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Ins. Law § 671(4): Use of an Interrogatory to Determine Qualification Under No-Fault's Threshold "Serious Injury" Test

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the presence of such a clause, there can be no contest of the charitable gift since the parent or issue will necessarily fail to satisfy the statutory requirement that "he . . . receive a pecuniary benefit from a successful contest . . . ."[135] Moreover, section 5-3.3 in no way restricts a testator's ability to bequeath half of his estate to charity and half to a total stranger, thus leaving penniless those dependents whom the law requires he support during his lifetime.[136] Concededly, the overruling of the unfortunate holding in *Cairo* would not remedy all of these problems. It would be a first step, however, toward preventing the circumvention of the clear legislative policy underlying section 5-3.3.

Editor's Note. As *The Survey* goes to print, *Eckart* has been reversed on appeal, 175 N.Y.L.J. 91, May 11, 1976, at 4, col. 1 (Ct. App.). Although the Court of Appeals did reject the *Cairo* rationale, it considered itself compelled to reaffirm the *Cairo* result. The Court declared that "it is the statute itself . . . which disrupts the stated legislative purpose. . . . [and] [i]f there is to be a constructive change it should come from the Legislature." *Id.*, col. 4.

INSURANCE LAW

Ins. Law § 671(4): Use of an interrogatory to determine qualification under no-fault's threshold "serious injury" test.

New York's enactment of the Comprehensive Automobile Insurance Reparations Act,[137] popularly known as the no-fault insur-

Estate of Fitzgerald, 72 Misc. 2d 472, 339 N.Y.S.2d 333 (Sur. Ct. N.Y. County 1972), provided that should there be a 5-3.3 contest to the bequest made therein to the Archdiocese of New York, the gift should pass personally to the Archbishop of New York without limitation or restriction on its use. The court held that "a clause providing for an alternative disposition . . . may deprive a parent or issue . . . of any status to contest under EPTL 5-3.3." *Id.* at 475, 339 N.Y.S.2d at 337. One proposal to close this loophole advocates ignoring the alternative provisions of the will for the purpose of allowing those persons who would otherwise participate in the distribution of the excess to contest the will. *See* COMMISSION ON ESTATES, *supra* note 100, at 228.

For a discussion of the possibility that, in addition to the gift-over loophole, the policy of the statute may also be circumvented by an inter vivos gift, in trust or otherwise, for charitable purposes, see 17B MCKINNEY'S EPTL § 5-3.3, commentary at 782 (1967). The various types of inter vivos dispositions that may be employed are outlined in Fisch, *Restrictions on Charitable Giving*, 10 N.Y.L.F. 307, 331 (1964).

[135] EPTL § 5-3.3(a)(1).

[136] Surrogate Midonick, in *In re* Estate of Rothko, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1972), proposed that the surrogate have the power to impose temporary and reasonable support obligations on all solvent estates until young dependents reach the age of majority or are able to provide for themselves. In the alternative, he suggested that the legislature could enact a formula to impose a trust on an estate until the children come of age. *Id.* at 78-79, 335 N.Y.S.2d at 670-71.

[137] Ch. 13, § 1, [1973] N.Y. Laws 56 (codified at N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975)).

ance law, has engendered criticism on an array of constitutional grounds.[138] The Court of Appeals' recent decision upholding the constitutionality of the Act,[139] however, clearly indicates that no-fault insurance is here to stay. No-fault advocates have long maintained that the traditional tort action both "placed an inordinate strain on . . . court systems and judicial resources"[140] and was overly expensive.[141] The major purpose of New York's no-fault law was to remedy these problems.[142] The statute provides that if both parties are "covered"[143] access to the courts for recovery of "noneconomic loss," *i.e.* pain and suffering,[144] is limited to those plaintiffs suffering a "serious injury."[145]

Nevertheless, substantial procedural problems often develop in the day-to-day operation of the no-fault statute, at times frustrating

