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INTRODUCTION:
FOUR WAVES OF TORT REFORM IN MICHIGAN

The evolution of tort reform in Michigan is usually thought of as beginning with the statutes passed in 1986, but in truth the movement began 13 years earlier. In 1973, the Michigan legislature passed the No-Fault Insurance Act, which made the first major structural change in the tort system in this state since the adoption of the workers disability compensation system. For accidents “arising from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle”, the Act abolished the right to sue in tort for property damage to the plaintiff’s motor vehicle, for medical expenses related to injuries sustained in the accident, and for work loss sustained for the first three years after the accident, and required that each driver purchase automobile insurance which would cover those losses on a first-party basis without consideration of fault. The Act also limited the right to sue for non-economic damages (pain and suffering, disability, disfigurement, emotional distress, loss of consortium) to those persons who had sustained a “serious impairment of body function” or “serious permanent disfigurement”.

This Act, the first tort reform legislation in Michigan in modern times, was successful in its primary goal: removing the majority of small claims arising from motor vehicle accidents from the courts and handling them as insurance claims under a no-fault system. The no-fault system also established a new insurance-based social welfare system in providing that medical expenses must be paid without limit as to time and amount, so long as they were found to be causally related to the accident.

The impetus for the second wave of tort reform in Michigan in the mid-1980s was the medical liability crisis in this state. Through the late 1970s and early 1980s, the growth of medical professional liability claims had grown to pose a serious hazard to the viability of the health care delivery system in Michigan. The crisis had both a subjective and an objective component. Subjectively, physicians felt beleaguered by a system that they perceived was inherently unfair in allowing lay persons to sit in judgment in claims involving medical decisions made by physicians, aided only by competing expert testimony from persons who were invariably allowed to offer their opinions, regardless of how much they truly knew about the specialty in question. The objective components were much easier to identify and measure: professional liability insurers began fleeing the state, stung by years of mounting losses, and the availability of professional liability coverage became seriously constricted. At the worst point, an obstetrician that one of our authors represented was not able to find coverage for more than $200,000 per occurrence, $600,000 aggregate per year, and for that coverage, with a favorable claims history, his premium was nearly $90,000 per year. Many physicians elected to go without liability coverage, but hospitals (which were exposed to inordinate liabilities as a result, given the rules of joint and several liability) responded by mandating that physicians carry at least $200,000/$600,000 coverage as a condition of staff privileges.

In 1975, a group of Detroit-area physicians organized the Physicians Crisis Committee, for the purpose of advocating for tort reform. The first legislative measure was taken that year with the creation of the Brown-McNeely Insurance Fund, a state-sponsored agency which provided a temporary source of coverage for physicians, given the void in the market left by the departure of several insurers. This fund lasted for five years, and was succeeded by the formation of the Physicians Insurance Company of Michigan.
PICOM, as it was then known, was one of three new mutual insurance companies organized during that time to offer professional liability insurance to health care providers. The two physician-owned and one hospital-owned mutual insurers created during that time are still in business in this state, but it is of no small interest that all three companies were demutualized some years ago.

There were occasional tinkerings with the system during this time, but these are not typically included in the concept of tort reform legislation. A system for voluntary arbitration of medical malpractice claims was adopted in 1975 and repealed in 1993. For a number of years, the Michigan Supreme Court adopted a “sliding scale” set of limits on plaintiff’s contingency fees in medical malpractice claims, but those limits were likewise lifted, although a cap of 1/3 remains.

One of the early efforts of the mutual companies in the 1980s – and of professional groups such as the Michigan State Medical Society and the Michigan Hospital Association – was to continue to lobby for legislative tort reform. In September 1985, Gov. James Blanchard asked former University of Michigan President Robben W. Fleming to undertake a study of the medical liability system and to formulate a series of recommendations on new legislation to reform and improve the system. Fleming’s report was rather quickly submitted in December 1985, and many of his recommendations formed the basis of new reform legislation passed the following year.

The legislation was introduced and ultimately passed as Public Act 178 (1986) – the second wave of Michigan tort reform. This statute made a number of changes for general tort claims, others specifically for medical liability cases, and a few for other discrete areas, most notably dram shop claims. Interestingly, a couple of Fleming’s positive and negative recommendations were not adopted. For instance, he recommended against a cap on non-economic damages, and he urged the creation of a Medical Liability Fund to provide excess insurance to physicians and to handle “long-tail” malpractice claims by minors.

**Highlights – 1986 statute**

The most significant changes to medical liability cases were:

- A requirement that a complaint be supported by an affidavit from a physician attesting that the case has merit. As an alternative, the plaintiff could file a $2,000 bond to secure the costs of the defense in the event that the claim was found to be without merit.
- Provisions for an “affidavit of non-involvement”
- Limits on non-economic damages, subject to a series of exceptions
- Limits on the statute of limitations in cases involving minors
- Limits on the qualifications of expert witnesses on standard of care issues
- Providing for special mediation panels, with participating health care providers

The changes effectuated for all tort claims included:

- Changes to the rules governing venue
- Abolition of the collateral source rule
• Modification of the rule of joint and several liability if the plaintiff is found to be at fault, except in product liability claims
• Provisions for the enforcement of statutory and contractual liens on awards
• Prohibiting the award of prejudgment interest for future damages
• Providing for the reduction of future damages to present value
• Modification of the forms of verdicts (to accomplish the last two listed items)
• Requiring pretrial mediation of all cases
• Adding sanctions similar to mediation sanctions to the offer of judgment rule
• Providing that awards of future damages over $250,000 must be paid on a periodic basis, unless the plaintiff is more than 60 years old

The changes applicable to dram shop cases included:

• A bar to recovery by the family members of the alleged intoxicated person in death cases
• A new notice requirement
• A presumption against liability if the licensee shows compliance with “responsible business practices”
• A presumption against liability of all licensees other than the last to serve the alleged intoxicated person

Highlights – 1993 statute

Several years of experience with these changes led to some fine-tuning and some substantial changes in Public Act 78 (1993), effective in April 1994 – the third wave of tort reform. Most but not all of these new provisions dealt with medical malpractice claims. Among the most significant changes were:

• A significant tightening of the affidavit of merit requirement, and abolition of the bond alternative
• A significant tightening of the qualifications of experts
• Modifications to the limits on non-economic damages, with creation of a two-tier system and abolition of the exceptions

Finally, in 1995, the final series of reforms was passed under Public Acts 161 and 249 (1995), effective March 1996 – the fourth wave. Unlike the previous two legislative changes, this one left medical malpractice almost completely unaffected. The primary purpose of the 1996 changes was to add a number of reforms and limits to product liability claims – including a cap on noneconomic damages – and to effectuate a simply-stated but very monumental change in the no-fault automobile insurance law by returning the power to decide issues of serious impairment to the court rather than leaving it to the jury.
**Highlights – 1995 statutes**

As noted above, the sole change in the no-fault law was of crucial importance. The definition of serious impairment of body function was modified somewhat, and the former rule that the determination of whether a particular injury met the threshold must be decided by the court rather than by the jury was restored.

The primary changes made to product liability cases were:

- Compliance with Federal regulatory standards represents a defense to the claim
- The failure to comply with a statute or regulation, however, does not raise a presumption of negligence
- The “state of the art” and “sophisticated user” defenses were adopted and codified
- A plaintiff who knowingly exposes himself to an unreasonable risk of injury may not assert a claim
- Claims against sellers and distributors were seriously limited

The changes made to all cases except medical malpractice cases included:

- Fine-tuning of the changes to the venue rules
- Complete abolition of the rule of joint and several liability, except in certain cases involving alcohol-related offenses
- Permitting the defense to reduce liability to the plaintiff by a percentage of fault attributable to non-parties to the case
- Barring claims for noneconomic damages if the plaintiff is found to be more than 50% at fault for the incident

The primary changes made to all cases of all kinds were:

- The adoption of a new section 2955 of the Revised Judicature Act, a Michigan codification of the Daubert gatekeeper standard adopted in Federal courts. This section now imposes an obligation on the trial court to review expert opinions and their bases for indicia of reliability before the expert is permitted to testify.
- A new provision barring any recovery of any damages by a plaintiff found to be 50% or more at fault for the accident in question as a result of intoxication or use of a controlled substance.

Minor reform efforts have continued since 1995. Every year sees the introduction of new proposals to further limit or restrict such things as the qualifications of expert witnesses or the recovery of damages. At the end of 2012, several new bills were enacted into law, making some fine-tuning modifications to some of the tort reform provisions. Those changes are noted where applicable.
What has been the overall effect of tort reform? It has been a success in reducing the number of claims, and in some discrete areas, such as product liability, it has drastically reduced the number of filings. The limits on non-economic damages have changed the field of battle. The plaintiff’s bar has gotten very adept at using various means to focus attention on and magnify the economic damages component of catastrophic injury claims. It is now a regular feature of big-ticket cases to have testimony from “Life Care Planners”, usually vocational rehabilitation types who have devised slick methodologies to gather and present various items of medical, psychological, and rehabilitation intervention that are claimed to be needed by the injured person to manage his future well-being.

Passing legislation is only half of the equation. Laws which make such broad and deep changes in the compensation system run the risk of being declared unconstitutional by the courts. Our neighboring states of Illinois and Ohio have also passed tort reform statutes in the 1990s, but key provisions of those laws have been invalidated by the courts in those states.

In Michigan, the damages caps have been upheld by the Supreme Court and by the Court of Appeals, and by the Federal courts. (See Section 1 - Caps on Non-Economic Damages for more information.) The limits on the qualifications of expert witnesses testifying on standard of care issues in medical malpractice cases were held proper in *McDougall v Schanz*, 461 Mich 15 (1999), against a challenge that the statute impermissibly infringed the authority of the Supreme Court to prescribe rules for the governance of litigation.

In addition, new statutes often require interpretation. The courts also shape the contours of the statutes by interpreting and applying their provisions. Every new statute provides its own wrinkles, and presents uncertainties and ambiguities as well as conflicts with other statutes or with common law principles. These ultimately have to be ruled on by the courts. We have seen, over the years, how statutory systems can be strengthened or weakened by the courts as they interpret the wording of statutes, and they have restricted or even at times wholly nullified certain statutory provisions in the name of "interpretation".

This manual includes references to most if not all appellate court decisions applying the tort reform statutes. Some of the Court of Appeals cases are unpublished, which means that they do not have precedential effect and thus are not binding on lower courts. These unpublished cases can nonetheless offer some persuasive authority to a trial court in considering the same issue.

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1 - CAPS ON NON-ECONOMIC DAMAGES

Statutory section: 600.1483 (medical malpractice) 600.2946a (product liability) 600.6098(1)

Brief description: Limits on non-economic damages

Statutory provisions: These limits were adopted in 1986 and 1993 for medical malpractice cases and in 1995 for product liability cases.

A two-tiered system is established. The initial limits were:
- $280,000 for most cases
- $500,000 for cases involving enhanced injuries

Both limits are increased yearly to account for inflation. The State Treasurer will certify the annual increases. The limits as of 2012 were:
- $424,800 for most cases
- $756,500 for cases involving enhanced injuries

The enhanced injuries justifying the higher cap in medical malpractice cases are:
- total loss of at least one limb caused by brain or spinal cord injury
- permanently impaired cognitive capacity with serious life limitations
- damage to reproductive organ resulting in inability to procreate

The enhanced injuries justifying the higher cap in product liability cases are:
- death
- permanent loss of vital body function

There are several exceptions to the product liability cap based on the defendant’s conduct:
- gross negligence (§2946a)
- reckless misconduct (§2949a), or
- conviction of a crime involving gross negligence or intoxication (§6312).

These apply only in product liability cases and only in cases involving more serious injuries, that is, only when the higher tier would otherwise apply.

After the verdict, the court must review the award and make the statutory reductions (§6098(1))

Previous law: The 1986 tort reforms enacted one set of caps for medical malpractice cases only, with a number of exceptions. The exceptions under the 1986 statute were invoked by the same factors used currently for the higher cap in product liability cases, death or loss of a “vital body function”, plus several others:
- intentional act
- a foreign object left in the body
- injury involving a reproductive organ
- fraudulent concealment
- wrongful removal of limb or organ

If one of these exceptions applied, non-economic damages were unlimited.

Under prior law, there were no caps. Damage awards could be reduced only by the judge, on a finding that they were against the great weight of the evidence.
Commentary: Since the adoption of the caps on non-economic damages, the plaintiff’s bar has gotten very adept at proving and maximizing economic damages, for which there is no cap.

Under §6304(5) and §2946a(2), the jury is not informed of the caps.

Complications: The omission of any mention of death under the 1993 medical malpractice statute seemed to leave open the issue of whether a cap would apply and, if so, which one. As noted below, the cases have now established that the cap applies, and at the lower tier.

What is a “vital body function”? We always take the position that it is the function of a body organ needed for survival. But see the decision in Lewis, noted below.

The consideration of the cap and how it applies to a multi-defendant claim may be complicated if the defendants are sued separately. This would militate in favor of consolidation of any such claims, wherever possible.

Legislative change: Cases including Velez v Tuma, discussed below, had to determine the priority of the steps to be taken by the trial court. Does it reduce non-economic damages to the maximum and then apply comparative negligence? Does it allocate the limits between damages to date and future damages? Since prejudgment interest applies only to an award of past damages, that can make a big difference.

At the end of 2012, for causes of action based on medical malpractice accruing after March 31, 2013, those questions were answered by the enactment of a new section 6306a. It provides that the court is to calculate the ratio of past to future damages and then make reductions based on the damages caps proportionally.

The 2012 legislation also amended section 1483 to add loss of society and companionship and loss of consortium to the definition of “noneconomic loss” under subsection (3). Senate Bill 1115, as originally introduced, included “loss of household or other services.” That phrase was removed when the bill was passed in the Senate.

The order of the Michigan Supreme Court in the 2009 Thorn case, discussed below, included a dissent from Justices Young, Corrigan, and Markman, who would have interpreted these as noneconomic losses, subject to the cap, since they are considered to be “loss of consortium” claims.

Cases applying:

Velez v Tuma,
283 Mich App 396; 770 NW2d 89 (2009)
489 Mich 956; 798 NW2d 512 (2012)

Court of Appeals: The cap should not be apportioned. Section 6306 calls for the court to enter a judgment on past non-economic damages before a judgment on future non-economic damages. Thus the past non-economic damages should be reduced first.

Supreme Court: The common law setoff still applies. The proper order: apply cap, reduce for collateral sources, then apply settlement.
(See the “Legislative change” section above.)
Applicable cap is the amount on the date of judgment, not the date of verdict.
Reduce future non-economic before past non-economic.

1. The higher cap applied to a plaintiff who sustained significant neurologic deficits in both arms. This qualified as "paraplegia". In light of apparent inconsistency in the language of this section, the best interpretation is that two things must be shown: hemiplegia, paraplegia, or quadriplegia and a resulting loss of function in one or more limbs.

2. The cap cannot be apportioned between past and future non-economic damages. (The Court would conclude that future non-economic damages should be reduced first, following a dissent in Dawe v Dr. Reuvan Bar-Levay & Associates, P.C., 279 Mich App 552, 598, 761 NW2d 318 (2008), an analysis that the court found "compelling" although not binding because the majority did not reach the issue. But it upheld the trial court, in light of Velez.)

Erectile dysfunction caused by damage to lumbar nerves is not permanent damage to a reproductive organ resulting in an inability to procreate, and the lower cap applied. The damage occurred to the lumbar nerves, not to the reproductive organ, and there was no medical evidence to establish an inability to procreate.

Claims by children of decedent in wrongful death case for loss of mother's household services are economic claims and not subject to the cap. Leave denied by the Michigan Supreme Court, with three justices dissenting, on the argument that personal services should be regarded as non-economic and thus subject to the cap.

Initial ruling – The court accepted the Shinholster ruling applying the higher cap to a wrongful death case, accepting it as persuasive even if the defendant was correct that it was not binding as a plurality ruling. Nonetheless, the Court found that the plaintiff had not established that the decedent suffered from an injury that met the criteria for the higher cap (permanently incapable of making independent, responsible life decisions) before his death, and thus ruled that the lower cap must apply.

On remand – 1. The trial court should have applied the 2005 cap which was in effect when the judgment was entered. It erred in using the 2009 cap.

2. The court does not consider the cap on damages in determining the applicability of an award of costs under the case evaluation rule.
Supreme Court – reversed ruling granting attorney fees for post-trial work after appeals under the case evaluation rule.

*Smith v. Botsford Hospital*
419 F.3d 513 (6th Cir. 2005)

Caps on damages in medical malpractice cases do not violate the Federal constitution, either the 7th Amendment right to a jury trial or the equal protection clause of the 14th.

*Jenkins v Patel, M.D.,*

First: The caps on damages enacted in 1993 for medical malpractice cases do not apply to wrongful death claims. The definition of damages in the statute does not encompass the claims for loss of society and companionship that characterize wrongful death claims.

Supreme Court: The caps on damages apply to wrongful death claims which are based on medical malpractice, and the lower cap applies because death is not specified as an injury justifying the higher cap. Constitutionality not addressed.

On remand, the caps were found to be constitutional. (*Phillips* cited.)

*Phillips v. Mirac, Inc.,*

The $20,000 limit on liability of a rental car agency under the motor vehicle owner's liability statute is constitutional and does not violate the constitutional guarantee to trial by jury. (See Commentary, above.)

*Wessels v Garden Way, Inc.,*

1) The cap which applies on the date of the judgment, not the date of the verdict, is the one that applies. Strategy for the defendant: enter judgment quickly if January 1 is coming up.

2) Caps on product liability claims upheld as constitutional. (*Phillips* cited)

*Shinholster v Annapolis Hospital,*

Court of Appeals

1) The higher tier of caps applies to wrongful death claim when the plaintiff was in a coma for several months and thus met the "permanently impaired cognitive capacity" criteria before death. Implied: the higher tier would not otherwise apply. (Upheld on appeal)

2) The court is to reduce the gross verdict to account for comparative negligence before applying the damages caps. (This issue was not appealed.)

Supreme Court

1) The caps on damages apply to wrongful death claims which are based on medical malpractice.

2) The higher tier of caps applies to wrongful death claim when the plaintiff was in a coma for several months and thus met the "permanently impaired cognitive capacity" criteria before death.

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Wiley v Henry Ford Cottage Hospital,  

Caps on medical malpractice claims would be overturned as unconstitutional, but for the decision in Zdrojewski, noted below.

Kenkel v Stanley Works,  
256 Mich App 548; 665 NW2d 490 (2003),  
Iv den 469 Mich 1008; 674 NW2d 382 (2004) 

Caps on product liability claims upheld as constitutional.

Zdrojewski v Murphy,  

Caps on medical malpractice claims upheld as constitutional.

Lewis v. Krogol,  

Accepted a broader definition of "vital body function", construing "vital" as "important to life". The injury was permanent spinal nerve damage and inability to walk. The higher cap applied in this medical malpractice case.

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### 2 - FUTURE DAMAGES

| Statutory section: | MCL 600.6306 and 6306a  
                      | MCL 600.6307  
                      | MCL 600.6309  
                      | MCL 600.6455(2) |
|-------------------|---------------------------------|
| Brief description: | Restricts awards for future damages |
| Statutory provisions: | Future damages awards are to be reduced to present value, using an interest rate of 5% per year, compounded annually. §6306  
                          | If total future damages exceed $250,000, the court shall order that they be paid under an annuity. §6307  
                          | The parties may agree, instead, to payments under a structured payment plan. §6309  
                          | The reduction and the provisions for annuities or structured payments do not apply if the plaintiff is over age 60. §6311 |
| Previous law:     | Future damages were lumped in with general damages, with no special rules or calculations. The jury was given instructions to reduce the award of future damages to present value, using an instruction that no jury ever understood. |
| Commentary:       | The reduction to present value is better done by the court than by the jury; see the comments under “Forms of Verdict”. |
| Complications:    | The statute gives no guidance as to whether the reduction to present value is to be done using simple interest or compound interest. The difference in large value cases can be quite significant. |
Section 6307 provides that awards of future damages over $250,000 shall be paid under an annuity, using the interest rate specified “under §6013(5) or §6452(5)”. Subsection (5) under §6013 is now subsection (6), but §6307 was not amended to correct the reference. The current §6013(5) provides for an interest rate of 12% for actions on a written instrument, where a higher rate is not specified. This is clearly a drafting error.

Public Act 608, passed at the end of 2012, modified the reduction to present value language of §6306 to provide that the reduction is compounded annually. This overrules the 1997 decision in Nation, finding that the reduction is based on simple interest.

The same Act carved out medical malpractice cases from section 6306 and added a new section 6306a for those claims. The new section specifies that the reduction based on caps on damages will be done before other modifications, and that the application of the caps and the reduction to present value will be done proportionally between past and future damages. This eliminates the claims, accepted by some courts, that the caps should apply preferentially to future damages, to allow the maximum award of prejudgment interest.

**Cases applying:**

*Hall ex rel Wade v Henry Ford Hospital,*
Court of Appeals (unpub 2005)

Upheld verdict in a case in which an expert was allowed to inform the jury that the court would reduce the award of damages to present value. The court did not allow the defendant, in response, to argue the result of investing the net amount, at compounded interest.

The trial court properly applied §6013(6) rather than §6013(5) in reducing the value of the annuity. Upheld, since the alternative of §6455(2) would have produced the same result.

*Hashem v Les Stanford Oldsmobile, Inc.,*
266 Mich App 61; 697 NW2d 558 (2005)

It was not error to permit the plaintiff's economic expert to offer testimony about the effect of inflation on future damages.

*Shinholster v Annapolis Hospital,*

The exception to the reduction to present value rule for those over age 60 applies in a wrongful death case when the decedent was over age 60.

*Setterington v Pontiac General Hospital,*

If the jury is given an instruction to reduce the verdict to present value, the trial court may properly decline to make the reduction in post-verdict proceedings.

454 Mich 489; 563 NW2d 233 (1997)

Simple interest rather than compound interest is to be used for the reduction to present value.
# 3 - VERDICT FORMS AND ENTRY OF JUDGMENT

**Statutory section:**
MCL 600.6305  
MCL 600.6098  
MCL 600.6306  
MCL 600.6306a - new after 2013

**Brief description:**
Modifies the form of jury verdicts  
Specifies how judgments are entered

**Statutory provisions:**
The jury must split the verdict into specific elements: past damages and future medical, wage loss, and noneconomic damages. All elements of future damages must be specified on a special verdict form for each year that the damages will accrue. (section 6305)

The court will review the verdict and apply the caps, and determine whether the verdict is insufficient or excessive. (section 6098)

The court will then enter judgment against each defendant for the separate elements of damages, in order:
- Past economic damages, less collateral source payments (see the collateral source item)
- Past noneconomic damage
- Future economic damages, less collateral source payment, reduced to gross present cash value (see the future damages item)
- Future noneconomic damages, reduced to gross present cash value
- Taxable and allowable costs

It will then reduce the judgment amount to account for the percentage of fault attributable by the jury to the plaintiff, allocating that percentage to both past and future damages proportionally. (section 6306)

**2012 update:**
For medical malpractice cases in which the cause of action accrues after March 31, 2013, the new section 6303a also provides for allocation of the caps on noneconomic damages between past and future elements of damages before the reductions for the plaintiff’s negligence and the caps on damages. See the “caps on damages” item for additional information.

**Previous law:**
Although the jury was to include both past and future damages, most verdicts were for lump sum figures unless the jury was given “special questions”.

**Commentary:**
The use of the new verdict forms with specification of the several types of damages is necessary to apply several other provisions: the reduction for collateral damages, the reduction to present value, caps on noneconomic damages, and the prohibition against awards of interest on future damages.

