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Damages Recoverable for Bodily Injury

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I. Overview

§2.1 Bodily injury actions make up a large part of the personal injury jurisprudence in Michigan and other states. The injuries can occur in product liability cases, auto negligence cases, medical malpractice cases, premises liability cases, intentional tort cases, and other types of cases. Damages available for bodily injury include those for both past and future pecuniary losses, including medical expenses, lost wages, or lost earning capacity, and past and future nonpecuniary damages such as pain and suffering, mental anguish, denial of social pleasure, embarrassment, or humiliation. Derivative damages for a family member's loss of the injured person's companionship or consortium or for a parent's loss of his or her child's earning capacity may also be available.

Tort reform legislation beginning in 1986 has had a major impact on the damages awarded for personal injury. Some of this legislation affects the jury's discretion in setting the amount of damages the plaintiff may receive or whether the injured plaintiff may receive damages at all. For example, damages for noneconomic losses in medical malpractice and product liability cases are limited to \$280,000 (adjusted annually) for most injuries and \$500,000 (also adjusted annually) for certain categories of injuries specified in each statute. MCL 600.1483, .2946a. In addition, a plaintiff whose share of the total fault is greater than the

aggregate fault of all other persons who contributed to the death or injury (including nonparties and persons released as the result of a settlement) may not recover noneconomic damages at all. MCL 600.2959.

Other factors also affect the ultimate damages award. For example, adjustments are made for collateral source payments, MCL 600.6303, and for comparative negligence, MCL 600.2959; future damages are reduced to present value, MCL 600.6306(2) (and, for medical malpractice cases arising on or after March 28, 2013, MCL 600.6306a); and future damages exceeding \$250,000 must be satisfied by the purchase of an annuity contract, MCL 600.6307.

Certain types of cases are governed by statutes that specify the types of damages that are available, such as first- and third-party no-fault cases under MCL 500.3101 et seq., dramshop cases under MCL 436.1801, worker's compensation cases under MCL 418.101 et seq., and cases brought under the Michigan Wrongful Death Act, MCL 600.2922.

II. Roles of the Court and the Jury

A. Traditional View

§2.2 The absolute bedrock feature of damages for bodily injury is that damages are awarded by the trier of fact in one single verdict. All past, present, and future damages must be included in the verdict. Thus, a claimant cannot return years later and complain that the damages awarded have turned out to be inadequate.

To determine the damages to be awarded, the trier of fact evaluates the plaintiff's financial, physical, and emotional conditions. Damages for bodily injury include pecuniary damages, such as past and future lost wages or earning capacity, and nonpecuniary damages, such as past and future pain and suffering. If the defendant or defendants can be found liable for these conditions, the trier of fact sets an economic value on the plaintiff's plight and denominates that as its award.

Traditionally, the subject of damages in bodily injury cases has been governed by common law. The general rule is set forth as follows:

The general rule of damages in an action of tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him, provided the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote, contingent, or speculative damages will not be considered in conformity to the general rule above laid down.

Van Keulen & Winchester Lumber Co v Manistee & NE RR Co, 222 Mich 682, 687, 193 NW 289 (1923); *see also Sutter v Biggs*, 377 Mich 80, 86, 139 NW2d 684 (1965).

However, statutory inroads have been made on the once traditional common-law area of damages for bodily injuries. For example, damages in no-fault automobile negligence cases are now governed by the Michigan No-Fault Insurance Act

(No-Fault Act), MCL 500.3101 et seq. Damages may also be available under the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.131. In other cases, damages are still determined under common-law principles, although statutory requirements and limitations may affect the damages award.

B. Effect of Tort Reform; Statutory Considerations

§2.3 Traditionally, the finder of fact has a large degree of discretion in setting the amount and the format of its award for damages for bodily injuries. However, statutory changes have been made in this area. Certain provisions contained in several rounds of tort reform legislation beginning in 1986 limit the fact finder's discretion.

In the past, verdicts could be awarded in one lump sum for all categories of damages. Now, MCL 600.6305 requires the trier of fact to allocate damages into categories: past economic damages, past noneconomic damages, future economic damages, future medical damages, and future noneconomic damages. MCL 600.6306(1) requires the court to order judgments in a form that separates out the various aspects of damages. MCL 600.6306(2) requires that the future damages be reduced to gross present cash value. MCL 600.6306(3) establishes reductions for the plaintiff's comparative fault. In addition, MCL 600.6307 mandates that certain future damages in excess of \$250,000 must be covered by the purchase of an annuity contract, and MCL 600.6309 allows this to be accomplished through a qualified assignment to an annuity company for periodic payments. Note that MCL 600.6306a describes the order in which a judgment in favor of a plaintiff in a medical malpractice case must be entered for causes of action arising on or after March 28, 2013.

