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CALCULATING DAMAGES IN MOTOR VEHICLE COLLISION CLAIMS IN ONTARIO

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I. INTRODUCTION 1
II. PROTECTED DEFENDANTS AND OTHER PERSONS 2
A. Introduction *2*
(i) Who are "Protected Defendants"? 2
(ii) What are the Advantages of Being a Protected Defendant? 5
(a) Non-Pecuniary General Damages 5
(b) Income Loss or Loss of Earning Capacity Claims 6
(c) Health Care Expenses 7
(d) OHIP and Subrogated Claims 7
(e) Vicarious Liability 9
(f) Vanishing Deductibles and Miscellaneous Issues 10
B. Collateral Benefits *11*
C. Leased Vehicles *16*
III. CALCULATING DAMAGES UNDER BILL 198 18
A. Introduction *18*
(i) Separate Calculation of Each Head of Damages 18
(ii) The Calculation Date 19
B. All Defendants Are Protected *20*
(i) Pre-Trial Loss of Income Claims 20
(ii) Health Care Expenses 22
(iii) Other Pecuniary Losses 22
(iv) Future Pecuniary Losses 23
(v) Non-Pecuniary Damages 24
C. A Mixture of Protected and Unprotected Defendants *25*
(i) Introduction 25
(ii) The Approach to Apportionment 26
(a) Sullivan Estate v. Bond and calculations under clause 267.7(1)(a) 27
(b) Clause 267.7(1)(b) 28
(c) Clause 267.7(1)(c) 29
(d) A Simplified Method for Calculating the Amount Owed 30
(iii) Pre-Trial Loss of Income Claims 31
Collateral Benefits 32
(iv) Health Care Expenses 34
(v) Other Pecuniary Losses 35
(vi) Future Pecuniary Losses 35
(vii) Non-Pecuniary Damages 35
D. Pre-judgment Interest and Advance Payments *37*
E. Death Benefits *37*
IV. TACTICAL CONSIDERATIONS 38

APPENDIX DAMAGE CALCULATION RULES **43**

APPENDIX RECENT DECISIONS INVOLVING BILLS 59 & 198 .... **51**

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I. INTRODUCTION

It has been almost 14 years since I first penned a paper outlining how I believed tort damages should be calculated under Bill 59[2]. Since then, there has been a fair bit of judicial comment on both Bill 59 and the bill which modified it in 2003, namely, Bill 198. Bill 18, which deals with the liability of lessors and lessees came into force in March of 2006. It also made some modest changes to how Bills 59 and 198 work. It is contemplated that this summer the government will further tweak the tort compensation model. Finally, almost all of the pre Bill 198 claims have worked their way through the system. I thought that this would be a good time to attempt to provide a comprehensive overview of how Bill 59/Bill 198 works in the tort compensation context before further changes are made this summer.

Bill 59 came into force on October 23, 1996. It ushered in a complex and confusing damage assessment model for victims of automobile crashes. Bill 198, which came into force on October 1, 2003, made several changes to the damage calculation rules.[3]

In previous versions of this paper I have commented on the changes brought about by Bill 59 and then on the modifications to this regime contained in Bill 198. In this paper, I intend to simply discuss the law is it stands today without considering the differences between the two Bills. If you need some historical context or are still dealing with a pre-Bill 198 claim I would suggest that you review one of the earlier versions of this paper. I will simply refer to the legislation in the balance of this paper as Bill 198.

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[2] S.O. 1996, c.21. The formal title of the Bill is the *Automobile Insurance Rate Stability Act.*

[3] In fact, the provisions of Bill 198 came into force on that date but, in addition, a number of regulatory changes were also made. These appear to have been made pursuant to the *Insurance Act* as it read before Bill 198 came into force. In this paper, I will distinguish between the regulatory and statutory amendments. However, given that they all came into force on the same date and for the sake of simplicity I will refer to all of these changes collectively as Bill 198.

The appendix contains a set of rules designed to simplify calculations under Bill 198. However, these rules only work if the assumptions contained in this paper about a number of nuanced interpretative issues are correct. Therefore, I would caution the reader to carefully assess the assumptions that I have made in each of the damage calculation rules before using them.

II. PROTECTED DEFENDANTS AND OTHER PERSONS

A. Introduction

Bill 198 divides defendants into two classes; namely protected defendants and other persons. Before discussing how the damage calculation and apportionment provisions work it is important to understand the distinction between these two types of defendants.

(i) Who are "Protected Defendants"?

Bill 198 defines a "protected defendant" as a person who is protected from liability under subsections 267.5(1), (3) and (5) of the *Insurance Act*.[4] In later subsections, persons who are not "protected defendants" are simply described as "other persons". I will refer to them as "unprotected defendants".

In the previously referred-to subsections, the persons protected from liability are enumerated. They are:

(a) the owner of an automobile,

(b) the occupants of an automobile,[5] and

(c) any person present at the incident.

There is a great deal of case law on who is an "owner" of an automobile which I will not canvass in this paper. The term "owner" is also defined in section 267.3 of the *Insurance Act* to include a

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[4] Section 267.3, *Insurance Act*, R.S.O. 1990, c. I.8 amended (hereinafter the "Act").

[5] Occupant is defined as the driver of the automobile, a passenger whether being carried in or on the automobile and a person getting into or on or getting out of or off the automobile. See section 224(1) of the *Act.*

CVOR operator and, effective March 1, 2006, this definition has been expanded to include a lessee.[6]

This latter change was made due to the fact that from March 1, 2006 forward lessees are jointly and severally liable with the owner and operator of an automobile for the negligent operation of that vehicle.[7] The amendments to the *Compulsory Automobile Insurance Act*, the *Highway Traffic Act* and the *Insurance Act* that took effect on that date were intended to accomplish a number of goals. The first was to make lessees, who had not previously been vicariously liable for the negligent operation of a rented or leased vehicle, vicariously liable for such operation. Second, they limit the vicarious liability of lessors for bodily injury and death claims to $1 million less whatever insurance is available from the lessees' and the operators' policies. Finally, it changed the priority of payment rules amongst the insurers for the lessor, lessee and operator.[8] Prior to March 1, 2006 the lessor's policy would respond first and the policies of the lessee and driver would respond on an excess basis. The new regime obliges the lessee's policy to respond first, the driver's second and the lessor's last.[9]

Subsection 267.5(6) adds a very important qualification to the definition of a protected defendant. The effect of this subsection is to strip a protected defendant of this status if the person is defended by an insurer that is neither an Ontario automobile insurer nor has filed the requisite undertaking.[10]

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[6] See section 267.3.

[7] The term "lessee" includes a person who rents or leases a vehicle for any period of time. See section 192 of the *Highway Act*.

[8] See section 277.

[9] These changes are discussed under "Leased Vehicles" II.C below.

[10] Section 226.1 of the *Act* permits an insurer, which issues automobile policies in another province or U.S. state, to file an undertaking with the Financial Services Commission of Ontario (FSCO) obliging it to provide certain minimum mandatory coverages on any vehicle which it insures when such vehicle are operated in Ontario. The coverages which must be provided are minimum third party liability limits of $200,000.00, basic S.A.B. benefits and $200,000.00 of uninsured motorist protection. Although mandatory in Ontario policies, the undertaking does not oblige insurers to provide direct compensation coverage. Most American and Canadian insurers are providing these minimum coverages anyway. Extra-provincial insurers are often obliged to provide such minimum coverages by the laws of the jurisdiction which licensed them, by the so-called conformity provisions in their policies which require them to provide the minimum coverages mandated by the law of the jurisdiction in which the automobile is being

This provision strips owners, occupants and persons present at the incident of their status as protected defendants if they are defended by the "wrong type" of insurer. They do not lose their status if they defend themselves.

A rare but interesting problem can arise for "persons present at the incident". Let us suppose a collision was partly caused by a bicyclist. The bicyclist's home insurer would likely defend the action. In most cases, that insurer also underwrites automobile insurance in Ontario. Therefore, the bicyclist would be a "protected defendant". However, there are a few insurers who underwrite homeowners' policies that are not licensed to undertake automobile insurance. A bicyclist defended by such an insurer would not be a "protected defendant". It does not appear that such insurers are entitled to file section 226.1 undertakings.

The phrase "any person present at the incident" has not been interpreted broadly. It probably only includes natural persons who were actually present at the scene of the crash.[11]

Persons who are vicariously liable for the negligence of a protected defendant are unprotected defendants. The most common situation will involve a driver who was in the course of his or her

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operated or have undertaken to do so in the undertakings they have filed with the Superintendent of Financial Institutions for the Province of British Columbia (now administered by the Canadian Council of Insurance Regulators). See *Healy v. Interboro Mutual Indemnity Insurance Company* (2000) 138 O.A.C. 199 (note), 2000 CarswellOnt 1805, [1999] S.C.C.A. No. 384, [2000] 1 S.C.R. xiii Leave to appeal refused 119 O.A.C. 354, [1999] O.J. No. 1667, (Ont. C.A.); Affirmed (1998), [1999] I.L.R. I-3636, 1998 CarswellOnt 2142, 2 C.C.L.I. (3d) 281, 40 O.R. (3d) 270, 38 M.V.R. (3d) 57 (Ont. Gen. Div.) and cases referred to therein. I used to recommend that out of province insurers file this undertaking as there was probably no risk in doing so. However, the recent Court of Appeal decision in *Avis v. Certas,* 2005 CarswellOnt 7442, 215 O.A.C. 396 (note), Leave to appeal refused, 22 C.C.L.I. (4th) 1198, [2005] I.L. R. I-4413, 18 M.V.R. (5th) 61, 197 O.A.C. 214, 75 O.R. (3d) 421, 2005 CarswellOnt 1926 (Ont. C.A.); Affirmed, 18 M.V.R. (5th) 43, 71 O.R. (3d) 313, 13 C.C.L.I. (4th) 115, 2004 CarswellOnt 1876 (Ont. S.C.J.) suggests that the filing of this undertaking can have unintended consequences for such insurers if they write excess or umbrella automobile coverage.

[11] See *Young v. Donway Ford Sales Ltd.* (1995), 129 D.L.R. (4th) 279 (Gen. Div.), *Kochis v. Dolmage*, [1999] O.J. No. 1712 and *Zsoldos v. Canadian Pacific Railway* (2007) CarswellOnt 1511, 46 C.C.L.I. (4th) 294 (Ont. S.C.J.). See also *Hachey-Tweedle v. Trillium Funeral Service Corp. (c.o.b. as Morris Sutton Funeral Home)*, [1999] O.J. 883 which may suggest that a corporation can be present at the incident through its employees. In the end this will not assist the corporation as it will still be considered an unprotected defendant as the employer of the employee present at the incident. See discussion at "Vicarious Liability" at III.C.viii below.

employment at the time of the crash. His or her employer is not a protected defendant even if the employer is also the owner of the vehicle.[12] This issue is discussed in further detail below.[13]

(ii) What are the Advantages of Being a Protected Defendant?

Protected defendants receive preferential treatment with respect to three heads of damage. They are non-pecuniary general damages, income loss and loss of earning capacity claims and health care expenses. In addition, they are immune from tort claims advanced by uninsured plaintiffs.[14]

<u>(a) Non-Pecuniary General Damages</u>

Non-pecuniary general damages and damages under the *Family Law Act*[15] for loss of care, guidance and companionship cannot be recovered against a protected defendant unless the injury satisfies the verbal threshold set forth in the legislation.[16] This threshold is an amalgam of the tests set forth in previous legislation.[17] A protected defendant is only liable for non-pecuniary general damages or for loss of care, guidance and companionship claims if the injured party dies, suffers a permanent serious disfigurement or suffers a permanent serious impairment of an important physical, mental or psychological function as a result of the crash.[18] If the injury does

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[12] *Vollick v. Sheard* (2005), 75 O.R. (3d) 621. In *Linhares v. Seals* (2007), 87 O.R. (3d) 557, Belobaba J. had to consider the situation where the owner's employees failed to properly maintain the vehicle's brakes but the employed driver was not negligent. The Court found that the owner was not a protected defendant. Whether the negligence of its employees arose from driving a vehicle or from maintaining that vehicle's brakes, an employer is vicariously liable for its employees and an unprotected defendant pursuant to *Vollick*. Of course, the employees who failed to properly maintain the brakes were probably not protected defendants. Leave to appeal was denied in *Linhares v. Seals*, [2007] O.J. No. 3799. Please note that the earlier decision in *Linhares v. Seals* (2006) CarswellOnt 8843, of Himel J., to the opposite effect, was decided before amendments were made to the pleadings by the plaintiff.

[13] See "Vicarious Liability" III.C.viii below.

[14] See section 267.6 which provides that a person cannot advance a tort claim for bodily injury or death if the person was contravening subsection 2(1) of the *Compulsory Automobile Insurance Act*. The Court of Appeal in *Hernandez v. 1206625 Ontario Inc.* (2002), 61 O.R. (3d) 584 concluded that this provision only prohibits actions against protected defendants.

[15] R.S.O. 1990, c. F.3 as amended [hereinafter the "*FLA*"]

[16] Subsection 267.5(5).

[17] The Court of Appeal in the leading decision of *Meyer* has indicated that the phrase "threshold" is inappropriate. Nevertheless, most lawyers and many judges continue to use it. I have used it in this chapter as the alternative phrase recommended by the Court of Appeal is cumbersome.

[18] subsection 267.5(5) and O.Reg 461/96 section 5.1.

not meet this threshold, then only an unprotected defendant would be obliged to pay non-pecuniary damages to the injured person or any *FLA* claimant. In addition, even if the injury does meet this threshold, section 267.5 provides for deductibles of $30,000.00 and $15,000.00 respectively for non-pecuniary general damage claims and for *FLA* loss of care, guidance and companionship claims.[19] These deductibles are only available to protected defendants.

<u>(b) Income Loss or Loss of Earning Capacity Claims</u>

Protected defendants are not liable for income loss or loss of earning capacity (collectively "loss of income") claims suffered in the first seven days following the crash. Also, they are not liable for more than 80% of any net income loss suffered after the first seven days and prior to trial.[20] Lastly, a protected defendant is not liable for more than 80% of an injured plaintiff's net loss of earning capacity suffered before the trial. After the trial commences, the liability of both protected and unprotected defendants is for 100% of the future gross loss of income.

Subsection 267.5(2) purports to make the same rules applicable to claims made pursuant to subsection 61(1) of the *FLA*. Technically, however, claims made pursuant to the *FLA* are for loss of dependence rather than for loss of income. While the intent of the legislation is to apply the same rules to loss of dependency claims, the language used in the legislation may not have accomplished this goal.[21]

Protected defendants are also given a partial priority with respect to the deduction of loss of income collateral benefits. These collateral benefits are deducted first from the damages that protected and unprotected defendants are jointly and severally liable to contribute to. If there are any past losses left after this deduction, then the remaining collateral benefits are deducted from

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[19]Both amounts can be increased by regulation.

[20]The definition of "net income loss" is found in O. Reg. 461/96.

[21] Frankly, O. Reg 416/96 should have set out rules for the calculation of loss of dependency under the *FLA*. This omission could support an argument that the court must ignore this subsection for fatality claims, as there is no formula provided to calculate such losses. Even if the loss of income formula in the regulation were used, plaintiffs could be over-compensated. It should also be noted that there are problems with the regulatory formula if a self-employed individual has ongoing business expenses or the plaintiff is on a pension. Further, there can be no gross-up for future loss of income claims with the exception of claims made under subsection 61(1) of the *FLA*. (see section 267.11).

the damages that the unprotected defendants are solely liable for. This priority only applies to past losses and not to future losses.[22]

(c) Health Care Expenses

Protected defendants are only liable for health care expenses if the injury pierces the verbal threshold.[23] Unprotected defendants are liable for health care expenses even if the injury does not pierce the threshold.

(d) OHIP and Subrogated Claims

There is no convenient place to discuss this topic so I will comment on it here. Subsection 267.8(17) strips anyone who has paid collateral benefits of their common law, statutory or contractual rights of subrogation. Subsection 267.8(18) carves out an exception for OHIP but only as against a person who is not insured under a motor vehicle liability policy issued in Ontario.[24]

Automobile insurers licensed in Ontario are assessed annually for the estimated costs OHIP incurs due to the negligence of their insureds.[25] The intent of subsection 267.8(18) was to ensure that OHIP would be entitled to subrogate against everyone else. One would presume that this permits OHIP to pursue subrogated claims against all unprotected defendants and a number of persons who would qualify as protected defendants but whose insurers are not assessed annually. The latter would include persons present at the incident, uninsured drivers and owners and any person insured by an out of province automobile insurer which has filed a section 226.1 undertaking.

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[22] See subsections 267.8(1) and (3). As will be discussed later (see the discussion under the heading "Collateral Benefits" III.C.iii below) certain interpretations of the *Sullivan Estate* decision may strip this provision of any vitality.

[23] Subsections 267.5(3).

[24] It is clear that the exception to the prohibition on subrogation in favour of OHIP is limited to OHIP. Other provincial health insurance plans cannot subrogate. See *Matt (Litigation Guardian of) v. Barber* (2002), 216 O.A.C. 34 (C.A.) and *Landry v. Roy* (2001), 55 O.R. (3d) 605.

[25] See O. Reg. 401/96.

Accordingly and given the above presumption, one would expect that OHIP should be entitled to recover all sums it pays out as a result of automobile crashes that occur in Ontario. The mechanism of recovery would differ depending on whether the person at fault is or is not insured under a motor vehicle liability policy issued in Ontario.

Unfortunately, this interpretive approach to subsection 267.8(18) was rejected by the Court of Appeal. The Court of Appeal has concluded that if a defendant is insured under the requisite type of policy, even if that is not the policy that is obliged to respond to the claim, then the defendant is immune from a subrogated claim by OHIP.[26] For example, if a tavern owns a car or, possibly, if it has a non-owned automobile endorsement on its CGL policy, then it cannot be called upon to reimburse OHIP. Frankly, this interpretation destroys the entire logic behind OHIP's subrogation rights. Following this decision, OHIP can only subrogate against non-residents and people who are not insured under any type of motor vehicle liability policy issued in Ontario.

