No. 206
Joseph Perl, et al.,
Appellants,
v.
Mehmood Meher, et al.,
Respondents.

No. 207
David Adler et al.,
Appellants,
v.
Pincus Bayer et al.,
Respondents.

No. 208
Sheila Travis,
Appellant,
Barry J. Moonan, et al.,
Plaintiffs,
v.
Nassirou M. Batchi, et al.,
Respondents.

Case No. 206:
Annette G. Hasapidis, for appellants.
Marjorie E. Bornes, for respondents.
New Yorkers for Fair Automobile Insurance Reform; New York State Trial Lawyers Association, amici curiae.

Case No. 207:
Annette G. Hasapidis, for appellants.
Jeffrey A. Domoto, for respondents.

Case No. 208:
Marie R. Hodukavich, for appellant.
Marjorie E. Bornes, for respondents.

SMITH, J.:

In Pommells v Perez (4 NY3d 566, 571 [2005]), then Chief Judge Kaye described the working of the No-Fault Law (officially the Comprehensive Motor Vehicle Insurance Reparations Act, Insurance Law §§ 5101 et seq.) by saying: "Abuse . . .

abounds." That included, she said, "abuse . . . in failing to separate 'serious injury' cases" from others (id.).

No-fault abuse still abounds today. In 2010, no-fault accounted for 53% of all fraud reports received by the Insurance Department (Annual Report to the Governor and the Legislature of the State of New York on the Operations of the Insurance Frauds Prevention Act at 23). "Serious injury" claims are still a source of significant abuse, and it is still true, as it was in 2005, that many courts, including ours, approach claims that soft-tissue injuries are "serious" with a "well-deserved skepticism" (Pommells, 4 NY3d at 571).

Here, we confront three cases in which the Appellate Division rejected allegations of serious injury as a matter of law. We conclude that we must reverse in two of the cases, Perl v Meher and Adler v Bayer, because the evidence plaintiffs have put forward is legally sufficient. We affirm in the third case, Travis v Batchi.

In finding that two of these three claims survive our scrutiny, we by no means signal an end to our skepticism, or suggest that that of lower courts is unjustified. There are cases, however, in which the role of skeptic is properly reserved for the finder of fact, or for a court that, unlike ours, has factual review power.

I

Plaintiffs Joseph Perl, David Adler and Sheila Travis

brought lawsuits for personal injuries allegedly resulting from automobile accidents; Perl's and Adler's wives also sued, asserting derivative claims. Because the No-Fault Law bars recovery in automobile accident cases for "non-economic loss" (e.g., pain and suffering) unless the plaintiff has a "serious injury" as defined in the statute, Perl, Adler and Travis seek to show that their injuries were serious.

Of the several categories of "serious injury" listed in the statutory definition, three are relevant here: "permanent 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" (Insurance Law § 5102 [d]). Plaintiffs in all these cases rely on one or both of the first two of these categories, claiming permanent and significant limitations of their use of a bodily organ or system. Travis also relies on the third category, claiming that she was disabled from "substantially all" of her "usual and customary daily activities" for at least 90 out of the 180 days following her accident.

Defendants challenged plaintiffs' showing of serious

injury in all three cases. In Perl, defendants moved for summary judgment; Supreme Court denied the motion, but the Appellate Division reversed and dismissed the complaint, with two Justices dissenting (Perl v Meher, 74 AD3d 930 [2nd Dept 2010]). The Adler case was tried, resulting in a jury verdict for plaintiffs after defendants had unsuccessfully moved for judgment as a matter of law under CPLR 4401; the Appellate Division reversed, granted defendants' motion and dismissed the complaint (Adler v Bayer, 77 AD3d 692 [2d Dept 2010]). In Travis, Supreme Court granted defendants' motion for summary judgment and the Appellate Division affirmed (Travis v Batchi, 75 AD3d 411 [1st Dept 2010]). Plaintiffs in Perl appeal to this Court as of right, pursuant to CPLR 5601 (a). We granted leave to appeal to plaintiffs in Adler and Travis.

