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Blaney McMurtry
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OATLEY MCLEISH GUIDE TO PERSONAL INJURY PRACTICE IN MOTOR VEHICLE CASES

Chapter 5A
Auto Insurance Primer
Bills 59 and 198

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Bills 59 and 198

Auto Insurance Primer:
Bills 59 and 198

I. INTRODUCTION[1]

This updated chapter makes reference to several new cases, provides more background on the vicarious liability issue and comments briefly on the recent legislative changes respecting the liability of the drivers, lessees and owners of leased and rented vehicles. The intent of this chapter is to provide a reasonably comprehensive guide to calculating damages under Bills 59 and 198.

The approach to damage calculations in this chapter differs from the approach adopted by Alan Rachlin in his Bill 59 Damages Apportionment Calculator. My review of that calculator suggests that the differences in our approaches are limited to the apportionment of collateral benefits. However, I have not thoroughly reviewed his calculator to ensure that this assumption is correct. These differences are not surprising as Alan and I have espoused somewhat conflicting interpretations of section 267.7 of the *Insurance Act* for a number of years.

Bill 59, or the *Automobile Insurance Rate Stability Act* ("Bill 59")[2], came into force in the Fall of 1996. It ushered in a complex and confusing damage assessment model for victims of automobile crashes. A number of commentators have authored articles providing advice to the profession on how to calculate damages under Bill 59.[3]

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[1] I would like to thank Gordon Marsden an associate with Blaney McMurtry LLP and Fabia Wong, student-at-law, for their assistance in updating the legal research for this chapter.

[2] S.O. 1996, c.21

[3] The following is a partial list of the papers that have been published. Gordon S. McKee and Lia Chiarotto, **Unprotected Defendants: Out of Sight out of Mind,** The Advocates Society Practical Strategies VII, 1997; John A. McLeish and John D. Johnson, **The Inter-Relationship Between First and Third Party Claims: Changes to *Cox v. Carter*?** , L.S.U.C. and Canadian Bar Association - Ontario, September 27, 1996; John A. McLeish, **Bill 59: Tactical Considerations in a Tort Claim**, County of Carleton Law Association, November 8, 1996; David F. MacDonald and Lawrence H. Mandel, Q.C., **A Guide to the Automobile Insurance Rate Stability Act, 1996 Tort-Collateral Benefit Interface Provisions**, The Advocates Society, October 4, 1996, **The Automobile Insurance**

Bill 198, which came into force on October 1, 2003, made several changes to the damage calculation rules.[4] These changes are relatively easy to understand once one understands the Bill 59 rules. However, they do require plaintiffs' counsel to consider anew the question of which defendants are worth suing. It must not be forgotten that the unvarnished version of Bill 59 continues to apply to any accident which occurred between November 1, 1996 and September 30, 2003. The Bill 198 amendments only apply to accidents which occurred on or after October 1, 2003.

As indicated previously, this chapter attempts to provide a comprehensive methodology for calculating damages under Bills 59 and 198. Rather than deal with Bill 198 separately at the end of the chapter, I have incorporated comments on Bill 198 into each section that is influenced by the amendments in that Bill.

The appendix contains a set of rules designed to simplify calculations under Bill 59. However, these rules are based on the assumptions that are discussed in this chapter. If any of these assumptions are incorrect, then the entire set of rules may require reconsideration. It is assumed that the reader has a basic understanding of the structure and purpose of Bill 59.[5]

<u>**Rate Stability Act, 1996**</u> **Getting to the Bottom Line** (1997), 19 Advocates' Quarterly 212; Stephen R. Moore, **Are You Dealing with Protected or Unprotected Defendants?**, Insight Seminars, November 7, 1996, **Damage Control**, LSUC-CLE Spring 1997, **Unprotected Defendants, An Update on Practical Strategies in Suing or Defending Claims Against Unprotected Clients,** The Advocates' Society Practical Strategies VIII, 1999 and **Sidestepping the Threshold**, **Maximizing Damages Under Bill 59,** The Advocates' Society Practical Strategies IX, 2000. My papers predating the Court of Appeal decision in *Sullivan Estate v. Bond* (2001), 57 O.R. (3d) 97 advocate an interpretation of section 267.7 which was rejected by the Court of Appeal.

[4] 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 chapter, 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.

[5] Any reader who requires a primer on Bill 59 would be advised to review the articles listed in footnote 3.

II. PROTECTED DEFENDANTS AND OTHER PERSONS

A. Introduction

Bill 59 divides defendants into two classes; namely protected defendants and other persons. Before discussing how the damage calculation and apportionment provisions work it is important to understand the distinction between these two types of defendants.

(i) Who are "Protected Defendants"?

Bill 59 defines a "protected defendant" as a person who is protected from liability under subsections 267.5(1), (3) and (5) of Bill 59.[6] 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,[7] and

(c) any person present at the incident.

Effective March 1, 2006 the definition of "owner" has been expanded to include a lessee.[8] This is due to the fact that from that date forward lessees are jointly and severally liable with the owner and operator of an automobile for the negligent operation of that vehicle.[9] The amendments to the *Compulsory Automobile Insurance Act*, the *Highway Traffic Act* and the *Insurance Act* that took effect on that date were intended to accomplish a number of goals. The first was to make lessees, who had not previously been vicariously liable for the negligent operation of a rented or leased

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[6]Section 267.3

[7]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*").

[8] See section 267.3

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

vehicle, vicariously liable for such operation. Second, they limit the vicarious liability of lessors for bodily injury and death claims to $1 million less whatever insurance is available from the lessee's and the operator's policies. Finally, it changed the priority of payment rules amongst the insurers for the lessor, lessee and operator.[10] Prior to March 1, 2006 the lessor's policy would respond first and the policies of the lessee and driver would respond on an excess basis. The new regime will oblige the lessee's policy to respond first, the driver's second and the lessor's last.[11]

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.[12]

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.

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[10] See section 277

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

[12] Section 226.1 of the *Act* permits an insurer, which issues automobile policies in another province or U.S. state, to file an undertaking with the Financial Services Commission of Ontario (FSCO) obliging it to provide certain minimum mandatory coverages on any vehicle which it insures when such vehicle are operated in Ontario. The coverages which must be provided are minimum third party liability limits of $200,000.00, basic s.a.b. benefits and $200,000.00 of uninsured motorist protection. Although mandatory in Ontario policies, the undertaking does not oblige insurers to provide direct compensation coverage. Most American and Canadian insurers are providing these minimum coverages anyway. Extra-provincial insurers are often obliged to provide such minimum coverages by the laws of the jurisdiction which licensed them, by the so-called conformity provisions in their policies which require them to provide the minimum coverages mandated by the law of the jurisdiction in which the automobile is being operated or have undertaken to do so in the undertakings they have filed with the Superintendent of Financial Institutions for the Province of British Columbia (now administered by the Canadian Council of Insurance Regulators). See *Healy v. Interboro Mutual Indemnity Insurance Company* (2000) 138 O.A.C. 199 (note), 2000 CarswellOnt 1805, [1999] S.C.C.A. No. 384, [2000] 1 S.C.R. xiii Leave to appeal refused 119 O.A.C. 354, [1999] O.J. No. 1667, (Ont. C.A.); Affirmed (1998), [1999] I.L.R. I-3636, 1998 CarswellOnt 2142, 2 C.C.L.I. (3d) 281, 40 O.R. (3d) 270, 38 M.V.R. (3d) 57 (Ont. Gen. Div.) and cases referred to therein. I used to recommend that out of province insurers file this undertaking as there was probably no risk in doing so. However, the recent Court of Appeal decision in *Avis v. Certas*, 2005 CarswellOnt 7442, 215 O.A.C. 396 (note), Leave to appeal refused, 22 C.C.L.I. (4th) 159, [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.

