



NOVEMBER 2014

## AN INTRODUCTION TO HANDLING MVA CLAIMS IN ONTARIO

Authored by Jay A. Stolberg

### I. OVERVIEW

Unlike other personal injury claims, the calculation of damages in an MVA claim is heavily governed by legislation.

To understand the current principles applicable to assessing damages in an MVA claim, it is helpful to review the evolution of auto insurance legislation in Ontario. Below is a brief overview various regimes, followed by a discussion of the current framework for assessing MVA damages claims

### II. THE EVOLUTION OF AUTO LEGISLATION IN ONTARIO

*Full tort rights (pre-June 22, 1990)*

- very limited no-fault benefits available from plaintiff's own insurer
- no restrictions on the plaintiff's right to sue for either personal injuries or property damage to an automobile

*OMPP (June 22, 1990 - Dec. 31, 1993)*

- Section 266, *Insurance Act*
- restricted tort actions in return for higher no-fault benefits
- introduced the 'protected defendant' defined as the owner, operator or a person present at incident
- threshold to sue protected defendant required a serious, continuing physical impairment
- if threshold was met, there were no restrictions on general damage or income loss claims
- eliminated the right of action for property damage claims between two insured automobiles

*Bill 164 (Jan. 1, 1994 - Oct. 31, 1996)*

- sections 267 - 267.4
- weakened threshold by removing the permanent requirement and including psychological impairments
- eliminated right to sue for all economic loss in exchange for extremely generous no-fault benefits (including 90% of net income loss with a \$1,000 weekly maximum)
- introduced 'deductibles' if the verbal threshold was met: \$10,000 for injured plaintiff; \$5,000 for FLA (amounts indexed)

*Bill 59 (effective November 1, 1996)*

- begins at section 267.5
- threshold strengthened to require:
  - » permanent serious disfigurement; or
  - » permanent serious impairment of an important physical, mental or psychological function
- deductible increased to \$15,000 for injured plaintiff; \$7,500 for FLA
- right to sue for economic loss restored with restrictions:
  - » no income loss recoverable for first week of disability
  - » pre-trial income loss recoverable at 80% of net income loss
  - » important: there are no statutory restrictions on post-trial income loss - recoverable at 100% of gross (common law restored)
- right to sue for health care expenses restored for "catastrophic injuries"
- reductions in levels of accident benefits; high levels retained for catastrophic injuries
- Income Replacement Benefits reduced to 80% of net with a weekly maximum of \$400
- collateral benefits deductible from tort award (accident benefits, LTD payments)
- Important: collateral benefits only deductible for *pre-trial* period. Tort defendant must pay full future loss and provided with an assignment of the plaintiff's future collateral benefits, or plaintiff to hold in trust for defendant
- procedural requirements for tort actions, including notice to tort defendant and provision of certain information before prejudgment interest begins to run (see Ont. Reg. 461/96)

#### Amendments to section 267.5

*Bill 198 (October 1, 2003)*

- Threshold requirements defined by Regulation intended to address watering down by courts (sections 4.1 - 4.2, Reg. 461/96):
  - To be "serious" the impairment must:
    - » substantially interfere with plaintiff's ability to work in regular employment, continue career training; or

» "substantially interfere with most of the usual activities of daily living, considering the person's age."

- An "important" function is defined to be:
  - » a function necessary to perform the essential tasks of the persons usual employment, career training; or
  - » necessary for the person to provide for own care or well-being;
  - » important to the usual activities of daily living, considering the person's age.
- A "permanent" impairment is defined as:
  - » Continuous since the accident without a likely substantial improvement with any recommended treatment.
- deductible increased to \$30,000 for injured plaintiff; \$15,000 for FLA
- no deductible for general damages awards over \$100,000 or over \$50,000 for the FLA claimant
- the deductibles do not apply in the case of death which results directly or indirectly from the accident
- optional coverage available to reduce deductible (payable by plaintiff's own insurer)
- health care expenses are recoverable for all claims (catastrophic and non-catastrophic)
- amendment to eliminate additional exposure of non-protected vicariously liable defendant (response to *Vollick* decision in which defendant employer was found to be unprotected in its capacity as employer, even though it was the owner of the defendant vehicle)
- CPP expressly made deductible from income loss claim (response to case law)
- SABS limits introduced on med/rehab expenses for minor injuries (Pre-Approved Framework - "PAF")