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[138] N.Y. INS. LAW § 673(1) (McKinney Supp. 1975), seriously restricts the common law right to maintain a tort action for noneconomic loss, *see* note 145 *infra*, and has been attacked as violative of equal protection. *E.g.*, Montgomery v. Daniels, 38 N.Y.2d 41, 59-66, 340 N.E.2d 444, 455-60, 378 N.Y.S.2d 1, 16-22 (1975); Note, *No-Fault Insurance in New York: Another Hazard for the Innocent Driver*, 40 BROOKLYN L. REV. 689, 709-11 (1974). It has also been argued that the reform represented by the no-fault scheme is unreasonably related to the legislatively perceived defects of the traditional tort system and therefore constitutes an infringement on the due process rights of accident victims. Montgomery v. Daniels, *supra* at 54-56, 340 N.E.2d at 452-53, 368 N.Y.S.2d at 12-13 (1975). For a more detailed discussion of the constitutional issues see Hart, *The Constitutionality of the New York State Comprehensive Automobile Insurance Reparations Act*, 43 FORDHAM L. REV. 379 (1974).

[139] Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1, *rev'g* 81 Misc. 2d 373, 367 N.Y.S.2d 419 (Sup. Ct. Kings County 1975). The Court, employing the traditional rational basis test, found the no-fault statute to be in conformity with the equal protection guarantees of the Federal and New York Constitutions. 38 N.Y.2d at 59-66, 340 N.E.2d at 455-60, 378 N.Y.S.2d at 16-22. Addressing the due process argument, the Court also ruled that the legislation "is reasonably related to the promotion of the public welfare and thus represents a legitimate exercise of our State's police power." *Id.* at 56, 340 N.E.2d at 453, 378 N.Y.S.2d at 13.

[140] Montgomery v. Daniels, 38 N.Y.2d 41, 51, 340 N.E.2d 444, 450, 378 N.Y.S.2d 1, 9 (1975). Similar arguments were propounded by other commentators. *E.g.*, R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 13-15 (1965); STATE OF NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 21-22 (1970).

[141] Montgomery v. Daniels, 38 N.Y.2d 41, 50, 340 N.E.2d 444, 449, 378 N.Y.S.2d 1, 8 (1975); *see* Sullivan v. Darling, 81 Misc. 2d 817, 820, 367 N.Y.S.2d 199, 203 (Sup. Ct. Saratoga County 1975).

[142] Governor's Memorandum, Feb. 13, 1973, *as appearing in* [1973] N.Y. Laws 2335 (McKinney), on approving Ch. 13 [1973] N.Y. Laws 56. *See* Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALBANY L. REV. 662, 671 (1973).

[143] A covered person is defined as "any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by [no-fault] . . . ." N.Y. INS. LAW § 671(10) (McKinney Supp. 1975).

[144] The Act defines noneconomic loss as "pain and suffering and similar non-monetary detriment." *Id.* § 671(3).

[145] *Id.* § 673(1). The serious injury threshold can be crossed in two ways. An injury resulting in death, significant disfigurement, or permanent loss of use or function qualifies as a serious injury. *Id.* § 671(4)(a). Alternatively, an injury is deemed serious if the reasonable, customary, and necessary expenses for medical or other statutorily enumerated related services exceed $500. *Id.* § 671(4)(b). For a compilation of the residuary situations in which a traditional tort action is available, see Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALBANY L. REV. 662, 702-04 (1973).

effectuation of the Act's major policy aims.[146] Indicative of this potential procedural subversion of no-fault objectives is *Cole v. Berkowitz.*[147] In *Cole,* the New York City Civil Court, New York County, granted defendant's motion to vacate a general verdict in favor of plaintiff and dismiss the complaint because of the jury's finding in response to an interrogatory that the serious injury threshold had not been crossed.[148]

Plaintiff, a pedestrian, was struck by defendant's motor vehicle. He sustained injuries which prevented him from pursuing his duties as a postal employee.[149] At a plenary trial, plaintiff at-

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[146] *See* Schwartz, *No-Fault Insurance: Litigation of Threshold Questions Under the New York Statute — The Neglected Procedural Dimension,* 41 BROOKLYN L. REV. 37 (1974) [hereinafter cited as Schwartz].

[147] 83 Misc. 2d 359, 373 N.Y.S.2d 782 (N.Y.C. Civ. Ct. N.Y. County 1975).

[148] *Id.* at 361, 373 N.Y.S.2d at 783.