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.[13]

Persons who are vicariously liable for the negligence of a protected defendant are unprotected defendants. The most common situation will involve a driver who was in the course of his or her employment at the time of the crash. His or her employer is not a protected defendant even if the employer is also the owner of the vehicle.[14] This issue is discussed in further detail below.[15]

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

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

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

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

Protected defendants receive preferential treatment with respect to three heads of damage. They are non-pecuniary general damages, income loss and loss of earning capacity claims and health care expenses. In addition, they are immune from tort claims advanced by uninsured plaintiffs.[16]

(a) Non-Pecuniary General Damages

Non-pecuniary general damages and damages under the *Family Law Act*[17] 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.[18] This threshold is an amalgam of the tests set forth in previous legislation.[19] 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 $15,000.00 and $7,500.00 respectively for non-pecuniary general damage claims and for *FLA* loss of care, guidance and companionship claims.[20] These deductibles are only available to protected defendants.

(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

[16] 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.

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

[18] Subsection 267.5(5)

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

[20]Both amounts can be increased by regulation.

for more than 80% of any net income loss suffered after the first seven days and prior to trial.[21] Lastly, a protected defendant is not liable for more than 80% of an injured plaintiff's net loss of earning capacity suffered before the trial. After the trial commences, the liability of both protected and unprotected defendants is for 100% of the future gross loss of income.

Subsection 267.5(2) purports to make the same rules applicable to claims made pursuant to subsection 61(1) of the *FLA*. Technically, however, claims made pursuant to the *FLA* are for loss of dependence rather than for loss of income. While the intent of the legislation is to apply the same rules to loss of dependency claims, the language used in the legislation may not have accomplished this goal.[22]

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.[23]

<u>(c) Health Care Expenses</u>

Protected defendants are only liable for health care expenses if the injury is catastrophic.[24] Unprotected defendants are liable for health care expenses even if the injury is not catastrophic.

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

[22] 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)

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

[24] Subsections 267.5(3) and (4) as they read before October 1, 2003.

(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.[25]

Automobile insurers licensed in Ontario are assessed annually for the estimated costs OHIP incurs due to the negligence of their insureds.[26] The intent of subsection 267.8(18) was to ensure that OHIP would be entitled to subrogate against everyone else. One would presume that this permits OHIP to pursue subrogated claims against all unprotected defendants and a number of persons who would qualify as protected defendants but whose insurers are not assessed annually. The latter would include persons present at the incident, uninsured drivers and owners and any person insured by an out of province automobile insurer which has filed a section 226.1 undertaking.

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.[27] For example, if a tavern owns a car or, possibly, if

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[25] 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.

[26] See O. Reg. 401/96

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

it has a non-owned automobile endorsement on its CGL policy, then it cannot be called upon to reimburse OHIP. Frankly, this interpretation destroys the entire logic behind OHIP's subrogation rights. Following this decision, OHIP can only subrogate against non-residents and people who are not insured under any type of motor vehicle liability policy issued in Ontario.

There is nothing in the *Act* that specifically describes how OHIP's claim would be calculated. Since the distinctions in subsection 267.8(18) are not premised on the protected defendant/unprotected defendant dichotomy, it is arguable that the apportionment provisions contained in section 267.7 are inapplicable. In situations where there is a mix of defendants, some of whom OHIP is permitted to sue and some whom it is not permitted to sue, it would be reasonable to treat the latter group as having paid their proportionate share of OHIP's claim through the mandatory assessment mechanism.[28] This should leave the defendants, against whom OHIP is entitled to subrogate, jointly and severally liable, as between themselves, for only that portion of the damages they caused.

Subsection 267.8(17) of the *Act* prohibits subrogation by anyone who has paid collateral benefits. As the result of the Court of Appeal's ruling in the *Wawanesa* case any doubt that this provision applied to unprotected defendants has been laid to rest. [29] Of course, subsection 267.8(18) of the *Act* permits OHIP to subrogate in the circumstances described above.

[28] 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.

[29] *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 16). *Wawanesa* is not referred to by the Court in *Hernandez.* For an interesting analysis of the scope of the phrase "arising directly or indirectly out of the use or operation of an automobile" see the decision of Boyko J. in *Scanes v. Datillo* (2003), 65 O.R. (3d) 768. See also *Greenhalgh v. ING Halifax Insurance Co.(2004),* 72 O.R. (3d) 338 (C.A.) and cases cited therein. All cases which turn on the meaning of the phrase "arising directly or indirectly out of the use or operation of an automobile" as do the above cited cases may require reconsideration in light of the recent Supreme Court of Canada decisions in *Citadel General Assurance Co. v. Vytlinga*, 2007 CarswellOnt 6626 and *Herbison v. Lumberman's Mutual Casualty Co.*, 2007 CarswellOnt 6628. In my view, the result in *Wawanesa* would not be changed by these decisions.

(e) Bill 198

Bill 198 does not change the definition of "protected defendant". However, subsection 267.5(10.1) provides:

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

The effect of this provision is to make a vicariously liable person a pseudo "protected defendant". The result is that the vicariously liable person is never liable for more damages than the protected defendant. To put it somewhat differently, a vicariously liable defendant will be obliged to pay precisely the same damages as the protected defendant. This provision, however, does not extend to the liability of that person for their own independent negligence. The most common situation where this provision will apply will be where the employer of an at-fault driver is sued.[30]

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

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

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[30] The result in the *Linhares* case (see footnote 14) would be the same under Bill 198 because the person who repaired the brakes is not a protected defendant.

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

Bill 198 both increases and decreases the advantages attached to the status of "protected defendant". The deductible has been increased from $15,000.00 to $30,000.00 in respect of claims for general damages by injured plaintiffs. The deductible has also been increased from $7,500.00 to $15,000.00 in respect of claims for loss of care, guidance and companionship under the *Family Law Act*.[31]

On the flip side, Bill 198 has created vanishing deductibles.[32] If the injured plaintiff's general damages are assessed in excess of $100,000.00, then no deductible is applied. Similarly, if an *FLA* claimant's damages for loss of care, guidance and companionship are assessed in excess of $50,000.00, then 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".