#### Bill 18 (March 1, 2006)

- Changes to exposure of lessors
- Vicarious liability of lessor (which includes rental companies) capped at \$ 1 million with lessee/renter's policy primary
- No limits on lessor's liability for direct negligence (i.e. improper maintenance of a rental vehicle)

#### Accidents after September 1, 2010

- Pre-trial income loss recoverable at 70% of gross
- Post-trial income loss remains recoverable at 100% of gross
- Reductions in accident benefits (affects available tort deductions)
  - » Income replacement Benefits payable at 70% of gross to a maximum of \$400/ week unless optional benefits purchased
  - » Med/rehab. limits reduced from \$100K to \$50K, unless optional benefits purchased (remains at \$1 million for catastrophic claims)
  - » Elimination of housekeeping and caregiver benefits unless catastrophic or optional benefits purchased

» Attendant care limited to \$36,000/year unless catastrophic or optional benefits purchased.

#### Summary - Where we are now

- \$30,000/ \$15,000 FLA deductibles - no deductible for award of more than \$100,000
- Threshold defined by Regulation 461/96
- No income loss is recoverable for the first week of disability
- Pre-trial income loss restricted to 70% of gross income loss (accidents on or after September 1, 2010)
- Pre-trial income loss restricted to 80% of net (accidents prior to September 1, 2010)
- Post-trial income loss payable at 100% of gross
- Collateral benefits deducted from pre-trial losses: tort defendants receive an assignment of future benefits, or funds are held in trust by the plaintiff

#### III. DAMAGES CALCULATIONS

##### Income Loss

- 70% of gross income loss, less any IRBs, CPP or LTD benefits paid or *available* to the plaintiff.
- ODSP is not deductible, but recovery will affect the plaintiff's entitlement to benefits, so there is strategic significance.
- Note: the pre-trial income losses recovery language is similar to accident benefits wording and in some cases, the payment of IRBs will eliminate the pre-trial income loss exposure, although there is not necessarily a 'wash'.
- IRBs are calculated based on the plaintiff's income in the 52 week prior to the accident, or the 4 week period prior to the accident, whichever is higher. The IRB amount is strictly fixed in accordance with this formula.
- Tort pre-trial income loss is not fixed, but based on the plaintiff's actual income losses. If the plaintiff can prove that he or she would have earned more income than they did prior to the accident (i.e. promotion, other higher paying employment which reasonably would have been obtained), the income loss amount will be higher. Conversely, if it can be established that the plaintiff would have earned less after the accident in any event (i.e. planned leave of absence, layoffs, etc.), the income loss will be lower.
- It is 70% of the gross income *loss* - not 70% of pre-accident income - which is recoverable in tort.

Example: Plaintiff earned \$100,000 at the time of the accident. The plaintiff could reasonably have expected to earn \$120,000 in the year following the accident had the accident not occurred.

» If the plaintiff can prove this likely would have occurred, the income loss claim for the second year after the accident would be 70% of \$120,000.

##### Protected v. Unprotected Defendants

- Both are entitled to collateral benefits deductions. Section 267.8(1) is not limited to protected defendants: see *Burhoe v. Mohammed* (2008), 97 O.R. (3d) 391 (SCJ). This would apply to taverns, municipalities, etc.

- The plaintiff does not recover the deductible from the unprotected defendant. The plaintiff recovers the same amount as if both were protected defendants, although the protected defendant gets the full benefit of the deductible: see *Sullivan Estate v. Bond* (2001) 57 O.R. (3d) 97 (CA).