There is nothing in the *Act* that specifically describes how OHIP's claim would be calculated. Since the distinctions in subsection 267.8(18) are not premised on the protected defendant/unprotected defendant dichotomy, it is arguable that the apportionment provisions contained in section 267.7 are inapplicable. In situations where there is a mix of defendants, some of whom OHIP is permitted to sue and some whom it is not permitted to sue, it would be reasonable to treat the latter group as having paid their proportionate share of OHIP's claim through the mandatory assessment mechanism.[27] This should leave the defendants, against whom OHIP is entitled to subrogate, jointly and severally liable, as between themselves, for only that portion of the damages they caused.

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[26] *Georgiou v. Scarborough (City)* [2002] O.J. No. 3335. The Supreme Court of Canada refused leave to appeal this decision.

[27] This argument was more attractive before the Court of Appeal decision in *Georgiou*. Now it will be more difficult to argue that a contribution has been made on behalf of a defendant to OHIP if the defendant is not defending the claim under a motor vehicle liability policy issued in Ontario.

Subsection 267.8(17) of the *Act* prohibits subrogation by anyone who has paid collateral benefits. As the result of the Court of Appeal's ruling in the *Wawanesa* case any doubt that this provision applied to unprotected defendants has been laid to rest. [28] Of course, subsection 267.8(18) of the *Act* permits OHIP to subrogate in the circumstances described above.

(e) Vicarious Liability

Prior to the enactment of Bill 198, the Court of Appeal had concluded that those who employed protected defendants were not themselves protected defendants. This could and did result in the employer of a protected defendant, who might actually own the vehicle involved in the collision, being obliged to pay those damages which the driver/employee was excused from paying under Bill 59.[29] As a result, when Bill 198 was enacted the following new subsection [267.5(10.10)] was included:

> Despite any provision of this Part, a person vicariously liable for the fault or negligence of a protected defendant is not, in respect of the person's vicarious liability, liable for any amount greater than the amount of damages for which the protected defendant is liable.

The effect of this provision is to make a vicariously liable person a pseudo "protected defendant". The result is that the vicariously liable person is never liable for more damages than the protected defendant. To put it somewhat differently, a vicariously liable defendant will be obliged to pay precisely the same damages as the protected defendant. This provision, however, does not extend

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[28] *Wawanesa Mutual Insurance Company v. O.P.P.* (2002), 212 D.L.R. (4th) 191 (C.A.) affirming 54 O.R. (3d) 112 (Divisional Court) reversing 47 O.R. (3d) 332 (per Kozak J.). There appears to be a conflict between this case and the later Court of Appeal decision in *Hernandez* (see footnote 14). *Wawanesa* is not referred to by the Court in *Hernandez.* For an interesting analysis of the scope of the phrase "arising directly or indirectly out of the use or operation of an automobile" see the decision of Boyko J. in *Scanes v. Datillo* (2003), 65 O.R. (3d) 768. See also *Greenhalgh v. ING Halifax Insurance Co.(2004),* 72 O.R. (3d) 338 (C.A.) and cases cited therein. All cases which turn on the meaning of the phrase "arising directly or indirectly out of the use or operation of an automobile" as do the above cited cases may require reconsideration in light of the recent Supreme Court of Canada decisions in *Citadel General Assurance Co. v. Vytlinga,* 2007 CarswellOnt 6626 and *Herbison v. Lumberman's Mutual Casualty Co.*, 2007 CarswellOnt 6628. In my view, the result in *Wawanesa* would not be changed by these decisions.

[29] See footnote 12.

to the liability of that person for their own independent negligence. The most common situation where this provision will apply will be where the employer of an at-fault driver is sued.[30]

Several anomalous situations can arise because vicariously liable persons are not actually "protected defendants". Protected defendants lose their protected status if they are defended by an insurer which is not licensed to undertake automobile insurance in Ontario or which has not filed a protected defendant undertaking. These requirements do not apply to the vicariously liable person. This could be significant in at least two situations.

The most common situation would involve an out of province driver driving a car rented in Ontario. The driver will be defended by the rental car company's insurer and both the driver and the rental car company will be protected defendants. However, the employer may well be defended under a non-owned automobile endorsement issued by an extra-provincial insurer, which is not licensed to undertake automobile insurance in Ontario. Nevertheless, the employer's exposure cannot be any greater than its employee's.

The second situation concerns OHIP claims. OHIP is entitled to prosecute its subrogation claim against anyone who is not insured under a motor vehicle liability policy issued in Ontario. However, in the last example OHIP would not be able to sue either the driver or the owner of the rented automobile. The out of province employer also appears to escape liability for OHIP's subrogated claim.

(f) Vanishing Deductibles and Miscellaneous Issues

Bill 198 has created vanishing deductibles.[31] If the injured plaintiff's general damages are assessed in excess of $100,000.00, then no deductible is applied. Similarly, if an *FLA* claimant's damages for loss of care, guidance and companionship are assessed in excess of $50,000.00, then

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[30] The result in the *Linhares* case (see footnote 12) would be the same under Bill 198 because the person who repaired the brakes is not a protected defendant.

[31] See subsections 267.5 (8) and (8.1).

no deductible is applied. It is important to note that the assessments must exceed $100,000.00 or $50,000.00 respectively for the deductibles to "vanish".

Effective April 15, 2004, amendments to the SABs Schedule affect a plaintiff's entitlement to income replacement, medical/rehabilitation and attendant care SABs for certain types of whiplash injuries.[32] If the plaintiff's injury is ultimately determined to satisfy the verbal threshold, then the unpaid medical/rehabilitation and attendant care expenses will probably be recoverable in the tort action.

Finally, regulations passed under Bill 198, which came into force on October 1, 2003, have set out detailed criteria for proving that an injury satisfies the verbal threshold.[33] A detailed discussion of those provisions is beyond the scope of this chapter.[34]

B. Collateral Benefits

Bill 198 specifically provides for the deduction of most collateral benefit payments which are received or were available to the plaintiff before trial. This statutory deduction of collateral benefits, which is detailed in section 267.8 of the *Act*, permits all defendants in actions arising directly or indirectly out of the use or operation of an automobile to deduct a wider variety of collateral benefits than could be deducted at common law.[35] There are three deduction provisions.

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[32] See O.Reg 458/03 which amends the SABs Schedule in respect of accident occurring on or after April 15, 2004.

[33] Sections 4.1 through 4.3 of O.Reg 461/96 as amended.

[34] Recently there has been some debate as to whether the changes introduced by Bill 198 were intended to strengthen the verbal threshold by increasing the severity of injuries necessary for a plaintiff to recover general damages, or whether Bill 198 simply codifies the existing case law. While the intention of Bill 198 may have been to strengthen the verbal threshold slightly, practically these changes are unlikely to be of great significance. Rather, the increase to the deductible from $15,000 to $30,000 will play a much greater role in the litigation of borderline cases. For a more detailed discussion on the effect of the Bill 198 changes to the verbal threshold, please see the appendix to this paper.

[35] *John v. Flynn* (2001), 54 O.R. (3d) 774 (C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 394, holds that all defendants are entitled to the collateral benefits deductions under the OMPP. The Court of Appeal's reasons for dismissing the appeal in *Wawanesa v. OPP* strongly suggest that the same is true under Bill 198. Also see the cases cited in footnote 28. However, Ontario Disability Support Program payments may not be deductible. See *Moss .v Hutchinson* (2007), 48 C.C.L.I (4th) 265, 2007 CarswellOnt 2779 (Ont. S.C.J. per Howden J.) In part, the Court's

Subsection 267.8(1) provides for the deduction of loss of income benefits. Subsection 267.8(2) provides that collateral benefit payments made in respect of any loss of income in the first seven days after the accident are not deductible. Subsection 267.8(3) provides that protected defendants have a priority with respect to the deduction of such benefits.[36]

The Court of Appeal's decision in *Cugliari v.White*[37] made it clear that a similarly, but not identically worded provision in the OMPP, limited collateral benefit deductibility for loss of income to those that are considered indemnity payments. As a result CPP Disability Benefits were found not to be deductible from loss of income claims under the OMPP. In 2005, Mr. Justice Patterson concluded that the wording of the provisions of section 267.8 and the OMPP were different and that CPP disability benefits are deductible under the section.[38] In any event, for accidents occurring on or after October 1, 2003 the regulations specifically provide that CPP Disability Benefits and most group employers' LTD benefits are deductible.[39] If *Cugliari* governs the interpretation of the Bill 198 collateral benefits deduction provisions, then most benefits paid pursuant to private LTD plans, which plans often do not satisfy the "indemnity" test, would not be deductible from loss of income claims. However, if the *Meloche* case is correctly decided, then private LTD benefits would be deductible under Bill 198.[40] In a 2009 decision, *Strickland v. Mistry*, the court agreed with Justice Paterson's reasoning and found that the LTD

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decision in *Moss* was founded upon applying the principle of statutory interpretation that the provisions of a general statute must yield to those of a specific one. The Court held that the provisions of *Insurance Act* must yield to those of the *ODSP Act*. O'Connor J reached the opposite conclusion with respect to CCAC payments in *Osborne (Litigation Guardian of) v. Bruce (County)*, 39 M.V.R. (3d) 1198, where the Court had held that the *Insurance Act* was specific legislation and that *Long-Term Care Act* and the *Ministry of Community and Social Services Act* were general legislation that must yield to it. I find O'Connor J.'s reasoning more persuasive.

[36] I believe that this section may actually have been rendered moot if the approach I commend for apportioning damages is adopted. See discussion under the heading "Collateral Benefits" at III.C.iii below.

[37] (1998), 38 O.R. (3d) 641 (C.A.); leave to appeal refused 120 O.A.C. 198 (note).

[38] *Meloche v. McKenzie*, [2005] O.J. No 3761 (S.C.J.).

[39] See section 5.2 of O.Reg 461/96 as amended.

[40] See above at footnote 38.

payments received by the plaintiff were deductible and subject to the trust and assignment provisions of the *Insurance Act*.[41]

In addition, the court determined in *Burhoe v. Mohammed et al*.[42], that unprotected defendants were also entitled to the benefits of the deduction, trust and assignment provisions for collateral benefits pursuant to s.267.8(1), (3), (9), (10) and (12) of the *Insurance Act* based on the statutory interpretation argument that the opening words of s.267.8 do not differentiate between protected and unprotected defendants, and s.267.8(3) specifically refers to "protected defendants".[43] By inference, omitting the distinction implies that the overall section applies to both protected and unprotected defendants.

Subsection 267.8(4) specifically provides for the deduction of health care expenses and subsection 267.8(6) provides for the deduction of any other pecuniary loss collateral benefit that is not an income loss, loss of earning capacity or health care expense collateral benefit.

The legislation specifically prohibits the deduction of collateral benefits from any award for non-pecuniary loss.[44] This prohibition applies to payments actually received and to payments the plaintiff is entitled to receive. Given the Court of Appeal's characterization of awards for loss of care, guidance and companionship as essentially non-pecuniary in nature, it follows that death benefits paid under the SABs Schedule are not deductible from such awards.[45]

It is not uncommon for claims for loss of income to be put forward by *FLA* claimants who have provided nursing or attendant care to the injured plaintiff. One case suggests that the amounts

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[41] [2009] O.J.No. 1169.

[42] (2009) 97 O.R. (3d) 391.

[43] (2009) 97 O.R (3d) 391.

[44] Subsection 267.8(6).

[45] *McCartney v. Islic* (2000), 46 O.R. (3d) 669 (C.A.). See also *DiGirolamo v. Smolen*, (2002), 198 O.R. (3d) 357 and *Wright (Litigation Guardian of) v. Hannon,* 2007 CarswellOnt 4114, (Ont. S.C.J.).

recovered in respect of the provision of such services from the SABs insurer are not deductible from the *FLA* pecuniary loss award.[46] Relying on section 63 of the *FLA*, which prohibits the deduction of amounts paid or payable as a result of injury or death under a policy of insurance, Justice D. S. Ferguson refused to reduce the wife's income loss claim by the amount that her husband was alleged to have received for attendant care benefits. Even if one can overcome this analysis, there are significant impediments to deducting the attendant care SABs from the wife's loss of income claim.

First, I would suggest that this reading of section 63 is too broad. It is arguable that section 63 was only intended to prohibit the deduction of lump sum, non-indemnity, payments for injury or death under insurance contracts. This would include death benefits and accidental death and dismemberment benefits. However, if the attendant care benefit is considered to be received by the wife, which is probably not correct, given that it is a health care benefit it probably cannot be deducted from a loss of income claim under section 267.8. Health care benefits can only be deducted from health care expenses and not loss of income claims.

Additionally, and as Justice Ferguson points out, given that the benefit is paid to the injured plaintiff, who can spend it as he or she sees fit, it is difficult to see how it can be deducted directly from the wife's claim. However, to sidestep both of these arguments I would be inclined to find out how the benefit was actually dealt with by the plaintiffs. For example, if the wife deposited her pay into a joint account before the accident and the attendant care benefit was also deposited to the same joint account, then I would argue that the injured plaintiff was actually using the benefit to pay his wife for her services. This argument would be strengthened if the claim is actually based on the wife's hours. Once the benefits are "paid" to the wife, I would also argue that they should cease to be characterised as insurance payments. However, there are still problems even if this approach is accepted. The defence will actually be seeking to deduct the payments twice, once from the plaintiff's attendant care claim and a second time from the wife's loss of income claim. Frankly, I am not troubled by this given that the claims are related. The

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[46] *Catlon v. Timmins (City)* (2006), 33 M.V.R. (5th) 198 (Ontario Superior Court of Justice).

attendant care benefit should be deducted from the attendant care expense claimed by the injured plaintiff. Once that is done, the amount received by the wife from the husband should be deducted from the wife's loss of income claim. However, I anticipate that most judges would be unwilling to allow the double deduction of the same benefit.

Subsections 267.8(21) and (22) define "available" for the purposes of subsections (1), (4) and (6). A payment is considered to be available, even if not received, if the plaintiff failed to apply for it, failed to submit to any examination required by law or settled his or her claim in bad faith. A payment is deemed not to be available under subsection 267.8(21) if the plaintiff's application was denied.

Since these sections are tied specifically to subsections 267.8(1), (4) and (6), it would appear that they only apply to pre-trial collateral benefits.[47] This implies that a plaintiff, who fails to recover benefits he or she was entitled to or makes a settlement in "bad faith", will only be penalized until trial. This is consistent with the wording of subsection 9 which creates a trust in respect of future collateral benefits. It only applies to payments the plaintiff "receives" after trial and not to payments that the plaintiff is entitled to or that were "available".[48] However, just to confuse matters further, the assignment of future collateral benefits provision in subsection 12 refers to payments that the plaintiff is "entitled" in respect of the incident after the trial. It would appear, on balance, that subsections 267.8(21) and (22) only apply to pre-trial collateral benefits. If this is correct, then it is incumbent on plaintiff's counsel to ensure that cases are tried quickly where the plaintiff has failed to apply for collateral benefits or has entered into a "bad faith" settlement.

If the plaintiff settles a collateral benefits claim in "bad faith," then the payment would also be considered to be available and could be deducted. Justice Greer in *Morrison v. Gravina*[49] held

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[47] The decision of Henderson J. in *Baillargeon v.Murray* (2001), 52 O.R. (3d) 278 reaches very different conclusions on this issue, but this case is was decided under the OMPP which has a differently worded provision.

[48] See *Peloso v. 775861 Ont. Inc.*, [2005] O.J. No. 2489 at paragraphs 438-444 which has adopted this approach to the interpretation of section 267.8.

[49]*Morrison v. Gravina*, [2001] O.J. No. 2060 (S.C.J.).

that "bad faith" implies more than negligence or bad judgment. There must be intent to act with ill will or an improper or illegal design. If this provision applies to future collateral benefits, then it would appear that the claim would be reduced by the actual present value of the future benefits rather than by an amount which would represent a "good faith" settlement of the future claim.[50]

Hugh Brown and Derek Abreu have identified another potential problem with respect to the treatment of future collateral benefits. If the future benefits are simply divided amongst the defendants in accordance with the apportionment of fault, then this could result in an inequitable division. For example, if the injury is not catastrophic, the protected defendant will not be held liable for paying any future health care expenses. Accordingly, it would be unfair for a protected defendant to receive any of the future health care collateral benefits. They should all be paid to the unprotected defendant. As Messrs. Brown and Abeu point out in their paper unprotected defendants facing this situation should request that an assignment order be made with terms which reflect this reality.[51]

There are a number of additional issues surrounding the deductibility of collateral benefits. They will be discussed at appropriate points in this chapter.

C. Leased Vehicles

As mentioned previously, effective March 1, 2006 the approach to leased vehicles has been changed. Prior to that date, only the owner of a motor vehicle was vicariously liable for its negligent consensual operation. Effective March 1, 2006, the lessee of the vehicle is also vicariously liable for the negligent operation of the vehicle.". The owner, lessee and operator are

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[50] See *Collee v. Kyriacou* (1996), 31 O.R. (3d) 558 (Gen. Div.). This case was decided under the OMPP where the test was not bad faith but improvidence.

[51] Hugh G. Brown and Derek Abreu, **Unprotected and Protected Defendants: the Effects on Litigation Strategy**, Auto Insurance Litigation Claims, The Canadian Institute, September 30 and October 1, 2002.

jointly and severally liable for the negligent operation of the motor vehicle.[52] This change applies not only to long term leases but also to short term rentals.

Changes to the *Insurance Act* provide that the liability of the lessor for personal injury and death claims is limited to $1,000,000[53] less any amounts:

> that are recovered for loss or damage from bodily injury or death under the third party liability provisions of contracts evidenced by motor vehicle liability policies *issued to persons other than a lessor* (emphasis added)

The intent of this provision is to limit the lessor's liability to $1 million less an insurance available to the lessee and/or the driver.