[149] At trial, plaintiff testified that he suffered a 4-weeks' salary loss of $905 which was reimbursed out of sick pay. Although the *Cole* court dismissed plaintiff's action, his rights to recover this sum through no-fault remedies were not thereby prejudiced. *Id.* at 361, 373 N.Y.S.2d at 784. The statutory liability of an insurer, denominated as "first party benefits," consists of "basic economic loss" with several enumerated deductions. N.Y. INS. LAW § 671(2) (McKinney Supp. 1975). Basic economic loss includes, up to a total of $50,000 per person: (1) reasonable and necessary medical expenses; (2) loss of earnings up to $1000 per month for not more than 3 years from the date of the accident; and (3) all other reasonable and necessary expenses, up to $25 per day for not more than 1 year from the date of the accident. *Id.* § 671(1)(a)-(c). A no-fault insurer is permitted to deduct from first party benefits, *inter alia,* amounts recoverable under state or federal social security or workmen's compensation benefits. *Id.* § 671(2)(b). This provision, however, will presumably not aid the insurer in a case involving New York State Workmen's Compensation, since such benefits are not available if first party benefits are payable under no-fault insurance. *Compare* N.Y. WORKMEN'S COMP. LAW § 205(10) (McKinney Supp. 1975) *with* N.Y. INS. LAW § 671(2)(b) (McKinney Supp. 1975). In *Cole,* plaintiff, a federal employee, sustained his injury while proceeding to his place of employment. As Judge Wallach noted, plaintiff's recovery of lost earnings under the statute is therefore dependent upon the question of whether or not reimbursed sick pay is a workmen's compensation benefit. 83 Misc. 2d at 361-62, 373 N.Y.S.2d at 784. It would appear that plaintiff's injury was not sustained "in the performance of his duty," 5 U.S.C. § 8102(a) (1970), thereby precluding federal workmen's compensation benefits. *Cf.* Bailey v. United States, 451 F.2d 963 (5th Cir. 1971). Moreover, under federal law a distinction is implicitly drawn between sick leave and workmen's compensation benefits. An employee may elect to use accrued sick leave and therefore be precluded from collecting workmen's compensation benefits until such use is terminated. 5 U.S.C. § 8118(c) (Supp. IV, 1974). Construing such an election as a workmen's compensation benefit would appear tortuous. In addition, while receiving benefits an employee generally may not receive salary. *Id.* § 8116(a); *cf.* Allen v. United States, 201 F.2d 263 (9th Cir. 1952) (per curiam), *cert. denied,* 345 U.S. 957 (1953) (accepting benefits exclusive remedy despite contractual provision providing for salary continuation). Thus, contrapositive logic would dictate that exercising a right to receive accrued sick pay, presumably secured by a collective bargaining agreement, generally precludes federal workmen's compensation benefits.

Interestingly, the amount of plaintiff's salary loss should never have been disclosed to the *Cole* jury. Basic economic loss may be offered in evidence only "to the extent that it is relevant to the proof of noneconomic loss." N.Y. INS. LAW § 673(3) (McKinney Supp. 1975). In *Cole,* the period of plaintiff's disability may have been probative of the issue of noneconomic loss; the amount of wage decrement, however, was not. Moreover, it appears that a "limited purpose" charge was proper. Such a charge must be requested, however, by counsel. C.K.S. Inc. v. Helen Borgenicht Sportswear, Inc., 25 App. Div. 2d 218, 268 N.Y.S.2d 409 (1st Dep't 1966) (per curiam); Pritchard v. Edison Elec. Illuminating Co., 92

tempted to prove that he had suffered a serious injury within the meaning of the no-fault statute[150] since he incurred necessary and reasonable medical expenses in excess of $500.[151] The jury, answering an interrogatory[152] submitted by Judge Wallach at defendant's request,[153] found that the serious injury threshold had not been crossed since plaintiff's necessary and reasonable medical expenses totaled only $472.

