CITATION: *Aubin v. Synagogue and Jewish Community Centre of Ottawa*, 2023 ONSC 3926
COURT FILE NO.: 16-71050
DATE: 2023/06/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DORIS AUBIN and AIMEE ZWEIG Applicant	)	Joseph Y. Obagi, Elizabeth A. Quigley and Cody L. Watson, for the Applicant
– and –	)	
SYNAGOGUE AND JEWISH COMMUNITY CENTRE OF OTTAWA operating as SOLOWAY JEWISH COMMUNITY CENTRE, JOHN DOE INC. and JANE DOE MAINTENANCE INC. Defendant	)	Tara L. Lemke and Alexander T. Herle, for the Defendant
	)	**HEARD:** March 17, 2023

REASONS FOR DECISION ON MOTION TO SET PREJUDGMENT INTEREST

WILLIAMS J.

Overview

[1] The defendant, Synagogue and Jewish Community Centre of Ottawa operating as Soloway Jewish Community Centre, brought a motion for an order setting the prejudgment interest rate on non-pecuniary damages awarded to the plaintiffs by a jury on November 18, 2022.

[2] The defendant argues the rate should be 1.3 per cent instead of the prescribed rate of five per cent for prejudgment interest on non-pecuniary damages in actions for personal injury.

[3] The plaintiffs brought a cross-motion, asking for prejudgment interest on their awards for both non-pecuniary and past pecuniary damages to be set at 8.46 per cent.

The relevant statutory provisions and rules

[4] Section 128(1) of the *Courts of Justice Act*, R. S. O. 1990, c. C. 43, provides that a person entitled to an order for the payment of money is entitled to claim and have included in the order interest at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

[5] Section 127(1) of the *CJA* defines "prejudgment interest rate" as the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point.

[6] Section 128(2) of the *CJA* is an exception to s. 128(1). It provides that prejudgment interest on non-pecuniary damages for personal injury is to be at the rate determined by the rules of court.

[7] Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 sets the rate under s. 128(2) at five per cent per year.

[8] Section 130 of the *CJA* provides that the court may, where it considers it just to do so, disallow prejudgment interest, allow prejudgment interest at a rate higher or lower than provided in s. 128, or allow prejudgment interest for a period other than that provided. (Section 130 also applies to postjudgment interest under s. 129. Postjudgment interest is not at issue in the motions before me.)

Factual background

[9] Doris Aubin suffered a head injury in a fall at the defendant's premises on January 2, 2015.

[10] Ms. Aubin's statement of claim was issued on December 21, 2016. Ms. Aubin's wife, Aimee Zweig, was also a plaintiff.

[11] Ms. Aubin's trial began on October 12, 2022. The jury delivered its verdict on November 18, 2022.

[12] The jury's award was slightly over $3.6 million. Of that amount, Ms. Aubin was awarded non-pecuniary damages of $216,000 for pain and suffering and past pecuniary damages of $25,094 for out-of-pocket expenses and $640,501 for past loss of income. Ms. Zweig was awarded non-pecuniary damages of $85,000 for loss of care, guidance, and companionship under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3. The balance of the jury's award was for strictly future losses.

[13] The jury found Ms. Aubin to be five per cent contributorily negligent.

[14] Under s. 127(1) of the *CJA*, the prejudgment interest rate applicable to proceedings commenced in the fourth quarter of 2016, such as the plaintiffs' action, was 0.8 per cent.

The parties' positions

The defendant

[15] The defendant argues that five per cent prejudgment interest on the jury's award for non-pecuniary damages would over-compensate the plaintiffs. The defendant relies heavily on the Ontario Court of Appeal decision in *MacLeod v. Marshall*, 2019 ONCA 842. The defendant submits that 1.3 per cent would be fair because it is the prejudgment rate under s. 127(1) that was in effect on the date of loss. The defendant notes that 1.3 per cent is also close to 1.175 per cent, which is the average s. 127(1) prejudgment rate from the date of Ms. Aubin's loss to the date of the jury's verdict.

[16] For Ms. Aubin's pecuniary damages, the defendant argues there is no reason to deviate from the prescribed prejudgment interest rate of 0.8 per cent.

The plaintiffs

[17] The plaintiffs argue the defendant is asking the court to lower the prejudgment interest rate on the awards for non-pecuniary damages on the basis that there have been "changes in market interest rates", one of the factors the court is to consider under s. 130(2) of the *CJA* when exercising discretion in respect of interest under s. 130(1). The plaintiffs submit the defendant's argument is really based on *prejudgment* interest rates and that the defendant has offered no evidence about

market interest rates. The plaintiffs submit that it would be an error of law for the court to treat prejudgment and market interest rates as synonymous.

