

## \$21 Million of Interest Awarded in Insurance Dispute

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In [\*MDS Inc. v. Factory Mutual Insurance Company \(FM Global\)\*](#), 2020 ONSC 4464, the plaintiff was awarded prejudgment interest (“PJI”) of \$14.8 million (USD) or \$21 million (CAD) on a judgment of \$25 million (USD).

The action arose from an insurance dispute, specifically a claim for loss of profits arising from a radioactive leak. Due to the radioactive leak, the insured was not able to purchase and re-sell radioisotopes that are used for cardiac imaging, cancer treatment and sterilization of medical products, which caused a loss of profits of over \$121 million.

In a [prior decision](#), Justice J. Wilson of the Ontario Superior Court of Justice described why she ordered an elevated rate of PJI. The plaintiffs had to borrow money as a result of not being paid by the insurer for amounts the insurer was ultimately ordered to pay.

Justice Wilson held that PJI is not intended to punish a defendant, but to compensate a plaintiff for the loss of value in delaying the payment of damages.

Further, Justice Wilson noted that the relationship between an insurer and its insured is one of mutual dependency and utmost good faith.

The applicable rate in the *Courts of Justice Act* was 1%. If this rate had been used, the plaintiffs would have been awarded PJI of around \$1.7 million (USD) or \$2.4 million (CAD). However, the court has discretion to depart from the PJI rates in the *Courts of Justice Act*.

Justice Wilson determined that an enhanced PJI rate should be applied for the following reasons:

- Although the insurer did not act in bad faith, it refused coverage before all the facts were known.
- The insurer had a long-term relationship with its insured and was aware of the insured’s vulnerability arising from the losses in question.

- The insurer had special knowledge of the facts of the claim because it was also the insurer of the facility where the incident took place.
- The insurer knew, or ought to have known, that the plaintiffs would be seeking enhanced interest because, in the statement of claim, the plaintiffs pled that they were seeking compensation for the insurer's breach of the policy including, losses, damages, and expenses, and also because it was foreseeable that the insured would have to borrow money if the insurer did not pay under the policy.
- There was evidence of the borrowing costs incurred by the plaintiffs, as well as evidence of the profit rate of the insurer.
- Awarding enhanced PJI would encourage early and fair settlements.

Ultimately, Justice Wilson applied an interest rate of 5.14% instead of 1%. This was based on the average rate of borrowing for the period during which interest was awarded.

In addition to an enhanced PJI rate, Justice Wilson surprisingly held that the PJI should be compounded annually from the date of the notice of the claim to the release of the decision. This resulted in an additional \$2 million of PJI.

Although section 128(4) of the *Courts of Justice Act* states that compound interest shall not be awarded, Justice Wilson referred to a Supreme Court decision involving a commercial lending agreement, which indicated that a judge has discretion to award compound interest.

Insurers should keep this decision in mind, particularly in large first party claims. The potential for an enhanced PJI rate and compound interest can have a substantial impact on reserves and exposure. In this case, it made a \$18.6 million (CAD) difference, surely one that the insurer did not anticipate.

When PJI is expected to be a significant issue, defence counsel would be wise to ask on discovery whether the plaintiff is seeking PJI at the *Courts of Justice Act* rate. If the plaintiff is seeking an enhanced PJI rate, questions should be asked on the basis for same and on whether the plaintiff had to borrow money as a result of the insurer's refusal to pay.