The concept of catastrophic impairment is no longer relevant to a plaintiff's entitlement to excess health care expenses from a protected defendant. A plaintiff is now entitled to recover excess health care expenses if he or she is able to establish that his or her injury meets the requirements of the verbal threshold.[33] This overcomes one of the most serious inequities under Bill 59. Under Bill 59 many persons with limb amputations were only entitled to $100,000.00 of medical/rehabilitation benefits. Since their injuries often did not satisfy the definition of catastrophic impairment, they were not entitled to pursue claims for items such as prosthetic limbs

[31] This is provided for in section 5.1 of O.Reg 461/96 as amended.

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

[33] Subsection 267.5(3).

in tort actions against protected defendants. The concept of catastrophic impairment is still critical in determining the limits on SABs for medical/rehabilitation and attendant care benefits.

Effective April 15, 2004, amendments to the SABs Schedule affect a plaintiff's entitlement to income replacement, medical/rehabilitation and attendant care SABs for certain types of whiplash injuries.[34] If the plaintiff's injury is ultimately determined to satisfy the verbal threshold, then the unpaid medical/rehabilitation and attendant care expenses will probably be recoverable in the tort action.

Finally, regulations passed under Bill 59, 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 regulations is beyond the scope of this chapter.[35]

B. Collateral Benefits

Bill 59 specifically provides for the deduction of most collateral benefit payments which are received or were available to the plaintiff before trial. This statutory deduction of collateral benefits, which is detailed in section 267.8 of the *Act*, permits all defendants in actions arising directly or indirectly out of the use or operation of an automobile to deduct a wider variety of collateral benefits than could be deducted at common law.[36] There are three deduction provisions.

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

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

[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 59. Also see the cases cited in footnote 29. 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) 159, 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.

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. In 2005, Mr. Justice Patterson concluded that the wording of the provisions of section 267.8 and the OMPP were different and that CPP disability benefits are deductible under the section.[39] In any event, for accidents occurring on or after October 1, 2003 the regulations specifically provide that CPP Disability Benefits and most group employers' LTD benefits are deductible.[40] If *Cugliari* governs the interpretation of the Bill 59 collateral benefits deduction provisions, then most benefits paid pursuant to private LTD plans, which plans often do not satisfy the "indemnity" test, would not be deductible from loss of income claims. However, if the *Meloche* case is correctly decided, then private LTD benefits would be deductible under Bill 59.[41]

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

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[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 below.

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

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

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

[41] See above at footnote 39.

The legislation specifically prohibits the deduction of collateral benefits from any award for non-pecuniary loss.[42] This prohibition applies to payments actually received and to payments the plaintiff is entitled to receive. Given the Court of Appeal's characterization of awards for loss of care, guidance and companionship as essentially non-pecuniary in nature, it follows that death benefits paid under the SABs Schedule are not deductible from such awards.[43]

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. A recent 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.[44] Relying on section 63 of the *FLA*, which prohibits the deduction of amounts paid or payable as a result of injury or death under a policy of insurance, Justice D. S. Ferguson refused to reduce the wife's income loss claim by the amount that her husband was alleged to have received for attendant care benefits. Even if one can overcome this analysis, there are significant impediments to deducting the attendant care SABs from the wife's loss of income claim.

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

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[42] Subsection 267.8(6)

[43] *McCartney v. Islic* (2000), 46 O.R. (3d) 669 (C.A.). See also *DiGirolamo v. Smolen*, (2002), 59 O.R. (3d) 357 and *Wright (Litigation Guardian of) v. Hannon*, 2007 CarswellOnt 4114, (Ont. S.C.J.),

[44] *Catlon v. Timmins (City)* (2006), 33 M.V.R. (5^{th}) 59 (Ontario Superior Court of Justice)

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. A payment is deemed not to be available under subsection 267.8(21) if the plaintiff's application was denied.

Since these sections are tied specifically to subsections 267.8(1), (4) and (6), it would appear that they only apply to pre-trial collateral benefits.[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

[45] 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.

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 a "bad faith" settlement.

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

Hugh Brown and Derek Abreu have identified another potential problem with respect to the treatment of future collateral benefits. If the future benefits are simply divided amongst the defendants in accordance with the apportionment of fault, then this could result in an inequitable division. For example, if the injury is not catastrophic, the protected defendant will not be held liable for paying any future health care expenses. Accordingly, it would be unfair for a protected defendant to receive any of the future health care collateral benefits. They should all be paid to the unprotected defendant. As Messrs. Brown and Abeu point out in their paper unprotected defendants facing this situation should request that an assignment order be made with terms which reflect this reality.[49]

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[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.).

[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.

[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.

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

Bill 198

Subject to one exception, Bill 198 does not change the rules for the deductibility of collateral benefits. Pursuant to regulation CPP Disability Pension benefits are now deductible collateral benefits.[50] The same regulation also clarifies that most employer group disability benefits are deductible. However, and somewhat surprisingly, most private LTD plans appear to remain non-deductible. This is due to the fact that most such plans would pay a benefit even if the insured was not employed at the time the disability arose. As such they would probably not be considered indemnity payments as that term was interpreted by the Court of Appeal in *Cugliari*. However, if the decision in *Meloche* is correct, then such benefits would be deductible under Bill 198.[51]

Bill 198 also envisioned a mechanism for commuting all future collateral benefit payments.[52] The details of that mechanism were to be spelled out in regulations. This provision in the Bill has not been proclaimed in force and the regulations were never promulgated.

C. Leased Vehicles

As mentioned above, 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

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

[51] See above at footnote 39.

[52] See subsection 267.8(7.1) which has not been proclaimed in force.

severally liable for the negligent operation of the motor vehicle.[53] This change applies not only to long term leases but also to short term rentals.

Changes to the *Insurance Act* provide that the liability of the lessor for personal injury and death claims is limited to $1,000,000[54] less any amounts:

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

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

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

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

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

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[53] 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.

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

raised by this legislation. A detailed discussion of these provisions is beyond the scope of this chapter. [55]

III. CALCULATING DAMAGES UNDER BILL 59

A. Introduction

The major problems in calculating damages under Bill 59 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. These examples are based on Bill 59 as it read on September 30, 2003. 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.[56] In other words, there is to be no cross deductibility of pre-trial collateral benefits.[57]

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[55] Please see the my paper entitled *Bill 18: Limited Liability for Car Leasing and Car Rental Companies* that was presented to the CBAO conference "*3rd Annual Hot Topics in Automobile Insurance*" on November 12, 2007. Updated versions of this paper can be found at www.blaney.com.

[56] Section 267.8.

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

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 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.[58]

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.[59] This obliges all defendants to make larger contributions to the future losses.[60]

(ii) The Calculation Date

The legislation uses the phrase "before the trial" to divide past and future loss of income claims. Presumably "before the trial" means before the commencement of the trial. For pre-judgment interest calculations, the relevant date is the date of judgment. In short trials, this difference will be of little practical importance. However, where the judgment is delivered long after the trial commences, it would appear that one calculation will have to be made for Bill 59 purposes and a second for prejudgement interest purposes.

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[58] 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.

[59] It appears that the drafters of Bill 59 did not consider the possibility that some past collateral benefits might still be available to reduce future loss of income claims.