These limitations on liability only apply to bodily injury and death claims. Therefore, if a lessee takes out a bridge causing $3 million damage, the lessor is still liable for the entire loss. Additionally, these limitations relate only to the lessor's vicarious liability under the *Highway Traffic Act*. If the lessor has itself acted negligently, then the lessor's liability for such negligence is not affected by these amendments.

For the purpose of calculating damages under Bill 198 after March 1, 2006, the lessee is a protected defendant. Prior to that date a lessee had no vicarious liability and could only be sued for his or her negligence. The lessee was not considered to be a protected defendant prior to March 1, 2006.

These provisions are complicated and a number of new policies and endorsements have been issued by the Financial Services Commission of Ontario to specifically address many of the issues

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[52] See section 192 of the *Highway Traffic Act*. While it seems clear that the liability to the plaintiff is joint and several the legislation says nothing regarding the nature of the liability as amongst these three types of defendants.

[53] The amount can be changed by regulation and is subject to minimum insurance limits prescribed pursuant to other legislation. For example, the lessor of a large bus would be liable for up to $8 million as this amount is required under the provisions of the *Public Vehicles Act*.

raised by this legislation. A detailed discussion of these provisions is beyond the scope of this paper. [54]

III. CALCULATING DAMAGES UNDER BILL 198

A. Introduction

The major problems in calculating damages under Bill 198 arise in situations where there is a mixture of protected and unprotected defendants. The apportionment provisions, which are set out in section 267.7, are complicated. Where the only defendants are "protected" the calculations are much simpler. I will first discuss an example involving only a protected defendant. I will then modify this example to include both types of defendants. However, before turning to the examples there are some additional matters that require discussion.

(i) Separate Calculation of Each Head of Damages

Subsection 267.7(2) specifically obliges the court to calculate the following heads of damages separately if there is a mix of protected and unprotected defendants:

(a) loss of income;

(b) health care expenses;

(c) other pecuniary losses; and

(d) non-pecuniary losses including *FLA* claims for loss of care, guidance and companionship.

This approach is necessary for several reasons. First, the deduction provisions strongly suggest that the court must match pre-trial collateral benefits to corresponding heads of damage.[55] In other words, there is to be no cross deductibility of pre-trial collateral benefits.[56]

The legislation may require the separate calculation of certain pre-trial and future pecuniary damage awards. Subsection 267.8(1) provides that "...the damages to which the plaintiff is

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[54] Please see my most recent paper on Bill 18 which can be found at www.blaney.com.

[55] Section 267.8.

[56] With respect to cross-deductibility of future collateral benefits see "Other Pecuniary Losses" at III.B.iii.

entitled for income loss or loss of earning capacity shall be reduced by the following amounts...". This, in and of itself, does not suggest that one would calculate past and future loss of income claims separately. However, subsection 267.8(4), which deals with the deductibility of health care expenses, provides that "...the damages to which a plaintiff is entitled for expenses that have been incurred or *will be incurred* for health care shall be reduced ..." (emphasis added). This difference in wording suggests that pre-trial loss of income collateral benefits are only deducted from pre-trial claims. Similarly, past and future "other pecuniary loss" claims probably need to be calculated separately. This phraseology is repeated in subsection 267.8(9), which deals with future collateral benefits.[57]

This issue is of significance for both protected and unprotected defendants. If for some reason pre-trial loss of income benefits exceed the past loss of income claim, then any excess benefits may not be available to reduce future claims.[58] This obliges all defendants to make larger contributions to the future losses.[59]

(ii) The Calculation Date

The legislation uses the phrase "before the trial" to divide past and future loss of income claims. Presumably "before the trial" means before the commencement of the trial. For pre-judgment interest calculations, the relevant date is the date of judgment. In short trials, this difference will be of little practical importance. However, where the judgment is delivered long after the trial commences, it would appear that one calculation will have to be made for Bill 198 purposes and a second for prejudgement interest purposes.

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[57] A separate "pre-trial" and "future" calculation approach for loss of income and other pecuniary losses is also supported by the fact that pre-trial and future collateral benefits are treated differently under the legislation.

[58] It appears that the drafters did not consider the possibility that some past collateral benefits might still be available to reduce future loss of income claims.

[59] This will likely only occur in two situations. The first is when the plaintiff is contributorily negligent. The second is when the plaintiff receives collateral benefits for a period longer than the court finds the plaintiff was disabled from working. Similar reasoning could be applied to the other pecuniary loss collateral benefits but not to health care expenses as the legislation specifically requires the deduction of past collateral benefits from past and future claims.

B. All Defendants Are Protected

For the following discussion let us use the following fact situation:

a) the injured plaintiff's claim surpasses the verbal threshold and non-pecuniary damages are assessed at $100,000.00;
b) the plaintiff's wife's *FLA* loss of care, guidance and companionship claim is assessed at common law at $20,000.00;
c) the son's *FLA* loss of care, guidance and companionship claim is assessed at common law at $5,000.00;
d) the injured plaintiff was earning $2,000.00 per week gross at the time of the crash;
e) 80% of the injured plaintiff's net loss of income is $700.00 per week;
f) after the crash the injured plaintiff receives private disability payments of $200.00 per week;
g) as a result of the foregoing he receives $400.00 per week in income replacement SABs under the Statutory Accident Benefits Schedule from his automobile insurer;
h) the injured plaintiff incurs $10,000.00 in health care expenses in the year following the crash;
i) the injured plaintiff receives $7,500.00 in collateral health care benefits;
j) the trial occurs one year after the crash; and
k) the court concludes that the plaintiff will be able to return to his old job in one year after the trial (it is anticipated that his loss of income collateral benefits will continue to be paid).

(i) Pre-Trial Loss of Income Claims

The injured plaintiff is not entitled to any loss of income claim for the seven days following the crash. The injured plaintiff is also not entitled to receive more than 80% of his net loss of income in the period commencing eight days after the crash and ending at the commencement of the trial. In this example the injured plaintiff is entitled to 80% of his net loss of income for a period of 51 weeks ($700.00 per week x 51 weeks), or $35,700.00.

The next step is to reduce the claim for contributory negligence.[60] Presumably the reduction is based on the percentage of the net loss of income rather than the gross loss of income. In our example, the gross loss of income is $104,000.00 (52 weeks x $2,000.00 per week). If this presumption is correct and the contributory negligence was assessed at 20%, then the reduction would be 20% of $35,700.00 rather than 20% of $104,000.00.[61] In the current example, the injured plaintiff is not contributorily negligent, so there is no deduction to make.

The collateral benefits are deducted next. In this case the injured plaintiff received SABs of $400.00 for 51 weeks and private disability payments of $200.00 per week for 52 weeks. Subsection 267.8(2) provides that no collateral benefits received for loss of income suffered in the first seven days after the crash are to be deducted. Accordingly, $600.00 per week for 51 weeks ($30,600.00) must be subtracted from the $35,700.00 figure calculated above. This reduces the plaintiff's net recovery to $5,100.00.

In the event that the only defendant is unprotected, an unusual result occurs. Using the same example, the unprotected defendant would be liable for full common law damages for loss of income, or $104,000.00. The defendant can subtract any collateral benefits received after the first seven days and before the trial; in this instance it is $30,600.00. However, the plaintiff actually received collateral benefits totalling $30,800.00 when the first week of private disability benefits are taken into account. Accordingly, the plaintiff's total recovery is $104,200.00.[62] The plaintiff actually recovers more than he lost. This happens because the unprotected defendant is liable for the first week's loss of income, but is not able to subtract collateral benefits received by the plaintiff in that week.

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[60] Subsection 267.8(8) provides that reductions for contributory negligence shall be made before collateral benefits are deducted. See also *Gos v. Nicholson* (1999), 46 O.R. (3d) 212 (C.A.).

[61] The effect of subsection 267.5(1) is not to reduce the damages but, rather, to render the protected defendant "...not liable ...for the following damages..." Arguably the full damages still exist but the protected defendant is not liable for part of them. The effect of section 3 of the *Negligence Act* is to apportion the "damages" on the basis of the comparative negligence of the parties. This suggests that the court should deduct 20% of the full damages rather than 20% of the damages for which the protected defendant is liable pursuant to subsection 267.5(1). There are, of course, contrary arguments and I suspect that these will prove to be more attractive to the courts.

[62] $73,400.00 received from the unprotected defendant ($104,000.00 less $30,600.00) plus collateral benefits received of $30,800.00.

(ii) Health Care Expenses

Since the injury pierces the threshold the plaintiff can recover health care expenses from the protected defendant.[63] If the injury had not pierced the threshold, then the plaintiff would not be entitled to recover such expenses from the protected defendant.[64] An unprotected defendant would be, at least, partially liable for such expenses regardless of the seriousness of the injuries.

In our example, the defendants are liable for $2,500.00; the difference between the health care expenses of $10,000.00 and the collateral health care benefits of $7,500.00.

(iii) Other Pecuniary Losses

The protected defendant is liable for all other pecuniary losses. All pecuniary losses which are not loss of income, loss of earning capacity or health care expenses are lumped together and from them are deducted all collateral benefits which are not for loss of income or health care expenses. Beyond that, no matching of expenses to benefits is required.[65]

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[63] *Briggs v. Maybee* (2001), 53 O.R. (3d) 368 (per Belch J.) has held that future housekeeping and home maintenance expenses are not health care expenses and may be recovered from a protected defendant. *Morrision v. Gravina,* [2001] O.J. No. 1208 (per Greer J.), is not entirely consistent with this viewpoint. Both cases are discussed in *Hunt (Litigation Guardian of) v. Martin* (2002), 40 C.C.L.I (3d) 75 (Ontario Superior Court).

[64] In the following articles, the authors outline clever arguments which would have obliged protected defendants to pay excess health care expenses: John A. McLeish and John D. Johnson, "The Inter-Relationship Between First and Third Party Claims: Changes to *Cox v. Carter*?", L.S.U.C. and Canadian Bar Association - Ontario, September 27, 1996;John A. McLeish, "Bill 59: Tactical Considerations in a Tort Claim", *County of Carleton Law Association*, November 8, 1996; David F. MacDonald and Lawrence H. Mandel, Q.C., "A Guide to the Automobile Insurance Rate Stability Act, 1996 Tort-Collateral Benefit Interface Provisions", *The Advocates Society*, October 4, 1996, "The Automobile Insurance Rate Stability Act, 1996 Getting to the Bottom Line" (1997), 19 *Advocates' Quarterly* 212. These arguments have been rejected in two cases, namely *Henderson v. Parker* (1998), 42 O.R. (3d) 462 and *Folmer v. Graham*, [2000] O.J. No. 2699 affm'd [2001] O.J. No. 1868 (C.A.). The Court of Appeal has also ruled that accident benefits are not payable for treatment that occurs after the expiration of the 10 year time limit in the SABs Schedule. See *Hope v. Canadian General* (2002), 212 D.L.R. (4th) 247 and also *Gottwald v. State Farm Automobile Insurance Co.*, 2007 CarswellOnt 5375.

[65] One should consider whether the Court of Appeal decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 6198 might require separate deductibility anyway. Note, however, that *Bannon* must be approached with caution after the Supreme Court of Canada's decision in *Gurniak v. Nordquist,* [2003] 2 S.C.R. 652 and, in particular, the reasons of Justice Gonthier. For both health care and other pecuniary loss claims any contributory negligence must be deducted before the collateral benefits are deducted (subsection 267.8(8)).

(iv) Future Pecuniary Losses

In the introduction to this section, I suggested it was unclear whether the legislation mandated separate calculations for pre-trial and future loss of income and other pecuniary loss claims. The question is only of practical importance if the pre-trial collateral benefits exceed the pre-trial pecuniary losses for a particular head of damages. In such a situation, if the legislation requires separate pre-trial and future calculations, then the excess pre-trial collateral benefits may be lost and unavailable to reduce the future damage awards. It is clear, however, that with respect to health care expenses, pre-trial collateral benefits must be deducted from pre-trial and future awards.

It must be kept in mind that protected defendants lose their partial priority with regards to the deduction of loss of income and loss of earning capacity collateral benefits once the trial starts.

The legislation treats future collateral benefits differently from pre-trial collateral benefits. In direct contrast to the OMPP, Bill 198 requires the plaintiff to assign or hold any future collateral benefits in trust for the defendants.[66] While this system is more equitable to plaintiffs than the OMPP, it does create some unique problems.

First, if the future collateral benefits cannot be commuted at the end of the trial, then the tort insurer must keep its file open indefinitely. The file will remain open until the benefits cease to be paid.

Second, the collateral benefits may be deductible from the entire damage award or the entire award save the non-pecuniary general damages.[67] The legislation goes to some lengths to ensure

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[66] Although future collateral benefits are held in trust and are not "deducted", I will use this rather imprecise term to describe the trust mechanisms. I disagree with John McLeish who, in his two papers, suggests that protected defendants are not entitled to deduct the future collateral benefits. I believe that the provisions Mr. McLeish relies upon for this argument are only applicable to pre-trial collateral benefits.

[67] Subsection 267.8(7) prohibits the deduction of collateral benefits the plaintiff has received or is entitled to receive from the non-pecuniary damages award. Depending on whether “entitled to receive” speaks to past benefits or to past and future benefits, this provision may prohibit the deduction of past benefits or past and future benefits. If it is the former, then the problem discussed in the next paragraph is a real one. If it is the latter, then this may be a partial check on deductibility. One could argue that once deductibility would begin to effectively reduce the non-pecuniary general damages, then it must cease. Of course, this would not prevent cross deductibility against other heads of damage.

that there is no cross-deductibility of pre-trial collateral benefits. However, subsection 267.8(9) appears to drop this approach for future collateral benefits. Once a plaintiff recovers an award for any pecuniary loss, the plaintiff is obliged to hold all manner of future collateral benefits in trust for the defendant.

A literal reading of this section would permit the defendant to continue to receive future collateral benefits even if they exceed the damages awarded at trial. In the current example, the trial judge found that the plaintiff will be able to return to work one year after the trial. He continues to receive SABs and private disability benefits of $600.00 per week after the trial and dutifully remits them to the defendant's insurer. However, one year after trial it is determined that the plaintiff cannot return to work because his condition has not improved. If subsection 267.8(9) is interpreted literally, then the plaintiff must continue to remit his loss of income collateral benefits to the defendant's insurer, notwithstanding his continuing disability. Even after the entire judgment is reduced to zero, the plaintiff is obliged to remit the collateral benefits to the defendant's insurer. Eventually, the defendant's insurer could turn a profit on the litigation.[68]

(v) Non-Pecuniary Damages

Protected defendants are entitled to deduct $30,000.00 from the non-pecuniary general damage awards and $15,000.00 from *FLA* awards for loss of care, guidance and companionship.[69] These reductions are to be made before contributory negligence is deducted under the *Negligence Act*.[70]

In our example, there is no contributory negligence. Accordingly, the injured plaintiff's claim is reduced by $30,000.00 to $70,000.00, the wife's *FLA* claim is reduced by $15,000.00 to $5,000.00 and the son's *FLA* claim is reduced to zero.

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[68] It might be argued that subsection 267.8(7) will halt deductions once they could reduce the general damage award. However, this subsection appears to deal only with pre-trial collateral benefits.

[69] Note that the since the injured plaintiff’s damages were not assessed in excess of $100,000.00, the vanishing deductible provision would not apply.

[70]Paragraph 267.5(7)4. This paragraph only refers to the *Negligence Act*, R.S.O. 1990, c. N.1 as amended. The reductions to the *FLA* claims are technically made pursuant to the *FLA*.

If we assumed that there was 20% contributory negligence, then it is not entirely clear what is owed. This is the same problem that arose for loss of income claims. The question is, do we deduct 20% of $100,000.00 or 20% of $70,000.00? It is my belief that one would deduct 20% of the $70,000.00 figure.[71]

Of course, if the only persons at fault are "unprotected defendants", then the plaintiffs will receive their full common law damages.[72]

C. A Mixture of Protected and Unprotected Defendants

(i) Introduction

When there is an action involving both protected and unprotected defendants, calculating the liability of each defendant for the plaintiff's damages becomes quite complicated. In an appendix to this chapter, I have outlined a step by step approach to these calculations. This part of the paper will provide detailed explanations for the calculation rules set forth in the appendix.

Before tort reform, tortfeasors who caused the same damage were jointly and severally liable to the plaintiff. This joint and several liability was imposed by the provisions of the *Negligence Act.* Accordingly, a municipality that was 10% at fault for the plaintiff's injuries was only required to pay 10% of the plaintiff's assessed damages, unless the remaining defendants had insufficient assets.

The OMPP introduced the “threshold” concept in 1990. This threshold shielded motorists from liability for most crashes. The OMPP modified the joint and several liability rules for non-motorists. Non-motorists became severally liable for the damage they caused under the OMPP. This concept was carried forward into Bill 164 for pecuniary losses, which motorists were completely shielded from paying. However, Bill 164 introduced deductibles for non-pecuniary

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[71] See discussion above under “Pre-Trial Loss of Income Claims” III.B.i above. Paragraph 267.5(7)4 indicates that the deductibles reduce the damages rather than the liability for the damages for protected defendants. This strongly suggests that the damages to be apportioned under section 3 of the *Negligence Act* are the deductible reduced damages. It is possible that a different approach should be taken to loss of income and non-pecuniary damages but there does not appear to be a cogent reason to do so.

[72] If the plaintiff fails to sue a protected defendant, then that potential defendant's liability must still be taken into account in apportioning damages. See subsection 267.7(3).

damages; deductibles that were only available to motorists. To determine how non-pecuniary damages would be divided between motorists and non-motorists, Bill 164 introduced a complex apportionment provision.[73] This provision has been carried forward into Bill 198 almost unchanged. However, this provision applies to the apportionment of damages between protected and unprotected defendants with regards to all heads of damages, not just non-pecuniary damages. The concept of several liability was dropped in Bill 198.