[18] The plaintiffs take issue with the defendant's suggestion that they would be over-compensated if they were to receive five per cent interest on their non-pecuniary damages. The plaintiffs say that if their RRSPs were combined, the weighted average of their rates of return in the years leading up to the date of the jury verdict would have been 8.46 per cent. The plaintiffs say if they had the money the jury awarded them, they would have invested it and earned a similar rate of return.

[19] The plaintiffs argue the defendant cannot legitimately claim that five per cent interest on the plaintiffs' non-pecuniary damages would be over-compensation, when the defendant's insurer, Intact Insurance, earned an average annual rate of return of 12.99 per cent on its investments from the date of Ms. Aubin's fall to the date of the jury's verdict.

[20] The plaintiffs also argue that if the prejudgment interest on their non-pecuniary damages is varied, the same exercise of discretion should be applied to vary the interest on their past pecuniary damages. The plaintiffs submit that the same considerations apply equally to both types of interest and there is no juridical reason to treat them differently if market interest rates are the basis for the court's exercise of discretion. The plaintiffs argue the prejudgment interest rate for the jury's awards for both non-pecuniary and pecuniary damages should be 8.46 per cent to reflect "the true time value" of the awards.

The Issues

[21] The issues are the following:

1. Should the court exercise its discretion in respect of the prejudgment interest rate on the plaintiffs' awards for non-pecuniary damages in this action for personal injury by setting prejudgment interest at a rate other than the prescribed rate of five per cent? If so, what should the rate be?

2. Should the court exercise its discretion in respect of the prejudgment interest rate on the plaintiffs' awards for past pecuniary damages by setting prejudgment interest at a rate other than the prescribed rate of 0.8 per cent? If so, what should the rate be?

Analysis

Issue #1: Prejudgment interest on the non-pecuniary damages in an action for personal injury

[22] I will begin my consideration of this issue by reviewing the rationale for s. 128(2) of the *CJA*, an exercise which will also serve to address the plaintiff's position that prejudgment interest on non-pecuniary and pecuniary damages should be treated the same way in this case, an argument with which I disagree.

[23] As is evident from the wording of the provision, s. 128 of the *CJA* contemplates two default rates of prejudgment interest: one for damages for non-pecuniary loss in personal injury actions (s. 128(2)); and one for all other money awards for which s. 128 makes prejudgment interest available (s. 128(1)). An obvious and significant difference between the two is that the rate of prejudgment interest on non-pecuniary damages for personal injury is set by the rules of court while prejudgment interest on all other money awards is tied to the bank rate.

[24] The five per cent interest rate for non-pecuniary damages in personal injury actions in s. 128(2) was part of a legislative response to the 1987 Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death. The report criticized the practice of awarding interest on damages for pecuniary and non-pecuniary loss at the same rate, because of the cap on non-pecuniary damages. The report concluded that as the cap was already adjusted for inflation, awarding the regular interest rate effectively amounted to double compensation for inflation. (*MacLeod*, at para. 45, citing *Awan v. Levant*, 2015 ONSC 2209.)

[25] In *Awan*, Matheson J. observed that, ironically, when the five per cent rate was established, it was intended to be a rate that was lower, not higher, than the default, or prescribed interest rate. The average prejudgment interest rate was 10 per cent in 1987, the year of the Law Reform Commission's report, and 13.5 per cent in 1989, the year the five per cent interest rate became

law. As Matheson J. noted, the mischief that gave rise to s. 128(2) was no longer being served by a five per cent rate given the interest rate climate.

[26] In *Awan*, Matheson J. considered *Tait v. Roden* (1994), 20 O.R. (3d) 20 (Gen. Div.) (*Awan* and *Tait* were both defamation cases.) In *Tait*, Killeen J. had also considered the 1987 Law Reform Commission report. Killeen J. noted that the Law Reform Commission had made a specific recommendation directed at reducing the prejudgment interest entitlement on non-pecuniary losses and that it had expressed concern that there was "serious unfairness" in granting the same prejudgment interest entitlement for non-pecuniary damages for personal injuries as for pecuniary damages. Killeen J. cited both the double recovery concern identified by Matheson J. in *Awan* and "the additional vexing problem that non-pecuniary damages included an assessment of future pain, suffering and disability down to the natural death of the victim and it was thought that interest should not be recoverable at the full rate on such future losses."

[27] The Law Reform Commission report that precipitated the five per cent interest rate recognized two reasons that non-pecuniary damages for personal injury are distinct from other damage awards that would attract prejudgment interest: they are tied to inflation; and they typically account for future, as well as past loss.