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

B. All Defendants Are Protected

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

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

(i) Pre-Trial Loss of Income Claims

The injured plaintiff is not entitled to any loss of income claim for the seven days following the crash. The injured plaintiff is also not entitled to receive more than 80% of his net loss of income in the period commencing eight days after the crash and ending at the commencement of the trial.

In this example the injured plaintiff is entitled to 80% of his net loss of income for a period of 51 weeks ($700.00 per week x 51 weeks), or $35,700.00.

The next step is to reduce the claim for contributory negligence.[61] Presumably the reduction is based on the percentage of the net loss of income rather than the gross loss of income. In our example, the gross loss of income is $104,000.00 (52 weeks x $2,000.00 per week). If this presumption is correct and the contributory negligence was assessed at 20%, then the reduction would be 20% of $35,700.00 rather than 20% of $104,000.00.[62] In the current example, the injured plaintiff is not contributorily negligent, so there is no deduction to make.

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

In the event that the only defendant is unprotected, an unusual result occurs. Using the same example, the unprotected defendant would be liable for full common law damages for loss of income, or $104,000.00. The defendant can subtract any collateral benefits received after the first seven days and before the trial; in this instance it is $30,600.00. However, the plaintiff actually received collateral benefits totalling $30,800.00 when the first week of private disability benefits are taken into account. Accordingly, the plaintiff's total recovery is $104,200.00.[63] The plaintiff actually recovers more than he lost. This happens because the unprotected defendant is liable for

[61] 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.).

[62] 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.

[63] $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.

(ii) Health Care Expenses

Since the injury is catastrophic the plaintiff can recover health care expenses from the protected defendant.[64] If the injury had not been catastrophic, 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.

Of course, under Bill 198 the protected defendant would be liable for excess health care expenses even if the injury was not catastrophic as long as it satisfied the verbal threshold test.

(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]

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[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. *Morrision v. Gravina*, [2001] O.J. No. 1208 (per Greer J.), is not entirely consistent with this viewpoint. Both cases are discussed in *Hunt (Litigation Guardian of) v. Martin* (2002), 40 C.C.L.I (3d) 75 (Ontario Superior Court).

[65] John McLeish , David F. MacDonald and Lawrence H Mandel, Q.C. in their papers referred to in footnote 3 above outline clever arguments which would have obliged protected defendants to pay excess health care expenses. These arguments have been rejected in two cases, namely *Henderson v. Parker* (1998), 42 O.R. (3d) 462 and *Folmer v. Graham*, [2000] O.J. No. 2699 affm'd [2001] O.J. No. 1868 (C.A.). The Court of Appeal has also ruled that accident benefits are not payable for treatment that occurs after the expiration of the 10 year time limit in the SABs Schedule. See *Hope v. Canadian General* (2002), 212 D.L.R. (4th) 247 and also *Gottwald v. State Farm Automobile Insurance Co.*, 2007 CarswellOnt 5375.

[66] One should consider whether the Court of Appeal decision in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 might require separate deductibility anyway. Note, however, that *Bannon* must be approached with caution after the Supreme Court of Canada's decision in *Gurniak v. Nordquist*, [2003] 2 S.C.R. 652 and, in particular, the reasons of Justice Gonthier. For both health care and other pecuniary loss claims any contributory negligence must be deducted before the collateral benefits are deducted (subsection 267.8(8)).

(iv) Future Pecuniary Losses

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

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

The legislation treats future collateral benefits differently from pre-trial collateral benefits. In direct contrast to the OMPP, Bill 59 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

[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. I disagree with John McLeish who, in his two papers, suggests that protected defendants are not entitled to deduct the future collateral benefits. I believe that the provisions Mr. McLeish relies upon for this argument are only applicable to pre-trial collateral benefits.

[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.

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

A literal reading of this section would permit the defendant to continue to receive future collateral benefits even if they exceed the damages awarded at trial. In the current example, the trial judge found that the plaintiff will be able to return to work one year after the trial. He continues to receive SABs and private disability benefits of $600.00 per week after the trial and dutifully remits them to the defendant's insurer. However, one year after trial it is determined that the plaintiff cannot return to work because his condition has not improved. If subsection 267.8(9) is interpreted literally, then the plaintiff must continue to remit his loss of income collateral benefits to the defendant's insurer, notwithstanding his continuing disability. Even after the entire judgment is reduced to zero, the plaintiff is obliged to remit the collateral benefits to the defendant's insurer. Eventually, the defendant's insurer could turn a profit on the litigation.[69]

(v) Non-Pecuniary Damages

Protected defendants are entitled to deduct $15,000.00 from the non-pecuniary general damage awards and $7,500.00 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 $15,000.00 to $85,000.00, the wife's *FLA* claim is reduced by $7,500.00 to $12,500.00 and the son's *FLA* claim is reduced to zero.

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[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] Of course, if this accident was governed by Bill 198, then the deductibles would be $30,000.00 and $15,000.00 respectively. 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*.

If we assumed that there was 20% contributory negligence, then it is not entirely clear what is owed. This is the same problem that arose for loss of income claims. The question is, do we deduct 20% of $100,000.00 or 20% of $85,000.00? It is my belief that one would deduct 20% of the $85,000.00 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 chapter will outline the genesis of 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

[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).

damages; deductibles that were only available to motorists. To determine how non-pecuniary damages would be divided between motorists and non-motorists, Bill 164 introduced a complex apportionment provision.[74] This provision has been carried forward into Bill 59 almost unchanged. However, this provision applies to the apportionment of damages between protected and unprotected defendants with regards to all heads of damages, not just non-pecuniary damages. The concept of several liability was dropped in Bill 59.

(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

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

[75] John McLeish has reached the opposite conclusion in both of his papers (see above at footnote 3). It should also be recalled that subsection 267.8(8) requires contributory negligence reduction to be made before collateral benefits are deducted. Some commentators believe that collateral benefits are deducted as part of the apportionment calculation. See the discussion under the heading “Collateral Benefits” at III.C.iii below.

[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.

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

Clause (a) is divided into two sub-clauses. The first specifies the damages that all defendants are jointly and severally liable to pay to the plaintiff. Essentially, all defendants are jointly and severally liable for all damages that the protected defendant is found liable to pay after applying the damage reduction provisions set forth in section 267.5 (the "Bill 59 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 Bill 59 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

[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, where the defendants have some relationship (such as employer and employee or owner and driver), this relationship may dictate a different apportionment of the damages. This is discussed under the heading "Vicarious Liability" at III.C.viii below.

solely liable under sub-clause 267.7(1)(a)(ii), this number would be multiplied by 20% yielding $20,000.00. From this $20,000.00 would be deducted the Bill 59 damages. Since the deductible is $15,000.00, the Bill 59 damages are $85,000.00 ($100,000.00 less $15,000.00). The result is a negative number ($20,000.00 less $85,000.00). Therefore the plaintiff only recovers the damages calculated under the first sub-clause ($85,000.00).

