

**MORE THAN A HEADACHE: HOW
THE APPLICATION OF NEW YORK'S
NO-FAULT THRESHOLD HAS EFFECTIVELY
ELIMINATED HEAD
INJURY PLAINTIFFS' CHANCES
OF RECOVERY**

*Marc A. Casale**

TABLE OF CONTENTS

I.	INTRODUCTION	446
II.	WHAT IS NO-FAULT?	448
III.	ORIGIN OF NO-FAULT	448
	A. United States	448
	B. New York.....	451
IV.	REQUIREMENT OF OBJECTIVE MEDICAL EVIDENCE	453
V.	MEDICAL KNOWLEDGE OF HEAD INJURIES	457
	A. Classifications of Head Injuries.....	459
	B. Symptoms of Mild Traumatic Brain Injuries	461
	C. Contusion versus Concussion	462
VI.	APPLICATION OF THE REQUIREMENT FOR OBJECTIVE MEDICAL EVIDENCE	463
VII.	HOW OTHER STATES HANDLE HEAD INJURIES	467
VIII.	PROPOSED STANDARD FOR HEAD INJURY PLAINTIFFS	471
IX.	ARGUMENTS FOR & AGAINST THE ACCEPTANCE OF SERIOUS HEAD INJURIES.....	473
	A. Malingering.....	473
	B. Cross-Examination on Speculation	475
	C. Subjective Complaints of Pain.....	476
	D. New Perception Needed by the Courts.....	477

*J.D. Candidate, 2013, Albany Law School; B.S., 2010, Rensselaer Polytechnic Institute; LaSalle Institute, 2007. I would like to thank my family for all of their love and support in getting me to where I am and where I will be. I would also like to thank Professor Rosemary Queenan for her constant guidance and support. Thank you to all of the members of the ALBANY LAW JOURNAL OF SCIENCE & TECHNOLOGY for all of your hard work in getting this note published.

X.	CONCLUSION	478
----	------------------	-----

I. INTRODUCTION

100,000,000,000. One hundred billion is the number of neurons contained in the human brain.¹ To put that number in perspective, it is also the same number of stars contained in the Milky Way galaxy.² Although only three pounds, “[a] single human brain has more switches than all the computers and routers and Internet connections on Earth.”³ It is able to complete an astonishing one hundred trillion computations every second. However, these are very rough estimates,⁴ because as much as the human brain can accomplish, it has failed to fully comprehend the internal workings of the brain. New York’s legal system has suffered this same fate.

Under New York’s No-Fault Insurance, a plaintiff must meet the definition of a serious injury in order to maintain a cause of action for pain and suffering stemming from an automobile collision.⁵ This no-fault statute, although devoid of any requirements for objective medical evidence, has been interpreted by New York courts to require the serious injury to be proven with such.⁶ This has led to a higher burden for head injury plaintiffs⁷ because most concussions cannot be detected on

¹ *Number of Neurons in a Human Brain*, THE PHYSICS FACTBOOK (2002), <http://hypertextbook.com/facts/2002/AniciaNdabahaliye2.shtml>.

² Robert Lee Hotz, *An Otherworldly Discovery: Billions of Other Planets*, WALL ST. J. (Jan. 12, 2012), <http://online.wsj.com/article/SB10001424052970203436904577154803588270744.html>.

³ Elizabeth Armstrong Moore, *Human Brain Has More Switches than All Computers on Earth*, CNET (Nov. 17, 2010, 12:03 PM), http://news.cnet.com/8301-27083_3-20023112-247.html.

⁴ Michelle Delio, *This Is Your Computer on Brains*, WIRED (Nov. 19, 2002), <http://www.wired.com/techbiz/it/news/2002/11/56459>.

⁵ N.Y. INS. LAW § 5104(a) (McKinney 1984).

⁶ *See Licari v. Elliot*, 441 N.E.2d 1088, 1091–92 (N.Y. 1982) (discussing the need for the court to determine at the outset whether the plaintiff has established a prima facie case of sustaining serious injury in order to comport with the Legislature’s intent in enacting the No-Fault Law); *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 691–92 (App. Div. 3d Dep’t 2001) (citations omitted).

⁷ This note uses “head injury” and “brain injury” interchangeably to refer to a traumatic brain injury. It is noted that a head injury can occur with no brain injury, and vice versa. Ronald Ruff, *Two Decades of Advances in Understanding of Mild Traumatic Brain Injury*, 20 J. HEAD TRAUMA REHAB. 5, 7 (2005).

2013] NO FAULT & RECOVERY ON HEAD INJURIES 447

an MRI or CT scan.⁸ Lacking the required objective medical evidence, head injury plaintiffs have tried to proffer, to no avail, medical testimony regarding the neurologists' diagnoses of post-traumatic or post-concussive syndrome based on the plaintiff's subjective complaints.⁹ This paper proposes that the objective medical evidence requirement should be relaxed for head injury plaintiffs, specifically because of the inherent difficulties in providing such evidence.

This paper focuses mainly on head injuries that are classified as mild traumatic brain injuries ("mTBI"). This is due in part to the fact that severe or moderate traumatic brain injuries are more easily diagnosed due to the ability of CT and MRI scans to discover them.¹⁰ The problems that exist for mTBI exist for moderate and severe traumatic brain injuries, however mTBIs are more likely to not have the objective medical evidence that is sufficient to meet New York's no-fault threshold.¹¹

Section I of this paper explains no-fault insurance. Section II will follow the inception of no-fault in the United States as well as in New York. Section III will provide how objective medical evidence became a requirement to prove a serious injury under New York's No-Fault. Section IV will explore head injuries and the inherent difficulties in providing objective medical evidence to prove the injuries exist. Section V will explore *Fitzmaurice v. Case* as an example of the difficulties in proving the existence of a head injury through objective medical evidence. Section VI explores how other states have handled head injury plaintiffs and the lack of objective medical evidence. Section VII proposes a new standard for the court in evaluating head injuries as serious injuries and explores the arguments for and against its adoption.

⁸ David Kushner, *Mild Traumatic Brain Injury: Toward Understanding Manifestations and Treatment*, 158 ARCHIVES OF INTERNAL MED. 1617, 1618 (1998).

⁹ See, e.g., *Fitzmaurice*, 732 N.Y.S.2d at 692 (declaring plaintiff's affidavits from her neurologist to be insufficient to demonstrate the presence of a brain injury due to a lack of objective symptoms); see also *infra* Part IV for a more detailed discussion of the topic.

¹⁰ Page Walker Buck, *Mild Traumatic Brain Injury: A Silent Epidemic in Our Practices*, 36 HEALTH & SOC. WORK 299, 299 (2011).

¹¹ See *id.* (discussing the issues associated with diagnosing mild traumatic brain injuries); see also N.Y. INS. LAW § 5102(d) (McKinney 2009) (defining "serious injury" within the no-fault context); *Fitzmaurice*, 732 N.Y.S.2d at 691–92 (discussing courts' requirement for objective symptoms in order to make a no-fault finding).

II. WHAT IS NO-FAULT?

In a tort system of recovery, an accident victim recovers compensation for injuries from another party, but only after proving the fault of that party.¹² A no-fault system provides for a person injured in an automobile accident to receive payment from the other driver's insurance and/or his/her own insurance to cover medical expenses as well as lost wages up to a certain point without proving fault of a third party.¹³ This allows an injured person to receive payments much faster than would be possible through the lengthy process of proving fault.¹⁴ This benefit of the no-fault system comes with a trade-off. The people in the jurisdiction must give up their right to sue the wrongdoer in the accident.¹⁵ Some claims for noneconomic losses may still be allowed, but only if the plaintiff can establish that he or she meets all of the requirements under the statute.¹⁶ These requirements are referred to as the "no-fault threshold." In summary, the no-fault system is made up of three components: "(1) a limitation on the ability to sue under the tort system, (2) a limitation on recovery for noneconomic damages, and (3) a first-party insurance system designed to replace the right to sue."¹⁷

III. ORIGIN OF NO-FAULT

A. *United States*

The idea of no-fault dates back as far as the 1920s, when it was proposed to model the automobile insurance industry after the workers' compensation approach to accidents that occurred in the workplace.¹⁸ "For the next 40 years, numerous academic studies decried the use of the tort system to compensate injured victims of automobile accidents."¹⁹ Reforming the automobile insurance

¹² JAMES M. ANDERSON ET AL., *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE* 7 (2010).

¹³ *Id.* This point in New York is \$50,000; expenses that are over \$50,000 require a lawsuit against the driver at fault. *See, e.g.,* *Montgomery v. Daniels*, 340 N.E.2d 444, 447 (N.Y. 1975) (illustrating a court's application of the rule); *see also* N.Y. INS. LAW §§ 5102, 5104 (relevant provisions of the N.Y. no-fault system).

¹⁴ *See* ANDERSON ET AL., *supra* note 12, at 89.

¹⁵ *Id.* at 7, 11–12.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 14.

¹⁸ *Id.* at xiv.

¹⁹ *Id.*

2013] NO FAULT & RECOVERY ON HEAD INJURIES 449

industry as well as the reformation of the tort-liability system got a significant push from Robert E. Keeton and Jeffrey O'Connell's "Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance," published in 1965.²⁰

At the time, the tort system was failing the victims of automobile accidents due to the length and expense of having to prove fault at trial.²¹ It was also an unbalanced system of recovery where the seriously injured were undercompensated and the victims of minor injuries were overcompensated.²² "Because [no-fault] minimized litigation and administrative costs associated with determining who was at fault for an accident, supporters of no-fault supposed it to be less expensive than the tort system."²³

Massachusetts became the first state to pass a no-fault automobile insurance system in 1970; many states, including New York, soon followed.²⁴ "A number of insurers and consumer groups supported no-fault over the opposition of the trial lawyers, and, for a while, it appeared as though it was a genuinely superior policy innovation. Over time, however, dissatisfaction with no-fault grew, primarily because the hoped-for premium-cost reductions never materialized."²⁵ While some states saw this as a reason to push the limitations of cost recovery actions further under no-fault, several states abandoned and repealed their no-fault laws altogether.²⁶

There are two forms of a no-fault system. One is pure no-fault, which completely eliminates all cost recovery actions and requires a victim to be compensated by his/her own insurance, without regard to fault.²⁷ This compensation is for only medical

²⁰ Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 611-12 (2000).

²¹ ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE, 2-5 (1965).

²² *Id.* at 2.

²³ ANDERSON ET AL., *supra* note 12, at xiv.

²⁴ See Comprehensive Automobile Insurance Reparations Act, ch. 13, 1973 N.Y. Laws 56; ANDERSON ET AL., *supra* note 12, at xiv.

²⁵ ANDERSON ET AL., *supra* note 12, at xiv.

