FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

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FOLA Submissions

Response to the Civil Rules Committee on Rules 53.09 and 53.10

Submitted to: Falguni Debnath, Senior Legal Officer
c/o Victoria Anderson at Victoria.Anderson@ontario.ca

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Submitted by: William Woodward, FOLA Chair
woodward@dyerbrownlaw.com

Michael Winward, FOLA Past Chair
winward@mackesysmye.com

Kristin Muszynski, FOLA 2nd Vice Chair
kmuszynski@tmlegal.ca

INTRODUCTION

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity to provide submissions regarding the Report to the Rules Committee on Rules 53.09 and 53.10 ("the Report").

FOLA is an organization that represents all 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province. In the context of the issues addressed in the Report, many of these lawyers practice insurance defence and many practice plaintiff personal injury.

In response to the Report, FOLA has put together a committee of three members who are the signatories to this submission. Two committee members (William Woodward and Kristin Muszynski) practice insurance defence and the third member (Michael Winward) practices plaintiff personal injury. Between them, they have a cumulative experience of 82 years practicing in personal injury law.

Throughout the Report, the Committee references that submissions from various stakeholders typically followed "partisan lines". Given the fact that many of our local law association members act on behalf of either insurers or plaintiffs and the fact that our committee is made up of two defence counsel and one plaintiff counsel, we believe that this response to the Report is balanced, objective and non- partisan.

We will divide our response to the Report into three parts: the discount rate, the prejudgment interest rate and our suggestions for going forward.

1. The Discount Rate

We would like to commend the Committee for the thoroughness that went into the discount rate section of the Report. We support the Committee's recommendations as summarized in paragraph 416 of the Report with one exception: we support an alternative discount rate relative to the provision of personal care services, such as a Personal Support Worker (PSW).

Although the number of serious injuries on Ontario's roadways has decreased by 26% over the past decade,[1] every year some motorists suffer life altering injuries. Add to that the fact that some people do suffer catastrophic complications from medical misadventure and other types of serious personal injury, there are those who will need permanent hands on care as a result of personal injury.

Fortunately, the number of people who suffer these catastrophic type injuries represents only a small fraction of the injured population. However, the needs of these individuals are both permanent and significant. An individual suffering from quadriplegia requires hands-on care, typically from a PSW, on a daily basis. An individual suffering a major brain injury who cannot live independently requires hands-

[1] Ontario Traffic Safety Annual Report, 2016, www.ontario.ca/orsar , pg. 9

on institutional or home care. The cost for providing this hands-on care does not increase by the cost of living. Consider, as an example, PSW hourly wage rates.

The starting rate of pay for a community based PSW is typically two or three dollars above minimum wage. However, those rates in pay can undergo significant jumps. In 2017, Ontario's minimum wage was $11.60. Effective January 1, 2018, minimum wage went to $14.00/hour; an increase of almost 21%. Rates of pay for PSW's bumped up significantly following the increase in the minimum wage.

In the current Covid climate, there has been much focus on the important work done by PSW's. There is some level of expectation that the pay levels for PSW's will increase post-pandemic to more properly reflect the value of the services they provide.

For a catastrophically injured person whose claim either settled or went to verdict on the assumption that rates of pay for personal care providers would increase at or close to the cost of living, jumps in pay can result in under compensation and an inability to fund hands on care. If a catastrophically injured person required 10 hours of PSW support per day, and settled the future care claim on an assumed hourly rate of $13.00, increasing annually by the cost of living, that person could find themselves seriously undercompensated when the minimum wage unexpectedly increased by nearly 21%.

FOLA would therefore recommend a different discount rate relative to the provision of personal care services. We would recommend that that rate retain the current ½% adjustment. In the grand scheme of personal injury claims, this secondary rate would apply only to a handful of cases. However, these are the most vulnerable of the injured population and the ½% reduction would provide a much needed buffer from unexpected and uncertain future rate changes for care providers.

2. Prejudgment Interest on Non-Pecuniary Damages

With respect, the depth and thoroughness that was evidenced in the Committee's review of the discount rate is not evident in the section on the prejudgment interest rate. Respectfully, we find that the conclusions in the Report were overly informed by the Court of Appeal decision in *MacLeod v Marshall*[2] *("Macleod")* and that more analysis is required.

We divide our comments into four sub-parts: what was the rationale for the enactment of Rule 53.10; are non-pecuniary damage awards indexed to inflation; does damage inflation plus prejudgment interest amount to double compensation and the concern over resolution delay. Given the 5 page limit for submissions, we are left to raise our concerns only in a summary way but would be happy to discuss matters more fully if it would be of help to the Committee.

(i) What was the rationale for the enactment of Rule 53.10?

The Report cites the Court of Appeal decision in *MacLeod* as setting out "the reason" for the 5% prejudgment interest rate in Rule 53.10. As authority for this reason, the Court in *MacLeod* cited the trial decision in *Awan v Levant*[3] *("Awan").* In those cases, the rationale behind Rule 53.10 was stated to

[2] 2019 ONCA, 842 (CanLII)
[3] 2015 ONSC, 2209 (CanLII)

be the legislative response to a 1987 Ontario Law Reform Commission ("OLRC") report that concluded that because the damage cap for non-pecuniary general damages was adjusted for inflation, adding interest effectively amounted to double compensation and the lower rate of 5% was more appropriate.[4]

Unfortunately, neither the trial judge in *Awan* nor the Court of Appeal in *MacLeod* cited any authority in support of its conclusion that Rule 53.10 actually was the legislative response to the OLRC report. We question whether the 1987 OLRC report was "the reason" for the 5% prejudgment interest rate enacted some three years later in Rule 53.07.

