



Calculating Damages in Motor Vehicle Collision Claims in Ontario

Stephen R. Moore

Blaney McMurtry LLP

416-593-3950

smoore@blaney.com

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I. INTRODUCTION¹

It has been almost 18 years since a Conservative government implemented Ontario's third major tort reform automobile compensation system. It came into force on October 23, 1996. That fall I presented my first iteration of this paper which explained how tort damages should be calculated under this new system. Since then, significant changes have been made to the legislation in 2003, 2006, 2010 and 2011 and there have been a number of judicial decisions interpreting various provisions of the tort reform scheme. There have also been a number of versions of this paper. This one is intended to provide a reasonably comprehensive analysis of how tort damages should be calculated for accidents occurring on or after May 12, 2011 based on the law as of March 1, 2014.² These changes are largely embodied in Bills 198 (2003), 18 (2006) and 34 (2010).

Bill 59 ("Bill 59") 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 Further significant changes were introduced in Bill 18 which rewrote the vicarious liability rules for leased and rented automobiles effective March 1, 2006. Finally, Bill 34 made some additional changes to the tort reform model effective September 1, 2010. A minor amendment was made in May of 2011 which affects public transit vehicles.

In previous versions of this paper I have commented on the changes originally ushered in 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 as it stands today without considering the differences between the various

¹ I would like to thank Jessica Freiman, a student-at-law with Blaney McMurtry LLP, for updating all of the research for this paper.

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

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.

Bills. If you need some historical context or are still dealing with pre-Bill 198 or 34 claims, then I would suggest that you review one of the earlier versions of this paper. I will simply refer to the current version of the legislation as AIRS.

The appendix contains a set of rules designed to simplify calculations under AIRS. 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

AIRS 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"?

AIRS defines a "protected defendant" as a person who is protected from liability under subsections 267.5(1), (3) and (5) of AIRS.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.

⁴Section 267.3

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 *Insurance Act*, R.S.O. 1990, c. I.8 amended (hereinafter the "*Act*").

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

Expanding the definition of “owner” under the *Insurance Act* to include a lessee was part of legislative scheme which has made lessees vicariously liable for the negligent operation of a rented or leased vehicle.⁷ The amendments to the *Insurance Act*, as well as to the *Compulsory Automobile Insurance Act* and the *Highway Traffic Act*, took effect on March 1, 2006. These amendments 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 any insurance that is available from the lessees’ and the operators’ policies. Finally, the priority of payment rules for the insurers of lessors, lessees and operators were changed.⁸

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.⁹

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 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 SAB 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 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

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.¹⁰

Persons who are vicariously liable for the negligence of protected defendants are unprotected defendants but now their liability is no greater than that of the protected defendants. The most common situation will involve a driver who was in the course of his or her employment at the time of the crash.¹¹ This issue is discussed in further detail below.¹²

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.

¹⁰ 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. See discussion at “Vicarious Liability” at III.C.viii below.

¹¹ *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

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

Protected defendants receive preferential treatment with respect to three heads of damage: Non-pecuniary general damages, income loss and loss of earning capacity claims and health care expenses. In addition, protected defendants are immune from tort claims advanced by uninsured plaintiffs.¹³

(a) Non-Pecuniary General Damages

Non-pecuniary general damages and damages under the *Family Law Act*¹⁴ 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.¹⁵ This threshold is an amalgam of the tests set forth in previous legislation.¹⁶ 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. If the injury does 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

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. Since October 1, 2003 the employer of a protected defendant has no greater liability than the employee (subsection 267.5(10.1) 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. See also *MacKinnon v A.J. Bus Lines Ltd.* [2010] O.J. No 2018 at para. 33.

¹² See “Vicarious Liability” II.A.ii.e below.

¹³ 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.

¹⁴ R.S.O. 1990, c. F.3 as amended [hereinafter the “*FLA*”]

¹⁵ Subsection 267.5(5)

¹⁶ The Court of Appeal in the leading decision of *Meyer Bright* 1993 CANLII 3389 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.

respectively for non-pecuniary general damage claims and for *FLA* loss of care, guidance and companionship claims.¹⁷ These deductibles are only available to protected defendants.