All three cases turn on the sufficiency of plaintiffs' proof. In Perl and Travis, all of the Appellate Division Justices concluded, as do we, that the evidence offered in support of defendants' summary judgment motions sufficed to shift to plaintiffs the burden of coming forward with evidence to raise an issue of fact. The question is whether plaintiffs met that burden. In Adler, the question is whether plaintiffs offered enough evidence at trial to get to the jury.

II

The Perl and Adler cases are not related, but they are similar in a number of ways, and plaintiffs in each relied on the

testimony of the same expert, Dr. Leonard Bleicher.

Perl and Adler both testified that their ability to function had been significantly limited since their accidents. Perl, 82 when the accident occurred, testified that he could no longer garden, carry packages while shopping, or have marital relations. Adler, a school teacher, testified that he could not move around easily, could not read for a long time and could not pick up his children.

We held in Toure v Avis Rent A Car Sys. (98 NY2d 345, 350 [2002]) that such "subjective complaints alone are not sufficient" to support a claim of serious injury; there must be "objective proof." Thus Dr. Bleicher's testimony was critical in both the Perl and Adler cases. In each case, the doctor testified that he examined the injured plaintiff shortly after the accident; that he performed a number of clinical tests, named but not fully described in the record, which were "positive" -- i.e., indicated some departure from the norm; that he observed that the patient had difficulty in moving and diminished strength; and that the patient's range of motion was impaired. Bleicher did not, at his initial examination of either Perl or Adler, quantify the range of motion he observed, except to say that Perl's was "less than 60 percent of normal in the cervical and lumbar spine." In each case, however, Bleicher again examined the patient several years later, using instruments to make specific, numerical range of motion measurements.

We said in Toure:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury . . . An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system"

(id.).

We need not decide here whether Bleicher's testimony would furnish legally sufficient proof of serious injury under the "qualitative" prong of Toure. While his observations at his initial examinations were detailed, it is debatable whether they have an "objective basis," or are simply a recording of the patients' subjective complaints. Under the "quantitative" prong of Toure, however, Bleicher's later, numerical measurements are sufficient to create an issue of fact as to the seriousness of Perl's and Adler's injuries.

Defendants argue that Bleicher's quantitative findings were made too long after Perl's and Adler's accidents. The Appellate Division in Perl agreed, holding that "plaintiffs are . . . required to demonstrate restricted range of motion based on findings both contemporaneous to the accident . . . and upon recent findings" (Perl v Meher, 74 AD3d at 931). (The Appellate Division's rationale in Adler, though not specifically explained, is presumably the same.) Toure, however, imposed no such

requirement of "contemporaneous" quantitative measurements, and we see no justification for it.

There is nothing obviously wrong or illogical about following the practice that Bleicher followed here -- observing and recording a patient's symptoms in qualitative terms shortly after the accident, and later doing more specific, quantitative measurements in preparation for litigation. As the author of a recent article points out, a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the severity of the injuries at a later time (see Morrissey, "Threshold Law": Is a Contemporaneous Exam by Court of Appeals in Order? New York Law Journal, January 17, 2011). Injuries can become significantly more or less severe as time passes.

Bleicher testified in Adler that it is the better practice to defer a precise quantitative assessment of an injury:

> "On initial examination when person has assorted extensive fresh recent acute injuries, then it's better to go with our visual parameters because measuring range of motion of the joint when it's acutely injured, it's not reliable. It doesn't present correct numbers."

The orthopedist who testified for the defense in Adler did not challenge this opinion. In fact, the defense doctor acknowledged that he, like Bleicher in his initial examination, relied on visual estimates of range of motion, not on measurements with

instruments.

We agree with the Appellate Division dissenters in Perl that a rule requiring "contemporaneous" numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

Defendants in both Perl and Adler offer alternative grounds for upholding the Appellate Division's dismissal of the complaints. We find only one of those grounds to warrant discussion: Defendants in Perl claim that there was insufficient evidence of a causal connection between Perl's accident and his injury. They assert that here, as in Carrasco v Mendez (decided with Pommells v Perez), defendants "presented evidence of a preexisting degenerative . . . condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact" (4 NY3d at 579).

