, loss of a body function, or permanent injury within reasonable medical probability.\textsuperscript{125} States following the Florida approach have attempted to specify with as much particularity as possible the exact types of injuries which are most likely to result in noneconomic detriment serious enough to justify allowing a common law action for noneconomic detriment.

In addition to these approaches, some states allow a common law action for noneconomic detriment in cases where the no-fault benefits are exhausted,\textsuperscript{126} or where an injured person is disabled for a specified period of time, ranging from 10 consecutive days in Georgia\textsuperscript{127} to 180 days in Nevada.\textsuperscript{128}

The legislative history of the Minnesota tort threshold provisions

\textsuperscript{122} See Appendix II.


\textsuperscript{126} See, e.g., Hawai'i Rev. Stat. § 294-6(a)(3) (Supp. 1975).


reflect the difficulty in arriving at a politically feasible approach to the threshold question.

1. The Legislative History of the Tort Threshold

The Senate no-fault bill,\textsuperscript{129} introduced by Senators Davies, Novak, and Knutson, was substantially the Uniform Motor Vehicle Accident Reparations Act. Section 5 of the Uniform Act provides for the partial abolition of tort liability:

(a) Tort liability with respect to accidents occurring in this State and arising from the ownership, maintenance, or use of a motor vehicle is abolished except as to:

(7) damages for noneconomic detriment in excess of [$5,000], but only if the accident causes death, significant permanent injury, serious permanent disfigurement, or more than six months of complete inability of the injured person to work in an occupation. 'Complete inability of an injured person to work in an occupation' means inability to perform, on even a part-time basis, even some of the duties required by his occupation or, if unemployed at the time of injury, by any occupation for which the injured person was qualified.\textsuperscript{130}

The comments to the Uniform Act are instructive in gleaning the rationale behind the tort threshold concept, as well as in underlining the problems faced in developing acceptable tort thresholds.

The comments indicate that the tort threshold provisions are the key provisions of the Uniform Act.\textsuperscript{131} The tort exemptions, including the tort exemption from liability for noneconomic detriment, are designed to eliminate the bulk of tort actions arising out of a defendant's ownership, maintenance, or use of a motor vehicle.\textsuperscript{132} Savings from the limitations on tort actions and recoveries are to be used to finance the extensive benefits provided for by the Uniform Act.\textsuperscript{133}

The seventh exemption, dealing specifically with limitations on noneconomic detriment, is designed to preserve the tort action only for seriously injured individuals.\textsuperscript{134} To ensure that only seriously injured individuals will attempt to sue, and recover, the Uniform Act couples descriptive tort thresholds with a limitation that allows only damages in excess of $5,000 to be compensable.\textsuperscript{135} Because the descriptive thresh-

\textsuperscript{129} S.F. 96, 68th Minn. Legis., 1st Sess. (1973).
\textsuperscript{130} UMVARA § 5(a)(7) (brackets in original).
\textsuperscript{131} Id. § 5, Comment.
\textsuperscript{132} See id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} See id.
olds, other than death, will invariably necessitate judicial interpretation, the $5,000 limitation was incorporated to narrow the scope of contention as to whether or not the descriptive thresholds have been met. In a case where it is arguable that the tort thresholds have been met, the $5,000 limitation will serve to reduce the incentive to litigate the close cases where injuries might be of the type or have the consequences described in the threshold but where the pain and suffering is not likely to be significant.

Subsequent amendments to the bill made the tort thresholds less restrictive. The amendments recommended by the Committee on Labor and Commerce were adopted, altering the threshold provision to read as follows:

Sec. 5. [LIMITATION OF GENERAL DAMAGES.]
Subdivision 1. In any action in tort brought as a result of bodily injury, sickness or disease arising out of the operation, ownership, maintenance or use of a motor vehicle in the manner described in section 2, there shall be no damages recoverable for pain, suffering, mental anguish and inconvenience, except as provided in subdivision 2.
Subd. 2. The general limitation prescribed in subdivision 1 shall not apply in cases which the injured person, (a) dies; (b) sustains permanent disfigurement, dismemberment or permanent loss of a bodily function; or (c) sustains an injury resulting in disability rendering the injured person incapable of performing his principal activity and a substantial portion of his other daily activities for not less than 90 days.

The Committee report and amendments were adopted by the Senate. The amendments delete the $5,000 limitation of the Uniform Act, require only permanent disfigurement rather than "serious" permanent disfigurement, substitute "dismemberment or permanent loss of a body function" for "permanent significant injury" and change the definition of disability as well as dropping the required disability period from more than six months to 90 days.

The bill was then referred to the Committee on Judiciary. The Judiciary Committee report recommended that the threshold provisions of the Uniform Act be partially reinstated:

Sec. 5. [PARTIAL ABOLITION OF TORT LIABILITY.] Tort liability with respect to accidents occurring in this state and arising from the ownership, maintenance, or use of a motor vehicle is abolished except as to:

136. See id.
137. See id.
139. Id. at 1528.
(7) Damages for noneconomic detriment, but only if the accident causes death, permanent significant disfigurement, permanent loss of a significant bodily function, or disability which, for not less than 90 days, renders the injured person incapable of performing his principal activity and a substantial portion of his other daily activities.\textsuperscript{140}

The Judiciary Committee report and amendments were adopted.\textsuperscript{141}

A floor amendment to the bill amended the threshold provision to abolish tort liability except as to:

(7) Damages for noneconomic detriment if the injured person (a) dies; (b) sustains permanent disfigurement or permanent loss of a bodily function; or (c) sustains an injury resulting in disability which, for not less than ninety (90) days, renders him incapable of performing his principal activity and a substantial portion of his other daily activities.\textsuperscript{142}

The only change was the deletion of the requirement that a disfigurement be "significant." A motion to amend the amendment by striking the words "loss of a bodily function" and inserting "injury" was accepted and the amendment as modified was passed.\textsuperscript{143}

The change from "permanent loss of a bodily function" to "permanent injury" was made to make the tort threshold less restrictive.\textsuperscript{144}

The principal argument for deleting the word "significant" from "permanent significant disfigurement" was to avoid use of a vague term difficult of legal application.\textsuperscript{145}

The final action on the threshold in the Senate, a motion to amend the disability portion of the threshold by requiring disability for not less than 90 consecutive days, was rejected.\textsuperscript{146} The principal argument for rejection was to avoid penalizing an injured individual who, following his injury, attempts to resume his principal and daily activities but is unable to do so.\textsuperscript{147}

As passed by the Senate, the no-fault bill preserved the tort action for noneconomic detriment in cases where the injured person dies, sustains permanent disfigurement or permanent injury, or sustains an injury resulting in disability for not less than 90 days.

Following transmission of the bill to the House, the bill was referred

\textsuperscript{140} Id. at 1726-27.
\textsuperscript{141} Id. at 1731.
\textsuperscript{142} Id. at 2527.
\textsuperscript{143} Id. at 2527-28.
\textsuperscript{144} Tape of Debate on S.F. 96 Before the Minnesota Senate (May 9, 1973).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
to the Committee on Financial Institutions and Insurance. The Committee reported back with significant amendments to the bill. Section 10 of the amendments would not have allowed an injured individual sustaining injury arising out of the operation, ownership, maintenance or use of a motor vehicle to bring a negligence action for noneconomic detriment unless:

(a) The basic medical economic loss benefits which are payable for his injury or which would be payable but for any optional deductible or exclusion exceed $2,000. The value of free medical or surgical care and of ordinary and necessary nursing services performed by a relative or member of the household of the injured person may be added to payable benefits to meet the requirements of this section; or

(b) the injury results in:

(1) permanent disfigurement;
(2) a fracture of a weight-bearing bone;
(3) a compound, comminuted or dislocation fracture;
(4) a compression fracture of the vertebrae;
(5) loss of a bodily member;
(6) permanent injury determined within a reasonable medical certainty;
(7) permanent loss of a bodily function; or
(8) death; or
(9) disability for 60 days or more.