It should also be noted that when Bill 198 came into force, Regulation 461/96 was amended to add provisions defining the elements of the threshold and how they must be proven.¹⁸

(b) Income Loss or Loss of Earning Capacity Claims

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 70% of any gross income loss suffered after the first seven days and prior to trial.¹⁹ Additionally, a protected defendant is not liable for more than 70% of an injured plaintiff's gross loss of earning capacity suffered before the trial.²⁰ After the trial commences, the liability of both protected and unprotected defendants is 100% of the future gross loss of income or earning capacity.

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

¹⁷ Subsection 267.5(5) and O.Reg 461/96 section 5.1 Since Bill 34 came into force on September 1, 2010 these deductibles do not apply to the injured party if the non-pecuniary damages exceed \$100,000 or to the *FLA* claimants if the damages exceed \$50,000. Additionally, no deductible applies to *FLA* claimants in respect of a fatal injury.

¹⁸ See sections 4.1 through 4.3. For a discussion of some of these rules see *MacKinnon v A.J. Bus Lines Ltd.* [2010] 2018 and cases cited therein and *Adams v Taylor*, 2013 ONSC 7920.

¹⁹ See O. Reg. 461/96 for definitions that apply to subsection 267.5(1).

²⁰ Prior to September 1, 2010 these figures were 80% of net income rather than 70% of gross income.

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)

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 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

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

²³ Subsection 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; and *Meady v. Greyhound Canada Transportation Corp.*, 2012 ONSC 657 at para 254.

²⁵ See O. Reg. 401/96

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.

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 AIRS 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

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.

OHIP is entitled to subrogate, jointly and severally liable, as between themselves, for only that portion of the damages they caused.

Subsection 267.8(17) of AIRS prohibits subrogation by anyone who has paid collateral benefits other than OHIP. 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 AIRS permits OHIP to subrogate in the circumstances described above.

(e) Vicarious Liability

Prior to the enactment of AIRS, 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 have owned 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 subsection [267.5(10.1)] was added:

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

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 13). *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. *Greenhalgh* was followed by the Ontario Court of Appeal in *Martin v. 2064324 Ontario Inc. (c.o.b. Freeze Night Club)*, 2013 ONCA 19, at para 39. 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. *Martin v. 2064324 Ontario Inc. (c.o.b. Freeze Night Club)*, 2013 ONCA 19 discusses *Citadel General Assurance Co. v. Vytlinga* and *Herbison v. Lumberman's Mutual Casualty Co.* at paras 69 through 71, in which Cronk J.A. held the causation requirement contemplated by *Vytlinga* and *Herbison* was not met on the facts in *Martin*.

²⁹ See footnote 11. See also *MacKinnon v. A.J. Bus Lines Ltd.* [2010] O.J. No. 2018 at para 33.

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 turn a vicariously liable person into 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 to the liability of that person for his or her 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

An anomalous situation 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 one situation:

If an out of province driver driving a car rented in Ontario, then 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.

(f) Vanishing Deductibles and Miscellaneous Issues

Bills 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

³⁰ The result in the *Linhares* case (see footnote 11) 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).

damages for loss of care, guidance and companionship are assessed in excess of \$50,000.00, then 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”. Bill 34 has removed deductibles for fatal accidents occurring after August 31, 2010.³²

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. A detailed discussion of those provisions is beyond the scope of this paper.³³

(g) Non-collision Events and Public Transit Vehicles

As of May 12, 2011, the owner or driver of a public transit vehicle, which is a defined term, is not entitled to the benefit of the income loss, health care expense, threshold provisions or the deductibles unless the public transit vehicle was involved in a collision with another vehicle or object.³⁴ In such circumstances, the claimant is not entitled to Statutory Accident Benefits.

This provision was clearly intended to force transit passengers in non-collision incidents to pursue pure tort remedies rather than accident benefits. This would apply to injuries sustained because of sudden starts or stops of transit vehicles.³⁵

B. Collateral Benefits

AIRS specifically provides for the deduction of many collateral benefit payments which are received or were available to the plaintiff before trial and that were paid in respect of the incident. This statutory deduction of collateral benefits, which is detailed in section 267.8 of AIRS, permits all defendants in actions arising directly or indirectly out of the use or operation of an automobile

³² Subsection 267.5(8.1.1)

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

³⁴ See subsection 267.5(6.1)

³⁵ Quære whether driving over a pothole would be considered to be a collision with an object (the bottom of the pothole).

to deduct a wider variety of collateral benefits than could be deducted at common law.³⁶ There are three deduction provisions.