In product liability cases, damages for noneconomic loss are limited to \$500,000 (\$786,000 in 2014) for death or permanent loss of a vital bodily function and \$280,000 (\$440,200 in 2014) for all other injuries, with the cap adjusted annually by the state treasurer. MCL 600.2946a. The Department of Treasury's notice of damages caps for noneconomic loss in product liability actions, adjusted for changes in the consumer price index, can be found online at http://www.michigan.gov/documents/noncolimit101_3658_7.pdf. The verdict is subject to the cap value in effect at the time judgment is entered, as opposed to the day the jury rendered its verdict. *Wessels v Garden Way, Inc*, 263 Mich App 642, 689 NW2d 526 (2004). The caps were found constitutional in *Kenkel v Stanley Works*, 256 Mich App 548, 665 NW2d 490 (2003). See also *Wessels*. The trier of fact must separate damages into economic and noneconomic loss, but the jury may not be told of the limitations on noneconomic loss. Damages awarded to the spouse of the main plaintiff for loss of consortium are to be included within the capped noneconomic losses. *Wessels*. The limitations do not apply when there is gross negligence or the manufacturer or seller willfully disregards actual knowledge of a defect. MCL 600.2946a(3), .2949a; *Rodriguez v ASE Indus*, 275 Mich App 8, 738 NW2d 238 (2007).

In medical malpractice cases, damages are now capped by MCL 600.1483. The cap covers the total noneconomic loss recoverable by *all* plaintiffs resulting

from the medical malpractice of *all* defendants. In most cases, the maximum award for noneconomic damages will be \$280,000, with the cap adjusted annually (\$462,400 in 2014). However, if the plaintiff suffers paralysis from brain or spinal injury, has permanently impaired cognitive function, or has lost the ability to procreate due to permanent damage to or loss of a reproductive organ, he or she may recover up to \$500,000 for noneconomic loss, with this cap also adjusted annually (\$786,000 in 2014). MCL 600.1483(1). The caps, as adjusted, can be found on the Department of Treasury's website: http://www.michigan.gov/documents/noncolimit101_3658_7.pdf The cap statute has been held to operate prospectively only, from the amendment's effective date (April 1, 1994). *Tobin v Providence Hosp*, 244 Mich App 626, 624 NW2d 548 (2001). MCL 600.1483(3) provides that "noneconomic loss" under the section means damages or loss due to "pain, suffering, inconvenience, physical impairment or physical disfigurement, loss of society and companionship, whether claimed under section 2922 or otherwise, loss of consortium, or other noneconomic loss."

The medical malpractice damages cap applies to a wrongful death action based on an underlying claim of medical malpractice. *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 685 NW2d 275 (2004); *Jenkins v Patel*, 471 Mich 158, 684 NW2d 346 (2004). In *Shinholster*, the court also held that the higher medical malpractice noneconomic damages cap of section 1483 applies where the injured person, at any time before his death and as a result of a defendant's negligent conduct, fits within the ambit of MCL 600.1483(1)(a), (b), or (c). The court rejected defendant's argument that the higher cap applies only if the injured person continues to suffer one of the enumerated conditions *at the time of judgment*. See also *Young v Nandi*, 276 Mich App 67, 740 NW2d 508 (2007) (higher noneconomic damages cap applies if injured party suffered qualifying injury before death; however, plaintiff failed to present persuasive evidence that decedent suffered permanently impaired cognitive capacity before she died), *vacated in part on other grounds*, 482 Mich 1007, 759 NW2d 351 (2008), *clarified*, 483 Mich 880, 759 NW2d 400 (2009), *rev'd and remanded in part on other grounds*, 490 Mich 889, 804 NW2d 366 (2011). See also *Shivers v Schmiede*, 285 Mich App 636, 776 NW2d 669 (2009), in which the court upheld the trial court's application of the higher damages cap where plaintiff was diagnosed with central cord syndrome (caused by trauma during bladder removal surgery) that resulted in the loss of "functional" use of both of his arms. The court noted that, while plaintiff was able to use a walker and feed himself some foods with a plastic spoon, his arms were no longer functional in the way normal arms are. *Id.*

As previously noted, the damages cap is adjusted upward annually based on certain factors. In *Velez v Tuma*, 283 Mich App 396, 417, 770 NW2d 89 (2009), *rev'd in part on other grounds*, 492 Mich 1, 821 NW2d 432 (2012), the court of appeals ruled that, since the statutory cap is applied, if at all, at the time judgment is entered, the trial court should apply the adjusted amount in effect as of the time of judgment (rather than the time plaintiff filed his or her complaint).

