

# Ontario Court of Appeal Ruling Questions Default PJI on Non-Pecuniary Damages

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In [MacLeod v. Marshall](#), the Court of Appeal recently confirmed that Ontario Courts have discretion when setting the prejudgment interest (PJI) rates for non-pecuniary damages arising from personal injury actions, except in motor vehicle accidents. In doing so, the Court of Appeal has signaled a possible shift away from the default rule of five per cent PJI for non-pecuniary damages as contemplated by Rule 53.

## Court of Appeal Analysis

Following the plaintiff's successful jury verdict at trial, the defendant, The Basilian Fathers of Toronto (the Basilians), launched an appeal on three separate grounds. This article will focus on the third ground of appeal, in which the Basilians argued that the "trial judge erred in setting the rate of prejudgment interest at five per cent for non-pecuniary damages." Specifically, the Basilians questioned whether the trial judge exercised his discretion and considered changes in market interest rates pursuant to section 130(2)(a) of the Court of Justice Act (CJA), which states:

- 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.
- (2) For the purpose of subsection (1), the court shall take into account, [among other things]
- (a) changes in market interest rates...

[Section 128\(2\) of the CJA](#) reads "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." The rule referred to is Rule 53.10 of the Rules of Civil Procedure, which provides that PJI for non-pecuniary damages in an action for personal injury is five per cent per year.

At the lower court, the Basilians argued that s. 258.3(8.1) of the Insurance Act changed the rate of PJI to be consistent with the bank rate for non-pecuniary damages. This section was amended in 2014 such that the five per cent PJI rate no longer applied in the context of motor vehicle accidents. The Court of Appeal agreed with the lower Court's ruling that this provision did not apply in the circumstances, as the claim did not arise out of a motor vehicle accident. However, the Court questioned the trial judge's conclusion that because s. 258.3(8.1) did not apply, the default PJI rate should be utilized.

The Court of Appeal found that in the circumstances, the trial judge should have utilized the discretion provided by s. 130 of the CJA. In particular, the Court of Appeal stated that there ought to have been an appreciation for current market rates for interest as compared to the default five per cent provided by the Rules of Civil Procedure. Had such an analysis been conducted, the lower Court would have noted the interest rates during the material time were rather low, and the default rule may act to overcompensate the plaintiff. In the end, the Court of Appeal used its discretion and set the PJI on non-pecuniary damages at 1.3 per cent instead of the default five per cent. As the jury's award for non-pecuniary damages was close to the cap on such damages, this ruling by the Court of Appeal represents a substantial decrease in the amount awarded for PJI.

## Takeaway

Moving forward, this ruling will likely have a widespread effect on personal injury claims. The Court of Appeal has added significant weight to the discretionary function prescribed by s. 130 of the CJA. One can anticipate future requests by defence counsel for courts to utilize their discretion in order to minimize the risk of over-compensating a plaintiff in a personal injury action.

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