Chrappa v. Ohm et al.
[Indexed as: Chrappa v. Ohm]

29 O.R. (3d) 222

[1996] O.J. No. 1667

Court File No. 93-CU-69827

Ontario Court (General Division),

Lax J.

May 9, 1996

Damages -- Personal injuries -- Deductions -- Disability benefits received by plaintiff to date of trial under employee group benefit plan to be deducted from damages under s. 267(1) (c) of Insurance Act -- Present value of future disability benefits to be deducted only where it is beyond dispute that plaintiff qualifies for such benefits -- Burden on defendant to establish entitlement to future disability benefits -- In absence of evidence establishing entitlement appropriate order being declaration that plaintiff holds disability benefits subsequently received in trust for defendant -- Insurance Act, R.S.O. 1990, c. I.8, s. 267(1)(c).

The plaintiff was injured in a motor vehicle accident and sued for damages. On a motion brought by the defendants under s. 266(4) of the Insurance Act, it was determined that the plaintiff was not precluded from bringing the action. After the jury returned a verdict in favour of the plaintiff, the trial judge had to determine whether long-term disability benefits paid to trial under an employee group benefit plan and the present value of future disability benefits should be deducted from the damages under s. 267(1)(c) of the Insurance Act.

Held, disability benefits paid to trial should be deducted; the present value of future disability benefits should not be deducted.

Categorizing payments as indemnity or non-indemnity payments is not a helpful approach to the interpretation of s. 267(1) (c). That section does not speak in terms of indemnity and non-indemnity payments and does not mention insurance or payments akin to insurance, nor is there any reference made or distinction drawn between payments derived from benefit plans funded exclusively by employees or by employers or by a combination of contributions from both. The section is silent on

the question of specified uncertain events and proof of pecuniary loss. Instead, it speaks in terms of "payments received" for "loss of income . . . or income continuation". A better approach to the interpretation of the section is to attempt to determine whether the payments in question can reasonably be construed to be payments of either kind. If the payments are for "loss of income" or for "income continuation", then, so long as the other language of the section is fulfilled, they are caught and are deductible. The disability benefits received by the plaintiff were intended to be and in fact were payments made to replace or continue the plaintiff's income due to her inability to work by reason of her disability. They were, therefore, deductible.

With respect to the present value of future disability benefits, in the absence of agreement or admitted facts on the issue of future entitlement to those benefits, the burden is on the defendant to establish entitlement. The fact that the plaintiff had been receiving long-term disability benefits did not give rise to a presumption of ongoing entitlement. If there was such a presumption, it was displaced here by evidence that the plaintiff's entitlement was conditional only, depending as it did on the insurer finding from time to time that she remained entitled to continuing benefits. The findings on the defence motion under s. 266(4) did not satisfy the evidentiary burden on the defendants to establish that the plaintiff would continue to receive long-term disability benefits to age 65 and was therefore "entitled". "Entitlement" should be interpreted in the narrowest possible terms and requires strict proof. It cannot be said that a person is "entitled" to the present value of payments to be made under an income continuation plan unless the payments will be received. Deduction of the present value of s. 267(1)(c) payments is only warranted if it is beyond dispute that the plaintiff qualifies in every respect. On the facts in this case, that was not established.

To avoid double recovery, a declaration should be made that the plaintiff hold in trust for the defendants and pay over to them any disability benefits subsequently received. If the stream of disability benefits was terminated, the plaintiff was to assign to the defendants her rights with respect to the insurer to the extent of the amount then outstanding on the judgment. The plaintiff was directed to co-operate in the prosecution of any action taken by the defendants against the insurer. After the defendants' monetary claim and any associated costs were satisfied, the defendants were to reassign to the plaintiff her rights in respect to the insurer unless the plaintiff was a party to any settlement which the defendants might reach with it and consented to the settlement as satisfying her claim against the insurer.

Brown v. Bouwkamp (1976), 12 O.R. (2d) 33, 67 D.L.R. (3d) 620, [1976] I.L.R. 1-807 (C.A.); Coderre v. Lambert (1993), 14 O.R. (3d) 453, 103 D.L.R. (4th) 289, [1993] I.L.R. 1-2977, 18 C.P.C. (3d) 17, 46 M.V.R. (2d) 1 (C.A.); Cox v. Carter (1976), 13 O.R. (2d) 717 (H.C.J.); Cugliari v. White (1994), 21 O.R. (3d) 225, 9 M.V.R. (3d) 237 (Gen. Div.) [supp. reasons 24 O.R. (3d) 57, 9 M.V.R. (3d) 237n (Gen. Div.)]; Cunningham v. Wheeler, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1, 88 B.C.L.R. (2d) 273, 164 N.R. 81, [1994] 4 W.W.R. 153 sub nom. Shanks v. McNee, Cooper v. Miller (No. 1); Dall Estate v. Adams (1994), 19 O.R. (3d) 93, 116 D.L.R. (4th) 189 (C.A.); Lovric v. Federation Insurance Co. of Canada (1989), 71 O.R. (2d) 403 (Dist. Ct.); Madill v. Chu, [1977] 2

S.C.R. 400, 71 D.L.R. (3d) 295, [1976] I.L.R. 1-810, 12 N.R. 187; Ratych v. Bloomer, [1990] 1 S.C.R. 940, 73 O.R. (2d) 448n, 69 D.L.R. (4th) 25, 39 O.A.C. 103, 107 N.R. 335, 30 C.C.E.L. 161, 3 C.C.L.T. (2d) 1; Schrump v. Koot (1977), 18 O.R. (2d) 337 (C.A.); Stante v. Boudreau (1980), 29 O.R. (2d) 1, 112 D.L.R. (3d) 172 (C.A.), consd