A sample form of verdict, using the yearly specification, is reproduced below.
Complications:

One school of thought suggests that the delineation of future damages by year will leads to amplified verdicts. Another suggests that it will lead to more defense verdicts because juries will not be willing to go through the calculations needed. In practice, we have sometimes seen cases in which juries which have simply made an award of future damages for one year and entered zeros for the rest. (This apparently occurred in Tobin v Providence Hospital, 244 Mich App 626, 624 NW2d 548 (2001)).

SAMPLE VERDICT FORM

**Damages to the Present Date**

7. What is the total amount of plaintiff’s damages to the present date for lost wages, medical expenses, the cost of rehabilitation?

$ ________________________________

8. What is the total amount of plaintiff’s damages to the present date for pain and suffering, scarring and disfigurement, and associated mental and/or emotional distress?

$ ________________________________

**Future Damages**

9. If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur such costs.

Answer:

$ __________ for 2003

$ __________ for 2004

$ __________ for 2005

$ __________ for 2006

$ __________ for 2007

$ __________ for 2008

$ __________ for 2009

$ __________ for 2010

$ __________ for 2011

$ __________ for 2012

$ __________ for 2013

$ __________ for 2014

$ __________ for 2015

$ __________ for 2016

$ __________ for 2017

$ __________ for 2018

$ __________ for 2019
10. If you find that the plaintiff will incur damages for pain and suffering, scarring and disfigurement, and associated mental and/or emotional distress in the future, please give the total amount for each year in which the plaintiff will incur such damages.

Answer:

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</tbody>
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Cases applying

*Velez v Tuma*, 489 Mich 956; 798 NW2d 512 (2012)

The common law setoff still applies in medical malpractice case, where joint and several liability still applies. The proper order of modification: apply damages cap, reduce for collateral sources, then apply the setoff for the settlement.

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4 - COLLATERAL SOURCES

<table>
<thead>
<tr>
<th>Statutory section:</th>
<th>MCL 600.6303</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief description:</td>
<td>Modification of collateral source rule</td>
</tr>
<tr>
<td>Statutory provisions:</td>
<td>After the jury renders its verdict, the court will deduct payments received from a collateral source, but will give the plaintiff a credit for the premiums paid for insurance. This does not apply to benefits to which a lien attaches under a statute or a contract, including workers’ compensation, Medicare, Medicaid, and private health insurance. This section provides for notification of actual or potential lienholders within ten days of a verdict for plaintiff. The lienholder must take steps to exercise its “right of subrogation” within 20 days, or the right is lost.</td>
</tr>
<tr>
<td>Previous law:</td>
<td>Under common law, a payment made by a “collateral source”, such as payment of insurance benefits, disability benefits, and governmental payments could not be used to offset an award of damages.</td>
</tr>
</tbody>
</table>
Commentary: This is one of the most significant of the tort reform provisions. It was first adopted in 1986.

Complications: The statute does not tell us the period of time for which the premium credit is to be applied. If the collateral source in question is disability insurance benefits, does the court credit the plaintiff with the premiums for one quarter? one year? ten years? New York, for instance, specifies that the premiums paid for two years before the claim accrues shall be considered. (Section 4545(a) of the CPLR.)

Cases applying:

*Hall v Bartlett*
Ct App unpub 2011

The award for past medical expenses was not subject to reduction based on the amounts actually paid by the health insurance carrier (following *Zdrojewski*). Plaintiff may recover the full charges, and then has to reimburse the carrier for what it paid.

*Zdrojewski v Murphy,*

The total amount paid by a health insurance carrier is subject to the exception, and thus not deductible from the damages as a collateral source, even if the lien covers only a part of the amount paid.

*Rogers v City of Detroit,*

Plaintiff did not notify lienholders of their rights within ten days after the verdict was rendered, but claimed to have notified them before the trial. The trial court had to discretion to grant them leave to provide notice within ten days after the entry of judgment, and properly did so. Substantial compliance was sufficient. [This decision takes into account the fact that a good amount of time can pass between the jury’s verdict and the entry of judgment, but disregards the fact that the apparent purpose of the early notice requirement is to allow a judgment to incorporate all orders on payment. In the current legal environment, reliance on any “substantial compliance” principle is not advised.]

*Heinz v. Chicago Road Investment Co.,*

*lv den* 567 NW2d 250 (Mich. 1997).

Collateral source provisions upheld: they do not constitute an unconstitutional taking of property and do not violate the equal protection or right to jury trial provisions of the State Constitution.

*Haberkorn v. Chrysler Corp.*

Reversed the trial court’s decision that social security benefits and disability benefits were not a collateral source, deducted from the award, on the basis that they might be discontinued in the future if the plaintiff regained the capacity to work.
For the purposes of the offer of judgment rule, the reduction for collateral sources does not apply in calculating the adjusted verdict. [This ruling would likely also apply to calculations under the case evaluation rule.]

Employee benefits are collateral source benefits which must be deducted from an award before entry of final judgment. But when the plaintiff's wage loss calculations already included a deduction for sick leave payments, the trial court did not err in failing to further reduce the award by those same benefits upon entry of the final judgment.

5 - JOINT AND SEVERAL LIABILITY

Statutory section: MCL 600.2956  
MCL 600.2957  
MCL 600.6304  
MCL 600.6306A(3) - new in 2012  
MCL 600.6312  

Brief description: Abolition of joint and several liability  
Assessment of the fault of non-parties

Statutory provisions

In tort cases, except medical malpractice cases, and subject to other specified exceptions set forth in §6312, the liability of any defendant is several only and not joint. §6304(4) The jury’s verdict must make findings of the percentage of negligence of all persons, including the named defendants, the plaintiff, and any person or entity who contributed to the occurrence, even if he was not named or could not have been named as a party defendant. §6304(1)

This does not change the rule of vicarious liability of an employer for the actions of the employee. §2956

The statute does not include any provision for the defendant to submit a designation of a non-party at fault as notice of his intent to take advantage of §6304(1), although §2957, discussed below, does provide for a period of time during which the non-party may be added as a defendant (despite the expiration of the statute of limitations) after such designation is made. (Proposed language governing a designation was removed before the statute was passed.) This was later remedied by the adoption of MCR 2.112(k), which requires that the defendant claiming that a non-party was at fault must submit the name and address of the party and a brief statement of the basis for believing that he is at fault within 91 days of answering the complaint. A late notice may be made for good cause shown.

The §6304 rules apply only to tort cases for personal injury, property damage, or wrongful death. It does not apply to non-injury cases such as libel and slander, discrimination, and commercial claims.

A person who is designated as a non-party at fault may be added as a defendant within 91 days of the designation, despite the expiration of the statute of limitations, so long as the filing would have been timely if he had been named from the outset. (§2957)
In a case involving a medical malpractice claim (and not just as to medical malpractice defendants), the 1986 reallocation provisions described in the “Previous law” section below still apply. §6304(6). The one exception is that the plaintiff must now be found to be 50% or less at fault in order to recover non-economic damages. See the section on “Comparative Fault” in this manual.

As an exception to the reallocation provisions, no governmental agency is required to pay more than its allocated share. This exception has an exception of its own. It does not apply to governmental hospitals or medical care facilities. §6304(7). This means that the reallocation schema will not apply to the rare case involving both (a) non-hospital governmental agencies sued on other theories and (b) a medical malpractice claim.

These changes are tied to the repeal of MCL 600.6303(3) and MCL 600.2925d(b), both of which provided for the setoff of the consideration paid by a settling defendant from the ultimate jury verdict.

Exceptions: Joint and several liability still applies to –

• Cases including medical malpractice claims, as described above.
• Cases in which the defendant is convicted of a crime involving gross negligence, intoxication, or impairment (§6312)

The effect of settlements in medical malpractice cases – In light of the fact that the two sections relating to setoffs were repealed, and that joint and several liability still applies to cases involving medical malpractice claims, the Markley case discussed below held that the former common-law provisions for setoff were revived. The new §6306A(3), applicable to medical malpractice cases accruing after March 31, 2012, now expressly revives the setoff rule under the statute.

Previous law: The 1986 tort reforms modified the rule of joint and several liability as to medical malpractice claims only, providing that (1) if the plaintiff was negligent, (2) no defendant would be required to pay more than his allocated share as found by the jury unless one or more of the other defendants were uncollectible. The share of any uncollectible defendant would be reallocated to the remaining defendants according to their share. If the plaintiff was not negligent, then the rule of joint and several liability still applied in full, except as to governmental agencies. For them, the limit on reallocation applies even if the plaintiff was not found to be at fault.

Under common law, the liability of all defendants responsible for the same injury was joint and several. The judgment could be collected in full from any of them.

Under common law, the jury could not consider the fault of persons who were not named as parties to the lawsuit. A defendant who paid more than his pro rata share could collect contribution from the others afterwards. The consideration paid by a defendant who settled before trial would be credited against the ultimate verdict as awarded by the jury.

Commentary - the risk of non-collectibility and the burden of loss

This is another of the very significant changes made by the tort reform statutes.

The traditional rules of joint and several liability and these amendments to those rules are all intended to govern the risk of non-collectibility. If a plaintiff secures a judgment against a single defendant and is not able to collect because the defendant has no assets, he is simply out of luck. In a case in which two or more defendants are found liable, under the common-law doctrine of joint and several liability, he would be entitled to collect the entire amount of the judgment from any of the defendants, and the defendants would have to sort out the issues of allocation among themselves.
Thus, the risk of the non-collectibility of one defendant was entirely on the other defendants, and not on the plaintiff.

Under the 1986 statute, applicable to all cases other than product liability, a plaintiff who was found to be at fault to some degree could not recover against a single defendant more than that defendant’s allocated share of the judgment, unless it was determined that another defendant was uncollectible. If so, then the reallocation would take place. (The exception for governmental agencies was included in the 1986 formulation.) This was intended to ensure that the plaintiff would, at least at first, pursue collection of the judgment against each defendant according to that defendant’s level of responsibility, as found by the jury, and imposed on the plaintiff the burden of changing the allocation based on the non-collectibility of a defendant.

The result was that, ultimately, the plaintiff would theoretically still be able to collect his entire judgment, thus avoiding the risk of non-collectibility. A less desirable result was not well appreciated: in order to do so, the plaintiff would have to show that a defendant was non-collectible. For an insured individual against whom a judgment in excess of policy limits was entered, this would require that the plaintiff take affirmative steps to try to recover from the defendant’s personal assets before being able to ask the court to reallocate the liabilities of the remaining defendants.

This procedural twist, which accompanied the 1986 system, still exists for defendants in cases which include medical malpractice claims, most notably hospitals and individual physicians. The interplay between the retained reallocation rule and the changes to the comparative negligence rule means that, in any case involving a medical malpractice claim, the following special rules apply:

- If the plaintiff is without fault, the liability of each defendant is joint and several, and the common-law rule applies in full force. §6304(6)(a)
- If the plaintiff is found to be at fault but his share is 50% or less, the adjustment of the share of any uncollectible defendant will take place, as provided in the 1986 statute, if the plaintiff takes the steps to do so within six months of the entry of judgment. §6304(6)(b). The reallocation applies to all defendants, not just the health care defendants, but does not include any governmental agency. §6304(7).
- If the plaintiff is more than 50% at fault, then he cannot recover non-economic damages (§2959). His recovery of economic damages is reduced by the degree of his assessed negligence. (§6306(3)) The recovery of economic damages is subject to the adjustment as provided in the 1986 statute.

The burden of loss

The 1995 tort reform statutes have also, for the first time, made changes to fundamental tort law governing the burden of loss.

The tort system is intended to provide a way of enforcing the social goal of placing the burden of loss on the person who caused the loss or injury. It is a central premise of our Anglo-American common law system that, if a person caused injury to another person as a result of improper conduct, the victim should not be required to bear the cost, and it should be shifted to the person whose improper conduct caused the injury.

Over the years, of course, some exceptions to this general goal have been carved out. Many of them involve the identification of "protected" persons or entities, onto whom society, acting through its courts and its legislatures, has determined that the shifting of loss should not take place. The protected class has included employers, governmental agencies, and charitable entities.

In addition, the interest in ensuring that claims are made on a timely basis has led to the statutes of limitations, and this provides the law's protection to persons not sued on time.

The practical limits of litigation means that there are persons who simply cannot be named as defendants because they cannot located or identified with the certainty required by the law, or because they have availed themselves of the last refuge offered by the Federal bankruptcy system.
The practical limits of representing plaintiffs has occasionally meant that a responsible person was not named as a party for various reasons personal to the plaintiff, such as a patient who does not want to name his doctor or a tenant who does not want to name his landlord as a defendant.

If the only responsible parties fit one or more of these definitions, then there could be no recovery under tort, and the burden of loss remained on the plaintiff.

If, however, there was a mix of protected and non-protected persons, then the analysis was similar to that involved in the discussion of the "risk of non-collectibility" noted above: the burden of loss fell disproportionately on the non-protected persons who were named as defendants, and not on the plaintiff. The tort system had always been based on the central principle that, assuming that liability is found, and subject to the ability to collect from a viable defendant, all of the loss should fall on the persons who were named as defendants, regardless of whether all of the responsible actors were named as defendants. The unfairness of disproportional liability, it was thought, was the price that the defendant had to pay for his negligence. That disproportional liability was considered preferable to requiring the plaintiff to share that burden.

The 1995 provisions have significantly changed these traditional principles. Now, for the first time, the burden of loss will remain on the plaintiff (except in medical malpractice cases and cases governed under §6312) to the extent that he cannot shift that burden to one or more viable defendants.

**Commentary on the statutes**

A defendant who is severally liable under the 1995 statute is required to pay only his share of the judgment as determined by the jury. The Michigan Court of Appeals has described this as “fair share liability” in recent cases. The plaintiffs in those cases now bear the risk of non-collectability.

Under §6306, all jury verdicts must now make a specific allocation of responsibility among all parties and all persons who contributed to the injury but who are not parties.

The statute as passed does not provide any procedure or time limit for the identification of non-parties at fault. (The language of §2957 does provide for the extension of the statute of limitations for 91 days after the identification of non-parties at fault, but all provisions for identification were deleted from the statute before it passed.) That gap was filled by the adoption of Rule 2.112(k) of the Michigan Court Rules, which requires that the non-party be identified within 91 days of the filing of the defendant’s answer. A late designation may be made for good cause shown.

Section 6304(1)(b) provides that the allocation of fault by the jury include “each person released from liability under section 2925d”. This would make it unnecessary to file a notice as to a party who settles his liability and is dismissed.

The rule permitting a setoff for the negligence of non-parties raises, for the first time, the ability to reduce the verdict on account of the negligence of an actor who is not or who cannot be made a party to the case, such as a defendant who is bankrupt, a defendant who cannot be served, the plaintiff’s employer, a governmental agency immune from liability, a released party, or a party as to whom the statute of limitations has expired. This shifts the risk of uncollectability or immunity from the remaining defendants to the plaintiff.

This change explains the abolition of the setoff rule. Under the new system, a plaintiff who settles with Defendant 1 prior to trial is compromising Defendant 1’s share of the ultimate liability as found by the jury, and the reduction of the verdict against Defendant 2 will be done by the jury, based on the percentage by which Defendant 1 is found to be liable, not by the court using the amount paid by Defendant 1, as was the former practice.
Complications

The abolition of the rules applying a setoff for pretrial settlements creates a problem for any defendant in a case involving a medical malpractice claim. Joint and several liability still applies, but there is no longer any statutory basis for reducing the jury verdict against remaining defendants. See below, however, for a case finding that the setoff would still apply, as a matter of common law.

The 1995 schema, contrary to the long-standing policy of this state to promote pretrial settlements, will make it much more difficult to settle cases early on behalf of one of several defendants, except perhaps for marginally-responsible defendants. Under the previous rules, the setoff approach meant that a plaintiff who settled with one defendant would still theoretically be able to collect the entire amount of his verdict as later found by the jury. Under the new rules, he is considered to be compromising the amount by which the settling defendant will be found responsible by the jury, and he bears the loss if he guesses wrong. The major incentive under the new rules, therefore, will be to keep all defendants in the case and let the jury allocate their liabilities among them.

Given the specific provision under §2956 that the rule of vicarious liability for the actions of an employee is not affected, does this mean that all other common-law vicarious liability rules (such as the responsibility of a general contractor for the actions of a subcontractor under a retained control theory) have been abolished by these provisions? (Note that other vicarious liabilities, such as that of an owner of a motor vehicle, are statutory and presumably will survive.)

The wording of Rule 2.112(k) would seem to permit the addition of the designated person as a party even if the statute of limitations had expired as of the filing of the original case. Since this is a substantive matter, however, we believe that the statute would control over the court rule, avoiding that potential result.

If the 1986 reallocations apply in a case involving a medical malpractice claim, and if one of the defendants is a governmental agency, are the percentages that would otherwise be reallocated to the governmental agency further reallocated to the remaining defendants, or does the plaintiff incur the loss of that percentage of his claim?

If the designated non-party was a subsequent actor rather than one whose actions were concurrent or previous to that of the defendant, can the defendant make the designation and will the jury be permitted to consider his conduct? The answer is probably yes, if there is a single injury at issue. The issue is somewhat more complex if there are a sequence of injuries involved.

If the defendant in an ordinary liability case names a physician as a non-party at fault based on a claim that he was guilty of medical malpractice, does the lawsuit thereby “include a medical malpractice claim” which would reimpose joint and several liability and thereby nullify the effect of the designation? Probably not, since that would result in a legal paradox.

A significant series of cases in the last several years have involved the principle that a person who owes no legal duty to the plaintiff may not be named as a non-party at fault. Plaintiffs often cite these cases in support of a position that a defendant may not name the plaintiff’s employer as a non-party at fault, on the assertion that the employer “owes no duty” of due care to his employee. That was the plaintiff’s assertion in Kopp v Zigich, 268 Mich App 258; 707 NW2d 601 (2005), discussed below. We believe that this is a specious argument. An employer does indeed owe a number of duties to his employees. Indeed, the employer’s duty to maintain a safe workplace was expressly noted by the court in Kopp. The employer may not be sued by the plaintiff because of the immunity conferred under law, not because of the absence of a duty owed to the employee.

Most cases agree with this position. Recent cases that have found that the employer may be named as a non-party at fault:

- Adamczyk v K-Mart Corp, Ct App unpub 2010
- Schmeling v Whitty, Ct App unpub 2011
Cases applying:

_Velez v Tuma_, 489 Mich 956; 798 NW2d 512 (2012)

The common law setoff still applies in medical malpractice case, where joint and several liability still applies.

_Driver v Naini, M.D._
490 Mich 239; 802 NW2d 311 (2011)

When a non-party at fault is designated in a medical malpractice case, the notice of intent must be served upon that party within the two-year statute of limitations. It does not relate back to the original NOI or complaint.

_Alfieri v Bertorelli (on reconsideration),_
295 Mich App 189; 813 NW2d 772 (2012)

Comparative negligence and several liability under section 6304(4) applies to a real estate claim based on failure to test for environmental contaminants. The term "personal injury" is interpreted broadly. It is not limited to bodily injuries.

_Vandonkelaar v. Kid's Kourt, L.L.C._,

Designation of parents as non-parties at fault should not have been allowed, not because they did not owe a duty, but because their alleged negligence involved failure to follow medical instructions after the injury, not the events that led to the initial injury to the child. Since the actions of the parents did not contribute to the initial injury, they cannot be named as non-parties at fault.

(Note: a necessary corollary of this ruling should have been that the defendant could not be held liable for the worsening of the injury caused by the parents' failure to follow instructions regarding physical therapy to the finger.)

This case provides a significant exposition of comparative fault statutes, case law to date and nonparty issues.

_Berkeypile v Westfield Insurance_

These provisions applied to a contract action under uninsured motorists coverage, since liability derives from the tort liability of the uninsured driver. UM coverage will be limited to the proportion of liability found on the part of the uninsured motorist.

The abolition of the common-law setoff rule did not affect the application of the similar setoff provision under the policy, and thus the jury's award of damages will be reduced to account for earlier settlements with insured drivers.

_Zahn v Frankenmuth Mutual Insurance Company_
483 Mich. 34, 764 N.W.2d 207 (2009)

This section does not apply to indemnity actions, which are contractual rather than tort claims.
Romain v Frankenmuth Mutual Insurance Company
483 Mich 18; 762 NW2d 911 (2009)

The Kopp case is overruled and Jones is adopted as to the requirement of proof of duty before a person may be named as a non-party at fault.

Howe v Boucree
483 Mich 907; 762 NW2d 477 (2009)

Even in a medical malpractice case, where joint and several liability still applies, the language of section 6304 requires an allocation of fault by the jury. The defendant properly sought leave to file a late notice after the physician was dismissed. The need to do so did not arise until then.

Kaiser v. Allen
480 Mich 31; 746 NW2d 92 (2008)

These provisions do not apply to cases involving vicarious liability of an owner of a motor vehicle for the negligence of its operator. In those cases, the common-law setoff rule still applies. If the plaintiff has settled with one, plaintiff's recovery against the other will be subject to a setoff in the amount of the settlement.

Snyder v Advantage Health Physicians

When an initial notice of intent had included a treating physician as a notified party, but he was not named as a non-party until later, the court found that the defendant wishing to file the notice had not acted with diligence in investigating whether he was negligent.

Bint v Brock (After Remand)

A designated NNPF may be added as a new party, even though the amendment was made nine years after the accident occurred. Prejudice to the new defendant is not a factor for the court to consider.

Laurel Woods Apts v Roumayah

A contract (lease) may provide for "joint and several" responsibility of tenants. The several liability only rule applies only to tort-based claims.

Snyder v Advantage Health Physicians

The defendant who seeks to file a late notice of non-party fault must establish due diligence in investigating the claim.

Dresser v. Cradle of Hope Adoption Center, Inc.
421 F Supp 2d 1024 (ED Mich 2006)

Parents may be named as negligent non-parties, even though they are immune from liability and even though the pre-tort reform common law principle was that the negligence of the parent cannot be imputed to the child.
Bell v. Ren-Pharm, Inc.

Rejected claim that subsection (6), governing medical malpractice cases, means that each defendant is jointly
and severally only for the proportion of negligence apportioned to the defendants together, and does not include
the proportion allocated to non-parties by the jury. The legislative intent was to continue the previous
provisions, based on common law as amended by statute, for cases involving medical malpractice claims.

Kopp v. Zigich

The plaintiff's employer was a properly named non-party.  (See Romain, above.)

Hashem v Les Stanford Oldsmobile, Inc.,
266 Mich App 61; 697 NW2d 558 (2005)

The owner of a motor vehicle cannot be held jointly and severally liable with the operator under §6312 in a case
in which the operator was intoxicated, since the owner was not guilty of an alcohol-related offense.

Shinholster v Annapolis Hospital

The jury should be permitted to consider the pre-treatment negligence of the plaintiff. It is not proper to prohibit
such inquiry as an offset against the defendant's level of fault.

Veltman v Detroit Edison Co.,

A defendant who did not name a non-party may still argue that that person was the sole proximate cause of the
incident.

John Hancock Financial Services, Inc v Old Kent Bank,
346 F.3d 727 (6th Cir. 2003)

In a case filed under the Uniform Commercial Code, regarding improper negotiation of checks, its provisions
for comparison of fault prevail over those of the RJA.

Markley v Oak Health Care Investors of Coldwater, Inc.

When a party sued in a previous case settled, the defendant in a medical malpractice case should receive a setoff
from the jury's verdict in the amount of the settlement, despite the fact that the statutory setoff provision has
been repealed. The repeal of the statutory system did not affect the common-law setoff right, which remains in
effect. The setoff will apply despite the fact that the two defendants were sued in separate cases.

Salter v Patton,

The jury must allocate responsibility to a non-party, on request, in a medical malpractice case, even though the
rules of joint and several liability still apply. The court should have granted the defendant's motion to make
a late designation as to a settling co-defendant, filed immediately after the settlement.  (But note that the
language of the statute seems to make it unnecessary to make the designation at all.)
Essell v George W Auch Company,
Court of Appeals (unpub 2004)

A claim for express contractual indemnity is not governed by these provisions, even though based on an underlying tort claim for personal injury. Parties can vary the statutory allocation by contract.

