

Ins. Law § 671(4): Physical Therapy Expenses and Chiropractic Fees Includable in Calculating No-Fault's "Serious Injury" Threshold

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unfair to place an absolute duty of production upon the state without requiring proof of some additional need for the testimony.

Upon closer analysis, however, it appears that the *Jenkins* standard may effectively eliminate a defendant's right to force production in the absence of bad faith on the part of the State. While the majority opinion necessitates only a showing that an informer's testimony is likely to be favorable,¹⁷⁷ this standard is not susceptible to neat and precise application. If, as Judge Fuchsberg contended, the application of this principle in *Jenkins* indicates that a defendant must show a missing informant's testimony to be favorable to the defense, production would seem unavailable to many defendants. Indeed, those having the greatest need for an informant's testimony, defendants who claim that the informant is the only person in a position to refute the facts presented by the prosecution, would face an almost insurmountable barrier to production. In the event that the *Jenkins* rule is applied this strictly, a defendant establishing bad faith or lack of diligence on the part of the State would have the greatest likelihood of obtaining production. Conversely, should the standard be applied in a less-demanding manner, it may become feasible to demonstrate a significant probability of exculpatory or doubt-creating tendencies in an informant's testimony and thereby force production.¹⁷⁸ Notwithstanding this uncertainty regarding the proper application of the *Jenkins* rule, it is hoped that New York prosecutors, now on notice of disclosure and production standards, will exercise a high degree of care in the handling of informers.

INSURANCE LAW

Ins. Law § 671(4): Physical therapy expenses and chiropractic fees includable in calculating no-fault's "serious injury" threshold.

Section 671(4)(b) of New York's no-fault insurance law allows a "covered person" to maintain an action against another covered person for "noneconomic loss" if the former has incurred reasonable and necessary medical expenses in excess of \$500.¹⁷⁹ The legislature

¹⁷⁷ 41 N.Y.2d at 311, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590.

¹⁷⁸ It is possible that in *Jenkins*, the prosecutor's case was of such strength that the standard applied by the majority could not be met. There also appeared to be other evidence that undercut the defendants' contention. See 41 N.Y.2d at 312, 360 N.E.2d at 1291, 392 N.Y.S.2d at 592. Perhaps if presented with a weaker prosecution case, this burden could have been carried, for then the informant's testimony would have weighed more heavily upon the outcome of the case.

¹⁷⁹ N.Y. Ins. Law § 671(4)(b) (McKinney Supp. 1976-1977). N.Y. Ins. Law § 671(4)(b)

neglected to specify, however, whether physical therapy expenses and chiropractic fees are includable in the computation of the \$500 threshold figure.¹⁸⁰ This omission has created uncertainty in the no-fault area and has resulted in inconsistent judicial decisions.¹⁸¹ Recently, in *Santiago v. Harris*,¹⁸² the Civil Court of the City of New York, attempting to resolve this still partially unsettled question, held that physical therapy and chiropractic expenses constitute valid medical expenditures for purposes of calculating the \$500 no-fault threshold amount.¹⁸³

In *Santiago*, the parties to a personal injury action requested the court to determine whether services rendered by a chiropractor, including physiotherapy and diathermy treatments, were "properly includable in determining compliance with the threshold requirements of the No-Fault Insurance Law."¹⁸⁴ Arguing that recent judicial decisions dictated that the no-fault statute be construed strictly, defendant contended that plaintiff's cause of action to recover chiropractic and physical therapy expenses should be barred.¹⁸⁵ Logical application of the strict construction employed in

defines serious injury as "a personal injury . . . if the reasonable and customary charges for medical . . . services necessarily performed as a result of the injury would exceed five hundred dollars." The essential purposes of New York's no-fault legislation are to foster the rapid payment of insurance benefits, to reimburse a plaintiff for basic economic loss without regard to fault, and to reduce automobile personal injury litigation by limiting the right to sue for non-economic loss, viz., pain and suffering, in the absence of "serious injury." See *id.* §§ 671(1)-(4), (10), 673(1). It was anticipated that if there were a limitation of the right to sue for non-economic loss, there would be a resulting decline in insurance premiums since plaintiffs would no longer feel a need to exaggerate injuries and perpetuate fraud. See P. GILLESPIE & M. KLIPPER, NO FAULT 13 (1972); Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALB. L. REV. 662 (1973).

¹⁸⁰ Enumerated under § 671(4)(b) of the statute are the "reasonable and customary charges" for the following services: "medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services."

¹⁸¹ *Compare Sanders v. Rickard*, 51 App. Div. 2d 260, 380 N.Y.S.2d 811 (3d Dep't 1976) (physical therapy expense not includable in computation of \$500 threshold), with *Albright v. Hook*, 85 Misc. 2d 403, 318 N.Y.S.2d 217 (N.Y.C. Civ. Ct. Queens County 1976) (physical therapy expenses allowable in computing \$500 threshold).