Other cases referred to

Boarelli v. Flannigan, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.); Bradburn v. Great Western Railway Co. (1874), L.R. 10 Ex. 1, [1874-80] All E.R. Rep. 195, 44 L.J. Ex. 9, 31 L.T. 464, 23 W.R. 48; Canadian Pacific Ltd. v. Gill Estate, [1973] S.C.R. 654, 37 D.L.R. (3d) 229, [1973] 4 W.W.R. 593; Carreiro v. Ontario (Superintendent of Insurance) (1994), 19 O.R. (3d) 332, 5 M.V.R. (3d) 70 (Gen. Div.); Coombe v. Constitution Insurance Co. (1980), 29 O.R. (2d) 729, 115 D.L.R. (3d) 499, [1980] I.L.R. 1-1278 (C.A.); Fong v. Bamford (1995), 25 O.R. (3d) 147, 15 M.V.R. (3d) 254 (Gen. Div.); Fraser v. Maritime Life Assurance Co. (1974), 52 D.L.R. (3d) 204, 19 N.S.R. (2d) 412 (T.D.); Gibson v. Sun Life Assurance Co. of Canada (1984), 45 O.R. (2d) 326, 6 D.L.R. (4th) 746, [1984] I.L.R. 1-1754 (S.C.); Glynn v. Scottish Union & National Insurance Co., [1963] 2 O.R. 705, 40 D.L.R. (2d) 929, [1963] I.L.R. 1-1111 (C.A.); London Life Insurance Co. v. Forget (1991), 3 O.R. (3d) 559, [1991] I.L.R. 1-2761 (Gen. Div.); London Life Insurance Co. v. Raitsinis (1990), 72 O.R. (2d) 278, [1990] I.L.R. 1-2568 (H.C.J.); Malkin v. Crown Life Insurance Co. (1989), 56 D.L.R. (4th) 296, 38 C.C.L.I. 117, [1989] I.L.R. 1-2444 (B.C.S.C.); Marshall v. Heliotis (1993), 16 O.R. (3d) 637, [1994] I.L.R. 1-3023 (Gen. Div.); Meyer v. Bright (1993), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354, 48 M.V.R. (2d) 1 (C.A.) [leave to appeal to S.C.C. refused (1994), 17 O.R. (3d) xvi, 172 N.R. 160n]; Parry v. Cleaver, [1970] A.C. 1, [1969] 1 All E.R. 555, [1969] 2 W.L.R. 821, 113 Sol. Jo. 147, [1969] 1 Lloyd's Rep. 183 (H.L.); Whittle v. Ontario (Minister of Transportation and Communications) (1995), 24 O.R. (3d) 394, 16 M.V.R. (3d) 226 (Gen. Div.)

Statutes referred to

Canada Pension Plan Act, R.S.C. 1985, c. C-8, s. 65(1)
Family Law Act, R.S.O. 1990, c. F.3, s. 63
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 6(1)(f)
Insurance Act, R.S.O. 1970, c. 224, s. 237(2)
Insurance Act, R.S.O. 1990, c. I.8, ss. 1 "disability insurance", 266(4), 267(1)
Public Service Superannuation Act, R.S.C. 1985, c. P-36

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Authorities referred to

O'Donnell, A., Automobile Insurance in Ontario (Markham: Butterworths, 1991), pp. 242-43
Ontario, Report of Inquiry into Motor Vehicle Accident Compensation in Ontario (1988)

RULING on deductions from damages in a personal injury action.

Robert Roth, for plaintiff.
S. Wayne Morris, for defendants.

LAX J.: -- The plaintiff was injured in a motor vehicle accident and sued for pecuniary and non-pecuniary damages. The jury returned a verdict awarding the plaintiff the sum of $188,000. In reasons for judgment released April 16, 1996, I review the facts in greater detail and dispose of a motion by the defendants pursuant to s. 266(4) of the Insurance Act, R.S.O. 1990, c. I.8. These reasons attempt to shed some light on the difficult issue of the deductibility of collateral benefits in what is referred to by the personal injury bar as "the Bill 68 window". This legislation amended the Insurance Act and applies to actions arising out of motor vehicle accidents that occurred between October 23, 1989 and December 31, 1993. At issue is the interpretation of s. 267(1)(c) of the Insurance Act.

At the conclusion of the trial, I was asked to determine the final award following deduction of statutory and other benefits paid and to be paid to the plaintiff. The benefits in question are:

(1)	No-fault accident benefits	$ 25,991.00
(2)	Employer income benefits	$ 9,644.00
(3)	Long-term disability benefits	$ 72,827.00 (paid to trial)
(4)	Future disability benefits	$150,159.24 (present value)

It is agreed that the no-fault accident benefits are deductible pursuant to s. 267(1)(a) of the Insurance Act and that the income benefits paid by the employer are deductible pursuant to s. 267(1)(c) of the Act. In dispute are the present and future disability benefits which the defendants say must be brought into account by virtue of s. 267(1)(c) in determining the damages to which the plaintiff is entitled.

I was also asked to assess the plaintiff's future loss, if any, of employer pension plan benefits. This issue was removed from the jury and left for my determination. It is the defendants' position

that, even if I award the plaintiff her full claim of $58,300 under this head of damage and add this to the jury award, the agreed statutory deductions together with the deductions for present and future disability benefits exceed the total amount awarded by the jury. I am asked by the plaintiff to find that the disability benefits which she has received and may continue to receive are in the nature of non-indemnity payments, within the private insurance exception to the collateral benefits rule, outside the ambit of s. 267(1) (c) of the Insurance Act and not deductible.

The Collateral Benefits Rule

The collateral benefits rule is intended to be a rule against double recovery by a plaintiff who receives benefits from a third party or collateral source. The rule comes into play when the plaintiff also recovers damages from a tortfeasor for the same loss. The reason for the rule is simple and derives from the fundamental principle of recovery in tort which is to compensate the plaintiff to the extent that money can for the full extent of the loss but no more. This apparently straightforward rule has been the subject of considerable judicial thought and has spawned exceptions, narrow and broad, extending back to the last century in Bradburn v. Great Western Railway Co. (1874), L.R. 10 Ex. 1, [1874-80] All E.R. Rep. 195, and forward to the recent decision of the Supreme Court of Canada in Cunningham v. Wheeler, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1.

The plaintiff's argument rests on a line of cases which establish that moneys received which are akin to private insurance payments do not offend the rule against double recovery: Boarelli v. Flannigan, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.); Canadian Pacific Ltd. v. Gill Estate, [1973] S.C.R. 654, 37 D.L.R. (3d) 229; Ratych v. Bloomer, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, and Cunningham v. Wheeler.

In my respectful view, the most complete and cogent analysis of the rationale for the rule and its several exceptions is found in the judgments of Madam Justice McLachlin in the two recent decisions of the Supreme Court of Canada to which I have referred. In Ratych v. Bloomer, Justice McLachlin wrote on behalf of the majority (Lamer C.J.C., La Forest, L'Heureux-Dubé and Sopinka JJ.) with Mr. Justice Cory in dissent. In Cunningham v. Wheeler, Cory J. wrote on behalf of the majority (Sopinka, Iacobucci and Major JJ.), McLachlin J. dissenting in part, where she was joined by Justices La Forest and L'Heureux-Dubé. I attempt below to summarize the current state of the law and to relate this to the argument which was advanced before me. For these purposes, I accept that the plaintiff's long-term disability policy was one which was paid for by her. Although it was a group benefit plan, the employer made no contributions.