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.³⁷

The Court of Appeal's decision in *Cugliari v. White*³⁸ 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. The question of deductibility was clarified under AIRS by the Court of Appeal in the *Demers* decision in 2012.³⁹ In that case, Justice Laskin, writing for the Court, concluded that it would take clear legislative language to displace the common law rule that private insurance payments are not deductible from tort damages. The Court concluded that both CPP and a private pension plan did not compensate the plaintiff for her loss of income or earning capacity, but rather for her disability. Additionally, as they were not paid in respect of the incident, they were not deductible under the

³⁶ *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. See also *Burhoe v Mohammed* 2008 CarswellOnt 9052 (per Wein J.) 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 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.

³⁷ 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.a below.

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

³⁹ *Demers v B.R. Davidson Mining & Developments Ltd.* [2012] O.J. 2570

express wording of the section. This case arose out of an accident that pre-dated Bill 198. Regulations enacted effective for accidents occurring on or after October 1, 2003 specifically provide that CPP Disability Benefits and most group employers' LTD plans are deductible.⁴⁰ It now appears that most private LTD plan benefits will not be deductible.

Subsection 267.8(4) specifically provides for the deduction of health care expenses. 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.⁴¹ This prohibition applies both 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.⁴²

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 recovered in respect of the provision of such services from the SABs insurer are not deductible from the *FLA* pecuniary loss award.⁴³ 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.

⁴⁰ See section 5.2 of O.Reg 461/96 as amended.

⁴¹ Subsection 267.8(6)

⁴² *McCartney v. Islic* (2000), 46 O.R. (3d) 669 (C.A.). See also *DiGirolamo v. Smolen*, [2002 O.J. No. 1526, 59 O.R. (3d) 357 and *Wright (Litigation Guardian of) v. Hannon*, 2007 CarswellOnt 4114, (Ont. S.C.J.),

⁴³ *Cantlon v. Timmins (City)*, [2006] O.J. 1918 (Ont. S.C.) (2006), 33 M.V.R. (5th) 198 (Ontario Superior Court of Justice)

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 which 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 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.⁴⁴ A

⁴⁴ According to at least two cases an improvident settlement is not necessarily a settlement made in bad faith. See *Pelosi v 778561 Ontario Inc.* 2005 CarswellOnt 2480 and *Vanderkop v. Personal Insurance Co. of Canada* 2008 CarswellOnt 2761.

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.⁴⁵ 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".⁴⁶ 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 an arguably "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*⁴⁷ held 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.⁴⁸

⁴⁵ See *Hornick v Kochinsky* 2005 CarswellOnt 1589. 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.

⁴⁶ 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.

⁴⁷ *Morrison v. Gravina*, [2001] O.J. No. 2060 (S.C.J.), followed in *Nielson v. Darcis*, 2010 ONSC 6402

⁴⁸ 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.

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 does not pierce the threshold, 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.⁴⁹

It also appears that some judges will not deduct settlements of collateral benefit obligations from the tort award. The reasoning is that a settlement is a settlement and not a payment of an income continuation benefit.⁵⁰

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 jointly and severally liable for the negligent operation of the motor vehicle.⁵¹ This change applies not only to long term leases but also to short term rentals.

⁴⁹ . 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.

⁵⁰ See *Anand v Belanger* 2010 CarswellOnt 7200 (per Stinson J.) where the trial judge did deduct the SABs settlement but not the settlement with the LTD carrier.

⁵¹ 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.

Changes to the *Insurance Act* provide that the liability of the lessor for personal injury and death claims is limited to \$1,000,000⁵² 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 AIRS 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 raised by this legislation. A detailed discussion of these provisions is beyond the scope of this paper.⁵³

⁵² 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*.

⁵³ Please see my most recent paper on Bill 18 which can be found at www.blaney.com

III. CALCULATING DAMAGES UNDER AIRS

A. Introduction

The major problems in calculating damages under AIRS 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.⁵⁴ In other words, there is to be no cross deductibility of pre-trial collateral benefits.⁵⁵

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 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

⁵⁴Section 267.8.