Zavsza v. Iafrate,
Court of Appeals (unpub 2003)

A defendant who knows of a non-party at fault but who does not know his name should file a "John Doe" notice.

Miller v Carcone,
Court of Appeals (unpub 2003)

A defendant need not file a notice of non-party fault in order to argue that another person was entirely at fault, since that is a complete defense to the claim. The procedure provided under MCR 2.112(k) applies only to situations in which the defendant seeks a reduction of liability after a finding that he was negligent.

Hill v Sacka,

The statutes does not apply to a dog bite case [MCL 257.381], where liability is imposed without fault. The term "strict liability" in the definition was not intended to apply to liability under the dog bite statute.

Holton v A+ Insurance Associates, Inc.,

In claim against insurance agent for failing to procure fire insurance, the agent may not designate as non-parties at fault the persons who started the fire, since that action was unrelated to the agent's inaction.

Karpanai v Victory,
Court of Appeals (unpub 2002)

When the party filing a notice of non-party fault is subsequently dismissed from the suit (in that case, by way of settlement), the notice continues to be effective and may still be relied upon by the remaining defendants.

Lamp v Reynolds,

The statute covers all types of fault (intentional, wilful & wanton, gross negligence, ordinary negligence, etc.) Labels or degrees of fault no longer relevant - the jury may consider all actions, provided defendant proves the fault is proximate cause of plaintiff's injuries.

Gerling Konzern Allgemeine Versicherungs AG v Lawson,

A party who settles rather than sustain a verdict cannot make a claim for contribution against a non-party; his settlement resolved only his share of the liability. (Citing Kokx.)

Rinke v Potrzebowski,

A driver could name an unidentified driver as a non-party at fault. If the other person cannot be identified by name, he can be identified by the best means possible.
A defendant could not identify a contractor as a non-party at fault after the contractor had secured summary disposition based on the open and obvious doctrine, since that doctrine negates a duty of due care. (See Romain, above.)

The jury MUST allocate fault to all possible tortfeasors whose fault contributed to the same injury or damages without regard to the theories of liability pled. Fault based upon breach of contract, breach of warranty, negligence, gross negligence and professional negligence may all properly be considered and compared by the jury in deciding defendant's relative percentage of fault.

The plaintiff does not have an automatic right to name the new defendants. A motion must still be filed and leave granted. (The Supreme Court's order of 2003 did not disturb this ruling.)

(Note that the language of MCR 2.112(k) – "the court shall allow a later filing" – suggests that the trial court does not have discretion to deny the motion.)

In a civil action arising out of an automobile accident, the fact that one party received a ticket is neither admissible nor dispositive. Defendant’s pretrial motion to bar plaintiff’s noneconomic damages based on plaintiff having received the ticket was properly denied.

After the defendant designates a hospital as non-party at fault, if the plaintiff wishes to name the hospital as a defendant, he must comply with the notice of intent and affidavit of merit requirements, even if he does not believe that the hospital is at fault.

When the defendant did not name non-parties within the 91-day period provided, the parties may not stipulate to waive that limit and allow a late designation and a late invocation of the extension of the statute of limitations.
Kokx v. Bylenga,
241 Mich App 655; 617 NW2d 368 (2000)

There can no longer be any contribution claims against a non-party after the verdict. Any such claims must be presented to and decided by the jury.

Rogers v City of Detroit,

Under the 1986 provisions, the uncollectable amount attributed to a defendant should have been allocated to the city, but limited to the percentage to which the jury assessed its responsibility. The purpose of the limit is to ensure that the same result that would occur if a plaintiff was found to be at fault would apply to a governmental agency even if the plaintiff were not at fault.

Wall v Cherrydale Farms, Inc,

On review of the legislative history, the Legislature clearly intended that fault be allocated to employers otherwise immune from suit, even though such employers cannot be held “liable” to the plaintiff.

6 - INTEREST ON JUDGMENTS

Statutory section: 600.6013

Brief description: Interest on judgments, including pre-judgment interest

Statutory provisions: Interest is added to all judgments in civil actions, calculated from the date of filing the complaint to the date of judgment, and accrues thereafter until the judgment is satisfied.
Interest is not allowed on “future damages” as defined in §6301. Interest is calculated a floating rate, set at one point over the prime rate as certified by the State Treasurer, and adjusted every six months. Interest is compounded.

Previous law: Prejudgment interest was previously collectable by statute at a rate of 12% per year for personal injury claims.

Commentary: The prohibition of prejudgment interest on the elements of the verdict which cover future damages is a common-sense reform. (See the discussion of the Paulitch and Buzzitta cases, below, regarding non-injury claims.)

Legislative change: Since §6013 was amended, it provided that the floating rate of prejudgment interest also applied to costs and awarded attorneys’ fees, if any. Public Act 609 (2012) now provides that, in medical malpractice cases, the interest rate may not be applied to those awards for any period of time before the entry of judgment.

Cases applying:

Velez v Tuma,
489 Mich 956; 798 NW2d 512 (2012)

The common law setoff still applies in medical malpractice case, where joint and several liability still applies. The proper order of modification: apply damages cap, reduce for collateral sources, then apply the setoff for the settlement.
**Ayar v Foodland Distributors**  
472 Mich 713; 698 NW2d 875 (2005),  
reh den 474 Mich 1201; 703 NW2d 188 (2005)

When case evaluation sanctions are awarded, prejudgment interest applies to those sanctions, calculated from the date of the filing of the complaint, not from the date of rejection of the case evaluation figure.

**Paulitch v. Detroit Edison Co.,**  

Interest may still be awarded on future damages in a non-personal-injury case, despite the apparent absurdity of that result, given the fact that the definition of "future damages" under §6013(1) is limited to personal injury claims.

The same result was reached in **Buzzitta v. Larizza Industries, Inc.**, Court of Appeals (unpub 2001).

When leave to appeal was denied, Justice Corrigan wrote a concurrence urging the Legislature to correct this discrepancy.  
641 NW2d 593 (Mich 2002)

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### 7 - CONTRIBUTORY NEGLIGENCE / INTOXICATION

**Statutory section:**  
MCL 500.3135(2)(b)  
MCL 600.2959  
MCL 600.2955a

**Brief description:**  
- No recovery for noneconomic damages for a plaintiff more than 50% at fault  
- Intoxication of the plaintiff bars all recovery of damages

**Statutory provisions:**  
In a case involving claims for personal injury, property damage, or death, if the plaintiff was more than 50% at fault, he may not recover non-economic damages. His fault must be compared to the aggregate of all other actors, not just all other parties. (§600.2959)

The no-fault act was amended to make a similar provision. (§500.3135(2)(b))

If the plaintiff was 50% or more the cause of the accident as the result of intoxication or impairment due to the use of alcohol or drugs, he may not recover any damages. A blood alcohol concentration (BAC) sufficient to trigger a presumption of impaired driving under the criminal statute raises a presumption of impaired ability to function under this section. (§2955a).

*Update – The impairment presumption statute, MCL 257.629a(9), was repealed effective September 30, 2003, in connection with the lowering of the OUIL threshold to a BAC of 0.08%.*

**Previous law:**  
The general rule of contributory negligence assessed on a comparative basis applied; the plaintiff’s intoxication was one factor to be considered. The rule in Michigan was “pure comparative negligence”. Even a plaintiff 95% at fault could recover 5% of his proven damages. This rule was adopted in Michigan in **Placek v City of Sterling Heights**, 405 Mich 638; 275 NW2d 511 (1979).
Prior to Placek, the common law rule of contributory negligence, prohibiting any recovery if the plaintiff was himself negligent, was followed in Michigan. This rule had led to a number of cumbersome doctrines, such as “last clear chance”, in an effort to ameliorate the harshness of the rule.

Commentary:

By contrast to the “pure comparative negligence” standard, the “modified comparative negligence” rule, barring recovery if the plaintiff was more than 50% at fault, applies in some other states. The §2959 rule applies the modified comparative negligence rule to noneconomic damages only, and thus it is a variation of the modified comparative negligence rule. (The companion provision, §500.3135(b)(2), applies to all damages recoverable in tort under the no-fault act, including actual wage loss after three years.)

Note that the §2955a impairment rule is a bar at “50% or more”, while the modified comparative negligence rule under §2959 and §3135(b)(2) is a bar only over 50%. This will make a big difference in cases in which the jury assesses the plaintiff’s level of responsibility precisely at 50%.

The definitions in the statute are important for the analysis of the absolute §2955a defense:

The plaintiff is barred from any recovery if the person on whose injury or death the claim is based “had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury.”

Section 2955a(2)(b) provides:

“Impaired ability to function due to the influence of intoxicating liquor or a controlled substance’ means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual’s senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance.”

It then goes on to provide that a blood alcohol concentration (BAC) that would give rise to a presumption of impaired driving under the Motor Vehicle Code also gives rise to a presumption of impaired ability under §2955a.

Note: The presumption was based on the former provisions of MCL 257.625a, which provided for a presumption of impaired driving given certain BAC levels. That section has been amended and the presumption no longer exists. Section 2955a, however, has not been amended to accommodate this change. It could be argued that there is now no presumption under section 2955a.

The general rule is limited to injury and property damage cases. It would not apply to cases involving discrimination, libel and slander, and other non-injury claims.

Most cases have ruled that the question of whether intoxication is more than 50% the cause of the injury is a factual question. The courts have ruled that it is a matter of law on occasion.
Complications: The statute is silent on the issue of whether the jury is to be informed of the effect of a 50% or over 50% finding. (Compare the specific prohibition against informing the jury of the caps on damages - see section 1.) The Model Civil Jury Instructions, which are drafted by a committee and approved by the Supreme Court, include the information in the instruction and on the jury verdict forms. See M Civ JI 42.01 and 66.01 et seq. This is consistent with the previous practice of informing the jury that its assessment of comparative negligence would be deducted from the amount awarded to the plaintiff.

Cases applying:

Lamphiere v Abraham
Court of Appeals (unpub 2012)

Found that plaintiff was more than 50% at fault as a matter of law – heavily intoxicated

Beebe v Hartman

Intoxication that contributed to the underlying accident is not a bar to a claim for improper treatment in the E.R. after the accident. The alleged malpractice caused a separate and identifiable injury.

Wood v Alighire
Court of Appeals (unpub 2009)

The trial court erred by striking defendants' affirmative defense of intoxication under MCL 600.2955a(1). When "an intoxicated person voluntarily chooses to ride with an intoxicated driver and thereby contributes to his or her own injury, MCL 600.2955a(1) is applicable and the degree of fault attributed to the passenger is a question of fact for the jury."

Biegas v Quickway Carriers, Inc,
573 F.3d 365 (6th Cir 2009)

The trial court improperly granted summary judgment to defendant on the question of whether plaintiff's negligence exceeded 50%. That issue should have been left for determination by the jury.

Williams v Robinson
Court of Appeals (unpub 2009)

Summary disposition for defendant upheld on the 50% rule. Plaintiff had a BAC of .242 & cannabinoid & opiates in his system when he staggered out onto a dark & rainy roadway in front of defendant’s vehicle. There was no evidence that defendant was speeding or otherwise operating her vehicle negligently.

Mallison v Scribner

The plaintiff voluntarily became intoxicated, voluntarily chose to ride with the intoxicated defendant while knowing of the defendant's intoxication, and voluntarily participated in the recreational driving which resulted in the accident. As a matter of law, the plaintiff was more than 50% the cause of the accident.
Sullivan v. Little,
Court of Appeals (unpub 2004)

Even where there were a number of factors strongly indicating plaintiff's negligence, the court erred in ruling that the 50% threshold had been met as a matter of law.

Harbour v Correctional Medical Services, Inc.,

Plaintiff's decedent died from complications of alcohol withdrawal. His intoxication contributing to that "event" should be considered by the jury under this section. As a matter of law, his intoxication was more than 50% the cause of the event.

Aebig v Poole,
Court of Appeals (unpub 2004)

In a particular case, the court can find as a matter of law, concluding that no reasonable juror could find otherwise, that the defendant's actions were not negligent and that the plaintiff's own actions were overwhelmingly the cause of the accident.

Michigan Tooling Ass'n Workers Comp Fund v Farmington Ins Agency, LLC,
Court of Appeals (unpub 2004)

Likewise, the Court can conclude that the actions of the plaintiff were reasonable, as a matter of law, and prohibit the submission of the issue of comparative negligence to the jury.

Piccalo v Nix,
246 Mich App 27; 630 NW2d 900 (2001),
vac'd and rem'd 466 Mich 861; 643 NW2d 233,
on rem 252 Mich App 675; 653 NW2d 447 (2002),

A minor who became intoxicated and chose to ride in a van driven by another intoxicated person was subject the absolute bar, on a jury finding her to have been 53% at fault.

Wysocki v Felt,
248 Mich App 346; 639 NW2d 572 (2001)

The intoxication bar is constitutional.

8 - NOTICE OF INTENT

<table>
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| Brief description: | Notice of intent to file claim - medical malpractice cases |

| Statutory provisions: | A notice of intent to file a claim for medical malpractice must be sent to the anticipated defendant. The complaint may not be filed until 182 days (six months) have elapsed from the filing of the notice. |
The notice must include –

- the factual basis for the claim
- the requirements of the standard of care
- the manner in which the standard was breached
- the action which should have been taken
- the manner in which the breach caused the injury to the plaintiff
- the names of all practitioners receiving the notice

The defendant must provide a response, providing similar information. If he fails to respond, the investigation period is shortened to 154 days.

The period may be shortened to 91 days if the plaintiff seeks to add defendants to an existing lawsuit. Provisions for exchange of information are included.

MCL 600.5856(d) provides that a properly filed notice of intent tolls the running of the statute of limitations during the investigation period.

Amendment: Section 5856, governing the tolling of the statute of limitations by the filing of a civil action, was amended in 2004. The amendment changed subparagraph (a) to provide that tolling would begin when the complaint is filed, so long as it was properly served as provided under the court rules. Subparagraph (c), which referred to the need to place the summons and complaint in the hands of an officer for service, was removed as no longer necessary. Hence the special subparagraph referring to the section 2912b notice period is now 5856(c).

The amendment of that subparagraph, seemingly non-substantive, was held in *Bush v Shabahang* (below) to overrule two previous Supreme Court decisions (*Roberts* and *Boodt*, also below). Now, in light of the amendment, a finding that the NOI was insufficient does not lead to the conclusion that the statute of limitations has expired. The amendment of the NOI effectively "relates back" to the original NOI.

(The inartful language, that the statute is tolled for the number of days remaining, was not substantively changed. The better formulation would be that the statute is tolled for 182 days.)

Court rule: Effective May 1, 2010, the Michigan Supreme Court added MCR 2.112(L)(2), which provides that a challenge to the sufficiency of a notice of intent must be filed by the defendant on or before the date of filing an answer or responsive motion.

Previous law: No provisions

Commentary: The intent of this requirement is to give the defendant and his insurer a period of time within which to informally investigate the case and a chance to negotiate settlement of a meritorious claim before legal expenses are incurred for defense.

Complications: There was an apparent conflict with section 4(1), which provided that the tolling provision does not apply to cases filed before the effective date of the statute, October 1, 1993. The court in *Morrison v. Dickinson* sensibly held that, in light of the mandatory notice period, this provision would not be enforced if it compelled a loss of an otherwise valid claim.
Because the NOI statute states that the filing of the notice tolls the statute of limitations, and because MCL 600.5852 is characterized as a “savings provision” for wrongful death claims and not as a special statute of limitations, the Supreme Court decided in 2004 in the case of *Waltz v. Wyse* that tolling does not apply to the §5852 rule. Since then, a whole series of cases has arisen over the retroactive applicability of the tolling provision and the cases to which the rule announced in *Waltz* should be applied.

In somewhat similar fashion, a series of cases has been presented which address the limits, if any, that should be placed on the Supreme Court’s ruling in *Eggleston v. Bio-Med Laboratories*, allowing the two-year period under §5852 to be restarted when a successor personal representative is named. In December 2012, this issue was laid to rest with an amendment of MCL 600.5852(2), to provide that a successor personal representative has one year after the date of death or incapacity of the original personal representative to file the claims, if that death or incapacity occurred within two years of the decedent’s death.

### Cases applying:

*Driver v Naini, M.D.*
490 Mich 239, 802 NW2d 697 (2011)

After defendant named a non-party, plaintiff filed a new NOI and moved to file an amended complaint. Motion granted. Amended complaint filed 47 days after the NOI was filed, thus noncompliant with the 91-day waiting period. Held: filing the amended complaint did not toll the statute of limitations because of this noncompliance. *Bush* does not apply, and the new NOI does not relate back to the first.

*Hoffman v Barrett*
288 Mich. App. 536, 794 NW 2d 67 (2010),
*vacated and remanded*, 490 Mich 890 (2011),
*on remand*, 295 Mich App 649, 816 NW2d 455 (2012),
*lv den* 493 Mich 925 (2013)

Court of Appeals –
2010 ruling: The NOI was sufficient. It listed details on the standard of care, the manner of breach, and the actions that should have been taken. The fact that it simply stated the conclusion that the death occurred as a proximate result of the breaches, without more, did not render the NOI defective, when read as a whole.

The 2012 ruling did not address NOI issues.

*Swanson v Port Huron Hospital (on remand)*

The NOI was defective, but sufficient under *Bush* to constitute a good-faith attempt to comply with the notice requirements.

*Decker v Rochowiak*

Plaintiff was permitted to file an amended complaint. Defendants argued that new allegations not originally listed in the NOI were untimely. Held: No new NOI needed to be filed. The amendments clarified and made more specific the claims. Distinguished *Gulley-Reaves*.  

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Bush v Shabahang  
484 Mich 156, 772 NW2d 272 (2009)  

In light of amendments to the statute made in 2004, the filing of an NOI as a good-faith effort to comply with the requirement tolls the statute of limitations, even if the NOI is later found to be defective. Roberts and Boodt overruled.

revised 480 Mich, 915, 739 N.W.2d 866 (2007)  
revised 484 Mich 397, 774 NW2d 1 (2009)

A notice to a physician and his P.C. is sufficient as to the P.C., without any language describing the nature of the relationship or the claim of vicarious liability, when the claim against the P.C. is based solely on vicarious liability.

Shember v U of M Medical Ctr,  
280 Mich App 309, 760 NW2d 699 (2008);  

Court of Appeals –  
Notice insufficient. It included broad and general allegations, without specific statements describing the standard of care applicable to individual defendants. Filing a complaint after a defective NOI does not toll the statute of limitations.

Supreme Court –  
Holding regarding tolling vacated as to four individual defendants, and trial court to reconsider in light of Bush.

Lee v Detroit Medical Center  

Failure to report child abuse is a statutory violation (MCL 722.633) and does not involve the exercise of medical judgment. The trial court improperly granted summary disposition for failure to file an NOI.

Ellout v. Detroit Medical Center  

The proper remedy for filing a compliant before the 182 days has run is dismissal without prejudice.

Ligons v Crittenton Hospital  

Although the initial notice of intent failed to specify the manner in which the defendants’ breach of the standard of care had injured the decedent, the plaintiff’s supplemental notice specified the manner of causation, and therefore the trial court properly concluded that the plaintiff’s notice of intent was sufficient.

Esselman v Garden City Hospital  

It is not necessary that there be separate NOIs when there are multiple defendants.
Once the required notice of intent to bring a medical malpractice claim is given, the limitation period is tolled for 182 days even if the alleged negligent health professional or health facility fails to provide a written response and the plaintiff is permitted to commence his medical malpractice action 154 days after he provided notice.

When a new theory of liability is developed in discovery, the complaint may be amended without a new NOI having to be filed.

An NOI which simply says "If the standard of care had been followed, decedent would not have died", is insufficient since it does not specify the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." The NOI was not sufficient to toll the statute of limitations. The later filing of the complaint did not toll the statute, since it was not proper with the filing of an improper notice. (Distinguishing Kirkaldy – see entry under section 9, Affidavit of Merit.)

Conflict panel decision – The successor personal representative has a new two-year period under §5852. Purports to distinguish Verbrugghe.

Holding: §5856(d) does not apply to causes of action arising before 1993. This case arose in 1984, and thus it does not apply. NOTE: there is no §5856(d). The reference is apparently to §5856(c), which tolls the statute of limitations by the filing of a NOI.

The deficiency of the NOI cannot be remedied by a dismissal without prejudice to permit the designation of a substitute PR. Eggleston is distinguished: the failure to file on time in this case was the result of an error by counsel in calculating the proper time. Further, a dismissal without prejudice would have been prejudicial to the defendants. Defendants were entitled to a ruling on the merits that would bar further litigation.
In a conflict panel ruling, held that *Waltz v Wyse* applies retroactively, and equitable tolling cannot be used to avoid that result. In three consecutive orders entered after *Waltz* was decided, the Supreme Court had consistently applied *Waltz* retroactively.

Supreme Court –
Reversed. *Waltz* does not apply to cases filed after the decision in *Omelenchuk* [March 28, 2000] and does not apply to cases where the personal representative was appointed within 182 days after *Waltz* was decided. [decided April 14, 2004, thus October 13, 2004]

(Note: This was an order of the Supreme Court rather than an issued opinion.)


*Newton v. Medina*  
(Court of Appeals 2006 - unpub)

Theories newly raised during discovery, not supported in the NOI and the complaint, are barred under the statute of limitations

*Gawlik v Rengachary*  
270 Mich App 1, 714 NW2d 386 (2006)

Plaintiff's notice contained a one-sentence generalized statement of a standard of care applicable to all defendants, and did not include any specific theory of liability applicable to the defendant neurological practice. Held: notice insufficient.

*Verbrugghe v. Select Specialty Hosp.-Macomb County, Inc.*,  

Under *Waltz*, the appointment of the second PR could not restart the two-year period.

The ruling in this case was not appealed. In 2010, in an unpublished ruling, the Court of Appeals rejected an effort to resurrect this case, filed as a motion for relief from judgment in light of the ruling in *Mullins*. Docket no. 287888 (December 9, 2010). See two other cases cited under *Mullins*.

*Mazumder v University of Michigan*,  

Application of *Waltz v. Wyse* rule should not be retroactive, on an equitable tolling principle.

*Ward v. Siano*,  
270 Mich App 584, 718 NW2d 371 (2006),  
vac'd in part, spec pan gtd 270 Mich App 801 (2006),  

Ward I: Followed *Mazumder*, but disagreed and declared conflict.
Ward II: Conflict panel: The principle of equitable tolling may not be used to avoid the effect of the *Waltz* rule.

*Mayberry v General Orthopedics, P.C.*
474 Mich 1 (2005)

When a first NOI is sent, with more than 182 days left to run on the statute, and is followed by a second NOI, raising new allegations, and sent within the 182 day period, the second NOI tolls the running of the statute. There was no violation of the prohibition against "tacking" tolling periods because only one tolling period applied. (Overruling *Ashby v Byrnes*, below.)

*Burton v Reed City Hospital*,
471 Mich 745 (2005)

A complaint filed before the 182-day waiting period elapsed did not toll the statute of limitations. (cf. *Roberts*, below)

*Roberts v Mecosta County General Hospital*,

A notice of intent that was clearly noncompliant, and did not even reflect a good-faith effort at compliance, did not toll the statute of limitations under the special tolling provision.

*Ousley v McLaren*,

The ruling in *Waltz* applies retroactively.

*Waltz v Wyse*,

The filing of an NOI does not toll the savings provision of MCL 600.5852, the special savings provision allowing for a case to be filed by a personal representative of a decedent's estate, because it expressly applied to statutes of limitations only.

*Halton v Fawcett*,

An NOI filed by a personal representative before she is appointed is effective. The Court accepted the argument that the filing was effective because the same person filed both the NOI and the complaint.


The existence of a stay under the bankruptcy statute does not preclude the filing of a notice of intent. The notice must still be filed to toll the statute, even though the complaint cannot be filed until the stay is lifted.