Concededly, if the threshold may be assessed negatively as a matter of law, the parties may quickly and efficiently proceed to no-fault remedies[154] in consonance with the purposes of the Act.[155]

App. Div. 178, 185-86 (1st Dep't), *aff'd*, 179 N.Y. 364, 72 N.E. 243 (1904); 1 J. WIGMORE, EVIDENCE § 13, at 301 (3d ed. 1940); Note, *Evidence Admissible for a Limited Purpose — The Risk of Confusion Upsetting the Balance of Advantage*, 16 SYRACUSE L. REV. 81, 90 (1964). Absent the limiting charge, reimbursed salary loss is presumably recoverable under the "collateral source" rule. *See, e.g.*, Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 44 (1961). *But cf.* Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962) (collateral source rule inapplicable to gratuities). Indeed, the jury in *Cole* was permitted, "without objection," to consider the loss of earnings as an item of damages pursuant to this rule. 83 Misc. 2d at 361, 373 N.Y.S.2d at 784. By defendant's failure to object, and thereby force the plaintiff to pursue statutory remedies for the recovery of this sum, his no-fault carrier was exposed to liability not imposed under the statute. The Act entitles the insurer to deduct 20% of lost earnings from the computation of statutory liability for basic economic loss. N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1975). Therefore, assuming the total wage decrement was included in the jury's $1500 verdict, had the threshold been crossed, defendant's insurer would have incurred excess liability in the amount of $181, *i.e.*, 20% of $905.

[150] The plaintiff is required to state in the complaint that a serious injury has been sustained, CPLR 3016(2). He may make the allegation without "evidentiary detail," 7B MCKINNEY'S CPLR 3016, commentary at 6 (Supp. 1975), but facts supporting the allegation may be required in a bill of particulars. CPLR 3043(a)(6). A general denial is sufficient to raise the threshold issue at trial. Morell v. Vargas, 83 Misc. 2d 30, 371 N.Y.S.2d 828 (N.Y.C. Civ. Ct. Queens County 1975). Generally, the party with the burden of pleading has the burden of proof. W. RICHARDSON, EVIDENCE § 99 (10th ed. J. Prince 1973). It is widely presumed that this general rule is to be followed in no-fault cases. *See* Schwartz, *supra* note 10, at 47; 7B MCKINNEY'S CPLR 3043, commentary at 40 (Supp. 1975).

[151] *See* note 145 *supra*.

[152] The jury's general verdict may be accompanied by "written answers to written interrogatories . . . upon one or more issues of fact." CPLR 4111(c). In *Cole*, Judge Wallach referred to the jurors' collateral findings as a "special verdict." 83 Misc. 2d at 361, 373 N.Y.S.2d at 783. CPLR 4111, however, provides that "[t]he court may direct the jury to find either a general verdict or a special verdict." Thus, the special verdict is used "in lieu of" the general verdict, 7B MCKINNEY'S CPLR 4111, commentary at 142 (1963), while "an answer to an interrogatory is used in conjunction with a general verdict." *Id. See generally* 4 WK&M ¶¶ 4111.02-.04.

[153] It is within the court's discretion to require the jury to answer written interrogatories. CPLR 4111(c).

[154] *See* 7B MCKINNEY'S CPLR 3211, commentary at 7 (Supp. 1975). In Davis v. Pathe Cab Corp., 84 Misc. 2d 559, 377 N.Y.S.2d 893 (N.Y.C. Civ. Ct. N.Y. County 1975), the court found as a matter of law that the $500 threshold had been crossed. Such a ruling, however, would appear to be predicated on the underlying facts of the particular case. *Compare id.* (allegations of 79-year old plaintiff with fractured humerus wholly unrefuted), *with* Snyder v. Laffer, 81 Misc. 2d 814, 367 N.Y.S.2d 454 (Sup. Ct. Nassau County 1975) (court unable to determine as matter of law if $1,180.75 is reasonable and customary expense for treatment of fractured clavicle).

[155] *See* text accompanying notes 140-42 *supra*.

Such cases, however, will rarely be litigated.[156] If the issue approximates the borderline where reasonable men differ, submission to a jury is proper upon demand by either party.[157] Assuming *arguendo* that the threshold issue must be resolved at the main trial, utilizing an interrogatory accompanying a general verdict is submitted to be the least efficient approach. The jury will be required to deliberate on at least two, and possibly three, separate issues: threshold qualification; defendant's liability; and, should the latter be resolved affirmatively, damages.[158] Thus, using an interrogatory to assess the facts underlying a plaintiff's allegation that he has sustained a serious injury requires a full trial of *all* issues in an automobile negligence action. A wasteful trial of moot issues will have occurred where the jury's response to the interrogatory resolves the threshold issue in the defendant's favor. Expense, delay, and institutional strain are maximized by requiring resolution of a statutorily created issue in the context of the traditional fault system.