[28] The prejudgment interest rate for non-pecuniary damages for personal injury under s. 128(2) has remained at five per cent since 1989. In January 2015, however, the *Insurance Act*, R.S.O. 1990, c. I. 8, was amended so that the s. 128(2) rate would not apply to motor vehicle personal injury claims; the rate in s. 128(1), defined in s. 127(1), would apply to these claims.

[29] Throughout this period, the court has had the discretion under s. 130(1) of the *CJA*, referenced above, to disallow interest under s. 128, to allow interest at a higher or lower rate than provided in the section or to allow interest for a period other than that provided in the section. The court may exercise this discretion "where it considers it just to do so." Section 130(2) lists factors the court must consider for purposes of any exercise of discretion under s. 130(1): (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.

[30] The plaintiffs submit that, in its motion to reduce the five per cent rate, the defendant is relying only on the factor in s. 130(2)(a), "changes in market interest rates". The plaintiffs say the defendant's motion must be dismissed, because it did not introduce any evidence about market interest rates.

[31] The plaintiffs argue the defendant cannot simply point to the trend in prejudgment interest rates since the plaintiffs' cause of action arose and rely on s. 130(2)(a) to ask the court to exercise its discretion to reduce the five per cent rate. The plaintiffs further contend it would be an error of law for the court to rely on evidence of prejudgment interest rates in the exercise of its discretion. The plaintiffs argue that if the legislature had intended changes in prejudgment interest rates to be among the factors to be considered under s. 130(2), it would have said so.

[32] The plaintiffs rely on *Triten Corp. of Canada v. Borden & Elliott*, 45 O. R. (3d) 409 (Ont. Ct. (Gen. Div.) In overturning an arbitrator's decision, Rivard J. found the arbitrator had erred in law when he equated changes in market interest rates with changes in the prejudgment interest rate, or bank rate, "when those terms have different meanings and where there was no evidence to support a departure from the presumptive rate."

[33] On several occasions, however, the Court of Appeal has sanctioned reliance on prejudgment interest rates in a court's exercise of discretion under s. 130(2) and its predecessor, s. 140: *MacLeod*, supra, at paras. 51 – 56 and 59, in which the Court of Appeal said the trial judge should have taken into account the changes in market rates and then applied the s. 127(1) prejudgment rate of 1.3 per cent "to keep pace with the low rates"; *Graham v. Rourke*, 75 O.R. (2d) 622 C.A.) at paras. 10 to 22; *Tuffnail v. Meekes*, 2020 ONCA 340, at paras. 101, 102 and 111.

[34] Further, in *Andani v. Peel*, [1993], O.J. No. 1604, at para. 16, the Court of Appeal specifically identified fluctuations in the prejudgment interest rate as a factor that should be considered in the court's exercise of discretion in respect of prejudgment interest:

> We are prepared to accept the submission that the fluctuation in the prime rate[1] over the pre-judgment interest period was significant and was a factor which should be considered in determining what the prejudgment interest rate should be.

[35] For these reasons, I am not persuaded by the plaintiffs' argument that it would be an error in law to consider prejudgment interest rates in the exercise of my discretion under s. 130.

[36] The plaintiffs argue that in *Andani*, the Court of Appeal held that significant fluctuations in interest rates are not, in and of themselves, enough to justify or compel a court to deviate from the prescribed rate. I do not read the case the same way. In my view, the case says that significant fluctuations in interest rates, in and of themselves, "may" not be enough to justify deviation from the prescribed rate. In *Andani*, the trial judge considered significant fluctuations in interest rates but chose not to depart from the presumptive rate. The Court of Appeal said it was not persuaded that the judge had been wrong.

[37] The s. 127(1) prejudgment interest rate at the time of Ms. Aubin's accident in January 2015 was 1.3 per cent. The defendant argues that the rate decreased from the time of the accident to the time the statement of claim was issued in December 2016, when it was 0.8 per cent. From the first quarter of 2017 until the third quarter of 2022, the rate did not exceed two per cent and was as low as 0.5 per cent. It went up to 2.8 per cent in the last quarter of 2022, when the trial took place. The average rate from the date of loss to the date of the jury's verdict was 1.175 per cent.