Does the Collateral Benefits Rule Apply to s. 267(1)(c)?

In Cunningham v. Wheeler, a majority of the court held that disability benefits received under a collective agreement had been "paid for" by the employee in the sense that they had been bargained for as part of the wage package by way of "reduction" from the plaintiff's hourly rate of pay. Cory J., speaking for the majority, construed these payments as falling within the private insurance exception to the collateral benefits rule. He distinguished the court's earlier decision in Ratych v.

Bloomer on the basis that the majority there held that the plaintiff did not meet the evidentiary burden and establish that the benefits were paid for by the employee so as to make them akin to private insurance. In his view, Ratych did not depart from the private insurance exception first articulated by the House of Lords in Bradburn, adopted in Parry v. Cleaver, [1970] A.C. 1, [1969] 1 All E.R. 555 (H.L.), and applied by Canadian courts since.

Madam Justice McLachlin disagreed with Mr. Justice Cory's interpretation of the ratio in Ratych v. Bloomer. It was her view that there the court had held that, as a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account. The issue which is joined in Cunningham v. Wheeler is whether or not the private insurance exception in Bradburn should be confined to personal contracts of insurance taken out and paid for by the plaintiff or extended to employment plans to which employees have contributed directly or indirectly. Madam Justice McLachlin concludes that, on the basis of precedent, including Ratych v. Bloomer, the weight of current authority is in favour of deducting wage benefits and should not be extended "unless the departure is clearly required on the grounds of common sense or policy". I do not propose to review the arguments canvassed by Madam Justice McLachlin "on the grounds of common sense and policy" although I say, with respect, that I would choose to follow her reasoning and conclusions if I were free to do so. Obviously, I am bound by the majority judgment. The real issue is whether the decision applies at all in the face of s. 267(1)(c). I have concluded that it does not.

Cunningham v. Wheeler was in fact a trilogy of cases emanating from British Columbia where no statutory scheme such as we have in Ontario had been enacted. The collateral benefits rule and its exceptions have developed from common law principles. It was the court's view that the private insurance exemption for lost wages which had a long history (a history with which McLachlin J. takes issue) should be maintained in those jurisdictions where legislatures had taken no action. However, in Ontario, the situation is different. At p. 401 S.C.R., pp. 10-11 D.L.R., Cory J., speaking for the court, said:

> There is a good reason why the courts should be slow to change a carefully considered long-standing policy that no deductions should be made for insurance monies paid for lost wages. If any action is to be taken, it should be by legislatures.
>
> . . . . .
>
> [I]n Ontario the non-deductibility principle was abandoned in relation to motor vehicle accidents when a no-fault motor vehicle insurance regime was enacted . . . s. 267 of the Insurance Act, R.S.O. 1990, c. I.8. It is significant that this was done in the context of creating a new system for compensating victims of motor vehicle accidents, largely outside traditional tort law.

In my view, the Supreme Court of Canada has recognized that Boarelli v. Flannigan, Ratych v. Bloomer and Cunningham v. Wheeler are no longer the law in Ontario with respect to injuries caused by automobile accidents between October 23, 1989 and December 31, 1993. It is legislation

and not common law principles which govern. This is also the view of Allan O'Donnell, Automobile Insurance in Ontario (Markham: Butterworths, 1991), who discusses this at pp. 242-43:

> For injury claims arising out of automobile accidents that occurred on or before October 23, 1989, reference should be made to the Ratych v. Bloomer case and the subsequent cases that refer to it. Similarly, for non-automobile caused injury cases, Ratych v. Bloomer and the cases that have followed it and will continue to follow it should be consulted. However, for automobile caused injuries after October 23, 1989, s. 231b [now s. 267(1)] of the Insurance Act appears to be a complete statutory code with respect to the deduction of collateral sources in the awarding of damages for personal injuries resulting from automobile accidents.

And, it is the view of the Ontario Court of Appeal in Dall Estate v. Adams (1994), 19 O.R. (3d) 93 at p. 95, 116 D.L.R. (4th) 189:

> Previously, the rule in Boarelli v. Flanigan, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (C.A.), as revised by Ratych v. Bloomer, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25 (and as even more recently revised by the Supreme Court of Canada in Cunningham v. Wheeler . . . [[1994] 1 S.C.R. 359, 88 B.C.L.R. (2d) 273]), permitted a plaintiff to recover what were referred to as collateral benefits, including disability coverage where the plaintiff had paid or contributed to the cost of such coverage.

(Emphasis added)

The plaintiff's ability to resist the deductibility of the disability benefits depends then on the interpretation to be given to s. 267(1)(c) of the Insurance Act to which I now turn.

The Indemnity/Non-Indemnity Approach to s. 267(1)(c)

> Section 267(1)(c) of the Insurance Act reads as follows:
>
> 267(1) The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by,
>
> (c) all payments that the person has received or that were or are available for loss of income under the laws of any jurisdiction or under an income continuation benefit plan and by the present value of any such payments to which the person is entitled . . .

The plaintiff contends that payments which can be characterized as non-indemnity payments are excluded from the ambit of s. 267(1)(c) and supports this argument with reference to the 1988

Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, more familiarly known as the Osborne Report, statutory provisions in the Insurance Act and the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), as amended, the decision of this court in Cugliari v. White (1994), 21 O.R. (3d) 225, 9 M.V.R. (3d) 237 (Gen. Div.), and the decision of the Ontario Court of Appeal in Dall Estate v. Adams, supra.

Under Mrs. Chrappa's long-term disability plan, she receives 60 per cent of her pre-disability net earnings, indexed to inflation until age 65, so long as she remains disabled as this is defined in her plan. The plaintiff relies on the definition of "disability insurance" in s. 1 of the Insurance Act, which is:

> [I]nsurance undertaken by an insurer as part of a contract of life insurance whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease . . .

Reference is also made to s. 6(1)(f) of the Income Tax Act which requires a taxpayer to include as a taxable benefit amounts paid pursuant to a disability insurance plan where an employer has made a contribution to its cost. Payments received from plans based on employee contributions are not taxable. It was submitted by the plaintiff that, as her plan is defined by the Insurance Act as an insurance policy, treated as one by Revenue Canada, and otherwise meets the criteria of a contract in the nature of indemnity as defined by Osborne J., I should regard payments received under the plan as non-indemnity payments and make no deductions from the award.

The argument based on the definition of "disability insurance" was advanced and rejected in Gibson v. Sun Life Assurance Co. of Canada (1984), 45 O.R. (2d) 326 at p. 332, 6 D.L.R. (4th) 746 (S.C.). The provisions of the Income Tax Act are of little assistance in interpreting the provisions of s. 267(1)(c) of the Insurance Act. This leaves the argument based on the "categorization" of the payments.