⁵⁵ With respect to cross-deductibility of future collateral benefits see “Other Pecuniary Losses” at III.B.iii

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.⁵⁶

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.⁵⁷ This obliges all defendants to make larger contributions to the future losses.⁵⁸

(ii) The Calculation Date

The legislation uses the phrase "before the trial" to divide past and future loss of income claims.⁵⁹ 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 the purposes of AIRS and a second for pre-judgment interest purposes.

B. All Defendants Are Protected

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

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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.

⁵⁹ Clauses 267.5(1) 2 and 3.

- 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) 70% of the injured plaintiff's gross loss of income is \$1,400.00 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 70% of his gross 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 70% of his gross loss of income for a period of 51 weeks (\$1,400.00 per week x 51 weeks), or \$71,400.00.

The next step is to reduce the claim for contributory negligence.⁶⁰ Presumably the reduction is based on the percentage of the recoverable 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 10%, then the reduction would be 10% of \$71,400.00 rather than 10% of \$104,000.00 or \$64,260.⁶¹ 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 \$64,260.00 figure calculated above. This reduces the plaintiff's net recovery to \$33,660.00.

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

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.

the first week's loss of income, but is not able to subtract collateral benefits received by the plaintiff in that week.⁶³

(ii) Health Care Expenses

Since the injury pierces the threshold the plaintiff can recover health care expenses from the protected defendant.⁶⁴ If the injury had not pierced the threshold, then the plaintiff would not be entitled to recover such expenses from the protected defendant.⁶⁵ 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.⁶⁶

⁶³ See subsection 267.8(2).

⁶⁴ *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. *Morrison 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). See also *Sabourin v Dominion of Canada General Insurance Co.* [2009] OJ 1425

⁶⁵ See *Henderson v. Parker* (1998), 42 O.R. (3d) 462 and *Folmer v. Graham*, [2000] O.J. No. 2699 affirm'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.

⁶⁶ 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, AIRS requires the plaintiff to assign or hold any future collateral benefits in trust for the defendants.⁶⁷ 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.⁶⁸ The legislation goes to some lengths to ensure that there is no cross-deductibility of pre-trial collateral benefits. However, subsection 267.8(9)

⁶⁷ Although future collateral benefits are held in trust and are not "deducted", I will use this rather imprecise term to describe the trust mechanisms.

⁶⁸ 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.

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.⁶⁹

(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.⁷⁰ These reductions are to be made before contributory negligence is deducted under the *Negligence Act*.⁷¹

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.

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

⁶⁹ 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.

⁷⁰ 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.

⁷¹ 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*.

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.⁷²

Of course, if the only persons at fault are "unprotected defendants", then the plaintiffs will receive their full common law damages.⁷³

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 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

⁷² 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.

⁷³ 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).

apportionment provision.⁷⁴ This provision has been carried forward into AIRS 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 AIRS.

(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.⁷⁵

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.⁷⁶ 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 partially at-fault driver to recover a greater percentage of his or her damages than an innocent passenger.

⁷⁴ Now section 267.1 of the *Insurance Act*.

⁷⁵ 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.

⁷⁶ 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.

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 “AIRS 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).⁷⁷ From this figure the AIRS 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 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 AIRS damages. Since the deductible is \$30,000.00, the AIRS damages are \$70,000.00 (\$100,000.00 less \$30,000.00). The result is a

⁷⁷ 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, a contractual indemnity between defendants could lead to a different result than would be dictated by the *Negligence Act*.

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).⁷⁸

(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

⁷⁸ See *McLean v. Knox* [2012] O.J. No. 3903 (Ont. S.C. per R.J. Smith J.) for a very muddled discussion of this section that assumes (incorrectly, it is submitted) that the plaintiff recovers the damages payable by the protected defendant plus the product of the unprotected defendant’s negligence and the amount of the deductible.

one.⁷⁹ 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*.⁸⁰

Utilizing the second interpretation, 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.

(c) Clause 267.7(1)(c)

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].⁸¹

⁷⁹ Discussed under the heading "Collateral Benefits" at III.C.iii below.

⁸⁰ [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.