(c) For the purposes of this subdivision ‘disability’ means a mental or physical condition which constitutes a handicap.\(^{148}\)

Following adoption of the committee report the bill was re-referred to the Committee on Financial Institutions and Insurance.\(^{149}\) The committee report, which was adopted, contained two amendments to the threshold portions of the bill. One of the amendments related to the methods of establishing medical expenses:

So long for the purpose of determination as to whether the basic economic loss medical expense benefits incurred exceed $2,000, the charges actually made shall not be conclusive as to their reasonable value. Evidence that the reasonable value thereof was an amount different from the amount actually charged and evidence of the reasonable value, if there was no charge, shall be admissible in any action brought in this state. An injured person who is furnished medical expense benefit services without charge or at less than the average reasonable charge therefor in this state shall be deemed to have exceeded $2,000 if the court determines that the fair and reasonable value of such services exceeds $2,000.\(^{150}\)

The other amendment related to the definition of “disability:”

\(^{149}\) 2 Minn. H.R. Jour. 4239 (1974).
\(^{150}\) Id. at 4495.
[Disability] means the inability to engage in substantially all of the
injured person's usual and customary daily activities. 151

Two floor amendments were offered and rejected. One of the
amendments would have stricken the description portions of the tort
threshold relating to specified types of fractures, loss of bodily func-
tion and loss of a bodily member, substituting the Senate version of
the threshold. 152 The other floor amendment sought to raise the med-
ical expense threshold from $2,000 to $5,000. 153 The amendment was
rejected, based upon an apparent consensus that the $2,000 medical
expense threshold would be sufficiently restrictive to prevent roughly
90 to 95 percent of those individuals sustaining injury in an automobile
accident from meeting the medical expense threshold. 154

The significant change made by the House is the addition of a med-
ical expense threshold and additional descriptive thresholds. The per-
manent injury and disfigurement standards are much the same as in
the Senate version. The disability period is shorter in the House ver-
sion than it is in the Senate version. In addition, the House version
defines disability differently than the Senate version. Disability is de-
 fined as a handicap, rather than an inability to perform certain activi-
ties. The addition of the fracture thresholds appears to be modeled
after the Florida approach. 155

A final distinction is that the Senate version would apply to a "tort
action" whereas the House version only applied to "negligence
actions."

Following the inability on the part of the House and Senate to agree
on a no-fault act, the bill was referred to a House-Senate conference
committee. The final product reads as follows:

Subd. 3. Limitation of damages for noneconomic detriment. In an
action described in subdivision 1, no person shall recover damages for
noneconomic detriment unless:
(a) The sum of the following exceeds $2,000:
   (1) Reasonable medical expense benefits paid, payable or payable
       but for any applicable deductible, plus
   (2) The value of free medical or surgical care or ordinary and nec-
       essary nursing services performed by a relative of the injured
       person or a member of his household, plus

151. Id.
152. Id. at 4645.
153. Tape of Debate on S.F. 96 Before the Minnesota House of Representatives (Jan. 31,
1974).
154. Id. Actuarial calculations were provided by the Kemper Insurance Company which used
all claims, including economic and noneconomic loss, in arriving at its statistics.
155. See notes 124-25 supra and accompanying text.
(3) The amount by which the value of reimbursable medical services or products exceeds the amount of benefits paid, payable, or payable but for an applicable deductible for those services or products if the injured person was charged less than the average reasonable amount charged in this state for similar services or products, minus

(4) The amount of medical expense benefits paid, payable, or payable but for an applicable deductible for diagnostic X-rays and for a procedure or treatment for rehabilitation and not for remedial purposes or a course of rehabilitative occupational training; or

(b) The injury results in:
   (1) permanent disfigurement;
   (2) permanent injury;
   (3) death, or
   (4) disability for 60 days or more.

(c) For the purposes of clause (a) evidence of the reasonable value of medical services and products shall be admissible in any action brought in this state.

(d) For the purpose of clause (b) disability means the inability to engage in substantially all the injured person's usual and customary daily activities.\(^\text{156}\)

The legislative purpose in establishing the tort thresholds was "to prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury."\(^\text{157}\) What is minor and what is serious, however, must be determined by reference to the specific thresholds, particularly in light of the careful consideration given to the wording of the tort thresholds as evidenced by the legislative history of the threshold provisions.

2. Application of the Tort Thresholds

The tort thresholds of subdivision 3 apply only to claims for noneconomic detriment. Claims for uncompensated economic loss or other loss not defined as noneconomic detriment are unaffected by the tort thresholds and are recoverable in a negligence action, irrespective of whether or not the tort thresholds are met.

As is the case with the limitations on recovery of economic loss, the tort thresholds apply only to causes of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance, or use of a motor vehicle with respect to which the security required by the Act has been provided.\(^\text{158}\) Subdivisions 4 and 5 of Section

156. \textit{Minn. Stat.} § 65B.51, subd. 3 (1974).
157. \textit{Id.} § 65B.42(2).
158. Compare \textit{Minn. Stat.} § 65B.51, subd. 1 (1974) with \textit{id.} § 65B.51, subd. 3.
65B.51 specifically except causes of action other than causes of action arising out of the maintenance or use of a motor vehicle from the tort limitations.\(^{159}\)

Assuming that the prerequisites of subdivision 1 are met so that the thresholds are applicable, at least one of the tort thresholds will have to be satisfied before a plaintiff will be entitled to recover any damages at all for dignitary loss.\(^{160}\) It must be established that the injury necessitated medical services and benefits having a value in excess of $2,000, caused permanent injury, permanent disfigurement, death, or disability for 60 days or more.\(^{161}\)

The medical expense threshold requires what seems to be a complicated computation, although in practice there should be no real difficulty in applying the threshold. The detailed computation required by the threshold is designed to ensure that the medical expense computation be as equitable as possible for all individuals, whether benefits are actually received for medical expenses or whether free medical services are received.\(^{162}\) Because the $2,000 threshold is designed to

159. Minn. Stat. § 65B.51, subd. 4 (1974) provides as follows:

Nothing in this section shall impair or limit the liability of a person in the business of manufacturing, distributing, retailing, repairing, servicing or maintaining motor vehicles arising from a defect in a motor vehicle caused or not corrected by an act or omission in manufacture, inspection, repair, servicing or maintenance of a vehicle in the course of his business.

160. In the conference committee there was some discussion of limiting recovery only to noneconomic detriment arising from the threshold injury. See Tape of Meeting on S.F. 96 Before the Minnesota House-Senate Conference Committee (Feb. 28, 1974). Although such a limitation could be applied, it would be extremely uncertain. In a case involving multiple injuries, it would virtually be impossible to determine what pain was caused by what injuries. Once one of the thresholds is met, therefore, recovery would be allowed for all dignitary loss.


Derivative claims for noneconomic detriment will depend on the injured person's satisfaction of the tort thresholds. In particular, a claim for loss of consortium, which is defined as noneconomic detriment, Minn. Stat. § 65B.43, subd. 7 (1974), as amended, (Supp. 1975), would be subject to the tort thresholds. If the injured person fails to meet one of the thresholds, the derivative claim would also fail.

162. See Montgomery v. Daniels, ___ N.Y.2d ____, 340 N.E.2d 444, 459-60, 378
allow those with serious injuries to recover for dignitary loss, it would be inequitable to make the computation turn solely on the benefits actually paid or payable. The presumed correlation is between the amount of treatment necessitated by the injury, rather than the actual cost of that treatment.

Several items are to be considered in determining if the $2,000 threshold is met. First, reasonable medical expense benefits paid, payable, or payable but for an applicable deductible are to be considered. All medical expenses for which benefits are payable under the act will be taken into consideration, including expenses for necessary medical, surgical, x-ray, optical, dental, chiropractic, and rehabilitative services, including prosthetic devices, prescription drugs, necessary ambulance, hospital, extended care and nursing services.

Second, the computation takes into consideration the value of free medical or surgical care or ordinary and necessary nursing services performed by a relative of the injured person or a member of his household.

Third, the amount by which the value of reimbursable medical services or products exceeds the benefits actually paid or payable is to be considered, if the injured person was charged less than the average reasonable amount charged in Minnesota for similar services or products.

From the total of these elements is to be deducted the amount of medical expense benefits paid, payable, or payable but for an applicable deductible, for diagnostic x-rays and for a procedure or treatment for rehabilitation. Only benefits paid or payable for a procedure or treatment for rehabilitation that is not for remedial purposes or is not for a course of rehabilitative occupational training are to be deducted. Although the Act is not entirely clear as to what constitutes rehabilitation for remedial purposes, “remedial” appears to mean medical rehabilitation.