(ii) The Approach to Apportionment

The subsection that prescribes the apportionment formula is 267.7(1). This provision has three major components. Clause (a) deals with the liability of unprotected defendants to the plaintiff. Clause (b) deals with the obligation of unprotected defendants to make contribution and indemnify protected defendants and clause (c) deals with a protected defendant's obligation to make contribution and indemnify unprotected defendants. You will note that this subsection does not deal with the liability of protected defendants to the plaintiff. This is dealt with in section 267.5. Although not explicitly stated, given the sequence of the sections and the wording of subsection 267.8(3), one would expect that any apportionment pursuant to subsection 267.7(1) is to be undertaken before collateral benefits are deducted.[74]

One final point should be made before the individual clauses are analysed. This section only applies if there is a mixture of defendants or, at least, a potential mixture of defendants.[75] If the defendants are all unprotected, then this subsection is inapplicable and the provisions of the *Negligence Act* are germane. Accordingly, if the plaintiff's actions contributed to his damages and the only other persons at fault are unprotected, section 267.7 is inapplicable. This could easily occur where the plaintiff and a road authority are the only parties at fault for a crash. Due to the fact that section 267.7 would apply to any claim by a passenger, it is possible for the

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[73] Now section 267.1 of the *Insurance Act*.

[74] John McLeish has reached the opposite conclusion in both of his papers (see above at footnote 63). It should also be recalled that subsection 267.8(8) requires contributory negligence reduction to be made before collateral benefits are deducted. Some commentators believe that collateral benefits are deducted as part of the apportionment calculation. See the discussion under the heading "Collateral Benefits" at III.C.iii below.

[75] Recall that subsection 267.7(3) obliges the Court to apply the subsection even if some of the persons at fault are not sued. Therefore, a plaintiff cannot avoid the effects of the subsection by simply failing to sue a protected defendant.

partially at-fault driver to recover a greater percentage of his or her damages than an innocent passenger.

Clause (a) is divided into two sub-clauses. The first specifies the damages that all defendants are jointly and severally liable to pay to the plaintiff. Essentially, all defendants are jointly and severally liable for all damages that the protected defendant is found liable to pay after applying the damage reduction provisions set forth in section 267.5 (the "Bill 198 damages"). The second sub-clause outlines which damages the unprotected defendants are solely liable for. This is the provision that the Court of Appeal interpreted in the *Sullivan Estate* case.

(a) Sullivan Estate v. Bond and calculations under clause 267.7(1)(a)

The Court of Appeal's decision deals with the interpretation of sub-clause (a)(ii). That provision reads:

> the other persons,…
> (ii) are solely liable for any amount by which the amount mentioned in sub-clause (i) is less than the amount that the other persons would have been liable to make contribution and indemnify the protected defendants in respect of damages in the absence of section 267.5.

The Court of Appeal has held that the proper way to interpret sub-clause (a)(ii) is as follows. First calculate the damages at common law. This number is then multiplied by the unprotected defendant's liability as determined under section 1 of the *Negligence Act* (that is the common law damages multiplied by percentage of fault).[76] From this figure the Bill 198 damages are subtracted [i.e. the figure determined under sub-clause (a)(i)].

If one assumes that we are dealing with general damages of $100,000.00 and fault is apportioned 80/20 against the protected defendant, then the result would be as follows. The damages at common law are $100,000.00. To determine the damages for which the unprotected defendant is

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[76] Actually, a proper interpretation of this provision requires the calculation of what would have been paid absent section 267.5. Where the defendants are unrelated liability would be determined by applying the provisions of the *Negligence Act*. The vast majority of cases will be determined in this manner. However, where the defendants have some relationship (such as employer and employee or owner and driver), this relationship may dictate a different apportionment of the damages. This is discussed under the heading "Vicarious Liability" at III.C.viii below.

solely liable under sub-clause 267.7(1)(a)(ii), this number would be multiplied by 20% yielding $20,000.00. From this $20,000.00 would be deducted the Bill 198 damages. Since the deductible is $30,000.00, the Bill 198 damages are $70,000.00 ($100,000.00 less $30,000.00). The result is a negative number ($20,000.00 less $70,000.00). Therefore the plaintiff only recovers the damages calculated under the first sub-clause ($70,000.00).

(b) Clause 267.7(1)(b)

In *Sullivan Estate* the Court of Appeal indicated that the parties agreed that this clause was clear and unambiguous. It reads as follows:

> ...the other persons are liable to make contribution and indemnify the protected defendants in respect of damages to the same extent as if section 267.5 did not apply, up to the amount for which the protected defendants are liable having regard to section 267.5

I believe that this provision is at least as difficult to interpret as sub-clause (a)(ii). There are two possible interpretations. The difference between these two interpretations turns on the meaning of the phrase "to the same extent as if section 267.5 did not apply". The first approach is to treat these words as an instruction to the court to multiply the joint and several damages [i.e., the damages determined under sub-clause 267.7(1)(a)(i)] by the unprotected defendant's percentage liability which would usually be determined under the *Negligence Act*.

Alternatively, this phrase may refer to the actual amount that the unprotected defendant would be liable for at common law. This would be an instruction to multiply the common law damages, not the joint and several damages, by the percentage liability and to then compare this product to the damages determined under sub-clause 267.7(1)(a)(i). The second interpretation is consistent with the Court of Appeal's interpretation of similar, but not identical, language in sub-clause 267.7(1)(a)(ii). Some support for this interpretation may also be found in subsection 267.5(10). Additionally, if the first interpretation is correct, then it is difficult to understand the reason for including the second condition in the clause.

The second interpretation may lead to other problems if my views with respect to the deductibility of collateral benefits are correct; problems that do not arise if the first interpretation is the correct

one. [77] Further, the first interpretation is more favourable to the unprotected defendant and the second is more favourable to the protected defendant. I believe that both interpretations are flawed. However, I have reluctantly adopted the second interpretation for calculating damages in this chapter. I believe that the second interpretation best utilizes all the words in the clause. It is also the interpretation advocated by the successful appellants in the *Sullivan Estate* case. Additionally, interpretation two may be supported by the Court of Appeal's decision in *Jack (Litigation Guardian of) v. Kirkrude*.[78]

Utilizing interpretation two, this clause instructs the court to take the lesser of common law damages multiplied by the unprotected defendant's percentage liability and the damages calculated under sub-clause 267.7(1)(a)(i). In the example just cited, this would be $20,000.00 [the lesser of $100,000.00 x 20% and $70,000.00]. It should be noted that this approach obliges the unprotected defendant to pay an amount in excess of 20% [actually 20/70ths] of the plaintiff's recoverable damages.

<u>(c) Clause 267.7(1)(c)</u>

Paragraph (c) provides that the protected defendants are obliged to indemnify the unprotected defendants. The amount of such liability is calculated as the difference between the number calculated in sub-clause (a)(i) and clause (b). In the present example, this amount would be $50,000.00 [$70,000.00 less $20,000.00].[79]

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[77] Discussed under the heading "Collateral Benefits" at III.C.iii below.

[78] [2002] O.J. No. 192 modifying [2000] CarswellOnt 4969. Actually, this case, decided under Bill 164, adopted the second interpretation based on a concession by counsel. The unprotected defendant was found 90% at fault and the protected 10% at fault. It was assumed that *Sullivan Estate* mandated that the unprotected defendant pay 90% of the general damage award. This would be consistent with interpretation two. However, the total judgment was in excess of 90% as the protected defendant paid 10% of the judgment less the deductible. This, in my view, is more than *Sullivan Estate* required as the protected defendant should have paid nothing. However, this result may be explained by the fact that the protected defendant did not appeal the trial judgment.

[79] This approach to these clauses is advocated by S. G. McKee and L. Chiarotto in their paper entitled "Unprotected Defendants: Out of Sight, Out of Mind", *Practical Strategies for Advocates (VII),* (Advocates' Society, Toronto, January 1998). The interpretation of clause 267.7(1)(a) advocated by these authors was accepted by the Court of Appeal in *Sullivan Estate*. However, this case does not interpret these clauses. The parties in the *Sullivan Estate* case agreed that these provisions were clear and unambiguous.

It must be remembered that these calculations must be carried out separately with respect to each head of damages.[80]

(d) A Simplified Method for Calculating the Amount Owed

If interpretation two is the correct one, then there is an easy method for determining the damages the plaintiff is entitled to recover and how they should be apportioned. This determination, as mentioned previously, must be made with respect to each head of damages.

The unprotected defendant must always pay or contribute the product of its percentage liability and the common law damages. If this number exceeds the Bill 198 damages, then this is the total award the plaintiff receives and all of the damages are paid by the unprotected defendant. If this number is less than the Bill 198 damages, then the plaintiff receives Bill 198 damages only. The difference between the Bill 198 damages and the amount the unprotected defendant contributes is paid by the protected defendant. Two examples will clarify the use of this simplified rule.

First, let us assume that the pre-trial income loss is $100,000.00 at common law and $50,000.00 under Bill 198. Then, let us assume that the unprotected defendant is 20% at fault. The product of the common law damages and the percentage fault of the unprotected defendant is $20,000.00 ($100,000 x 20%). This is less than the Bill 198 damages. Accordingly, the plaintiff only recovers the Bill 198 damages of $50,000.00. The unprotected defendant pays $20,000.00 and the protected defendant pays the difference between this amount and the Bill 198 damages, which is $30,000.00.

Now let us assume that the unprotected defendant is 60% at fault. The unprotected defendant must pay or contribute $60,000.00 ($100,000.00 x 60%). Since this exceeds the Bill 198 damages, the plaintiff receives this amount [$60,000.00] from the unprotected defendant. The protected defendant pays nothing. However, if the unprotected defendant is judgment proof, then the protected defendant would be obliged to pay the Bill 198 damages of $50,000.

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[80] Since past and future loss of income claims are divided differently as between protected and unprotected defendants, it would seem to follow that past and future collateral benefits will be divided differently as well.

For the sake of clarity, I will not use this simplified method in carrying out the calculations in the balance of this paper.

(iii) Pre-Trial Loss of Income Claims

I will continue with the example we have been using, however, assuming 20% contributory negligence, 50% negligence on the part of the unprotected defendant and 30% on the part of the protected defendant.

The first step is to calculate the liability of the unprotected defendants at common law. This would be 100% of the gross loss of income before trial, or $104,000.00.[81]

We must repeat a calculation we have previously done, namely calculate the liability of the protected defendant for the pre-trial loss of income. We have previously determined that this figure is $35,700.00.[82] This figure must be reduced by 20% for contributory negligence to determine the amount under sub-clause (a)(i). This figure is $28,560.00.[83]

The next step is to perform the apportionment calculations mandated by section 267.7. The calculation for sub-clause (a)(i) is simply the $28,560.00 figure calculated above. Accordingly, both of the defendants are jointly and severally liable for this amount. The figure for sub-clause (a)(ii) is the product of $104,000.00 and the unprotected defendant's percentage fault [50%] or $52,000.00 less the number calculated under (a)(i) yielding $23,440.00. This is the amount the unprotected defendant is solely liable for. The plaintiff recovers the sum of the amounts calculated in (a)(i) and (a)(ii) or $52,000.00.

The figure required for clause (b) is the product of the common law damages and the unprotected defendant’s percentage liability ($52,000) up to a cap of $28,560. This capped figure is the unprotected defendant's "share" of the joint and several damages ($28,560.00). In this case it is

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[81] 100% of the pre-trial loss would be $2,000.00 per week x 52 weeks.

[82] 80% of net income loss after the first seven days or $700.00 per week x 51 weeks.

[83] I have assumed a reduction of 20% to the amount calculated under subsection 267.5(1). See discussion at “Pre-Trial Loss of Income” at III.B.i above.

all of the damages. In addition the unprotected defendant is liable to pay the plaintiff the damages it is solely liable for, which are $23,440.00. In total, it must pay $52,000.00 ($23,440.00 plus $28,560.00).

One would obtain the figure for clause (c) by calculating the difference between the figure calculated in (a)(i) and (b) [$28,560.00 less $28,560.00 or $0.00 in this case]. This is the protected defendant's "share" of the joint and several damages.

These calculations indicate that if both defendants are solvent, then their respective liabilities to the plaintiff are $0.00 for the protected defendant and $52,000.00 for the unprotected defendant. If the unprotected defendant was insolvent, then the protected defendant would pay the plaintiff $28,560.00.

Collateral Benefits

The next step is to deduct collateral benefits. In our example the total deductible collateral benefits are $30,600.00.[84] Only $28,560.00 of these collateral benefits is needed to reduce to zero the damages for which the protected and unprotected defendants are jointly and severally liable. In this case, the unprotected defendant is entitled to deduct the remaining benefits and the plaintiff's net judgment (paid entirely by the unprotected defendant) is $21,400.00.[85]

This example demonstrates the problem with interpretation two of clause 267(1)(b) adverted to at page 28 above. If this interpretation is correct, then every time the unprotected defendant's

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[84] $20,400.00 from the s.a.b.s insurer and $10,400.00 from the disability insurer but $200.00 of that is not deductible.

[85] In this case, the joint and several damages were wiped out by the collateral benefits. That will not always occur. The question that arises is how those collateral benefits are apportioned between the protected and unprotected defendants. The apportionment clauses [267.7(1)(b) and (c)] always oblige the unprotected defendant to contribute more than its percentage liability to the joint and several damages. Are the collateral benefits apportioned in accordance with the provisions of the Negligence Act or the apportionment clauses? The protected defendant will argue that the apportionment should be in accordance with the Negligence Act and the unprotected defendant will argue the opposite. I believe the unprotected defendant has the stronger argument. If subsection 267.7(1) replaces the provisions of the Negligence Act with respect to apportioning damages as between protected and unprotected defendants, then the collateral benefits should be apportioned in the same manner. Additionally, the order of sections in Bill 198 also appears to be the order that calculations are to be carried out. This is not the position favoured by Alan Rachlin, who successfully argued the Sullivan Estate case, nor is it supported by S. G. McKee and L. Chiarotto in their paper entitled "Unprotected Defendants: Out of Sight, Out of Mind", Practical Strategies for Advocates (VII), (Advocates' Society, Toronto, January 1998).

liability exceeds the joint and several damages calculated under sub-clause 267.7(1)(a), the unprotected defendant will pay all of the pre-trial loss of income claim. This approach strips subsection 267.8(3) of any vitality. Subsection 267.8(3) provides that loss of income collateral benefits are to be deducted first from the damages for which all defendants are jointly and severally liable and any excess amount is to be deducted from the damages for which the unprotected defendant is solely liable. The intention of the subsection is to provide protected defendants with a partial priority with respect to the deduction of these collateral benefits. However, in every situation where this subsection might be engaged the only party who is liable for the damages is the unprotected defendant. Accordingly, this priority provision will never make any difference to the amounts actually paid by the protected and unprotected defendants.

This problem can be overcome if one deducts the collateral benefits as one of the steps in the subsection 267.7(1) calculations rather than after these calculations have been completed. This is the approach recommended by Gordon McKee[86] and by Alan Rachlin, who successfully argued the appeal in the *Sullivan Estate* case. If collateral benefits are deducted during these calculations, then subsection 267.8(3) still has vitality. However, there are problems with this approach as well. If one adopts this approach one runs into problems with, what I refer to as, "vanishing collaterals". An example will assist in understanding this problem.

Let us assume the pre-trial loss of income is $100,000.00 and that 80% of the net loss of income is $40,000.00. Let us further assume that the unprotected defendant is 35% at fault and the collateral benefits are $20,000.00. Using the McKee/Rachlin approach one would first calculate damages at common law and under the *Act* taking into account the collateral benefits. The figure under sub-clause 267.7(1)(a)(i) would be the damages under Bill 198 ($40,000.00) less the collateral benefits of $20,000.00 yielding $20,000.00.[87] The number under sub-clause 267.7(1)(a)(ii) would be $100,000 x 35% or $35,000.00. The unprotected defendant would be solely liable for the difference between $35,000.00 and $20,000.00, or $15,000.00. Under this

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[86] See McKee's article cited at footnote 80 above. Hugh Brown and Derek Abreu assume that this is the correct approach in their paper. See footnote 51 above.

[87] The joint and several damages are reduced first. It is only where the joint and several damages are reduced to zero that the unprotected defendant is entitled to any deduction as against its sole liability under sub-clause 267.7(1)(a)(ii).

scenario the plaintiff recovers $35,000.00 in tort ($20,000.00 plus $15,000.00) and receives a further $20,000.00 in accident benefits. The unprotected defendant pays all of the tort damages. The plaintiff's total recovery is $55,000.00.

If the plaintiff had not received any collateral benefits, the calculation would be as follows. The number under sub-clause 267.7(1)(a)(i) would be the Bill 198 damages, or $40,000. The number under sub-clause 267.7(1)(a)(ii) would be $100,000.00 x 35% less $40,000 yielding zero dollars. The plaintiff would receive a total of $40,000.00, of which $35,000.00 would be paid by the unprotected defendant. The plaintiff who receives collateral benefits recovers more than the plaintiff who does not. In this example, $15,000.00 in collateral benefits has simply vanished during the calculation.

In my opinion, collateral benefits must be deducted after the apportioning has been completed under subsection 267.7(1). Subsection 267.8(3) states that collateral benefits are to be deducted from the amounts calculated under sub-clauses 267.7(a)(i) and (ii). This implies that those calculations must be completed before the collateral benefits are deducted.

Unfortunately, none of these conflicting interpretations permits the provisions to mesh properly. Interpretation one does not seem to be consistent with either the sub-clause's language or the decision in *Sullivan Estate*. This interpretation, however, does not create a vanishing collaterals problem, nor does it strip subsection 267.8(3) of its vitality. Interpretation two creates a vanishing collaterals problem if the McKee/Rachlin approach to deducting collaterals is utilized. Further, interpretation two strips subsection 267.8(3) of any vitality if my approach to the deduction of collaterals is utilized. Incidentally, none of these interpretive problems arise if the approach to sub-clause 267.7(1)(a)(ii) adopted by the motion's court judge in *Sullivan Estate* is adopted.