(b) Clause 267.7(1)(b)

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

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

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

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

The second interpretation may lead to other problems if my views with respect to the deductibility of collateral benefits are correct; problems that do not arise if the first interpretation is the correct one. [78] 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*.[79]

Utilizing interpretation two, this clause instructs the court to take the lesser of common law damages multiplied by the unprotected defendant's percentage liability and the damages calculated under sub-clause 267.7(1)(a)(i). In the example just cited, this would be $20,000.00 [the lesser of $100,000.00 x 20% and $85,000.00]. It should be noted that this approach obliges the unprotected defendant to pay an amount in excess of 20% [actually 20/85ths] 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 $65,000.00 [$85,000.00 less $20,000.00].[80]

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

[79] [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.

[80] 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.[81]

(d) A Simplified Method for Calculating the Amount Owed

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

The unprotected defendant must always pay or contribute the product of its percentage liability and the common law damages. If this number exceeds the Bill 59 damages, then this is the total award the plaintiff receives and all of the damages are paid by the unprotected defendant. If this number is less than the Bill 59 damages, then the plaintiff receives Bill 59 damages only. The difference between the Bill 59 damages and the amount the unprotected defendant contributes is paid by the protected defendant. Two examples will clarify the use of this simplified rule.

First, let us assume that the pre-trial income loss is $100,000.00 at common law and $50,000.00 under Bill 59. Then, let us assume that the unprotected defendant is 20% at fault. The product of the common law damages and the percentage fault of the unprotected defendant is $20,000.00 ($100,000 x 20%). This is less than the Bill 59 damages. Accordingly, the plaintiff only recovers the Bill 59 damages of $50,000.00. The unprotected defendant pays $20,000.00 and the protected defendant pays the difference between this amount and the Bill 59 damages, which is $30,000.00.

Now let us assume that the unprotected defendant is 60% at fault. The unprotected defendant must pay or contribute $60,000.00 ($100,000.00 x 60%). Since this exceeds the Bill 59 damages, the plaintiff receives this amount [$60,000.00] from the unprotected defendant. The protected defendant pays nothing. However, if the unprotected defendant is judgment proof, then the protected defendant would be obliged to pay the Bill 59 damages of $50,000.

[81] 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.

I will not use this simplified method in carrying out the calculations in the balance of this chapter.

(iii) Pre-Trial Loss of Income Claims

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

The first step is to calculate the liability of the unprotected defendants at common law. This would be 100% of the gross loss of income before trial, or $104,000.00.[82]

We must repeat a calculation we have previously done, namely calculate the liability of the protected defendant for the pre-trial loss of income. We have previously determined that this figure is $35,700.00.[83] This figure must be reduced by 20% for contributory negligence to determine the amount under sub-clause (a)(i). This figure is $28,560.00.[84]

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

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

[82] 100% of the pre-trial loss would be $2,000.00 per week x 52 weeks.

[83] 80% of net income loss after the first seven days or $700.00 per week x 51 weeks.

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

it is solely liable for, which are $23,440.00. In total, it must pay $52,000.00 ($23,440.00 plus $28,560.00).

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

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

Collateral Benefits

The next step is to deduct collateral benefits. In our example the total deductible collateral benefits are $30,600.00.[85] Only $28,560.00 of these collateral benefits is needed to reduce to zero the damages for which the protected and unprotected defendants are jointly and severally liable. In this case, the unprotected defendant is entitled to deduct the remaining benefits and the plaintiff's net judgment (paid entirely by the unprotected defendant) is $21,400.00.[86]

This example demonstrates the problem with interpretation two of clause 267(1)(b) adverted to at page 29 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 subsection 267.8(3) of any vitality. Subsection 267.8(3) provides that loss of income collateral

[85] $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.

[86] 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 59 also appears to be the order that calculations are to be carried out. This is not the position favoured by Alan Rachlin, who successfully argued the *Sullivan Estate* case, nor is it supported by McGee (see above at footnote 3).

benefits are to be deducted first from the damages for which all defendants are jointly and severally liable and any excess amount is to be deducted from the damages for which the unprotected defendant is solely liable. The intention of the subsection is to provide protected defendants with a partial priority with respect to the deduction of these collateral benefits. However, in every situation where this subsection might be engaged the only party who is liable for the damages is the unprotected defendant. Accordingly, this priority provision will never make any difference to the amounts actually paid by the protected and unprotected defendants.

This problem can be overcome if one deducts the collateral benefits as one of the steps in the subsection 267.7(1) calculations rather than after these calculations have been completed. This is the approach recommended by Gordon McKee[87] and by Alan Rachlin, who successfully argued the appeal in the *Sullivan Estate* case. If collateral benefits are deducted during these calculations, then subsection 267.8(3) still has vitality. However, there are problems with this approach as well. If one adopts this approach one runs into problems with, what I refer to as, "vanishing collaterals". An example will assist in understanding this problem.

Let us assume the pre-trial loss of income is $100,000.00 and that 80% of the net loss of income is $40,000.00. Let us further assume that the unprotected defendant is 35% at fault and the collateral benefits are $20,000.00. Using the McKee/Rachlin approach one would first calculate damages at common law and under the *Act* taking into account the collateral benefits. The figure under sub-clause 267.7(1)(a)(i) would be the damages under Bill 59 ($40,000.00) less the collateral benefits of $20,000.00 yielding $20,000.00.[88] The number under sub-clause 267.7(1)(a)(ii) would be $100,000 x 35% or $35,000.00. The unprotected defendant would be solely liable for the difference between $35,000.00 and $20,000.00, or $15,000.00. Under this scenario the plaintiff recovers $35,000.00 in tort ($20,000.00 plus $15,000.00) and receives a further $20,000.00 in accident benefits. The unprotected defendant pays all of the tort damages. The plaintiff's total recovery is $55,000.00.

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[87] See McKee's article cited at footnote 3 *supra*. Hugh Brown and Derek Abreu assume that this is the correct approach in their paper. See footnote 49 above.

[88] 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).

If the plaintiff had not received any collateral benefits, the calculation would be as follows. The number under sub-clause 267.7(1)(a)(i) would be the Bill 59 damages, or $40,000. The number under sub-clause 267.7(1)(a)(ii) would be $100,000.00 x 35% less $40,000 yielding zero dollars. The plaintiff would receive a total of $40,000.00, of which $35,000.00 would be paid by the unprotected defendant. The plaintiff who receives collateral benefits recovers more than the plaintiff who does not. In this example, $15,000.00 in collateral benefits has simply vanished during the calculation.

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

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

(iv) Health Care Expenses

In our example, the injury is catastrophic. Therefore, the protected defendant must contribute to this claim. The pre-trial health care expenses are $10,000.00. This figure must be reduced by 20% to $8,000.00 to account for the plaintiff's contributory negligence.[89] The calculations under subsection 267.7(1) yield the following results:

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

[89] 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.

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

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

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

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

(v) Other Pecuniary Losses

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

(vi) Future Pecuniary Losses

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

(vii) Non-Pecuniary Damages

The effect of section 267.7 makes these calculations tricky. Since the plaintiff was 20% contributorily negligent, all of the plaintiffs' damages are reduced by 20%. For non-pecuniary damages, clause 267.5(7)(4) provides that the deductibles are to be subtracted before the award is reduced to account for contributory negligence. In our example, the injured plaintiff would be entitled to $68,000.00 from the protected defendant.[90] His wife's claim would be reduced to $10,000.00 and the son's to zero.