In *Zdrojewski v Murphy*, 254 Mich App 50, 657 NW2d 721 (2002), the court of appeals held that the noneconomic damages caps in medical malpractice cases were constitutional. Another panel of the court concluded that the *Zdrojewski* case

was incorrectly decided and should be overruled because MCL 600.1483 (non-economic cap statute) violates the right to a trial by jury. The court concluded, however, that it was bound by MCR 7.215(J) to follow *Zdrojewski. Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 668 NW2d 402 (2003). The court of appeals declined to convene a special panel to resolve the conflict between *Wiley* and *Zdrojewski. Wiley v Henry Ford Cottage Hosp*, 257 Mich App 801, 668 NW2d 641 (2003), *appeal denied*, 469 Mich 1012, 678 NW2d 439 (2004). *See also Jenkins v Patel (On Remand)*, 263 Mich App 508, 688 NW2d 543 (2004).

Under MCL 600.2912a, a plaintiff in a medical malpractice action may not recover for loss of opportunity to survive unless the opportunity is greater than 50 percent. Note that a living person may not recover under this theory. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 631 NW2d 686 (2001); *see also Theisen v Knake*, 236 Mich App 249, 599 NW2d 777 (1999) (plaintiff seeking damages for loss of opportunity to achieve better result must plead that, had malpractice not occurred, patient's outcome would more likely than not have been better). This statutory provision nullifies the supreme court's holding in *Falcon v Memorial Hosp*, 436 Mich 443, 462 NW2d 44 (1990), that the loss of an opportunity to survive is compensable in proportion to the lost opportunity.

In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 655 NW2d 569 (2002), *appeal granted sub nom Fulton v Pontiac Gen Hosp*, 468 Mich 947, 666 NW2d 663, *grant of leave vacated*, 469 Mich 964, 671 NW2d 876 (2003), the court of appeals interpreted MCL 600.2912a to require, in cases involving loss of opportunity to survive or to achieve a better result, that the loss of opportunity exceed 50 percent. The percentage is measured by the difference between the initial opportunity and the opportunity after the alleged malpractice has occurred. In *Fulton*, the decedent's initial opportunity to survive cervical cancer was 85 percent, and her opportunity after defendant's alleged malpractice in failing to diagnose the cancer was 60 to 65 percent. Because the difference in survival opportunity was less than 50 percent, defendant was entitled to a grant of summary disposition. The *Fulton* approach of subtracting plaintiff's opportunity to survive after defendant's alleged malpractice from the initial opportunity to survive without malpractice was criticized in *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 687 NW2d 143 (2004).

In *Stone v Williamson*, 482 Mich 144, 753 NW2d 106 (2008), the supreme court revisited the "lost opportunity" doctrine as stated in *Fulton*. The court issued three opinions. The specific holding was that the *Stone* case itself was not a loss-of-opportunity case, but rather, a case where the alleged malpractice was a proximate cause of plaintiff's injuries—loss of both legs and his left hip. (Six justices concurring in this result.) Nonetheless, the justices further discussed the *Fulton* decision as it would relate to a true loss-of-opportunity case, and although all the justices rejected the *Fulton* approach, because they did so for different reasons *Fulton* remained technically applicable in such cases. However, in *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 791 NW2d 853 (2010), the court held that because *Fulton* incorrectly articulated the burden of proof for proximate cause in a traditional medical malpractice case, it is overruled "to the extent that it has led courts to improperly designate what should be traditional medical malpractice

claims as loss of opportunity claims and has improperly transformed the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause.” The court explained that the court of appeals erred in holding, under *Fulton*, that *O’Neal* constituted a loss-of-opportunity case controlled by the first and second sentences of MCL 600.2912a(2). Rather, the court held that the case involved a claim for traditional medical malpractice and was therefore controlled by only the first sentence of §2912a(2). Further, the court found that plaintiff established a question of fact as to proximate cause because his experts opined that defendants’ negligence was “more probably than not” the proximate cause of his injuries.

In a pre-*O’Neal* case, *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 766 NW2d 896 (2009), the court of appeals, noting its obligation to follow *Fulton*, held that the trial court erred in granting summary disposition on plaintiff’s lost-opportunity claim where conflicting expert interpretations of survival statistics created a question of material fact for the jury. In *Velez*, the court of appeals upheld a jury verdict for plaintiff in what it deemed a “traditional” medical malpractice case alleging that delay in treatment resulted in the amputation of plaintiff’s leg below the knee. The court reasoned that plaintiff was not required to establish causation by proving “a loss of opportunity greater than 50 percentage points” under *Fulton* because hers was not a loss-of-opportunity case, but rather an ordinary malpractice claim alleging actual, physical injury. Thus, plaintiff was required to show only that defendant’s negligence “more probably than not” caused her leg to be amputated.