(iv) Health Care Expenses

In our example, the injury is catastrophic. Therefore, the protected defendant must contribute to this claim. The pre-trial health care expenses are $10,000.00. This figure must be reduced by

20% to $8,000.00 to account for the plaintiff's contributory negligence.[88] The calculations under subsection 267.7(1) yield the following results:

(a) $8,000.00 for sub-paragraph (a)(i);

(b) $0.00 for sub-paragraph (a)(ii);

(c) $5,000.00 for paragraph (b); and

(d) $3,000.00 for paragraph (c).

Since there is no priority for the deductibility of collateral health care benefits, these are deducted in proportion to the defendant's liability. Accordingly, the unprotected defendant deducts 5/8ths of the benefits of $7,500.00, or $4,687.50. The protected defendant deducts 3/8ths, or $2,812.50. The net awards to the plaintiff are $312.50 from the unprotected defendant and $187.50 from the protected defendant.

(v) Other Pecuniary Losses

Since there are no priority provisions applicable to such losses, they would be handled in the same manner as health care expenses in a catastrophic injury case. If the calculation of other pecuniary losses must be split into pre-trial and future claims, then it is possible in some cases that some pre-trial collateral benefits will be wasted.

(vi) Future Pecuniary Losses

There are no issues with regards to calculating future pecuniary damages that have not been previously addressed.

(vii) Non-Pecuniary Damages

The effect of section 267.7 makes these calculations tricky. Since the plaintiff was 20% contributorily negligent, all of the plaintiffs' damages are reduced by 20%. For non-pecuniary damages, clause 267.5(7)(4) provides that the deductibles are to be subtracted before the award is reduced to account for contributory negligence. In our example, the injured plaintiff would be

[88] If there was a future award, subsection 267.8(4) suggests that it would be added to the pre-trial health care expense award and reduced by the contributory negligence before the section 267.7 calculation is done.

entitled to $56,000.00 from the protected defendant.[89] His wife's claim would be reduced to $10,000.00 and the son's to $2,500.

This now takes us to the calculations required by subsection 267.7(1). They yield the following results:[90]

	Injured Plaintiff	**Wife**	**Son**
subparagraph (a)(i); joint and several liability of all defendants	$56,000.00	$4,000.00	0.00
subparagraph(a)(ii); sole liability of unprotected defendant	$0.00 [$100,000 x 50% less $56,000.00]	$6,000.00 [$20,000.00 x 50% less $4,000.00]	$2,500.00 [$5,000.00 x 50% less $0.00]
paragraph (b); unprotected defendant's contribution to joint and several liability	$50,000.00	$4,000.00	$2,500.00
paragraph (c); protected defendant's contribution to joint and several liability	$6,000.00	$ 0.00	$0.00

[89] $100,000.00 less the deductible of $30,000.00 yields $70,000.00 and 20% must be subtracted from that amount yielding $56,000.00.

[90] When calculating the damages for sub-clause (a)(i) the contributory negligence must be deducted. However, contributory negligence is not deducted for the calculations under sub-clause (a)(ii) and clause (b). This is due to the fact that by multiplying common law damages only by the unprotected defendant's percentage liability (here 50%) the contributory negligence has already been accounted for. The contributory negligence is included in the other 50%.

D. Pre-judgment Interest and Advance Payments

Advance payments, under either the *Insurance Act* or the *Courts of Justice Act,*[91] should be taken into account only after all of the above calculations are completed. The case law indicates that such advance payments should be applied to principal first rather than to interest.[92] Different types of damages attract different interest rates. One case has held that the advance payment should be applied first to the damages that attract the highest rate of interest.[93]

Once any advance payments have been deducted, pre-judgment interest on each of the awards needs to be calculated. Keep in mind that the date for calculating pre-judgment interest is the date of the judgment and not the first day of trial.

E. Death Benefits

As mentioned earlier, in light of the Court of Appeal decision *McCartney v. Islic*, damage awards under clause 61(2)(e) of the *FLA* will likely be treated as non-pecuniary in nature. [94] Accordingly, death benefits should not be deductible from loss of care, guidance and companionship awards in accordance with subsection 267.8(7) of the *Act*. Additionally, any amount received as a survivor's benefit under the *Canada Pension Plan*[95] is not deductible.[96]

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[91] R.S.O. 1990, c. C.43

[92]See *Baart v. Kumar* (1985), 20 C.C.L.I. 232 (B.C.C.A); *Downey v. Maes* (1992), 8 O.R. (3d) 440 and *Stelco Inc. v. Royal Insurance Co. of Canada* (1993), 18 C.C.L.I. (2d) 238 (Ont.C.J. - Gen. Div.), varied on other grounds (1997), 34 O.R. (3d) 263 (C.A.). The Court of Appeal upheld the trial judge's decision regarding the application of payments.

[93] *Illingworth v. Elford,* [1996] O.J. No. 2893

[94] 46 O.R. (3d) 669; see also *Di Girolamo v. Smolen*, (2002), 198 O.R. (3d) 357 (per Spiegel J).

[95] R.S.C. 1985, c. C-5.

[96] See *Di Girolamo v. Smolen,* above at footnote 94, which held that section 63 of the *FLA* takes precedence over subsection 267.8(1) of the *Insurance Act*.

IV. TACTICAL CONSIDERATIONS[97]

The most striking feature of damage calculations under Bill 198 is the very different treatment of pre-trial and future loss of income claims. Once the trial starts, the recovery for the loss of income claim increases from 80% of net income to 100% of gross income. This can make a significant difference to the plaintiff's recovery. Because of this factor, there is a significant incentive for plaintiffs to get their cases to trial as quickly as possible. This factor must be weighed against the equally important consideration of not rushing a case to trial before the plaintiff's damages can be properly assessed. Any unexplained delay in setting an action down for trial may be regarded as professional negligence. Each file requires a timetable and counsel should obtain their client's agreement to that timetable. The rationale for the timetable should be explained in a letter to the client. At a minimum a memo to file should be prepared. Once the timetable is established, it must be followed. If it is not, then the reasons should be documented.

The flip side to this is that counsel for protected defendants, and possibly all defendants, have an incentive, where there is a continuing loss of income, to delay the trial. Even a relatively short delay could significantly reduce the plaintiff's total recovery. The clear intent of these provisions is to provide an incentive to plaintiffs to get to trial as quickly as possible. I believe the courts should be sceptical of requests for adjournments and punish the use of delaying tactics by defence counsel. Assignment court judges should refuse to grant defence adjournment requests unless the defence agrees that damages shall be deemed to be assessed as of the date the case was originally scheduled to proceed.

At mediation, the parties need to agree on the date that the case will likely be tried. The quantum of any settlement may hinge on this date. Without such an agreement, it may be difficult to agree on damage figures. It would be preferable to reach an agreement on the assessment date before the mediation.

Where there is a concern that the protected defendant does not have any or sufficient insurance, then it is usually advisable to sue any potentially liable party. This has not changed under Bill

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[97] This section assumes that interpretation 2 of clause 267.7(1)(b) is correct. For those who might be interested earlier versions of this paper also considered the same tactical considerations assuming interpretation 1 was correct.

198. However, there are circumstances where suing an unprotected defendant can increase the plaintiff's recovery under Bill 198. Plaintiffs' counsel must analyze each file to determine whether it is worthwhile suing an unprotected defendant when a protected defendant is clearly at fault. In most cases, counsel will need to weigh the potential for recovering greater damages against the costs associated with suing the unprotected defendant.

In analysing a file, plaintiff's counsel must consider the three types of damage awards that are affected by Bill 198. As mentioned previously, they are non-pecuniary damages, pre-trial loss of income claims and health care expense claims. Since each head of damages is calculated separately, each type of damage must be considered separately. Unless the ratio of damages under Bill 198 as compared to damages calculated at common law is less than the percentage liability of the unprotected defendants, no additional monies will be recovered by suing an unprotected defendant.[98] For example, if general damages are $100,000 at common law, the plaintiff will not recover any additional damages by suing the unprotected defendant unless that defendant is at least 71% at fault.[99]

In most serious personal injury cases, the deductible will be irrelevant as the damages will exceed the vanishing deductible. This implies that in serious cases where the protected defendant has sufficient insurance there may be little reason to name the unprotected defendants in the action. In less serious cases, it will be a more significant consideration. Therefore, there is a greater likelihood of recovering something from an unprotected defendant in a less serious injury case. For example, if the unprotected defendant is 50% at fault, the plaintiff can only receive a higher damage award by suing the unprotected defendant if the damages for non-pecuniary loss are less than $60,000.00. The *FLA* deductible is only $15,000.00. Therefore, to recover any additional amount where liability is 50:50, the *FLA* damages must be less than $30,000.00.

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[98] If the ratio of Bill 198 damages: common law damages < % liability of unprotected defendants, then the plaintiff can recover additional damages.

[99] One cannot avoid this result by only suing unprotected defendants. Subsection 267.7(3) obliges the court to consider the liability of non-parties when apportioning damages under subsection 267.7(1).

If, however, the injury does not pierce the threshold, then the plaintiff will recover his or her non-pecuniary general damages (including *FLA* damages) from an unprotected defendant in proportion to its liability.

For pre-trial loss of income claims, one must actually determine the claim's value before making the decision to sue the unprotected defendant. Since we have progressive taxes in Canada, 80% of net income is usually a larger percentage of gross income for middle income earners than for high income earners.[100] This implies that high income earners can recover additional damages for pre-trial losses of income from unprotected defendants who are less at fault than middle income earners can.

There will be situations where the plaintiff will not recover any additional non-pecuniary damages by suing an unprotected defendant, but could recover additional pecuniary damages. For example, let us assume that the unprotected defendant is 70% at fault, the non-pecuniary general damages are $100,000.00, the common law loss of income claim is $100,000.00 and the Bill 198 loss of income claim is $50,000.00. In this instance, the plaintiff does not recover any additional non-pecuniary damages by suing the unprotected defendant but will recover an additional $20,000.00 for his or her loss of income claim.[101]

Under Bill 198, excess health care expenses can be recovered from protected defendants if the injury satisfies the verbal threshold. It is going to be the rare case where there will be excess health care expenses and the case does not satisfy the verbal threshold. Therefore, the existence of excess health care expenses will rarely be a factor in deciding whether or not to sue an unprotected defendant.

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[100] For example, if someone is taxed at 25% then 80% of net income is about 60% of gross income. However, a higher income earner may be taxed at 40%. 80% of that plaintiff's net income would be 48% of gross income. If the unprotected defendant was 60% at fault, the high income earner would recover additional amounts by suing that entity but the modes income earner would not.

[101] 70% of $100,000.00 is the same as the deductible reduced damages of $70,000.00. Therefore, the plaintiff recovers no additional non-pecuniary general damages. On the other hand, 70% of $100,000.00 is $20,000.00 greater than the protected defendant is obliged to pay for the loss of income claim. It would therefore be prudent for the plaintiff to sue the unprotected defendant to recover this additional $20,000.00.

In *Sullivan Estate*, the approach of the lower court and of Justice Weiler (in dissent) in the Court of Appeal to the interpretation of subsection 267.7(1) would have obliged the unprotected defendant to pay any damages that protected defendants were insulated from paying. In essence, where an unprotected defendant was partially at fault, the plaintiff would receive his or her full common law damages. The burden of paying those additional damages was cast upon the unprotected defendant. Under the majority's interpretation, the unprotected defendant will never be called upon to pay more than it would have been obliged to pay in any action at common law. A review of some of the earlier calculations demonstrates that, in many cases, the unprotected defendant (or possibly a third party) may be obliged to pay a significant proportion of the damages.[102] The Court of Appeal's decision may have increased the incentive for protected defendants to third party unprotected defendants. In any case where a protected defendant is even partly at fault, the protected defendant receives all of the benefit of the damage reduction mechanisms. In addition, the protected defendant's obligation to contribute to the damages for which it is jointly and severally liable will be less than under the *Negligence Act*. To put it a little differently, under the Court of Appeal's interpretation it is only the plaintiff that loses under Bill 198. The amount that the unprotected defendant is obliged to pay does not change. The amount the protected defendant pays or is obliged to contribute under the *Negligence Act* is reduced by precisely the amount that the plaintiff loses.

Under Bill 198 as compared to Bill 59, the incentive for protected defendants to sue an unprotected defendant may actually have increased. For example, let us assume that general damages are assessed at $100,000.00 and that that unprotected defendant is 25% at fault. Under either Bills 59 or 198, the unprotected defendant would be liable for 25% of $100,000.00 or $25,000.00. Under Bill 59 the protected defendant would pay the balance of the Bill 59 damages ($85,000.00 less $25,000) or $60,000.00. Under Bill 198 the protected defendant would be liable for the balance of the "Bill 198 damages" ($70,000 less $25,000) or $45,000.00. Under Bill 198

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[102] See the chart at the heading "Non-Pecuniary Damages" at III.C.vii above. In that example, the protected defendant was the only defendant with assets it would be liable to pay damages to the husband and wife totalling $60,000.00 ($56,000.00 in respect of the husband and $4,000.00 in respect of the wife). If the unprotected defendant has assets, this liability is reduced to $6,000.00. If a unprotected defendant is third partied is its liability to the protected defendant calculated under the provisions of the *Negligence Act* or in accordance with clauses 267.7(1)(b) and (c)?

the protected defendant is liable for about 70% of the non-pecuniary damages and under Bill 198 it is liable for only about 64.3% of the damages. The unprotected defendant remains liable for the same dollar amount but is actually paying a larger proportion of the damages under Bill 198.

Offers to settle can be tricky to draft. Since the loss of income claim is dependant on the trial date, all parties will need to consider drafting offers which reflect this reality. I would suggest drafting offers which assume the trial will take place on a certain date, but including adjustment clauses which kick in if the trial actually proceeds on a different date. Hopefully, this will provide enough certainty to the offer to make it capable of being easily accepted, but will offer enough flexibility if the trial proceeds earlier or later than anticipated.

As previously discussed, the future collateral benefits trust provisions, if applied literally, could oblige plaintiffs to pay back more of a judgment than is fair.[103] One must be very careful in drafting minutes of settlement and judgments to avoid this result. The practice, which many counsel adopt, of simply parroting the legislative language in minutes of settlement could lead to unanticipated problems for plaintiffs.

With respect to costs, they tend to be apportioned at trial in accordance with the degrees of fault found under the *Negligence Act*. Protected defendants might wish to consider asking the trial judge to apportion costs in the same ratio as damages are apportioned. This would usually result in a more favourable apportionment to the protected defendant than an apportionment based on degrees of fault.

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[103] See discussion at the last paragraph of III.B.iv above.

APPENDIX A
DAMAGE CALCULATION RULES

These rules assume that there is a mixture of protected and unprotected defendants. The example that is used is the one presented in the chapter under "A Mixture of Defendants".

1. Calculate the damages for each of the following heads of damage in the same manner as you would at common law:

    (a) Pre-trial loss of income;

    (b) Future loss of income;

    (c) Health Care Expenses;

    (d) Other Pecuniary Losses; and

    (e) Non-Pecuniary Losses.

2. Calculate the protected defendants' liability for pre-trial loss of income. Take 80% of the net loss of income for the period commencing seven days after the crash and ending on the first day of trial. This is the protected defendants' liability for pre-trial loss of income.

3. Take the figure from 1(e) above and deduct the appropriate deductible of $30,000.00 or $15,000.00. If the injury does not pierce the threshold, then the amount is zero.

4. Reduce the figures calculated under 2 and 3 above by the contributory negligence of the plaintiff. If a figure calculated under another rule has been reduced because of the use of this rule, then I will refer to it as a figure calculated under rule 4-x (for example the figure calculated in accordance with rule 2 is then reduced under this rule the figure would be referred to as the figure calculated under rule 4-2).

5. Each head of damages must now be apportioned as between the protected and unprotected defendants.

    (a) For pre-trial loss of income:

        (i) take the number from rule 2 or 4-2 (depending on whether there is contributory negligence). The protected and unprotected defendants are jointly and severally liable for this amount;

        (ii) the unprotected defendants are solely liable to the plaintiffs (on a joint and several basis as between themselves) for the product of the amount calculated in rules 1(a) and their percentage liability less the amount calculated in rules 5-1(a)(i). If the difference is zero or less, then there is no sole liability to the plaintiffs;

(iii) the unprotected defendants' share of the joint and several liability is the lesser of rule 5(a)(i) and the product of rule 1(a) and the unprotected defendant's percentage liability;

(iv) the protected defendants' share of the joint and several liability is the figure calculated in rule 5(a)(i) less the figure calculated in rule 5(a)(iii);

(v) the total liability of the protected defendants is the figure calculated in rule 5(a)(iv);

(vi) the total liability of the unprotected defendants is the sum of the figures calculated in rule 5(a) (ii) and (iii).

(b) For future loss of income or earning capacity, take the figure calculated in rules 1(b) or 5-1(b) and apportion it in accordance with the defendants' relative degrees of fault.

(c) For health care expenses, the rules differ depending on whether the injury does or does not pierce the threshold. First reduce the damages calculated under rules 1(c) or 4-1(c) by any collateral benefits. If the injury does not pierce the threshold catastrophic, then the unprotected defendants, as between themselves, are jointly and severally liable for the net damages multiplied by their proportionate negligence. If the injury does pierce the threshold, then one simply takes the net damages and apportions them in accordance with each defendant's percentage liability.

(d) For other pecuniary losses take the figure calculated from rule 1(c) or 4-1(d), reduce it for any collateral benefits and apportion it in accordance with the defendants' relative degrees of fault.

(e) For non-pecuniary damages:

(i) the protected and unprotected defendants are jointly and severally liable for the figure calculated under rule 3 or 4-3;

(ii) the unprotected defendants are jointly and severally liable, as between themselves, for the difference, if any, between the figure calculated under rule 1(e) multiplied by their percentage liability and the figure calculated under rule 5(e)(i);

(iii) the unprotected defendants' share of the joint and several liability is the lesser of the amount calculated by multiplying the figure in rule 1(e) by their percentage liability and the figure calculated under rule 5(e)(i);

(iv) the protected defendants' share of the joint and several liability is the figure calculated in rule 5(e)(i) less the figure calculated in 5(e)(iii);

(v) the total liability of the protected defendants is the figure calculated in 5(e)(iv) above;

(vi) the total liability of the unprotected defendants is the sum of the figures calculated in rules 5(ii) and (iii).