163. MINN. STAT. § 65B.51, subd. 3(a)(1) (1974).
164. Id. § 65B.44, subd. 2, as amended, (Supp. 1975).
165. MINN. STAT. § 65B.51, subd. 3(a)(2) (1974).
166. Id. § 65B.51, subd. 3(a)(3).
167. Id. § 65B.51, subd. 3(a)(4).
168. Id.
169. The term “remedial” appears only one other place in the Act. MINN. STAT. § 65B.44, subd. 2 (Supp. 1975) provides that medical expense benefits “shall also include necessary remedial treatment and services recognized and permitted under the laws of this state for an injured person who relies upon spiritual means through prayer alone for healing in accordance with his
Section 65B.45 of the Act, which was taken from the Uniform Motor Vehicle Accident Reparations Act,\textsuperscript{170} does not use the term "remedial" in setting payment standards and procedures for the payment of rehabilitation expenses.\textsuperscript{171} It does refer to rehabilitation procedures, occupational rehabilitation, and medical rehabilitation.\textsuperscript{172} That section provides for the payment of benefits for rehabilitation procedures or treatments and courses of rehabilitative occupational training according to specified procedures and standards. Medical rehabilitation is specifically excepted from the operation of the section.\textsuperscript{173} Such benefits would be payable without being subjected to the requirements of Section 65B.45.

Procedures or treatments for rehabilitation referred to in Section 65B.45 includes those programs which do not improve the injured person's earning capacity, but which will make it easier for the injured person to adjust to his handicap.\textsuperscript{174} Occupational rehabilitation programs and medical rehabilitation programs are not included.\textsuperscript{175}

Although basic economic loss benefits will be payable for all three types of rehabilitation procedures or programs, the medical expense threshold excludes from the medical expense computation expenses that are not for remedial purposes or for occupational purposes. It is arguable that all rehabilitation programs are remedial in nature since they will tend to improve a person in some manner. If the term "remedial" is to have any meaning in the context of the medical expense deduction, however, it obviously cannot take into consideration all rehabilitation programs. The specific intent is to exclude from the medical expense computation those expenses incurred in a procedure or treatment for rehabilitation that is not occupational or remedial. Since "remedial" does not refer to occupational rehabilitation programs, nor to the other type of rehabilitation program, it must refer to medical rehabilitation.

The purpose in excluding nonremedial and nonoccupational rehabilitation procedures or treatments and diagnostic x-rays appears to be to remove the incentive to reach for the threshold by resorting to items of medical expense which are easily inflated and subject to religious beliefs." As used in that sentence, "remedial," by referring to treatment for healing, appears to be referring to medical treatment.

\textsuperscript{170} Compare Minn. Stat. § 65B.44 (1974), as amended, (Supp. 1975) with UMVARA § 34.
\textsuperscript{171} See Minn. Stat. § 65B.45 (1974).
\textsuperscript{172} Id.
\textsuperscript{173} Id. § 65B.45, subd. 2.
\textsuperscript{174} See UMVARA § 34, Comment.
\textsuperscript{175} Id.
abuse.

The standard for determining whether the medical expense incurred or services required are to be considered seems to be a reasonableness standard.\footnote{176} The standard appears to be no different than the common law standard for determining the damages to be awarded for accrued medical expenses.\footnote{177} Accordingly, the medical expenses threshold should not need further definition.

The remaining thresholds, particularly the permanent injury and permanent disfigurement thresholds present more significant problems of construction.

In drafting these thresholds there were a number of choices available to the legislature. As the legislative history indicates, the detail of the Florida approach was rejected in favor of more generalized descriptive thresholds. Although there are problems in attempting to define the thresholds with too much specificity, as in the Florida approach, use of general terms like “permanent injury” and “permanent disfigurement” also carries with it problems of interpretation. Questions arise as to whether all permanent injuries, no matter how minor, will satisfy the permanent injury threshold, and whether any permanent scar, no matter how obscure, will satisfy the permanent disfigurement threshold. Further definition of the thresholds may, however, aid in understanding and applying those thresholds.

Where the question has arisen, permanent injury has been defined as an injury “from which there can be no recovery.”\footnote{178} In assessing the sufficiency of the evidence to sustain a finding of permanency, emphasis is placed on the lasting nature of the injury or the pain flowing from the injury.\footnote{179}

Although there are no personal injury cases in Minnesota in which the term “permanent injury” has been defined, there are a number of cases dealing with the question of the sufficiency of the evidence to sustain a finding of permanency.\footnote{180} In practice, the standard appears to be similar to the definitions utilized in other jurisdictions. Evidence

\footnote{176} Minn. Stat. § 65B.51, subd. 3(a)(1) (1974) requires that the “medical expense benefits paid, payable or payable but for an applicable deductible” be reasonable. Implicit in the use of the term “value” in subdivisions 3(a)(2) and (3) is a standard of reasonableness. It is unlikely that the standard would be construed any differently than the common law standard.


\footnote{179} See Yates v. Bradley, 396 S.W.2d 735, 738 (Mo. Ct. App. 1965).

\footnote{180} See, e.g., Koehler v. Kline, 290 Minn. 485, 185 N.W.2d 539 (1971) (per curiam); Ed-
is necessary to show injury of a lasting nature. The most significant aspect of the Minnesota case law relating to permanent injury is the demonstrated liberality in the type of evidence which will suffice to establish permanency. The proof necessary may be developed through the testimony of a medical expert, although subjective evidence of an injury at the time of trial may, in certain cases, be sufficient to allow a jury to draw an inference of permanency, even in the absence of an opinion by a physician that the injury is likely to be permanent.

wards v. Engen, 288 Minn. 1, 178 N.W.2d 731 (1970); Pagett v. Northern Elec. Supply Co., 283 Minn. 228, 167 N.W.2d 58 (1969); Brown v. Kamiński, 277 Minn. 131, 152 N.W.2d 79 (1967); Colgan v. Raymond, 275 Minn. 219, 146 N.W.2d 530 (1966); Swanson v. Minneapolis St. Ry., 252 Minn. 484, 90 N.W.2d 514 (1958); LeMay v. Minneapolis St. Ry., 245 Minn. 192, 71 N.W.2d 826 (1955); Penteluk v. Stark, 244 Minn. 337, 69 N.W.2d 899 (1955); Cameron v. Evans, 241 Minn. 200, 62 N.W.2d 793 (1954).

181. See Colgan v. Raymond, 275 Minn. 219, 224-25, 146 N.W.2d 530, 533-34 (1966); Swanson v. Minneapolis St. Ry., 252 Minn. 484, 488, 90 N.W.2d 514, 517-18 (1958); Penteluk v. Stark, 244 Minn. 337, 341-42, 69 N.W.2d 899, 901-02 (1955); Cameron v. Evans, 241 Minn. 200, 205, 62 N.W.2d 793, 796-97 (1954). Issues concerning the permanency of the injury or disfigurement are analogous to those regarding future damages. See, e.g., Carpenter v. Nelson, 257 Minn. 424, 430, 101 N.W.2d 918, 922 (1960). It must appear to a reasonable certainty that there is a permanent injury or disfigurement. Id. at 428, 101 N.W.2d at 921; Cameron v. Evans, 241 Minn. 200, 203, 62 N.W.2d 793, 795-96 (1954); Romann v. Bender, 190 Minn. 419, 424, 252 N.W. 80, 82 (1934). The requirement of reasonable certainty does not alter the plaintiff's usual burden of proof; he need only show by a fair preponderance of the evidence that future disabilities would, to a reasonable certainty, ensue. See Carpenter v. Nelson, supra at 428-29, 101 N.W.2d at 921-22. It is necessary to distinguish between the quantum and substance of required evidence. See id. at 428, 101 N.W.2d at 921.