²⁶ See Memorandum of State Executive Department, *reprinted in* 1977 N.Y. Sess. Laws 2445, 2448 (McKinney); ANDERSON ET AL., *supra* note 12, at xiv; *Amending a Faulty No-Fault Law*, N.Y. TIMES, Apr. 21, 1979, at 22; Alfonso A. Narvaez, *Panel Calls for End to Dollar Threshold on Injuries Under 'No Fault'*, N.Y. TIMES, Dec. 21, 1977, at B2.

²⁷ Schwartz, *supra* note 20, at 616.

expenses and lost wages; compensation is not provided for non-economic losses such as pain and suffering.²⁸

The second form is a modified no-fault system that only permits causes of action for certain plaintiffs. The requirements can be one of two types under no-fault for the compensation of injuries.²⁹ One includes a qualitative assessment, as in New York, which only permits certain types of injuries to be compensated for non-economic loss in a cost recovery action.³⁰ The other includes a quantitative assessment where the plaintiff must have damages in excess of a set amount in order to pursue legal action.³¹ Some states have combined the two types, which was the case in New York's original enactment in 1973.³²

Some states have adopted a mere no-fault "add-on" system whereby "the first-party no-fault coverage is added on to the conventional tort liability and its required insurance coverages."³³ In this "add-on" system, there is "no restriction on access to the tort system or noneconomic damages through the tort system."³⁴ This add-on system can be either mandatory or an optional add-on that insurance companies are required to offer to purchasers.³⁵

Even fewer states allow the no-fault system to be a choice.³⁶ A driver can either choose the less-expensive limited tort insurance, "which restricts the right to recover for noneconomic losses," or the more expensive full tort insurance, "which allows the insured to retain the full right to recover" under the tort system against third parties.³⁷

When a driver who has elected full tort [insurance] is injured by a driver who has elected limited tort [insurance], the full tort driver can recover against the limited-tort driver's [insurance]. The limited tort driver can recover against the other driver only for economic damages that exceed the limited-tort driver's [personal injury protection] insurance coverage.³⁸

²⁸ *Id.* ("Pure no-fault . . . does not currently exist in the United States.").

²⁹ *See* ANDERSON ET AL., *supra* note 12, at 12.

³⁰ *Id.*

³¹ *Id.*

³² *See* Comprehensive Automobile Insurance Reparations Act, ch. 13, sec. 1, § 671(4), 1973 N.Y. Laws 56, 57 (defining the scope of "serious injury").

³³ ANDERSON ET AL., *supra* note 12, at 14.

³⁴ *Id.* at 15.

³⁵ *Id.* at 14.

³⁶ *Id.* at 15.

³⁷ *Id.*

³⁸ *Id.*

B. New York

Liability without fault was a tough pill to swallow for New Yorkers. The New York Court of Appeals originally held the idea of no-fault under the worker's compensation law unconstitutional.³⁹ It took an amendment to the New York State Constitution in order to overcome this opposition by the courts.⁴⁰

New York's no-fault statute was first enacted in 1973, as the Comprehensive Automobile Insurance Reparations Act.⁴¹ It did not take long for lawyers to question the tort limitation's constitutionality; "within hours after the state's new no-fault auto insurance law" took effect, a vocal group of lawyers launched a legal challenge of its validity.⁴² However, the Court of Appeals upheld the constitutionality of the no-fault statute in *Montgomery v. Daniels*.⁴³

In adopting the no-fault system, the legislature found "four basic infirmities or defects in the common-law fault system of automobile accident reparation for personal injuries."⁴⁴ These four infirmities included: (1) the "exposure to the risk of tort liability did not function as a significant factor in motivating drivers to operate their vehicles carefully or prudently,"⁴⁵ (2) "the tort system was excessively and needlessly expensive and inefficient,"⁴⁶ (3) "the distribution of compensation among accident victims under the tort system of reparation was unfair and inequitable," and (4) "the system placed an inordinate strain on the State's court systems and judicial resources."⁴⁷ In terms of inefficiency:

The average claim-to-payment interval for automobile injury was 15.8 months, or [ten] times as long as the interval for automobile collision, homeowners or burglary insurance and [forty] times as long as the interval for accident and health insurance. In addition, 17% of total claims which remained unpaid after two years

³⁹ *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911).

⁴⁰ N.Y. Const. art. I, § 18. *See also* *Jensen v. S. Pac. Co.*, 109 N.E. 600, 602 (N.Y. 1915), *rev'd on other grounds*, 244 U.S. 205 (1917).

⁴¹ Comprehensive Automobile Insurance Reparations Act, ch. 13, 1973 N.Y. Laws 56.

⁴² Tom Goldstein, *Lawyers Ready to Challenge State's No-Fault Law*, N.Y. TIMES, Jan. 29, 1974, at 65.

⁴³ *Montgomery v. Daniels*, 340 N.E.2d 444, 446 (N.Y. 1975).

⁴⁴ *Id.* at 448.

⁴⁵ *Id.* at 448-49.

⁴⁶ *Id.* at 449.

⁴⁷ *Id.* at 450.

represented 45% of the total dollar loss.⁴⁸

For these reasons, the court held that the no-fault statute had met the rational basis test.⁴⁹

In its original enactment, the statutory definition of “serious injury” included a personal injury “which results in death; dismemberment; significant disfigurement; a compound or comminuted fracture; or permanent loss of use of a body organ, member, function, or system.”⁵⁰ The definition of serious injury also included a personal injury, which “if the reasonable and customary charges for medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug, and prosthetic services necessarily performed as a result of the injury would exceed [\$500].”⁵¹ Due to inflation, that amount today would be over \$2,500.⁵² This number would likely be even higher due to health care costs outpacing inflation.⁵³ This \$500 figure was reduced from the originally proposed \$5,000 figure.⁵⁴

The no-fault statute was instituted as a trade-off between victims receiving benefits, while avoiding the costly and lengthy process of proving fault, and a victim’s right to recovery for personal injury.⁵⁵ Limiting a plaintiff’s right to recovery would help lower the cost of insurance, which is mandatory on all motor vehicles.⁵⁶ However, because the reduction in the number of

⁴⁸ *Id.* at 449 n.6.

⁴⁹ *Montgomery*, 340 N.E.2d at 459.

⁵⁰ Comprehensive Automobile Insurance Reparations Act, ch. 13, sec. 1, § 671(4), 1973 N.Y. Laws 56, 57.

⁵¹ *Id.*

⁵² *U.S. Inflation Calculator*, COINNEWS MEDIA GROUP LLC, <http://www.usinflationcalculator.com> (for first year enter “1973”; for item price enter “500”; for second year enter “2013”; then click “Calculate” hyperlink) (last visited Mar. 31, 2013).

⁵³ See *Total Expenditures for the Five Most Costly Medical Conditions (1996 vs. 2006)*, NAT’L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/statistics/4TOT_MC9606.shtml (last visited Mar. 31, 2013) (reflecting the increase in health care expenditures, even after accounting for inflation).

⁵⁴ See N.Y. Bill Jacket, L. 1973 ch. 13, at 85 (discussing how the amount was originally \$5,000). This number would equate to over \$25,000. See *U.S. Inflation Calculator*, *supra* note 52 (for first year insert “1973”; for item price enter “5000”; for second year enter “2013”; then click “Calculate” hyperlink).

⁵⁵ Memorandum of Governor Rockefeller, on approving L. 1973, ch. 13 (Feb. 13, 1973), *reprinted in* 1973 N.Y. Sess. Laws 2335 (McKinney).

⁵⁶ See N.Y. INS. LAW § 5103 (McKinney 2009 & Supp. 2012); N.Y. VEH. & TRAF. LAW § 312 (McKinney 2005 & Supp. 2012); N.Y. VEH. & TRAF. LAW § 401 (McKinney 2010); Memorandum of Governor Rockefeller, *supra* note 55, at 2335.

2013] NO FAULT & RECOVERY ON HEAD INJURIES 453

“noneconomic loss” claims fell far short of the eighty percent reduction expected,⁵⁷ the \$500 threshold ended up causing the very thing it was intended to solve.⁵⁸ With insurance companies required to pay insurance premiums immediately up to \$50,000 and only about a 20% reduction in “noneconomic loss” claims, insurance premiums increased by 55% between 1975 and 1976.⁵⁹

The no-fault statute experienced a significant change in 1977, when the statutory definition of serious injury was expanded to include other categories intended to further restrict claims.⁶⁰ The revised categories now included:

[P]ermanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; [and a] medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.⁶¹

This definition was later expanded in 1984 to include the loss of a fetus.⁶²

IV. REQUIREMENT OF OBJECTIVE MEDICAL EVIDENCE

Currently, under New York’s no-fault statute, a plaintiff has no right of recovery for non-economic loss (i.e. pain and suffering), except where the plaintiff has suffered a serious injury.⁶³ Serious injury is currently defined under New York law as:

[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent

⁵⁷ *Drop in Lawsuits Under No-Fault Less than Legislature Expected*, N.Y. TIMES, Dec. 15, 1976, at D29.

⁵⁸ Memorandum of State Executive Department, *supra* note 26, at 2445, 2450.

⁵⁹ *Drop in Lawsuits Under No-Fault Less than Legislature Expected*, *supra* note 57, at D29.

⁶⁰ Act of Aug. 11, 1977, ch. 892, sec. 8, § 671(4), 1977 N.Y. Laws 7.

⁶¹ *Id.*

⁶² Act of May 25, 1984, ch. 143, sec. 1, § 671(4), 1984 N.Y. Laws 1680. Also, in 1984, the insurance laws, which had not seen major revisions since its enactment in 1939, were given a complete overhaul, being reworked and renumbered into what it is today as Article 18 of the New York Statutes. See N.Y. Bill Jacket, L. 1984 c. 367, at 1–3. The inclusion of a loss of fetus was not carried over in the definition during the renumbering of the statutes, so a new law was passed to do so. Act of Aug. 6, 1984, ch. 955, sec. 4, § 5102(d), 1984 N.Y. Laws 3521–22.

⁶³ N.Y. INS. LAW § 5104(a) (McKinney 2006).

loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.⁶⁴

The applicable categories under the definition of serious injury that are used for a head injury are the "permanent consequential limitation," "significant limitation of use," and the "medically determined injury . . . of a non-permanent nature," commonly known as the "90/180 day" category.⁶⁵ Although there is no language within the statute requiring objective medical evidence to prove this "serious injury," courts have construed it to require such.⁶⁶ This has allowed judges to dismiss claims for failing to adequately prove the existence of a serious injury based on objective medical findings, sometimes disregarding the medical opinion of the treating physician.⁶⁷

The requirement for objective medical proof began in the New York Court of Appeals' decision in *Licari v. Elliott*.⁶⁸ In that case, the plaintiff suffered a bad sprain in his neck and back as well as a concussion, which caused headaches and dizziness.⁶⁹ The court held that the "plaintiff's subjective complaints of occasional, transitory headaches hardly fulfill the definition of serious injury."⁷⁰ This plaintiff had testified that his headaches "occurred only once every two or three weeks and were relieved by aspirin."⁷¹ The plaintiff also failed to offer proof that the injuries

⁶⁴ N.Y. INS. LAW § 5102(d) (McKinney 2009).