*Roberts v Mecosta County General Hospital*,
466 Mich 57, 642 NW2d 663 (2002)

The filing of a complaint does not toll the running of the statute of limitations if the notice of intent was not filed "in compliance with all the provisions of §2912b". If the statute of limitations has run, the dismissal will be with prejudice. There is no obligation under the statute to raise the challenge during the investigation period.
Reversing *Roberts v. Mecosta County General Hospital*, 240 Mich App 175, 610 NW2d 285 (2000), which held that the challenge to the notice of intent is waived if not challenged during the investigation period.

*Omelenchuk v. City of Warren*,
461 Mich 567, 609 NW2d 177 (2000)

Even though the plaintiff may file suit within 154 days (28 days earlier than the 182 day period otherwise applicable) if the defendant fails to respond to the notice, the tolling period is 182 days.

The NOI requirements apply to an ambulance service and to the city which owns it.

*Rheaume v. Vandenberg*,

The putative defendant must be identified by name. Designation by description is insufficient.

*Neal v. Oakwood Hospital*,

The proper sanction for failure to comply is dismissal without prejudice to the right to refile. (But see *Roberts* – if the statute of limitations runs in the meantime, the dismissal may be final.) The notice requirement is constitutional and does not violate equal protection guarantees.

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**9 - AFFIDAVIT OF MERIT**

**Statutory section:** MCL 600.2912d  
MCL 600.2912e  
MCR 2.112(L) and 118(D)

**Brief description:** Affidavit of merit; affidavit of meritorious defense

**Statutory provisions:** A complaint for medical malpractice and the position of the defendant must be supported by an affidavit signed by a physician qualified to testify as an expert – see “expert testimony” page. The statute spells out the issues that must be addressed and supported.

**Court rules:** Effective May 2010, the Michigan Supreme Court amended rules 2.112(L)(2) and 2.118(D):

- Any challenge to an affidavit must be files within 63 days of the filing of the affidavit.
- If the affidavit is found to be deficient, the court shall allow it to be amended unless it finds that an amendment is not justified.

**Previous law:** No cognate at common law.

Under the 1986 tort reform statute, either an affidavit or a $2,000 bond had to be filed.

**Commentary:** The purpose is to ensure that there is a reasonable basis to proceed before a complaint is filed.

Note that the requirement as to the defendant is the first time that the law has imposed an affirmative duty on a defendant to establish or substantiate his position.
Complications:
The statute is silent as to the sanction to be applied for failure to comply. See the cases below on the sanction applicable to plaintiffs: dismissal of the claim, without prejudice unless the statute of limitations has run.

No case has addressed the issue of what sanction can apply to a defendant. A default seems too drastic a remedy, particularly in light of the 91-day requirement.

The requirement that the physician executing the affidavit be an expert qualified to testify in the case can be problematic for the plaintiff in a case in which a physician practices in two different specialties, and when it is not quite clear which specialty is involved.

The fact that the statute requires that the Affidavit of Meritorious Defense be filed within 91 days of the filing of the plaintiff’s Affidavit of Merit can create significant time constraints when the defendant is not served right away. Under Rule 2.102(D) of the Michigan Court Rules of 1985, the summons expires 91 days after the filing of the complaint, and may be extended for up to a year after the complaint is filed. Thus, in some cases the defendant’s affidavit could be due before he is even served.

Cases applying:

Kalaj v Khan

It was error to strike an AOM based on the argument that the expert had reviewed "the wrong" diagnostic films.

Hoffman v Barrett
288 Mich. App. 536, 794 NW 2d 67 (2010),
vacated and remanded, 490 Mich 890 (2011),
on remand, 295 Mich App 649, 816 NW2d 455 (2012),
lv den 493 Mich 925 (2013)

Court of Appeals –
2010 ruling: The AOM was signed by a general surgeon. Defendant is a board-certified general surgeon and a board-certified thoracic surgeon. The injuries in question involved some thoracic injuries and some abdominal injuries. AOM found proper.

2012 ruling: Remanded for reconsideration after Ligons II. “We conclude that Ligons II does not apply and again affirm.”

Ligons v Crittenton Hospital
490 Mich. 61, 803 N.W.2d 271 (2011)

Court of Appeals –
The plaintiff's affidavits of merit recited as breaches of the standard of care that the defendants had failed to timely hospitalize the decedent and to obtain appropriate consultations, and that consequently the decedent died, but the affidavits failed to specify how the failures proximately caused the death. Under the circumstances, the affidavits of merit were insufficient.

The filing of a complaint and an affidavit of merit in a medical malpractice action tolls the statutory limitations period until the affidavit is successfully challenged as invalid.
Supreme Court –
Two AOMs filed with the complaint found defective. The statute of limitations had expired before the personal representative was appointed. Under Waltz v Wyse, the filing did not toll the two-year period under 5852, and thus the dismissal should have been with prejudice. *Bush* does not control; it dealt with an NOI, not an AOM. Amendment under MCR 2.118 was not available, since an AOM is not a pleading. (Note that 2.118 was amended in 2010, specifically to allow amendment and relation back. The effective date of the amendment was May 1, 2010. The Court refused to apply it retroactively.)

*Esselman v Garden City Hospital*

Causation is sufficiently supported if examination of the AOM as a whole explains how the malpractice caused the injury.

*Bush v Shabahang*
484 Mich 156; 772 NW2d 272 (2009)

Court of Appeals - Although some parts of the Affidavit were deficient, it was sufficient to toll the statute when read as a whole. As to causation, the Affidavit need not assert that the chances of survival exceeded 51%.

Supreme Court - Affirmed. The defendant's written response was insufficient, and as a consequence the plaintiff was permitted to file the complaint after 154 days had passed.

*King v Reed*
278 Mich App 504; 751 NW2d 525 (2008)

An additional affidavit is not required upon the filing of an amended complaint. Because discovery was not available until after the plaintiff commenced suit, the affidavit of merit was not required to contain information about additional claims of professional negligence which could not have been known to the plaintiff before discovery was taken.

*Jackson v Detroit Medical Center*
278 Mich App 532; 753 NW2d 635 (2008)

A plaintiff is not precluded from offering new theories of liability based upon new information received in the course of pretrial discovery, even though the supporting affidavit filed with the original complaint did not reference the new theory. Under *Kirkaldy*, the statute was tolled while the lawsuit was pending, and the new theory was timely.

*Kirkaldy v. Rim,*
251 Mich App 570; 651 NW2d 80 (2002),
*vac'd in part, rem'd 471 Mich 924; 689 NW2d 228 (2004),
on rem 266 Mich App 626, 702 NW2d 686 (2005)

- First - The proper sanction for initiating the case without a compliant affidavit is dismissal without prejudice. See also *Dorris*. Compare *Roberts* and *Vandenbergen* (on remand).
- On appeal - reversed.
- On remand - Affidavit by a neurosurgeon is insufficient in a case against a neurologist. The statute of limitations has expired, under *Roberts*. The Court respectfully suggests that *Roberts* was wrongly decided and that the Supreme Court revisit the issue.
- Supreme Court: *Mauradian* and *Gerald* overruled. A complaint accompanied by a defective Affidavit of Merit does nonetheless toll the statute of limitations. The proper remedy upon challenge is dismissal.
without prejudice, which will resume the running of the statute and give the plaintiff the chance to refile with a conforming affidavit.

*Note: MCR 2.112 and 2.118 have since been amended, effective May 2010, to provide for relation back of the filing, and to place time limits on a challenge to the sufficiency of the affidavit.*

*Sturgis Bank v. Hillsdale Community Health Center*


A nurse is qualified to execute an AOM which includes opinions on causation issues. If the nurse meets the qualification requirements of section 2169, it is not necessary to include a separate affidavit from a physician or other witness qualified to offer opinions on the causation issue.

*Saffian v Simmons, D.D.S.*

267 Mich App 297; 704 NW2d 722 (2005),

477 Mich 8; 727 NW2d 132 (2007)

The fact that a filing is a nullity under *Scarsella, Roberts, Geralds*, and *Mouradian* does not mean that the defendant is excused from answering the complaint. Entry of default upheld. (cf. *White*, 1998)

*Robins v. Garg, M.D.*


478 Mich 862, 731 NW2d 408 (2007)

276 Mich App 351, 741 NW2d 49 (2007) (on remand)

First case: A family practitioner is qualified to provide an affidavit regarding the standard of care for a general practitioner. The court regarded them as "engaged in the same type of medical practice" for purposes of the statute, and claimed "The terms family practitioner and general practitioner have become interchangeable."

Second: (Supreme Court remands for reconsideration in light of *Woodard*. See discussion under Expert Qualifications.)

On remand: No change in the referenced ruling.

*Barnett v Hidalgo, M.D.*


478 Mich 151; 732 NW2d 472 (2007)

Court of Appeals: It was error to admit the Affidavit of Merit as evidence.

Supreme Court: The Affidavit was properly admitted as the admission of a party opponent. (The affidavits were inconsistent with the experts’ testimony at trial.)

*Brown v. Hayes.*

724 NW 2d 470 (2006)

The AOMD was sufficient when defense counsel reasonably believed the physician was qualified, even if the court later found him unqualified.

*David v. Sternberg, DPM*


A claim that bandages were applied too tight sounds in malpractice, not ordinary negligence. An AOM was required.
Gawlik v. Rengachary.

Entry of default was an improper sanction for defective AOMD. Plaintiffs waived the issue by not raising it in the final pretrial.

475 Mich 403; 716 NW2d 236 (2006)

A defendant who is immune under governmental immunity does not need to file an Affidavit of Meritorious Defense. If the defense is denied, he need not file an Affidavit of Meritorious Defense while an appeal is pending.

Court of Appeals (unpub 2006)

When it was learned that a nurse, not the physician, had attached a cautery plate, the Affidavit of Merit signed by a physician was held insufficient. The claim was untimely. An Affidavit of Merit can be necessary in a case using a *res ipsa loquitur* theory. In this case, expert testimony was still needed. (Case appears to accept the premise that some *res ipsa* cases do not need an Affidavit of Merit because they do not need an expert.)

Hepfinger v. White
Court of Appeals (unpub 2006)

An affidavit signed in Pennsylvania and attaching a "jurat" (notary certification) prepared in Michigan was not filed in compliance with this provision.


Since nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of care.

Ward v. Rooney-Gandy, D.O.
265 Mich App 515; 696 NW2d 64 (2005),

The proper affidavit was prepared but the Complaint was filed, by mistake, with another client's affidavit attached.

Trial court: Complaint dismissed.
Court of Appeals: Dismissal of complaint reversed based on equitable tolling, and relying on Bryant.
Dissent: This was a grossly nonconforming filing. Plaintiff did not raise any equitable basis to excuse his error. He did not raise it on appeal. Defendant has not had a chance to respond.
Supreme Court: Reversed, order of dismissal reinstated for the reasons stated by the dissent.

Wyant v. Norton Shores Medi-Ctr.
Court of Appeals (unpub 2005)

The remedy of dismissal with prejudice after the statute of limitations has run also applies to defective affidavits of merit. (Compare Roberts.)
Apsey v Memorial Hospital,
266 Mich App 666, 702 NW2d 870 (2005),
on reconsideration, 266 Mich App 666; 702 NW2d 870 (2005),
477 Mich. 120, 730 NW 2d 695 (2007)

Court of Appeals:
The provisions of MCL 600.2102, requiring certification of a notary's authority apply to an affidavit of
merit signed outside the state of Michigan. The uniform recognition of acknowledgements act, MCL
565.262, does not change this conclusion. The affidavit must be accompanied by a certification from a court
of competent jurisdiction authenticating the notary's signature and his qualifications. On reconsideration, the
ruling was limited to prospective effect only.

Supreme Court:
Reversed. The Legislature intended that the URAA provide an alternative means of attestation.

VanSickle v Anderson, D.O.,
Court of Appeals (unpub 2005)

Plaintiffs attorney did not reasonably believe that the gynecologist signing the affidavit was qualified as a
witness. Although there may have been some question about the defendant's specialty when the notice of
intent was sent, the defendant's answer to the notice specifically disclosed that he was a general surgeon and
that the applicable standard of care was general surgery. The court rejected plaintiff's claim that the expert's
yellow pages ad (which mentioned surgery) misled his attorney.

DiFalco v Dock,
Court of Appeals (unpub 2004)

Plaintiff's attorney reasonably thought that the expert signing the affidavit was qualified. The actual inquiry
was made by a consultant retained to find an expert. The inquiry need not be made by counsel.

Halloran v Bhan,

A board-certified anesthesiologist with a certificate of added qualification in critical care medicine issued
by the American Board of Anesthesiology was not qualified to testify against a specialist in internal
medicine with a certificate of added qualification in critical care medicine issued by the American Board of
Internal Medicine. The focus is on the specialties of the physicians, not on their subspecialties, and on
board-certification rather than other certificates.

Grossman v Brown,

The plaintiff's attorney had a reasonable belief that the proposed expert was qualified. The filing of the
complaint and the affidavit tolled the statute of limitations, despite a later finding by the court that the
expert was not properly qualified.

Gulley-Reaves v Baciewicz,

An affidavit addressing a claim for "improper performance of surgery" was not sufficient to support a claim
for improper administration of anesthesia.
Geralds v Munson Healthcare,

An attorney did not have a reasonable belief that the proposed expert was board-certified in emergency medicine when he failed to make that inquiry when the expert was consulted.

Mouradian v Goldberg,

A grossly nonconforming affidavit filed a month after the filing of the complaint was not sufficient to toll the statute of limitations.

Giusti v. Mt. Clemens General Hospital,
Court of Appeals (unpub 2003)

A physician who worked only half-time was not qualified to sign the affidavit of merit.

Kyser v Hillsdale Community Health Center,
Court of Appeals (unpub 2003)

Defendant was an internist working in the ER. An affidavit signed by an ER doctor was insufficient under Scarsella. The affidavit also did not establish that the physician spends the majority of his time practicing or teaching in the specialty field in question.


The affidavit as to a hospital must cover the specialty field of the physician whose conduct is at issue.

Young v Sellers,

Affidavit inadvertently omitted from complaint, not delivered to defense until after the statute of limitations ran. Held, not effective to commence action.

Tate v. Detroit Receiving Hosp.,
249 Mich App 212; 642 NW2d 346 (2002)

If the defendant has multiple certifications, the certification in the field at issue controls.

Vandenberg v Vandenberg, (on remand)

Even though the issue was not raised on the first motion, the law of the case doctrine did not prevent the defendant from raising the late filing of the affidavit in connection with the statute of limitations.

Original ruling – see below.

Watts v. Canady,

If the plaintiff's attorney has a reasonable belief that the physician signing the affidavit was qualified, the filing is timely even if the court later finds that he was not (pediatric neurosurgery vs. neurosurgery).
Descenza v Host Marriott, LP,
(ED Mich 2001 - unpub)
(Docket No. 00-71145) (Judge Cohn)

After the defendant designates a hospital as non-party at fault, if the plaintiff wishes to name the hospital as a defendant, he must comply with the notice of intent and affidavit of merit requirements, even if he does not believe that the hospital is at fault.

Eskew v. Sethavaranguru,
Court of Appeals (unpub 2001)

The 28 day extension mentioned in the statute is from the date of filing, not the date the motion is granted.

Kowalski v Fiutowski, M.D.,
247 Mich App 156; 635 NW2d 502 (2001)

Remedy for defendant's failure to file timely affidavit must be determined by the court, considering several factors. Entry of a default is not mandated.

Barlett, et al. v. North Ottawa Community Hospital,
244 Mich App 685; 625 NW2d 470 (2001)

Filing a motion for extension of time does not toll the statute if the motion is not set for hearing and is not granted.

Decker v. Flood,
248 Mich App 75; 638 NW2d 163 (2001)

The statute's generalist vs. specialist rule also applies to dental practitioners.

Holmes v Michigan Capital Medical Center,

Complaint not accompanied by an affidavit of merit did not act to toll the statute of limitations. Affidavit filed five months later did not relate back to the filing of the complaint. A non-notarized affidavit is not in compliance. Dismissal of the case (as in Scarsella, below) will be with prejudice when the statute has expired in the interim.

Wilhelm v Mustafa,

Despite an extreme delay in filing the defendant's Affidavit of Meritorious Defense, the trial court properly denied plaintiff's motion for default, raised for the first time on the first day of trial. The decision on the appropriate sanction for failure to comply is within the court's discretion.

Glancy v. St. Joseph Mercy Hospital,
Court of Appeals (unpub 2000)

A second complaint filed without an affidavit does not toll the running of the statute, even though the first complaint was accompanied by an affidavit.

Steenhagen v Getz,
Court of Appeals (unpub 2000)

A deposition transcript cannot substitute for an affidavit of merit.
Given the affidavit requirement, the filing of a complaint without the affidavit is insufficient to stop the running of the statute of limitations.

The filing of a complaint accompanied by an affidavit later found deficient will stop the running of the limitations period.

Dismissal without prejudice on a motion for summary disposition was appropriate sanction for failure to comply.

The complaint was filed with no affidavit or security (under the 1986 statute). The court improperly refused to set aside the default entered after the defendant failed to answer. (Cf. Saffian, 2005)

When the filing did not include the affidavit but the affidavit was served with the copy of the complaint, the purpose of the affidavit requirement was met and dismissal was not appropriate. (See above for decision on remand.)

Dismissal without prejudice is the proper remedy for failure to comply.

10 - VENUE

Statutory section:
MCL 600.1629
MCL 600.1621
MCL 600.1627
MCL 600.1641

Brief description: Venue provisions – in which county may the case be filed?

Statutory language: In most injury cases, the suit is filed in the county in which “the original injury occurred”.

The determination of proper venue is a complicated one, because the analysis requires a step-by-step consideration of several different non-sequential sections. The special provision for governmental agencies is discussed below, although it has not been amended since the 1960s and thus is not a “tort reform” statute.
§1629 The first analysis for any case seeking damages for injury, property damage, or wrongful death is done under §1629. Under that section, venue is proper if the location where the original injury occurred coincides with any of the following, in descending order:

- the defendant resides or conducts business there, or any corporate defendant has its registered office
- the plaintiff resides or conducts business there, or any corporate plaintiff has its registered office
- a county in which both parties reside or conduct business

§1621 If none of these provisions applies, then the law reverts to the former provisions. There are two competing statutes. Under §1621, venue is proper in the following, in descending order:

- a county in which one of the defendants resides or conducts business (including, in the case of a business, having its “corporate registered office” there)
- a county in which one of the plaintiffs resides or conducts business
- in a case against a fiduciary, the county in which the fiduciary was appointed.

§1627 Under §1627, venue is proper in the location where all or part of the cause of action arose. This section does not apply to actions based on contract.

§1615 There is a special section covering governmental agencies: under §1615, claims against a governmental agency are proper in any county where it exercises its authority; or where the cause of action arose if it is the same as the agency’s principal office. This section takes precedence by virtue of its mention as an exception to §§1621 and 1627.

Sections 1605 and 1611, also mentioned as exceptions under §§1621 and 1627, govern actions based on real property, the return of personal property, or actions on probate bonds.

Special provisions: Section 1629(3) specifies that a defendant in a product liability action is regarded as doing business in any county in which its product is sold at retail.

§1641 Section 1641 states that a case in which more than one “cause of action” is joined is governed by the venue rule applying to any of the causes of action. If one of the claims is a tort claim for personal injury, proper venue is decided under §1629.

Even when venue is proper, the statute explicitly permits a party to request that venue be moved to another county “based on hardship or inconvenience”, §1629(2).

Previous law: The 1995 Act fine-tuned the changes previously made in the 1986 Act.

Prior to 1986, the law permitted a defendant to be sued in any county in which it “conducted business”, under §1621 and 1627. The only limitation was the discretion of the trial court in ordering that the case be moved to another county for the convenience of the parties or witnesses.

Commentary: Because certain counties, most notoriously Wayne County, were known to be more generous in making awards, plaintiffs attorneys filed there whenever possible. “Forum shopping” allows a plaintiff to try to steer a case to a more hospitable location. These provisions restrict the ability of the plaintiff to engage in forum shopping.
The venue statutes do not affect the jurisdiction of the court to hear the case (subject matter jurisdiction), its jurisdiction over a person or company (personal jurisdiction) or the issue of which state’s laws apply to the cause of action (choice of law issues).

This fact means that an error of the trial court will often be properly challenged by means of an interlocutory appeal, since the courts will not be eager to overturn a jury decision based solely on improper venue.

**Complications:**

Multi-defendant cases – If there is more than one defendant, how are these provisions applied? The cases previously stated that if venue is proper as to one defendant, it is proper for all. See the *Massey* case, cited below, for a different rule under §1629.

Injury – In some cases, the identification of where the injury “occurred” can be problematic. If a wrongful act done in one location causes injury in another, the location of the “injury” will control.

What if the presence of one party makes venue proper but that defendant is later added or dismissed? The courts previously ruled that venue is analyzed at the initiation of the case only. *Brown v Hillsdale County Road Commission*, 126 Mich App 72, 76-78; 337 NW2d 318 (1983). The *Colucci* case held that this no longer applies when a party is added in tort cases. The *Brown* rule would likely still apply when a party is dismissed, however.

How shall the language of §1641(2), involving multiple claims, be parsed? It provides the following for cases involving multiple claims:

> “If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in section 1629.”

Does the language mean –

- based on (tort or another legal theory) seeking (damages for personal injury, property damage, or wrongful death)

or

- based on (tort) or (another legal theory seeking damages for personal injury, property damage, or wrongful death)?

That is the question posed in *Angelucci*.

**Cases applying:**

*Angelucci v. Dart Properties Incorporated*,

____ Mich App ____ (2012)

The panel would disagree with the *Providers Committee* analysis (see below) and find that the provision for venue for claims “based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death,” would include a tort-based claim for economic injuries.

Calls for a special conflict panel under MCR 7.215(J)(3). The court issued an order doing so on December 20, 2012.
Grekowicz v. Farooki  
Court of Appeals (unpub 2011)

The place of wrong is the place where bodily injury first occurred.

Yono v Carlson  
283 Mich App 567, 770 NW2d 400 (2009)

The original injury in a defamation case arose in the county where the publication was prepared and edited, and where most copies were sold. The location of the original injury is where the first actual injury occurred which resulted from an act or omission of another, rather than where a plaintiff contends that it first relied on the act or omission which caused the injury.

Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC  

Accounting advice given in Wayne County, causing the loss of plaintiff's business in Oakland County. Since no claim could arise until damages were suffered, Oakland was where the injury occurred.

Taha v Basha Diagnostics, PC  
275 Mich App 76, 737 NW2d 844 (2007)

The plaintiff's wrist was x-rayed in Wayne County, and the x-ray was read by the defendants in Oakland County. The plaintiff alleged that the defendants misread the x-ray, and that the physician then treated the wrist in Wayne County based on the misinformation. Held: the damage asserted by the plaintiff was the injury sustained in Wayne County as a result of the alleged negligence.

Provider Creditors Committee v United American Health Care Corporation  

A business-related complaint arising out of a management contract included both contractual and tort claims, but all damages claimed were economic. Since chapter 16 of the RJA does not define "personal injury", the court borrowed the definition found in chapter 63, MCL 600.6301, as a reflection of the "plain meaning" as used in section 1641(2). Held: section 1641(1), not 1641(2), controls.

Shiroka v Farm Bureau General Insurance Company  

Pursuant to §1641, governing mixed claims, venue has to be determined under the tort statute, §1629, when the suit is brought against both the uninsured driver (tort claim) and the UM carrier (contract claim).

Provider Creditors Committee v United American Health Care Corp.  

The tort provisions, §1641, apply only to claims for bodily injury, sickness, disease, or death. Negligence claims in general are not covered.