**Example: The plaintiff recovers \$90,000 in damages. The defendants are each found 50% liable. The judgment would be payable as follows:**

	Damages Assessed Against Each Defendant	Deductible	Payable to Plaintiff
Protected Def.	\$45,000	\$30,000	\$15,000
Unprotected Def.	\$45,000		\$45,000
Total	\$90,000		\$60,000

- A similar principle would apply to income loss claims, although it is much more complicated. See Stephen Moore's paper *Calculating Damages in Motor Vehicle Collision Claims in Ontario* (March 2014) for a detailed discussion of protected v. unprotected defendants and apportionments of damages.

### Multiple Accidents

- If there are distinct, divisible injuries, each defendant will be responsible for injuries caused.
- If the injuries are intermingled - which is often the case - the court will make a global assessment of damages and then determine the damages caused by defendant #1, as assessed the day before accident #2.
- Multiple deductibles apply where there are multiple accidents: see *Martin v. Fleming* (2012) ONCA 750.

### Contributory Negligence

- Contributory negligence is to deducted before collateral benefits are deducted: s. 267.8(8)
- This is significant as it results in a higher deduction for the tort defendant than if the collaterals are deducted first.

**Example: The plaintiff is awarded general damages of \$150,000 and income loss of \$100,000 for a total of \$250,000. Contributory negligence is assessed at 25%. The plaintiff received \$50,000 in collateral benefits prior to trial.**

- Deducting contributory negligence first would result in the following judgment:

- » \$250,000 less 25% (contrib.) = \$187,500
- » \$187,500 less \$50,000 (collaterals) = **\$137,500**

- Incorrectly deducting the collaterals first would result in the following lower amount:

- » \$250,000 less \$50,000 (collaterals) = \$200,000
- » \$200,000 less 25% = **\$150,000**

- It is debatable whether the contributory negligence is deducted on the pre or post-deductible amount (the former being more advantageous to the defendant). See discussion of the issue in Stephen Moore's paper.

### Costs and Interest

- Costs are payable on the **gross** general damages assessment, not the post-deductible amount: section 267.5(9). At a mediation or settlement discussion, the defendant will seek to pay costs on the net amount.
- Prejudgment interest does not begin to run until the plaintiff gives the defendant written notice of the claim: section 258.3(8)
  - » Note: this includes interest on both general damages and out-of-pocket and income loss claims
  - » PJI on generals is 5%
  - » For PJI on pecuniary losses see published *Courts of Justice Act* rates for the quarter in which the claim was issued (1.3% since January 2011)

### Offers to Settle

- The Court of Appeal has held that Rule 49 offers to settle are to be considered without reference to deductible. *The actual amount the plaintiff is awarded by the court* is to be used in determining whether the plaintiff beat the defendant's offer: *Rider v. Dydk* (2007) ONCA 687.
- This creates a significant problem for the tort defendant. If the claim is fairly assessed by the defendant at \$90,000 less the \$30,000 deductible, to make a valid Rule 49 offer, the defendant would have to offer \$90,000 to the plaintiff. The plaintiff would be free to except this amount, even though only \$60,000 would be recovered at trial on a \$90,000 judgment.

### IV. CONCLUSION

Calculating MVA damages in Ontario requires not only an understanding of the various deductions and restrictions available to the tort defendant, but also an understanding of the correct order in which these are to be applied. Equipped with this information, the claims examiner will be in a much better position to reduce the insured's exposure in a particular case.

For further information, please contact:



**Jay A. Stolberg**  
 Partner  
 Insurance Litigation Group  
 Direct 416.596.2876  
 jstolberg@blaney.com

**Blaney  
 McMurtry**  
 BARRISTERS & SOLICITORS LLP

2 Queen Street East, Suite 1500  
 Toronto, Canada M5C 3G5  
 Tel 416.593.1221  
 Fax 416.593.5437  
 www.blaney.com