⁶⁵ *Id.*; *Alcombrack v. Swarts*, 856 N.Y.S.2d 357, 359 (App. Div. 4th Dep't 2008); *see also* *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 691 (App. Div. 3d Dep't 2001) (discussing the application of head injury categories established by serious injury definition under N.Y. law); *Morrone v. McJunkin*, No. 98 CIV. 2163 (DLC), 1998 WL 872419, at *4 (S.D.N.Y. Dec. 15, 1998) (discussing the application of head injury categories established by serious injury definition under New York law).

⁶⁶ *See Fitzmaurice*, 732 N.Y.S.2d at 691 (citations omitted).

⁶⁷ *See id.* at 692; *Licari v. Elliot*, 441 N.E.2d 1088, 1092–93 (N.Y. 1982).

⁶⁸ *See Licari*, 441 N.E.2d at 1091–92 (discussing the insufficiency of the plaintiff's subjective evidence in his attempt to satisfy the threshold requirements for recovery of damages in a no-fault liability scheme).

⁶⁹ *Id.* at 1089, 1092–93.

⁷⁰ *Id.* at 1092.

⁷¹ *Id.*

2013] NO FAULT & RECOVERY ON HEAD INJURIES 455

caused a significant limitation of use of a body function or system.⁷² This led the court to say that “[n]o proof was offered to show that these ailments ever went beyond mere temporary discomfort, relieved by aspirin.”⁷³ The court also stated that it did not believe “the subjective quality of an ordinary headache falls within the objective verbal definition of serious injury as contemplated by the No-Fault Law. To hold that this type of ailment constitutes a serious injury would render the statute meaningless and frustrate the legislative intent in enacting no-fault legislation.”⁷⁴ The court in *Licari* did not preclude all concussions or headaches from satisfying the objective verbal definition of serious injury, only those headaches which could be considered minor.⁷⁵

However, this was not the end of the progression of the requirement for objective medical evidence. The New York Court of Appeals in *Lopez v. Senatore* stated that “summary judgment should be granted for defendant where the plaintiff’s evidence is limited to conclusory assertions tailored to meet statutory requirements” for the no-fault threshold.⁷⁶ However, the court denied both parties’ motions for summary judgment because there was a triable issue of fact as to the definition of “significant limitation” in regard to an injury of limited rotation of the neck.⁷⁷ In doing so, the court allowed a plaintiff to continue with its cause of action for injuries, which included “trauma to the left side of the skull, with contusions, pain, cerebral concussion and post-concussion, cepahlgia and vertigo,” among other injuries.⁷⁸

The New York Court of Appeals, in *Dufel v. Green*, upheld a judgment against defendant driver where a doctor, while testifying, used the exact definitions of the serious injury to describe the plaintiff’s injuries, because the statements “were supported by objective evidence of plaintiff’s condition and treatment.”⁷⁹ These two previous cases were cited by the court of appeals in its decision in *Toure v. Avis Rent A Car Systems, Inc.*

⁷² *Id.* at 1092–93.

⁷³ *Licari*, 441 N.E.2d at 1093.

⁷⁴ *Id.* at 1092 (citation omitted).

⁷⁵ *See id.* at 1092–93.

⁷⁶ *Lopez v. Senatore*, 484 N.E.2d 130, 131 (N.Y. 1985).

⁷⁷ *Id.*

⁷⁸ *Id.* at 130–31.

⁷⁹ *See Dufel v. Green*, 647 N.E.2d 105, 106–07 (N.Y. 1995) (describing how the form of the physician’s opinion was not unduly prejudicial) (citations omitted).

as support for its finding that objective proof of a plaintiff's injury is required "in order to satisfy the statutory serious injury threshold."⁸⁰ After this ruling, head injury plaintiffs did not stand a chance.⁸¹

On a motion for summary judgment, the burden is on the defendant to "submit admissible evidence demonstrating that a plaintiff did not sustain a serious injury" within the meaning of Insurance Law § 5102(d).⁸² Upon providing sufficient evidence, the burden shifts to the plaintiff to submit "competent medical evidence based upon objective medical findings and diagnostic tests to support her claims."⁸³

This creates an enormous burden for a plaintiff suffering a head injury. Absent post-mortem examination, there is usually no objective medical evidence that can be proffered to support a claim for recovery from a mild Traumatic Brain Injury.⁸⁴ Although there are neuropsychological examinations, without a prior examination, there are no benchmarks with which to judge the extent of the injuries.⁸⁵ Also, a neuropsychological

⁸⁰ *Toure v. Avis Rent A Car Sys.*, 774 N.E.2d 1197, 1199–1200 (N.Y. 2002) (citations omitted).

⁸¹ *See id.* (stating how subjective complaints alone would not suffice where objective evidence can be used to prevent frivolous claims).

⁸² *Gaddy v. Eyler*, 591 N.E.2d 1176, 1177 (N.Y. 1992); *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 691 (App. Div. 3d Dep't 2001) (citations omitted).

⁸³ *Fitzmaurice*, 732 N.Y.S.2d at 691–92 (quoting *Fountain v. Sullivan*, 690 N.Y.S.2d 341, 342 (App. Div. 3d Dep't 1999)).

⁸⁴ *See* Kevin D. Browne et al., *Mild Traumatic Brain Injury and Diffuse Axonal Injury in Swine*, 28 J. NEUROTRAUMA 1747, 1747–48 (2011) (explaining that it is difficult to confirm recovery from a concussion due to the limited possibility of neuropathological examination in living patients); Gary E. Cordingley, *How Are Brain Contusions Different from Brain Concussions?*, CORDINGLEY NEUROLOGY (2005), <http://www.cordingleyneurology.com/contuseconcuss.html> (stating that traumatic brain injuries are not well understood).

⁸⁵ *See* *Guzman v. 4030 Bronx Blvd. Assocs. L.L.C.*, 861 N.Y.S.2d 298, 309 (App. Div. 1st Dep't 2008) (Saxe, J., dissenting in part) ("Defendant in its motion papers presented to the trial court relied upon *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350, 746 N.Y.S.2d 865, 774 N.E.2d 1197, in which the Court of Appeals focused on the need of 'objective medical proof' for a plaintiff 'to meet the 'serious injury' threshold under the No-Fault Law' (emphasis added). That case focused entirely and solely on the No-Fault Law. It does not preclude a plaintiff in a personal injury action from establishing the existence of traumatic brain injury through results of neuropsychological testing combined with observations of people who know the plaintiff as to alterations in him since the accident."). In *Guzman*, the Appellate Court reversed and remanded the case for a new trial based on denying a motion for continuance and dismissing the case, but not reversing the trial court's decision excluding testimony of a

2013] NO FAULT & RECOVERY ON HEAD INJURIES 457

examination has yet to be accepted by an appellate court as sufficient objective medical evidence of a serious injury.⁸⁶

V. MEDICAL KNOWLEDGE OF HEAD INJURIES

There are several ways that a plaintiff can suffer a head injury during an automobile accident. The most commonly perceived injury is a blunt force strike to the head, known as head trauma.⁸⁷ However, the most common injury is a whiplash injury, where a person's head is jerked violently during the collision.⁸⁸ Depending on where and how the vehicle is struck, a person's head is suddenly accelerated in one direction and followed by a sudden deceleration of the head. This can lead the brain to strike the inside of the skull causing brain damage,⁸⁹ which can in turn lead to a brain contusion, or bruising of the brain.⁹⁰

Even if the brain does not strike the skull, this sudden acceleration and deceleration can cause a shearing injury.⁹¹ This type of injury involves the stretching and/or tearing of axons, which are the part of a nerve cell, or neuron, that transmits neural signals.⁹² "Damage to axons is thought to be the most

neuropsychologist and stating that a neuropsychologist "may testify only as to the effects of a brain injury, but not as to the existence of a brain injury, where there is no medical evidence establishing such brain injury." *Id.* at 305 (majority opinion), 308 (Saxe, J., dissenting in part). The court in *Guzman* agreed with the lower court and excluded the neuropsychologist from testifying; the expert could not rule out other causes of the neurological deficits such as other trauma or other nontraumatic causes because the plaintiff lacked pre-accident cognitive assessments. *Id.* at 303–04 (majority opinion). *But see* *Viscusi v. Ostrowski*, No. 2005–2044, 2007 WL 6913154, at *4 (N.Y. Sup. Ct. Schenectady Cnty. Sept. 12, 2007) (holding that the testimony of a neuropsychologist provided sufficient objective medical evidence to defeat a motion for summary judgment), *aff'd*, 860 N.Y.S.3d 756 (App. Div. 3d Dep't 2008).

⁸⁶ *See Guzman*, 861 N.Y.S.2d at 308–309 (discussing how the court would not accept any of the plaintiff's expert's procedures as providing a causal link for plaintiff's injury based on the evidence's reliability).

⁸⁷ *See* Buck, *supra* note 10, at 299 (explaining how traumatic brain injury is commonly understood to be the result of a person's head hitting an object).

⁸⁸ *Whiplash Injury*, NEUROSURGEON.COM, <http://neurosurgeon.com/conditions/whiplash.htm> (last visited Mar. 31, 2013).

⁸⁹ *See* Kushner, *supra* note 8, at 1617–18 (explaining how brain damage is caused).

⁹⁰ *See* Cordingley, *supra* note 84 (explaining the cause of a brain contusion).

⁹¹ *See Traumatic Brain Injury: A Guide for Patients*, DEP'T OF VETERAN AFFAIRS, 1 (Jan. 14, 2013), <http://www.mentalhealth.va.gov/docs/tbi.pdf> (explaining the concept of whiplash).

⁹² *See* Browne et al., *supra* note 84, at 1752–53 (explaining axonal damage due to rotational injury); John A. Wolf et al., *Traumatic Axonal Injury Induces Calcium Influx Modulated by Tetrodotoxin-Sensitive Sodium Channels*, 21 J.

common pathology associated with traumatic brain injury.”⁹³ “Damage to these fibers disrupts communication between nerve cells, and thereby reduces the efficiency of widespread brain networks.”⁹⁴ These microscopic injuries in the brain can only be detected, if at all, through post-mortem examination.⁹⁵

A diffuse axonal injury occurs when there is widespread damage to axons in the brain.⁹⁶ This type of injury “results from the inertial forces exerted on the white matter tracts in the brain during traumatic incidents such as automobile accidents.”⁹⁷ Rather than a localized injury such as a contusion involving a direct impact to the brain, this type of injury causes widespread damage throughout the entire white matter of the brain, while still remaining undetected.⁹⁸ “Although severe inertial brain injury may induce tissue tears in the white matter resulting in immediate disconnection of axons (primary axotomy), most damaged axons undergo secondary disconnection over an extended time course (secondary axotomy) . . .”⁹⁹ More importantly, “immediate disconnection of axons during brain trauma is not thought to be the predominant form of traumatic axonal pathology. Rather, most axonal pathology has been proposed to develop over hours to even months after trauma . . .”¹⁰⁰

A whiplash injury can even occur in a low speed collision; a collision of only eight miles per hour causes a person’s head to move roughly eighteen inches in less than a quarter of a second.¹⁰¹ This can cause the head to experience a force as great as seven times the force of gravity.¹⁰² The Discovery Space

NEUROSCIENCE 1923, 1923 (2001) (describing axonal injury); Kendra Cherry, *Structure of a Neuron*, ABOUT.COM (Jan. 14, 2013), <http://psychology.about.com/od/biopsychology/ss/neuronanat5.htm> (describing axons generally).