¹⁸² 88 Misc. 2d 1009, 389 N.Y.S.2d 275 (N.Y.C. Civ. Ct. N.Y. County 1976).

¹⁸³ *Id.* at 1012, 389 N.Y.S.2d at 277.

¹⁸⁴ *Id.* at 1009, 389 N.Y.S.2d at 275.

¹⁸⁵ *Id.* at 1010, 389 N.Y.S.2d at 275-76. See, e.g., *Colenzo v. Kernan*, 49 App. Div. 2d 809, 373 N.Y.S.2d 426 (4th Dep't 1975) (mem.); *Jackson v. Decatur*, 83 Misc. 2d 295, 373 N.Y.S.2d 320 (Sup. Ct. Onondaga County 1975). The debate over the inclusion of the cost of physical therapy treatment under § 671(4)(b) has resulted from the legislature's specific enumeration of this service in the basic economic loss section of the no-fault law. N.Y. Ins. LAW § 671(1)(a)(ii) provides that "[b]asic economic loss" means, up to fifty thousand dollars per person [for] all reasonable and necessary expenses incurred for . . . psychiatric, physical and occupational therapy and rehabilitation . . ." It has been determined by some courts

these cases, defendant maintained, "would . . . preclude the inclusion of any chiropractic services [including nonremunerated physical therapy expenses] within the threshold determination of the existence of a serious injury."¹⁸⁶ The court, however, opted for a liberal construction of the statute. Preliminarily noting that two trial court decisions¹⁸⁷ holding physical therapy expenses to be within the ambit of section 671(4)(b) were more compelling than contrary case law,¹⁸⁸ the court held inclusion of these costs in computing the threshold amount to be valid: contrary determinations, the court found, would "thwart rather than advance the statutory purpose of the no fault legislation."¹⁸⁹ Thereafter, the court considered the related and relatively novel issue concerning inclusion of chiropractic costs within this threshold computation. Judge Egeth pointed out the medical characteristics of chiropractic services, as defined in the Education Law,¹⁹⁰ and emphasized that a large number of people seek and rely upon a chiropractor's services to relieve various physical ailments.¹⁹¹ He concluded that these services are

that since physical therapy is not among the class of services set forth in § 671(4)(b) as includable in the computation of the \$500 threshold, it is logical to conclude that the legislature deliberately excluded this service. *See, e.g., Goldwire v. Youngs*, 82 Misc. 2d 351, 369 N.Y.S.2d 285 (Sup. Ct. Oneida County 1975). This logic, however, has not been unanimously accepted by New York courts. *See Agnostakios v. Laureano*, 85 Misc. 2d 203, 379 N.Y.S.2d 664 (N.Y.C. Civ. Ct. N.Y. County 1976); *cf. Albright v. Hook*, 85 Misc. 2d 403, 381 N.Y.S.2d 217 (N.Y.C. Civ. Ct. Queens County 1976) (physical therapy expenses considered "medical" and therefore includable). *See* notes 194-97 and accompanying text *infra*.

¹⁸⁶ 88 Misc. 2d at 1010, 389 N.Y.S.2d at 276.

¹⁸⁷ The court referred to *Albright v. Hook*, 85 Misc. 2d 403, 381 N.Y.S.2d 217 (N.Y.C. Civ. Ct. Queens County 1976), and *Agnostakios v. Laureano*, 85 Misc. 2d 203, 379 N.Y.S.2d 664 (N.Y.C. Civ. Ct. N.Y. County 1976).

¹⁸⁸ For illustrations of case law excluding physical therapy fees, see *Colenzo v. Kernan*, 49 App. Div. 2d 809, 373 N.Y.S.2d 426 (4th Dep't 1975) (mem.); *Jackson v. Decatur*, 83 Misc. 2d 295, 373 N.Y.S.2d 320 (Sup. Ct. Onondaga County 1975).

¹⁸⁹ 88 Misc. 2d at 1011, 389 N.Y.S.2d at 276.

¹⁹⁰ *Id.* The *Santiago* court noted that under N.Y. Educ. Law § 6551 (McKinney 1972), *see* note 198 *infra*, a licensed chiropractor independently could examine, diagnose, and prescribe his own course of treatment. 88 Misc. 2d at 1011, 389 N.Y.S.2d at 276. Section 6551 allows the chiropractor to independently "detect and correct," without making reference to the need for supervision or referral by a physician. The significance of this section is exemplified by comparing its provisions with the statutorily permissible duties of the physical therapist described in N.Y. Educ. Law § 6531 (McKinney Supp. 1976-1977). The physical therapist is restricted to rendering treatment pursuant to a physician's prescription or referral and in accordance with the physician's diagnosis. *Id.* The *Santiago* court therefore noted that "the case for inclusion of reasonable chiropractic charges is . . . far more compelling than the inclusion therein of the physical therapy items of expense." 88 Misc. 2d at 1012, 389 N.Y.S.2d at 276.