182. Edwards v. Engen, 288 Minn. 1, 4, 178 N.W.2d 731, 733 (1970); Brown v. Kamiński, 277 Minn. 131, 133, 152 N.W.2d 79, 80 (1967); Carpenter v. Nelson, 257 Minn. 424, 430, 101 N.W.2d 918, 922 (1960) (dictum); McClain v. City of Duluth, 163 Minn. 198, 202, 203 N.W. 776, 777 (1925); Haugen v. Northern Pac. Ry., 132 Minn. 54, 58, 155 N.W. 1058, 1059 (1916) (dictum). However, whenever primarily subjective evidence is offered, it will be subject to close scrutiny, Koehler v. Kline, 290 Minn. 485, 487, 185 N.W.2d 539, 541 (1971); Gordon v. Land of Lakes Motor Co., 262 Minn. 97, 99-100, 113 N.W.2d 576, 577-78 (1962); Lesewski v. Nielsen, 254 Minn. 286, 292, 95 N.W.2d 13, 18 (1959); Propper v. Chicago, R.I. & Pac. R., 237 Minn. 386, 406, 54 N.W.2d 840, 852 (1952), especially where an examining physician is available but is not called to testify. Gordon v. Land of Lakes Motor Co., supra at 99-100, 113 N.W.2d at 577-78; see Tibbets v. Nyberg, 276 Minn. 431, 434, 150 N.W.2d 687, 689 (1967). Generally, expert testimony is only required when the injury or disfigurement is so complex that laymen would not be able to assess permanency, Edwards v. Engen, supra at 4, 178 N.W.2d at 733 (dictum), when the duration, extent, or consequences are beyond their knowledge, LeMay v. Minneapolis St. Ry., 245 Minn. 192, 201, 71 N.W.2d 826, 832 (1955), or when only an expert could link the injury or disfigurement to the proper cause. Rehnke v. Jammes, 283 Minn. 431, 435, 168 N.W.2d 494, 497 (1969). See also Kundig v. Prudential Ins. Co., 219 Minn. 25, 29, 17 N.W.2d 49, 52 (1944).

However, the jury will not be free to reject uncontroversial credible expert testimony that no permanent injury or disfigurement was sustained. Rehnke v. Jammes, supra at 435, 168 N.W.2d at 497; Kundig v. Prudential Ins. Co., supra at 29, 17 N.W.2d at 52.

In this regard it is important to distinguish the Minnesota cases that require permanent injury to appear to a reasonable medical certainty. See Dornberg v. St. Paul City Ry., 253 Minn. 52,
Establishing that a permanent injury is one from which there can be no recovery is the easy task in construing the permanent injury threshold. The hard problem is in determining if all injuries of a lasting nature will be sufficient to justify a finding of permanent injury for threshold purposes.

The legislative history of the tort thresholds presents no conclusive answers. The Senate amendments to the threshold provisions of the bill made the thresholds less restrictive than the thresholds set out in the Uniform Act. There were specific deletions of the words “serious” or “significant” as modifiers of the “permanent injury” and “permanent disfigurement” thresholds. In addition, the disability threshold time period was reduced from six months to 90 days.

Addition of the medical expense threshold and other descriptive thresholds, and the reduction of the disability period to 60 days would have made the House thresholds even less restrictive than the Senate thresholds. Legislative discussion of these thresholds revealed no clear understanding of what types of injuries would suffice to meet the permanent injury and permanent disfigurement thresholds. However, in light of the stated purpose of the Act to prevent overcompensation of injured individuals sustaining minor injuries by restricting the right to recover general damages to cases involving serious injury the thresholds can be viewed as an attempt to limit recovery to those injuries that are classifiable as major injuries.

If the permanent injury and disfigurement thresholds are viewed in light of the remaining tort thresholds in the Act, this conclusion is reinforced. An injury resulting in more than $2,000 in medical expenses is likely to be a major injury, since something over 90 percent of the cases involving motor vehicle accidents will fail to result in claims of more than $2,000. The disability threshold, which requires disability for 60 days or more, requires a showing that the injured individual was unable to engage in substantially all of his usual and customary daily activities. An injury meeting this standard, viewed


183. See notes 138-45 supra and accompanying text.

184. See notes 138-43 supra and accompanying text.

185. See notes 146-47 supra and accompanying text.

186. See notes 148-55 supra and accompanying text.


189. See note 154 supra and accompanying text.
objectively, would be debilitating.

The legislative intent, as indicated by the stated purposes of the Act, and the stringency of the other tort thresholds in the Act, leads to the conclusion that the permanent injury and permanent disfigurement thresholds should not take into consideration all injuries that might be labeled as permanent.

Whether the thresholds are viewed as major or serious injury thresholds, however, the real problem is in finding some limiting factor which will narrow the area of contention over what constitutes a permanent injury and permanent disfigurement thresholds.

In extreme cases where the injury, though permanent, is minor, and the injured individual seems to have sustained little, if any, dignitary loss, a court may be justified in ruling that the threshold has not been met as a matter of law. Usually, however, this qualitative judgment will have to be made by the trier of fact.190

The only real limiting factor in the extreme cases will be the lack of economic incentive for bringing such suits, and the fact that such suits will be unnecessary if the injured individual receives his major out-of-pocket losses from his own insurance company.

Similar problems are presented by the “permanent disfigurement” standard. Lack of any definition for “disfigurement” could result in a situation where any scar that is permanent would constitute a disfigurement even though the scar is such that there is little likelihood of any humiliation or embarrassment arising out of the scarring. Unlike the permanent disfigurement threshold, however, the area of contention may be narrowed somewhat in light of accepted definitions of the term “disfigurement.”

There are two no-fault decisions dealing with the disfigurement question. In Gillman v. Gillman,191 a Florida district court of appeals case, the plaintiff sustained a 4.5 centimeter trap-door scar on the right forehead, extending through the medial end of the right eyebrow and onto the right eyelid. The plaintiff’s physician was of the opinion that the scar was permanent and would be very apparent at conversational

190. A frequently made argument is that the tort thresholds deprive individuals of their right to trial by jury guaranteed by the state constitutions. The argument has been uniformly rejected. See, e.g., Lasky v. State Farm Ins. Co., 296 So. 2d 9, 22 (Fla. 1974); Manzanares v. Bell, 214 Kan. 589, 616, 522 P.2d 1291, 1312 (1974); Montgomery v. Daniels, ___ N.Y.2d ___,___, 340 N.E.2d 444, 460, 378 N.Y.S.2d 1, 23 (1975). The rationale is that the no-fault acts limit a common law action, rather than specifically limiting right to trial by jury.

Because the no-fault acts do not tamper specifically with the right to trial by jury, the threshold questions will ordinarily be submitted to the trier of fact for resolution. See Allstate Ins. Co. v. Ruiz, 305 So. 2d 275, 276-77 (Fla. Dist. Ct. App. 1974).

distance. The defendant moved for summary judgment, arguing that the scar did not constitute "disfigurement" within the meaning of the Florida threshold permitting suits for pain and suffering if a "permanent disfigurement" is sustained.

As is the case in the other no-fault statutes, the Florida no-fault act does not define the term "disfigurement." The court defined a disfigurement as "that which impairs or injures the beauty, symmetry or appearance of a person or thing; or that [which] renders unsightly, misshapen, or imperfect, or deformed in some manner," or a "blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance." Applying these standards, the court held that a scar may be a permanent disfigurement within the contemplation of the Florida statute. Although it was not implying that every scar would constitute a disfigurement, the court held that when the existence of the scar is established, the disfigurement determination must be made by a jury.

The most extensive opinion dealing with the disfigurement question in a no-fault case is *Falcone v. Branker*, a New Jersey Superior Court case in which the plaintiff's suit was dismissed for failure to satisfy the "permanent significant disfigurement" threshold in the New Jersey no-fault act. In *Falcone* the plaintiff attempted to meet the tort threshold provision by establishing certain scarring he sustained as a result of an automobile accident. The plaintiff had a facial scar on his nose, approximately one-fourth of an inch long, extremely thin, and the same color as the surrounding skin. It was barely noticeable at a three-foot distance. He had a second scar on his right leg, about two inches below his kneecap. The scar was about one and one-half inches long; it was basically the same color as the surrounding skin, although it was slightly darker.