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[90] $100,000.00 less the deductible of $15,000.00 yields $85,000.00 and 20% must be subtracted from that amount yielding $68,000.00.

This now takes us to the calculations required by subsection 267.7(1). They yield the following results:[91]

	Injured Plaintiff	**Wife**	**Son**
subparagraph (a)(i); joint and several liability of all defendants	$68,000.00	$10,000.00	0.00
subparagraph(a)(ii); sole liability of unprotected defendant	$0.00 [$100,000 x 50% less $68,000.00]	$0.00 [$20,000.00 x 50% less $10,000.00]	$2,500.00 [$5,000.00 x 50% less $0.00]
paragraph (b); unprotected defendant's contribution to joint and several liability	$50,000.00	$10,000.00	$2,500.00
paragraph (c); protected defendant's contribution to joint and several liability	$18,000.00	$ 0.00	$0.00

(viii) Vicarious Liability

The previous examples assume that the only statute or common law rule that effects apportionment is the *Negligence Act*. However, the *Negligence Act* is not the only source of contribution and indemnity rights. These rights can arise under statutes, under contracts, at common law and in equity. These additional contribution and indemnity rights may well affect

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

the Bill 59 calculations. This can best be seen by examining an example involving the vicarious liability of a vehicle owner and the driver's employer.

Let us assume that a driver is employed by Employco and his car is owned by Leasco. Let us also assume that this driver is 100% at fault for a crash. The plaintiff sustains injuries and the general damages are assessed at $100,000.00. How would the liability of the three defendants be calculated?

It is clear that the vehicle owner, Leaseco, and the driver are protected defendants. As such, they are jointly and severally liable for the Bill 59 damages.[92] Those damages would be $85,000.00 ($100,000.00 less the $15,000.00 deductible). What of Employco's liability? According to the *Vollick v. Sheard* decision, employers are not protected defendants even if they are also the owners of an involved automobile. [93] In the current example, Employco is vicariously liable for the negligence of the driver in its capacity as an unprotected defendant. At first blush, Employco appears to be liable for 100% of the damages. Using the second interpretive approach to clause 267.8(1)(b), this would suggest that Employco, being vicariously liable for 100% of the damages, is obliged to pay full common law damages or $100,000.00. However, this approach, which I have advocated previously, ignores the fact that Leaseco is also 100% vicariously liable as owner under the provisions of the *Highway Traffic Act.*[94] Are there any rights of contribution as between Leaseco and Employco? An older Court of Appeal case suggests there may be.[95] I would contend

[92] In most cases, any damages that the owner and driver are liable for would be paid by the insurer of the owner. Rarely, would that insurer have any rights of subrogation against the driver.

[93] (2005), 75 O.R. (3d) 621

[94] R.S.O. 1990, c. H.8 as amended

[95] *Lang v. Hooey*, [1932] O.R. 363. In this case it was suggested that the owner might be entitled to full indemnity from the employer. However, the owner and driver were both sales agents of the same employer. That said, any right of contribution probably does not arise under the *Negligence Act*. See D. Cheifetz, **Apportionment of Fault in Tort**, (Canada Law Book, Aurora,1981) at pages 15 and 16.

that since each is 100% liable for the damages of the driver, this liability should be split equally between them.[96]

If this assumption is correct, then the calculations lead to a different result. Employco's sole liability is zero ($100,000.00 x 50% less $85,000.00 which is a negative number). Employco is jointly and severally liable for the Bill 59 damages of $85,000.00 ($100,000.00 less the $15,000 deductible). Under clause 267.7(1)(b), Employco is liable to contribute $100,000.00 x 50% to the joint and several damages and Leasco would pay the balance of $35,000.00.

If this analysis is correct, then, in most cases, it will not make any sense for the plaintiff to sue an employer; the plaintiff's recovery will not be increased. On the other hand, the owner may have a significant incentive to third party the employer. The employer may be obliged to pay in excess of 50% of the damages, as illustrated in the above example. It is somewhat surprising that owner's have not routinely pursued claims against employers in the past.[97]

What happens if the employer and the owner are the same person? Cases such as *Vollick* indicate that the liability of the employer, in that capacity, survives the machinations of Bill 59. However, is there a way for the employer/owner to divide its liability between its two different capacities so as to reduce its overall exposure to the plaintiff's claims?[98] If it can, then liability would be calculated in exactly the same manner as set out above. However, if the liability cannot be apportioned, then the employer/owner will be held liable for 100% of the common law damages. Where the employer/owner is a defendant, it is difficult to envision how this could be accomplished. There is only one defendant and no readily apparent mechanism for treating the employer/owner as two different parties. Additionally, the employer/owner probably cannot add

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[96] I am ignoring any potential rights of indemnity by the employer or vehicle owner from the driver.

[97] An interesting issue that might arise in such a claim is whether the owner's policy would be primary. The answer to this question probably turns on the applicability of subsection 277(1) of the *Insurance Act*. It is my tentative view that it is inapplicable because the employer would not be an insured under the owner's policy.

[98] It should be noted that in all of these decisions the court was only asked to determine if the employer was to be treated as an unprotected defendant. It was not asked to apportion liability. The suggested approach to apportioning damages between the owner/operator in its two capacities was not addressed.

itself as a third party. To do so would offend the common law prohibition against suing oneself and the prohibition, in the Rules of Civil Procedure, against third partying persons who are already parties.[99] However, the courts in this province have found ways to sidestep these problems in situations where such rules would preclude plaintiffs from pursuing meritorious claims.[100] Additionally, there may be some support for this approach in the Supreme Court of Canada's decision in *Derksen*.[101] If my views about contribution between separate employers and owners are correct, then it would be incongruent for the liability of a single owner/employer to be greater than the total liability of separate owners and employers. Nevertheless, there are major legal obstacles to overcome for anyone arguing that the liability of the employer/owner should not exceed the Bill 59 damages.

Bill 198

Of course, Bill 198 provides that Employco is not liable, in respect of its vicarious liability, for an amount greater than its employee is. This suggests that for the purposes of section 267.7 Employco will be treated as a pseudo "protected defendant". This will take away any real incentive for plaintiffs to pursue employers of protected defendants unless there is insufficient insurance to cover the plaintiff's losses.

D. Pre-judgment Interest and Advance Payments

Advance payments, under either the *Insurance Act* or the *Courts of Justice Act*,[102] should be taken into account only after all of the above calculations are completed. The case law indicates that

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[99] See *Ontario (Public Trustee) v. Guaranty Trust Co. of Canada*, [1980] 2 S.C.R. 931 and rule 29.01 of the *Rules of Civil Procedure*.

[100] *Dionisi v. Dionisi* (1983), 42 O.R. (2d) 597; *Re 286301 Ontario Ltd.* (1981), 31 O.R. (2d) 765.