Another plenary trial procedure used in no-fault cases has been to charge the jury to proceed to the question of liability only upon finding that threshold qualification has been met.[159] This approach is somewhat more desirable in the setting of a full trial since it eliminates unnecessary jury deliberation on the issues of liability and damages.[160] Potentially needless and prejudicial evidence pertaining to liability and damages, however, would still be presented to the triers of fact.[161] Perhaps a better solution, there-

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[156] 7B McKINNEY's CPLR 3211, commentary at 7 (Supp. 1975).

[157] *See* Morell v. Vargas, 83 Misc. 2d 30, 371 N.Y.S.2d 828 (N.Y.C. Civ. Ct. Queens County 1975); Sullivan v. Darling, 81 Misc. 2d 817, 367 N.Y.S.2d 199 (Sup. Ct. Saratoga County 1975); Maynor v. Wrenn, 78 Misc. 2d 193, 356 N.Y.S.2d 469 (City Ct. of Syracuse 1974). *See also* Snyder v. Laffer, 81 Misc. 2d 814, 367 N.Y.S.2d 454 (Sup. Ct. Nassau County 1975).

[158] *See, e.g.*, Cole v. Berkowitz, 83 Misc. 2d 359, 373 N.Y.S.2d 782 (N.Y.C. Civ. Ct. N.Y. County 1975).

[159] *See, e.g.*, Morell v. Vargas, 83 Misc. 2d 30, 371 N.Y.S.2d 828 (N.Y.C. Civ. Ct. Queens County 1975); Maynor v. Wrenn, 78 Misc. 2d 193, 356 N.Y.S.2d 469 (City Ct. of Syracuse 1974) (dicta).

[160] Plaintiffs may prefer this particular avenue "on the theory that the total impact-of-the-damage evidence would encourage favorable threshold assessments." Schwartz, *supra* note 146, at 57. This theory is applicable to the interrogatory mechanism to a somewhat lesser degree since the jury will pass on the issues of liability and damages in any event. In fact, it did not hold true in *Cole*. There, the jurors returned a verdict awarding $1500 in damages. Nevertheless, the threshold requirement was not reached because they also determined that only $472 was attributable to reasonable and necessary medical expenses. 83 Misc. 2d at 361, 373 N.Y.S.2d at 783.

[161] Arguably, the interrogatory approach does not expressly enlighten the jurors as to the existence of a threshold requirement, whereas the comprehensive charge does. It is submitted this distinction is faulty in its assumption of juror naiveté. Moreover, both methods expose the jurors to possibly prejudicial evidence on the questions of liability and damages.

fore, would be the employment of a split trial.[162] In addition to promoting efficiency,[163] a split trial precludes the possibility of prejudice resulting from exposing the jurors to proof of damages and liability prior to resolution of the threshold issue.

Alternatively, a defendant desirous of contesting a plaintiff's threshold qualification may seek to discharge the entire case by motion.[164] Since the no-fault statute is virtually devoid of procedural guidelines,[165] extant procedural law must be consulted. The most appropriate vehicles for such a disposition are the motion to dismiss for failure to state a cause of action[166] and the motion for summary judgment,[167] with the court in either case ordering an immediate trial of the threshold issue.[168] Much can be

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[162] CPLR 603 provides in part: "In furtherance of convenience or to avoid prejudice the court may . . . order a separate trial . . . of any separate issue. The court may order the trial of any . . . issue prior to the trial of the others." Professor Schwartz predicts a favorable reception of this approach by the judiciary and practitioners. Schwartz, *supra* note 146, at 57.

[163] *See generally* Ziesel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

[164] *See* text accompanying notes 166-68 *infra*. Should the defendant raise threshold qualification as a defense in the answer, a plaintiff interested in a prompt disposition may move to strike the defense pursuant to CPLR 3211(b). Davis v. Pathe Cab Corp., 84 Misc. 2d 559, 377 N.Y.S.2d 893 (N.Y.C. Civ. Ct. N.Y. County 1975); 7B MCKINNEY'S CPLR 3211, commentary at 10 (Supp. 1975). Issues raised on such a motion may be resolved by an immediate trial. CPLR 3211(c). *See* note 168 *infra*. *See also* Davis v. Pathe Cab Corp., *supra* (motion to strike granted as a matter of law).

[165] *See* N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975).

[166] CPLR 3211(a)(7).