The Osborne Report provides definitions of indemnity and non-indemnity payments at p. 429 which were adopted by Madam Justice McLachlin in Cunningham v. Wheeler at p. 371 S.C.R., pp. 26-27 D.L.R.:

> An indemnity payment is one which is intended to compensate the insured in whole or in part for a pecuniary loss. [Unemployment insurance benefits and employment disability benefits are examples of indemnity payments.] A non-indemnity payment is a payment of a previously determined amount upon proof of a specified event, whether or not there has been pecuniary loss. [Life insurance, employee retiree benefits and fixed-sum accident benefits are examples of non-indemnity payments.]

In some instances, non-indemnity payments, like indemnity payments are predicated on the happening of an event and payment of a sum certain. The plaintiff argues that her policy fits this

description and I am inclined to agree. Looked at in this way, the distinction between indemnity and non-indemnity contracts is difficult to discern. However, this argument ignores the fundamental purpose of an indemnity payment. Indemnity payments are compensatory. They are intended to and in fact do replace a financial loss. That the insured contracts to be indemnified for this loss does not detract from this essential purpose. There is no corresponding compensatory feature to non-indemnity payments. Payment is made on the contingency whether or not there is financial loss. It is for this reason that courts have held that non-indemnity payments do not violate the rule against double recovery. However, it is clear that Justice Osborne regarded employment disability plans as falling within the category of indemnity payments. It seems to me that reliance on Justice Osborne does not advance the plaintiff's argument.

The issue facing Madam Justice Caswell in Cugliari v. White was the nature of disability payments made by the Government of Canada pursuant to the Canada Pension Plan Act, R.S.C. 1985, c. C-8, as amended. It was her view that the legislature enacted s. 267(1) in accordance with Justice Osborne's recommendations. Accordingly, she accepted that non-indemnity payments were outside the section. Her analysis sought to determine the nature of the C.P.P. payments with reference to the indemnity/ non-indemnity distinction which has developed in the cases, some of which I have referred to. Reference may also be had to: Glynn v. Scottish Union & National Insurance Co., [1963] 2 O.R. 705, 40 D.L.R. (2d) 929 (C.A.); London Life Insurance Co. v. Raitsinis (1990), 72 O.R. (2d) 278, [1990] I.L.R. 1-2568 (H.C.J.); and London Life Insurance Co. v. Forget (1991), 3 O.R. (3d) 559, [1991] I.L.R. 1-2761 (Gen. Div.). Caswell J. concluded that the C.P.P. payments were in the nature of indemnity payments, caught by s. 267(1)(c), and therefore deductible.

With respect, I do not think that a "categorization" approach is helpful in the interpretation of s. 267(1)(c). The section does not speak in terms of indemnity and non-indemnity payments. It does not mention insurance or payments akin to insurance. Nor is there any reference made or distinction drawn between payments derived from benefit plans funded exclusively by employees or by employers or by a combination of contributions from both. The section is silent on the question of specified uncertain events and proof of pecuniary loss. Instead, it speaks in terms of "payments received" for "loss of income . . . or income continuation". It seems to me that the better approach is to attempt to determine whether the payments in question can reasonably be construed to be payments of either kind. Put in its simplest terms, what are the payments for?

This was the approach adopted by the Court of Appeal in Dall Estate v. Adams. There, the court was asked to determine whether s. 267(1)(c) required the deduction of benefits available under the Canada Pension Plan and the Public Service Superannuation Act, R.S.C. 1985, c. P-36, in Mrs. Dall's Family Law Act claim. In my view, the court approached the issue by asking itself, what are these payments for? The answer was that they were survivor benefits paid to Mrs. Dall by reason of Mr. Dall's death. They were not payments to compensate Mrs. Dall for her "loss" or "discontinuance of income" as she may never have received this income. Therefore, they were not payments made to continue income and were outside the section.

The court found that s. 267(1)(c) of the Insurance Act was in conflict with s. 63 of the Family Law Act, R.S.O. 1990, c. F.3. Austin J.A., speaking for the court, said at p. 96:

> In my view, having regard to the degree to which the non-deductibility of the type of benefits in issue in these proceedings had been established in Ontario, as well as elsewhere in Canada, it would have taken the clearest of language to displace it. That description does not fit the language of s. 267(1)(c). More particularly, the legislation which brought about the new approach in the fall of 1989 referred with particularity to a host of affected statutes . . . It did not, however, refer to the Family Law Act, s. 63, leaving the inference that there was no legislative intent to alter that provision.

I do not interpret this passage to mean that an interpretation of s. 267(1)(c) requires a categorization of the benefits in question as indemnity or non-indemnity payments. Also, I do not agree with the statement in Fong v. Bamford (1995), 25 O.R. (3d) 147 at p. 157, 15 M.V.R. (3d) 254 (Gen. Div.), that the Court of Appeal in Dall "placed considerable emphasis on the existence of a substantial long-standing body of case-law in Ontario and elsewhere that survivor's benefits were not deductible from damage awards". In my view, the court was merely stating that it was not prepared to read into the language of the section a deprivation of rights accorded by another statute or in law, in the absence of clear language which is not present here. I agree with this.

As I have earlier observed, the distinction between indemnity and non-indemnity payments is frequently blurred. Both types of payments may be triggered on the happening of a specified event, whether it be death, accident, retirement, disability or unemployment. Sometimes, proof of actual pecuniary loss is not required and yet the court has held that the payments in question are in the nature of indemnity or partial indemnity: Gibson v. Sun Life Assurance Co. of Canada, supra. As Madam Justice McLachlin observed in Cunningham v. Wheeler at p. 390 S.C.R.:

> The history of judicial attempts to deal with collateral benefits belies the suggestion that it is easy to decide when they should or should not be brought into account in a negligence action.

I frankly do not see how the categorization of payments is of any assistance in interpreting s. 267(1)(c). If one must look for a distinguishing feature, it is preferable to look to the purpose of the payment. What the legislature has done in s. 267(1)(c) is to provide the means to do this. If the payments are for "loss of income" or for "income continuation" then, so long as the other language of the section is fulfilled, they are caught and are deductible.

Mrs. Chrappa's disability plan is with The Great-West Life Assurance Company. The plan document states:

> Your financial stability depends on the regular salary you receive from CBC. If you are unable to work because of an accident or illness, your income is protected by the Short-Term and Long-Term Disability Plans offered by the Benefits Program.