¹⁹¹ 88 Misc. 2d at 1011, 389 N.Y.S.2d at 276. Judge Egeth observed that "[s]uch services are customarily accepted by the public as medical services and medical treatment, and a great number of people seek and rely upon these services to ameliorate various physical

medical in nature and that reasonable and customary chiropractic charges are therefore includable in determining compliance with the section 671(4)(b) threshold.¹⁹²

It is submitted that the *Santiago* court reached a fair result based upon sound judicial reasoning. While the question presented to the court, at least that portion dealing with chiropractic fees, has not been often litigated,¹⁹³ it is significant to note that inclusion of physical therapy and chiropractic fees under section 671(4)(b) appears consonant with the analysis of the no-fault legislation adopted by the Court of Appeals in *Montgomery v. Daniels*.¹⁹⁴

Prior to *Montgomery*, several lower courts had held that the services enumerated in the basic economic loss section, 671(1)(a)(ii), should not be included in computing the threshold figure.¹⁹⁵ These courts concluded that the enumeration of specific services such as physical therapy in section 671(1)(a)(ii) indicates that, had the legislature desired these same services to be calculated in the 671(4)(b) threshold amount, it would have expressly so pro-

injuries" *Id.* at 1011, 389 N.Y.S.2d at 276. The court reasoned, therefore, that to eliminate the cost of these services would cause persons "who had previously utilized and benefited from this accepted medical service to be dissuaded from thereafter so doing for wholly non-medical reasons." *Id.* at 1012, 389 N.Y.S.2d at 277. The *Santiago* court also pointed out that a licensed chiropractor is authorized to testify as an expert witness in respect to chiropractic disorders in tort actions. *Id.* at 1011, 389 N.Y.S.2d at 277 (citing *Badke v. Barnett*, 35 App. Div. 2d 347, 316 N.Y.S.2d 177 (2d Dep't 1970)).

¹⁹² 88 Misc. 2d at 1012, 389 N.Y.S.2d at 277.

¹⁹³ The only other case in New York which has dealt with the question of including chiropractic services under § 671(4)(b) is the unreported decision of *Vidra v. Shoman*, No. 60261 (Civ. Ct. Kings County 1974), wherein the court's conclusion parallels that of *Santiago*. The issue is significant, however, and has been the focus of much debate. See *Shayne, Economics and 'No Fault'*, N.Y.L.J., July 23, 1975, at 1, col. 1, wherein an interesting opinion by the Deputy Superintendent and General Counsel of the Insurance Department is noted. The Deputy stated:

"It is . . . the Department's position that utilization of chiropractic services does not prevent a person from demonstrating a 'serious injury' as defined in Section 671(4)(b) which enables a covered person to bring a tort action for non-economic loss under Section 671(1).

. . . [I]f the charge for 'necessary' medical, hospital, surgical, etc. treatment for a covered person's injury would 'customarily' exceed \$500.00, he has sustained a 'serious injury' and is entitled to ensue a tort recovery under Section 673(1) even though he elected to be treated by a chiropractor rather than a physician."

Id. at 1, col. 2, at 4, col. 4. *But see Lynch, Insurance*, 28 SYRACUSE L. REV. 317, 320 (1977). Although Professor Lynch does not specifically broach the subject of the inclusion of chiropractic services under § 671(4)(b), he contended that physical therapy treatment should not be included under medical services since therapy is the treatment of a disease by physical or non-medical means.

¹⁹⁴ 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975).

¹⁹⁵ See, e.g., *Goldwire v. Youngs*, 82 Misc. 2d 351, 369 N.Y.S.2d 285 (Sup. Ct. Oneida County 1975).

vided.¹⁹⁶ Notwithstanding this reasoning, the *Montgomery* Court noted a distinction between the serious injury and economic loss subdivisions of the no-fault statute. Recognizing the difference in language employed by the legislature in these statutory provisions, the Court indicated that while the "reasonable and necessary expenses incurred" for basic economic loss under section 671(1)(a) are determined via an individualized standard,¹⁹⁷ the "reasonable and customary charges for services necessarily performed" for personal injury under section 671(4)(b) are determined by a general standard.¹⁹⁸ The Court of Appeals thus made it clear that the various subdivisions of the no-fault law are separate and distinct.¹⁹⁹ As a result, there exists a sound basis for concluding that the legislature's failure specifically to include a particular kind of treatment as one of the enumerated services in section 671(4)(b) does not eliminate such costs from consideration in threshold computations.