Ferguson v Pioneer State Mutual of Michigan  

Claim for PIP benefits or uninsured motorist benefits for personal injuries is based on contract. Action against the insurer is subject to the general venue provision rather than the venue provision pertaining to personal injury actions.
In a case alleging wrongful death due to a failure to diagnose a medical problem, the situs of the first manifestation of injury, a cardiac arrest, rather than the place of treatment, is the situs of the "original injury".

In light of the amendment of §1641 in 1995, the addition of a defendant in a tort case requires that venue be re-evaluated and changed if necessary.

The reference to adding a "cause of action" includes adding a new party based on the same type of claim as that made against an original defendant.

Venue under §1615 for governmental defendants controls over §§1621 and 1627, since they expressly defer to §1615.

In a multiple defendant case, §1629(1)(a) does not apply unless all of the defendants satisfy the criterion, in light of the statute's use of the phrase "the defendant".

In a wrongful death action, the phrase "county where original injury occurred" means the place where the injury resulting in death occurred, not the place where the decedent died.

**11 - EXPERT WITNESSES**

Standard of care testimony in medical malpractice cases

<table>
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<tr>
<th>Statutory section:</th>
<th>MCL 600.2169</th>
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<td>Brief description:</td>
<td>Limiting qualifications of experts in medical malpractice cases</td>
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<td>Statutory provisions:</td>
<td>The expert must be a licensed physician who practices in the same specialty as the defendant. If the defendant is board-certified in his specialty field, the expert must likewise be board-certified. The expert must spend most of his time practicing or teaching in that field. A listing of factors that the court is to apply is specified.</td>
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<tr>
<td>Previous law:</td>
<td>At common law, the court could admit the testimony of any witness who claimed to be familiar with the standard of care, regardless of his own specialty. This led to a number of cases in which general practitioners offered testimony critical of neurosurgeons or obstetricians, as one example.</td>
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</tbody>
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In 1986, the first version of this section required that the witness be a specialist in the same or a “related and relevant area of practice”. Thus, a family practitioner could not testify against a cardiac surgeon, but a cardiologist could do so in most cases.

This 1993 version tightens that provision.

**Commentary:**
The proposed expert must be a practitioner in the same area of specialty as the defendant, and must be board-certified if the defendant is himself board-certified.

The proposed expert must devote the majority of his time to the practice of the specialty in question. No longer may a long-retired physician offer testimony.

**Complications:**
This provision interplays with section 2912a, which provides for a nationwide standard of care for specialists, and for a locality rule as it pertains to general practitioners.

Since the Supreme Court had previously enacted MRE 702, governing the qualifications of expert witnesses, an early issue arose as to whether the Legislature had the authority to modify the rule by statute. This was answered affirmatively in *McDougall v Schanz*, 461 Mich 15 (1999).

**Cases applying:**

*Gay v Select Specialty Hospital*

Expert found qualified to testify. The 50% requirement can be met by non-clinical work while teaching nursing students.

*Jilek v Stockson*,
490 Mich. 961, 805 NW 2d 852 (2011) (order of reversal)
491 Mich. 870, 809 NW 2d 566 (2012) (denying reconsideration)

Court of Appeals –
For a board-certified family physician working in an urgent care center, when she was listed by the hospital as a member of the emergency department, the proper standard of practice was that of emergency medicine. This determination should have been made in advance of trial. It was error to allow the question of which specialty should apply (under the “one most relevant specialty” standard applied in Woodard) to be argued before the jury.

Supreme Court (order rather than signed opinion) –
The trial court properly held that the relevant specialty was family medicine. One of plaintiff's experts testified that there was no difference between the two specialties under these circumstances. Plaintiff was permitted to offer the testimony of a family physician. The trial court properly instructed the jury to consider the SOC in light of facilities available in an urgent care center.

On the motion for reconsideration, Justice Markman wrote a concurrence explaining some of the rulings. He noted that the "one most relevant specialty" standard under Woodard applies only when the defendant physician has and practices more than one specialty. That was not the case here.
Kiefer v Markley

A plastic surgeon who spent 30-40% of his professional time on hand surgery and the rest on other aspects of plastic surgery was not qualified to testify in a hand surgery case.

Reeves v Carson City Hospital (on remand)

An expert who is an emergency medicine specialist is qualified to testify in a case against a board-certified family practitioner practicing emergency medicine. The "specialty he was engaged in" was emergency medicine.

Gonzalez v. St. John Hospital & Medical Center, et al

Interpreting the Woodard standard: A surgical resident is a specialist, and a board-certified general surgeon thus is qualified to testify for or against him.

Robins v. Garg, M.D.
478 Mich 862, 731 NW2d 408 (2007)
276 Mich App 351, 741 NW2d 49 (2007) (on remand)

A Florida family practitioner is qualified to testify against a Michigan general practitioner on a showing that the two communities are similar in population size and have a similar number of hospitals and family practice physicians. The expert testified that he interacted with general practitioners from throughout the country and believed that the way he practiced medicine was similar to the way a physician practiced medicine in Michigan. The court concluded after consideration of the testimony that the expert’s practice "fits under the definition of a general practice".

Remanded by the Supreme Court for reconsideration in light of Woodard; same ruling on remand.

Raab v. Joyce
Court of Appeals (unpub 2006)

A D.O. general surgeon "matches" an M.D. general surgeon.

Trevino v. Turfah, et al.
Court of Appeals (unpub 2006)

A board-certified general surgeon did not match a board-certified colon and rectal surgeon when colon surgery was at issue.

Woodard v Custer, M.D.

An expert must specialize in the same subspecialty as the defendant, if the subspecialty is what was being practiced. A subspecialist (infectious diseases) may not testify against a specialist (internal medicine) when general internal medicine is at issue. (Consolidated with Hamilton.)
Smith v. Joy, M.D.  
(Court of Appeals 2005 - unpub)

A physician who is board certified in both family medicine and emergency medicine, and who works the majority of his time in emergency medicine, is qualified to testify against a defendant who is board certified in family medicine and who was working in the emergency room at the time of the incident.

Hamilton v Kuligowski, D.O.,  

An expert in internal medicine, subspecialist in infectious diseases, is qualified to testify against an internist on an issue involving internal medicine. Infectious diseases, which was more than 50% of the witness's practice, is "a more focused application of internal medicine, but internal medicine nonetheless." (Reversed; see Woodard v Custer, above.)

Tennyson v Botsford Hospital,  
Court of Appeals (unpub 2004)

An expert board-certified in both internal medicine and hematology/oncology is qualified to testify against a board-certified internist. "The statute only refers to the specialties of the doctors involved, not their subspecialties."

Caution – if the defendant is board-certified in a subspecialty field which is involved in the claim, this language could be read to support a conclusion that only the main specialty need be considered, but we do not consider that to be the intended result. See also Tate, discussed below, and the Halloran case under Section 9 – Affidavit of Merit.

Giusti v Mt. Clemens General Hospital,  
Court of Appeals (unpub 2003)

Expert found not qualified when he admitted that he spent only half his time in practice. His own characterization of his practice as "half-time" is most reliable and must prevail over a later contrary affidavit. Practicing medicine in a teaching hospital, by itself, does not meet the "instruction of students" criterion.

Caution – This opinion also includes some questionable rulings on the qualifications of experts on causation issues. The limits under §2169 relate solely to standard of care issues, a fact which the Court seems to have overlooked.

Cox v. Flint Board of Hospital Managers  

Section 2912a does not apply to claims against nurses, because they do not engage in the practice of medicine. Absent a statutory standard, the common-law standard of care applies: nurses are held to the skill and care ordinarily possessed and exercised by practitioners of their profession in the same or similar localities.

Tate v Detroit Receiving Hospital,  

When the defendant physician is board-certified in multiple specialties, the expert must be certified in the specialty relevant to the treatment provided.
Greathouse v. Rhodes,
465 Mich 885, 636 NW2d 138 (2001)

Court of Appeals: A challenge to the qualifications of the expert under §2169 is waived if not filed within a reasonable time. A motion filed on the eve of trial is untimely.

Supreme Court: Reversed. There is no statutory or case law authority imposing a "reasonable time" limit.

McDougall v Schanz,

Court of Appeals: This section is unconstitutional. The Supreme Court has the sole authority to determine the rules of evidence and the rules of procedure.

Supreme Court: Reversed. These provisions are constitutional, and do not violate the separation of powers.

12 - EXPERT TESTIMONY

substantive limits

Authority: MCL 600.2955 - enacted in 1995
MRE 702 - adopted in 2003

Brief description: Adopts restrictions similar to those announced in the Federal Daubert case (not applicable in state courts) on the introduction of scientific opinion testimony.

Statutory provisions: Before allowing expert testimony, the court must make a finding that the opinion is reliable. The statute then sets forth a number of factors that the court is to apply in determining whether to admit the testimony, including whether it has been subjected to scientific testing, challenge, and proof. One of the factors is the extent to which it has been accepted in the relevant scientific community. Another is whether experts outside of the litigation sphere rely upon it. §2955(1)

A novel methodology must be shown to have achieved general scientific acceptance in the field before it may be used in the courtroom. §2955(2)

Previous law: Before 1986, any expert testimony on medical or scientific issues could be admitted so long as the court found that it would assist the jury in making its decision.

The broad discretion of the court was limited in cases where a novel scientific theory was advanced, under the Davis-Frye rule:

• Frye v United States, 54 US App DC 46, 47; 293 F 1013 (1923)
• People v Davis, 343 Mich 348, 370; 72 NW2d 262 (1955)
Both cases involved the admissibility of the results of polygraph testing.

Commentary: This rule is a Michigan adoption of the Federal Daubert rule, which imposes a "gatekeeper" requirement on courts to ensure that only reliable and sound scientific testimony is permitted to be considered by the jury. See http://www.daubertontheweb.com/Chapter_2.htm for information on Daubert and its progeny.
The purpose of this section, like that of the *Daubert* rule, is to prevent the admission of unproven or hypothetical medical and scientific theories, often dubbed “junk science”.

The problem with the former practice is that a wide range of novel and untested theories could be offered, regardless of whether they had any scientific validity. The law gave the courts no guidance on what could be admitted, with the result that virtually everything was fair game in many courtrooms, subject only to the *Davis-Frye* rule.

The position taken by the courts in response to those who criticized the wide-ranging rule favoring admissibility was that the defense could introduce its own evidence, in the form of testimony from its own expert witnesses or otherwise, to counter the plaintiff’s theories, and the jury would make its ruling after hearing both sides.

The problem with that approach is that juries do not have the level of knowledge or sophistication necessary to make sound determinations on matters of scientific validity. The *Daubert* rule in Federal courts and the §2955 rule in Michigan are based on the premise that judges are more capable of doing so.

The *Davis-Frye* rule focused solely on the issue of whether the validity of particular method of testing is “generally accepted”. This statute raises a number of factors for the court to apply to a wide range of issues.

The restriction imposed by §2169 is on who can testify as an expert on standard of care issues. This section limits what can be said by any expert witness. It typically applies to causation rather than to standard of care issues, but that is not necessarily the case.

Note that §2955 by its terms applies only to personal injury cases.

Evidence Rule: Rule 702 of the Michigan Rules of Evidence was amended in July 2003, effective January 1, 2004, to add the following to the general rule governing expert testimony in all cases:

[The court may allow an expert to testify] if:

(1) the testimony is based on sufficient facts or data,
(2) the testimony is the product of reliable principles and methods, and
(3) the witness has applied the principles and methods reliably to the facts of the case.

In personal injury cases, it is not clear what the amendment of MRE 702 will accomplish that MCL 600.2955 does not already accomplish. The amendment will ensure that the rule applies to non-injury cases, including criminal prosecutions as well as 1st-party no-fault claims. The court’s order amending MRE 702 makes no mention of §2955, interestingly enough.

Complications: For medical malpractice cases, the interplay between this section and §2169 (qualification of expert witness on standard of care) must be kept in mind. Note the express statement at the very end that this section does not affect the criteria specified under §2169.
As is the case in the Federal courts under *Daubert*, adding an affirmative requirement that trial judges make findings on issues of scientific validity of testimony is a very complicated task. Many currently serving trial judges originally took the job without having that requirement as part of the job description.

**Cases applying:**

**Edry v. Adelman**  
Expert gynecologist who based opinion on web sites, and who claimed to refer to but could not produce peer-reviewed articles, found not qualified to offer opinions on cancer growth rates.

**Morgan v Bediako**  
Court of Appeals (unpub 2010)  
A trial judge need not conduct a separate evidentiary hearing as to the reliability of an expert's opinion testimony so long as he or she provides a "searching inquiry" and "thoughtful analysis."

**Clerc v. Chippewa County War Memorial Hospital,**  
267 Mich App 597; 705 NW2d 703 (2005),  
Order granting summary disposition reversed. The trial court failed to conduct an adequate hearing on the validity of the scientific evidence offered (staging in a cancer case). Unlike the *Davis-Frye* rule, MRE 702 does not apply only to novel scientific theories.

**Craig v Oakwood Hospital,**  
Court of Appeals:  
A Davis-Frye hearing is not necessary for testimony not involving a novel scientific issue.

**Supreme Court:**  
Whenever the defendant requests a hearing on the scientific validity of the plaintiff's offered testimony, the court must hold it. There is no burden on the defendant to establish (or even to make a preliminary showing that there is reason to believe) that the theory espoused by plaintiff is not scientifically valid. (Issues decided under the old version of MRE 702, not under §2955, but still instructive.)

**Gilbert v DaimlerChrysler Corp.,**  
The trial court erred in admitting the testimony of a social worker on issues relating to the effect of acts of sexual harassment on the plaintiff's brain chemistry and overall medical health. The court must evaluate and approve the methodology followed by the witness because, if it does not, "ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions". (Also decided under MRE 702, rather than §2955.)
An expert may testify about an alternative theory of causation if it is a possibility; he need not assert that it is the true theory. The court must focus on the methodology used, not the expert's conclusion, in applying §2955.

Safeco Insurance Company v Carrier Corporation
Court of Appeals (unpub 2003)

Plaintiff’s expert electrical engineer found not qualified to offer expert opinion testimony as to safer alternative designs for furnace circuit boards where he failed to adequately examine or test either the original or proposed alternatives by disassembly, recreating the failure, or analyzing and comparing the components and their properties. Opinion found not reliable.

"The plain language of the state establishes the Legislature's intent to assign the trial court the role of determining pursuant to the Daubert criteria, whether proposed scientific opinion is sufficiently reliable for jury consideration." The legislature enacted MCL 600.2955(1) "in an apparent effort to codify the United States Supreme Court's holding in Daubert."

Special commentary on McDougall

The decision of the Supreme Court in McDougall v Schanz, 461 Mich 15; 597 NW2d 148 (1999), upholding the constitutionality of §2169, would seem to apply in full force to this section as well, for the same reasons.

The Supreme Court's reversal of the Court of Appeals's constitutionality ruling in McDougall far overshadowed the other holding by the Court of Appeals panel in that case. In addition to holding that the 1993 medical malpractice expert witness statute was unconstitutional, the majority held (before the 1995 amendments which introduced §2955) that trial judges already had a responsibility under MRE 702, similar to the Daubert standard in Federal courts, to act as "gatekeepers" and to ensure that all expert scientific testimony offered at trial is reliable. This portion of the opinion imposed upon Michigan judges, under MRE 702, an obligation to ensure the reliability of expert scientific testimony, albeit without the requirement of a formal hearing for each and every scientific expert witness as §2955 requires. Other appellate panels in the Court of Appeals subsequently accepted this idea, as well. See, for example, Nelson v American Sterilizer (on remand), 223 Mich App 485; 566 NW2d 671 (1997), in which the court affirmed as inadmissible testimony by the plaintiff's treating physicians that exposure to a certain toxin caused his condition because the animal studies on which those opinions were based were too inconclusive to justify that conclusion, and thus the testimony was not admissible as expert opinion based upon "recognized scientific knowledge."

Now that §2955 has been adopted, effective in 1996, the courts have that duty as a matter of statute, and they are required to make the findings set forth in the statute as to each proposed expert who is challenged by the opponent. The holding of the Court of Appeals panel, however, would still have validity in cases other than those “for injury to a person”.

Further, as noted above, MRE 702 was itself amended, effective January 1, 2004, to place similar obligations on the judge in cases in which §2955 does not apply, including first-party no-fault claims.

13 - LOSS OF CHANCE – PROXIMATE CAUSE

<table>
<thead>
<tr>
<th>Statutory section:</th>
<th>MCL 600.2912a(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief description:</td>
<td>Lost chance of survival or better result - limits</td>
</tr>
</tbody>
</table>
Statutory provisions: The 1993 tort reform statutes added subsection 2:

“In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.”

Previous law: The case of Falcon v Memorial Hospital, 436 Mich 443; 462 NW2d 44 (1990), rev’d in part on other grounds, 437 Mich 926 (1991), had ruled that the common law would permit recovery by a personal representative of a chance of survival, even if it was not more likely than not (over 50% probability) that the patient would have survived.

Commentary: The Falcon rule represented a judicial dilution of the common law rule of causation: that the plaintiff must be able to show by a preponderance of the evidence, on a “more likely than not” standard, that the damages would have been avoided by the exercise of due care by the defendant.

Complications: The Falcon case had also held that the recovery by the plaintiff must be reduced by the chance of death. In that case, the proofs had been that the decedent had a 38% chance of survival, and the court ruled that the plaintiff estate could only recover 38% of the full measure of damages. The ruling permitting a recovery has been overruled by this statute, but the statute does not address the limitation on recovery issue. Accordingly, the rule that the plaintiff’s recovery should be reduced by the chance that the damages claimed could not have been avoided is technically still good law in this state.

Cases applying:

O’Neal v. St. John Hospital  
Overruled Fulton to the extent that it characterized traditional malpractice claims as loss of opportunity claims. “Its simple subtraction analysis was wrong.” This case did not present loss of opportunity claims. The amendment to section 2912(a) does not apply to the causation analysis of traditional malpractice cases.

Stone v Williamson  
482 Mich 144, 169, 753 NW2d 106 (2008)  
Majority: The case did not involve a lost opportunity issue at all. The patient had an abdominal aneurysm which ruptured. He had an excellent chance of recovery (over 90%), if surgically treated, and an 80% chance of death if not treated. If untreated, 10% will live but sustain serious complications - as plaintiff did.

Three concurrences: The new second sentence is unenforceable because it provides no guidance regarding its meaning or how courts are to apply it. (The fact that three Justices were willing to disregard a statute because it would be difficult to apply was remarkable.)

Pennington v. Longabaugh  
Court of Appeals (unpub 2006)  
Patient suffered a perforation during a procedure and later a stroke after surgery to repair the defect. Plaintiff's expert could not testify to a medical probability concerning what caused the decedent’s stroke or that an earlier diagnosis of the perforation would have altered the outcome. Summary disposition affirmed.
An expert witness indicated that the plaintiff who had suffered a stroke had, without the administration of a thrombolytic, a 20% chance of full recovery from the stroke, while with the medication he would have had between a 30-50% chance of full recovery. Thus, the plaintiff lost between 10-30% of a chance of full recovery, and this degree of an opportunity to achieve a better result was insufficient to support the medical malpractice claim.

Jarzombek v Clinton Women's Health,
Court of Appeals (unpub 2005)

An affidavit from an expert stating that taking a different action "would have saved" the plaintiff's Fallopian tube is sufficient to convey a more than 50% likelihood.

Dykes v William Beaumont Hospital
246 Mich App 471, 633 NW2d 440 (2001),

The plaintiff submitted an affidavit of merit of a physician which indicated that, if the proper standard of care had been met, the decedent would have had a greater than 50% chance of surviving the infection, but during a discovery deposition, the physician testified that he could not state that omitted treatments would have altered the outcome. The defendants moved for summary disposition on the basis that the plaintiff could not establish that the chance of survival lost had been greater than 50%. The contradictory affidavit did not raise a genuine issue of material fact.

Fulton v Pontiac General Hospital,

The degree by which the plaintiff has lost an opportunity must exceed 50%. The court rejects plaintiff’s argument that he need only show that his initial opportunity to survive was higher than 50%, and that he simply needed to show that he has lost some opportunity from that starting point. (Leave to appeal was granted, 666 N.W.2d 663 (2003), then that order was vacated and leave was denied, 671 N.W.2d 876 (2003)).

Wickens is not binding and is not persuasive.


A living plaintiff cannot sue on a theory of a lost chance of survival. A breast cancer patient who had a 55-70% chance of surviving ten years before the events at issue and 0% afterwards cannot assert a claim for that loss. The plain language of the statute (“an injury... was proximately caused”) limits it to damages already sustained, not those to be sustained in the future.

Note that this case would change the common law rule on future damages – that they may be recovered if they are more likely than not to occur.

Setterington v Pontiac General Hospital,

Plaintiff’s proofs that the decedent had a 60% chance of survival if the diagnosis had been made earlier were sufficient to establish proximate cause.
14 - NO-FAULT - SERIOUS IMPAIRMENT

Statutory section: 500.3135

Brief description: Tightens the “serious impairment” threshold for auto cases

Statutory provisions: The issue of serious impairment is “a question of law for the court”, not a jury issue. The jury will resolve the issue as to the nature and extent of the injury, if necessary.

There can be no recovery by a plaintiff more than 50% at fault.
There can be no recovery by an uninsured driver.

The statute adopts a new definition: “As used in this section, ‘serious impairment of body function’ means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”

Previous law: Serious impairment was to be determined by the jury. (See commentary.) The definition of serious impairment is similar to some of the more restrictive definitions adopted by case law.

Commentary: Ever since no-fault insurance was introduced in Michigan, residual tort liability was limited to serious injury cases. The standard in general has been that the plaintiff must have sustained a serious impairment of body function or serious permanent disfigurement in order to recover non-economic damages.

Over the years, the case law had shifted back and forth on the issue of who makes the crucial decision as to whether the injury in question meets the serious impairment threshold. The most recent formulation was that this issue was to be left to the jury.

The definition of serious impairment is more liberal than the case law in one respect: the focus is now on the individual’s ability to lead “his or her normal life”. The test is now subjective rather than objective.

Cases applying:

See our No-Fault Manual, where these cases are compiled.

15 - STATUTE OF LIMITATIONS – ACCRUAL AND REPPOSE

Statutory section: MCL 600.5838a(2)

Brief description: Accrual of cause of action
Statute of repose

Statutory provisions: A claim for malpractice by a member of a health care profession accrues on the date of the service or occurrence at issue.
The discovery rule, which permits filing a claim after the limitations period has expired in certain cases, is now subject to a six-year period of repose, subject to the following exceptions:

- discovery of the existence of the claim was prevented by fraudulent concealment
- the injury involves the loss of ability to procreate as a result of damage to or loss of a reproductive organ.

Previous law:

Under previous law, a claim for malpractice accrued on the date of the last professional service provided by the defendant. That rule still applies to claims against professionals other than health care providers.

The discovery rule was first adopted as a common law provision (holding that the claim did not accrue until discovery, and giving the plaintiff two years to file) and then was enacted as a statute, limiting the period to six months. There was no outside time limit.

Cases of fraudulent concealment were previously a common-law exception to the statute of limitations.

Commentary:

This 1986 amendment avoids the “long tail” statute which applied when a physician or other professional provided services over a long period of time. In some extreme cases, claims could be brought 10 or 15 years after the date of the alleged malpractice, because the defendant continued to serve the plaintiff in a professional capacity over a course of many years.

This special provision applies only to health care professionals. The former rule that the claim accrues as of the date of last service (found in MCL 600.5838) continues as to other professionals.

The statute of repose likewise avoids “long tail” situations, under which a plaintiff could initiate a lawsuit many years after the occurrence or after the termination of the relationship, by showing that he did not know or should not have reasonably known that he had a claim.

Similar statutes of repose for claims against architects and contractors have previously been found constitutional.

The case law is replete with rulings on various issues as to what constitutes discovery of a claim, whether knowledge of the identity of the defendant is necessary, etc. The formulation is that the discovery period begins when the plaintiff knows or should know enough to suggest that he might have a claim. Lack of knowledge as to who the potential defendant is does not invoke the rule.