⁹³ Wolf et al., *supra* note 92, at 1923.

⁹⁴ *Traumatic Brain Injury*, *supra* note 91, at 1.

⁹⁵ See Browne et al., *supra* note 84, at 1748, 1753 (explaining that the opportunity for neuropathological examination of traumatic brain injury is restricted since it is non-fatal).

⁹⁶ Wolf et al., *supra* note 92, at 1923.

⁹⁷ *Id.*

⁹⁸ See Browne et al., *supra* note 84, at 1750–52 (describing how axonal injury can cause widespread damage to the white matter of the brain).

⁹⁹ Wolf et al., *supra* note 92, at 1923.

¹⁰⁰ *Id.* at 1928.

¹⁰¹ *Whiplash Injury*, *supra* note 88.

¹⁰² *Id.*

Shuttle was designed to withstand only three times the force of gravity.¹⁰³ These acceleration/deceleration forces can “cause [a] whiplash injury . . . sufficient to permanently disable you.”¹⁰⁴

In a study of twenty individuals who had a common concussion with loss of consciousness for less than five minutes, “none of the patients with common concussion developed abnormalities that could be clinically (visually) detected and related to brain trauma,” using conventional MRI.¹⁰⁵ “With the inability of traditional structural brain imaging techniques to accurately diagnosis MTBI, there is hope that more advanced applications like functional magnetic resonance imaging (fMRI) and diffusion tensor imaging (DTI) will be more specific in diagnosing MTBI.”¹⁰⁶ However, whether these new technologies will pave the way into further understanding and diagnosing the organic changes that occur in mild Traumatic Brain Injuries is yet undetermined.¹⁰⁷

A. Classifications of Head Injuries

Head injuries are classified into three types of traumatic brain injuries.¹⁰⁸ These three categories are severe, moderate, and mild.¹⁰⁹ Various factors are utilized to determine a head injury’s classification, such as whether it is an open or closed head

¹⁰³ *Id.*; see also *Acceleration*, THE PHYSICS HYPERTEXTBOOK, 1, 3, <http://physics.info/acceleration/> (last visited Mar. 31, 2013).

¹⁰⁴ *Whiplash Injury*, *supra* note 88.

¹⁰⁵ Harald Schrader et al., *Magnetic Resonance Imaging After Most Common Form of Concussion*, BMC MED. IMAGING, 5 (June 17, 2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709613/pdf/1471-2342-9-11.pdf>.

¹⁰⁶ K. Zhang et al., *Are Functional Deficits in Concussed Individuals Consistent with White Matter Structural Alterations: Combined FMRI & DTI Study*, 204 EXPERIMENTAL BRAIN RESEARCH 57, 57 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2919274/pdf/nihms222523.pdf>.

Adding further salt to injury, it has been shown that concussed individuals will actually exhibit higher neural activity than control patients. *Id.* at 58–59. It is hypothesized that this increase reflects, “the functional compensatory mechanisms substituting for either structural/functional disruption of the brain default network or deficits within some local regions in this network resulting from mild TBI.” *Id.* at 59.

¹⁰⁷ See Schrader et al., *supra* note 105, at 5 (discussing how the findings in mTBI patients for studies utilizing diffusion tensor imaging (DTI) are “usually discrete, inconsistent, and diverging”); Zhang et al., *supra* note 106, at 58 (determining that “no consistent findings across advanced brain imaging techniques (fMRI and DTI) were observed” and discussing how the reasons for the inconsistencies across other studies have yet to be determined).

¹⁰⁸ Kushner, *supra* note 8, at 1617.

¹⁰⁹ *Id.*

injury.¹¹⁰ An open head injury occurs when the skull is fractured.¹¹¹ Other factors include loss of consciousness and duration of posttraumatic amnesia.¹¹² The most utilized factor for head injury classification is the Glasgow Coma Scale.¹¹³ The scoring is based on three responses, which include eye opening response, verbal response, and motor response.¹¹⁴ Each response has a range of scores, such as from one to six.¹¹⁵ These three scores are added together to come up with the “GCS score.”¹¹⁶ A score of eight or less is considered a severe injury, nine to twelve is a moderate injury, and thirteen to fifteen is considered a mild injury.¹¹⁷

A diagnosis of severe or moderate TBI is relatively straightforward given the availability of diagnostic technology, including computer tomography scans and magnetic resonance imaging. Mild injuries, however, are far more difficult to [diagnose]. The first issue is that survivors are often unaware of their injury, either because symptoms are subtle enough not to cause alarm or because the presence of other more acute injuries take priority. Even when individuals suspect an injury, diagnosis is complicated because the current technology is not able to reliably detect the neural damage that occurs in mild injuries. . . . Diagnoses of mTBI are often based on self-report.¹¹⁸

To aid diagnosis of mTBI, the American Congress of Rehabilitation Medicine established diagnostic criteria for mTBI.¹¹⁹ The inclusion criteria consist of one or more of the following symptoms: “[a]ny period of loss of consciousness for up to 30 min[utes]”; “[a]ny loss of memory for events immediately before and after the accident for as much as 24 h[ours]”; “[a]ny alteration of mental state at the time of accident (dazed,

¹¹⁰ *X-Plain: Traumatic Brain Injury Reference Summary*, THE PATIENT EDUC. INST., <http://www.nlm.nih.gov/medlineplus/tutorials/traumaticbraininjury/nr289102.pdf> (last reviewed May 6, 2009).

¹¹¹ *Id.*

¹¹² Kushner, *supra* note 8, at 1617.

¹¹³ *Id.*; *X-Plain: Traumatic Brain Injury Reference Summary*, *supra* note 110, at 4.

¹¹⁴ *Glasgow Coma Scale*, CTR. FOR DISEASE CONTROL AND PREVENT., DEP'T OF HEALTH & HUMAN SERVS. (May 9, 2003), <http://www.bt.cdc.gov/masscasualties/pdf/glasgow-coma-scale.pdf>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Buck, *supra* note 10, at 299.

¹¹⁹ Ruff, *supra* note 7, at 8.

2013] NO FAULT & RECOVERY ON HEAD INJURIES 461

disoriented, or confused)”; or “[f]ocal neurological deficit(s) that may or may not be transient.”¹²⁰ The exclusion criteria, which remove the injury from the definition of mild, are any of the following symptoms: “[l]oss of consciousness exceeding 30 min[utes]”; “[p]osttraumatic amnesia persisting longer than 24 h[ours]”; or “[a]fter 30 min[utes], the Glasgow Coma Scale falling below [a score of thirteen].”¹²¹

Approximately 1.5 million traumatic brain injuries occur annually in the United States.¹²² Over eighty-five percent of these are classified as mild.¹²³ At one month, fifty percent of these patients still suffer from symptoms associated with mTBI and fifteen to twenty percent are still experiencing the symptoms after one year.¹²⁴

B. Symptoms of Mild Traumatic Brain Injuries

Although it is called a mild traumatic brain injury, its symptoms and effects are anything but mild.¹²⁵ Its symptoms are only mild in comparison to the effects of a severe or moderate traumatic brain injury.¹²⁶ “While there is debate regarding the overall impact of mTBI on society, it has been reported that more than a third of prospective mTBI patients did not resume work by [three] months after injury . . . and persisting neurocognitive deficits have been found in approximately [fifteen percent] of mTBI patients.”¹²⁷ The most common of these symptoms is the posttraumatic headache (“PTH”), which is reported in thirty to eighty percent of the cases following an mTBI.¹²⁸ Other symptoms include dizziness, vertigo, nausea, decreased coordination or balance, cognitive impairment, impaired vision, ear ringing, irritability, fatigability, anxiety, insomnia, impaired concentration, and impaired memory.¹²⁹ “Because emotions are also produced by interactions among brain cells, the concussed

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Jeffrey J. Bazarian et al., *Mild Traumatic Brain Injury in the United States, 1998–2000*, 19 *BRAIN INJURY* 85, 85 (2005).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Browne et al., *supra* note 84, at 1747.

¹²⁶ *Id.* at 1753.

¹²⁷ *Id.* at 1747.

¹²⁸ Russell C. Packard, *Posttraumatic Headache: Permanency and Relationship to Legal Settlement*, 32 *HEADACHE* 496, 496 (1992).

¹²⁹ *Id.*; Buck, *supra* note 10, at 299.

patient might show tearfulness, irritability or other changes in behavior as a result of the injury.”¹³⁰ All of these symptoms are “referred to as . . . postconcussion or posttraumatic syndrome.”¹³¹

Posttraumatic headache was once believed to be psychogenic, rather than an actual injury, until “a subgroup of clinicians . . . suffered [mTBI], whereupon they became certain that their own symptoms were due to organic changes in the brain.”¹³² Now, “[t]here is little doubt that PTH can persist for many months or even years in some individuals. Several studies have shown persistence of PTH in 15% to 31% of cases for three years or more.”¹³³ Interestingly, “[t]he actual development and persistence of PTH does not seem to correlate with duration of unconsciousness, posttraumatic amnesia, skull fracture, EEG abnormalities or blood noted in cerebrospinal fluid.”¹³⁴ Further, there exists an “inverse relationship between severity of head injury (as assessed by duration of posttraumatic amnesia) and the incidence of PTH; a trivial injury often leading to protracted or even incapacitating symptoms.”¹³⁵

C. Contusion versus Concussion

In order to further understand the lack of objective medical proof of mild traumatic brain injuries, a review of the differences between a concussion and a contusion can prove useful. A contusion is a macroscopic injury, while a concussion is a microscopic injury.¹³⁶ A contusion involves the type of damage that occurs from the brain striking an object.¹³⁷ This can occur from striking a blunt object, such as a windshield, or the brain hitting the skull.¹³⁸ A contusion is a localized bruise at the point of impact that occurs on the brain that leads to neuron damage,

¹³⁰ Cordingley, *supra* note 84, at 2.

¹³¹ Packard, *supra* note 128, at 496.