[38] The prejudgment interest rate climate in *MacLeod* was similar to that in the plaintiffs' case. In *MacLeod*, the notice of action was served in September 2012 when the prejudgment interest rate was 1.3 per cent. The parties considered that to be the operative commencement date for the running of interest. The action was tried in April 2018 when the rate was 1.5 per cent. In the interim, the average annual rate was 1.3 per cent in both 2013 and 2014, 1.08 per cent in 2015, 0.8

[1] While s. 127(1) of the *Courts of Justice Act* defines prejudgment interest as "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced", s. 36 of Ontario's *Judicature Act*, the statute at issue in *Andani*, tied prejudgment interest to the "prime rate existing for the month preceding the month on which the action was commenced".

per cent in 2016 and 0.85 per cent in 2017. The Court of Appeal fixed prejudgment interest on the plaintiff's non-pecuniary damages a 1.3 per cent.

[39] In the more recent decision of *Henry v. Zaitlen*, 2022 ONSC 7259, the plaintiff's cause of action arose in July 2010 when the prejudgment rate was 0.8 per cent. The average annual rate in 2010 was 0.8 per cent. In 2011 it was 1.03 per cent. The rate was 1.3 per cent when the statement of claim was issued in 2012. The jury in *Henry* released its verdict on December 13, 2022 (less than one month after the verdict in the case before me) when the rate was 2.8 per cent. Sanfilippo J. fixed prejudgment interest on the non-pecuniary loss at 1.3 per cent.

[40] The parties brought to my attention several cases decided by this court which considered the five per cent prejudgment interest rate in s. 128(2): *C. O. v. Williamson*, 2020 ONSC 3874; *Fleury Estate v. Kassim*, 2022 ONSC 2464; *Lapointe v. Labelle*, 2023 ONSC 470.) These cases turned on their own facts. In *Burke v. Dupont*, 2021 ONSC 7988, I awarded the plaintiff prejudgment interest of five per cent. Burke was a motion for default judgment. The defendant was not present, obviously, to argue why or how I should exercise my discretion under s. 130(2) of the *CJA*. I did not consider it just in that case to deviate from the five per cent rate.

[41] I reject the plaintiffs' argument that the interest earned by the defendant's insurer from 2015 to 2022 should have a bearing on my analysis. I consider this to be irrelevant. Further, as Valin J. observed in *Pilon v. Janveaux*, 2011 CarswellOnt 1198, at para. 9, large corporations achieve higher returns than individual investors, and market rates may vary depending on the amount of money available to be invested or borrowed.

[42] The plaintiffs also argued that five per cent prejudgment interest cannot possibly amount to over-compensation, as the defendant claims, because prejudgment interest is simple, not compound interest. I took the defendant's argument to be that five per cent would represent over-compensation within the context of the *CJA*'s prejudgment interest regime, recognizing that it does not provide for compound interest.

[43] I have considered the factors in s. 130(2). Whether filed under changes in market interest rates under s. 130(2)(a), or any other relevant consideration under s. 130(2)(g), the most relevant

factor in this case is the one relied on by the defendant, that the prejudgment interest rates from the date of Ms. Aubin's fall to the date of the jury's award have been well below five per cent.

[44] I have considered Matheson J.'s observation in *Awan*, which was applied by the Court of Appeal in *MacLeod*, to the effect that the mischief that gave rise to s.128(2) has not been served by a five per cent rate, given the interest rate climate.

[45] I have also considered that, in this case, there is no doubt that the jury's awards for non-pecuniary damages for both plaintiffs compensate for future, as well as past losses. The jury released its verdict just under eight years after Ms. Aubin's fall. Ms. Aubin was born in 1967; Ms. Zweig in 1970. Ms. Aubin was 48 when she was injured; Ms. Zweig was 45 at the time. Ms. Aubin was 55 at the time of the jury verdict; Ms. Zweig was 52. There was no evidence that either would have less than full life expectancy. Strictly in terms of timeframe, the past loss component of these awards covers about eight years; the future loss component is likely to cover about thirty years.

[46] I find that it would be just in the circumstances of this case to exercise my discretion to reduce the prejudgment interest rate on the plaintiffs' awards for non-pecuniary damages from the five per cent prescribed by s. 128(2). As noted in para. 37, above, the s. 127(1) prejudgment interest rate in this case is 0.8 per cent, the rate applicable to proceedings started in the fourth quarter of 2016, and the average prejudgment interest rate from the date of Ms. Aubin's loss to the date of the jury's verdict is 1.175 per cent. The defendant's proposal of 1.3 per cent is reasonable, in my view. I will, therefore, fix the prejudgment interest on the plaintiffs' non-pecuniary damages at 1.3 per cent.

Issue #2: Prejudgment interest on past pecuniary damages

[47] The plaintiffs ask me to award interest on the jury's awards for past pecuniary loss at 8.46 per cent, instead of the default rate of 0.8 per cent.