⁸¹ 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.⁸²

(d) A Simplified Method for Calculating the Amount Owed

If the second interpretation 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 AIRS 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 AIRS damages, then the plaintiff receives AIRS damages only. The protected defendant pays the difference between the AIRS damages and the amount the unprotected defendant contributes. 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 \$70,000.00 under AIRS. 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 ($\$100,000 \times 20\%$). This is less than the AIRS damages. Accordingly, the plaintiff only recovers the AIRS damages of \$70,000.00. The unprotected defendant pays \$20,000.00 and the protected defendant pays the difference between this amount and the AIRS damages, which is \$50,000.00.

Now let us assume that the unprotected defendant is 80% at fault. The unprotected defendant must pay or contribute \$80,000.00 ($\$100,000.00 \times 80\%$). Since this exceeds the AIRS damages, the plaintiff receives this amount [\$80,000.00] 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 AIRS damages of \$70,000.

⁸² 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 completeness, 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 were using under the heading “All Defendants are Protected” but I will assume 10% contributory negligence, 70% negligence on the part of the unprotected defendant and 20% 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 \$104,000.00.⁸³

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 \$71,400.00.⁸⁴ This figure must be reduced by 10% for contributory negligence to determine the amount under sub-clause (a)(i). This figure is \$64,260.00.⁸⁵

The next step is to perform the apportionment calculations mandated by section 267.7. The calculation for sub-clause (a)(i) is simply the \$64,260.00 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 [70%] or \$72,800.00 less the number calculated under (a)(i) yielding \$8,540.00. 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 \$72,800.00.

The figure required for clause (b) is the product of the common law damages and the unprotected defendant's percentage liability (\$72,800.00) up to a cap of \$64,260.00. This capped figure is the unprotected defendant's "share" of the joint and several damages (\$64,260.00). In this case it is

⁸³ 100% of the pre-trial loss would be \$2,000.00 per week x 52 weeks.

⁸⁴ 80% of net income loss after the first seven days or \$700.00 per week x 51 weeks.

⁸⁵ I have assumed a reduction of 10% 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 \$8,540.00. In total, it must pay \$72,800.00 (\$64,260.00 plus \$8,540.00).

One would obtain the figure for clause (c) by calculating the difference between the figure calculated in (a)(i) and (b) [\$64,260.00 less \$64,260.00 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 \$72,800.00 for the unprotected defendant. If the unprotected defendant was insolvent, then the protected defendant would pay the plaintiff \$64,260.00.

(a) Collateral Benefits

The next step is to deduct collateral benefits. In our example the total deductible collateral benefits are \$30,600.00.⁸⁶ As the joint and several damages are \$64,260 this sum is reduced by \$30,600.00 to \$33,660.00. The unprotected defendant is liable for this entire amount plus \$8,540 or \$42,200 in total.⁸⁷

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 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

⁸⁶ \$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 as it relates to a benefit paid with respect to the first 7 days after the accident which is not deductible by anyone.

⁸⁷ 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.

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 McKee⁸⁸ 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 70% of the net loss of income is \$70,000.00. Let us further assume that the unprotected defendant is 50% at fault and the collateral benefits are \$25,000.00. Using the McKee/Rachlin approach one would first calculate damages at common law and under AIRS taking into account the collateral benefits. The figure under sub-clause 267.7(1)(a)(i) would be the damages under AIRS (\$70,000.00) less the collateral benefits of \$25,000.00 yielding \$45,000.00.⁸⁹ The number under sub-clause 267.7(1)(a)(ii) would be \$100,000 x 50% or \$50,000.00. The unprotected defendant would be solely liable for the difference between \$50,000.00 and \$45,000.00, or \$5,000.00. Under this scenario the plaintiff recovers \$50,000.00 in tort (\$45,000.00 plus \$5,000.00) and receives a further \$25,000.00 in

⁸⁸ See Gordon S. McKee and Lia Chiarotto, **Unprotected Defendants: Out of Sight out of Mind**, The Advocates Society Practical Strategies VII, 1997.

⁸⁹ 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).

collateral benefits. The unprotected defendant pays all of the tort damages. The plaintiff's total recovery is \$75,000.00.