In searching for applicable standards to apply to the threshold determination the court relied heavily on the *Superior Mining Co. v. Industrial Commission*, an Illinois Supreme Court case construing the phrase "permanent serious disfigurement" in the Illinois Work-

195. See 319 So. 2d at 166-67.
198. 309 Ill. 339, 141 N.E. 165 (1923).
men's Compensation Act. The court defined "disfigurement" as follows:

A disfigurement is that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner. 199

This definition of disfigurement has been generally followed by other courts in construing the term disfigurement in workers' compensation statutes. 200

Workers' compensation definitions are arguably irrelevant as no-fault guidelines because of the emphasis on loss of earning capacity or employability, whereas for no-fault purposes, the emphasis is placed on establishing standards for compensating for dignity loss. The definition, however, seems to be applicable to either or both. 201

The workers' compensation flavor may add to the definition by requiring a showing that the disfigurement did in fact result in loss of employability. For no-fault purposes, the definition will be used to define those types of cases likely to result in dignity loss, without any necessary reference to employability.

Use of the definition would serve to exclude minor injuries, such as the scarring sustained by the plaintiff in the Falcone case. 202 The scarring in Falcone was minor and the likelihood of that scarring resulting in any embarassment or humiliation was extremely remote.

Aside from defining "disfigurement," there appears to be no other standard for further definition of the threshold. As in the case of the permanent injury threshold, the permanent disfigurement threshold seems to anticipate a major injury. The same problem arises, however, in drawing the line between major and minor injuries. The line will have to be drawn by the trier of fact in most cases.

Of the two remaining thresholds, the death and the disability thresholds, the only possible problem would be with the disability threshold. That threshold requires that the injury result in disability for 60 days

199. Id. at 340, 141 N.E. at 166.
200. See, e.g., St. Laurent v. Kaiser Aluminum & Chem. Corp., 113 R.I. 10, 13, 316 A.2d 504, 507 (1974); Bowen v. Chiquola Mfg. Co., 238 S.C. 322, 330, 120 S.E.2d 99, 102-03 (1961). In Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich. 441, 208 N.W.2d 469 (1973), the Michigan Supreme Court in an advisory opinion determined that the phrase "permanent serious disfigurement" was sufficiently clear for purposes of legal interpretation. 389 Mich. at 477, 208 N.W.2d at 481-82. The court provided a lengthy list of cases in which such phrases have been interpreted. See id. at 479 n.11, 208 N.W.2d at 481 n.11.
or more.\textsuperscript{203} Disability is defined as "the inability to engage in substantially all of the injured person's usual and customary daily activities."\textsuperscript{204} The disability must be for 60 days or more.\textsuperscript{205} The 60-day minimum is cumulative. It does not require 60 consecutive days of disability, as is indicated by the Senate rejection of a proposed floor amendment which would have required 90 consecutive days of disability.\textsuperscript{206}

The only word which might need further definition is "substantially." There must be an inability of the injured person to engage in substantially all of his usual and customary daily activities. Giving the word "substantially" its ordinary meaning, it denotes "the main part."\textsuperscript{207} The term seems to be clear enough without further elucidation for the trier of fact.

In addition to the substantive and interpretive problems which are raised by the tort thresholds, procedural problems relating to pleading, burden of proof, and threshold disposition are also raised by the Act.

\textbf{3. Procedural Aspects of the Tort Threshold: Burden of Pleading and Proof; Threshold Disposition}

Subdivision 3 of Section 65B.51, providing that "in an action described in subdivision 1, no person shall recover damages for noneconomic detriment unless" one of the tort thresholds is met, suggests that the burden of pleading and proving the tort thresholds is on the plaintiff. Although the substance of the tort thresholds in the other no-fault states differs, most of the statutes phrase the limitation on recovery for noneconomic detriment in terms of a condition which must be satisfied by the plaintiff before recovery will be allowed.\textsuperscript{208}

\begin{itemize}
  \item \textsuperscript{203} \textit{Minn. Stat.} § 65B.51, subd. 3(b)(4) (1974).
  \item \textsuperscript{204} \textit{Id.} § 65B.51, subd. 3(d).
  \item \textsuperscript{205} \textit{Id.} § 65B.51, subd. 3(b)(4).
  \item \textsuperscript{206} See notes 146-47 \textit{supra} and accompanying text.
  \item \textsuperscript{207} \textit{Webster's New International Dictionary} 2280 (3d ed. 1961).
  \item \textsuperscript{208} The only exception appears to be in New Jersey. \textit{See N.J. Stat. Ann.} § 39:6A-8 (1973). The statute has been construed to require the defendant to plead and prove the tort threshold as an affirmative defense. Rather than phrasing the threshold in terms of a condition precedent, the act grants a defendant an exemption from tort liability if the injury is a soft tissue injury and the medical expenses are less than $200. There is no exemption from tort liability if the injured party has sustained death, permanent disability, permanent significant disfigurement, permanent loss of any bodily function or loss of a body member in whole or in part. \textit{Id.} The statute has been construed to require the defendant to plead and prove the tort threshold as an affirmative defense. \textit{See Fennell v. Ferreira}, 133 N.J. Super. 63, 69, 335 A.2d 84, 88 (L. Div. 1975); \textit{Rugamer v. Thompson}, 130 N.J. Super. 181, 186, 325 A.2d 860, 863 (L. Div. 1974) (dictum). The conclusion is understandable because of the phraseology of the New Jersey act, but it is difficult to reconcile a decision such as \textit{Fennell} which in essence requires a defendant to disprove what the plaintiff is attempting to prove. Because of this problem, the New Jersey Superior Court in \textit{Seskin v. Cone},
\end{itemize}
The suggestion that the plaintiff has the burden of pleading and proving the tort threshold is reinforced by the traditional analysis utilized in such cases. The rules of civil procedure provide a starting point. Rule 8.03 of the Minnesota Rules of Civil Procedure for the District Courts, sets out 19 affirmative defenses; the rule also states that "any other matter constituting an avoidance or affirmative defense" must be set forth affirmatively. The question is whether the tort threshold is a matter of avoidance or affirmative defense.

Resolution of the question depends on whether the issue arises by logical inference from the plaintiff's pleadings. If a particular matter is determined to be part of the plaintiff's case, the defendant only needs to plead a general denial.209 If the issue does not arise by logical inference from the plaintiff's pleadings it will be a matter of affirmative defense to be plead by a defendant as an affirmative defense.210 Requiring the defendant to plead new matter avoids any unfairness or surprise which might otherwise result to the plaintiff.211

The logical inference approach begs the question, however, because it only suggests that matter not logically part of the plaintiff's case


210. See C. CLARK, supra note 209, § 96, at 607; M. PIRSIG, supra note 209, at § 1250; C. WRIGHT & A. MILLER, supra note 209, § 1271, at 311-312; Schwartz, supra note 208, at 49-50.

211. See C. CLARK, supra note 209, § 96, at 609; M. PIRSIG, supra note 209, at § 1250; C. WRIGHT & A. MILLER, supra note 209, § 1271, at 315; Schwartz, supra note 208, at 49.
must be pleaded affirmatively by the defendant. That question is the key; how it is answered depends on practical considerations and considerations of policy.

As to the fairness factor, it seems clear that the plaintiff will have the superior knowledge with respect to the information necessary to establish the tort thresholds. In addition, as a practical matter, the proof which the plaintiff will have to supply to prove the nature and extent of his damages will be the same proof that will be necessary to establish the presence of the tort threshold. If the tort threshold would be deemed to be a matter of affirmative defense the defendant would, in essence, have to disprove by a preponderance of the evidence what the plaintiff has to prove by a preponderance of the evidence. The result would be absurd. The nature of a negligence case involving the

212. See C. CLARK, supra note 209, § 96, at 609; C. WRIGHT & A. MILLER, supra note 209, § 1271, at 312.
214. But see Fennell v. Ferreira, 133 N.J. Super. 63, 335 A.2d 84 (L. Div. 1975), where a New Jersey court determined that the burden of pleading and proving the tort threshold is placed on the defendant. N.J. STAT. ANN. § 39:6A-8 (1973) provides:

> Every owner, registrant, operator or occupant of an automobile to which section 4, personal injury protection coverage, regardless of fault, applies, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages to any person who is required to maintain the coverage mandated by this act ... as a result of bodily injury, arising out of the ownership, operation, maintenance or use of such automobile in this State, if the bodily injury, is confined solely to the soft tissue of the body and the medical expenses incurred or to be incurred by such injured person or the equivalent value thereof for the reasonable and necessary treatment of such bodily injury, is less than $200.00, exclusive of hospital expenses, X-rays and other diagnostic medical expenses. There shall be no exemption from tort liability if the injured party has sustained death, permanent disability, permanent significant disfigurement, permanent loss of any bodily function or loss of a body member in whole or in part. . . .