[48] In support of this request, the plaintiffs rely on an affidavit from Ms. Zweig and attached Scotia iTrade annual account reports for Ms. Aubin and Ms. Zweig. In her affidavit, Ms. Zweig said that when the two investment portfolios arewere considered together, they yield a weighted average rate of return of 8.46 per cent per year dating back to January 1, 2013. Ms. Zweig said:

"Had we received any damages from the Defendants in regard to the fall of January 2, 2015, we would have invested them in a similar manner."

[49] The plaintiffs argue that market interest rates are higher than the prejudgment interest rate and that they should receive full compensation for their loss of use of the funds awarded by the jury.

[50] However, prejudgment interest, while intended to compensate a plaintiff, is not intended to match market interest rates or the return a plaintiff might earn in an investment portfolio. As Myers J. explained in *Rubner v. Waddington McLean & Co. Limited*, 2020 ONSC 692 (Div. Ct.): "Prejudgment interest rates are not generally full compensation for the cost of delayed payment. Prejudgment interest rates are simple interest rates rather than compound interest rates as used in the world of commerce. Moreover, they are set in relation to the cost paid by banks to borrow funds from the Bank of Canada. I can take judicial notice of the fact that, by definition, the rates charged by banks to consumers are greater than the cost they pay to obtain funds. The cost to obtain replacement funds or the opportunity cost of using one's own funds is certainly greater that the prescribed prejudgment interest rate."

[51] If I were inclined to exercise my discretion to increase the prejudgment interest rate on the plaintiffs' pecuniary loss, I would have difficulty with the plaintiffs' evidence. The plaintiffs argue that because Ms. Aubin and Ms. Zweig are a married couple and because Ms. Zweig has been handling their finances since Ms. Aubin's accident, it is appropriate to consider a "weighted" average return rate based on both of their investment portfolios. The rate of return on Ms. Aubin's portfolio was well below 8.46 per cent: it had a 3.61 per cent rate of return since March 31, 2016, a 3.06 per cent rate of return in the past five years, a negative 0.41 per cent rate of return over the past three years and a negative 11.46 per cent rate of return over the past year. Ms. Zweig did not explain in her affidavit how she calculated the weighted average rate of 8.46 per cent. Further, although Ms. Zweig may have been overseeing Ms. Aubin's portfolio, I see no basis for considering the rate of return on Ms. Zweig's portfolio.

[52] The plaintiffs rely on a wrongful dismissal case in which the court increased prejudgment interest from the default rate of 2.5 per cent to five per cent: *Puhl v. Katz Group Canada Ltd.*, 2008

CanLII 433 (ON SC.) In that case, in which cause for termination was alleged but not found, the court exercised its discretion to award prejudgment interest at a rate comparable to the rate saved by the defendant employer on funds that otherwise should have been paid to the plaintiff. The court in *Puhl* was, of course, entitled to exercise its discretion in this manner, but the decision does not sway me in my exercise of discretion in the case before me.

[53] The plaintiffs have not persuaded me that it would be just to increase the prejudgment interest rate on Ms. Aubin's past pecuniary loss to 8.46 per cent or at all.

[54] Prejudgment interest on Ms. Aubin's past pecuniary damages shall be at the default rate of 0.8 per cent.

Conclusion

[55] In conclusion, having considered ss. 130(1) and 130(2) of the *CJA*, I grant the defendant's motion, dismiss the plaintiffs' cross-motion and make the following orders:

1. I award prejudgment interest on the jury's awards for non-pecuniary damages at a rate of 1.3 per cent.

2. I award prejudgment interest on the jury's awards for past pecuniary damages at a rate of 0.8 per cent.

Costs

[56] If the parties are unable to agree on the costs of the motion and cross-motion, the defendant may deliver brief written submissions within 10 days. The plaintiffs may deliver brief submissions in reply within 10 days of the date of receipt of the defendant's submissions. These submissions shall be filed through the portal and emailed to my attention at scj.assistants@ontario.ca.

Justice H.J. Williams

Released: June 30, 2023

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RE: DORIS AUBIN and AIMEE ZWEG

Plaintiffs

and

SYNAGOGUE AND JEWISH COMMUNITY CENTRE OF OTTAWA operating as SOLOWAY JEWISH COMMUNITY CENTRE, JOHN DOE INC. and JANE DOE MAINTENANCE INC.

Defendants

BEFORE: The Honourable Justice H.J. Williams

COUNSEL: Joseph Y. Obagi and Cody L. Watson, Lawyer for the Plaintiffs

Tara L. Lemke, Lawyer for the Defendant

HEARD: March 17, 2023

REASONS FOR DECISION

Williams J.

Released: June 30, 2023