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De-mystifying Pre-judgment Interest

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What is pre-judgment interest?

- PJI is legislated interest calculated on a judgment that is paid out to plaintiffs in civil litigation.
- It doesn't arise until there is an Order for a payment of money.
- Rate of PJI is generally subject to a formula under s. 127 of the *Courts of Justice Act*.
- Rate is based not on when the cause of action arose but when **proceeding commenced**.
- However, the rate of PJI to be applied is **always** under the Court's discretion

The Purpose of PJI

- "It must be remembered that an award of pre-judgment interest is compensatory."
 - *Awan v. Levant*, 2015 ONSC 2209
- "The goal is to fairly compensate an injured party and to restore to him or her, so far as money is able to do, all that he or she has lost as a result of the injury –but neither too much, nor too little."
 - *Cobb v. Long Estate*, 2017 ONCA 717

An award of PJI should not 'over-compensate' the recipient

Section 128 (1) of the *Courts of Justice Act*

- **128. (1)** A person who is entitled to an **order for the payment of money** is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the **date the cause of action arose to the date of the order.**
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- **“Pre-Judgment Interest Rate”** – bank rate at end of first day of last month of the quarter preceding the quarter when the proceeding was commenced.

The Exception - Section 128 (1) of the *Courts of Justice Act*

Specific to personal injury actions:

- (2) Despite subsection (1), the rate of interest on damages for **non-pecuniary loss** in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).
- Non pecuniary loss = general damages.

Rule 53.10 of the *Rules of Civil Procedure*

PREJUDGMENT INTEREST RATE FOR NON-PECUNIARY DAMAGES

- **53.10** The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year.

However...the Exception to the Exception

- Section 258.3(8.1) of the *Insurance Act* states that section 128(2) of the *Courts of Justice Act*, does not apply to motor vehicle accident claims
- Therefore, damages arising from motor vehicle accidents are subject to a much lower PJI rate. Instead, they are entitled to the much lower “default rate”.

Section 130 of the *Courts of Justice Act*

- **130.** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
 - (a) disallow interest under either section;
 - (b) allow interest at a rate higher or lower than that provided in either section;
 - (c) allow interest for a period other than that provided in either section.

Factors the Court may Consider

Pursuant to Section 130(2):

For the purposes of 130(1), the Court shall take into account.

- a) changes in market rates
- b) circumstances of 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 length unnecessarily the duration of the proceeding; and
- g) any other relevant consideration

Why 5%?

- The 5% rate for non-pecuniary loss in personal injury actions was the legislative response to the 1987 Ontario Law Reform Commission Report for Compensation for Personal Injuries and Death. The Report criticized the practice of awarding prejudgment interest on pecuniary and non-pecuniary damages at the same rate because there is a cap on non-pecuniary damages. The cap is adjusted for inflation.
- The Report concluded that giving the default interest rate (which, at the time, was much higher than 5%) was more appropriate.

Half Rate vs. Full Rate

- Section 128(3) says interest shall be calculated for each 6 month period preceding the Order. Court decided easy approach it to use half rates for recurring claims.
- Half Rates – applied to recurring benefits or past claims (i.e., a weekly income loss)
- Full Rates – applied to one-time costs or periodic items

NO PJI ON:

- Punitive damages
- On interest accruing under the Act.
- On costs
- On future losses
- With respect to any advance payment
- On consent order except with consent of debtor;
and,
- Where interest is payable by a right other than
under this section.

Takeaway Considerations

- 1) MVA v. non MVA
- 2) Pecuniary v. non-pecuniary
- 3) When does start
- 4) What rate do I apply?
- 5) Half Rate v. Full Rate
- 6) Any basis to consider variance under s.130.

The difference PJI can make in a personal injury case

T.N. v. Personal Insurance Company of Canada; FSCO A06-000399

- T.N. had a serious motor vehicle accident in February 2000. She sustained severe injuries to her brain, skull, face, and teeth.
- Attendant care benefits were never adjusted or paid by the Insurer.
- In 2012, the Financial Services Commission of Ontario (F.S.C.O) found that T.N. was entitled to 24-hour attendant care benefits
- F.S.C.O. ruled that T.N. was entitled to 2% compound interest, to be back paid from the date of the accident

Unique Features of Car Accident Cases

- Under s. 258 of the Insurance Act no PJI until an notice of claim letter is delivered.
- Under the *Statutory Accident Benefits Schedule (SABS)* interest is on overdue amounts is payable at 1% per month, compounded monthly, to the date of payment or to the date of a LAT filing in which case the rate resorts to s.128(3).

The result for T.N.?

- The insurer owed T.N. **\$3,593,308** for overdue attendant care payments
- The interest owing was **\$7,250,828**
- The insurer had to pay out \$10,844,136 – **over three times the original amount owed**

The Court's Discretion at Play

- *Cobb v. Long Estate*, 2017 ONCA 717
 - The legislation does not create a “vested” right to a particular rate of PJI
 - “Interest rates fluctuate over time and it only makes sense that the interest rates set by the court should reflect these changes as well”
 - The Court found that the provisions of the *Courts of Justice Act* “recognize that rates of PJI require variation to keep pace with economic realities”

Cobb v. Long Estate, 2017 ONCA 717

- The Court determined that 3% was an appropriate prejudgment interest rate.
- In making this determination, the Court considered the lengthy time since the accident, and the lack of compensation from the defendant Insurer throughout the entire period.

Recent Development in PJI: *MacLeod v. Marshall*, 2019 ONCA 842

- *MacLeod* is a historical sexual abuse claim. The trial judge awarded the Plaintiff PJI on generals and aggravated damages at the annual rate of 5%.
- The Defendants appealed.
- The particular factor in question in this case was the change in market rates that occurred over the length of the proceeding. Had the trial judge considered this factor, he would have noted that interest rates from the time the claim was issued to the time of judgement were low.

MacLeod v. Marshall (cont)

- The Court of Appeal set the PJI on non-pecuniary damages at 1.3% as a rate of 5% PJI would be 'over-compensating' the Plaintiff. This resulted in a substantial decrease in the amount awarded for PJI.
- The Court of Appeal confirmed that the default 5% prejudgment interest rate has been out of step with modern slow-growth interest rates.

What to consider when you (as an expert) are calculating PJI rates

- The Court may end up applying a rate entirely different than your calculation. However when preparing costings for clients, consider providing calculations at the legislated rates.
- Consider ‘changing interest rates’ when providing your reports to clients.
- All in all, it is the lawyer’s job to advocate for the rate they think is most appropriate for their client. Your calculations will provide a foundation for this.

How to Calculate PJI

- This can get complicated.
- Darcy Merkur, Partner at Thomson, Rogers, has created a software called the “Ontario Personal Injury Damages Calculator” that automatically applies the correct PJI rates.

THANK YOU

Please feel free to call or email with questions.

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