¹³² *Mild Head Injury and Posttraumatic Headache*, NEUROPSYCHOLOGY CENTRAL, 1 (2002), http://www.neuropsychologycentral.com/interface/content/resources/page_material/resources_general_materials_pages/resources_document_pages/mild_head_injury_and_posttraumatic_headache.pdf.

¹³³ Packard, *supra* note 128 at 496.

¹³⁴ *Id.* at 496–97.

¹³⁵ *Id.* at 497. This has led to the questioning of the validity of posttraumatic headaches. *See infra* Part VII.A.1.

¹³⁶ Cordingley, *supra* note 84, at 2.

¹³⁷ *Id.*

¹³⁸ *See id.* (“[T]he brain nearest the point of impact bashes against the inner surface of the hard skull, producing a contusion”).

which can sometimes be irreparable.¹³⁹

In contrast, a concussion is not a localized event but rather a widespread injury and a disruption of function, which can manifest itself in a short loss of consciousness or memory dysfunction.¹⁴⁰ “In a concussion there is diffuse, widespread, homogeneous impairment of brain tissue, but nothing that shows as a macroscopic, localized abnormality on a scan.”¹⁴¹ Even with a post-mortem examination, a microscope may still not be able to detect the changes that occur from a concussion, because “a concussion disrupts the physiology (functioning) of brain cells more than their anatomy (structure).”¹⁴²

VI. APPLICATION OF THE REQUIREMENT FOR OBJECTIVE MEDICAL EVIDENCE

In *Fitzmaurice v. Chase*,¹⁴³ the plaintiff was involved in an accident and was diagnosed and treated at the hospital for a head contusion.¹⁴⁴ The plaintiff was “given Tylenol and released.”¹⁴⁵ The plaintiff visited her primary care physician complaining of headaches and the doctor referred her to a neurologist.¹⁴⁶ The plaintiff visited this neurologist three times over the span of a year and four months still complaining of headaches as well as double vision.¹⁴⁷ Plaintiff was referred to a neuro-ophthamologist for the double vision complaints and was diagnosed with sinusitis and conjunctivitis.¹⁴⁸ The plaintiff’s CT

¹³⁹ *Id.* Usually, there is also a second contusion on the opposite side of the impact to the brain, which occurs from the brain ricocheting back from the impact spot or from a suddenly created vacuum due to the newly formed void in the intracranial fluid. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Cordingley, *supra* note 84, at 2.

¹⁴² *Id.*

¹⁴³ *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690 (App. Div. 3d Dep’t 2001). This article will examine *Fitzmaurice* in depth, rather than look at the breadth of common law in this area because generally the record is sealed in these cases due to the inclusion of confidential health records. The record on appeal in *Fitzmaurice* is one of the few exceptions.

¹⁴⁴ *Id.* at 690–91. This case involved serious family turmoil in that the plaintiff was a passenger while her niece was driving when the vehicle was struck by a truck. The niece and the driver of the truck were both defendants. The niece is the one who moved for a motion for summary judgment, thus dismissing her aunt’s case. *Id.*

¹⁴⁵ *Id.* at 691.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Fitzmaurice*, 732 N.Y.S.2d at 691.

scan and MRI were unremarkable throughout the course of the injury and subsequent treatment.¹⁴⁹

In support of its motion for summary judgment, the defendant proffered an affidavit of a neurologist who opined that:

[T]here was no objective findings to support plaintiff's claim that she suffered from a neurological injury and that any head injury sustained in the accident was trivial. Specifically, he asserted that plaintiff's claimed inability to remember things was inconsistent and incredible and that her complaint of double vision was unrelated to the accident inasmuch as it would have been evident immediately after the accident, not a week later as plaintiff described. Likewise, he opined that plaintiff's complaints of headaches are drug rebound headaches from overuse of analgesics and noted that her medical records revealed a past medical history of migraines.¹⁵⁰

This evidence was deemed sufficient to shift the burden to the plaintiff to establish a serious injury based on objective medical evidence.¹⁵¹ In opposition to the motion, the plaintiff proffered an affidavit of her neurologist stating that he had diagnosed her with "postconcussive syndrome secondary to a concussion she sustained in the . . . accident and prescribed Fioricet to relieve her headaches."¹⁵² The expert noted that "[f]amily history was negative for migraines."¹⁵³ It was further noted that "Ms. Fitzmaurice reported that she did not have a history of severe headaches prior to the accident. She stated that prior to the accident, she would get headaches occasionally but not nearly as severe or as frequent as the ones that she had been experiencing since the accident."¹⁵⁴ Also, the expert stated that there were "several significant findings which indicate a post concussive syndrome."¹⁵⁵ These findings included a "history of severe headaches" after the accident, which were "localized on the right side which is where she sustained the trauma."¹⁵⁶ She also suffered "diplopia [or double vision], dizziness, blurred vision and difficulty concentrating," all "classic symptoms for post

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 691–92.

¹⁵² *Id.* at 692.

¹⁵³ Record on Appeal at 198, *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690 (App. Div. 3d Dep't 2001) (No. 88621).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

2013] NO FAULT & RECOVERY ON HEAD INJURIES 465

concussive syndrome.”¹⁵⁷ The expert opined that the fact that the plaintiff had a head contusion (a bruise or bump not to be confused with a brain contusion) evidenced head trauma, “and the fact that the headaches started after the trauma, with no pre-trauma history of headaches of this nature, and no family history of migraines, clearly indicates that they are post traumatic in origin.”¹⁵⁸

In the neurologist’s affidavit, “[h]e acknowledged that this diagnosis was based on plaintiff’s subjective complaints and conceded that *there are no objective signs or symptoms associated with postconcussive syndrome* and that no objective tests can be performed to determine whether a patient suffers from such a condition.”¹⁵⁹ Although the expert did concede this point, his affidavit stated that:

The fact that there are no purely objective indicators in no way contraindicates the diagnosis, because there simply are no purely objective indicators. However, this does not mean that I [cannot] make a medically sound diagnosis of post concussive syndrome and resulting recurrent headaches, dizziness, blurred vision, diplopia and difficulty concentrating.¹⁶⁰

This expert, who was also her treating neurologist, diagnosed the plaintiff with a medically determined injury of a concussion and postconcussive syndrome.¹⁶¹ Moreover, this “neurologist opined that plaintiff’s condition would have limited her ability to perform certain activities, including working as a seamstress and carrying out her activities of daily living from the time of the accident [(October 1996)] until April 17, 1997.”¹⁶² The plaintiff also affirmed “that the headaches and double vision . . . left her unable to effectively perform her job as a seamstress, ultimately resulting in her termination from employment, and that these headaches prevented her from performing her housekeeping duties such as cooking, cleaning and laundry.”¹⁶³ However, the court granted the defendant’s motion for summary judgment and dismissed the case for lack of sufficient objective medical

¹⁵⁷ *Id.* at 198–99.

¹⁵⁸ *Id.* at 43, 47, 199.

¹⁵⁹ *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 692 (App. Div. 3d Dep’t 2001) (emphasis added).

¹⁶⁰ Record on Appeal, *supra* note 153, at 197.

¹⁶¹ *Id.* at 197, 201.

¹⁶² *Fitzmaurice*, 732 N.Y.S.2d at 692.

¹⁶³ *Id.*

evidence, which was affirmed by the appellate court.¹⁶⁴

Although this evidence clearly meets the statutory language of the 90/180 day injury, or at least raises a triable issue of fact, the burden shifting and its objective medical evidence requirement precludes a plaintiff who suffers mTBI from seeking a cost recovery action.¹⁶⁵ This leads to the inconsistent conclusion that the statute would allow a plaintiff who fractures a finger to proceed with a cost recovery action,¹⁶⁶ but the courts would preclude a plaintiff who suffers headaches, memory loss, and cognitive impairments from receiving compensation from a wrongdoer when there lacks a sufficient alternative for compensation.¹⁶⁷ In *Vogel v. Cichy*, the jury awarded no damages to a plaintiff who “fractured a bone in the fourth finger of her dominant hand” in an automobile collision,¹⁶⁸ but the appellate court awarded the plaintiff \$20,000 in future pain and suffering as well as \$25,000 for past pain and suffering.¹⁶⁹ This mirrors one of the reasons why the no-fault statute was enacted in the first place: the seriously injured being undercompensated and the victims of minor injuries being overcompensated.¹⁷⁰

The only hope for a head injury plaintiff, who lacks objective proof in the form of an MRI or CT scan, is to have the head injury ride the coat tails of another injury that can meet the objective evidence requirements imposed by the courts, such as in *Morrone v. McJunkin*.¹⁷¹ The Southern District Court of New York in *Morrone* allowed the plaintiff, who suffered headaches, as well as back and neck pain, to proceed with her cause of action and denied the defendant’s motion for summary judgment because

¹⁶⁴ *Id.*

¹⁶⁵ See N.Y. Ins. Law § 5102(d) (McKinney 2009) (defining “serious injury” as one “which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than [90] days during the [180] days immediately following the occurrence of the injury or impairment.”); *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 691–92 (App. Div. 3d Dep’t 2001) (“The burden then shifted to plaintiff to ‘come forward with competent medical evidence based upon objective medical findings and diagnostic tests to support her claims.’”);

¹⁶⁶ *Vogel v. Cichy*, 862 N.Y.S.2d 401, 403–04 (App. Div. 3d Dep’t 2008).

¹⁶⁷ *Id.* at 403.

¹⁶⁸ *Id.* at 402–03.

¹⁶⁹ *Id.* at 405. The court gave the defendant the option to either stipulate to the amount of \$25,000 for past pain and suffering or have the case be remanded for a new trial on the issue of damages. *Id.*

¹⁷⁰ KEETON & O’CONNELL, *supra* note 21, at 1, 2.

¹⁷¹ *Morrone v. McJunkin*, No. 98 CIV. 2163 (DLC), 1998 WL 872419, at *3–4 (S.D.N.Y. Dec. 15, 1998).

2013] NO FAULT & RECOVERY ON HEAD INJURIES 467

the plaintiff had sufficient objective medical proof of a herniated disc on an MRI scan.¹⁷²

There is some light at the end of this tunnel. The New York Court of Appeals, in *Perl v. Meher*, eased the once difficult contemporaneous requirement for all no-fault plaintiffs.¹⁷³ Prior to this, most courts required the treating physician at the time of the accident to write medical records as if preparing for litigation, rather than just immediate treatment.¹⁷⁴ In *Perl*, the court pointed out that a treating physician can record “a patient’s symptoms in qualitative terms shortly after the accident, and later [do] more specific, quantitative measurements in preparation for litigation.”¹⁷⁵ The Court of Appeals also reminded the courts that the role of the judge with respect to a motion for summary judgment is one of sufficiency and not one of credibility.¹⁷⁶ Only time will tell if this case will lead to any curtailment of the heavy burden placed on head injury plaintiffs, but it is a step in the right direction.