The courts in Michigan formerly adopted a common law discovery rule for claims other than medical malpractice, but this series of opinions was overruled by the Michigan Supreme Court in *Trentadue v Buckler Automatic Lawn Sprinkler Company*, 479 Mich 378; 738 NW2d 664 (2007), reh den 480 Mich 1202; 739 NW2d 79 (2007).
Cases applying:

*Kuznar v Raksha Corp*

A pharmacist is a health care professional, and claims against a pharmacist are subject to this section. A pharmacy is not a health care professional.

**16 - STATUTE OF LIMITATIONS – CLAIMS BY MINORS**

<table>
<thead>
<tr>
<th>Statutory section:</th>
<th>MCL 600.5851(7) and (8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief description:</td>
<td>Modification of the long statute of limitations for medical malpractice cases which involve minors</td>
</tr>
<tr>
<td>Statutory provisions:</td>
<td>If the minor was under the age of 8 at the time of the occurrence, he must bring the action by his 10th birthday. Otherwise, he must file within the two-years statute of limitations. For injuries involving the reproductive system, if the minor was under the age of 13 at the time of the occurrence, he must bring the action by his 15th birthday.</td>
</tr>
<tr>
<td>Previous law:</td>
<td>Minority was regarded as a legal disability, and the statute did not run until one year after the disability was lifted – i.e., the plaintiff’s 19th birthday.</td>
</tr>
<tr>
<td>Commentary:</td>
<td>This special rule, adopted in 1986, applies only to medical malpractice claims, and is aimed primarily at the birth trauma cases which sometimes were filed almost two decades after the events in question. In those cases, it was often difficult to locate living persons who were involved in the occurrence.</td>
</tr>
<tr>
<td>Complications:</td>
<td>If the minor is disabled, does the disability continue to toll the statute? Note that for permanently disabled plaintiffs who meet the legal definition of “insanity” under the tolling provisions of the statute of limitations, MCL §600.5851, there simply is no statute of limitations, since the disability is never lifted. If an injury involving the reproductive system is sustained by a child under the age of 8, and if he also sustains other injuries, are there two statutes of limitations which govern his claims? It would appear that he would have until his 10th birthday to file a claim arising from the other injuries, and until his 15th birthday to file the claim for the injuries to the reproductive system.</td>
</tr>
</tbody>
</table>

Cases applying:

*Vanslembrouck v. Halperin, M.D.*
277 Mich App 558, 747 NW2d 311 (2008),
*lv den* 483 Mich 965, 763 NW2d 919 (2009)

The 10-year provision of MCL 600.5851(7) is a period of limitations rather than a saving provision. It is a "statutory provision that requires a person who has a cause of action to bring suit within a specified time." Following and applying *Miller v. Mercy Memorial Hospital*, 466 Mich. 196, 644 N.W.2d 730 (2002), which applied the discovery rule under MCL 600.5838a(2) to wrongful death actions.
The provisions of subsection (1) (plaintiff under 18) are irrelevant to medical malpractice actions for living plaintiffs, which are governed by subsection (7) only. The provisions of subsection (7) do not apply to claims for the wrongful death of a minor under age 8, since he will never reach his 10th birthday. Only the provisions of 600.5852 (savings provision for personal representatives) apply.

Court of Appeals: The special provision for persons under a disability, MCL 600.5851(1), does not apply to any medical malpractice claimant, regardless of age, due to the exception noted in that subsection for claims under subsections (7) and (8).

Supreme Court: Reversed. The savings provision does apply in medical malpractice claims.

These provisions are constitutional under equal protection analysis.

### 17 - STATUTE OF LIMITATIONS – DEATH, TOLLING

| Statutory section: | MCL 600.5852  
|                   | MCL 600.5856  
| Brief description: | Statutes for wrongful death claims.  
|                   | Tolling of statute of limitations.  
| Statutory provisions: | If a claimant dies before the statute of limitations has run, or within 30 days thereafter, a lawsuit based on a claim that survives by law may be filed within two years of the appointment of a personal representative, so long as it is within three years of the date that the statute otherwise expired. §5852  
|                   | Tolling occurs at the filing of the complaint if service is then made as provided in the court rules. (This is a new section, amended 2004.) The applicable rule is MCR 2.102. §5856  
|                   | In medical malpractice cases, the statute of limitations is tolled by the filing of a Notice of Intent in compliance with §2912b if the statute would expire during the notice period.  
| Commentary: | Section 5852 is characterized as a savings statute, not a different statute of limitations. See the section on Notice of Intent for the cases which decided that tolling based on the filing of a Notice of Intent does not affect the §5852 period.  
|                   | Public Act 609 (2012) amended §5852 to overrule decisions that permitted the two-year period to be restarted when a personal representative died or resigned, and a new PR was appointed. Now, the two-year period is calculated only from the first appointment. |
“Tolling” is the suspension of the statute of limitations based on a particular event. Since §2912b prohibits the filing of a complaint during the six-month notice period, the special tolling provision referring to the filing of a notice of intent is necessary to avoid foreclosing claims during the notice period. See the entries on Notice of Intent and Affidavit of Merit for cases involving the interface between those provisions and the tolling period. Those cases require that the complaint be accompanied by an Affidavit drawn in compliance with the rule for tolling to apply.

**Cases applying:**

_Gladych v New Family Homes, Inc._  
468 Mich 594; 664 NW2d 705 (2003),  

The plaintiff filed his complaint against the defendant on January 22, 1999, one day before the expiration of the three-year limitations period. After some difficulty, the defendant was served on May 4, 1999. Held: the filing of the complaint alone did not toll the limitations period. It is also necessary to take one of the steps provided in §5856. In this case, it was necessary to either serve the defendant or place the summons in the hands of an officer for service within the one day left. Overruling: _Buscaino v Rhodes_, 385 Mich 474; 189 NW2d 202 (1971).  

(Note: This case was decided under the old version of §5856(1). Since 2004, that subsection now defers to the court rules as to the method of service.)

_Hoekstra v Bose_  
253 Mich App 460; 655 NW2d 298 (2002),  

To toll the limitations period, a complaint and summons must be properly filed and served, but in the absence of bad faith or fraud, the court does not need to acquire personal jurisdiction over the defendant. The filing of a complaint in Illinois was effective to toll the statute, even though the Illinois court eventually determined that it had no jurisdiction over defendant. The tolling statute does not require the acquisition of personal jurisdiction, and thus the filing and service of the complaint and summons had tolled the running of the limitations period.

_Yeo v State Farm Fire & Casualty Insurance Co_  
242 Mich App 483; 618 NW2d 916 (2000)

The commencement of suit tolls the running of the limitations period, including, in certain circumstances, during the pendency of an appeal in the suit. However, the dismissal of a suit without prejudice does not preclude the commencement of a new suit, and an appeal on the issue of whether the dismissal should have been with prejudice does not toll the limitations period during the pendency of the appeal. The statute recommenced running upon the entry of the order of dismissal, and expired.

### 18 - FRIVOLOUS CLAIMS OR DEFENSES

**Statutory section:** MCL 600.2591  
**Brief description:** Costs may be awarded for the assertion of a frivolous claim or defense
Statutory provisions: Costs, including attorneys fees, may be awarded by the court if it finds that the action or defense was frivolous. The statute defines a frivolous case as one in which –
- The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- The party's legal position was devoid of arguable legal merit.

Previous law: MCL 600.2949 had dealt with frivolous claims or defenses in medical malpractice cases, but was repealed in 1995, presumably in light of the adoption of this section in its place.

At common law, the court had a general power to award costs, but it was seldom invoked.

Commentary: In personal injury claims, this section is very seldom argued, and almost never enforced.

Compare Rule 11 practice in the Federal courts, where significant sanctions for frivolous claims are available and are sometimes enforced.

See also MCL 600.4915 and MCR 2.403, providing for a bond and other procedural steps if a case evaluation panel makes a determination that a claim or defense is frivolous.

Cases applying:

Court of Appeals (unpub 2010)

Sanctions upheld against insurer claiming misrepresentation by insured. The insurer was not in existence when the misrepresentation was made, and thus there was no relationship between insurer and insured at that time. Denial of sanctions against the insurer's attorney reversed. The plain language of section 2591 requires that the sanction also be imposed on the attorney. (This case involved an apparently fictitious insurance company.)

B.J.'s and Sons Construction Company, Inc. v VanSickle,
266 Mich App 400; 700 NW2d 432 (2005)

A claim filed on the basis of an obvious scrivener's error in the preparation of a deed, of which the plaintiff's attorney was notified before filing, justified a finding that the action was frivolous.

Jerico Construction, Inc v Quadrants, Inc
257 Mich App 22; 666 NW2d 310 (2003),
Lv den 469 Mich 1010; 675 NW2d 37 (2004)

The determination whether a claim or defense was frivolous must be based on the circumstances which existed at the time the claim or defense was asserted. That alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry.

Attorney General v. Harkins

Plaintiff's tolling arguments, although rejected by this Court and the trial court, were not so lacking in legal merit as to support a conclusion that plaintiff's action was frivolous. Sanctions are not required and should
not be imposed merely because the legal argument advanced by a litigant is rejected by the court. Where, as here, there is no developed case law mandating a particular result, sanctions are not warranted.

*Yee v Shiawassee County Board of Commissioners*
251 Mich App 379; 651 NW2d 756 (2002),
*lv den* 468 Mich 852; 658 NW2d 491,

Upheld a trial court's award of sanctions when it found that the plaintiffs were attempting to relitigate a matter previously litigated to a conclusion.

*In re Costs & Attorney Fees*
250 Mich App 89; 645 NW2d 697 (2002)

When a writing was found which contradicted the asserted defense that certain terms had not been agreed by the parties, a finding that the defense was devoid of arguable legal merit was proper. As lawyers for the defendant in the underlying litigation, the defendants had no authority to unilaterally determine whether the letter had been accepted. That is a matter to be determined by the court.

*Kitchen v Kitchen*

For the purpose of the imposition of sanctions because of the assertion of a frivolous claim, not every error in legal analysis constitutes a frivolous position. In this case, the defendants asserted that the plaintiff's claim of an irrevocable license by estoppel had no legal merit. Although the plaintiffs' claim had no legal validity, it was not devoid of arguable legal merit, and thus the imposition of sanctions was improper.

### 19 - MISCELLANEOUS MEDICAL MALPRACTICE PROVISIONS

The following are the “lesser” provisions. Many of them were adopted in 1986. Some involve procedural features that are seldom or never used. None of them have any cases interpreting or applying them.

<table>
<thead>
<tr>
<th>Statutory section</th>
<th>Brief description</th>
</tr>
</thead>
<tbody>
<tr>
<td>MCL 600.2912c</td>
<td>Affidavit of non-involvement – A defendant may file an affidavit that he was not involved in the occurrence and obtain an expedited dismissal.</td>
</tr>
<tr>
<td>MCL 600.2912f</td>
<td>Waiver of privilege – More clearly states that the filing of a claim is a waiver of the physician-patient privilege.</td>
</tr>
<tr>
<td>MCL 600.2912g</td>
<td>Arbitration of small malpractice claims – Permits an expedited procedure for claims under $75,000. In our experience, this provision has never been used.</td>
</tr>
<tr>
<td>MCL 600.2912h</td>
<td>Notification – A party who settles a medical malpractice claim must notify the Department of Licensing and Regulation of the settlement.</td>
</tr>
</tbody>
</table>
# 20 - PRODUCTS – COMPLIANCE WITH STANDARDS

**Statutory section:** MCL 600.2946

**Brief description:** Industry standards; definition of defect; governmental standards

**Statutory provisions:**
- Compliance with industry standards is admissible as evidence.
- Compliance with governmental standards raises presumption of no liability.

- Noncompliance with a standard does not raise a presumption of product defect.
- FDA approval of drug raises presumption of no liability.
  - Definition of when manufacturer is liable

**Previous law:**
- Compliance with governmental standards was an issue which could be raised by the defense but it was not determinative.

**Commentary:**
- This is a significant restriction in the law governing product liability.

**Case law applying:**

*Marsh v Genentech, Inc.*, ___ F3d ___ (6th Cir 2012)

  - Applied the state bar, and found that the claim was preempted as to claims based on post-approval failure to comply – following *Garcia*.

*Attorney General v. Merck Sharp & Dohme Corp.*

  - Immunity applies to state misrepresentation claims against drug manufacturer for Medicaid payments.

*Garcia v Wyeth-Ayerst Laboratories*,
265 F Supp 2d 825 (ED Mich 2003),
385 F.3d 961 (6th Cir. 2004)

  - The FDA approval provision is constitutional.
  - On appeal: The exceptions to immunity apply only if the FDA itself (or another federal agency) determines that the manufacturer has defrauded or bribed the FDA. The plaintiff may not introduce evidence of such misconduct.
  - This section enacts the governmental contractor defense, when a government agency has issued specifications.

*Lavin v Child Craft Industries*,
(Court of Appeals 2004, unpub.)

  - The failure to comply with standards may be evidence of negligence, but does not raise a presumption of negligence.

*Taylor v Gate Pharmaceuticals*,
468 Mich 1, 658 NW2d 127 (2003),
reversing 248 Mich App 472;
639 NW2d 45 (2001)

  - Section 5 (FDA approval) is constitutional. It does not impermissibly delegate legislative power to the FDA. The FDA approval is an "act of independent significance" which can be properly used by the statute.
21 - PRODUCT ALTERATION; INHERENT RISKS; RETAILERS

Statutory section: MCL 600.2947

Brief description: Alteration or misuse of product as defense
Limitation on claims against distributors and vendors

Statutory provisions: A manufacturer is only responsible for foreseeable alterations to or misuse of the product by another. The question of foreseeability is to be determined by the Court. §2947(1) and (2)

No liability for risks known by the purchaser or user who knowingly exposed himself to that risk. §2947(3)

No liability for failure to warn for a product sold for use by a sophisticated user. §2947(4)

No liability for inherent unavoidable risks. §2947(5)

Liability against defendants other than manufacturers must be based on negligence, including breach of implied warranty, or on breach of express warranty. §2947(6)

Previous law: The jury determined issues of foreseeability as a factual issue.

Under common law, anyone in the chain of distribution – manufacturer, wholesaler, distributor, vendor – could be named as a defendant.

Commentary: The rule requiring the court to determine the issue of foreseeability may have a significant impact on claims – depending upon the judge.

Limiting the liability of non-manufacturers would be another significant restriction on the plaintiff’s ability to recover damages. Often, the manufacturer is either insolvent, out of business, or beyond the reach of process, and the distributor or retailer ends up absorbing the entire loss. The significance of subsection (6), however, is unclear, since the liability of a retailer of a product has always been based on one of the three theories listed: negligence, breach of implied warranty, or breach of express warranty. It does not appear at first glance that this new provision changes the law applying to distributors and retailers in any meaningful way.

Complications: Does the voluntary exposure rule under subsection (3) come into play when the purchaser who knew of and voluntarily accepted the risk is not the user of the product who was later injured by the product? Compare the pre-tort-reform cases of Tasca v G T E Products Corp, 175 Mich App 617, 438 NW2d 625 (1988) and Brown v Drake-Willock International, Ltd, 209 Mich App 136, 530 NW2d 510 (1995), upholding the reasonableness of a manufacturer relying on the purchaser to communicate warnings to the ultimate user of the product.

Cases applying:

Bearup v General Motors Corporation
Court of Appeals (unpub 2009)

Trial court should have applied the statutory sophisticated user provision under section 2947(4), rather than the common-law doctrine discussed in Bock. In light of the wording of the statute, the defense applies if either the employer or the employee fits the definition of sophisticated user.
Curry v Meijer, Inc.

Plaintiff failed to offer any evidence of a failure to exercise reasonable care on the part of the retailer - that
the retailer knew or should have known of the alleged defect when the product was sold. Breach of implied
warranty is not a separate avenue of liability.

Heaton v Benton Construction Company
286 Mich App 528 (2009)

Pre-cast foundation walls, installed in new construction, are a product for purposes of this section. The
contractor who installed them, although he had been licensed since 1997, was not a "sophisticated user" of
this product in light of evidence that he had only constructed twelve homes under his license and had never
used this type of foundation wall.

Garcia v Wyeth-Ayerst Laboratories,
265 F Supp 2d 825 (ED Mich 2003),
385 F.3d 961 (6th Cir. 2004)

The FDA approval provision is constitutional.

Lavin v Child Craft Industries,
Court of Appeals (unpub 2004)

The failure to comply with standards may be evidence of negligence, but does not raise a presumption of
negligence.

Taylor v Gate Pharmaceuticals,
468 Mich 1, 658 NW2d 127 (2003),
reversing 248 Mich App 472; 639 NW2d 45 (2001)

Section 5 (FDA approval) is constitutional. It does not impermissibly delegate legislative power to the FDA.
The FDA approval is an "act of independent significance" which can be properly used by the statute.

22 - KNOWN PRODUCT RISKS

Statutory section: MCL 600.2948
Brief description: Obvious risks; State of the art defense
Statutory provisions: No liability for obvious or known risks.
Liability against a manufacturer is limited to the risks known as of the date of manufacture. There is no liability for breach of implied warranty for risks not appreciated at that time.
Previous law: There was no explicit statutory statement of what should seem to be a common-sense matter: that a product which has obvious risks cannot be held defective when an injury which is within those risks occurs. This principle had been adopted in several cases, sometimes as a statement that liability cannot be imposed for a “simple tool” whose risks are well-known by ordinary people. See Boumelhem v Bic Corporation, 211 Mich App 175, 535 NW2d 574, lv den 452 Mich 858, 550 NW2d 200 (1996) [lighter]; Mallard v Hoffinger Industries, Inc. (on remand), 222 Mich App 137, 564 NW2d 74 (1997) [above-ground swimming pool]; Glittenberg v Doughboy Recreational Industries (On Rehearing) 441 Mich 379; 491 NW2d 208 (1992), reh den sub nom Spaulding v Lesco International Corp, 441 Mich 1202; 495 NW2d 388 (1992) [above-ground swimming pool].

Nonetheless, this explicit statutory statement will lead to more of these claims being dismissed or not filed in the first place.

The second leg is much more significant. At common law, a manufacturer’s product was not judged against the state of the art as of the date it was sold. Instead, the jury was allowed to consider later knowledge and development in determining whether it was “defective”. For a whole range of products which were thought to be beneficial when sold but later turned out to be unreasonably dangerous – many drugs and asbestos come to mind – this defense will be very significant.

Cases applying:

White v Victor Automotive Products, Inc,
488 Mich 875; 788 NW2d 460 (2010)

Mechanic working on a car is presumed to know the risk of running the engine in a closed garage, leading to carbon monoxide death.

Fowler v Jack’s Corner Stores
Court of Appeals (unpub 2010)

Obvious risk - bungee cord

Green v AP Products, Ltd,

Court of Appeals –
Whether the risk was obvious – in the statutory language, whether the risk is “obvious to a reasonably prudent product user” or “a matter of common knowledge” – is a question of fact to be determined by the jury. Where the risk of some injury is obvious, but it is not obvious that there is a risk of fatality, a jury could find that the exception does not apply.

Supreme Court –
Reversed. Given the language of the statute, there is no duty to warn of a material danger that is or should be obvious to the reasonably prudent user. The risk of inhaling and ingesting a hair product containing oils is such a danger, and this is determined as a matter of law. There is no exception for products ingested by children. There is no requirement under the statute that particular risks (death or serious personal injury) be specified. The statute displaces common law rules on these issues.
### 23 - PRODUCT LIABILITY – RECKLESS MISCONDUCT

<table>
<thead>
<tr>
<th>Statutory section:</th>
<th>MCL 600.2949a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief description:</td>
<td>Loss of certain defenses if the product defendant was guilty of reckless misconduct</td>
</tr>
<tr>
<td>Statutory provisions:</td>
<td>If the jury determines that a products liability defendant had: (1) actual knowledge that the product was defective, and there was (2) a substantial likelihood that the defect would cause THE injury and (3) that the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then the defendant is penalized. §2949a</td>
</tr>
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</table>

The penalty is that the defendant cannot take advantage of:
- Presumption of due care arising from compliance with governmental standards [§ 2946(4)]
- Products liability damage cap [§ 2946a]
- Alteration [§ 2947(1)]
- Misuse [§ 2947(2)]
- Voluntary assumption of risk [§ 2947(3)]
- Sophisticated user [§ 2947(4)]
- Open and obvious defense to duty to warn [§ 2948(2)]

| Previous law: | No special provision for reckless misconduct, except an award of exemplary damages. |
| Commentary: | Note that other defenses remain, however, including: |
| | • Compliance with (governmental and nongovernmental) are still admissible to show due care, even if no presumption arises [§ 2946] |
| | • Feasibility (economic and otherwise) [ § 2946(3)] |
| | • FDA approval of drug products [§ 2946(5)] |

This provision is likely to be seldom used, since reckless misconduct is a very high standard.

**Cases applying**


A jury's finding that the defendant was not grossly negligent under 2946a(3), an exception to the cap on damages – see section 1 – does not conflict with its finding that the defendant had actual knowledge that its product was defective under this section.

### 24 - PRODUCT LIABILITY – ECONOMIC LOSS

<table>
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<tr>
<th>Statutory section:</th>
<th>MCL 600.2946a(4)</th>
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<tr>
<td>Brief description:</td>
<td>Default provision for calculating damages for economic losses</td>
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<tr>
<td>Statutory provisions:</td>
<td>In product liability actions, if the plaintiff’s economic loss cannot be readily ascertained, it will be governed by the Michigan median family income as certified by the state treasurer.</td>
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<tr>
<td>Previous law:</td>
<td>The burden of establishing economic loss was on the plaintiff. There were no presumptions or default provisions.</td>
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</table>
Commentary: This section is likely to be used only in certain classes of cases. If the actual earnings of the injured party were significantly lower (or higher) than the median income, then we would expect to see proof by the defendant (or the plaintiff) of the actual figures, rather than a reliance on the default figures.

The existence of the default figures, however, will make litigation of the economic elements of damages less costly for both sides when the plaintiff’s actual earnings were close to the median.

(The provisions of §2946a which impose a cap on damages in product liability cases are addressed above under topic 1 - Caps on Damages.)

---

25 - CLAIMS AGAINST CPAs

Statutory section: MCL 600.2962

Brief description: Limits on claims against CPAs

Statutory provisions: Claims may only be brought by clients unless the client has informed the CPA in writing that the primary purpose of the service was to benefit the plaintiff, and the CPA has identified in writing the person(s) intended to rely on the services. New in 2012: These written statements must be done prior to the commencement of services.

Exception: fraudulent misrepresentations by the CPA.

New in 2012: No claim may be brought based on
• assignment of a claim (subject to specified exceptions)
• succession after foreclosure or surrender of assets
• statement in writing, as above, not signed by the CPA’s client

Previous law: The rules as to when and how a non-client could make a claim against a CPA tracked those which applied to lawyers and other professionals. Such claims could be brought only in certain situations, where the reliance of a third party was foreseeable.

Commentary: This represents a significant restriction. Note, however, that it applies solely to certified public accountants, not to accountants generally.

Cases applying

Ohio Farmers Ins. Co. v. Shamie,

Statute does not apply to a case which accrued before its effective date.
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500.3135 Tort liability for noneconomic loss; action for damages pursuant to subsection (1); abolition of tort liability; exceptions; action for damages pursuant to subsection (3)(d); commencement of action; removal; costs; decision as res judicata; “serious impairment of body function” defined.

Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.
(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

(b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred.

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

(b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

(d) Damages up to $500.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (4).

(4) In an action for damages pursuant to subsection (3)(d):

(a) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(b) Liability shall not be a component of residual liability, as prescribed in section 3131, for which maintenance of security is required by this act.

(5) Actions under subsection (3)(d) shall be commenced, whenever legally possible, in the small claims division of the district court or the municipal court. If the defendant or plaintiff removes the action to a higher court and does not prevail, the judge may assess costs.