[167] CPLR 3212. Professor Siegel has noted that the preferable method for raising the threshold issue is the motion to dismiss under 3211(a)(7). Unlike a motion for summary judgment pursuant to CPLR 3212(a), which can be invoked only after the defendant serves his answer, the motion to dismiss for failure to state a cause of action is available any time. CPLR 3211(e). *See* 7B MCKINNEY'S CPLR 3211, commentary at 10 (Supp. 1975). *But see* Schwartz, *supra* note 146, at 55, wherein the author indicates that summary judgment will be the preferred method. Moreover, the court may, after adequate notice to the parties, treat a motion to dismiss as one for summary judgment. CPLR 3211(c).

[168] CPLR 3211(c) provides in pertinent part:

> Whether or not issue has been joined, the court, after adequate notice to the parties, may treat [a] motion [under subdivision (a) or (b)] as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

Treating the motion as one for summary judgment and ordering an immediate trial are "separate" powers. 7B MCKINNEY'S CPLR 3211, commentary at 441 (1970). *See* Duboff v. Board of Higher Educ., 34 App. Div. 2d 824, 312 N.Y.S.2d 726 (2d Dep't 1970) (mem.). Thus, to promote court efficiency and a possible early disposition, the court can order an immediate adjudication of the threshold issue pursuant to CPLR 3211(c). Sullivan v. Darling, 81 Misc. 2d 817, 367 N.Y.S.2d 199 (Sup. Ct. Saratoga County 1975) (dicta); 7B MCKINNEY'S CPLR 3211, commentary at 8 (Supp. 1975).

> With respect to the summary judgment motion, CPLR 3212(c) provides in part: If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact . . . .

In Sullivan v. Darling, 81 Misc. 2d 817, 367 N.Y.S.2d 199 (Sup. Ct. Saratoga County 1975), the defendant moved for summary judgment dismissing the plaintiff's complaint for

said for this method. An order favoring the plaintiff would serve to promote settlement and narrow the issues for the main trial.[169] Conversely, an unfavorable order would result in immediate dismissal. Moreover, disposition by motion would discourage "wasteful forays into the plenary litigative system"[170] based on a mere allegation of a serious injury.

Admittedly, employment of the motion procedure would necessitate repetition of medical proof if the plaintiff's serious injury allegation was upheld. Postponing resolution of the threshold issue until the plenary trial clearly circumvents both the necessity for a dual trial and the concomitant duplication of some medical evidence.[171] Refusal to determine this issue before plenary trial on the merits, however, delays resolution of the threshold issue, thereby obstructing any possibility of a relatively prompt dismissal, and prevents unclogging of calendar congestion.[172] In addition, retention by the courts of automobile negligence actions with expanded issues may upset the actuarial basis of no-fault insurance, resulting in higher premiums.[173] In short, immediate

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lack of subject matter jurisdiction. An immediate trial of the threshold issue was requested pursuant to CPLR 3212(c). The motion was granted "insofar as it [sought] an immediate trial . . . ." *Id.* at 821, 367 N.Y.S.2d at 204. Although the plaintiff's injuries were the result of a one-car accident, the opinion is silent on whether or not liability was conceded. Assuming it was not, the court appears to have employed lack of subject matter jurisdiction, pursuant to CPLR 3211(a)(2), as the predicate for an immediate trial. Analysis on a jurisdictional basis, however, appears inconsistent with the wording of N.Y. INS. LAW § 673(1) (McKinney Supp. 1975), which provides in part: "[I]n any action by or on behalf of a covered person against another covered person for personal injuries . . . there shall be *no right of recovery* for non-economic loss, except in the case of a serious injury, or for basic economic loss." *Id.* (emphasis added). The no-fault law has been viewed as not withdrawing the courts' jurisdiction in minor injury cases, but rather as imposing a limitation on the right of recovery. Snyder v. Laffer, 81 Misc. 2d 814, 816, 367 N.Y.S.2d 454, 456 (Sup. Ct. Nassau County 1975). It is submitted that such an approach is overly literal and ignores the practical effect of the statute in regard to noneconomic loss. *See* Schwartz, *supra* note 146, at 56. Furthermore, a contrary interpretation would permit the use of CPLR 3211(a)(2), together with 3211(c), as an alternative means of securing an immediate trial.

