THE ESSENTIALS ON COSTS AND PRE-JUDGEMENT INTEREST

INSURANCE LAW

Tips for Plaintiffs When Pursuing Pre-Judgment Interest Claims in Settlement Negotiations and Beyond

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TIPS FOR PLAINTIFFS WHEN PURSUING PRE-JUDGMENT INTEREST CLAIMS IN SETTLEMENT NEGOTIATIONS AND BEYOND

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Lawyers often incorrectly calculate, or even worse, fail to include pre-judgment interest claims in settlement negotiations. Below are some helpful tips for avoiding common pitfalls when addressing these claims.

1) Identify the type of claim and rate that applies

The Pre-Judgment Interest ("PJI") rate differs depending on the nature of the claim and the damages sought.

These claims can be very significant when you are advancing a retroactive damages claim in the context of the Statutory Accident Schedule where the current interest rate is 1%/monthly, compounded.

There have been several recorded accident benefits decisions where the insurer failed to adjust claims for lengthy periods of time (in some cases over a decade) and where the ultimate interest amount payable was several times greater than the principal amount owed.

This is illustrated by a 2012 decision of the Financial Services Commission of Ontario, called *T.N.v. Personal*[i], where an interest order was made on attendant care benefits dating back to a 2000 accident, which were never adjusted or paid. The principal attendant care amount overdue was $3,593,308; **the interest owing was** $7,250,828 for a total of $10,844,136. **Compound interest can represent a very significant exposure for insurers.**

General damages outside of the motor vehicle accident ("MVA") scheme are subject to the more favorable 5% rate under section 53.10 of the Rules of Civil Procedure. This can be a very significant claim in cases where there is a long delay.

Even in MVA claims, the discretion remains under s. 130 of the *Courts of Justice* Act for the Court to vary the rate. This will remain an important tool in older cases (pre January 1, 2015) prior to the recent amendment to the *Insurance Act.*

When addressing past pecuniary loss claims you need to be able to differentiate between claims where half rates v. full rates apply. Half rates are used for recurring benefits or past claims (i.e. a weekly income loss) whereas full rates apply when dealing with one time or periodic items (such as a single out of pocket expense claim). This approach is used for simplicity in calculating interest on recurring past claims. It was endorsed in the 1985 Federal Court of Appeal decision of *Borland v. Muttersbach*[ii], which has been widely applied.

2) **Keep you PJI claim alive throughout negotiations**

PJI will not be your sexiest claim in settlement discussions but it will be your easiest claim to prove.

Subject to rare arguments about when the cause of action arises and the rate to be used, there should be agreement in most cases regarding when PJI is payable and at what rate.

Make sure to separate the PJI claim from the principal damages claim in settlement discussions. A failure to do so could result in a significant under-valuation of the claim.

When you review general damages charts and past decisions make sure to determine whether or not PJI is included in the amounts. Also make sure to adjust these numbers for inflation, which is another item that must be considered in preparing damages assessments.

Example:

For example a 2005 claim for general damages which is settled in 2017 would include 12 years of PJI, which at a 5% rate would increase your principal amount by 60%.

If your principle amount was assessed in a similar case at $100,000.00 in 2005, by 2017, **with inflation, that assessment would be approximately $127,500, plus interest of $76,500, for a total of $204,000.**

3) **Send your notice letters as soon as possible**

Regardless of the type of claim there is always potential for a debate about when the cause of action arises. Generally speaking, the cause of action arises when all facts necessary to constitute the action have occurred. In most personal injury cases this is the date of the accident.

However, where the cause of action is historical there is the potential for a Defendant to try and rely on s.130 of the *Courts of Justice Act* to argue that notice should start at some date more recent that the date of the accident.

This may come up in historical sexual assault claims where there is often a debate as to when the interest clock starts. Judges in some of these historical cases (often going back decades and creating significant interest exposure) have found that it can be anywhere from the date of the assault, to the date notice is delivered, to the date of commencement of the proceeding.

The safest way to ensure the commencement of the PJI clock is to send out a notice letter. In the MVA context interest won't start to accrue until that notice letter is delivered as per section 258.3(8) of the *Insurance Act.*

However, outside of the MVA world, the notice letter could play a factor where there is a debate about when the cause of action arises.

4) Don't forget that the PJI rate is always discretionary

Section 130 of the *Courts of Justice* Act, gives the Court wide discretion with respect to the PJI rate to be used having regard to the following factors:

(a) changes in market interest rates;
(b) the circumstances of the case;
(c) the fact that an advance payment was made;
(d) the circumstances of medical disclosure by the plaintiff;
(e) the amount claimed and the amount recovered in the proceeding;
(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
(g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.

Notably, the Court of Appeal decision, in *Cobb v. v. Long Estate*[iii], upheld a 3% PJI rate having regard to the factors above, where there was a debate about the applicability of the new PJI rate.

This section will continue to be relied upon with respect to pre January 1, 2015 MVA claims. It may also be relied upon going forward, especially in an environment where trial dates are scheduled years in the future and where market interest rates may change significantly between the dates the cause of action arises and trial.

5) Know how to calculate the rates. It is just math…

**See attached calculator printouts using the Personal Injury Calculator created by Darcy Merkur*

The examples attached at **Exhibit "A" and "B"** are in respect of a personal injury accident on November 29, 2013.

a) Half rate v. full rate calculation

Exhibit "A" shows the difference between half and full rates.

Full rates are used for one-time expenses.

In the attached example the date of the accident was November 29, 2013. The applicable PJI rate was 1%. This example assumes the claim is settled exactly 4 years from the date of loss and one of the claims involves a $10,000.00 expense that was incurred on the date of loss. This is a single discrete expense and interest would be paid at the full rate of 4% (1% x 4 years) from the date the expense was incurred. The total interest is $400.00.