[101] (2001) SCC 72, 205 D.L.R. (4th) 1, 2001 CarswellOnt 3605. This argument might be more attractive to a judge if different insurers were obliged to indemnify the owner/employer in its two capacities. However, it appears that in many cases the automobile insurer will be obliged to provide coverage to the owner/employer in its two capacities. See *Royal Insurance Co. of Canada v. Guardian Insurance Co. of Canada* (995), 26 O.R. (3d) 290 at paragraph 45 (per Macdonald J.) which dealt with this issue without any discussion.

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

such advance payments should be applied to principal first rather than to interest.[103] 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.[104]

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. [105] Accordingly, death benefits should not be deductible from loss of care, guidance and companionship awards in accordance with subsection 267.8(7) of the *Act*. Additionally, any amount received as a survivor's benefit under the *Canada Pension Plan*[106] is not deductible.[107]

IV. TACTICAL CONSIDERATIONS

A. Assuming Interpretation Two of Clause 267.7(1)(b) is the Correct One

Almost all of my calculations are premised on the assumption that the second interpretation of clause 267.7(1)(b) is correct. The following comments explore the strategic ramifications of this approach to damage calculations. In the next section, I will briefly canvass the tactical considerations if interpretation one is correct.

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[103]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

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

[105] 46 O.R. (3d) 669; see also *Di Girolamo v. Smolen*, (2002), 59 O.R. (3d) 357 (per Spiegel J).

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

[107] See *Di Girolamo v. Smolen*, above at footnote 105, which held that section 63 of the *FLA* takes precedence over subsection 267.8(1) of the *Insurance Act*.

The most striking feature of damage calculations under Bill 59 is the very different treatment of pre-trial and future loss of income claims. Once the trial starts, the recovery for the loss of income claim increases from 80% of net income to 100% of gross income. This can make a significant difference to the plaintiff's recovery. Because of this factor, there is a significant incentive for plaintiffs to get their cases to trial as quickly as possible. This factor must be weighed against the equally important consideration of not rushing a case to trial before the plaintiff's damages can be properly assessed. Any unexplained delay in setting an action down for trial may be regarded as professional negligence. Each file requires a timetable and counsel should obtain their client's agreement to that timetable. The rationale for the timetable should be explained in a letter to the client. At a minimum a memo to file should be prepared. Once the timetable is established, it must be followed. If it is not, then the reasons should be documented.

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

At mediation, the parties need to agree on the date that the case will likely be tried. The quantum of any settlement may hinge on this date. Without such an agreement, it may be difficult, if not impossible, to agree on damage figures. It would be preferable to reach an agreement on the assessment date before the mediation.

Where there is a concern that the protected defendant does not have any or sufficient insurance, then it is usually advisable to sue any potentially liable party. This has not changed under Bill 59. However, there are circumstances where suing an unprotected defendant can increase the plaintiff's recovery under Bill 59. Plaintiffs' counsel must analyze each file to determine whether it is worthwhile suing an unprotected defendant when a protected defendant is clearly at fault. In most cases, counsel will need to weigh the potential for recovering greater damages against the costs associated with suing the unprotected defendant.

In analysing a file, plaintiff's counsel must consider the three types of damage awards that are affected by Bill 59. As mentioned previously, they are non-pecuniary damages, pre-trial loss of income claims and health care expense claims. Since each head of damages is calculated separately, each type of damage must be considered separately. Unless the ratio of damages under Bill 59 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.[108] 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 86% at fault.[109]

In most serious personal injury cases, the deductible will be a modest percentage of the total non-pecuniary general damages. In less serious cases, it will be a more significant percentage. This is particularly so for Bill 198 cases where the deductibles are $30,000.00 and $15,000.00. 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 $30,000.00 [less than $60,000.00 under Bill 198]. The *FLA* deductible is only $7,500.00. Therefore, to recover any additional amount where liability is 50:50, the *FLA* damages must be less than $15,000.00 [$30,000.00 under Bill 198].

Under Bill 198 there will be more cases where it is important to sue unprotected defendants to increase a plaintiff's recovery for non-pecuniary damages. This is simply due to the fact that the deductibles are higher. For example, in the typical tavern liability case, the tavern is not likely to be found more than 25% at fault. Under Bill 59, the plaintiff would only increase his or her recovery of non-pecuniary general damages by suing the tavern if the injury was worth less than

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[108] If the ratio of Bill 59 damages: common law damages < % liability of unprotected defendants, then the plaintiff can recover additional damages

[109] 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).

$20,000.00. Under Bill 198 that figure rises to $40,000.00.[110] These cases are still small enough, however, that unless there is a significant pecuniary loss claim, they will likely never get to trial. Of course, once the non-pecuniary damages assess above $100,000.00, then under Bill 198 the deductible vanishes. In such cases the plaintiff gains nothing by suing the unprotected defendant.

If, however, the injury is below 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. In such cases it would be unwise to sue the protected defendant, but it would be wise to sue the unprotected defendant.

For pre-trial loss of income claims, one must actually determine the claim's value before making the decision to sue the unprotected defendant. At modest income levels, 80% of net income is a larger percentage of the gross loss of income than it is for higher levels of income. Accordingly, the ratio of Bill 59 damages to common law damages is smaller for high income plaintiffs. Therefore, higher income plaintiffs can recover additional damages from unprotected defendants at a lower percentage of liability than can less well-to-do plaintiffs.

There will be situations where the plaintiff will not recover any additional non-pecuniary damages by suing an unprotected defendant, but could recover additional pecuniary damages. For example, the unprotected defendant is 75% at fault, the non-pecuniary general damages are $100,000.00, the common law loss of income claim is $100,000.00 and the Bill 59 loss of income claim is $50,000.00. In this instance, the plaintiff does not recover any additional non-pecuniary damages by suing the unprotected defendant but will recover an additional $25,000.00 for his or her loss of income claim.[111]

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[110] At $20,000.00 the Bill 59 damages are $5,000.00 or equal to what the unprotected defendant is obliged to pay. At any lower assessment the amount the unprotected defendant will be obliged to pay will exceed the Bill 59 damages. For example, with an assessment of $15,000.00 the protected defendant pays nothing but an unprotected defendant would pay $3,750.00. If the deductible is doubled, as it is under Bill 198, then the break even point is $40,000.00. The plaintiff will be ahead by suing the unprotected defendant in such cases.

[111] 75% of $100,000.00 is less than the deductible reduced damages of $85,000.00. Therefore, the plaintiff recovers no additional non-pecuniary general damages. On the other hand, 75% of $100,000.00 is $25,000.00 greater than the protected defendant is obliged to pay for the loss of income claim. It would therefore be prudent for the plaintiff to sue the unprotected defendant to recover this additional $25,000.00.

If a plaintiff sustains an injury that is not catastrophic, the protected defendants are not obliged to pay any portion of his or her excess health care expenses. This is a situation where it may well make sense to pursue an unprotected defendant. For example, if a plaintiff had a limb amputated following a crash, it is unlikely that the injury would be considered catastrophic. However, the cost of prosthetics over a lifetime would almost certainly exhaust the statutory accident benefits of $100,000.00. In this instance, it is worthwhile suing an unprotected defendant that is 25% at fault.