6. The next step is to deduct the appropriate pre-trial collateral benefits from the damage awards calculated in Rule 5.

For loss of income claims, protected defendants receive partial priority with regards to deducting pre-trial loss of income collateral benefits. These benefits are first deducted from the figures determined in Rule 5(a)(iii) and (iv) in proportion to their liability for any joint and several damages (i.e., in proportion to their liability to indemnify each other under the rules 5(a)(iii) and (iv)). Any remaining loss of income collateral benefits are then deducted from the figure calculated under Rule 5(a)(ii). It is unclear whether any leftover collateral benefits (i.e. after all of the protected defendant's liability is reduced to zero for pre-trial losses) can be deducted from the future loss of income award or are simply lost.

All other collateral benefits are divided between the defendants in relation to their fault and deducted from the appropriate head of damages. It is clear that past health care collateral benefits can be deducted from future health care costs. Other collateral benefits that have been received or were available may only be deductible from past losses.

7. Future collateral benefits are held in trust by the plaintiff for the defendants and are apportioned between all defendants in accordance with their obligation to pay damages as calculated under subsection 267.7(1) for each head of damages.

8. Advance payments are deducted from the damages as calculated above under Rule 6. It appears that they are first deducted from the heads of damage that attract the highest prejudgment interest.

9. Pre-judgment interest is calculated on all past losses and any non-pecuniary losses.

Example:

	Injured Plaintiff	**Wife**	**Son**
Rule 1(a)	$104,000.00	x	x
(b)	$104,000.00	x	x
(c)	$ 10,000.00	x	x
(d)	x	x	x
(e)	$100,000.00	$20,000.00	$7,500.00

Rule 2. Eighty percent of the injured plaintiff's pre-trial net loss of income from seven days following the crash until the beginning of the trial is $35,700.00.

Rule 3. After subtracting the deductibles, the non-pecuniary damages of the plaintiffs are $70,000.00 for the injured plaintiff, $5,000.00 for the wife and nothing for the son.

Rule 4	**Injured Plaintiff**	**Wife**	**Son**
Rule 1(a)	$83,200.00	x	x
(b)	$83,200.00	x	x
(c)	$8,000.00	x	x
(d)	x	x	x
(e)	$80,000.00	$16,000.00	$4,000.00
Rule 2	$28,560.00	x	x
Rule 3	$56,000.00	$4,000.00	zero

Rule 5(a) Pre-Trial Loss of Income		**Injured Plaintiff**
(i) all defendants joint and severally liable		$28,560.00
(ii) sole liability of unprotected defendant	$52,000.00 less 5(a)(i)	$23,440.00
(iii) unprotected defendant's share of joint and several liability lesser of $28,560.00 and $52,000.00		$28,560.00
(iv) protected defendant's share of joint and several liability ((i) minus (iii))		$0.00
(v) total liability of the protected defendant		$0.00
(vi) total liability of the unprotected defendants ((ii) plus (iii))		$52,000.00

Rule 5(b) Future Loss of Income

The future loss is $104,000.00 reduced by 20% to $83,200.00 which is, in turn, apportioned 50% of the $104,000.00 to the unprotected defendant ($52,000.00) and the balance of the $83,200.00 to the protected defendant ($31,200.00).

Rule 5(c) Health Care Expenses

As the injury pierces the threshold, the health care expenses of $10,000.00, reduced by 20% to $8,000.00, are apportioned in the same ratio as the Future Loss of Income. The protected defendant is liable for $3,000.00 and the unprotected defendant for $5,000.00.

Rule 5(d) Other Pecuniary Losses

There are no other pecuniary losses in this example.

Rule 5(e) Non-Pecuniary Damages	**Injured Plaintiff**	**Wife**	**Son**
(i) all defendants joint and severally liable	$56,000.00	$4,000.00	zero
(ii) sole liability of unprotected defendant ($100,000 x 50% less $56,000), ($20,000 x 50% less $4,000) and ($5,000 x 50% less zero)	$0.00	$6,000.00	$2,500.00
(iii) unprotected defendant's share of joint and several liability [lesser of (i) and (common law damages x 50%)}	$50,000.00	$4,000.00	zero
(iv) protected defendant's share of joint and several liability ((i) minus (iii))	$6,000.00	zero	zero
(v) total liability of the protected defendant	$6,000.00	zero	zero
(vi) total liability of the unprotected defendant ((ii) plus (iii))	$50,000.00	$10,000.00	$2,500.00

Rule 6

There are $30,600.00 of pre-trial collateral benefits which can be deducted from the loss of income award. The protected defendant has partial priority for their deduction. In this example, the collateral benefits will reduce the joint and several damages for loss of income to zero. This leaves $2,040.00 that the unprotected defendant can deduct from the damages for which it is solely liable, reducing them from $23,440.00 to $21,400.00. This is the only amount payable by the defendants for pre-trial loss of income. The future loss of income claim payable by the unprotected defendant is $52,000.00 and by the protected defendant is $31,200.00.

The pre-trial health care collateral benefits of $7,500.00 would be split in the ratio of 3:5 - protected defendant to unprotected defendant reducing the unprotected defendant's contribution to $312.50 ($5,000.00 - [$7,500.00 x 5÷8]) and the protected defendant's contribution to $187.50 ($3,000.00 - [$7,500.00 x 3÷8]).

Rule 7

All future collateral benefits would be held in trust for the unprotected and protected defendants in the ratio 5:3.

Rules 8 and 9 have not been applied in this example.

The final amounts in the judgment look like this, with the plaintiff holding any future collateral benefits in trust for the defendants:

Injured Plaintiff

Claim	**Protected Defendant**	**Unprotected Defendant**
Pre-trial Loss of Income	$0.00	$21,400.00
Future Loss of Income	$31,200.00	$52,000.00
Health Care Expenses	$187.50	$312.50
Non-Pecuniary Damages	$6,000.00	$50,000.00
Total	$37,387.50	$123,712.50

The wife will recover $10,000.00 from the unprotected defendant. The son will recover $2,500.00 from the unprotected defendant.

APPENDIX B
RECENT DECISIONS INVOLVING BILL 59 & 198

There are three primary issues addressed by the decisions involving Bills 59 and 198 since 2005. The first is the interpretation of the threshold and the standard required for a plaintiff's injuries to qualify for the exception under s. 267.5(5). The other issues are the deductibility of collateral benefits and the interaction between limitation periods and Bills 59 and 198.

Threshold

The primary issue that has arisen is with respect to the effect of Bill 198 on the verbal threshold. Specifically, whether Bill 198 was simply confirmatory of the existing law or whether by introducing Bill 198 and defining certain terms, the legislature intended to "tighten up" the threshold and raise the criteria for allowing recovery for general damages arising from a MVA, which was originally set in *Meyer v. Bright*.

In *Nissan v. McNamee*,[104] Madam Justice Morissette held that despite the slight changes in wording, Bill 198 is essentially confirmatory of the existing law. Though it is noted that the inclusion of the word "most" in relation to daily activities suggests a higher threshold where the impairment affect daily living but not employment.

Madam Justice Milanetti takes a slightly different approach in his reasons in *Sherman*[105] and in a subsequent case, *Valdez*.[106] Milanetti J. notes that the purpose of the legislation was to limit claims for pain and suffering to seriously injured individuals, thereby reducing insurance premiums paid by Ontario motorists. She takes the position that Bill 198 attempted to tighten up the threshold by defining the components more precisely and thus reducing the discretion available to judges in interpreting the various components of the definition.

Despite these differences, there is a consensus that Bill 198 does not make prior case law irrelevant; it is of great assistance in determining what constitutes permanent, serious, continuous injuries and what constitutes an important function.

Whether the intention was to raise the standard for plaintiff's injuries to reach threshold or not, it does not appear that the changes to the threshold criteria brought by Bill 198 will have much impact on which cases are found to pierce the threshold. In practical terms, the increase of the deductible to $30,000 under Bill 198 will have a much greater impact in determining which plaintiffs will recover in tort for their injuries sustained in an motor vehicle accident in Ontario.

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[104] [2008] O.J. No. 1739.

[105] *Sherman v. Guckelsberger* [2008] O.J. No. 5322.

[106] *Valdez v. Clarke*, 2010 CarswellOnt 30.

Another issue related to threshold was addressed in the recent decision *Sabourin v. Dominion of Canada General Insurance Co.*,[107] where Valin J. determined that future loss of housekeeping and home maintenance are not subject to the threshold.

Collateral Benefits

In *Meloche v. Makenzie*,[108] the court held that since the original intent of having the collateral benefits deducted from tort awards was to prevent double recovery, the interpretation of these sections, should be broad, inclusive and encompassing with respect to identifying those benefits which are the subject of deduction in tort law from an award for past loss and the subject of a trust for future receipt. Accordingly, the collateral benefits provided by the employer, namely: sickness and accident, extended disability benefits, disability pension benefits as well as Canada Pension Disability Benefits are properly deductible and are the subject of the trust provisions of the legislation.

In *Burhoe v. Mohammed et al.*,[109] the court found that unprotected defendants were also entitled to a deduction for collateral benefits pursuant to s.267.8(1) and were entitled to the benefit of the trust and assignment benefits contained in s.267.8 (9), (10) and (12) of the *Insurance Act*.

In *Strickland v. Mistry*,[110] the court found that any amounts received on account of future C.P.P. payments are properly the subject matter of a trust in favour of the defendant by operation of section 267.8(a) of the *Insurance Act*. The court also found that with respect the trust requirements and assignment provisions in s.267.8(12) relating to the Long Term Disability Payments, the language is permissive and allows the court to impose any conditions it considers just. In *Strickland*, the court imposed a trust with respect to the LTD payments to be paid within 7 days of receipt, failing which the monies would be assigned to the defendant.

Limitation Period

In *Ng v. Beline*,[111] where there are separate claims relating to the same motor vehicle accident one which is subject to threshold and one which is not (for example a general damages claim and special damages claim), there should not be two separate limitation periods. The court concluded that if the threshold claim is not timely then all the claims should be statute-barred, and, conversely, if the threshold claim is timely, then it is just that all the claims should go forward. The rationale for this approach is to prevent a limitation period trap in situations where the plaintiff does not discover that the claim will meet the threshold until sometime after the motor vehicle accident in question.

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[107] [2009] O.J. No. 1425.

[108] [2005] O.J. No. 3761.

[109] (2009) 97 O.R. (3d) 391.

[110] [2009] O.J. No. 1169.

[111] [2008] O.J. No. 5686.

CASES

1. THRESHOLD

***Brak v. Walsh*, [2008] O.J. No. 1173, 2008 ONCA 221 - Threshold Appeal**

- Threshold, "serious"

Decision by: K.M. Weiler, M.J. Moldaver and R.G. Juriansz JJ.A. - April 1, 2008

Facts: Appeal from a trial judge's decision after careful review of the medical evidence that while the plaintiff did sustain a lower back injury, he went on to find that her injuries did not meet threshold.

Reasoning: The jurisprudence establishes that permanent means lasting indefinitely into the future as opposed to for a limited time with a definite end. See e.g. *Bos Estate v. James* (1995), [1995] O.J. No. 598, 28 C.C.L.I. (2d) 166 (S.C.J.) Howden J.; *Altomonte v. Matthews*, [2001] O.J. No. 5756 (S.C.J.), McDermid J. The requirement of a permanent injury is also met when a limitation in function is unlikely to improve for the indefinite future: See: Roccamo J. in *Hartwick v. Simser,* [2004] O.J. No. 4315 at para. 87 and *Rizzo v Johnson* (2006), 82 O.R. (3d) 633 Smith J. at para. 11 to the same effect.

The question of whether an injury is serious was addressed by the court in *May v. Casola*, [1998] O.J. No. 2475 (Ont. C.A.). Carthy J.A. said "In our view a person who can carry on daily activities, but is subject to permanent symptoms including, sleep disorder, severe neck pain, headaches, dizziness and nausea which, as found by the trial judge, had a significant effect on her enjoyment of life must be considered as constituting serious impairment.

The requirement that the impairment be "serious" may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain. In such cases it must also be considered whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children, and engage in recreational pursuits.

Here, the trial judge did not indicate he considered anything other than that the appellant carried on with her full range of activities. This is not significant in itself as judges are presumed to know the law. However, the trial judge also failed to allude to evidence of the lay witnesses, which was important in assessing the appellant's claim that continuing pain affected her overall enjoyment of life. Together these omissions undermine the conclusion he reached.

***Nissan v. McNamee* [2008] O.J. No. 1739**

- Bill 198 does not significantly affect the threshold analysis

Decision by: J.N. Morissette J. - April 30, 2008

Facts: The motor vehicle accident in this case occurred on November 2, 2003. Bill 198 governs this case. It appears that this case is the first in Ontario to interpret the O.Reg. 381/03, which amended O.Reg. 461/94.

Issue: The ultimate question is whether the defining regulation was implemented to codify the interpretation made by the Ontario Court of Appeal in *Meyer*, or whether the legislator's intent was to substantially reduce the number of personal injury claims coming before the Courts as a result of motor vehicle accidents.

Reasoning: Efforts to reframe the broad approaches that have been applied since *Meyer*, should be resisted.

The defendants in the case at hand note three distinctions that arise between the two definitions. The first are references to accommodation with respect to employment and training. Second are references to reasonable efforts with respect to that accommodation. Third is the consideration of the person's age with respect to daily living. The addition of the word "most" to modify "usual activities of daily living" should also be noted.

The addition of references to accommodation suggests a slight change. It raises the threshold for plaintiffs, but only does so modestly given the existence of prior decisions that have considered accommodation. It seems that this provision has added a positive obligation on plaintiffs to make reasonable efforts to use accommodation measures.

The infusion of the words "reasonable efforts" as they relate to accommodation appears to suggest that a plaintiff has a positive obligation to adduce some evidence that show what "reasonable efforts" a plaintiff has made with respect to the accommodations provided, if any.

The most significant change is the addition of the word "most" to modify "daily activities." The threshold already contained, and still contains, a requirement for substantial interference. The additional requirement may suggest a quantitative analysis. However, it seems that the word "most" serves to clarify that it is not enough that an impairment substantially interfere with "some" activities of daily living, but that there must be a full consideration of the import of the activities that have been interfered with.

This definition appears to be largely consistent with the guidance from *Meyer* that the importance of a bodily function is considered in terms of its importance to the injured person. The defendant's agree that the court must consider the effect the relevant bodily function has upon the plaintiff's way of life in the broadest sense. The comments above regarding "accommodation," "reasonable," and "age", in my opinion, remain applicable.

The Court of Appeal in *Brak v. Walsh*, [2008] O.J. No. 1173 (C.A.), recently dealt with what a permanent injury means, stating that a permanent injury meets the threshold if the limitation in function is unlikely to improve for the indefinite future.

The court concludes that regulation 4.2(1)3(i) is a codification of the existing case law.

In summary, most of the regulation does not appear to support any significant change in the interpretation of the threshold. In general terms, it suggests at best some clarification of the law regarding accommodation. The one exception is the addition of the word "most," which suggests a higher threshold where impairments affect daily living but not working.

***Gaukel v. Thukral* [2008] O.J. No. 3521**

- Threshold, soft tissue/chronic pain meets threshold

Decision by: H.S. Arrell J. - Sept. 11, 2008

Facts: This case involved soft tissue injury and chronic pain. The complaints of pain and dysfunction were obviously subjective in nature and given primarily through the evidence of the plaintiff. As such her credibility was a significant issue.

The function that is permanently impaired is to this plaintiff's upper back and to a lesser extent her neck, right shoulder and right arm along with headaches. Such impairment affects her daily, and throughout the day, in most activities she does, including sitting too long, reaching, lifting from a reaching position. Such activities occur throughout a normal day. There is little she would do where she would not be reminded of the injury. As well, there was evidence of increased pain and dysfunction with any activity and as the day wore on. There was also evidence of disruption of sleep on a nightly basis due to pain and an inability to sleep on the right side. This plaintiff is right hand dominate.

Reasoning: The jurisprudence establishes that permanent means lasting indefinitely into the future as opposed to a limited time with a definite end. *Bos Estate v. James* [1995] O.J. No. 598; *Brak v. Walsh*, [2008] O.J. No. 1173, 2008 ONCA 221

The requirement of a permanent injury is also met when a limitation in function is unlikely to improve for the indefinite future. *Hartwick v. Simser*, [2004] O.J. No. 4315; *Rizzo v. Johnson*, (2006), 82 O.R. (3d) 633; *Brak v. Walsh* (*supra*)

The court concluded that the physical impairment to this plaintiff's upper back is an important one for all of the reasons given and all of the day to day activities that are affected; as it would be for anyone.

The court concluded that the plaintiff suffered a serious and permanent impairment of an important function.

***Saikaly v. Buck* [2008] O.J. No. 3996**

- Bill 198 is confirmatory of the prior law; follows *Nissan v. McNamee*

Decision by: H.R. McLean J. - May 16, 2008

The only outstanding issue was the question of the threshold. The Court found that *Nissan v. McNamee*, [2008] O.J. No. 1739, is highly persuasive. Madam Justice Morissette found that the amendments to the *Insurance Act* that are found in s. 267.5(5) are essentially confirmatory of the law that is found in *Meyer v. Bright* (1993), 15 O.R. (3d) 129, a decision of the Court of Appeal. She finds that considering the commentary in *Dreidger on the Construction of Statutes*, there may be in Canada, due to the *Interpretation Act*, a slight presumption with regard to the construction of amendments to statutes. She finds, on the basis of the slight construction, that she is persuaded that, simply put, because the definitions are added by a regulation as opposed to an amendment to the *Act*, that the sections added by regulation are essentially confirmatory of the prior law.

The court finds Madam Justice Morissette reasoning is persuasive in this matter.