Half rates would be used for a recurring claim like income loss. In the attached example a $100 weekly income loss from the date of the accident would result in a principal claim of $20,800.00. Interest over each period would be paid at 0.5% (at half the applicable 1% rate) for a total of 2% (over the 4 years from the date of the incident to the settlement). The interest amount would thus be $416.00.

b) General damages calculation

This is the same as (a) though with the 5% rate applied to a general damages assessment of $200,000.00. Over 4 years the accumulated interest is 20%, amounting to $40,000.00. This is a straightforward non-compounded calculation which can be seen at **Exhibit "A."**

c) Compound interest calculation

Compound interest is much harder to calculate and you will need a calculator to do this precisely. It is a good idea to have such a calculator because where compound interest is in play the numbers may be very significant as per the T.N. decision.

Exhibit "B Past Accident Benefits Analysis" shows an example of a compound interest calculation using the SABS rates. Half and full rate calculations apply and are shown at **Exhibit "B".**

6) Review the Defendant's calculations and methodology

Don't assume the numbers in the defendants offer for PJI are accurate. They may be using half rates when not appropriate and/or may be ignoring relevant information or using incorrect start dates or interest rates.

These calculations frequently go unchallenged and one should treat these offers with the scrutiny of any other component of the Defendant's offer.

If you have arguments to vary the rate under section 130 spell those out early and often in correspondence with defence counsel, especially where they may not expect this to be an issue in negotiations.

7) PJI is always increasing and can impact policy limits exposure

Keep in mind in larger cases, where policy limits are potentially exposed, that an accumulation of interest can put additional pressure on defendants and insurers as the standard motor vehicle policy includes pre-judgment interest.

The longer Defendants go without resolving a potential limits claim the more likely there could be exposure to an over limits claim with interest accruing.

You may wish to remind the Defendants of that exposure and the increased interest as time passes and as you get closer to trial.

8) Use a Calculator - 2 plus 2 does not equal 4 when there is compound interest involved!

Lawyers often say they aren't good at math and it is probably true. So invest in a calculator that can perform the calculations for you.

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[i] *T.N. v. Personal Insurance Company of Canada,* FSCO A06-000399.
[ii] *Borland v. Muttersbach* (1985), 53 O.R. (2d) 129.
[iii] *Cobb v. v. Long Estate (*2017), ONCA 717.

WITHOUT PREJUDICE **EXHIBIT "A"**

ONTARIO PERSONAL INJURY DAMAGES CALCULATOR 2017

File Name	**Doe**	**Internal File Number**	**123456**
Damage Assessment (as of)	**November 29, 2017**		
Date of Incident	**November 29, 2013**		
Applicable Motor Vehicle Accident Scheme	**Legislation on or after Sept 1, 2010**		

DAMAGE ASSESSMENT

GENERAL DAMAGES (Gross Amounts)			Gross Amount	Deductible		Net	PJI rate	PJI	Total
Jane Doe			$200,000.00	$0.00		$200,000.00	20.00%	$40,000.00	$240,000.00

PAST DAMAGES	PJI Rates	PJI since	Amount	Less Benefits	Net	PJI rate	PJI	Total
Past Income Loss Claim (at $100/week)	Half Rates	Incident Date	$20,800.00		$20,800.00	2.00%	$416.00	$21,216.00
Out of Pocket Expenses	Full Rates	Incident Date	$10,000.00		$10,000.00	4.00%	$400.00	$10,400.00

	Total Damages (without PJI)	Total Interest	Grand Total
GRAND TOTAL OF ALL DAMAGES AND INTEREST	$230,800.00	$40,816.00	**$271,616.00**

Notes

Years Since Incident (to assessment date)	4.00		
Date Notice Given to Defendants (i.e. PJI Commencement Date)	29-Nov-2013	Plaintiff's Date of Birth	1-Jan-1987
Years Since PJI Commencement Date (to assessment date)	4.00	Plaintiff's Age (as of Assessment Date)	30.91
Date Statement of Claim Issued	28-Nov-2015	Plaintiff's Gender	male
Applicable annual PJI rate pursuant to s.127/128 of CJA	1.00%	Plaintiff's Life Expectancy	49.5629

Past Accident Benefit Analysis EXHIBIT "B" *ONTARIO PERSONAL INJURY DAMAGES CALCULATOR 2017*

(calculated at 1% per month compounded monthly pursuant to s. 51(2) of the new SABS, if THE MVA occurred on or after Sept 1, 2010)
(calculated at 2% per month compounded monthly pursuant to s. 46(2) of the old SABS, if THE MVA occurred prior to Sept 1, 2010-see FSCO decision)

File Name Doe
Assessment (as of) November 29, 2017
Incident Date November 29, 2013

Internal File Number 123456

Fixed Accident Benefits Owed (i.e. One Time Amounts Owed)

#	Name of Accident Benefit	$ Fixed Amount	Owed Since	Calculated # of months overdue	Compound Interest %	Principal Owed	Compound Interest Amount	Total Principal and Interest
1	Medication	$2,000.00	November 29, 2014	36	43.08%	$2,000.00	$861.54	$2,861.54

Periodic Accident Benefits Owed (i.e. Reoccurring Amounts Owed)

#	Name of Accident Benefit	$ Periodic Amount	Frequency	First Payment Owed As Of	Last Payment Due	Calculated # of missed payments	Principal Owed	Compound Interest Amount	Total Principal and Interest
1	Income Replacement Benefits	$400.00	weekly	December 6, 2016	November 29, 2017	52	$20,800.00	$1,162.00	$21,962.00

GRAND TOTALS (of both fixed and periodic accident benefits owed)	$22,800.00	$2,023.54	$24,823.54