(6) A decision of a court made pursuant to subsection (3)(d) is not res judicata in any proceeding to determine any other liability arising from the same circumstances as gave rise to the action brought pursuant to subsection (3)(d).

(7) As used in this section, “serious impairment of body function” means an objectively manifested impairment...
of an important body function that affects the person's general ability to lead his or her normal life.


**Compiler's note:** Act 143 of 1993, which amended this section, was submitted to the people by referendum petition (as Proposal C) and rejected by a majority of the votes cast at the November 8, 1994, general election.

**Popular name:** Act 218

**Popular name:** Essential Insurance

**Popular name:** No-Fault Insurance
600.1483  Action for damages alleging medical malpractice; limitation on noneconomic damages; exceptions; itemizing damages into economic and noneconomic loss; “noneconomic loss" defined; adjusting limitation on noneconomic loss.  [M.S.A. 27a.1483]

Sec. 1483.  (1)  In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a)  The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i)  Injury to the brain.

(ii)  Injury to the spinal cord.

(b)  The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c)  There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2)  In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3)  As used in this section, “noneconomic loss” means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4)  The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, “consumer price index” means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.


Compiler’s note:  Section 3 of Act 178 of 1986 provides:

“(1)  Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2)  Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3)  Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4)  Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5)  Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6)  Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.1621 Venue; determination; exceptions. [M.S.A. 27a.1621]

Sec. 1621. Except for actions provided for in sections 1605, 1611, 1615, and 1629, venue is determined as follows:

(a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

(b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.

(c) An action against a fiduciary appointed by court order shall be commenced in the county in which the fiduciary was appointed.

600.1627  Venue; county where cause of action arose; exceptions; suits against surety of public officers or their appointees.  [M.S.A. 27a.1627]

Sec. 1627. Except for actions founded on contract and actions provided for in sections 1605, 1611, 1615, and 1629, the county in which all or a part of the cause of action arose is a proper county in which to commence and try the action. Suits against the surety of a public officer or his or her appointees are not excepted from the application of this section.

600.1629 Provisions applicable in action based on tort; grounds for motion for change in venue; determination of venue in product liability action. [M.S.A. 27a.1629]

Sec. 1629. (1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
(a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
   (i) The defendant resides, has a place of business, or conducts business in that county.
   (ii) The corporate registered office of a defendant is located in that county.
(b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
   (i) The plaintiff resides, has a place of business, or conducts business in that county.
   (ii) The corporate registered office of a plaintiff is located in that county.
(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:
   (i) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
   (ii) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
(d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.
(2) Any party may file a motion to change venue based on hardship or inconvenience.
(3) For the purpose of this section only, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product is sold at retail.


Compiler's note: Section 3 of Act 178 of 1986 provides:
“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.
“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.
“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.
“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.
“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.
“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.1641   Venue; joinder of causes of action; separation.

Sec. 1641. (1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.

(2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in section 1629.

600.2169 Qualifications of expert witness in action alleging medical malpractice; determination; disqualification of expert witness; testimony on contingency fee basis as misdemeanor; limitations applicable to discovery.

Sec. 2169. (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

(d) The relevancy of the expert witness's testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(4) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis. A person who violates this subsection is guilty of a misdemeanor.

(5) In an action alleging medical malpractice, all of the following limitations apply to discovery conducted by opposing counsel to determine whether or not an expert witness is qualified:

(a) Tax returns of the expert witness are not discoverable.

(b) Family members of the expert witness shall not be deposed concerning the amount of time the expert witness spends engaged in the practice of his or her health profession.

(c) A personal diary or calendar belonging to the expert witness is not discoverable. As used in this subdivision, “personal diary or calendar” means a diary or calendar that does not include listings or records of professional activities.


Constitutionality: MCL 600.2169 is an enactment of substantive law. As such it does not impermissibly infringe the Supreme Court's constitutional rule-making authority over "practice and procedure." McDougall v Schanz, 461 Mich 15 (1999).

Compiler's note: Section 3 of Act 178 of 1986 provides:
“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.2591 Frivolous civil action or defense to civil action; awarding costs and fees to prevailing party; definitions.  [M.S.A. 27a.2591]
Sec. 2591.  (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:
   (a) “Frivolous” means that at least 1 of the following conditions is met:
      (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
      (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
      (iii) The party's legal position was devoid of arguable legal merit.
   (b) “Prevailing party” means a party who wins on the entire record.

Compiler's note: Section 3 of Act 178 of 1986 provides:
“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.
“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.
“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.
“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.
“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.
“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.2912a Action alleging malpractice; burden of proof.  [M.S.A. 27a.2912(1)]

Sec. 2912a. (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
   
   (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

   (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

   (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

600.2912b Action alleging medical malpractice; notice; mailing; notice period; statement; access to medical records; tacking successive notice periods; response; failure to receive response; health professional or facility not intending to settle.

Sec. 2912b. (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

(2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

(3) The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:

(a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.

(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

(d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

(4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

(5) Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law.

(6) After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

(7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that
contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

(8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

(9) If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

600.2912c Action alleging medical malpractice; filing affidavit certifying noninvolvement; dismissal of claim; reinstatement of party; discovery.

Sec. 2912c. (1) In an action alleging medical malpractice, a party named as a defendant in the action may, instead of answering or otherwise pleading, file with the court an affidavit certifying that he or she was not involved, either directly or indirectly, in the occurrence alleged in the action. Unless the affidavit is opposed pursuant to subsection (2), the court shall order the dismissal of the claim, without prejudice, against the affiant.

(2) Any party to the action may oppose the dismissal or move to vacate an order of dismissal and reinstate the party who filed the affidavit if it can be shown that the party filing the affidavit was involved in the occurrence alleged in the action. Reinstatement of a party to the action under this subdivision shall not be barred by any statute of limitations defense that was not valid at the time the action was originally commenced against the affiant. The opposing party may obtain discovery regarding the involvement or noninvolvement of the party filing the affidavit. The discovery shall be completed within 90 days after the date the affidavit is filed.


Compiler’s note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925h, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.2912d **Action alleging medical malpractice; complaint to be accompanied by affidavit of merit; filing extension; failure to allow access to medical records.**

Sec. 2912d. (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.


**Compiler's note:** In subsection (3), the reference to “section 2912b(6)” evidently should be to section 2912b(5).

Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925h, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2912c, 2912d, 2912e, 2912f, 2912h, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.2912e Action alleging medical malpractice; filing answer to complaint; filing affidavit of meritorious defense; failure to allow access to medical records.

Sec. 2912e. (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:

(a) The factual basis for each defense to the claims made against the defendant in the complaint.
(b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
(c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
(d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

(2) If the plaintiff in an action alleging medical malpractice fails to allow access to medical records as required under section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after filing an answer to the complaint.


Compiler's note: In subsection (2), the reference to "section 2912b(6)" evidently should be to section 2912b(5).

Section 3 of Act 178 of 1986 provides:

"(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

"(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

"(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

"(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

"(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

"(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988."
600.2912f Waiver of privilege; permissible communication; disclosure not as violation of law.

Sec. 2912f. (1) A person who has given notice under section 2912b or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.

(2) Pursuant to subsection (1), a person or entity who has received notice under section 2912b or who has been named as a defendant in an action alleging medical malpractice or that person's or entity's attorney or authorized representative may communicate with a person specified in section 5838a in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.

(3) A person who discloses information under subsection (2) to a person or entity who has received notice under section 2912b or to a person or entity who has been named as a defendant in an action alleging medical malpractice or to the person's or entity's attorney or authorized representative does not violate section 2157 or any other similar duty or obligation created by law and owed to the claimant or plaintiff.

600.2912g Arbitration.

Sec. 2912g. (1) Subject to subsection (2), at any time after notice is given as required under section 2912b, if the total amount of damages claimed is $75,000.00 or less, including interest and costs, all claimants and all health professionals or health facilities notified under section 2912b may agree in writing to submit the claim stated in the notice to binding arbitration. An arbitration agreement entered into under this subsection shall contain at least all of the following provisions:

(a) A process for the selection of an arbitrator.
(b) An agreement to apportion the costs of the arbitration.
(c) A waiver of the right to trial.
(d) A waiver of the right to appeal.

(2) The claimants giving notice and the health professionals or health facilities receiving notice under section 2912b may agree in writing to a total amount of damages greater than the limit set forth in subsection (1).

(3) Arbitration conducted under this section is binding as to all parties who have entered into the written agreement described in subsection (1). Arbitration under this section shall be summary in nature and shall be conducted as follows:

(a) The proceeding shall be conducted by a single arbitrator chosen by agreement of all parties to the claim.
(b) There shall be no live testimony of parties or witnesses.
(c) The Michigan general court rules pertaining to discovery are not applicable except that all of the following information shall be disclosed and exchanged between the parties upon written request of a party:
   (i) All relevant medical records or medical authorizations sufficient to enable the procurement of all relevant medical records.
   (ii) An expert witness report or statement, but only if the party procuring the expert witness report or statement intends to or does furnish the expert witness report or statement to the arbitrator for consideration.
   (iii) Relevant published works, medical texts, and scientific and medical literature.
   (iv) A concise written summary prepared by a party or the party's representative setting forth that party's factual and legal position on the damages claimed.
   (v) Other information considered by the party making the request to be relevant to the claim or a defense to the claim.

(d) The arbitrator shall conduct 1 or more prehearing telephone conference calls or meetings with the parties or, if a party is represented by an attorney, the party's attorney, for the purpose of establishing the orderly request for and exchange of information described in this subsection, and any other advance disclosure of information considered reasonable and necessary in the arbitrator's sole discretion. The arbitrator shall set deadlines for the exchange or advance disclosure of information under this subsection including, but not limited to, the concise written summary required under subdivision (c)(iv).

(e) The arbitrator may issue his or her decision without holding a formal hearing based solely upon his or her review of the materials furnished by the parties under this section. In his or her sole discretion and whether or not requested to do so by a party, the arbitrator may hold a hearing. A hearing held under this subdivision is limited solely to the presentation of oral arguments, subject to time limitations set by the arbitrator.

(f) A written agreement to submit the claim to binding arbitration under this section is binding on each party signing the agreement and on their representatives, insurers, and heirs. An arbitration agreement under this section signed on behalf of a minor or a person who is otherwise incompetent is enforceable and is not subject to disaffirmance or disavowal, if the minor or incompetent person was represented by an attorney at the time the written agreement was executed.

(g) The arbitrator shall issue a written decision that states at a minimum the factual basis for the decision and the dollar amount of the award. The arbitrator shall not include costs, interest, or attorney fees in an award. A party may submit an award by an arbitrator under this section to a court of competent jurisdiction for entry of judgment on and enforcement of the award.

(4) An arbitration award under this section is not subject to appeal.
600.2912h Settlement agreement.

Sec. 2912h. (1) If the plaintiff in an action alleging medical malpractice enters into a settlement agreement with a defendant concerning the action, whether or not the settlement agreement was entered into under court supervision, and the defendant is licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, the plaintiff's attorney and the defendant's attorney or, if the plaintiff and the defendant are not represented by attorneys, the plaintiff and the defendant shall jointly file a complete written copy of the settlement agreement with the bureau within the department of commerce responsible for health occupations licensure, registration, and discipline, within 30 days after entering into the settlement agreement.

(2) Information filed with the department of commerce under subsection (1) is confidential except for use by the department of commerce in an investigation and is not subject to disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

600.2945 Definitions.

Sec. 2945. As used in this section and sections 1629, 2945 to 2949a, and 5805:

(a) “Alteration” means a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.

(b) “Drug” means that term as defined in section 201 of the federal food, drug, and cosmetic act, chapter 675, 52 Stat. 1040, 21 U.S.C. 321. However, drug does not include a medical appliance or device.

(c) “Economic loss” means objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

(d) “Gross negligence” means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

(e) “Misuse” means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

(f) “Noneconomic loss” means any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages.

(g) “Product” includes any and all component parts to a product.

(h) “Product liability action” means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.

(i) “Production” means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.

(j) “Sophisticated user” means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

600.2946  Product liability action; admissible evidence.

Sec. 2946.  (1) It shall be admissible as evidence in a product liability action that the production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

(2) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice is practical and feasible only if the technical, medical, or scientific knowledge relating to production of the product, at the time the specific unit of the product left the control of the manufacturer or seller, was developed, available, and capable of use in the production of the product and was economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge is not economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

(3) With regard to the production of a product that is the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that is learned, placed in use, or discontinued after the event resulting in the death of the person or injury to the person or property, which if learned, placed in use, or discontinued before the event would have made the event less likely to occur, is admissible only for the purpose of proving the feasibility of precautions, if controverted, or for impeachment.

(4) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or was approved by, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product. Noncompliance with a standard relevant to the event causing the death or injury set forth in a federal or state statute or lack of approval by, or noncompliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency does not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury is not admissible.

(5) In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. However, this subsection does not apply to a drug that is sold in the United States after the effective date of an order of the United States food and drug administration to remove the drug from the market or to withdraw its approval. This subsection does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:

(a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act, chapter 675, 52 Stat. 1040, 21 U.S.C. 301 to 321, 331 to 343-2, 344 to 346a, 347, 348 to 353, 355 to 360, 360b to 376, and 378 to 395, and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.

(b) Makes an illegal payment to an official or employee of the United States food and drug administration for the purpose of securing or maintaining approval of the drug.

600.2946a Determination of damages; limitation.  [M.S.A. 27a.2946(a)]

Sec. 2946a. (1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00. On the effective date of the amendatory act that added this section, the state treasurer shall adjust the limitations set forth in this subsection so that the limitations are equal to the limitations provided in section 1483. After that date, the state treasurer shall adjust the limitations set forth in this subsection at the end of each calendar year so that they continue to be equal to the limitations provided in section 1483.

(2) In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations under subsection (1). The court shall adjust an award of noneconomic loss to conform to the limitations under subsection (1).

(3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a perponderance of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that the matters stated in section 2949a are true.

(4) If damages for economic loss cannot readily be ascertained by the trier of fact, then the trier of fact shall calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the same manner as provided in subsection (1).


Compiler's note: In subsection (3), the word “perponderance” evidently should read “preponderance.”
600.2947  Product liability action; liability of manufacturer or seller.

Sec. 2947.  (1) A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.

(2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

(3) A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

(4) Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

(5) A manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community.

(6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

600.2948  Death or injury; warnings as evidence.

Sec. 2948. (1) Evidence is admissible in a product liability action that, before the death of the person or injury to the person or damage to property, pamphlets, booklets, labels, or other written warnings were provided that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

(2) A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

(3) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, a manufacturer or seller is not liable unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer.

(4) This section does not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product has left the manufacturer's or seller's control.

Sec. 2955. (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.
(b) Whether the opinion and its basis have been subjected to peer review publication.
(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
(d) The known or potential error rate of the opinion and its basis.
(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

600.2955a Impaired ability to function due to influence of intoxicating liquor or controlled substance as absolute defense; definitions.

Sec. 2955a. (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

(2) As used in this section:
   (a) “Controlled substance” means that term as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws.
   (b) “Impaired ability to function due to the influence of intoxicating liquor or a controlled substance” means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.

600.2956 Several and joint liability.

Sec. 2956. Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

600.2957 Determination and allocation of fault; action against nonparty; amendment of pleading; assessment of fault against nonparty.

Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

(2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(3) Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

600.2959 Comparative fault; reduction of damages.

Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

600.2962 Malpractice action against certified public accountant.

Sec. 2962. (1) This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:

(a) Subject to subsection (2), a negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant's client.

(b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.

(c) Subject to subsection (2), a negligent act, omission, decision, or other conduct of the certified public accountant if the certified public accountant was informed in writing directly by the client before commencement of the engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. For the purposes of this subdivision, the certified public accountant shall also separately identify in writing directly to the client, before commencement of the engagement, each person, generic group, or class description that the certified public accountant intends to have rely on the services. The certified public accountant may be held liable only to each identified person, generic group, or class description. The certified public accountant's written identification shall include each person, generic group, or class description identified by the client as being benefited or influenced.

(2) A certified public accountant is not liable for civil damages in any of the following situations:

(a) The claimant is not the certified public accountant's client, but asserts standing to sue based on an assignment of the claim from the client to the claimant. This subdivision does not apply to an action arising out of an annual report required by the cemetery regulation act, 1968 PA 251, MCL 456.521 to 456.543, or the prepaid funeral and cemetery sales act, 1986 PA 255, MCL 328.211 to 328.235.

(b) The claimant is not the certified public accountant's client, but asserts standing to sue based on a voluntary surrender of assets or acquisition of the claim by means of foreclosure or surrender under any type of security agreement between the claimant and the client.

(c) The claimant is not the certified public accountant's client, but asserts standing to sue based on a writing referred to in subsection (1)(c) that was not signed by the client himself or herself, if an individual, or that was not signed by an officer, manager, or member of the client, if an entity.

600.5838 Claim based on malpractice; accrual; commencement of action; burden of proof; limitations.

Sec. 5838. (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

(2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925h, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.5838a Claim based on medical malpractice; accrual; definitions; commencement of action; burden of proof; applicability of subsection (2); limitations.

Sec. 5838a. (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. 

As used in this subsection:

(a) “Licensed health facility or agency” means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.

(b) “Licensed health care professional” means an individual licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian.

(2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. This subsection does not apply, and the plaintiff is subject to the period of limitations set forth in subsection (3), under 1 of the following circumstances:

(a) If discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made.

(b) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(3) An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed...
600.5851 Disabilities of infancy or insanity; tacking of successive disabilities prohibited; year of grace; removing disability of infancy; claim alleging medical malpractice accruing to person 8 years old or less or 13 years old or less; disability of imprisonment; “release from imprisonment” defined.

Sec. 5851. (1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

(2) The term insane as employed in this chapter means a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane.

(3) To be considered a disability, the infancy or insanity must exist at the time the claim accrues. If the disability comes into existence after the claim has accrued, a court shall not recognize the disability under this section for the purpose of modifying the period of limitations.

(4) A person shall not tack successive disabilities. A court shall recognize only those disabilities that exist at the time the claim first accrues and that disable the person to whom the claim first accrues for the purpose of modifying the period of limitations.

(5) A court shall recognize both of the disabilities of infancy or insanity that disable the person to whom the claim first accrues at the time the claim first accrues. A court shall count the year of grace provided in this section from the termination of the last disability to the person to whom the claim originally accrued that has continued from the time the claim accrued, whether this disability terminates because of the death of the person disabled or for some other reason.

(6) With respect to a claim accruing before the effective date of the age of majority act of 1971, Act No. 79 of the Public Acts of 1971, being sections 722.51 to 722.55 of the Michigan Compiled Laws, the disability of infancy is removed as of the effective date of Act No. 79 of the Public Acts of 1971, as to persons who were at least 18 years of age but less than 21 years of age on January 1, 1972, and is removed as of the eighteenth birthday of a person who was under 18 years of age on January 1, 1972.

(7) Except as otherwise provided in subsection (8), if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

(8) If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has not reached his or her thirteenth birthday and if the claim involves an injury to the person's reproductive system, a person shall not bring an action based on the claim unless the action is commenced on or before the person's fifteenth birthday or within the period of limitations set forth in section 5838a, whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her thirteenth birthday and the claim involves an injury to the person's reproductive system, he or she is subject to the period of limitations set forth in section 5838a.

(9) If a person was serving a term of imprisonment on the effective date of the 1993 amendatory act that added this subsection, and that person has a cause of action to which the disability of imprisonment would have been applicable under the former provisions of this section, an entry may be made or an action may be brought under this act for that cause of action within 1 year after the effective date of the 1993 amendatory act that added this subsection, or within any other applicable period of limitation provided by law.

(10) If a person died or was released from imprisonment at any time within the period of 1 year preceding the effective date of the 1993 amendatory act that added this subsection, and that person had a cause of action to which
the disability of imprisonment would have been applicable under the former provisions of this section on the date of his or her death or release from imprisonment, an entry may be made or an action may be brought under this act for that cause of action within 1 year after the date of his or her death or release from imprisonment, or within any other applicable period of limitation provided by law.

(11) As used in this section, “release from imprisonment” means either of the following:
(a) A final release or discharge from imprisonment in a county jail.
(b) Release on parole or a final release or discharge from imprisonment in a state or federal correctional facility.


Compiler's note: Section 3 of Act 178 of 1986 provides:
“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.
“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.
“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.
“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.
“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.
“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.5856   Tolling of statute of limitations or repose.
Sec. 5856.   The statutes of limitations or repose are tolled:
(a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
(b) At the time jurisdiction over the defendant is otherwise acquired.
(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.
(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

600.6013  Interest on money judgment.

Sec. 6013. (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, “future damages” means that term as defined in section 6301.

(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to June 1, 1980, at the rate of 6% per year and on and after June 1, 1980, to the date of satisfaction of the judgment at the rate of 12% per year compounded annually.

(3) For a complaint filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the rate after the date judgment is entered shall not exceed either of the following:

(a) Seven percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses after May 31, 1980.

(4) For a complaint filed on or after June 1, 1980, but before January 1, 1987, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case interest is calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

(7) For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

(9) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and is rejected by the plaintiff, the court shall order that...
interest is not allowed beyond the date the bona fide, reasonable written offer of settlement is filed with the court.

(10) Except as otherwise provided in subsection (1) and subject to subsections (11) and (12), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(11) If a civil action is based on medical malpractice and the defendant in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from the date notice was given in compliance with section 2912b to the date of satisfaction of the judgment.

(12) If a civil action is based on medical malpractice and the plaintiff in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from 182 days after the date the complaint was filed to the date of satisfaction of the judgment.

(13) Except as otherwise provided in subsection (1), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2\% plus the rate of interest calculated under subsection (8).

(14) A bona fide, reasonable written offer of settlement made according to this section that is not accepted within 21 days after the offer is made is rejected. A rejection under this subsection or otherwise does not preclude a later offer by either party.

(15) As used in this section:
   (a) “Bona fide, reasonable written offer of settlement” means either of the following:
      (i) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, a written offer of settlement that is not less than 90\% of the amount actually received by the plaintiff in the action through judgment.
      (ii) With respect to an offer of settlement made by a plaintiff, a written offer of settlement that is not more than 110\% of the amount actually received by the plaintiff in the action through judgment.
   (b) “Defendant” means a defendant, a counter-defendant, or a cross-defendant.
   (c) “Party” means a plaintiff or a defendant.
   (d) “Plaintiff” means a plaintiff, a counter-plaintiff, or a cross-plaintiff.


**Compiler’s note:** Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925h, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 2912f, 2912g, 2912h, 2912i, 2912j, 2912k, 2912l, 2912m, 2912n, 2912o, 2912p, 2912q, 2912r, 2912s, 2912t, 2912u, 2912v, 2912w, 2912x, 2912y, 2912z, 2912aa, 2912ab, 2912ac, 2912ad, 2912ae, 2912af, 2912ag, 2912ah, 2912ai, 2912aj, 2912ak, 2912al, 2912am, 2912an, 2912ao, 2912ap, 2912aq, 2912ar, 2912as, 2912at, 2912au, 2912av, 2912aw, 2912ax, 2912ay, 2912az, 2912ba, 2912bb, 2912bc, 2912bd, 2912be, 2912bf, 2912bg, 2912bh, 2912bi, 2912bj, 2912bk, 2912bl, 2912bm, 2912bn, 2912bo, 2912bp, 2912bq, 2912br, 2912bs, 2912bt, 2912bu, 2912bv, 2912bw, 2912bx, 2912by, 2912bz, 2912ca, 2912cb, 2912cc, 2912cd, 2912ce, 2912cf, 2912cg, 2912ch, 2912ci, 2912cj, 2912ck, 2912cl, 2912cm, 2912cn, 2912co, 2912cp, 2912cq, 2912cr, 2912cs, 2912ct, 2912cu, 2912cv, 2912cw, 2912cx, 2912cy, 2912cz, 2912da, 2912db, 2912dc, 2912dd, 2912de, 2912df, 2912dg, 2912dh, 2912di, 2912dj, 2912dk, 2912dl, 2912dm, 2912dn, 2912do, 2912dp, 2912dq, 2912dr, 2912ds, 2912dt, 2912du, 2912dv, 2912dw, 2912dx, 2912dy, and 2912dz of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6301 Definitions. [M.S.A. 27a.6301]

Sec. 6301. As used in this chapter:

(a) “Future damages” means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering.