Under Bill 198, excess health care expenses can be recovered from protected defendants if the injury satisfies the verbal threshold. It is going to be the rare case where there will be excess health care expenses and the case does not satisfy the verbal threshold.

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.[112] The Court of Appeal’s decision may have increased the incentive for protected defendants to third party unprotected defendants. In any case where a protected defendant is even partly at fault, the protected defendant receives all of the benefit of the damage reduction mechanisms. In addition, the protected defendant’s obligation to contribute to the damages for which it is jointly and severally liable will be less than under the *Negligence Act*. To put it a little differently, under the Court of Appeal's interpretation it is only the plaintiff that loses under Bill

[112] See the chart at the heading “Non-Pecuniary Damages” at III.C.vii above. In that example, the protected defendant, if sued alone, would pay damages to the husband and wife totalling $78,000.00 ($68,000.00 in respect of the husband and $10,000.00 in respect of the wife). If the unprotected defendant is sued, this liability is reduced to $18,000.00. If a unprotected defendant is third partied is its liability to the protected defendant calculated under the provisions of the *Negligence Act* or in accordance with clauses 267.7(1)(b) and (c)?

59. The amount that the unprotected defendant is obliged to pay does not change. The amount the protected defendant pays or is obliged to contribute under the *Negligence Act* is reduced by precisely the amount that the plaintiff loses.

Under Bill 198, the incentive for protected defendants to sue an unprotected defendant may actually have increased. For example, let us assume that general damages are assessed at $100,000.00 and that that unprotected defendant is 25% at fault. Under either Bills 59 or 198, the unprotected defendant would be liable for 25% of $100,000.00 or $25,000.00. Under Bill 59 the protected defendant would pay the balance of the Bill 59 damages ($85,000.00 less $25,000) or $60,000.00. Under Bill 198 the protected defendant would be liable for the balance of the "Bill 198 damages" ($70,000 less $25,000) or $45,000.00. Under Bill 59 the protected defendant is liable for about 70% of the non-pecuniary damages and under Bill 198 it is liable for only about 64.3% of the damages. The unprotected defendant remains liable for the same dollar amount but is actually paying a larger proportion of the damages under Bill 198.

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

As previously discussed, the future collateral benefits trust provisions, if applied literally, could oblige plaintiffs to pay back more of a judgment than is fair.[113] 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.

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

It is also unclear whether the courts will apportion costs in accordance with the split in liability or the split in damages payable. If interpretation two is correct and the latter approach is adopted, then the unprotected defendant's exposure to cost awards will increase commensurately.

B. Assuming Interpretation One of Clause 267.7(1)(b) is the Correct One

The question of what damages an unprotected defendant is solely liable for does not change using interpretation one. Its use does affect how the joint and several damages calculated under sub-clause 267.7(1)(a)(i) are apportioned. Interpretation one results in such damages being apportioned in the same manner as under the *Negligence Act*. Therefore if an unprotected defendant is 50% at fault, that defendant pays 50% of the joint and several damages regardless of whether that defendant is also solely liable for some damages under sub-clause 267.7(1)(a)(ii).

A simple example will demonstrate this difference. Let us assume that pre-trial general damages are $100,000.00 and the deductible of $15,000.00 reduces those damages under Bill 59 to $85,000.00. Let us also assume that the unprotected defendant is 25% at fault. Under interpretation two, the unprotected defendant is not solely liable for any damages. Its liability under clause 267.7(1)(b) is $100,000.00 x 25% or $25,000.00. Under interpretation one, the unprotected defendant is still not solely liable for any of the plaintiff's damages. However, the unprotected defendant will pay 25% of the joint and several damages. Therefore, it pays one quarter of $85,000.00, or $21,250.00.

Under interpretation one, the plaintiff receives exactly the same damages as under interpretation two. However, the apportionment of the joint and several damages is more favourable to the unprotected defendant than it is under interpretation two. Accordingly, one would expect protected defendants to favour interpretation two and unprotected defendants to favour interpretation one.

The balance of my comments on tactical considerations continue to apply regardless of which interpretation is correct.

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

3. Take the figure from 1(e) above and deduct the appropriate deductible of $15,000.00 or $7,500.00. If the injury is does not pierce the threshold, then the amount is zero. [$30,000.00 and $15,000.00 respectively under Bill 198 and zero if the damages assess at more than $100,000.00 and $50,000.00 respectively.]

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

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

   (a) For pre-trial loss of income:

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

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

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

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

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

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

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

(c) For health care expenses, the rules differ depending on whether the injury is or is not catastrophic. First reduce the damages calculated under rules 1(c) or 4-1(c) by any collateral benefits. If the injury is not catastrophic, then the unprotected defendants, as between themselves, are jointly and severally liable for the net damages multiplied by their proportionate negligence. If the injury is catastrophic, then one simply takes the net damages and apportions them in accordance with each defendant's percentage liability. [For a Bill 198 claim remember that the test is whether the injury satisfies the verbal threshold rather than if it results in a catastrophic impairment.]

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

(e) For non-pecuniary damages:

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

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

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

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

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

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

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

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

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

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

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

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

Example:

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

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

Rule 3. After subtracting the deductibles, the non-pecuniary damages of the plaintiffs are $85,000.00 for the injured plaintiff, $12,500.00 for the wife and nothing for the son.

Rule 4	**Injured Plaintiff**	**Wife**	**Son**
Rule 1(a)	$83,200.00	x	x
(b)	$83,200.00	x	x
(c)	$8,000.00	x	x
(d)	x	x	x
(e)	$80,000.00	$16,000.00	$4,000.00
Rule 2	$28,560.00	x	x
Rule 3	$68,000.00	$10,000.00	zero

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

Rule 5(b) Future Loss of Income

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

Rule 5(c) Health Care Expenses

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

Rule 5(d) Other Pecuniary Losses

There are no other pecuniary losses in this example.

Rule 5(e) Non-Pecuniary Damages	**Injured Plaintiff**	**Wife**	**Son**
(i) all defendants joint and severally liable	$68,000.00	$10,000.00	zero
(ii) sole liability of unprotected defendant ($100,000 x 50% less $68,000), ($20,000 x 50% less $10,000) and ($5,000 x 50% less zero)	$0.00	$0.00	$2,500.00
(iii) unprotected defendant's share of joint and several liability (lesser of (i) or common law damages x 50%)	$50,000.00	$10,000.00	zero
(iv) protected defendant's share of joint and several liability ((i) minus (iii))	$18,000.00	zero	zero
(v) total liability of the protected defendant	$18,000.00	zero	zero
(vi) total liability of the unprotected defendant ((ii) plus (iii))	$50,000.00	$10,000.00	$2,500.00

Rule 6

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

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

Rule 7.

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

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

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

Injured Plaintiff

Claim	Protected Defendant	Unprotected Defendant
Pre-trial Loss of Income	$0.00	$21,400.00
Future Loss of Income	$31,200.00	$52,000.00
Health Care Expenses	$187.50	$312.50
Non-Pecuniary Damages	$18,000.00	$50,000.00
Total	$49,387.50	$123,712.50

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