

# no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

08.08.11

## When Is Experimental Surgery Payable As PIP Benefits? Supreme Court Defines Threshold For “Reasonably Necessary”

By Sidney A. Klingler

In *Krohn v Homeowners Ins Co*, issued July 29, 2011, a four member majority of the Michigan Supreme Court defined a legal threshold for determining if experimental medical procedures are “allowable expenses” payable as personal insurance protection benefits under MCL 500.3107(1)(a). In order for such procedures to qualify as “reasonably necessary . . . for an injured person’s care, recovery or rehabilitation,” the Supreme Court said, the insured must present objective and verifiable medical evidence that the procedure is efficacious.

The Plaintiff in this case, Mr. Krohn, suffered a severe spinal injury that resulted in paraplegia. He chose to undergo an experimental surgery performed in Portugal, in which olfactory stem cells are transplanted from the injured person’s sinus area into the site of the spinal injury. The procedure is sanctioned in Portugal for research purposes, but it is not approved by the FDA and cannot legally be performed in the United States. Plaintiff testified that he saw improvement immediately after the procedure, including improved urinary and bowel control, and an ability to sometimes move his legs and crawl.

Plaintiff’s no fault carrier declined to pay for the experimental procedure, and Plaintiff filed suit for the benefits. The Supreme Court held that judgment for the insurer was required as a matter of law because Plaintiff did not present evidence “that the experimental surgical procedure . . . presented him with an objectively verifiable chance that it would be efficacious in his care, recovery, or rehabilitation.” Slip op, p 22. Plaintiff therefore failed to satisfy the statutory requirement that an allowable expense be “reasonably necessary . . . for an injured person’s care, recovery, or rehabilitation.” MCL 500.3107(1)(a).

Whether a procedure is “reasonably necessary” so as to be an allowable expense payable as PIP benefits must be assessed by an objective rather than a subjective standard, the Supreme Court stated. Furthermore, the Court held, an experimental surgery cannot be “reasonably necessary” unless it “may result in care, recovery or rehabilitation;” that is, unless the procedure is efficacious. The efficaciousness of the surgical procedure “must be based on objective and verifiable medical evidence.” Thus, “if a surgical procedure is experimental, an insured cannot establish its reasonable necessity under MCL 500.3107 unless expert testimony indicates that the surgery presents a reasonable chance that it will be efficacious in the injured person’s care, recovery, or rehabilitation.”

### SECRET WARDLE NOTES:

In order for an experimental surgery to qualify as an allowable expense payable as PIP benefits, an insured must present objective and verifiable medical evidence showing that the surgery “presents a reasonable chance that it will be efficacious in the injured person’s care, recovery, or rehabilitation.” This rule only addresses experimental procedures, and does not apply to “services generally accepted by the medical community for treatment or care of a specific and diagnosed injury” which, subject to rebuttal, are presumed to be reasonably necessary under Section 3107(1)(a).

## CONTINUED...

The insured need not demonstrate that the procedure in question has gained general acceptance in the medical community. The majority in *Krohn* specifically rejected the dissent's suggestion that the majority required "controlled studies subject to peer review or scholarly publications" as objective and verifiable medical evidence. Furthermore, FDA data are not required.

What is required, it is clear, is expert testimony supported by medical evidence of efficacy. A doctor's say-so alone is insufficient. Furthermore, the evidence showing reasonable necessity must pass the test of reliability imposed by MRE 702. If objective and verifiable evidence of efficaciousness is presented, "even if opposed by several witnesses claiming the proposed medical treatment is not efficacious," then the issue of whether an experimental procedure was "reasonably necessary" so as to be an allowable expense is for a jury.

In the *Krohn* case, expert testimony that outcomes for this procedure are not known and that the surgery was an "understandable personal choice" fell short of the minimum threshold for recovery of "reasonably necessary" medical costs for an experimental procedure. The expert testimony of a Portuguese neurologist that the procedure was reasonably necessary for plaintiff if he desired to recover function below the injury site was also inadequate absent "objective evidence establishing efficacy in the first place." In short, the Court stated, Dr. Lima "failed to present medical evidence" to support his theory.

The Supreme Court's decision in *Krohn* is significant because it defines a legal threshold for determining the reasonable necessity of an experimental medical procedure – the plaintiff must present objective and verifiable medical evidence that the procedure is efficacious. If plaintiff meets that threshold, it is for the jury to decide whether, in the particular case, the treatment at issue was reasonably necessary.

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