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 AIRS damages, or \$70,000.00. The number under sub-clause 267.7(1)(a)(ii) would be \$100,000.00 x 50% less \$70,000 yielding zero dollars. The plaintiff would receive a total of \$70,000.00 in tort damages and collateral benefits (none). \$50,000 of that amount would be paid by the unprotected defendant and \$20,000.00 by the protected defendant. The plaintiff who receives collateral benefits recovers more than the plaintiff who does not. However the difference in recovery is not equal to the collateral benefits paid. In this example and depending on how you view it, \$5,000.00 or \$10,000.00 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 over threshold. 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

10% to \$9,000.00 to account for the plaintiff's contributory negligence.⁹⁰ The calculations under subsection 267.7(1) yield the following results:

- (a) \$9,000.00 for sub-paragraph (a)(i);
- (b) \$0.00 for sub-paragraph (a)(ii);
- (c) \$7,000.00 for paragraph (b); and
- (d) \$2,000.00 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 7/9ths of the benefits of \$7,500.00, or \$5,833.33. The protected defendant deducts 2/9ths, or \$1,666.67. The net awards to the plaintiff are \$1,166.67 from the unprotected defendant and \$333.33 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 10% contributorily negligent, all of the plaintiffs' damages are reduced by 10%. 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

⁹⁰ 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 \$63,000.00 from the protected defendant.⁹¹ His wife's claim would be reduced to \$4,500.00 and the son's to zero.

This now takes us to the calculations required by subsection 267.7(1). They yield the following results:⁹²

	Injured Plaintiff	Wife	Son
subparagraph (a)(i); joint and several liability of all defendants	\$63,000.00	\$4,500.00	0.00
subparagraph(a)(ii); sole liability of unprotected defendant	\$7,000.00 [\$100,000 x 70% less \$63,000.00]	\$9,500.00 [\$20,000.00 x 70% less \$4,500.00]	\$3,500.00 [\$5,000.00 x 70% less \$0.00]
paragraph (b); unprotected defendant's contribution to joint and several liability	\$63,000.00	\$4,500.00	\$0.00
paragraph (c); protected defendant's contribution to joint and several liability	\$0.00	\$ 0.00	\$0.00

⁹¹ \$100,000.00 less the deductible of \$30,000.00 yields \$70,000.00 and 10% must be subtracted from that amount yielding \$63,000.00.

⁹² 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 70%) the contributory negligence has already been accounted for. The contributory negligence is included in the other 30%.

D. Pre-judgment Interest and Advance Payments

Advance payments, under either the *Insurance Act* or the *Courts of Justice Act*,⁹³ 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.⁹⁴ 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.⁹⁵

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.⁹⁶ Accordingly, death benefits should not be deductible from loss of care, guidance and companionship awards in accordance with subsection 267.8(7) of AIRS. Additionally, any amount received as a survivor's benefit under the *Canada Pension Plan*⁹⁷ is not deductible.⁹⁸

⁹³ R.S.O. 1990, c. C.43

⁹⁴ 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

⁹⁵ *Illingworth v. Elford*, [1996] O.J. No. 2893

⁹⁶ 46 O.R. (3d) 669; see also *Di Girolamo v. Smolen*, [2002] O.J. No. 1526, 59 O.R. (3d) 357 (per Spiegel J.).

⁹⁷ R.S.C. 1985, c. C-5

⁹⁸ See *Di Girolamo v. Smolen*, above at footnote 96, which held that section 63 of the *FLA* takes precedence over subsection 267.8(1) of the *Insurance Act*.

IV. TACTICAL CONSIDERATIONS⁹⁹

The most striking feature of damage calculations under AIRS 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 70% of gross income to 100% of gross income.¹⁰⁰ 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.

⁹⁹ 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.

¹⁰⁰ The differences have been significantly reduced, particularly for high income earners, now that the pretrial loss of income claim is 70% of gross rather than 80% of net.

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 AIRS. However, there are circumstances where suing an unprotected defendant can increase the plaintiff's recovery under AIRS. 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 AIRS. 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 AIRS 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.¹⁰¹ 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.¹⁰²

In most serious personal injury cases, the deductible will be irrelevant, since 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.

¹⁰¹ If the ratio of AIRS damages: common law damages < % liability of unprotected defendants, then the plaintiff can recover additional damages

¹⁰² 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.