(Emphasis added)

Benefits under the plan terminate when the employee returns to work unless the employee engages in "approved rehabilitative employment", in which case the plan "may continue to pay you an income . . . [to be] reduced by 50 per cent of the earnings you receive from rehabilitative employment"

(emphasis added).

The evidence was that Mrs. Chrappa had received benefits under her plan to the time of trial totalling $72,827 which were continuing. There is no dispute that she had "received" these payments as required by the section. In my view, there can be little doubt that these benefits were intended to be and in fact were payments made to replace or continue Mrs. Chrappa's income due to her inability to work by reason of her disability. They are therefore deductible.

Is the Present Value of Future Payments Deductible?

To this point, I have been dealing with payments received by the plaintiff from her disability insurer to the date of trial. At trial, the plaintiff led accounting evidence with respect to the value of the plaintiff's present and future losses. During cross-examination of the accountant, he was asked to calculate the present value of the future disability payments to the plaintiff assuming she remains disabled to age 65. The amount is $150,159.24. The issue is whether or not s. 267(1)(c) also requires the deduction of this amount from the jury award.

On this issue, both plaintiff and defendants rely on the Court of Appeal decision in Coderre v. Lambert (1993), 14 O.R. (3d) 453, 46 M.V.R. (2d) 1 (C.A.). To my knowledge, this is the only decision of a higher court which has considered this aspect of s. 267(1)(c). In that case, Mr. Coderre was a passenger on a snowmobile and sustained injuries when it collided with another snowmobile. He commenced an action against the drivers and owners of both vehicles. Coderre was insured under his employer's accident and insurance plan and had received short-term disability benefits. He had applied for and been refused long-term benefits by London Life. The case turned on a procedural question which was whether or not London Life could be joined in the action in order to have determined, at the same time, the entitlement of Coderre to these benefits. The court was unanimous that this could not be done either under the Rules of Civil Procedure or under the Insurance Act.

In obiter, the members of the court expressed different views on the interpretation that should be given to s. 267(1)(c) and, in particular, its concluding language which reads "and by the present value of any such payments to which a person is entitled". Justices Grange and McKinlay, after reciting the section, state at pp. 462-63 O.R., p. 11 M.V.R.:

> [Section 267(1)(c)] clearly reduces the recovery of the plaintiff by the present value of any payment to which he is entitled under the insurance policy which the plaintiff's

> employer has with London Life. We need refer only to Madill v. Chu, [1977] 2 S.C.R. 400 . . . when the majority held that a similar clause relating to workmen's compensation benefits did not require a formal application and rejection. It was sufficient that upon the admitted facts the insured was entitled to the benefit. Perhaps the facts entitling the plaintiff to the benefit here are not admitted but no party to the litigation disputes that, if the plaintiff recovers judgment for long-term disablement from the defendants, his recovery will be subject to reduction by the amount of the coverage of London Life.

This is, in part, the position of the defendants in the case before me.

The plaintiff prefers the obiter of Austin J.A. at p. 460 O.R., pp. 9-10 M.V.R. and his conclusion which was against deduction:

> Any reduction in Coderre's judgment would be upon the basis that London Life is required to pay Coderre long-term benefits. On the face of it, Coderre would be no worse off; he would just receive the same amounts from London Life rather than from Bellemare, but over a longer period. But what if London Life went out of business a week after the trial? Or what if six months after the trial London Life decided that Coderre's condition had changed and he was now no longer entitled to long-term disability benefits and London Life discontinued payments? Or what if six months after the trial Coderre died, thereby terminating London Life's liability? In the first two of these situations Coderre, and in the third situation, his estate, would be worse off than if he had recovered in full from Bellemare. He would not have the payments and it would be up to him to decide what to do and, if to sue, to pay the costs and run the risk of litigation. Some of the potential problems are illustrated by the decision in Constitution Insurance Co. of Canada v. Coombe (1992), 11 O.R. (3d) 783 . . . (Gen. Div.).

It is generally understood that the amendments to the Insurance Act came into force as part of a comprehensive scheme of motor vehicle accident legislation which was intended to substitute tort damages with a "no-fault" compensation regime. However, by s. 266(1) of the Insurance Act, tort recovery is preserved in fatal accidents and in those cases where a court determines that the injured person has sustained permanent serious continuing physical injuries or permanent serious disfigurements. It is also generally understood that the deductibility provisions in s. 267(1) were designed to eliminate double recovery in those cases in which tort damages were awarded. Plainly read, s. 267(1) would appear to give the tortfeasor credit for all payments received and to be received by the plaintiff. Where future benefits are predictable and certain, for example, in cases of catastrophic injuries, the marriage of ss. 266(1) and 267(1) is, I suggest, harmonious. In such cases, the parties may even agree on the present value of these payments. However, in the case which is not catastrophic but is nevertheless one in which the court has determined that the plaintiff's injuries come within s. 266(1), there may be far less predictability and certainty with respect to continuing entitlement to future benefits.

In Meyer v. Bright (1993), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354 (C.A.), the court was asked to interpret the language of s. 266(1). In so doing, it determined that injuries that were less than catastrophic were capable of "crossing the threshold". It also determined that courts are to decide, on a case-by-case basis, the kind of injuries which are sufficiently serious, important and permanent and for which tort damages are recoverable. The analysis of s. 266(1) provided in Meyer v. Bright makes it possible for cases such as the one at bar to be actionable. A determination of whether or not a plaintiff's injuries are within one or both of the exceptions in s. 266(1) is a question of fact in each case to be decided in accordance with the three tests set out by the Court of Appeal in Meyer v. Bright. These tests may not be (and in many cases will not be) the same tests as are found in policies of disability insurance which vary, according to insurer. Moreover, the evidence relied on by a court in coming to a determination under s. 266(1) may differ from the evidence relied on by a disability insurer in deciding whether or not an insured meets the criteria set out in the policy. At once, the legislative harmony between s. 266(1) and s. 267(1) is disturbed and the questions posed by Austin J.A. in Coderre are brought into sharp focus.

In this case, there is no agreement, as there apparently was in Coderre, that the future benefits are deductible. Here, unlike Coderre, the plaintiff was receiving long-term disability benefits at the time of trial. Here, I have evidence of the present value of these benefits to age 65. It is on these facts that I am asked to give some meaning to the legislative intent expressed in the words "shall be reduced by . . . the present value of any such payments to which the person is entitled". It seems to me that the issue I am asked to address must turn on the interpretation to be given to the word "entitled" in s. 267(1)(c). Can it be said here that Mrs. Chrappa "is entitled" to these benefits? The language of the section is otherwise mandatory.