VII. HOW OTHER STATES HANDLE HEAD INJURIES

There are only two other states, Florida and Michigan, which have strictly qualitative thresholds that are mandatory.¹⁷⁷ Hawaii, Kansas, Kentucky, Massachusetts, North Dakota, and Utah utilize a quantitative threshold, rather than a strictly qualitative definition.¹⁷⁸ The remaining states either do not have

¹⁷² *Id.* at *3–5; *Castillo v Gonzalez*, No. 14511/09, 2011 N.Y. Misc. LEXIS 4926, at *25 (Sup. Ct. Nassau Cnty. Oct. 13, 2011) (quotations omitted) (“Since plaintiffs established that at least some of their injuries satisfy the no-fault threshold, it is unnecessary to address whether their proof with respect to other injuries they allegedly sustained would have been sufficient to withstand defendant’s motion for summary judgment.”).

¹⁷³ *Perl v. Meher*, 960 N.E.2d 424, 428 (N.Y. 2011).

¹⁷⁴ Eric Turkewitz, *New York’s No-Fault Mess (Do Our Judges Want Doctors to Go to Law School?)*, NEW YORK PERSONAL INJURY LAW BLOG (Mar. 5, 2009), <http://www.newyorkpersonalinjuryattorneyblog.com/2009/03/new-yorks-no-fault-mess-do-our-judges-want-doctors-to-go-to-law-school.html>.

¹⁷⁵ *Perl*, 960 N.E.2d at 428.

¹⁷⁶ *Id.* at 429 (holding that the defense expert’s statement that equated to accusations of the plaintiff malingering went to the issue of credibility).

¹⁷⁷ See IRVIN E. SCHERMER & WILLIAM J. SCHERMER, 4 AUTOMOBILE LIABILITY INSURANCE 4TH §§ 74:2, 87:2 (2011).

¹⁷⁸ HAW. REV. STAT. § 431:10C-306(b)(4) (West 2005); KAN. STAT. ANN. § 40-3117 (West 2000); KY. REV. STAT. ANN. § 304.39-060(2)(b) (LexisNexis 2011); MASS. ANN. LAWS ch. 231, § 6D (LexisNexis 2009); N.D. CENT. CODE § 26.1-41-01(21) (2010); UTAH CODE ANN. § 31A-22-309(1)(a)(v) (LexisNexis 2010). See also SCHERMER & SCHERMER, *supra* note 177, §§ 76:2, 81:2, 82:2, 86:2, 99:2,

a no-fault statute, retain the tort liability, or no-fault is presented as an option either at the purchasing of the insurance coverage or after the accident.¹⁷⁹

Florida's no-fault threshold on its face seems to be more restrictive than that of New York.¹⁸⁰ Florida's no-fault statute limits recovery for pain and suffering to permanent injuries.¹⁸¹ The four categories that meet the no-fault threshold in Florida are "[s]ignificant and permanent loss of an important bodily function"; "[p]ermanent injury within a reasonable degree of medical probability, other than scarring or disfigurement"; "[s]ignificant and permanent scarring or disfigurement"; and death.¹⁸² However, unlike New York, Florida allows subjective complaints to create the permanent injury.¹⁸³ This allows for an easier approach for head injury plaintiffs because the organic injury does not need to be shown to be permanent.¹⁸⁴ Rather, the subjective complaints, although stemming from an initial organic injury, can create the permanent injury.¹⁸⁵

For example, in *Johnson v. Phillips*, the court held that a woman suffering from headaches and dizziness, which were opined to be permanent by a neurosurgeon, was sufficient to meet the threshold requirements in Florida for a permanent injury.¹⁸⁶ The court affirmed the judgments appealed from even though the testifying neurosurgeon believed there was no permanent injury of an organic nature.¹⁸⁷ The court disagreed that "permanent injury" requires objective findings and held that "permanent injury" includes "permanent subjective complaints of pain resulting from an initial organic injury."¹⁸⁸ The court held that the plaintiff's "initial injury was of an organic nature, to wit,

109:2.

¹⁷⁹ See SCHERMER & SCHERMER, *supra* note 177, *passim*. This note reviews only those states where the right to sue for pain and suffering was not a choice.

¹⁸⁰ See N.Y. INS. LAW § 5102 (McKinney 2009); FLA. STAT. ANN. § 627.737(2) (West 2011).

¹⁸¹ FLA. STAT. ANN. § 627.737(2) (West 2011).

¹⁸² *Id.*

¹⁸³ Compare *City of Tampa v. Long*, 638 So. 2d 35, 38 (Fla. 1994), and *Johnson v. Phillips*, 345 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 1977), with *Fitzmaurice v. Chase*, 732 N.Y.S.2d 690, 692 (App. Div. 3d Dep't 2001).

¹⁸⁴ *Johnson*, 345 So. 2d at 1117.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

2013] NO FAULT & RECOVERY ON HEAD INJURIES 469

a brain concussion.”¹⁸⁹

Although not argued in *Johnson*, Florida’s no-fault threshold at the time of the decision also included the following category:

A serious, nonpermanent injury which has a material degree of bearing on the injured person’s ability to resume his normal activity and lifestyle during all or substantially all of the 90 day period after the occurrence of the injury, and the effects of which are medically or scientifically demonstrable at the end of such period.¹⁹⁰

In *Howard v. Newman*, the court held that *Johnson* was not dispositive of the issue involved in a “nonpermanent” 90 day injury and that objective signs of injury were required to meet such category.¹⁹¹ Florida’s previous version of the statute, which included the “nonpermanent” 90 day category, is distinguishable from that of New York’s 90/180 day category, because New York’s language states that a “medically determined injury” is sufficient, while Florida’s language required an injury that is “medically or scientifically demonstrable.”¹⁹²

Also, in *City of Tampa v. Long*, the Supreme Court of Florida held that “subjective evidence of pain may properly be used to prove the existence and permanency of an injury *provided* that expert medical testimony is presented to establish its existence and permanency within a reasonable degree of medical probability.”¹⁹³ The court recognized that the no-fault statute did not require “objective findings to establish the existence or permanency of a physical injury.”¹⁹⁴ The court distinguished between an “obvious injury” and “a soft tissue injury,” which “may lack objective signs of physical injury, and the subjective complaint of the patient may be the principal evidence available to prove its existence.”¹⁹⁵ The court realized that subjective complaints alone are not sufficient and that the “permanency of the injury [must] be established ‘within a reasonable degree of medical probability.’”¹⁹⁶

Michigan understands the inherent complexities of measuring

¹⁸⁹ *Id.*

¹⁹⁰ *Howard v. Newman*, 363 So. 2d 65, 66 (Fla. Dist. Ct. App. 1978).

¹⁹¹ *Howard*, 363 So. 2d. at 66.

¹⁹² *Compare* N.Y. INS. LAW § 5102(d) (McKinney 2009), *with Howard*, 363 So. 2d at 66.

¹⁹³ *City of Tampa v. Long*, 638 So. 2d 35, 38 (Fla. 1994).

¹⁹⁴ *Id.* at 37.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 38.

brain injuries. That is why it has a specific statutory exception for head injury patients.¹⁹⁷ In determining whether there is a factual dispute as to a “serious impairment of body function” for a closed-head injury, “a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.”¹⁹⁸ This “serious neurological injury” exception creates a question of fact for the jury for a “serious impairment of body function,” which is similar to New York’s category of “significant limitation of use of a body function or system.”¹⁹⁹ Although this creates a question of fact for that category of injury, New York still has another category, the 90/180 day category, which has a lower burden.²⁰⁰

Other states have elected to have a quantitative threshold, rather than a strictly verbal definition. These states include: Hawaii, Kansas, Kentucky, Massachusetts, North Dakota, and Utah.²⁰¹ These medical treatment thresholds range from \$1,000 to \$5,000.²⁰² The average cost for an MRI of the brain in the United States is \$2,550;²⁰³ the average cost for a CT scan of the brain in the United States is \$1,150.²⁰⁴ The CT scan usually

¹⁹⁷ MICH. COMP. LAWS SERV. § 500.3135(2)(a)(ii) (LexisNexis 2010).

¹⁹⁸ *Id.* A licensed allopathic and an osteopathic physician are a Doctor of Medicine, M.D., and a Doctor of Osteopathy, D.O., respectively. Health Professions & PreLaw Ctr., *Two Kinds of Physicians: Allopathic and Osteopathic*, IND. UNIV. BLOOMINGTON, <http://hplc.indiana.edu/medicine/med-res-twokinds.shtml> (last visited Apr. 22, 2013).

¹⁹⁹ MICH. COMP. LAWS SERV. § 500.3135(2)(a)(ii) (LexisNexis 2010); N.Y. INS. LAW § 5102(d) (McKinney 2009).

²⁰⁰ *See* N.Y. INS. LAW § 5102(d) (utilizing this exception requires that the injury prevents the plaintiff from going about their normal activities “for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment”).

²⁰¹ Hawaii has a threshold of \$5,000. HAW. REV. STAT. § 431:10C-306(b)(4) (West 2005). Kansas has \$2,000. KAN. STAT. ANN. § 40-3117 (West 2000). Kentucky has \$1,000. KY. REV. STAT. ANN. § 304.39-060(2)(b) (LexisNexis 2011). Massachusetts has \$2,000. MASS. ANN. LAWS ch. 231, § 6D (LexisNexis 2009). North Dakota has \$2,500. N.D. CENT. CODE § 26.1-41-01(21) (2010). Utah has \$3,000. UTAH CODE ANN. § 31A-22-309(1)(a)(v) (LexisNexis 2010). The tort limitation in Kentucky is also optional in that a plaintiff can reject it, however doing so opens the plaintiff up to full tort liability as a defendant. KY. REV. STAT. ANN. § 304.39-060(4), (7) (LexisNexis 2011).

²⁰² *See id.*

²⁰³ *Brain MRI Procedure & Cost Information*, NEW CHOICE HEALTH, <http://newchoicehealth.com/Directory/Procedure/36/BrainMRI> (last visited Mar. 31, 2013).

²⁰⁴ *Brain CT Scan Procedure & Cost Information*, NEW CHOICE HEALTH, <http://newchoicehealth.com/Directory/Procedure/2/Brain%20CT%20Scan> (last

2013] NO FAULT & RECOVERY ON HEAD INJURIES 471

occurs upon arrival at the emergency room shortly following the traumatic brain injury and the MRI is used to evaluate the injury thereafter, putting the total cost for both at \$3,700, well on the head injury plaintiff's way to the no-fault threshold.²⁰⁵

VIII. PROPOSED STANDARD FOR HEAD INJURY PLAINTIFFS

Head injury plaintiffs do present a very difficult issue. On one hand, a plaintiff, who suffers debilitating headaches and cognitive impairments sufficient to impede substantially all of his or her daily activities for ninety out of the one hundred eighty days following the accident, should be compensated for his/her pain and suffering, as well as the loss of future earning potential, if permanent.²⁰⁶ On the other hand, how does one parse through the head injury cases to determine which plaintiffs are suffering serious head injuries based on mostly subjective complaints?