Under *AIRS*, 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.

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.¹⁰³ 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 *AIRS*. The amount that the unprotected defendant is obliged to pay does not change. The amount

¹⁰³ 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 partyed 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 pays or is obliged to contribute under the *Negligence Act* is reduced by precisely the amount that the plaintiff loses.

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 that reflect this reality. I would suggest drafting offers that 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.¹⁰⁴ 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.

¹⁰⁴ See discussion at the last paragraph of III.B.iv above.

APPENDIX
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 70% of the gross 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 is does not pierce the threshold, then the amount is zero.
4. Reduce the figures calculated under 1(b), (c), (d), 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 product of rule 1(a) and the unprotected defendant's percentage liability up to the number calculated in 5(a)(i);
 - (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, 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	\$5,000.00

Rule 2. Seventy percent of the injured plaintiff's pre-trial gross loss of income from seven days following the crash until the beginning of the trial is \$71,400.00.

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 (b)	\$93,600.00	x	x
(c)	\$9,000.00	x	x
(d)	x	x	x
Rule 2	\$64,260.00	x	x
Rule 3	\$63,000.00	\$4,500.00	zero

Rule 5(a) Pre-Trial Loss of Income	Injured Plaintiff
(i) all defendants joint and severally liable	\$64,260.00
(ii) sole liability of unprotected defendant	\$72,800 less 5(a)(i) \$8,540.00
(iii) unprotected defendant's share of joint and several liability is amount under 1(a) x percent liability up to maximum of the amount calculated under rule 5(a)(i) [\$72,800.00 which exceeds \$64,260.00]	\$64,260.00
(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))	\$72,800.00

Rule 5(b) Future Loss of Income

The future loss is \$104,000.00 reduced by 10% to \$93,600.00 which is, in turn, apportioned 70% of the \$104,000.00 to the unprotected defendant (\$72,800.00) and the balance of the \$93,600.00 to the protected defendant (\$20,800.00).

Rule 5(c) Health Care Expenses

As the injury pierces the threshold, the health care expenses of \$10,000.00, reduced by 100% to \$9,000.00, are apportioned in the same ratio as the Future Loss of Income. The protected defendant is liable for \$2,000.00 and the unprotected defendant for \$7,000.00.

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	\$63,000.00	\$4,500.00	zero
(ii) sole liability of unprotected defendant (\$100,000 x 70% less \$63,000), (\$20,000 x 70% less \$4,500) and (\$5,000 x 70% less zero)	\$7,000.00	\$9,500.00	\$3,500.00
(iii) unprotected defendant's share of joint and several liability [lesser of (i) and (common law damages x 70%)]	\$63,000.00	\$4,500.00	zero
(iv) protected defendant's share of joint and several liability ((i) minus (iii))	zero	zero	zero
(v) total liability of the protected defendant	zero	zero	zero
(vi) total liability of the unprotected defendant ((ii) plus (iii))	\$70,000.00	\$9,500.00	\$3,500.00

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 \$33,360.00. The unprotected defendant will pay the entire loss. The future loss of income claim payable by the unprotected defendant is \$72,800.00 and by the protected defendant is \$20,800.00. Assuming that future collaterals of \$600 per week are payable, this would reduce the future loss of income from \$93,600 to \$62,400 apportioned 2/9ths to the protected defendant and 7/9ths to the unprotected defendant.

The pre-trial health care collateral benefits of \$7,500.00 would be split in the ratio of 2:7 - protected defendant to unprotected defendant reducing the unprotected defendant's contribution to \$1,166.67 ($\$7,000.00 - [\$7,500.00 \times 7 \div 9]$) and the protected defendant's contribution to \$333.33 ($\$2,000.00 - [\$7,500.00 \times 2 \div 9]$)

Rule 7.

All future collateral benefits would be held in trust for the unprotected and protected defendants in the ratio 7:2.

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	\$33,360.00
Future Loss of Income	\$20,800.00	\$72,800.00
Health Care Expenses	\$1,166.67	\$333.33
Non-Pecuniary Damages	zero	\$70,000.00
Total	\$21,967.67	\$176,493.33

The wife will recover \$9,500.00 from the unprotected defendant. The son will recover \$3,500.00 from the unprotected defendant.