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FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

# LAW FAX

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From the Co-Editors  
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**MEDICAL CAUSATION TEST**  
**SIGNIFICANTLY LIBERALIZED BY**  
**SUPREME COURT'S NEW MAJORITY**

Contributor<sup>1</sup> - JAMES L. BORIN

The “new majority” of the Michigan Supreme Court has finessed a major change in no-fault jurisprudence. In the case of *Scott v State Farm Insurance Company*, 278 Mich App 578 (2008), the Court of Appeals reviewed a situation wherein the claimant sustained a traumatic brain injury in 1981, just three days prior to her 18<sup>th</sup> birthday. Many years later one of the claimant’s treating physicians commented that her hyperlipidemia (elevated cholesterol) could be related to the excess weight she had gained as a consequence of her inability to maintain a reasonable diet. It was also suggested that her exercise restrictions contributed to the onset of that condition. In 2003, State Farm was asked to pay for Zetia or Vytorin, both of which were prescribed to control her cholesterol. State Farm declined payment, stating that the hyperlipidemia did not arise out of the motor vehicle accident. State Farm moved for Summary Disposition which was denied and,

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thereafter, sought immediate interlocutory appeal to the Michigan Court of Appeals, which was granted.

In a unanimous, published Opinion, the Court of Appeals stated as follows:

“Here, plaintiffs responded to defendant’s motion by producing evidence of a causal connection between the accident and the hyperlipidemia, and we consider that evidence in a light most favorable to plaintiffs. Plaintiffs presented testimony indicating that the accident caused brain and skeletal injuries, which make it difficult for plaintiff to exercise, and which contribute to poor judgment regarding diet. Plaintiffs also presented evidence that this difficulty in exercising and the poor diet contribute to hyperlipidemia. Plaintiffs are not required to establish direct or proximate causation. Almost any causal connection will do. Although a genetic predisposition to hyperlipidemia is apparently present, there is no authority that, for purposes of personal protection insurance, a plaintiff must exclude other possible causes (as there is authority for instance, when proximate causation is at issue in a traditional tort context). Plaintiffs have presented evidence sufficient to raise a genuine issue of material fact. The chain of causation, under plaintiffs’ theory, though somewhat attenuated, is not so long that its links are completely unable to support the burden of proof. There is testimony indicating that there is no objective test that can distinguish between a case of hyperlipidemia caused genetically and one caused by independent factors. Thus, the trier of fact must decide whether the high-cholesterol problem is one “arising out of” the accident.” (Emphasis Added)

*Id.* at 586

The critical language in the Opinion, obviously, is the statement that “plaintiffs are not required to establish direct or proximate causation. Almost any causal connection will do.”

*Scott* was appealed to the Michigan Supreme Court and, in late 2008, the “old majority” struck the “almost any causal connection will do” test from the Court of Appeals Opinion.<sup>2</sup> Significantly, in her dissenting opinion, Justice Kelly stated the following:

“The Michigan Supreme Court should not alter the precedent concerning this issue without first hearing oral argument and inviting briefing on it. State Farm argues that the sky will fall if the standard used by the Court of Appeals is not revised. Yet, the sky has remained in place under the existing standard for the last 30 years.

Rather than alter this important standard hastily, the Court should grant leave to appeal and make a change, if any, only after due deliberation”.<sup>3</sup>

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<sup>2</sup> 482 Mich 1074 (2008).

<sup>3</sup> *Id.* pg. 1077.

Counsel for *Scott* petitioned for reconsideration and, on June 5, 2009, same was granted. The “new majority”, rather than requesting for full briefing and oral argument, simply denied the application for appeal, essentially leaving the Court of Appeals decision as binding precedent for the “arising out of” test of medical causation. In a concurring comment by Chief Justice Kelly, she stated as follows:

“The Court of Appeals did not err in relying on these cases to interpret the causal nexus required in a no-fault case involving injury. Precedent makes clear that an injury requires more than a fortuitous, incidental, or ‘but for’ causal connection, but does not require proximate causation. As *Bradley* states, ‘almost any causal connection will do.’ Nothing suggests that these two standards are in opposition or cannot be applied together. They logically build on one another and stand for the same basic proposition. Taken together, they mean that evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental, or but for. But it need not be much more; almost any causal connection or relationship will do. The Court in *Bradley* recognized this when it cited both standards to render its decision, just as the Court of Appeals did in this case.”

As a consequence of this unusual procedural history, we have a bifurcated test for medical causation. On one hand, the causal relationship must be “more than merely fortuitous, incidental or but for”. On the other hand, without any explanation as to how it should be interpreted and applied, we have been further instructed that “almost any causal connection will do”. To the extent that Chief Justice Kelly’s concurring comment has substantive implications, the proof requirements imposed on the claimant are minimal to establish a question of fact in response to a motion for summary disposition.

Pulling all of this together, there is now, arguably, a more liberal test for medical causation. Based upon *Scott*, a narrative report from a physician or expert posing almost any theory of causation will necessitate a more thoughtful and comprehensive review by the claims person handling that matter. There will be a greater need for medical review experts to analyze records as to the issue of causation. There will also be more litigation, perhaps by health care providers, to test their theories of causation. All of this will be discussed in greater depth at the firm’s Breakfast Seminar on November 5, 2009 at the Troy Marriott Hotel.

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### **BASICS OF NO-FAULT**

James Borin will be teaching the No-Fault Course at Lawrence Tech University commencing September 1, 2009. Please call Tim Meloche at LTU for additional information and registration. His telephone number is (248)204-4055.



## SAVE THE DATE

Garan Lucow Miller's Annual Golf Outing

The Inn at St. John's, Plymouth, Michigan

September 16, 2009

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## INDY CITY SEMINAR

Mark your calendar for the Firm's Indy City Seminar which will be held in Indianapolis on Thursday, October 22, 2009. **Watch Law Fax for further details.**

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## FALL BREAKFAST SEMINAR

Mark your calendar for the Firm's Fall Breakfast Seminar which will be held at the Troy Marriott Hotel on Thursday November 5, 2009. **Watch Law Fax for further details.**