In Coderre, Justices Grange and McKinlay rely on Madill v. Chu, [1977] 2 S.C.R. 400, 71 D.L.R. (3d) 295, as authority for the proposition that "entitlement" does not depend on a formal application and rejection. However, their obiter recalls that, in Madill v. Chu, the facts establishing "entitlement" were agreed upon. In Coderre, they state that it was "undisputed" that, if Coderre recovered judgment against the defendants for long-term disablement, his recovery would be subject to reduction by the amount of this coverage.

Austin J.A. states in Coderre at p. 459 O.R., p. 7 M.V.R. that the decision of the majority in Madill v. Chu stands for the following proposition:

> [W]here the plaintiff meets all of the qualifications for a benefit, he is then "entitled", even if he has not applied for such benefits. In my view, that case is not helpful here. It would only be helpful if it was beyond dispute that Coderre qualified for long-term disability benefits in every respect but had not applied for them. Those are not the facts: Coderre has applied for the benefits and London Life has refused to pay them.

I do not think that there was any conflict among the members of the court in Coderre on the interpretation to be given to the Supreme Court of Canada decision in Madill v. Chu. It would

appear to be confined to those cases where there is no application, but the facts establishing "entitlement" are either agreed or they are "beyond dispute". I believe that this is in fact what was decided in Madill v. Chu and refer to the decision of the majority where Ritchie J. said at pp. 407-08:

> The singular feature of the present case is that no evidence was adduced by either party at the trial and the record is therefore confined to an agreement as to the existence of facts which disclose that the respondent's injuries were caused while he was in the course of his employment in an industry included in Sch. 1 of the statute . . . These facts, to which the respondent agreed, in my opinion constitute prima facie evidence . . . [that the respondent] was entitled to the benefits of The Workmen's Compensation Act.

The case before me is different from Madill v. Chu and from Coderre. Here, there are no agreed facts from which "entitlement" can be established. It is not in dispute that the plaintiff was receiving long-term disability benefits at the time of trial, however, the plaintiff's "entitlement" to the benefits is very much in dispute. The plaintiff introduced evidence at trial that, just prior to trial, the plaintiff had been required to attend a medical assessment arranged by Great-West Life and, from time to time, would be required to be medically examined in order for the insurer to determine her continuing entitlement to benefits. On this evidence, it was argued that, at least so far as the insurer is concerned, entitlement to future benefits is a matter of some uncertainty. In any event, it is my view that in Madill v. Chu, the Supreme Court of Canada decided that even agreed facts are not determinative. They are to be regarded as prima facie evidence only. I infer from this that, even if I find that there is a presumption in favour of continuing entitlement as the defendants contend I should, the presumption may be displaced by appropriate evidence.

Subsequent to Madill v. Chu, the Court of Appeal reconsidered the meaning of "entitled" in Stante v. Boudreau (1980), 29 O.R. (2d) 1, 112 D.L.R. (3d) 172 (C.A.), where the court discusses this with reference to its earlier decision in Brown v. Bouwkamp (1976), 12 O.R. (2d) 33, 67 D.L.R. (3d) 620 (C.A.). It acknowledged that, to the extent that Brown v. Bouwkamp decided that a party who had made no claim against his no-fault insurer could not be viewed as "entitled" to benefits, it was overruled by the Supreme Court of Canada in Madill v. Chu. In passing, I note that the words "are available" in the first part of s. 267(1)(c) and which also appear in s. 267(1)(a) relating to "no-fault" benefits, would appear to codify Madill v. Chu. However, Brown v. Bouwkamp is still the law on the meaning of "entitled" for a party who has made a claim and has been denied. There is no "entitlement": see Stante v. Boudreau, at pp. 6-7 O.R.

In Stante v. Boudreau, the question was whether or not a plaintiff who had been receiving no-fault benefits from his own insurer which had been terminated, was required, in an action against the tortfeasor, to deduct an amount to which he may have been entitled in an action against his own insurer. In my view, the case stands for the proposition that, in the absence of agreement or admitted facts as to the deductions to be made from an award, or a finding of fact on the issue of

future entitlement, the burden is on the defendant to establish "entitlement". The court found that the question put to the jury in that case did not establish that the plaintiff would have been "entitled" to the no-fault benefits for the period in question. There was therefore no finding by jury or judge upon which the deductions could be made. The defendant was unable to obtain the benefit of the release then provided by s. 237(2) of the Insurance Act, R.S.O. 1970, c. 224.

The defendants argue that, as Mrs. Chrappa has been receiving long-term disability benefits for some time, this gives rise to a presumption of ongoing entitlement. I was referred to cases which stand for the proposition that the onus is on the insurer to demonstrate a change in circumstances to establish disentitlement; Coombe v. Constitution Insurance Co. (1980), 29 O.R. (2d) 729, 115 D.L.R. (3d) 499 (C.A.); Fraser v. Maritime Life Assurance Co. (1974), 52 D.L.R. (3d) 204, 19 N.S.R. (2d) 412 (T.D.); and Malkin v. Crown Life Insurance Co. (1989), 56 D.L.R. (4th) 296, 38 C.C.L.I. 117 (B.C.S.C.). I take no issue with the proposition for which these cases stand. But, these are cases as between insurer and insured whereas the issue here is as between plaintiff and defendants. I do not see how a presumption which favours the insured in a dispute with an insurer about the continuation of benefits can become a presumption in these proceedings in favour of a defendant who seeks credit for these benefits. The burden of proof should lie on the party seeking the benefit of the "entitlement". In any event, the presumption is displaced here by the evidence which established that the plaintiff's "entitlement" is conditional only depending as it does on the insurer finding from time to time that she remains "entitled" to continuing benefits.

Stante v. Boudreau is unaffected by anything that was said in Madill v. Chu on the burden of proof. It is still the law in Ontario that, in the absence of agreed facts, which constitute prima facie evidence only, the onus is on the defendant to establish "entitlement". Stante v. Boudreau does not discuss the standard of proof to which the defendant is put. The defendants argue that they need only establish "entitlement" on the test of substantial possibility as discussed in Schrump v. Koot (1977), 18 O.R. (2d) 337 (C.A.). In my view, Schrump v. Koot applies only to the question of the assessment of future damages: see Carreiro v. Ontario (Superintendent of Insurance) (1994), 19 O.R. (3d) 332, 5 M.V.R. (3d) 70 (Gen. Div.).