Another statutory change requires that the fact-finder must determine the percentage of fault of all persons that contributed to the death or injury at issue, including the plaintiff, nonparties, and persons released from liability as the result of a settlement. MCL 600.2957(1); MCL 600.6304(1)(b). Recovery of noneconomic loss is unavailable to a plaintiff whose share of the total fault is greater than the aggregate fault of other persons (whether or not they are parties to the action) who contributed to the injury. MCL 600.2959. Relative fault is also taken into account when the trial court determines whether case evaluation sanctions will be assessed. MCR 2.403(O)(10), citing MCL 600.6304.

C. Judicial Review

§2.4 Outside of areas now governed by statute, the determination of damages in bodily injury cases is still primarily governed by the common law. The extent of a plaintiff’s injuries and impairments is generally deemed a question of fact for the jury. *McMiddleton v Otis Elevator Co*, 139 Mich App 418, 427, 362 NW2d 812 (1984). Similarly, the question of an injury’s permanence is one for the jury. *Clingerman v Bruce*, 11 Mich App 3, 160 NW2d 614 (1968). Actual tangible economic damages are governed by the rules set forth in *Werker v McGrain*, 315 Mich 287, 291, 24 NW2d 111 (1946): “If there is substantial evidence tending to support the verdict it should not be set aside even though [a reviewing court] might be in doubt as to the ultimate facts.”

In *Bennett v Hill*, 342 Mich 754, 764, 71 NW2d 220 (1955), the supreme court cited a similar rule for intangible noneconomic losses given in *Teeter v Pugsley*, 319 Mich 508, 511, 29 NW2d 850 (1947): “The amount allowed for pain and suffering must rest in the sound judgment of the trier of the facts. We do not substitute our judgment on this question unless a verdict has been secured by improper methods, prejudice, or sympathy.”

In *Precopio v Detroit Dep’t of Transp*, 415 Mich 457, 465, 330 NW2d 802 (1982), the supreme court upheld, but recast, the *Bennett* rule as follows:

In reviewing damage awards in cases tried to juries, this Court has asked whether the award shocks the judicial conscience, appears unsupported by the proofs, or seems to be the product of improper methods, passion, caprice, or prejudice; if the amount awarded falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the verdict has not been disturbed.

The standard used in appellate review of bench trial damages awards is the broader “clearly erroneous” standard. *Meek v Department of Transp*, 240 Mich App 105, 121, 610 NW2d 250 (2000). The award may be set aside if the trial court clearly erred, but it may not be set aside merely because the reviewing court would have awarded a different result. In *Precopio*, for example, the supreme court overturned an award made by a judge, sitting as the trier of fact, of \$375,000 for pain and suffering, humiliation, and residual injury to the plaintiff’s right arm. After examining awards made for similar injuries, the court reduced the award to \$132,900. *Id.* at 474–478. The court held that the fact that the award was made by a judge, rather than a jury, gave the supreme court a broader scope of appellate review. *Id.* at 466–467.

It should be noted that even under the broader scope of review allowed in *Precopio*, an award of \$7,491,854 made by a trial judge sitting as the trier of fact was permitted to stand in *Radloff v Michigan (On Remand)*, 136 Mich App 457, 356 NW2d 31 (1984). Compare the opinion of the court in *Peterson v Department of Transp*, 154 Mich App 790, 800–802, 399 NW2d 414 (1986), with the dissent by Judge Bell (*id.* at 804–805). Also compare *Precopio* with *Armstead v Jackson*, 121 Mich App 239, 245, 328 NW2d 541 (1981), and *Belin v Jax Kar Wash No 5, Inc*, 95 Mich App 415, 423–424, 291 NW2d 61 (1980), where remittiturs granted by trial courts in personal injury cases were overturned on appeal and the original verdicts restored pursuant to the *Bennett* rule regarding noneconomic losses.

Even at common law, the trier of fact does not have unbridled discretion in setting damages. The tangible uncontroverted economic damages must be awarded if the fact finder determines the defendant is liable. Thus, in *Ross v Richardson*, 29 Mich App 110, 185 NW2d 106 (1970), the court of appeals held that a jury award of six cents for uncontroverted out-of-pocket expenses for emergency medical treatment obtained by the plaintiff was unsupportable, and a new trial, concerning damages only, was ordered. In *Burtka v Allied Integrated Diagnostic Servs, Inc*, 175 Mich App 777, 438 NW2d 342 (1989), the jury found that the plaintiff was discharged from employment without just cause but failed to award the plaintiff’s uncontroverted economic damages. The court of appeals reversed