The standard that should be utilized is to take the focus away from the organic injury and instead focus on the treatment. If the treatment is more invasive, then more weight should be given to the subjective complaints, which is similar to Florida's approach to "permanent injury" in requiring expert testimony to corroborate subjective complaints as well as establish its permanency "within a reasonable degree of medical probability."²⁰⁷ If a neurologist's medical opinion with respect to a patient's symptoms, whether subjective or not, is sufficient for him or her to prescribe a regulated and controlled substance, which can be highly addictive to a patient in the eyes of the state,²⁰⁸ then it should also be true that the court should give

visited Mar. 31, 2013).

²⁰⁵ See *Patient Information: Traumatic Brain Injury*, AM. ASS'N. OF NEUROLOGICAL SURGEONS (Mar. 2011), <https://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Traumatic%20Brain%20Injury.aspx> (stating that the CT scan is the standard device used for the radiological assessment of patients with traumatic brain injuries and the MRI is used after a TBI patient is stabilized); M. Tyson Pillow et al., *Emergency Neuroradiology: Diagnostic Workup*, MEDSCAPE, <http://emedicine.medscape.com/article/810904-overview#aw2aab6b5> (last updated Aug. 15, 2011) ("CT is the imaging procedure of choice in evaluation of acutely injured patients or patients with acute neurologic deficit. . . . MRI is valuable in identifying subtle abnormalities on initial and subacute evaluation and in dating injury.").

²⁰⁶ N.Y. INS. LAW §§ 5102(d), 5104(a) (McKinney 2009).

²⁰⁷ *City of Tampa v. Long*, 638 So. 2d 35, 37–38 (Fla. 1994).

²⁰⁸ See Schedule III of Controlled Substances, 21 C.F.R. § 1308.13 (2012) (listing drugs, medications, and chemicals containing or derived from barbituric

weight to that patient's subjective complaints in establishing a serious injury. As in Florida, the subjective complaints, when corroborated with medical testimony, should be sufficient to overcome the no-fault threshold.²⁰⁹ The current burden shifting analysis should be modified to require that a defense expert must establish that the treating physician is incorrect in his or her prescribed treatment or that there is some other cause for the alleged cognitive impairments or headaches, such as a prior injury or overmedication.

Another possibility is that the New York State Legislature adopts an approach similar to that of Michigan, which requires that a plaintiff need only to provide an affidavit of a neurologist, or other qualified doctor, opining that the plaintiff suffers from a serious neurological injury.²¹⁰ The New York Senate and Assembly are not in complete agreement on how the courts have interpreted the statute.²¹¹ In fact, there is proposed legislation in both the Senate and Assembly seeking to amend and broaden the definition of serious injury.²¹² The legislation states:

When the legislature originally passed N.Y.S. Ins. Law § 5102, it never intended that New York's citizens would be deprived of their constitutional right to a trial by jury where they actually sustained a serious injury.

The judicial transformation and interpretation of this statute has produced overwhelming obstacles never intended by the legislature and has clogged the courts with boilerplate "threshold motions" which monopolize judicial resources.²¹³

The proposed legislation was referred to the Insurance

acid on the DEA's list of controlled substances); ROSE GIAMMARCO ET AL., CRITICAL DECISIONS IN HEADACHE MANAGEMENT 77 (1998) (stating that certain analgesics used to treat migraines "can cause dependence"); *Fiorinal*, DRUGS.COM, <http://www.drugs.com/pro/fiorinal.html> (last updated June 2009) (stating that Fiorinal is used to treat "headache pain, psychic tension, and muscle contraction in the head, neck, and shoulder region" and contains butalbital, "a short-to-intermediate-acting barbiturate."); *Barbital and Aspirin Combination (Oral Route)*, MAYO CLINIC, <http://www.mayoclinic.com/health/drug-information/DR602263> (last updated Nov. 1, 2012) (explaining that "butalbital may become habit-forming").

²⁰⁹ *City of Tampa*, 638 So. 2d at 37–38.

²¹⁰ MICH. COMP. LAWS SERV. § 500.3135(2)(a)(ii) (LexisNexis 2010).

²¹¹ Assemb. 4787, 2011–2012, Reg. Sess. (N.Y. 2011); S. 3790, 2011–2012, Reg. Sess. (N.Y. 2011); see also Assemb. 2362, 2013–2014, Reg. Sess. (N.Y. 2013); S. 880, 2013–2014, Reg. Sess. (N.Y. 2013).

²¹² *Id.*

²¹³ N.Y. S. 3790.

2013] NO FAULT & RECOVERY ON HEAD INJURIES 473

Committee on January 14, 2013.²¹⁴ This author is working with the office of Assemblyman Matthew Titone to incorporate mild traumatic brain injuries into his bill to broaden the definition of “serious injury.”²¹⁵

IX. ARGUMENTS FOR & AGAINST THE
ACCEPTANCE OF SERIOUS HEAD INJURIES

A. Malingering

There is a constant concern of fraudulent activity and malingering within the no-fault system.²¹⁶ “‘Serious injury’ claims are still a source of significant abuse, and it is still true . . . that many courts, including [the New York Court of Appeals], approach claims that soft-tissue injuries are ‘serious’ with a ‘well-deserved skepticism.’”²¹⁷ However, the court did mention, as stated previously, that issues of credibility are not for the court to determine, only sufficiency of evidence.²¹⁸

Malingering is an issue of credibility to be determined by a jury and should be disconnected from the sufficiency analysis.²¹⁹ Even so, a neurologist engages in the same credibility analysis that a jury must engage in.²²⁰ However, the neurologist is in a better position to determine the patient’s credibility because he/she deals with patients with brain injuries on a regular basis and would be able to determine, based on experience and medical knowledge, whether the symptoms are merely psychological or malingering.²²¹

It is unfortunate that the occurrence and persistence of posttraumatic headaches, as well as the other symptoms associated with mTBI, are “associated with a normal neurologic exam and imaging studies,” thus leading to “divergent views regarding the role of psychological and organic factors.”²²² Furthermore, there “has also been concern about the role of litigation and the possibility of compensation influencing or

²¹⁴ N.Y. Assemb. 2362; N.Y. S. 880.

²¹⁵ Assemb. 2362, 2013–2014, Reg. Sess. (N.Y. 2013).

²¹⁶ *Perl v. Meher*, 960 N.E.2d 424, 426 (N.Y. 2011).

²¹⁷ *Id.* (quoting *Pommells v. Perez*, 830 N.E.2d 278, 281 (N.Y. 2005)).

²¹⁸ *Id.* at 429.

²¹⁹ *See id.* (explaining that the issue of malingering is one of credibility, and not for the court to decide).

²²⁰ *Id.*

²²¹ *See supra* text accompanying notes 208–10.

²²² Packard, *supra* note 12828, at 497.

prolonging symptoms. This controversy has raged for over a century”²²³

In our increasingly litigious society, there is persistence of an attitude that headaches (or other “subjective” posttraumatic symptoms) are simply a manifestation of malingering or accident neuroses, and will immediately resolve following resolution of a claim. Such feelings persist among physicians, attorneys and insurance companies despite increasing evidence that [mTBI] probably involves actual brain injury (damage) from head acceleration/deceleration and rotational forces that cause shear/strain and disruption of nerve fibers. Whereas early settlement of an outstanding claim may contribute to the ultimate recovery, several studies have shown that legal settlement does not necessarily bring a termination of symptoms or a return to work.²²⁴

The New Jersey Superior Court, in determining whether a psychiatric injury could be classified as a serious injury under New Jersey’s similar no-fault statute, stated: “It is true, of course, that psychiatric and psychological injuries are ‘highly subjective in nature,’ easily fabricated, and at times, perhaps only imagined. But this does not mean that they should not be compensated.”²²⁵ The court went on to quote *Prosser and Keeton on the Law of Torts*:

It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. And where the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim. Such are the basic policy issues with which the courts continue to struggle in defining the limits of liability for negligently inflicted emotional harm.²²⁶

The New Jersey court held that the psychiatric injuries were sufficient to defeat a motion for summary judgment on the issue of serious injury²²⁷ and in so holding, the court relied on case law

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Granowitz v. Vanvickle, 624 A.2d 1047, 1050 (N.J. Super. Ct. Law Div. 1993).

²²⁶ *Id.* (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 54, at 361 (5th ed. 1984)).

²²⁷ *Id.* at 1052.

2013] NO FAULT & RECOVERY ON HEAD INJURIES 475

provided by New York courts prior to the requirement of objective medical evidence.²²⁸

B. Cross-Examination on Speculation

In *Toure v. Avis Rent A Car Systems, Inc.*,²²⁹ the New York Court of Appeals stated that when an expert's opinion is supported by objective evidence, it can be "challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injures or frivolous claims."²³⁰

First, permitting plaintiffs to recover for pain and suffering when they have endured a mild traumatic brain injury in no way frustrates the purposes of New York's No-Fault Law than does permitting a plaintiff who suffers a broken finger to proceed with a cost recovery action²³¹ or allowing a head injury to ride the coat tails of another injury.²³² New York is the only state that applies such harsh treatment to plaintiffs who suffer the worst type of injury.²³³

Second, expert witnesses that testify regarding their diagnosis with a reasonable degree of medical certainty can be challenged and weighed by the trier of fact, even if that diagnosis is based on subjective complaints.²³⁴ In *Higgins*, a jury awarded the plaintiff

²²⁸ *Id.* at 1048–49 (examining *Harris v. St. Johnsbury Trucking Co.*, 393 N.Y.S.2d 611 (App. Div. 3d Dep't 1977); *Quaglio v. Tomaselli*, 470 N.Y.S.2d 427 (App. Div. 2d Dep't 1984); *Lacomb By Claytor v. Poland C. Sch. Dist.*, 455 N.Y.S.2d 994 (Sup. Ct. Herkimer Cnty. 1982)).

²²⁹ *Toure v. Avis Rent A Car Sys., Inc.*, 774 N.E.2d 1197 (N.Y. 2002).

²³⁰ *Toure*, 774 N.E.2d at 1200.

²³¹ *See Vogel v. Cichy*, 862 N.Y.S.2d 401, 403–04 (App. Div. 3d Dep't 2008) ("[T]he fracture to plaintiff's hand was caused by the . . . automobile accident," such that "the failure to award any damages for past pain and suffering constitutes a material deviation from reasonable compensation.").

²³² *See Morrone v. McJunkin*, No. 98 CIV. 2163 (DLC), 1998 WL 872419, at *4 (S.D.N.Y. Dec. 15, 1998) (denying defendant's motion for summary judgment in a claim for back injuries and post-traumatic headaches because the plaintiff proffered objective evidence of disc herniation).

²³³ *See supra* Parts VI, VII.

