Ontario Court of Appeal confirms 5 per cent default PJI on non-pecuniary damages

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In the 2019 decision of *MacLeod v Marshall*, the Court of Appeal signaled a possible shift away from the default pre-judgment interest (PJI) rate of 5 per cent for non-pecuniary damages in favour of lower market interest rates. This was recently revisited by the Court of Appeal in the jointly heard appeals of *Henry v Zaitlen* and *Aubin v Synagogue and Jewish Community Centre of Ottawa*.

What you need to know

Through these decisions, the Court of Appeal has now confirmed that the presumptive rate of PJI on non-pecuniary damages in personal injury actions (except in motor vehicle accidents) remains 5 per cent and only in unusual or special circumstances is deviation from this rate appropriate.

In the *Aubin* decision, the Court of Appeal applied a PJI rate on non-pecuniary **and** pecuniary damages of 8.46 per cent. The Court took into consideration what the plaintiff could have earned had she invested her damages though her own investment advisor and what the defendant's insurer must have earned on the damages they were eventually ordered to pay to the plaintiff.

Court of Appeal analysis

Section 128(2) of the *Courts of Justice Act* (CJA) dictates that the PJI rate for non-pecuniary damages **shall** be determined by the rules of court. This is provided for by Rule 53.10 of the *Rules of Civil Procedure*, which sets the rate in personal injury cases at 5 per cent. Section 130 of the CJA. however, affords discretion to the Court "where it considers it is just to do so" to alter 5 per cent rate taking into account the following enumerated 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 lengthen unnecessarily the duration of the proceeding; and
g. Any other relevant consideration.

In both *Henry* and *Aubin*, the plaintiffs were successful at trial. The defendants in both actions brought post-trial motions where they relied on the *MacLeod v. Marshall* decision and sought orders setting the PJI at lower than 5 per cent. In *Aubin,* a cross motion was also brought by the plaintiffs seeking a PJI rate above 5 per cent. The trial judges both exercised their discretion and lowered the rate of PJI on non-pecuniary damages from 5 per cent to 1.3 per cent. It was held that PJI at a rate of 5 per cent would overcompensate the plaintiffs given market interest rates in the relevant time periods were much lower than 5 per cent. In both cases, the parties demonstrated "market interest rates" by relying on the average pecuniary PJI rate, while the trial judge in *Henry* also relied on the average Consumer Price Index (CPI) during the material time.

On appeal, the notion that the statutory presumption of a rate of 5 per cent for non-pecuniary damages had been displaced given recent fluctuations in interest rates was rejected. As stated by the Court of Appeal, "[o]nly the legislature can change the presumptive rate and the legislature has not done so in the face of years of market rates below five per cent." The underlying purpose of the statutory PJI scheme was also affirmed by the Court of Appeal: to fairly compensate a plaintiff, to encourage settlements and efficiently run proceedings and to deprive a defendant of the benefit derived from the use of funds ultimately awarded. These underlying rationales were noted to be reflected in the myriad of factors enumerated under section 130 of the CJA, none of which (including changes in market interest rates) are paramount to the others.

Guidance was also provided by the Court of Appeal in considering what is meant by "market interest rates" in section 130. The CJA defines "prejudgment interest rate" and "bank rate", but no definition is provided for "market interest rates". The Court of Appeal stated that this reflects the legislature's intention for "market interest rates" to be purposely broad and, in particular, broader than the bank rate. The party relying on changes in market interest rates must lead evidence demonstrating the changes. Such evidence may include what a party would have earned in the market. Ultimately, the Court of Appeal suggested that expert evidence may be required to explain the relationship between any particular index/rate and "market interest rates".

The Court of Appeal found in the circumstances of both cases that the trial judges erred in the exercise of their discretion to vary the rate of PJI on non-pecuniary damages from 5 per cent to 1.3 per cent. These errors were found to be rooted in incorrect view that there is no presumptive PJI rate and an improper focus on prevailing market rates. Additionally, no evidence was led by the defendants in either case to demonstrate "changes in market rates" (i.e. no expert evidence was led to show the relationship between CPI, the pecuniary PJI rate and/or bank rates with "market interest rates").

In *Henry,* the Court of Appeal reverted to the presumptive rate of PJI on non-pecuniary damages of 5 per cent. In *Aubin,* the Court of Appeal prescribed a PJI rate on non-pecuniary **and** pecuniary damages of 8.46 per cent. This rate reflected the average returns achieved by the plaintiffs through investments, contrasted with the averaged return on investment of 12.99 per cent by the defendants' insurer during the material

time. Even with this elevated PJI award, the defendant insurer was nonetheless seen as benefiting financially by taking the case to trial instead of settling.

Takeaway

The Court of Appeal seems to be aiming for certainty and consistency in confirming the statutory presumption of the PJI rate on non-pecuniary damages of 5 per cent. In application however, “changes in market interest rates” still appear to rule the day. This was seen in *Aubin,* where the Court of Appeal varied the rate above 5 per cent based nearly exclusively on a comparison of the investment portfolios of the plaintiffs and the defendants’ insurer.

The practical implications of the emphasis the Court of Appeal placed on investment portfolios of parties is significant. The rationale of relevance of these investments was twofold: 1) these returns are reflective of what is available in the financial market and therefore demonstrate “changes in market rates”; and 2) ensuring defendants are not benefiting from holding onto funds eventually awarded to plaintiffs bearing in mind the overarching goal of promoting early settlement. Moving forward, parties may seek details of a one another’s investment portfolios through the discovery process. The relevance of such inquiries will no doubt be litigated at a later date.

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