Defendants in Perl did indeed present evidence, in the form of a sworn radiologist's report based on an MRI, that Perl's injuries were "degenerative in etiology and long standing in nature, preexisting the accident." However, plaintiffs' contrary

evidence, while hardly powerful, was sufficient to raise an issue of fact. They submitted another radiologist's affidavit, saying that, while some findings from the MRI "are consistent with degenerative disease," a single MRI cannot rule out the possibility that "the patient's soft tissue findings are . . . a result of a specific trauma." That question, this radiologist said, can best be judged "by the patient's treating physician in conjunction with exam, history and any previous tests."

The treating physician, Dr. Bleicher, opined that since Perl "had not suffered any similar symptoms before the accident or had any prior injury/medical conditions that would result in these findings," the findings were causally related to the accident. A factfinder could of course reject this opinion: It is certainly not implausible that a man of 82 would have suffered significant degenerative changes. We cannot say as a matter of law on this record, however, that such changes were the sole cause of Perl's injuries.

Though we hold plaintiffs' evidence of serious injury in both Perl and Adler to be legally sufficient, both cases have troubling features. Most striking is the sworn assertion by a defense physician who examined Perl, which in substance accuses Perl of malingering. The doctor said:

> "The fact that he sits, yet presents with a show of only 10 degrees of flexion of the lumbar spine is contradictory. His 'give-away' strength is contradictory with his ambulation. This individual's show of such decreased range of motion is totally

> contradicted by the fact that he followed me about, rotating the cervical spine 60 degrees and flexing at least 30 degrees. I do not believe that this individual presents with any true findings at this time."

The issue presented by this evidence, of course, is one of credibility, which is not for this Court to decide.

III

We reach a different result in Travis, because we see no evidence in the record of that case of a serious injury as defined in the No-Fault Law.

Travis, like Perl and Adler, relies on the two "limitation of use" categories of the statutory definition -- categories that in substance require some significant, permanent impairment. But no evidence of such an impairment is to be found -- indeed we cannot tell from the record what Travis's alleged permanent impairment is. She submitted a report from her treating physician, stating the conclusion that she has a "[m]ild partial permanent disability," but the report does not describe the disability; it says that Travis is "[c]urrently able to perform the essential functions of her job." There is no evidence that she suffered either a "permanent consequential limitation of use of a bodily organ or member" or a "significant limitation of use of a body function or system."

Travis relies more heavily on the category of the definition that relates to temporarily disabling conditions, claiming that she had a "medically determined injury or

impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute [her] 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." Again, however, the evidence to support the claim is lacking. Even Travis's subjective description of her injuries -- which in any event would be insufficient, under Toure, to defeat summary judgment -- does not show that there were 90 of the 180 days after the injury when she was disabled from "substantially all" of her usual activities. On the contrary, she acknowledges that she was able to do some work from home less than three months after the accident. And her doctor's reports say nothing at all about what activities she could and could not perform until, 111 days after the accident, she was found able "to perform the essential functions of her job," though with "restrictions." The record does not show any "medically determined injury" that would bring Travis within the "90/180" provision of the statute.

Accordingly, in Perl v Meher, the order of the Appellate Division should be reversed, with costs, and the order of Supreme Court denying defendant's motion for summary judgment reinstated; in Adler v Bayer, the order of the Appellate Division should be reversed, with costs, defendant's motion for judgment as a matter of law denied, and the case remitted to the Appellate

Division for consideration of issues raised but not determined on the appeal to that court; and in Travis v Batchi, the order of the Appellate Division should be affirmed, with costs.

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For Case No. 206: Order reversed, with costs, and order of Supreme Court, Kings County, reinstated. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

For Case No. 207: Order reversed, with costs, defendants' motion for judgment as a matter of law denied, and case remitted to the Appellate Division, Second Department, for consideration of issues raised but not determined on the appeal to that court. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

For Case No. 208: Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided November 22, 2011