In the case before me, the defendant did adduce evidence through the cross-examination of the accountant as to the present value of the future benefits. The plaintiff takes no issue with the amount. But, the plaintiff has put in issue the fact of continuing entitlement under the disability policy. That policy defines disability as follows:

Definition of Disability

> To receive Long-Term Disability benefits, you must be considered "totally disabled" according to the plan definition. That is, for the first seventeen weeks of short-term disability and for the next two years, starting from your eighteenth week of disability, you must be unable to perform duties that regularly take 60% of your time to complete, or certain tasks that are essential to your own job. Thereafter, you must be unable to

> perform the duties of any job for which you are or could become reasonably qualified by your education and experience.

The findings made by me pursuant to the motion brought by the defendants under s. 266(4), and which are set out in reasons for judgment released April 16, 1996, cannot be construed as deciding or even presuming that the plaintiff, to age 65, will be "unable to perform the duties of any job for which [she is] or could become reasonably qualified by [her] education and experience". This is the test she must meet under her policy. This is not the question I answered nor did the jury answer it. In effect, I am asked to infer that my findings of fact on the defence motion satisfy the evidentiary burden on the defendant to establish that the plaintiff will continue to receive long-term disability benefits to age 65 and is therefore "entitled". I do not think that any such inference is warranted. Even if I am wrong about the appropriate standard of proof and Schrump v. Koot applies, I do not agree that the fact that the plaintiff was receiving benefits at the time of trial and that I found she had brought herself within s. 266(1)(b) necessarily establishes, even on a test of substantial possibility, that her insurer will conclude that to age 65, she remains totally disabled under the strict test set out in her policy. The evidence does not establish this. No representative of Great-West Life testified nor was the doctor who conducted the medical assessment of the plaintiff shortly before trial called to give evidence.

The cases which I have discussed on the meaning of "entitled" do not of course directly address the issue here. In each, there was either no claim made or there was a claim and a refusal. This is a different case because here there is a claim and continuing payments. Apart from the obiter in Coderre, no court has apparently dealt with this. Nevertheless, I cannot distinguish this case in principle from the cases to which I have referred. It is apparent to me from my review of the cases that our courts have consistently interpreted "entitlement" in the narrowest possible terms and required strict proof. There is good reason for this. The claimant's receipt of future benefits will always be subject to some uncertainty when the determination of future entitlement is made by a party which is not bound by the findings in the lis between plaintiff and defendant, when it is founded on facts and tests which may differ from those at issue in the lawsuit, and when, despite the medical opinions advanced at trial, the medical condition of the plaintiff changes for better or worse.

In Coderre, Austin J.A. recognized the uncertainty which faced Mr. Coderre. Mrs. Chrappa is also faced with uncertainty. Perhaps the degree of uncertainty is less than in Mr. Coderre's case, as her disability insurer, until now, has paid benefits. But, it is one thing to say that she "is entitled" today. It is quite another to say that she "is entitled" to age 65. A present value calculation is a prediction into the future. It is an amount which, if invested today, will provide the claimant with the payments which he or she will receive to a time certain in the future. In my view, it cannot be said that a person "is entitled" to the present value of payments to be made under an income continuation plan unless the payments will be received. To borrow the language of Austin J.A. in Coderre, it must be "beyond dispute that the plaintiff qualifies in every respect".

In Coderre, it was the opinion of Austin J.A. that courts should continue to narrowly interpret "entitled" as it appears in the present legislation. He states at p. 459 O.R., p. 7 M.V.R.:

> What was s. 237(2) is now, with substantial cosmetic changes, s. 267(1)(a). The objective of that subsection, like that of s. 267(1)(c), is to avoid or prevent double recovery. As "entitled" in what is now s. 267(1)(a) has been consistently interpreted in a "narrow" fashion, it is reasonable to assume that when the legislature added s. 267(1)(c) to the Act in 1989 and used the same word, it intended that word to be interpreted the same way.

I respectfully adopt this as the correct approach to this subsection.

There is a final good reason for rejecting the defendants' arguments on this point. I return to where I began in these reasons in discussing the collateral benefits rule. The purpose of the rule is to prevent double recovery and derives from the fundamental principle of recovery in tort which is to compensate the plaintiff to the full extent that money can for the full extent of the loss but no more. Given that this legislation is an attempt to provide fair and full recovery to plaintiffs and to eliminate double recovery, I cannot give the subsection an interpretation which would put the plaintiff at risk of reducing her recovery below the amount to which she is entitled in law. This was the view expressed by McLean J. in Whittle v. Ontario (Minister of Transportation & Communications) (1995), 24 O.R. (3d) 394, 16 M.V.R. (3d) 226 (Gen. Div.), in considering a somewhat different issue. Nevertheless, I concur in his reasoning which applies equally here.

In my view, deduction of the present value of s. 267(1)(c) payments is only warranted if the facts establish that it is beyond dispute that the plaintiff qualifies in every respect. It is only then that the plaintiff "is entitled" to the future payments and the defendant can receive credit for these payments by way of a deduction from the award made at trial. In the absence of agreed facts, which constitute prima facie evidence only, the onus is on the defendant to establish this. I cannot say that, on the facts before me, this has been established.

The Approach to Future Payments

Having decided that deduction is not required or warranted in this case does not end the matter. If the plaintiff continues to be eligible for disability benefits, these must be brought into account in some way. Otherwise, the rule against double recovery is violated. Courts have employed the doctrine of trust and of assignment to deal with this situation.

In Cox v. Carter (1976), 13 O.R. (2d) 717 (H.C.J.), Morden J., as he then was, employed the doctrine of trust to require that future payments received by the plaintiff from his insurer be held in trust for and paid over to the defendant. So-called "Cox v. Carter orders" have been made routinely by courts in the 20 years since that decision. In Cox v. Carter, the legislation under consideration was s. 237(2) of the Insurance Act which, as Austin J.A. observes in Coderre, is "what is now, with substantial cosmetic changes", s. 267(1)(a). The object of that subsection and of s. 267(1)(c) is to

avoid double recovery. An order in the nature of a "Cox v. Carter order" was made in Whittle v. Ontario (Minister of Transportation & Communications), supra, to deal with the uncertainty of a reduction in payments where the no-fault insurer claimed an overpayment and the issue was to be arbitrated. There is no reason why "Cox v. Carter orders" should not continue to be made under s. 267(1)(c).

The difficulty with a "Cox v. Carter order" is illustrated by the facts in Lovric v. Federation Insurance Co. of Canada (1989), 71 O.R. (2d) 403 (Dist. Ct.). There, a "Cox v. Carter order" was made but, immediately after judgment, the disability insurer stopped making payments. The defendant commenced an action in the name of the plaintiff against the disability insurer whereupon the plaintiff moved for an order dismissing or staying the action on the grounds that he had not authorized any action in his name. To address this difficulty, Kurisko D.C.J. ordered that the plaintiff be added as a defendant in the action.