There were two primary reasons for the court's decision. Initially, the court found that making the threshold a matter of affirmative defense would be in accord with general principles of statutory construction. In general, if an exception or exemption appears in the enacting words of the statute, it will be necessary for the plaintiff to plead and prove facts showing that his case does not fall within the exemption or exception. If, however, the exemption or exception appears elsewhere in the statute, it will be regarded as a proviso and the burden of proof will be on the defendant to plead and prove the exception. Because the tort exemption in the New Jersey act was not set out in the enacting clause, the court indicated that the tort exemption would be considered to be a proviso.

The reference to the general rule of statutory construction is somewhat confusing. Reference to the rule, without further interpretation, makes the application of the rule difficult to understand. The initial sections of the New Jersey Automobile Reparations Reform Act, N.J. STAT. ANN. §§ 39:6A-1 to -2 (1973) contain the short title and definitions. The essence of the statute is embodied in section 4 of the act which provides for compulsory first party insurance which is to be payable without regard to fault. The tort threshold provisions of the act set out in section 8 provide for the limitation on damages recoverable in a common law negligence action. As such, the limitations on the right to recover tort damages are not a limitation on a right established under the act, but rather are a limitation on a common law remedy. The court's reference to the
tort thresholds is such that the close relationship to the plaintiff of the threshold issue, in light of the burden of proof already carried by the plaintiff with respect to the elements of a negligence case, seems to necessitate placing the burden of pleading and proving the thresholds on the plaintiff.

As a final matter, the policy underlying the Minnesota No-Fault Automobile Insurance Act also suggests that the plaintiff should bear the burden of pleading and proving the tort threshold. The tort threshold will limit tort recovery, but in exchange for that limitation the injured individual has the right to receive basic economic loss benefits promptly and without regard to fault. The exchange allows for the use of the cost savings resulting from the elimination of overcompensation of accident victims to finance the basic economic loss benefits. In essence, the basic economic loss benefits are designed to serve as a substitute for a tort action, at least in cases of minor injuries. In light of the legislative purpose, it seems difficult to classify the tort threshold as a disfavored defense, such that the burden of pleading and proving the absence of the tort threshold should be placed on the defendant.\textsuperscript{215}

Assuming, then, that the plaintiff has the burden of pleading and proving that the threshold is present, the question remains of how the doctrine thus appears to be erroneous. First, the tort limitation provision is not part of the general statutory limitation on a new right created by the no-fault act. Second, the general rule applies in situations where the statute creates rights or obligations and conditions the exercise of those rights. See State v. Red Owl Stores, Inc., 253 Minn. 236, 252, 92 N.W.2d 103, 114 (1958); Faribault v. Hulett, 10 Minn. 30, 37 (Gil. 15, 20) (1865). The tort threshold does not, but rather limits common law rights. See Schwartz, supra note 208, at 41-43.

The second and more persuasive reason given by the court is simply that the threshold is phrased in terms which require the defendant to prove that the plaintiff has sustained only soft tissue injuries and less than $200 in medical expenses. The court analogizes the threshold to the defense of charitable immunity. The difficulty with the conclusion, although justifiable in terms of the wording of the statute, is that it creates practical problems because it requires the defendant to disprove by a preponderance of the evidence something that the plaintiff has to prove by a preponderance of the evidence. The plaintiff will have to demonstrate either a major injury, or an injury other than a soft tissue injury, or medical expenses in excess of $200 to overcome the threshold limitation. Making the threshold a matter of affirmative defense is inconsistent because of the obvious superior knowledge possessed by the plaintiff with respect to those issues. In a more recent decision, Seskin v. Cone, ___ N.J. Super. ___, 353 A.2d 558 (1976) the court, in disagreeing with Fennell, determined that the threshold was not an affirmative defense.

215. As a matter of policy, the courts may seek to discourage a particular issue by requiring the defendant to plead and prove the issue. 1 M. Pirsig, supra note 209, at § 1250. Viewed differently, it could be argued that the burden of pleading and proving an issue should be placed on the party seeking to benefit from a departure from the supposed norm. 5 C. Wright & A. Miller, supra note 209, § 1271, at 314. Usually, motor vehicle accidents will not result in personal injuries meeting the thresholds. Following the probability analysis, the burden should be placed on the party seeking to demonstrate the unusual occurrence—meeting the threshold.
defendant may challenge the presence of the threshold. Several pro-
cedural vehicles suggest themselves. A defendant might challenge the
plaintiff's claim through a motion to dismiss for failure to state a
claim upon which relief can be granted216 or a motion for summary judg-
ment.217 In addition, assuming that because of factual disputes, the
threshold determination cannot be made as a matter of law by the trial
judge, the possibility remains that in appropriate cases, the trial judge
can sever the threshold issue from the rest of the case and try the
issue separately.218

A motion to dismiss for failure to state a claim upon which relief
can be granted is the least likely vehicle for determining whether or
not the tort thresholds have been met. Even assuming that a plaintiff
has failed to allege the presence of the tort threshold, the appropriate
procedure would be to give the plaintiff an opportunity to amend his
complaint to allege the presence of the threshold. Given the amend-
ment, a motion to dismiss would obviously be insufficient to challenge
the presence of the threshold. If matters outside the pleadings are
presented so the motion is converted into a motion for summary judg-
ment, the defendant may be able to challenge the threshold if he is
able to demonstrate to the court that there is no genuine dispute as to
any material issue of fact. The standard indicates the problem, how-
ever. In most cases it will be impossible for a trial judge to make the
determination that as a matter of law the plaintiff has not met the
threshold. There is enough leeway in the threshold definitions so as to
require jury resolution of the factual disputes that will arise.

In extreme cases like Falcone v. Branker,218 where there is no dis-
pute as to the nature of the minor scarring sustained by the plaintiff,
summary judgment may be deemed appropriate. In such a case, where
the scars are apparent, it seems feasible to make an objective deter-
mination that the threshold is not met as a matter of law. The sum-
mary judgment procedure would be more difficult to apply when the
concern is whether the plaintiff has sustained permanent injury, be-
cause of the absence of any feasible means of defining the threshold to
narrow the area of contention.

Use of summary judgment for challenging the medical expense
threshold will be subject to the same problems. In unusual cases it
may appear clearly that impermissible expenses were used in comput-

216. Minn. R. Civ. P. 12.02(5).
218. See Minn. R. Civ. P. 42.02.
ing the threshold amount, justifying the grant of a motion for summary judgment.\textsuperscript{220} If the only issue is whether the medical expenses incurred were reasonable, summary judgment would be inappropriate.

The trial motions, therefore, do not appear to be of great utility in testing the presence of the thresholds.\textsuperscript{221} If a court is not able to rule on the defendant’s favor on a motion to dismiss\textsuperscript{222} for failure to state a claim or a motion for summary judgment, the threshold question will have to await disposition at trial.\textsuperscript{223}


\textsuperscript{221} See Morell v. Vargas, 83 Misc. 2d 30, 33-35, 371 N.Y.S.2d 828, 830-31 (N.Y. City Ct. 1975); Maynor v. Wrenn, 78 Misc. 2d 193, 356 N.Y.S.2d 469 (Syracuse City Ct. 1974). In recent amendments to its no-fault act Florida set forth a new procedure to govern the pretrial resolution of threshold questions. The new provision states:

(3) When a defendant, in a proceeding brought pursuant to ss. 627.730-627.741, questions whether the plaintiff has met the requirements of s. 627.737(2), then the defendant may file an appropriate motion with the court and the court shall, on a one-time basis only, 30 days before the date set for the trial or the pre-trial hearing, whichever is first, by exchanging the pleadings and the evidence before it, ascertain whether the plaintiff will be able to submit some evidence that the plaintiff will meet the requirements of s. 627.737(2). If the court finds that the plaintiff will not be able to submit such evidence then the court shall dismiss the plaintiff’s claim without prejudice.