(b) “Personal injury” means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6303  Payment of plaintiff's expense or loss by collateral source; notice to contractual lien holder; failure to exercise right of subrogation; contracts to which subsection (3) applicable; "collateral source" defined; benefits from collateral source as payable or receivable.

Sec. 6303. (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

(2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, “collateral source” means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

(5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after January 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after January 1, 1988.”
600.6304  Personal injury action involving fault of more than 1 party to action; instructing jury to answer special interrogatories; findings of court; determining percentages of fault; determining award of damages; release from liability; amount of damages; reducing award of damages; reallocation of uncollectible amount; liability of governmental agency; “fault” defined. [M.S.A. 27a.6304]

Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff’s damages.
(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).

(b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), according to their respective percentages of fault as determined under subsection (1). A party is not required to pay a percentage of any uncollectible amount that exceeds that party's percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(7) Notwithstanding subsection (6), a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of any uncollectible amount that exceeds the governmental agency's percentage of fault as determined under subsection (1).

(8) As used in this section, “fault” includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

Compiler's note: Section 3 of Act 178 of 1986 provides:

"(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

"(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

"(3) Sections 1629, 1653, 2169, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes filed on or after October 1, 1986.

"(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

"(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

"(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988."
600.6305 Verdict or judgment; specific findings; basis of calculation of future damages.  
[M.S.A. 27a.6305]

Sec. 6305.  (1) Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter shall include specific findings of the following:
   (a) Any past economic and noneconomic damages.

   (b) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of future damages:
      (i) Medical and other costs of health care.
      (ii) Lost wages or earnings or lost earning capacity and other economic loss.
      (iii) Noneconomic loss.

   (2) The calculation of future damages for types of future damages described in subsection (1)(b) shall be based on the costs and losses during the period of time the plaintiff will sustain those costs and losses. In the event of death, the calculation of future damages shall be based on the losses during the period of time the plaintiff would have lived but for the injury upon which the claim is based.


Compiler's note: Section 3 of Act 178 of 1986 provides:
   “(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.
   “(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.
   “(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.
   “(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.
   “(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.
   “(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6306 Entering order of judgment; order; judgment amounts; definition; reduction of judgment amount. [M.S.A. 27a.6306]

Sec. 6306. (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) As used in this section, “gross present cash value” means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b).

(3) If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff’s fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.


Compiler’s note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6307  Purchase of annuity contract.

Sec. 6307. In an action alleging personal injury, if the amount of future damages, as described in section 6306(1)(c) and (e), in the judgment exceeds $250,000.00 gross present cash value, as determined under section 6306(2), the court shall enter an order that the defendant or the defendant's liability insurance carrier shall satisfy that amount of the judgment, less all costs and attorney fees the plaintiff is obligated to pay, by the purchase of an annuity contract, if all of the following requirements are met:

(a) The purchase price of the annuity contract shall be equal to 100% of the future damages subject to this section, less an amount determined by multiplying the amount of those damages by a percentage equal to the rate of prejudgment interest as calculated under section 6013(5) or section 6455(2) on the date the trial was commenced.

(b) The annuity contract is purchased from a life insurer authorized to issue annuity contracts under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6309  Plan for structured payment of future damages; determination as to future collectibility of annuity contract or qualified assignment; owner of annuity contract; making qualified assignment; effect of qualified assignment; recipients of structured payments guaranteed by annuity contract.

Sec. 6309. (1) Subject to section 6307, if the plaintiff and the defendant agree to a plan for the structured payment of future damages within 35 days of the judgment, the court shall order that structured payments shall be made pursuant to that plan.

(2) If the plaintiff and defendant do not agree to a plan for structured payments as prescribed by subsection (1), the court shall order the structured payment of future damages pursuant to a plan submitted to the court by the plaintiff or defendant.

(3) Upon motion by the plaintiff, the court shall make a determination as to the future collectibility of the annuity contract or a qualified assignment made pursuant to subsection (4).

(4) The defendant or the defendant's liability insurance carrier who satisfies a portion of the judgment by the purchase of an annuity contract as provided by this section or section 6307 shall be the owner of that annuity contract, except that the defendant or the defendant's insurance carrier may make a qualified assignment, within the meaning of section 130(c) of the internal revenue code of 1954, as amended, of the obligation to the plaintiff.

(5) If a qualified assignment is made pursuant to subsection (4), the defendant's liability insurance carrier shall be relieved of all obligation to the plaintiff.

(6) Structured payments guaranteed by an annuity contract shall be made to the plaintiff or the plaintiff's estate, or in a wrongful death action, to the person or persons entitled to the damages or that person's or persons' estate, as applicable.


Compiler's note: Section 3 of Act 178 of 1986 provides:

"(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

"(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

"(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

"(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed on or after October 1, 1986.

"(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

"(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988."
Sec. 6311. Sections 6306(1)(c), (d), and (e), 6307, and 6309 do not apply to a plaintiff who is 60 years of age or older at the time of judgment.


Compiler's note: Section 3 of Act 178 of 1986 provides:

“(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986.

“(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986.

“(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986.

“(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986.

“(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987.

“(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988.”
600.6312 Joint and several liability.

Sec. 6312. A defendant that is found liable for an act or omission that causes personal injury, property damage, or wrongful death is jointly and severally liable if the defendant's act or omission is any of the following:

(a) A crime, an element of which is gross negligence, for which the defendant is convicted.

(b) A crime involving the use of alcohol or a controlled substance for which the defendant is convicted and that is a violation of 1 or more of the following:


(iii) Section 625 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled Laws.

(iv) Section 185 of the Aeronautics code of the state of Michigan, Act No. 327 of the Public Acts of 1945, being section 259.185 of the Michigan Compiled Laws.

(v) Section 80176 of part 801 (marine safety), 81134 of part 811 (off-road recreation vehicles), or 82127 of part 821 (snowmobiles) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.80176, 324.81134, and 324.82127 of the Michigan Compiled Laws.


Several new statutory amendments were enacted at the very end of the legislative session in December 2012. They include:

**Public Act 608** – amending

- §1483 – caps on damages
- §6306 – entry of judgment
- §6306a – new section, for medical malpractice cases

  incidental amendments
  - §2959 – reduction of verdict before judgment
  - §6307 – payment of future damages in installments

**Public Act 609** – amending

- §5852 – extended time for filing – estate of deceased plaintiff
- §6013 – prejudgment interest

  incidental amendment
  - §2912e – affidavit of meritorious defense
STATE OF MICHIGAN
96TH LEGISLATURE
REGULAR SESSION OF 2012

Introduced by Senators Kahn, Meekhof, Moolenaar and Smith

ENROLLED SENATE BILL No. 1115

AN ACT to amend 1961 PA 236, entitled “An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of the courts, and of the judges and other officers of the courts; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in the courts; pleading, evidence, practice, and procedure in civil and criminal actions and proceedings in the courts; to provide for the powers and duties of certain state governmental officers and entities; to provide remedies and penalties for the violation of certain provisions of this act; to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act; and to repeal acts and parts of acts,” by amending sections 1483, 2959, 6306, and 6307 (MCL 600.1483, 600.2959, 600.6306, and 600.6307), section 1483 as amended by 1993 PA 78, section 2959 as added and section 6306 as amended by 1995 PA 161, and section 6307 as added by 1986 PA 178, and by adding section 6306a.

The People of the State of Michigan enact:

Sec. 1483. (1) In a claim for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the medical malpractice of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, “noneconomic loss” 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.

(4) Beginning April 1, 1994, the state treasurer shall adjust the limitations on damages for noneconomic loss set forth in subsection (1) by amounts determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, “consumer price index” means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.
Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable. If that person’s percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and noneconomic damages shall not be awarded.

Sec. 6306. (1) After a verdict is rendered by a trier of fact in favor of a plaintiff in a personal injury action other than an action for medical malpractice, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs and less collateral source payments determined to be collectible under section 6303(5), reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) As used in this section, “gross present cash value” means the total amount of future damages reduced to present value at a rate of 5% per year, compounded annually, for each year in which those damages will accrue, as found by the trier of fact under section 6305(1)(b).

(3) If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff’s fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

Sec. 6306a. (1) After a verdict is rendered by a trier of fact in favor of a plaintiff in a medical malpractice action, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided in section 6303.

(b) All past noneconomic damages, reduced subject to the limitations in section 1483. When reducing past noneconomic damages as required by section 1483, the court shall calculate the ratio of past noneconomic damages to future noneconomic damages and shall allocate the amounts to be deducted proportionally between the past and future noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303, reduced to gross present cash value.

(d) All future medical and other health care costs, reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value and reduced subject to the limitations in section 1483. When reducing future noneconomic damages as required by section 1483, the court shall calculate the ratio of past noneconomic damages to future noneconomic damages and shall allocate the amounts to be deducted proportionally between the past and future noneconomic damages.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount as determined under this section shall be reduced, subject to section 2959, by the percentage of plaintiff’s fault. When reducing a judgment amount under this subsection, the court shall determine the ratio of total past damages to total future damages and allocate the amounts to be deducted proportionally between the past and future damages.

(3) If liability is determined to be joint and several, the total judgment amount determined under this section shall be reduced by the amount of all settlements paid by all joint tortfeasors, including joint tortfeasors who were not parties to the action and joint tortfeasors who are not persons described in section 5838a(1). When reducing a judgment amount under this subsection, the court shall calculate the ratio of total past damages to total future damages awarded by the trier of fact and shall allocate the amounts to be deducted proportionally between the past and future damages.

(4) As used in this section, “gross present cash value” means the total amount of future damages reduced to present value at a rate of 5% per year, compounded annually, for each year in which the damages will accrue, as found by the trier of fact under section 6305(1)(b).
Sec. 6307. In an action alleging personal injury, if the amount of future damages, as described in section 6306(1)(c) and (e) or 6306a(1)(c) and (e), as applicable, in the judgment exceeds $250,000.00 gross present cash value, as determined under section 6306 or 6306a, as applicable, the court shall enter an order that the defendant or the defendant’s liability insurance carrier shall satisfy that amount of the judgment, less all costs and attorney fees the plaintiff is obligated to pay, by the purchase of an annuity contract, if all of the following requirements are met:

(a) The purchase price of the annuity contract is equal to 100% of the future damages subject to this section, less an amount determined by multiplying the amount of those damages by a percentage equal to the rate of prejudgment interest as calculated under section 6013(8) or section 6455(2) on the date the trial was commenced.

(b) The annuity contract is purchased from a life insurer authorized to issue annuity contracts under the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302.

Enacting section 1. Sections 1483, 2959, 6306, and 6307 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1483, 600.2959, 600.6306, and 600.6307, as amended by this amendatory act and section 6306a of the revised judicature act of 1961, 1961 PA 236, MCL 600.6306a, as added by this amendatory act apply only to actions in which the cause of action arose on or after the effective date of this amendatory act.

Approved

Secretary of the Senate

Clerk of the House of Representatives

Governor
AN ACT to amend 1961 PA 236, entitled “An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of the courts, and of the judges and other officers of the courts; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in the courts; pleading, evidence, practice, and procedure in civil and criminal actions and proceedings in the courts; to provide for the powers and duties of certain state governmental officers and entities; to provide remedies and penalties for the violation of certain provisions of this act; to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act; and to repeal acts and parts of acts,” by amending sections 2912e, 5852, and 6013 (MCL 600.2912e, 600.5852, and 600.6013), section 2912e as amended by 1993 PA 78, section 5852 as amended by 1988 PA 221, and section 6013 as amended by 2002 PA 77.

The People of the State of Michigan enact:

Sec. 2912e. (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendant’s attorney shall file, not later than 91 days after the plaintiff or the plaintiff’s attorney serves the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant’s attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant’s attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:

(a) The factual basis for each defense to the claims made against the defendant in the complaint.

(b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.

(2) If the plaintiff in an action alleging medical malpractice fails to allow access to medical records as required under section 2912b(5), the affidavit required under subsection (1) may be filed within 91 days after filing an answer to the complaint.
Sec. 5852. (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.

(2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.

(3) If a personal representative dies or is adjudged by a court to be legally incapacitated within 2 years after his or her letters are issued, the successor personal representative may commence an action alleging medical malpractice that survives by law within 1 year after the personal representative died or was adjudged by a court to be legally incapacitated.

(4) Notwithstanding subsections (1) to (3), an action shall not be commenced under this section later than 3 years after the period of limitations has run.

Sec. 6013. (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, “future damages” means that term as defined in section 6301.

(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to June 1, 1980, at the rate of 6% per year and on and after June 1, 1980, to the date of satisfaction of the judgment at the rate of 12% per year compounded annually.

(3) For a complaint filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the rate after the date judgment is entered shall not exceed either of the following:

(a) Seven percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses after May 31, 1980.

(4) For a complaint filed on or after June 1, 1980, but before January 1, 1987, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case, interest is calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate under this subsection shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate under this subsection shall not exceed 13% per year compounded annually after the date judgment is entered.

(6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

(7) For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer; and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.
(9) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and is rejected by the plaintiff, the court shall order that interest is not allowed beyond the date the bona fide, reasonable written offer of settlement is filed with the court.

(10) Except as otherwise provided in subsection (1) and subject to subsections (11) and (12), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(11) If a civil action is based on medical malpractice and the defendant in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from the date notice was given in compliance with section 2912b to the date of satisfaction of the judgment.

(12) If a civil action is based on medical malpractice and the plaintiff in the medical malpractice action failed to allow access to medical records as required under section 2912b(5), the court shall order that interest be calculated from 182 days after the date the complaint was filed to the date of satisfaction of the judgment.

(13) Except as otherwise provided in subsection (1), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest calculated under subsection (8).

(14) A bona fide, reasonable written offer of settlement made according to this section that is not accepted within 21 days after the offer is made is rejected. A rejection under this subsection or otherwise does not preclude a later offer by either party.

(15) As used in this section:
(a) “Bona fide, reasonable written offer of settlement” means either of the following:
(i) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, a written offer of settlement that is not less than 90% of the amount actually received by the plaintiff in the action through judgment.
(ii) With respect to an offer of settlement made by a plaintiff, a written offer of settlement that is not more than 110% of the amount actually received by the plaintiff in the action through judgment.
(b) “Defendant” means a defendant, a counter-defendant, or a cross-defendant.
(c) “Party” means a plaintiff or a defendant.
(d) “Plaintiff” means a plaintiff, a counter-plaintiff, or a cross-plaintiff.

Enacting section 1. Sections 2912e, 5852, and 6013 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2912e, 600.5852, and 600.6013, as amended by this amendatory act apply only to actions in which the cause of action arose on or after the effective date of this amendatory act.

Carol Murray Vivenzi
Secretary of the Senate

Sandy Randall
Clerk of the House of Representatives

Approved .................................................................

Governor
600.6304 Personal injury action involving fault of more than 1 party to action; instructing jury to answer special interrogatories; findings of court; determining percentages of fault; determining award of damages; release from liability; amount of damages; reducing award of damages; reallocation of uncollectible amount; liability of governmental agency; “fault” defined. [M.S.A. 27a.6304]

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<th>Text</th>
<th>Cross-refs</th>
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<tr>
<td>Sec. 6304. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:</td>
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<td>Although there is no time limit in this statutory provision, the Supreme Court later enacted Rule 2.112(k) which requires that a defendant which wishes to avail itself of this section must file a notice of non-party fault, and must do so within 91 days of filing his answer. Since the Supreme Court has the power to prescribe procedural rules, this time limit is probably valid.</td>
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<td>(a) The total amount of each plaintiff's damages.</td>
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<td>The “could have been named” makes it clear that the fault of persons against whom a claim could not be made due to immunity, expiration of the statute of limitations, etc. may still be considered.</td>
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<td>(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.</td>
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<td>See also Further Note 1</td>
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<td>(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.</td>
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<td>The jury needs to be instructed that both the nature of the act and the causal connection to the injury must be considered.</td>
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(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

Section 2955a is the special provision prohibiting any award of damages to a plaintiff 50% or more at fault due to use of alcohol or drugs. Section 6303 is the provision for reduction by amounts paid by a collateral source. Section 2925d is the section which governs the effect of a settlement with one of several co-defendants.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

Section 2956 provides for several and not joint liability in all tort claims for personal injury “except as provided in” this section. Section 6312 is the provision that retains joint and several liability for certain specified torts, including crimes involving gross negligence and alcohol-related offenses.

Actions “to which this section applies” are all actions for damages for personal injury, wrongful death, or property damage, based on tort or otherwise. This includes medical malpractice claims. This subsection does not make joint and several liability applicable to malpractice claims; it states that several and not joint liability applies to all claims. Section 6, however, includes its own special rules, which modify the general rule under Section 4.

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

Section 1483 applies caps on non-economic damages.
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<tr>
<th>(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:</th>
<th>Section 5838a(1) identifies health care professionals as to whom the 1986 and 1993 tort reform provisions applied</th>
<th>This is another retention provision: joint and several liability continues to apply to all cases which include medical malpractice claims in which the plaintiff is not negligent. This includes any tort claim which includes a medical malpractice claim, and covers all defendants, not just health care professionals. Note that there seems to be no reason (except the separate verification requirements) that a fairly spurious medical malpractice claim could not be added to the case, just to avail the plaintiff of joint and several liability if there is a concern about the collectibility of one or more defendants. See also Further Note 2</th>
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<td>(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).</td>
<td>Query how a defendant who is severally and not jointly liable in a malpractice case (because the plaintiff is negligent) can still have to share the liability of other defendants when they are found to be uncollectible. The “share of the obligation” language is a holdover from the 1986 statute, which was drafted when joint and several liability was the rule. Now, instead of one unified “obligation” as to which shares may be calculated, there are separate and unshared obligations. Nonetheless, the intent is to continue to provide for a reallocation among the defendants. Section 4 above, which provides that no person shall pay more than his share of the damages, makes a specific exception for Section 6. Now, in some situations, the plaintiff in a medical malpractice case can be better off than the plaintiff in a personal injury case, which seems to contradict the intent of the 1986 and 1993 reforms.</td>
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<td>(b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party’s share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), according to their respective percentages of fault as determined under subsection (1). A party is not required to pay a percentage of any uncollectible amount that exceeds that party’s percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.</td>
<td>The rules on several liability or joint liability apply to governmental agencies, but the reallocation of liability provision does not apply to governmental agencies other than hospitals or medical care facilities. This section comes into play only on the rare case in which (1) a case includes a medical malpractice claim and (2) a governmental agency which is not a hospital or MCF is involved. It is not clear whether this is intended to provide an exception only to the reallocation of damages among severally liable defendants -- which applies under section 6(2) when the plaintiff is negligent -- or also to the joint and several liability which continues under Section 6(1) when the case includes a medical malpractice claim and the plaintiff is not negligent. Only Section 6(2) refers to an “uncollectible amount”.</td>
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<td>(7) Notwithstanding subsection (6), a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of any uncollectible amount that exceeds the governmental agency’s percentage of fault as determined under subsection (1).</td>
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As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

This makes it clear that all avenues of liability are included.


See also the flow chart for analyzing the application of these provisions.

Further notes

1. Sec. 6304(1)(b) – This section provides authority for allowing the jury to include the fault of a defendant who has settled with the plaintiff before trial. Unlike the consideration of fault of others, this one does not require any notice. Query whether the practice of executing a "covenant not to sue" can avoid the application of this section to a person who has settled his liability before trial, as it previously did in the case of a settlement reached with either the principal or agent in a vicarious liability case.

   In favor of yes: The case law recognized a difference between a release and a covenant not to sue in that context. Section 2925d, which governs the effect of dismissal of one defendant on contribution rights in a joint and several liability context, includes a covenant not to sue under its terms; since that document was included there and not included here, an argument can be made that the execution of a covenant not to sue would preclude the effect of this section.

   In favor of no: this section uses the verb "release" rather than the noun "release", and that both documents act to "release [the settling defendant] from liability" for the purposes intended in this section.

2. Sec. 6306(6)(a) – This language makes it unclear whether joint and several liability as retained in the cases governed by this section is for the entire value of the damages as found by the jury or only for the proportion of the damages which is attributed to the parties to the case. If damages are assessed at $100,000, and an employer is found 40% responsible, and three defendants have a combined responsibility of 60%, are they jointly and severally liable for $100,000 or for $60,000?

   In favor of 100K: there would otherwise be no real difference between this subsection (a) and the procedure under subsection (b).

   In favor of 60K: the first three sections -- 6304(1)-(3) -- do not make an exception for cases falling under 6304(6). They require that the allocations be made in all cases, including section (6) cases. If the intent was to exempt section (6) cases, section 6304 would have started off with "Except as provided in subsection (6) below . . . ." Instead, that language is not found until subsection (4), meaning that the allocations are to be made in section (6) cases. And if they are to be made, they are to be made for a reason.
RULES FOR ALLOCATION OF FAULT AMONG DEFENDANTS AND NON-PARTIES

DOES THE ACTION CLAIM DAMAGES FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH?

- YES
  - ARE THERE TWO OR MORE PERSONS AT FAULT BESIDES THE PLAINTIFF?
    - YES
      - ARE THERE PERSONS AT FAULT WHO ARE NOT DEFENDANTS?
        - YES
          - DO ANY OF THE CLAIMS INVOLVE MEDICAL MALPRACTICE?
            - NO
              - LIABILITY OF DEFENDANTS IS SEVERAL ONLY
            - YES
              - IS THE PLAINTIFF AT FAULT?
                - YES
                  - LIABILITY IS SEVERAL ONLY, BUT SUBJECT TO REALLOCATION FOR UNCOLLECTIBLE DEFENDANTS
                - NO
                  - LIABILITY IS JOINT AND SEVERAL AS TO ALL DEFENDANTS, MEDICAL AND NON-MEDICAL

- NO

SPECIAL RULES FOR PLAINFIGH'S NEGLIGENCE

PLAINTIFF MORE THAN 50% AT FAULT: NO RECOVERY FOR NON-ECONOMIC DAMAGES
Sec. 2959

PLAINTIFF 50% OR MORE AT FAULT DUE TO ALCOHOL OR DRUGS: NO RECOVERY FOR ANY DAMAGES.
Sec. 2955a
Limits on non-economic damages

<table>
<thead>
<tr>
<th>Tier</th>
<th>Med Mal</th>
<th>Products</th>
</tr>
</thead>
<tbody>
<tr>
<td>First tier - $280,000</td>
<td>All cases not meeting the definitions below, including death claims (unless the injury to the decedent would have met one of the definitions)</td>
<td>All cases not meeting the definitions below</td>
</tr>
<tr>
<td>Second tier - $500,000</td>
<td>1. Injury to the brain/spinal cord causing para, hemi or quadriplegia involving total, permanent functional loss of one or more limbs;</td>
<td>1. Death</td>
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<td></td>
<td>2. permanently impaired cognitive capacity so as to be permanently incapable of making independent life decisions and performing the activities of daily living; or</td>
<td>2. permanent loss of vital body function</td>
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<td></td>
<td>3. permanent loss or damage to a reproductive organ causing inability to procreate.</td>
<td>MCL 600.2946a</td>
</tr>
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<td></td>
<td>MCL 600.1483(1)(a)</td>
<td></td>
</tr>
<tr>
<td>Third tier - no limit</td>
<td>[no third tier]</td>
<td>Permanent loss of vital body function and defendant was reckless (as defined in section 2949a or grossly negligent (section 2946a)</td>
</tr>
</tbody>
</table>