[169] Sullivan v. Darling, 81 Misc. 2d 817, 820, 367 N.Y.S.2d 199, 203 (Sup. Ct. Saratoga County 1975). Of course, the extent to which settlement is promoted will vary, depending upon the issue of liability and the conceivable amount of damages.

[170] *Id.* at 820, 367 N.Y.S.2d at 203, *quoting* Schwartz, *supra* note 146, at 53. It has been suggested that raising the threshold from $500 to $2000 will aid in relieving calendar congestion. N.Y. Times, April 18, 1976, at 24, cols. 3-4. Such legislation would decrease the number of suits, but the problem of finding the most efficient method for resolving the threshold issue would remain, although it would be less pressing.

[171] Snyder v. Laffer, 81 Misc. 2d 814, 367 N.Y.S.2d 454 (Sup. Ct. Nassau County 1975).

[172] No-fault insurance has yet to achieve its predicted objective of decreasing court cases by 75% to 80%. A 20% to 30% decrease, however, has been accomplished. N.Y. Times, April 18, 1976, at 24, col. 3. Clearly, inflated medical costs have contributed to this failure. *See* note 170 *supra.*

[173] Schwartz, *supra* note 146, at 57; *see* Sullivan v. Darling, 81 Misc. 2d 817, 820, 367 N.Y.S.2d 199, 203 (Sup. Ct. Saratoga County 1975). *See also* N.Y. INS. LAW § 677 (McKinney Supp. 1975). *But see* Comment, *New York Adopts No-Fault: A Summary and Analysis,* 37 ALBANY L. REV. 662, 671 (1973), wherein the student author contends no-fault insurance will merely

resolution of the threshold issue seems a far more preferable solution than postponement until full trial.

Pleas for legislative[174] and judicial[175] action to develop no-fault procedure have been made. Regardless of the solution finally adopted — disposition by motion, postponement, or perhaps a procedural system peculiar to no-fault — it is suggested that *Cole* illustrates the potential for procedural frustration of no-fault insurance objectives and the need for clarification of no-fault procedure.

JUDICIARY LAW

Judiciary Law art. 19: Postjudgment enforcement procedures held violative of due process.

Article nineteen of the New York Judiciary Law[176] established postjudgment procedures whereby a judgment debtor could be held in civil contempt, fined, and imprisoned without a hearing.[177] A debtor who failed to comply with a judgment creditor's subpoena to appear for deposition concerning his ability to satisfy the judgment[178] could be subject to an ex parte order of the court to show cause why he should not be held in contempt.[179] Failure to appear in response to this order could result in a determination that the debtor was in contempt of court,[180] whereupon a final order could issue directing that he be fined and/or imprisoned.[181] If a fine had been imposed and affidavits of the attorney for the judgment creditor satisfied the court that the order imposing the fine had been served on the judgment debtor and that he had failed to comply therewith, the court could issue an ex parte commitment

provide moderate savings and that this feature was not stressed as a major benefit of the statute.

[174] *See* 7B McKINNEY'S CPLR 3211, commentary at 8, 11 (Supp. 1975).

[175] Schwartz, *supra* note 146, at 58.

[176] N.Y. JUDICIARY LAW §§ 750 *et seq.* (McKinney 1975).

[177] *Id.* §§ 756, 757, 770, 772-74.

[178] CPLR 5223 permits a judgment creditor to compel disclosure of any information pertinent to the satisfaction of the judgment by serving the debtor with a subpoena. The judgment creditor may serve any or all of the following subpoenas: a subpoena requiring the debtor's attendance for deposition; a subpoena duces tecum requiring the production of books and papers; an information subpoena accompanied by written questions which require the debtor's written answers under oath. CPLR 5224.

[179] CPLR 5251 makes "refusal or willful neglect" to obey a subpoena punishable as a contempt of court. If the court was satisfied by creditor's affidavit that the judgment debtor had failed to comply with the subpoena, it could issue an order directing the accused to show cause why he should not be punished for contempt. N.Y. JUDICIARY LAW § 757(1) (McKinney 1975). For a more detailed discussion of this procedure see 7B McKINNEY'S CPLR 5251, commentary at 199 (Supp. 1975).

[180] N.Y. JUDICIARY LAW § 750(A)(3) (McKinney 1975).

[181] *Id.* §§ 770, 772.