

Civil court delay reduction and prejudgment interest

By **Tom Connolly**

Law360 Canada (May 27, 2025, 2:48 PM EDT) -- In fall 2023, Attorney General Doug Downey created the civil rules review (CRR) with a mandate to identify issues and develop proposals for reforming the *Rules of Civil Procedure*. The CRR's Phase 1 Consultation Paper asked: What reforms might improve efficiency and reduce delays and costs?

In the CRR's consultation questionnaire and in its subsequent Phase 2 Consultation Paper, released on April 1, no mention is made of the role of prejudgment interest and its impact on both case flow and as a potential area of reform to reduce unreasonable delay. Rather, the approach seems to be to rebuild the system from the ground up and potentially throw out the baby with the bathwater by eliminating oral discovery.



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The Phase 2 paper does not define reasonable delay. The vast types and complexities of civil cases make it difficult to assess what is a reasonable time for a case to reach trial. Every case has an inherent dynamic that skilled counsel will understand to arrive at the ultimate goal of a just resolution. Counsel and litigants who commence claims must determine the rhythm, pace, flow and timing of a case and not have artificial timelines imposed by generic rules.

It is accepted law that an award of damages alone is insufficient to achieve a just outcome. The solution is an award of prejudgment interest: an additional payment made by the defendant to account for the period of time between the occurrence of the defendant's wrongdoing and the rectification of the wrong by the court's damages order.

In personal injury and medical negligence cases, where judgment is often not handed down until many years after the wrongdoing, the amount payable for prejudgment interest could be a significant motivator to counter unreasonable delay in the settlement and resolution of meritorious claims.

The court at present has a wide discretion when deciding whether to award prejudgment interest, but this discretion must be exercised in a principled way. To that end, there are two principled bases on

which prejudgment interest can be awarded.

The first basis, the compensatory basis, is to compensate the plaintiff for the loss suffered. And the second basis, the restitutionary basis, is to reverse any profits that the "real" defendant may have made through wrongdoing.

The court in Ontario has recently confirmed that prejudgment interest should be awarded on the compensatory basis — specifically, by reference factors like the profits that a plaintiff could have made from the funds if they had been received earlier and the benefits accrued to the defendant's insurer by retaining the funds. (See *Aubin v. Synagogue and Jewish Community Centre*, 2024 ONCA 615; leave to appeal SCC refused.)

The "real" defendant in personal injury and medical negligence claims is a commercial insurance corporation or the taxpayer-funded Canadian Medical Protective Association (CMPA). This is acknowledged in s. 258.5 of Ontario's *Insurance Act*, which is designed to promote timely resolution of tortious motor vehicle cases by imposing a requirement that insurers "attempt to settle the claim as expeditiously as possible." This statutory duty is very vague and although the Act provides that a failure to comply "shall be considered by the Court in awarding costs," the obligation has had no discernible impact in reducing delay or promoting timely resolution of claims.

Insurers are educated and sophisticated litigants who are quite properly financially driven by the twin goals of minimizing claim payouts and earning interest on invested funds.

Corporate invested funds earn compound interest. Compound interest can be defined as interest on interest. The longer the time horizon of compounding, the more significant the impact on the growth of the initial fund. The reality of compounding on invested funds results in a built-in incentive to the insurance industry to retain the funds as long as possible and keep the benefit of the compounded interest.

Meanwhile, individuals pay compound interest on personal debt like credit cards and car loans.

Compound interest is not new to claims resolution and was introduced over 30 years ago in the Statutory Accident Benefits Schedule, which provided for interest to be paid on amounts overdue from the date the amount became overdue at the rate of two per cent per month compounded monthly.

A new presumptive rule that prejudgment interest be calculated on a compound basis would encourage and give incentive to the insurance industry to reduce unreasonable delay by settling meritorious cases or making advance payments and seeking early trial dates where settlement is not possible. It would be a powerful measure to reduce unreasonable delay.

Tom Connolly is a founding partner of the Ottawa law firm of Connolly Obagi LLP. Tom was called to the bar in 1975 and practises serious personal injury and medical malpractice litigation. He is a past president of the Ontario Trial Lawyers Association, a member of the American Association for Justice and The Advocates' Society. Tom is a frequent contributor to various continuing legal education programs in civil litigation and has published numerous articles and papers on personal injury litigation.

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