Moreover, it should be noted that "the rules of the Department of Insurance . . . include physical therapy within the ambit of permissible medical threshold items"²⁰⁰ and thus lend even more credibility to the *Santiago* holding. Similarly, the court's position that chiropractic services, including physiotherapy treatments, are medical in nature is supported by a comparison of New York's statutory definition of the practice of chiropractic²⁰¹ with that of the practice of medicine.²⁰² Although a chiropractor may not treat a person for a

¹⁹⁶ See *id.* at 352-53, 369 N.Y.S.2d at 286-87.

¹⁹⁷ 38 N.Y.2d at 65, 340 N.E.2d at 459-60, 378 N.Y.S.2d at 22.

¹⁹⁸ *Id.* at 65-66, 340 N.E.2d at 459-60, 378 N.Y.S.2d at 22. Under the individualized standard, the expenses that have in fact been incurred by the injured party determine the amount that may be recovered. Pursuant to the general standard, however, the payments that the injured party has made are not determinative in evaluating whether he has surpassed the threshold figure. *Id.*

¹⁹⁹ *Id.* See *Agnostakios v. Laureano*, 85 Misc. 2d 203, 379 N.Y.S.2d 664 (N.Y.C. Civ. Ct. N.Y. County 1976). The *Montgomery* analysis of the no-fault law appears to cast doubt upon the reasoning in *Colenzo v. Kernan*, 49 App. Div. 2d 809, 373 N.Y.S.2d 426 (4th Dep't 1975) (mem.); *Jackson v. Decatur*, 83 Misc. 2d 295, 373 N.Y.S.2d 320 (Sup. Ct. Onondaga County 1975); and, *Goldwire v. Youngs*, 82 Misc. 2d 351, 369 N.Y.S.2d 285 (Sup. Ct. Oneida County 1975). See note 185 and accompanying text *supra*.

²⁰⁰ 88 Misc. 2d at 1010, 389 N.Y.S.2d at 276.

²⁰¹ N.Y. EDUC. LAW § 6551 (McKinney 1972) defines the practice of chiropractic as follows:

1. The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.

²⁰² *Id.* § 6521 defines the practice of medicine as the "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."

disease,²⁰³ he may "detect and correct" by "manual or mechanical means" nerve interference and its effects,²⁰⁴ viz., pain which has been produced by a structural imbalance, distortion, or subluxation in the human body. Additionally, a chiropractor may use x-rays for the purpose of analysis.²⁰⁵ In view of the fact that the New York Education Law defines the practice of medicine as the "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition,"²⁰⁶ the definitional overlap between the two statutes is apparent. Since both medical and chiropractic practice permit treatment for pain, injury, or deformity, it seems reasonable to conclude that the definition of medical practice sufficiently embraces the statutorily permissible services of a chiropractor so as to allow these services to be characterized as medical in nature. It is submitted that the refusal to recognize the services of a licensed chiropractor as includable within the no-fault serious injury threshold would constitute an unreasonable rejection of treatment which patients often seek as an alternative to the care provided by a licensed physician. The *Santiago* court, therefore, is to be applauded for its reasonable and highly practical construction of the New York no-fault legislation.

Editor's Note. As *The Survey* goes to print, the Appellate Division, Second Department, has reversed *Vidra v. Shoman*, discussed in note 193, and unanimously held that reasonable expenses for chiropractic treatments are not includable in determining whether a plaintiff has suffered serious injury within the meaning of the no-fault statute. N.Y.L.J., Oct. 13, 1977, at 12, col. 6 (2d Dep't Oct. 11, 1977). Thus, confusion and uncertainty apparently will continue to dominate this controversial area of New York law. Fortunately, however, the \$500 threshold has been eliminated by a recent legislative amendment, ch. 892, § 8 [1977] N.Y. Laws 1832 (McKinney), which applies to the use and operation of motor vehicles on and after Dec. 1, 1977. *Id.* § 17, at 1836.

²⁰³ *Id.* § 6551(3) (McKinney 1972). See also *Riddett v. Allen*, 23 App. Div. 2d 458, 261 N.Y.S.2d 562 (3d Dep't 1965); *People v. Kightlinger*, 276 App. Div. 230, 93 N.Y.S.2d 636 (1st Dep't 1946), *aff'd mem.*, 301 N.Y. 639, 93 N.E.2d 920 (1950).

²⁰⁴ N.Y. EDUC. LAW § 6551(1) (McKinney 1972).

²⁰⁵ *Id.* § 6551(2)(a).

²⁰⁶ *Id.* § 6521.