Act of June 27, 1976, ch. 76-266, § 5, [1976] Fla. Sess. Law Serv. 757 (West), \textit{to be codified as Fla. Stat. Ann. § 627.737(3)}. Florida is the only state specifically providing a special procedure for the pretrial screening of the threshold issue. It is questionable whether this procedure will do anything more than a motion for summary judgment.

\textsuperscript{222} If there is dismissal of an action on the grounds that the thresholds have not been met, a question arises as to whether the dismissal should be with or without prejudice. In Lasky v. State Farm Ins. Co., 296 So. 2d 9, 23 (Fla. 1974), the Florida Supreme Court indicated that the proper disposition when there is a preliminary dismissal for failure to meet the medical expense threshold is a dismissal without prejudice. See also Smith v. United States Fidelity & Guar. Co., 305 So. 2d 216 (Fla. Dist. Ct. App. 1974) (per curiam).

In accord is the Restatement (Second) of Judgments § 48.1(2) (Tent. Draft No. 1, 1973), which provides as follows:

\begin{quote}
A valid and final personal judgement for the defendant which rests on the prematurity of the action or on the plaintiff’s failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law, or the circumstances are such that it would be manifestly unfair to subject the defendant to such action.
\end{quote}

In situations where the plaintiff’s suit is dismissed for failure to satisfy the medical expense threshold, following the Lasky approach, the result would be dismissal without prejudice. If additional medical expenses were incurred putting the plaintiff over the medical expense threshold, the plaintiff would be allowed to refile. The same result might be reached with the disability threshold, although it would be unlikely with the permanent injury and permanent disfigurement thresholds. \textit{See Restatement (Second) of Judgments § 48.1(2), Comments (Tent. Draft No. 1, 1973). But see Act of June 27, 1976, ch. 76-266, § 5, [1976] Fla. Sess. Law Serv. 757 (West), \textit{to be codified as Fla. Stat. Ann. § 627.737(3)}.

\textsuperscript{223} The threshold question has arisen many times in the context of pretrial motions. Most of the cases recognize the difficulty of making the determination in advance of trial. \textit{See}, e.g.,
A final possibility for speedy disposition of the question is to sever the threshold question from the liability and damages questions.\textsuperscript{224} Rule 42.02 permits the court, when separate trial will be conducive to the expeditious disposition of a case and to judicial economy, to order a separate trial of any claim or issue. The principal problem with severance, however, is that there will be significant duplication of effort in most cases, since the threshold issues will require the same proof as the plaintiff's damages. The necessary duplication makes the split less likely to be of utility.

The method of resolving disputes over the tort thresholds will, ordinarily, thus be resolvable only at trial, because of the inadequacy of any other procedural method for challenging the threshold.

4. Summary

In order for the tort thresholds in the Act to apply, the cause of action must be for negligence arising out of the ownership, maintenance, use or operation of a motor vehicle. Actions based upon strict or statutory liability, recklessness, or negligence other than negligence arising out of the maintenance or use of a motor vehicle will not be subjected to the tort thresholds.

In a negligence cause of action, one of the tort thresholds will have to be established before any damages will be awarded for noneconomic detriment. The burden of pleading and proving the tort thresholds should be on the individual bringing suit for noneconomic detriment.

In determining whether or not the tort thresholds have been met, both legal and factual interpretation will be necessary. Further definition of the tort thresholds will give some help, but the factual problems will necessarily remain. The utility of disposing of the threshold question on a motion to dismiss or a motion for summary judgment is questionable, in light of the fact that factual questions will invariably arise as to the threshold issue. In most cases resolution of the question will be made by the trier of fact.

Once one of the tort thresholds has been met, recovery will be

allowed for all provable noneconomic detriment sustained by the injured individual.

III. CONCLUSION

The tort limitations set forth in section 65B.51 of the Minnesota No-Fault Automobile Insurance Act are essential to the operation of the Act. Prevention of duplicate recovery of economic loss and limitation of claims for noneconomic detriment to cases involving serious injury are part of the legislative purpose of avoiding the excessive cost to the no-fault system which would result without such limitations.

A number of problems will arise with the application of the tort limitations. Resolution of those problems is best accomplished by applying the limiting provisions in a manner consistent with the history and purposes of the Act. Although subdivisions 1 and 2, dealing with economic loss, are not entirely clear, a construction consistent with the treatment of economic loss in cases in which subrogation is allowed by the Act, and which is consistent with the history and purpose of the Act can be readily achieved. Such a construction solves the future loss problem and achieves the purpose of preventing duplicate recovery of economic loss, while preserving recovery for uncompensated economic loss and noneconomic detriment.

The conclusions with respect to the tort thresholds may seem less than satisfactory. Because the purpose of interposing the tort thresholds is to limit recovery for noneconomic detriment to cases involving serious injury, the tendency is to search for some principle which will allow for clarification and facile application of the thresholds. Aside from further definition of some of the thresholds, however, probably the most important conclusion is that the threshold determination will ordinarily have to be made by the trier of fact. This result is not a defect in the Act, but rather a function of the legislative choice of generalized tort thresholds.

In conclusion, while no-fault does affect the nature and amount of recovery which will be allowed in a negligence action, the Act should present no real difficulty in its application to fault actions, if the purposes of the Act are used as the guidelines for application.
### APPENDIX I

**BENEFITS UNDER THE MINNESOTA ACT**

This chart summarizes the benefits provided for in the Minnesota No-Fault Automobile Insurance Act, as of September 1, 1976, the limitations on benefits, and the exclusions from coverage. If losses are not compensable under the Act because of limitations on coverages or exclusions from coverage, they should be recoverable in a tort action, unless they fall within the category of noneconomic detriment.

<table>
<thead>
<tr>
<th><strong>BENEFITS</strong></th>
<th><strong>Loss and Expenses for which Benefits are Payable</strong></th>
<th><strong>Specific Limitations on Benefits</strong></th>
<th><strong>Cumulative Limitations on Benefits</strong></th>
<th><strong>General Limitation on All Benefits</strong></th>
<th><strong>Persons Excluded from Coverage</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Medical Expense Benefits</strong></td>
<td>All reasonable expenses for necessary medical, surgical, x-ray, optical, dental, chiropractic, and rehabilitative services. Includes prosthetic devices, prescription drugs, necessary ambulance, hospital, extended care and nursing services.</td>
<td>Hospital room and board benefits may be limited to the regular, daily semi-private room rates customarily charged by the institution in which the recipient of benefits is confined.</td>
<td>Medical expense benefits are subject to a maximum of $20,000.</td>
<td>A reparation obligor may provide in the plan of reparation security that benefits are to be terminated after a prescribed period of lapse of disability and medical treatment. The period shall not be less than one year.</td>
<td>Converters other than good faith converters are excluded from recovering under any policy other than policies under which they are insured. In the event of death, survivors are subject to the same exclusion.</td>
</tr>
<tr>
<td><strong>Disability and Income Loss Benefits</strong></td>
<td>Loss of gross income due to inability to work, defined as disability which continuously prevents the injured person from engaging in any substantial gainful occupation or employment, for wage or profit, which he is or may be training to become reasonably qualified for.</td>
<td>Limited to 85% of present and future gross income, subject to a maximum of $200 per week.</td>
<td>Income loss benefits, funeral and burial expense benefits, replacement service loss, survivor's economic loss, and survivor's replacement service loss are subject to a cumulative limitation of $10,000.</td>
<td></td>
<td>Individuals injured in the course of or during practice for an officiated race. Survivors are subject to the same exclusion.</td>
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<tr>
<td><strong>Funeral and Burial Expenses</strong></td>
<td>Funeral and burial expenses, including expenses for cremation or delivery under the Uniform Anatomical Gift Act.</td>
<td>Limited to $1,250.</td>
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<td></td>
<td>Intentional wrongdoers are excluded from coverage if injured while attempting to cause injury to themselves or others; survivors are excluded only where the person died while intending or attempting to inflict injury on himself.</td>
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<tr>
<td><strong>Replacement Service and Loss</strong></td>
<td>Expenses reasonably incurred by or on behalf of the nonfatally injured person in obtaining usual and necessary substitute services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the direct benefit of himself or his household; if the nonfatally injured person normally, as a full time responsibility, provides care and maintenance of a home with or without children, the benefit to be provided shall be the reasonable value of such care and maintenance or the reasonable expenses incurred in obtaining usual and necessary substitute care and maintenance of the home, whichever is greater.</td>
<td>Limited to $15 per day. The day of injury and the first seven days thereafter are excluded.</td>
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<tr>
<td><strong>Survivors Economic Loss Benefits</strong></td>
<td>Loss after decedent’s death of contributions of money or tangible things of economic value, not including services, that his surviving dependents would have received for their support during their dependency from the decedent had he not suffered the injury causing death.</td>
<td>Limited to $200 per week. Benefits are payable only if death occurs within one year of the date of the accident causing the injury which resulted in death.</td>
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<tr>
<td><strong>Survivors Replacement Services Loss</strong></td>
<td>Expenses reasonably incurred by surviving dependents after the date of the decedent’s death in obtaining ordinary and necessary services in lieu of those the deceased would have performed for their benefit had he not suffered the injury causing death, minus expenses avoided by reason of the decedent’s death.</td>
<td>Limited to $200 per week.</td>
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APPENDIX II
NONECONOMIC DETRIMENT

The following breakdown is according to the major types of threshold devices utilized in the states which limit recovery for noneconomic loss.

