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