²³⁴ *See Higgins v. W. 50th St. Ass'n*, No. 10174/06, 2011 WL 2535042, at *1 (N.Y. Sup. Ct. N.Y. Cnty. June 20, 2011), *modified*, 942 N.Y.S.2d 83 (App. Div. 1st Dep't 2012) (reducing future lost earnings from \$2 million to \$1.5 million); *City of Tampa v. Long*, 638 So. 2d 35, 38–39 (Fla. 1994); *Johnson v. Phillips*, 345 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 1977) (reiterating in each case the ability of the trier of fact to weigh the evidence presented).

“\$1.5 million for past pain and suffering, \$1 million for future pain and suffering to cover 43 years, \$129,004 for lost earnings, \$2 million for future lost earnings covering 28 years, \$14,000 for past medical expenses and \$2.5 million for future medical expenses, covering 43 years” for back injuries and a mild traumatic brain injury sustained in slipping and falling down concrete stairs.²³⁵

The plaintiff in *Higgins* “submitted evidence that she was diagnosed with a mild traumatic brain injury within one week of the accident. [The plaintiff] also submitted the expert testimony of [two doctors], both with specialties in traumatic brain injury.”²³⁶ The defendants submitted their own expert testimony and the court held: “As with other expert testimony, the jury was free to determine which experts’ testimony to accept.”²³⁷ The court further held that the testimony was “a sufficient basis for the jury to conclude that plaintiff sustained a traumatic brain injury.”²³⁸ Courts in Florida also allow experts to testify in regard to subjective complaints by plaintiffs in order to establish a permanent injury.²³⁹ Remember, Florida is the only other state with a mandatory qualitative threshold, besides Michigan, which has the statutory exception for head injuries.²⁴⁰ Also, expert witnesses testify without objective evidence for plaintiffs with traumatic brain injuries when they meet the threshold on a different injury.²⁴¹

C. Subjective Complaints of Pain

In 1987, the New York Court of Appeals rejected the appellate court’s holding that “pain may form the basis of ‘serious injury.’ To so hold would undercut the policy behind the No-Fault Insurance scheme to reduce the number of automobile personal injury accident cases litigated in the courts and frustrate the Legislature’s attempt to put an objective verbal definition of serious injury.”²⁴² The Third Department, which was overturned,

²³⁵ *Higgins*, 2011 WL 2535042, at *1.

²³⁶ *Id.* at *3.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *City of Tampa*, 638 So. 2d at 38; *Johnson*, 345 So. 2d at 1117.

²⁴⁰ *See supra* Part VII.

²⁴¹ *E.g.*, *Morrone v. McJunkin*, No. 98 CIV. 2163 (DLC), 1998 WL 872419, at *4 (S.D.N.Y. Dec. 15, 1998).

²⁴² *Scheer v. Koubek (Scheer II)*, 512 N.E.2d 309, 309 (N.Y. 1987).

2013] NO FAULT & RECOVERY ON HEAD INJURIES 477

had held that the pain from an injury could cause a significant limitation of use of a body function or system, even though the plaintiff did not suffer limited movement.²⁴³

Although the Court of Appeals rejected the Third Department's holding that pain is sufficient to form the basis of a "serious injury," it did so only under the circumstances of the case.²⁴⁴ That is, the case involved an injury to the back, shoulders, and neck, but did not cause a significant limitation, if any limitation at all, in the rotation and movement of these members.²⁴⁵ It is unclear whether this holding would extend to the pain experienced from a posttraumatic headache.²⁴⁶ If so, it would reduce the likelihood of a head injury plaintiff succeeding under the "permanent consequential limitation" or the "significant limitation of use" categories, because the plaintiff did testify that she experienced headaches.²⁴⁷

New York allowing subjective complaints of pain to create a serious injury would align it with Florida, which allows subjective complaints to not just create a significant injury, but a permanent injury.²⁴⁸ New York would also align itself more with Michigan, which has a statutory exception for head injuries to pass the motion for summary judgment phase.²⁴⁹ As stated previously, New York, Florida, and Michigan make up the only states where tort limitation is mandatory and is strictly a qualitative threshold.²⁵⁰ Nor would this deviate from the statutory language of the no-fault threshold as was noted by the Florida Supreme Court with respect to its no-fault threshold.²⁵¹

D. New Perception Needed by the Courts

In order to break away from the strict evidentiary

²⁴³ *Scheer v. Koubek (Scheer I)*, 511 N.Y.S.2d 435, 436 (App. Div. 3d Dep't), *rev'd*, 512 N.E.2d 309 (N.Y. 1987).

²⁴⁴ *Scheer II*, 512 N.E.2d at 309.

²⁴⁵ *Scheer I*, 511 N.Y.S.2d at 437 (Kane, J., dissenting).

²⁴⁶ *Scheer II*, 512 N.E.2d at 309 (holding that a mild injury, coupled with subjective complaints of transitory pain, does not fall under the statutory definition of a "serious injury").

²⁴⁷ If subjective complaints of headaches is insufficient evidence to meet the statutory burden, head injury plaintiffs will have difficulty succeeding on such claims. N.Y. INS. LAW § 5102(d) (McKinney 2009); *Scheer I*, 511 N.Y.S.2d at 435.

²⁴⁸ *City of Tampa v. Long*, 638 So. 2d 35, 38 (Fla. 1994); *Johnson v. Phillips*, 345 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 1977).

²⁴⁹ MICH. COMP. LAWS SERV. § 500.3135(2)(a)(ii) (LexisNexis 2010).

²⁵⁰ SCHERMER & SCHERMER, *supra* note 177, §§ 74:2, 87:2.

²⁵¹ *City of Tampa*, 638 So. 2d at 36–38.

requirements involved for neck and back pain and the restrictions in range of motion, one must keep in mind that movement and the restriction thereof is mechanical.²⁵² Without finding a wrench, the mechanical motion of the rotation of one's back or neck should not be impeded.²⁵³ However, the brain, which has the consistency of "Jell-O that has barely begun to set,"²⁵⁴ functions based on the interactions between one hundred billion neurons along one hundred fifty trillion synapses.²⁵⁵ A brain injury cannot be classified with range of motions because it is not a mechanical function.²⁵⁶ Also, it should not be classified as a "soft-tissue" injury because it is anything but minor.²⁵⁷

X. CONCLUSION

The adoption of a statutory head injury exception or the mere relaxing of the objective medical evidence requirement for head injury plaintiffs, in which the court focuses more on the treatment and the corroboration of the subjective complaints with medical testimony, will not lead to the opening of the proverbial "floodgates." A head injury plaintiff will still need to prove causation, which could be more heavily examined due to the lack of objective medical evidence.²⁵⁸ This heavier scrutiny of

²⁵² See Philip W. McClure & Kenneth R. Flowers, *Treatment of Limited Shoulder Movement: A Case Study Based on Biomechanical Considerations*, 72 PHYSICAL THERAPY J. 929, 929–30 (1992); see also Delmas J. Bolin, *The Application of Osteopathic Treatments to Pediatric Sports Injuries*, 57 PEDIATRIC CLINICS N. AM. 775, 777–78 (2010); Karen Jensen, *Musculoskeletal System*, BIOLOGY REFERENCE, <http://www.biologyreference.com/MoNu/Musculoskeletal-System.html> (last visited Apr. 12, 2013).

²⁵³ *Id.* Although pain may cause a restriction in movement, the true cause of the restriction is muscle contractions or spasms, which are classified as objective medical evidence. See *id.*; *Armstrong v. Morris*, 754 N.Y.S.2d 420, 422 (App. Div. 3d Dep't 2003); see also *Harris v. Ariel Transp. Corp.*, 865 N.Y.S.2d 73, 74 (App. Div. 1st Dep't 2008) ("Medical testimony concerning observations of a spasm may constitute objective evidence in support of a serious injury."); HAZEL M. CLARKSON, *JOINT MOTION & FUNCTION ASSESSMENT: A RESEARCH-BASED PRACTICAL GUIDE* 15 (Pamela Lappies ed. 2005).

²⁵⁴ Greg Miller, *The Brain Collector*, 324 SCIENCE 1634, 1636 (2009), available at <http://web.missouri.edu/~segerti/1000H/HMBrain.pdf>.

²⁵⁵ *Brain Facts and Figures*, UNIV. OF WASH., <http://faculty.washington.edu/chudler/facts.html> (last visited Apr. 22, 2013).

²⁵⁶ See Cordingley, *supra* note 84 ("[A] concussion disrupts the physiology (functioning) of brain cells more than their anatomy (structure)").

²⁵⁷ See *supra* Part V.

²⁵⁸ See *Pommells v. Perez*, 830 N.E.2d 278, 281 (N.Y. 2005) (holding that "when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening

2013] NO FAULT & RECOVERY ON HEAD INJURIES 479

causation could include the examination of whether the forces in the collision were sufficient to produce a more than minor or insignificant brain injury.²⁵⁹ Also, during causation, the plaintiff will still need to prove no prior injuries or if there is a prior injury, that there was an exacerbation of that prior injury.²⁶⁰

Additionally, for the permanent consequential limitation and the significant limitation categories, the plaintiff will still need to prove that the injury is more than minor or insignificant, thus worthy to fall under the “serious injury” definition.²⁶¹ For the 90/180 day category, the plaintiff will still need to prove that substantially all of his/her daily activities were impeded.²⁶² The plaintiff will also need to establish that the impedance is more than minor or insignificant,²⁶³ as well as prove the impedance is caused by the injury.²⁶⁴

The people of New York have two choices. The first choice is to decide together that there has to be a change to this legal framework that prevents head injury plaintiffs from seeking compensation for their injuries. The other choice is to decide on an individual basis that you will just hope that you will not be one of the 300,000 who will be involved, and one of the almost 200,000 who will be injured, in a motor vehicle accident this year in New York, or the year after.²⁶⁵ Do you plan on playing your odds?

medical problem or a preexisting condition—summary dismissal of the complaint may be appropriate”).

²⁵⁹ *Id.* at 282.

²⁶⁰ *Id.* at 281.

²⁶¹ *Licari v. Elliot*, 441 N.E.2d 1088, 1091 (N.Y. 1982) (“[A] minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute.”).

²⁶² N.Y. INS. LAW § 5102(d) (McKinney 2009).

²⁶³ *Cartha v. Quin*, 856 N.Y.S.2d 581, 582 (App. Div. 1st Dep’t 2008).

²⁶⁴ *Gaddy v. Eyler*, 591 N.E.2d 1176, 1178 (N.Y. 1992).

²⁶⁵ N.Y. STATE DEPT OF MOTOR VEHICLES, SUMMARY OF MOTOR VEHICLE ACCIDENTS: 2010 STATEWIDE STATISTICAL SUMMARY, tbl.1 (2011), available at <http://www.dmv.ny.gov/Statistics/2010NYSAccSummary.pdf>.