In Coderre, it was too early to know what action, if any, the plaintiff might take against his disability insurer. To avoid the awkward result which materialized in Lovric, it was suggested by Austin J.A. that, in the action by Coderre against the defendants (the action was on the trial list but had not been reached), it be a term of the judgment that Coderre assign to the paying defendants his interest in the claim against London Life Limited to the extent to which these defendants were required to compensate Coderre for his losses. Austin J.A. would also have included in the assignment an agreement by Coderre to co-operate in the prosecution of any such claim.

This approach commends itself to me. It puts the onus on the defendants to take action in the event the disability insurer terminates payment. It is, after all, the defendants who seek credit and who are entitled to credit to the extent of any duplication in payments. It requires the plaintiff to co-operate in the prosecution of any such action thereby avoiding the unsatisfactory result which occurred in Lovric. It puts the risk of non-payment with the defendants thereby avoiding the "uneasiness" which led to Morden J.'s decision in Cox v. Carter and the rhetorical questions of Austin J.A. in Coderre. However, it does not ensure the protection of the plaintiff's legitimate interest in the prosecution of a claim in regard to any excess of amounts which would satisfy the defendants. In other words, this approach could result in a settlement between the defendants' insurers and the disability insurer which would result only in repayment of the defendants' monetary claim. It seems to me that there are two ways of addressing this. The plaintiff asks that I impose a trust on the defendants so that they are required to act uberrima fides with respect to pursuing and resolving the assigned legal chose in action. The other way to address this is to require that the plaintiff's chose in action be re-assigned by the defendants to the extent of any interest which remains after the defendants' monetary claim and costs is satisfied. I prefer the second solution.

There was evidence at trial that the plaintiff had made application to the Canada Pension Plan for disability benefits but that no decision had been made on her application. The defendants submit that, if I am disposed to make an assignment to them of the plaintiff's chose in action against Great-West Life, the assignment should also include the plaintiff's rights as against the Canada

Pension Plan. However, s. 65(1) of the Canada Pension Plan Act prohibits this and I can make no such order.

CBC Pension Loss

The plaintiff presented evidence at trial through Mr. Rosen, the accountant who testified on her behalf, as to the value of the plaintiff's future loss of her CBC pension. This was the issue which was removed from the jury and left for my assessment. Initially, Mr. Rosen calculated this loss to be $58,300. As I understand his evidence, this figure represents the diminished value of the pension to be paid to the plaintiff from age 65 due to the fact that no contributions are being made to the pension from the date of accident to age 65 with a consequent loss of pensionable service on which the pension payments will be based. However, the assumption on which he calculated this amount is, at least in part, incorrect. The plaintiff's disability policy provides that the disability insurer will make payments to the pension plan and that the employee will accumulate pensionable service so long as she is in receipt of long-term disability benefits. The evidence, of course, is that the plaintiff was in receipt of these benefits at trial. Therefore, at least a portion of the sum of $58,300 represents a loss which the plaintiff has not sustained. During argument on this issue, this was pointed out by counsel for the defendants. On consent, the plaintiff filed a new report of Mr. Rosen in which he now calculates this loss to be $22,700 representing the future loss only. The plaintiff's position is that this amount should be added to the jury award and made subject to a "Cox v. Carter order" or assignment.

In respect of both of Mr. Rosens' calculations, the assumption is that, but for the accident, the plaintiff would have continued to work to age 65. However, this is not the evidence. On examination for discovery, Mrs. Chrappa testified that she planned to retire when she became eligible for an unreduced pension which is on January 1, 1999 at age 58. At trial, she qualified this evidence. Nevertheless, she acknowledged that she would not work to age 65. Even if I accept the plaintiff's submission as to the appropriate way to deal with this future loss, I have no evidence of the amount which has not been proved. In any event, it would be a very modest sum. I therefore make no award for the reduced value of the CBC pension.

Damages, Pre-Judgment Interest and Costs

The damages awarded by the jury are $188,000. From this amount is to be deducted, in accordance with ss. 267(1)(a) and (c), the total amount of the payments received by the plaintiff which is $108,462: Marshall v. Heliotis (1993), 16 O.R. (3d) 637, [1994] I.L.R. 1-3023 (Gen. Div.). These payments consist of "no-fault" accident benefits of $25,991 and loss of income benefits in amounts of $9,644 and $72,827 resulting in a final award of $79,538. The plaintiff will have judgment in this amount against the defendants together with pre-judgment interest. I do not think there is any disagreement on the pre-judgment interest calculations, but, if there is, I may be spoken to. The plaintiff was successful on the motion pursuant to s. 266(4) and, following deductions, was successful in the action. Costs of the motion and costs of the action, including G.S.T., are awarded

to the plaintiff.

The Order on Future Payments

This leaves the issue of the present value of future disability benefits which I have declined to deduct from the award. The present value of these payments is $150,159.24, which, ignoring pre-judgment interest, is about double the amount of the judgment. If all of the payments are made to age 65 or to an earlier retirement date, the total amount received by Mrs. Chrappa may exceed the amount which is appropriately credited to the defendants on account of the judgment they must pay. If the payments are terminated at some point, it may be in the defendants' interest to pursue the disability insurer or it may be in the plaintiff's interest to do this. There is no way to determine today if this will occur or whose interests may be affected if it does occur. I have decided that the best way to deal with this uncertainty is through a combination of a "Cox v. Carter order" and an assignment.

In Cox v. Carter, the plaintiff obtained judgment in the amount of the assessed damages from which were deducted the Sch. E benefits received to date. The judgment included a declaration that the plaintiff hold in trust for the defendant and pay over to her any Sch. E payments subsequently received. The total of these payments was not to exceed the plaintiff's judgment against the defendant. In my view, this is the appropriate order to make here with respect to future Great-West Life payments and future C.P.P. disability benefits, if any. However, if the stream of payments from Great-West Life is terminated, the plaintiff is to immediately assign to the defendants her rights with respect to the Great-West Life Assurance Company to the extent of the amount then outstanding on the judgment. The plaintiff is directed to co-operate in the prosecution of any action taken by the defendants against the Great-West Life Assurance Company. After the defendants' monetary claim and any associated costs are satisfied, the defendants are to re-assign to the plaintiff her rights in respect to Great-West Life unless the plaintiff is a party to any settlement which the defendants may reach with it and consents to the settlement as satisfying her claim against Great-West Life.

Order accordingly.