***Sherman v. Guckelsberger* [2008] O.J. No. 5322**

- Threshold - Bill 198 intended to tighten up the exception

Decision by: J.A. Milanetti J. - Dec. 29, 2008

Facts: The plaintiff claimed for her injuries and past and future wage loss resulting from an accident on March 10, 2004. The plaintiff's car was rear-ended; the defendant admitted liability for the collision. Following the accident, the plaintiff was initially off of work for one week and then worked part time for two weeks before resuming her normal hours, which were eight hours per day, four days per week. In June of 2004, the plaintiff started doing a bookkeeping job out of her home, involving a couple of hours of work per week. In about July of 2007, the plaintiff reduced her work by eight hours per week, taking the position that headaches and neck pain caused by the accident precluded her from working her previous hours. After the accident the plaintiff had continued going on annual camping trips, but was unable to carry a canoe any more, drove to Florida with her husband and worked out for one hour five days per week. The plaintiff complained of daily headaches, pain in the centre of her neck and numbness and tingling in two fingers on her right hand. A physiatrist hired by the plaintiff took the position that plaintiff's whiplash injury caused neurological problems and opined that the plaintiff suffered from "thoracic outlet syndrome" attributable to injuries sustained from the accident; no other doctors had arrived at these diagnoses.

Reasoning: If the legislators saw fit to amend the legislation yet again-increasing the deductible for claims under $100,000 and making it so much more specific, they did so with a view to tightening it up from the former version.

This case requires an interpretation of Regulation 381/03 (known as Bill 198); which amends Regulation #461/96 (Bill 59). This amending legislation is relatively recent and applies to accidents which occurred on or after October 1, 2003.

The only other decision dealing with the new legislation is the decision of Justice Morrisette in *Nissan v. McNamee* [2008] O.J. No. 1739, (2008) W.L. 1955825 (Ont. S.C.J.). There are also numerous other cases flowing from prior versions of the legislation that predated O.Reg.381/03. Justice Morrisette did a thorough review of the new amendments comparing the new legislation to the old and addressing the purpose of the legislative change. She concluded that the Bill 198 legislative changes do little to change the Bill 59 legislation that predated it.

However, Justice Milanetti takes a different view of the changes and their ramifications.

The threshold is the genesis of No Fault legislation - the OMPP that purportedly set out to deal with skyrocketing insurance premiums; a hot button political issue at the time. The purpose, was to limit claims for pain and suffering to seriously injured individuals, thereby reducing insurance premiums paid by Ontario motorists. At its inception, the change in legislation, limiting the right to sue for non pecuniary general damages, was said to be balanced by the increased accident benefits available to injured parties, regardless of fault.

Even before the amendments, the Court of Appeal in *Meyer v. Bright* said that, "When the legislation qualified permanent impairment" by the word serious, it obviously intended that injured persons must endure some permanent impairment without being able to sue. In Mr. Meyer's case for instance, the court found that:

> Mr. Meyer has some continuing pain and discomfort causing impairment of his ability to walk, bear weight, squat and kneel, but that did not have a detrimental impact on his way of life that we can consider a serious impairment for him. (p. 16, par 63 & 64) 94 D.L.R. (4th) 648.

Each case depends on its own facts and that what is a serious injury to one individual is not necessarily to another. However, the court did not accept that Ms. Sherman's injuries and impairments are of the sort that the legislation intended quite specifically to qualify as an exemption to the no fault approach to motor vehicular tort injury.

Ali v. Consalvo [2009] O.J. No. 487 - Threshold

- Threshold, credibility of plaintiff

Decision by: D.A. Wilson J. - Feb 6, 2009

Facts: This accident occurred May 30, 2004, and is therefore governed by Bill 198. Following a jury trial general damages were assessed at $5,000. Nil was awarded for future medical needs. This was a threshold motion.

Reasoning: The court agreed with the comments of Justice J.A. Milanetti in Sherman *v. Guckelsberger*, [2008] O.J. No. 5322, where she stated that Bill 198 does not make prior case law irrelevant; it is of great assistance in determining what constitutes permanent, serious, continuous injuries and what constitutes an important function.

It is clear that each case must be determined on its own facts and the same injury does not result in an identical outcome in each person. To put it another way, whether an individual can establish an injury pierces the threshold depends on the facts specific to that particular plaintiff.

Given the serious credibility issues concerning the evidence of the plaintiff there were doubts about what her actual activity level has been since the accident. The plaintiff failed to prove on a balance of probabilities that her case fell within the exception to the threshold set out in s. 4.2 (1)1(iii).

***Del Rio v. Lawrence* [2009] O.J. No. 676**

- Threshold, chronic pain

Decision by: A.M. Gans J. - Feb 18, 2009

Facts: The subject MVA took place on October 5th, 2001 and hence the operative regime under which to consider the threshold and other issues is Bill 59.

The court accepted the plaintiff's evidence that, while she can work and attend to her personal needs and grooming, she more often than not returns home from work effectively unable to do anything but lie down as a result of the pain caused by her CPS.

Reasoning: In the wake of the Court of Appeal decision in *May v. Casola* and the more recent decisions of that court in *Jones v. Mazolla* (2005), 78 O.R. (3d) 772 and *Brak v. Walsh*, [2008] O.J. No. 1173, 2008 ONCA 221, it is now beyond dispute that the motion court is obliged to consider whether or not the continuing pain seriously affects a plaintiff's enjoyment of life, including his or her ability to socialize with others, have intimate relations, enjoy his or her children, or engage in recreational pursuits. This analysis must be undertaken even if the motion judge concludes that the plaintiff can otherwise 'function' at work and can take care of him or herself.

The plaintiff met the threshold, as required under Bill 59.

Obiter: Bill 198 appears to be a codification of the principles set out by the Court of Appeal in *Meyer v. Bright, supra*, which apply to accidents that took place on or after November 1, 1996.

The court noted that it was not persuaded that when one suffers from CPS, one is obliged to lead evidence of a physiatrist or a psychologist/psychiatrist in support of one's claim in respect of the issue of permanence. The court suggested that an orthopaedic surgeon well versed in the diagnosis and treatment of such a condition is well equipped to render an opinion on this issue, particularly if the defendant chooses not to cross examine him on his report and that portion of his opinion remains unchallenged. That said, it would have been prudent of the plaintiff to at least lead the evidence of the surgeon since the cases referred to in *Podleszanski,* make it clear that the absence of any such evidence can be fatal to the threshold motion.

***Xiao v. Gilkes* [2009] O.J. No. 735**

- Threshold, injuries were not "permanent"

Decision by: I.A. MacDonnell J. - Feb 24, 2009

Facts: Threshold motion. 33 year old plaintiff. His ambition was to become a chef and open his own restaurant. After his arrival in Canada, he took a job as a dishwasher, intending to work his way up the kitchen ladder. The job was physically demanding, requiring Mr. Xiao to be on his feet lifting heavy objects.

On November 20, 2000, Mr. Xiao's car was struck by the car of the defendant. It is conceded that the defendant was completely at fault. Mr. Xiao suffered soft tissue injuries to his neck, shoulder and back. After the accident, he received therapy for his injuries at a chiropractic clinic for about three months. Prior to the accident, Mr. Xiao had been working 60 hours per week; after the accident, he was forced to reduce his hours.

On May 19, 2002, eighteen months after the first accident, Mr. Xiao was involved in a second motor vehicle collision. Once again, he suffered injuries to his neck and back for which he received therapy for a few months. He also returned to Doctor Lo and was treated by him for six months, until November 2002. There is no evidence that Mr. Xiao saw any doctor after that, for any purpose, until November 2006 when he was sent by his lawyer to a pain specialist, Dr. Finklestein, for an evaluation for the purposes of this action.

At the time of the second accident, Mr. Xiao was working at the Bayview Garden restaurant. He was off work following the accident, but his evidence and that of Dr. Lo was that after about two months his physical condition returned to what it had been immediately before the second accident. He did not go back to work, however, apparently because he was receiving some form of compensation. It appears that he did not seek employment of any kind for at least 18 months, and that for 12 months after that his only employment was as a babysitter. In January 2005, he became employed again in the kitchen of a Chinese restaurant. Since then he has been working full time, 60 hours per week, without interruption.

The substance of Mr. Xiao's position in this action is that he continues to suffer chronic pain from the injuries sustained in the first accident - the one for which the defendant Kristine Gilkes is liable - and that the pain seriously impairs his ability to perform his duties as a chef and to engage in the daily activities he engaged in prior to being injured. His position is that at the time of the second accident he had not recovered from the injuries suffered in the first. While the second accident aggravated his original injuries, he testified, the aggravation only lasted about two months, at which point he returned to the state he was in before the second accident.

With the agreement of counsel, the motion was brought following delivery of the jury's verdict awarding Mr. Xiao $20,000 in general damages, and Yin Ling and Allen Xiao $9,667 and $12,500, respectively, for their *Family Law Act* claims.

Reasoning: In the present case, only the impairment of a physical function is alleged, namely the ability to bend at the waist, to lift heavy objects, and to stand for extended periods of time. It is not in dispute that these abilities are essential for someone like Mr. Xiao, who works long hours

as a chef in a restaurant. The physical function in question is therefore important to him, and the fact that it is important to him is sufficient to establish that it is an important function for the purposes of s. 267.5(5)(b).

The real question is whether Mr. Xiao has suffered a permanent and serious impairment of that function.

In order to establish that an impairment is permanent, it is not necessary for a plaintiff to prove that he or she will never be rehabilitated. In *Brak v. Walsh*, 2008 ONCA 221, 90 O.R. (3d) 34, at paragraph 4, the Court of Appeal stated that "the jurisprudence establishes that permanent means lasting indefinitely into the future as opposed to for a limited time with a definite end ... The requirement of a permanent injury is also met when a limitation in function is unlikely to improve for the indefinite future ..." Further, to establish permanence, a plaintiff need not prove that the impairment constantly manifests itself. "A continuing impairment, albeit experienced intermittently, can satisfy the plain language of the statute": *Frankfurter v. Gibbons*, [2004] O.J. No. 4969, 74 O.R. (3d) 39 (Div. Ct.), per Jennings, J. at paragraph 16.

The plaintiffs established that Mr. Xiao suffered injuries to his neck and lower back in the first accident, those injuries were slow to heal, and they adversely affected his ability to bend or to lift or to stand for long periods of time. Therefore, Mr. Xiao sustained an impairment of an important physical function. So long as the injuries and the concomitant pain persisted, the impairment caused substantial interference with the ability of Mr. Xiao to carry out his duties at work on a full time basis and to participate in the daily activities of his life, and accordingly that it was serious.

The court was not satisfied that the impairment was permanent. The plaintiffs had not established that Mr. Xiao had not made a full recovery from his injuries by early 2002, prior to the second accident. Further, even if his back and neck problems persisted beyond the date of the second accident. The court was not satisfied that he continued to suffer from those problems. Finally, even if the court were to find that Mr. Xiao still experienced some lingering, occasional impairment of his physical abilities, the court would have concluded that any such impairment cannot be characterized as serious.

Any one of these findings is sufficient to support a conclusion that the plaintiffs have not brought Mr. Xiao within the exception set forth in s. 267.5(5)(b) of the *Insurance Act*. Accordingly, the defendant is not liable for any of the plaintiffs' non-pecuniary losses.

***Sabourin v. Dominion of Canada General Insurance Co.* [2009] O.J. No. 1425**

- Future loss of housekeeping and home maintenance are not subject to the threshold

Decision by: G.T.S. Valin J. - April 9, 2009

This is an action for damages for personal injuries arising from a motor vehicle accident that occurred in Sturgeon Falls on March 18, 2005. The plaintiff was a homemaker when she was injured.

Issues: Whether her injuries meet threshold?

Whether the threshold applies to a claim for damages for future loss of housekeeping and home maintenance services?

Reasoning: The plaintiff must do more than simply experience pain in order to bring herself within the exception to the threshold wording. The onus is on her to prove on a balance of probabilities that the pain she is experiencing has substantially interfered with most of her activities of daily living. I find that she has failed to prove on balance that her case falls within the exception to the threshold set out in s. 4.2(1)1(iii) of Bill 198. By any definition of the word "most", she has failed to prove on balance that the pain from which she suffers has substantially interfered with most of her activities of daily living. Her claim for non-pecuniary damages is therefore dismissed.

Subsections 267.5(1), (3) and (5) of the Act set out the protections from liability which are available to Defendants in motor vehicle litigation. Section 267.5(1) sets out limitations on the right to recover damages for income loss and loss of earning capacity. Section 267.5(3) sets out limitations on the right to recover damages for past and future health care expenses. Section 267.5(5) sets out limitations on the right to recover damages for non-pecuniary losses.

The limitation on the right to recover those damages is known as the threshold. It should be noted that housekeeping and home maintenance claims are conspicuously absent from those sections of the Act. Part V of the Statutory Accident Benefits Schedule is entitled "Medical, Rehabilitation And Attendant Care Benefits". Sections 14, 15 and 16 define medical, rehabilitation and attendant care benefits. There is no reference in any of those sections to housekeeping and home maintenance expenses.

Housekeeping and home maintenance expenses are dealt with in section 22 of the Statutory Accident Benefits Schedule. That section is located in Part VI of the Statutory Accident Benefits Schedule which is entitled "Payment Of Other Expenses". Housekeeping and home maintenance expenses are dealt with under section 22 in Part VI.

Given the framework of the Statutory Accident Benefits Schedule established under Bill 59, the court was not satisfied that the definition of health care was intended to include claims for housekeeping and home maintenance beyond the two-year period where the plaintiff's claim does not relate to catastrophic injuries. Belch J. reached a similar conclusion in *Briggs v. Maybee*. In the subsequent case of *Hunt v. Martin*, Chapnik J. followed the decision in *Briggs*.

Insured persons are entitled to the protection and benefit of the *Act* unless there is clear and unambiguous legislative direction that limits those rights. The White Paper issued by the Ontario Ministry of Finance in July 2003 set out proposals and policy reasons for tightening up the threshold to reduce the number of individuals entitled to sue. With that intention in mind, the legislature enacted Ontario Regulation 198/03 (Bill 198) to amend Ontario Regulation 403/'96 (Bill 59). The new definitions of "serious", "important", and "permanent" addressed that policy goal.

If the legislature had intended to amend the Act with respect to claims for housekeeping and home maintenance expenses, it could easily have added those claims to the categories of protected claims when it enacted Bill 198. It is reasonable to infer that, by not having done so, the

legislature intended that the exclusion of claims for future loss of housekeeping and home maintenance services in non-catastrophic cases from the categories of protected claims should stand.

The plaintiff's claim for future loss of housekeeping and home maintenance services is not subject to the threshold.

***Hayden v. Stevenson* [2009] OJ No 2571**

- Threshold, follows *Nissan* - Bill 198 is a codification of existing law

Decision by: J.E. Ferguson J. - June 18, 2009

Facts: The motor vehicle accident occurred on November 8, 2003, and the case is therefore governed by Bill 198.

A video tape showed the plaintiff bending; sitting; crouching; reaching; lifting a rear bench car seat both in and out of the car and lifting a child. the plaintiff saw that video the first time at trial. He confirmed that he has been able to continue to do these activities since the accident, but that they cause him pain, particularly at the end of the day. He cannot do such things everyday. He has good and bad days. He described the day of the video as a good day. The court accepted his evidence that he can perform these activities but that he does so with pain.

Issue: Whether the defining regulation is a codification of the principles set out by the Court of Appeal in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 or whether the legislator's intent was to substantially reduce the number of personal injury claims as a result of motor vehicle accidents?

Reasoning: The court agreed with by Morissette J.'s view of the new amendment which she dealt with in *Nissan v. McNamee* 62 C.C.L.I. (4th) 135, In reviewing the changes which were made to the threshold wording, Morissette J. stated the following:

> The ultimate question at this stage is whether the defining regulation was implemented to codify the interpretation made by the Ontario Court of Appeal in *Meyer*, or whether the legislator's intent was to substantially reduce the number of personal injury claims coming before the Courts as a result of motor vehicle accidents.

Morissette J. found that O. Reg. 381/03 did not change anything already found in O. Reg. 461/96 but rather added definitions. She found that the subject regulation is a codification of existing case law. Morissette J. found that most of the regulation does not represent a significant departure from the prior interpretation of the threshold.

Bill 198 does not make prior case law irrelevant. That case law remains of great assistance in determining what constitutes permanent, serious, continuous injuries and what constitutes an important function.

A serious impairment is one which causes substantial interference with the ability of the injured person to perform his usual daily activities or to continue his regular employment.

The question of what is serious must be decided on a case by case basis.

Further, a permanent injury meets the threshold if "the limitation function is unlikely to improve for the indefinite future".

The court concluded that the plaintiff had sustained a "permanent serious impairment of an important physical, mental or psychological function" that meets the criteria.

***Valdez v. Clarke* 2010 CarswellOnt 30**

- Threshold, Bill 198, follows *Sherman*, tightening up the exception

Decided by: Milanetti J. - Jan. 6, 2010

Facts: Threshold motion after a three week trial before a jury. The jury in its verdict, awarded the Plaintiff the sum of $25,000 in general damages for the pain and suffering resultant of motor vehicle accidents which occurred on May 15, 2003, October 3, 2003 and May 17, 2004.

As a result of the foregoing and in view of the $30,000 deductible under Bill 198 regime, the Plaintiff will effectively be barred from any financial recovery.

Counsel urged the court to make a decision in any event given the paucity of Bill 198 law on threshold thus far.

Section 4 through 4.3 of Ontario Regulation 381/03 (Bill 198) defines a permanent serious impairment of an important physical, mental, or psychological function in quite precise terms. That the legislation has attempted to tighten up the threshold by more precisely defining its components. This is a change from the former versions. It appears to me that legislators have tried to reduce the discretion available to judges in interpreting the various components of the definition.

It has very specifically articulated the type of evidence required to establish the nature and permanency of the impairment; the specific function impaired, and the importance of this function to the individual.