<table>
<thead>
<tr>
<th>State</th>
<th>Descriptive Threshold</th>
<th>Disability Threshold</th>
<th>Medical Expense Threshold</th>
<th>Dollar Expense Threshold</th>
</tr>
</thead>
</table>
| **Colorado**<sup>1</sup> | Death  
Dismemberment  
Permanent disfigurement | Permanent disability          | Medical expenses in excess of $500 | Loss of earnings and loss of earning capacity extending beyond the 52-week limit on benefits provided for under the Act and not compensated by an applicable, complying policy |
| **Connecticut**<sup>2</sup> | Death  
Permanent injury  
Fracture of any bone  
Permanent significant disfigurement  
Permanent loss of any bodily function  
Loss of a body member | Medical expenses in excess of $400 | | |
| **Florida**<sup>3</sup> | Permanant disfigurement  
Fracture to a weight-bearing bone  
Compound, comminuted, displaced or compressed fracture  
Loss of a body member  
Permanent injury within a reasonable medical probability  
Permanent loss of a bodily function  
Death | Medical expenses in excess of $1,000 | | |
| **As amended, effective Oct. 7, 1976**<sup>4</sup> | Loss of a body member  
Permanent loss of a bodily function  
Permanent injury within a reasonable degree of medical probability other than scarring or disfigurement  
Significant permanent scarring or disfigurement  
Death | A serious non-permanent injury which has a material degree of bearing on the injured person's ability to resume his normal activity and life-style during all or substantially all of the ninety day period after the occurrence of the injury, and the effects of which are medically or scientifically demonstrable at the end of such period | | |
| **Georgia**<sup>5</sup> | Death  
A fractured bone  
Dismemberment  
Permanent disfigurement  
Permanent loss of a bodily function  
Permanent partial or total loss of sight or hearing. | Disability for not less than 10 consecutive days | Medical expenses in excess of $500 | |
<table>
<thead>
<tr>
<th>State</th>
<th>Condition Description</th>
<th>Medical Expenses</th>
<th>Maximum No-Fault Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Death&lt;br&gt;A significant permanent loss of use of a part or function of the body&lt;br&gt;Permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering</td>
<td>On or before Aug. 31, 1976: Medical-rehabilitative expenses exceeding $1,500&lt;br&gt;After Aug. 31, 1976: The medical-rehabilitative expense threshold will be set yearly by the state commissioner of motor vehicle insurance at a figure below which are 90% of all medical-rehabilitative claims for that year</td>
<td>Maximum no-fault benefits exceeded</td>
</tr>
<tr>
<td>Kansas</td>
<td>Permanent disfigurement&lt;br&gt;Fracture to a weight-bearing bone&lt;br&gt;Compound, comminuted, displaced, or compressed fracture&lt;br&gt;Loss of a body member&lt;br&gt;Permanent injury within reasonable medical probability&lt;br&gt;Permanent loss of a bodily function&lt;br&gt;Death</td>
<td>Medical expenses of $500 or more</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>Permanent disfigurement&lt;br&gt;Fracture to a weight-bearing bone&lt;br&gt;Compound, comminuted, displaced, or compressed fracture&lt;br&gt;Loss of a body member&lt;br&gt;Permanent injury within reasonable medical probability&lt;br&gt;Permanent loss of a bodily function&lt;br&gt;Death</td>
<td>Medical expenses in excess of $1,000</td>
<td></td>
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<tr>
<td>Massachusetts</td>
<td>Death&lt;br&gt;Loss of a body member&lt;br&gt;Permanent and serious disfigurement&lt;br&gt;Loss of sight or hearing&lt;br&gt;A fracture</td>
<td>Medical expenses in excess of $500</td>
<td></td>
</tr>
</tbody>
</table>

A.6. HAWAI. REV. STAT. § 294-6(a) (Supp. 1975). COMPARE id. § 294-6(a)(2) with id. § 294-10(b).
<table>
<thead>
<tr>
<th>State</th>
<th>Descriptive Threshold</th>
<th>Disability Threshold</th>
<th>Medical Expense Threshold</th>
<th>Dollar Expense Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>Death</td>
<td>Disability for 60 days or more</td>
<td>Medical expenses in excess of $2,000</td>
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<tr>
<td></td>
<td>Serious impairment of body function</td>
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<tr>
<td></td>
<td>Permanent serious disfigurement</td>
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<tr>
<td>Minnesota</td>
<td>Permanent injury</td>
<td>Disability for 60 days or more</td>
<td>Medical expenses in excess of $2,000</td>
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<tr>
<td></td>
<td>Permanent disfigurement</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Death</td>
<td></td>
<td></td>
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<tr>
<td>Nevada</td>
<td>Death</td>
<td>Permanent partial or permanent total disability</td>
<td>Medical expenses in excess of $750</td>
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<tr>
<td></td>
<td>Chronic or permanent injury</td>
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<tr>
<td></td>
<td>Disfigurement</td>
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<tr>
<td></td>
<td>Fracture of a major bone</td>
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<td>Dismemberment</td>
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<td>Permanent loss of a body function</td>
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<tr>
<td>New Jersey</td>
<td>Injury other than a soft tissue injury</td>
<td>Disability for 60 days or more</td>
<td>Medical expense of $200 or more</td>
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<tr>
<td></td>
<td>Death</td>
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<td>Permanent disability</td>
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<td></td>
<td>Permanent significant disfigurement</td>
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<td>Permanent loss of any bodily function</td>
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<td></td>
<td>Loss of a body member in whole or in part</td>
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<tr>
<td>New York</td>
<td>Death</td>
<td>Disability for 60 days or more</td>
<td>Medical expenses in excess of $500</td>
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<tr>
<td></td>
<td>Dismemberment</td>
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<td></td>
<td>Significant disfigurement</td>
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<td></td>
<td>Compound or comminuted fracture</td>
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<td></td>
<td>Permanent loss of use of a body organ, member, function, or system</td>
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<tr>
<td>North Dakota</td>
<td>Death</td>
<td>Disability for 60 days or more</td>
<td>Medical expenses in excess of $1,000</td>
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<td></td>
<td>Dismemberment</td>
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<tr>
<td></td>
<td>Serious and permanent disfigurement</td>
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<tr>
<td>Pennsylvania</td>
<td>Death Serious and permanent injury Permanent, irreparable and severe cosmetic disfigurement</td>
<td>Medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than 60 consecutive days</td>
<td>Medical expenses in excess of $750</td>
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<tr>
<td>Utah</td>
<td>Death Dismemberment Fracture Permanent disfigurement</td>
<td>Permanent disability</td>
<td>Medical expenses in excess of $500</td>
<td></td>
</tr>
</tbody>
</table>

A.11. [Minn. Stat. § 65B.51, subd. 3(a)-(b) (1974)].
A.14. [Compare N.Y. Ins. Law § 671(4) (McKinney Supp. 1975) with id. § 673(1)].

A.15. [Compare N.D. Cent. Code § 26-41-03(18) (Supp. 1975) with id. § 26-41-12(1)(a)].