This most specific definition and the evidentiary requirements accompanying it must also be read in the context of the increased monetary deductible for less significant injuries and the elimination of the deductible entirely for more serious injuries (those over $100,000). All of these steps signal that the legislators view the threshold as "alive and well"; their intent is to ensure adequate compensation to those with serious injuries, while eliminating those with more minor problems. All of these changes must of course must be read in the context of increased accident benefits to all accident victims, regardless of fault.

The new legislation has not made prior case law irrelevant. In Valdez's case, the Court of Appeal decision in *Brak v. Walsh*, 2008 ONCA 221 (Ont. C.A.) which adopts the definition of 'serious' set by the same court in *May v. Casola*, [1998] O.J. No. 2475 (Ont. C.A.) are of relevance. In Valdez's case, the evidence establishes both interference with his regular and usual employment

(given his forfeit of the part time cleaning job he'd held for sometime before this accident), and his usual activities of daily living.

In short, Mr. Valdez's pain seriously affects his "enjoyment of life, ability to socialize with others....enjoy their children and engage in recreational pursuits".

Considering both the ongoing loss of Valdez's secondary employment and his diminished level of social and recreational activity, he has successfully established that his injuries satisfy the Bill 198 threshold.

2. Collateral Benefits

Meloche v. McKenzie [2005] O.J. No. 3761

- Deductibility of collateral benefits, Bill 198 is clarification of original legislation

Decision by: T.L.J. Patterson J.

Facts: A motion brought by the plaintiff, seeking a declaration that the defendant is not entitled to a deduction nor an assignment nor requiring the plaintiff to receive and hold any trust received to date or received in the future for the benefit of the defendant with respect to:

a) sickness and accident benefits received from Maritime Life Insurance Company, now ManuLife;
b) extended disability benefits received from Maritime Life Insurance Company now ManuLife;
c) disability pension benefits received from Daimler Chrysler Canada, Inc. Canada Pension Disability benefits received from Human Resources Development Canada on behalf of the federal government of Canada.

Issue: Are these benefits deductible from an award in tort against a protected defendant for damages on account of income loss or a loss of earning capacity pursuant to section 267.8(1) of the *Insurance Act*, and properly the subject matter of a trust and or assignment pursuant to section 267.8(9) of the *Insurance Act*, with respect to future payments.

Reasoning: With respect to future collateral benefits, s.267.8(9) the *Insurance Act* provides that the plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care or other pecuniary loss in an action for loss or damage for bodily injury or death arising directly or indirectly from the use or the operation of an automobile, shall hold the following amounts in trust:

1. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of income loss or loss of earning capacity.

2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
3. All payments in respect of the incident that the plaintiff receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.
4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.
5. All payments in respect of the incident that the plaintiff receives after the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law.
6. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care."

The intention of 267.8 was an overt attempt by the Legislature to eliminate double recovery in tort awards arising out of claims for damages on account of injuries sustained in motor vehicle accidents.

Bill 164, the predecessor regime to Bill 59, which was in force June 1st, 1994 to October 31st, 1996 and specifically, section 267(1), was enacted to abolish private insurance exception that still existed at common law. Bill 164, by section 267(1) provided for the deduction of collateral benefits from a tort award.

These provisions were expanded under the provisions of Bill 59 by the inclusion of the words, "on account of loss of earning capacity," with the intent to clearly eliminate the private insurance exception. Bill 59 also created a statutory trust in favour of the defendants' for the receipt of such collateral benefits after trial see Section 267.8(1) and 207.8(9).

Since the original intent was to prevent double recovery by having the collateral benefits deducted from the tort award, the interpretation of these sections, should be broad, inclusive and encompassing with respect to identifying those benefits which are the subject of deduction in tort law from an award for past loss and the subject of a trust for future receipt.

Cugliari held that C.P.P. benefits were akin to payments made under a private insurance plan and fell within the private insurance exception against double recovery in common law. That is why, Bill 59 specifically section 267.8(1) and (9) of the act were enacted to guard against this double recovery.

Bill 198, being an amendment by way of regulation, merely confirms what was in 267.8 of Bill 59. The purpose of Bill 198 to amend by regulation, was to make it clear that Bill 59 said what it meant in that there would be no double recovery for income loss or loss of earning capacity.

Bill 198 is a clarification of the original legislation which remained unchanged. The insertion of the date October 1st, 2003 certainly, once and for all, clarifies the situation from that date forward but, incidents that are covered by Bill 59 namely from November 1st, 1996 to the passage of Bill 198, if they had received judicial interpretation during that time period, would have resulted in identically the same result as provided in Bill 198.

The collateral benefits provided by the employer, namely: sickness and accident, extended disability benefits, disability pension benefits as well as Canada Pension Disability Benefits are properly deductible and are the subject of the trust provisions of the legislation.

***Burhoe v. Mohammed et al.* (2009) 97 O.R. (3d) 391**

- Deductions and trust assignment of collateral benefits for unprotected defendants

Decision by: Wein J. - Dec. 31, 2008

Facts: MVA in front of the Park Hyatt Toronto Hotel on December 21, 2001 in Toronto. The plaintiff, Burhoe, was the driver of a vehicle that was struck from the rear by a vehicle being operated by the defendant Mohammed. The damages to which Burhoe may be entitled are accordingly governed by the provisions of Bill 59.

At the time of the accident, Mohammed was employed as a parking valet with Park Hyatt Hotel and was operating a guest's vehicle with the consent of both the guest and Park Hyatt. The vehicle was owned by the defendant Budget Car Rentals Toronto Ltd.

Burhoe alleges that he sustained severe, painful and permanent personal injuries as a result of the car accident giving rise to this claim. Burhoe began receiving long-term disability benefits from Co-Operators, which were available to him as a result of his employment, on March 9, 2003. He continues to receive long-term disability benefits from Co-Operators, and may continue to receive long-term disability benefits after trial.

Issue: Whether Park Hyatt, as an unprotected defendant is entitled to the benefits of the deduction, trust and assignment provisions set out in subsections 267.8(1), (3), (9), (10) and (12) of the *Insurance Act*, with respect to Mr. Burhoe's long-term disability benefits.

Reasoning: The deductibility of collateral benefits by an unprotected defendant under Bill 164 was considered by the Superior Court of Ontario in *Cowles v. Balac*, [2005] O.J. No. 299. The defendant, African Lion Safari, was an unprotected defendant. It took the position that certain insurance benefits received by the plaintiffs should be deducted from the damages awarded to them for loss of income. Justice MacFarland (as she then was) noted that Bill 164, unlike the OMPP, did not contain any provision for the deductibility of collateral benefits, whereas the OMPP had provided for this. She held that because the statute was silent on whether collateral benefits were to be deducted, the common law governed. Subsequently, Bill 59 was enacted effective November 1, 1996.

Meloche and *Moss* dealt with the deductibility of collateral benefits under Bill 59 by protected defendants.

Central to the questions in this case is the interpretation of section 267.8 of the *Insurance Act*, dealing with collateral benefits. The opening words of the section simply state that damages are to be reduced by certain amounts. The wording does not refer to either protected or unprotected defendants: it does not distinguish between the two. It was agreed in this case that the long term disability benefits received by the plaintiff came within either an income continuation benefit plan

or payments under a sick leave plan arising by his employment, so that the section was applicable. The key issue is whether or not the section differentiates between protected and unprotected defendants.

Based on the straightforward statutory interpretation argument, section 267.8 does not differentiate between protected and unprotected defendants. This position is strengthened by section 267.8(3) which does specifically refer to protected defendants. Since that distinction is made in the subsection, it follows logically that the overall section, in not making a distinction, does not differentiate between protected and unprotected defendants. The plain reading of the section compels this interpretation.

For these reasons the unprotected defendant, Park Hyatt Hotel, is entitled to a deduction pursuant to s.267.8(1) of the Insurance Act for collateral benefits, and the unprotected defendant Park Hyatt Hotel is entitled to the benefit of the trust and assignment benefits contained in s.267.8 (9), (10) and (12) of the Insurance Act.

***Strickland v. Mistry* [2009] O.J. No. 1169**

- Assignment of CPP and LTD benefits

Decision by: T.A. Bielby J. - March 13, 2009

Facts: The plaintiff Agatha Strickland at the time of trial was receiving a Canada Pension, disability pension and a long term disability benefit from her employer's group insurer. These payments total approximately $50,000.00 per year.

Issue: Whether these benefits are to be protected in favour of the defendants' insurer to the extent of the lost income award?

Reasoning: With respect to the Canada Pension Plan monies, the court is in agreement with Patterson J. in *Meloche v. McKenzie*, [2005] O.J. No. 3761.

When Bill 59 was passed, it was the intent of the Ontario Legislature to include C.P.P. disability benefits among the class of benefits deductible from a tort award against a protected defendant. The Bill dealt with both the issues of income loss and loss of earning capacity. Bill 59 was in force when the Strickland motor vehicle accident occurred.

Bill 198 was enacted to make it clear that Bill 59 stood for the proposition that there would be no double recovery for income loss or loss of earning capacity.

By operation of section 267.8(a) of the *Insurance Act*, any amounts received on account of future C.P.P. payments are properly the subject matter of a trust in favour of the defendant. Accordingly, the C.P.P. benefits received by Agatha Strickland are the subject matter of a trust in favour of the defendant.

With respect to the Long Term Disability Payments, the issue is whether these payments should be subject to the same trust requirements or be assigned to the defendant pursuant to subsection

12 of section 267.8. The section is permissive and allows the court to impose any conditions the court considers just.

The court imposed on the plaintiff, a trust with respect to the LTD payments. As she receives these monies, together with the C.P.P. benefits, she is to pay them out to the defendant within 7 days of receipt. If she fails to do so the LTD monies are to be assigned to the defendant. The defendant can enforce the assignment upon filing with the LTD payor an affidavit swearing to the default.

3. LIMITATION PERIOD

***Mathurin v. Vandenburg* [2007] O.J. No. 4796**

- Threshold, discoverability, adding a party, limitation periods

Decision by: Master L.A. Pope - Nov. 26, 2007

Facts: The plaintiff was injured in a motor vehicle accident on September 12, 2004. She sustained injuries when the defendants' vehicle, which was travelling in the opposite direction on Highway 401, slid into the median and rolled over several times causing the defendants' roof rack to come off and strike the plaintiff's windshield. This action was commenced on February 1, 2006 against Shirley Vandenburg as the driver of the defendants' vehicle and 1385041 Ontario ("Ontario") as the owner, as set out on the Motor Vehicle Accident Report. The plaintiff moves to add as a defendant GMAC Leaseco Corporation ("GMAC") as the registered lessor of the defendants' vehicle. A VIN search conducted on October 3, 2005 revealed that GMAC was the registered lessor and Ontario was the registered lessee of the defendants' vehicle.

GMAC resisted the motion on the basis that the action against it is statute barred by virtue of the two-year limitation period under section 4 of the *Limitations Act, 2002*. The plaintiff relied on the discoverability principle to deny that the limitation period expired, and in the alternative that special circumstances and no prejudice exists to warrant the amendment.

Issue: Applicability of discovery principle to threshold.

Reasoning: In 1997, the Supreme Court of Canada in *Peixeiro v. Haberman* dealt precisely with the issue of the applicability of the discoverability principle and its effect on the limitation period in a personal injury action in the context of s. 206(1) of the *Ontario Highway Traffic Act*, the relevant legislation at the time. Section 206(1) contained a two-year limitation period in personal injury actions from the time when the damages were sustained.

The Supreme Court held that under s. 206(1), there is no cause of action until the injury meets the statutory exceptions to liability immunity in s.266(1) of the *Insurance Act*. Further, the discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Thus, time under s.206(1) did not begin to run until it was reasonably discoverable that the injury met the threshold of s.266(1).

The principles in *Piexeiro* remain good law despite the repeal of s. 206(1) of the *Ontario Highway Traffic Act*, the amendments to the threshold provisions of the *Insurance Act* and the enactment of the *Limitations Act, 2002*.

The authorities are clear that when a party is seeking to apply the discoverability rule, the court should afford a degree of latitude to that party before declaring that the limitation period has begun to run. In practical terms, the question is not whether the plaintiff believes that her injury meets the criteria but whether there is a sufficient body of evidence available to be placed before a judge that, in counsel's opinion, has a reasonable chance of persuading a judge, on the balance of probabilities that the injury qualifies. Therefore, when such a body of material has been accumulated, then and only then should the limitation begin to run.

In order for the plaintiff to obtain leave to add GMAC as a defendant on the basis that the limitation period did not expire until August 19, 2007 at the earliest, the plaintiff must satisfy the court that she did not know or could not reasonably have known until that time that she had a reasonable chance of persuading a court that her injuries would meet the threshold under the *Insurance Act*.

In my view, based on all of the evidence, the plaintiff has met her onus. There is an abundance of evidence that, in my view, gives the plaintiff a reasonable chance of persuading a trial judge that she did not know or could not reasonably have known until August 19, 2005 that her injuries from the accident would meet the threshold under the *Insurance Act*.

***Ng v. Beline* [2008] O.J. No. 5686**

- Threshold, discoverability, limitation period, pecuniary and non-pecuniary claims

Decision by: P.M. Perell J. - Oct. 8, 2008

Facts: MVA governed by Bill 198. Under that scheme, an accident victim's claims for non-pecuniary damages are treated differently than his or her claims for pecuniary damages arising from the same car accident. This motion for a partial summary judgment raises the question of how this difference in treatment affects the operation of the *Limitations Act, 2002*, S.O. 2002, c. 24.

The plaintiff's pecuniary claims, however, are not subject to a threshold, which had been the case in an earlier iteration of Ontario's no-fault automobile insurance scheme.

Issues: When a person is injured in an automobile accident and suffers both (a) pecuniary (special) damages, which are not subject to any statutory threshold and also (b) non-pecuniary damages, which are subject to a statutory threshold, is a claim for pecuniary damages statute-barred if the person's action is commenced more than two years after the discoverability of the claim for pecuniary damages?

Reasoning: Under Bill 198, although pecuniary claims are not subject to a threshold, the Bill 198 scheme minimizes the instances of pecuniary claims by offering statutory accident benefits and by imposing a $30,000 deductible for pecuniary losses not covered by accident benefits. Moreover, if

a plaintiff does sue for pecuniary losses, he or she must give credit for the accident benefits and, thus, unless there is a substantial difference between the pecuniary losses and the statutory benefits, a lawsuit for just the pecuniary losses may not be worthwhile.

Here, it is important to note that in *Peixeiro,* the Supreme Court was concerned about a scheme under which both pecuniary and non-pecuniary claims arising from an automobile accident were subject to the threshold test. In *Peixeiro*, the Supreme Court held that the limitation period for commencing an action for negligence arising from an automobile accident would commence to run when the plaintiff knew or ought to have known that he or she had a claim that satisfied the threshold test. This was an application of the discoverability principle that holds that a limitation period does not begin to run until the plaintiff knows or ought to know that he or she has a cause of action.

An effect of the *Chenderovitch* judgment is that it recognized that there are separate causes of action for pecuniary and non-pecuniary losses under the *Insurance Act* scheme for automobile accident claims. However, it does not follow from the *Chenderovitch* judgment that each cause of action receives an independent limitations period analysis.

The spirit and thrust of the *Chenderovitch* judgment is that with respect to the operation of limitation provisions, a plaintiff with an automobile accident claim should receive the most favourable treatment possible, and this means that the measure of whether he or she has a claim is governed by the discoverability of the claim for non-pecuniary damages, which is the claim that is subject to the threshold test. This approach, in effect, continues the approach from *Peixeiro*. In practical terms, the pecuniary claims may shelter under the limitation period for the non-pecuniary claims if those claims are not statute-barred.

The effect of the *Chenderovitch* judgment is that insurance and limitation period legislation should not be read in a way that lays a limitation trap to prevent accident victims from pursing their significant damage claims. That reading of the effect of the legislation and of the *Chenderovitch* judgment avoids the anomaly of a limitation period barring claims arising from the same act of negligence in a piecemeal fashion.

The case at bar demonstrates the anomalous and unfair result of applying the limitation period piecemeal to the plaintiff's claims arising from the same incident.

The court concludes that if the threshold claim is not timely then all the claims should be statute-barred, and, conversely, if the threshold claim is timely, then it is just that all the claims should go forward. This approach respects the rationales for limitation periods.

4. OTHER

***Raymond (Litigation Guardian of) v. Lampman* [2005] O.J. No. 3084**

- Retroactivity of Bill 198 for drug coverage

Decision by: Master S.G. Birnbaum

Facts: Raymond was injured in a motor vehicle accident in August 1998. He was seven years old at the time. The applicable legislation provided for coverage for medication to age 25 for an insured person under the age of 15 at the time of the accident. Apart from this exception there was no recovery for drugs. The subsequent legislation that came into force in 2003 allowed recovery for medication. Raymond claimed to have suffered a permanent serious impairment of an important physical function. The defendants objected to the proposed amended claim by Raymond for significant pharmaceutical costs incurred as a result of this impairment and submitted that it did not raise a tenable cause of action. They claimed that they did not have to pay for Raymond's drugs once he was over the age of 25. Raymond argued that the subsequent legislation was remedial as to drug coverage. It was intended to undo the damage of the former legislation. It would be unfair if he was not allowed to have drug coverage.

Issue: Is Bill 198 is remedial as to coverage for drugs, that it was the intention of the government to undo the damage of the former act, and it would be unfair to the plaintiff that he not be allowed to have drug coverage?

Reasoning: There is nothing in Bill 198 that says that it applies retroactively and the general rule of statutory interpretation is that statutes are not to be construed as having retroactive effect unless there is an express or a necessary implication in the language of the act, (see Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271).

S. 267.5(3)(4)&(5) are the applicable sections from Bill 59. They eliminated recovery for health care expenses unless there was catastrophic impairment. Bill 198 changed the test from "catastrophic" to "permanent serious impairment of an important physical, mental or psychological function."

Bill 198 contains a section that was written without concern for any of the principles of clear writing; not plain language principles, nor the KISS (keep it simple) principle.

Master Birnbaum determined that it is for a judge, not a master, to determine what s. 267.4(1)&(2) means and how such meaning affects the plaintiff's rights.