Over the dissent of Earl Cherniak, the OLRC recommended that the prejudgment interest rate on non-pecuniary general damages be set at the discount rate, which was at that time 2.5%.[5] Three years later, Rule 53.10 set the prejudgment interest rate at 5%. We question how it was concluded that the 5% rate was based entirely on the OLRC report. Was there a report to the Civil Rules Committee in advance of Rule 53.10 similar to this Committee's report? We suggest there were other reasons behind the 5% rate, including intentional resolution delay by some plaintiffs in the era of double digit interest and pressure from insurers who were facing high interest payouts. We cannot help but think that there was more to the Rule 53.10 amendment than just the OLRC report.

(ii) Are Non-Pecuniary Damage Awards Indexed to Inflation?

Respectfully, we reject the statement at paragraph 456 in the Report that "Non-pecuniary general damages are still indexed to inflation". While the cap on non-pecuniary general damages may be indexed to inflation, there is no evidence to suggest that non-cap general damages are indexed to inflation. There are simply too many variables that go into an assessment to conclude that general damages, across the board, have some inflationary component.

In the majority of personal injury cases that go to trial, the trier of fact is a jury. There is no evidence that jury awards over the past years have increased, whether for inflation or otherwise.

(iii) Does Damage Inflation Plus Prejudgment Interest Amount to Double Compensation?

Even if there was an across the board inflationary component to non-pecuniary general damages, the idea that inflation together with prejudgment interest amounts to double compensation, so as to disentitle a plaintiff from receiving full prejudgment interest, has been rejected by the Ontario Court of Appeal and the Supreme Court of Canada.

Respectfully, the Committee put considerable emphasis on the *MacLeod* decision but did not take into account two other important cases: *Borland v. Muttersbach*[6] *("Borland")* and *Botiuk v. Toronto Free Press*[7] *("Botiuk").* *Borland* was decided before the OLRC report but *Botiuk* was decided after the report.

[4] *Awan v. Levant* (supra) at para. 23; *MacLeod v. Marshall* (supra) at para. 45 and 46
[5] Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death, 1987, at para. 212
[6] *Borland v. Muttersbach*, 1985, ONCA, 2134 (CanLII)
[7] *Botiuk v. Toronto Free Press*, [1995] 3 S.C.R., 3

Borland was a personal injury case in which one of the plaintiffs was awarded non-pecuniary general damages at the cap. *Botiuk* was a defamation case. Both cases addressed the argument as to whether prejudgment interest on inflation adjusted damages resulted in double compensation. In *Borland,* the Court of Appeal rejected the argument. In *Botiuk*, the Supreme Court of Canada agreed:

> "It was contended in *Borland* that since the ceiling on awards for non-pecuniary damages established by the 'trilogy' of cases from this court could be increased to reflect inflation…, the award of prejudgment interest on the inflated sum amounted to double payment. The Court of Appeal did not agree and upheld the trial judge's decision on this matter.
>
> The trial judge in *Borland* had observed that the award adjusted for inflation buys no more than the original figure did in 1978. He went on to determine that whatever the award, the statute gives the plaintiff the *prima facie* right to receive prejudgment interest on it at the prevailing prime rate. In the absence of such a guarantee, there would be no incentive for defendants to make advance payments, thereby foregoing investment income. He concluded that the fact of inflation is not a proper ground for depriving plaintiffs of the *prima facie* right to receive prejudgment interest.
>
> In my view, the decision in *Borland* is correct and the reasoning should be applied to the award made to Botiuk".[8]

Respectfully, the very brief prejudgment interest section in the Report does not address decisions from other courts, including the Supreme Court of Canada. *MacLeod* is one case, but there are others and there are considerations to take into account in determining a proper prejudgment interest rate other than the fact that current rates are relatively low.

(iv) <u>The Delay Concern</u>

As the Committee noted, at the time Rule 53.10 was introduced, the prejudgment interest rate was "very high". This high interest rate provided an incentive to some plaintiffs to delay resolution of their claims. It was well known in practice that some plaintiffs would be in no rush to resolve a claim when they could yield a risk and tax free "investment" in double digits. In part, we submit that to address this incentive to delay, Rule 53.10 was introduced to fix the prejudgment interest rate in personal injury actions to 5%, which at the time was 7 to 8% lower the prejudgment interest rate under the *Courts of Justice Act*.

If the prejudgment interest rate is set too low, defendants will have a similar incentive to delay resolution of the action. Insurance companies, the Canadian Medical Protective Association, the Health Care Insurance Reciprocal of Canada (HIROC), etc. are all sophisticated investors. If the prejudgment interest rate is set at a figure that is too low, defendants will be motivated to delay resolution. There

[8] *Botiuk v. Toronto Free Press*, supra, at para. 117-119

has to be a balance in the prejudgment interest rate that motivates neither the plaintiff nor the defendant to delay the resolution of the action. As stated in the 1987 OLRC report:

"The Commission recognizes that expeditious settlement of personal injury claims is an important goal that should be fostered. In our view, the ideal prejudgment interest rule should be neutral with respect to settlement behavior, in the sense that such a rule should operate in such a way that neither the injured person nor the wrongdoer can benefit from delaying settlement or resolution of the action".[9]

It may be that in the current environment, a prejudgment interest rate of 5% is too high, as it may act as an incentive for the plaintiff to delay resolution. However, a prejudgment interest rate as recommended by the Committee will set the prejudgment interest rate so low that defendants would have incentive to delay resolution of the action. There must be some middle ground where neither side would benefit from delay.

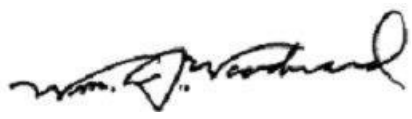
3. Suggestions for Going Forward

FOLA therefore makes the following suggestions:

1. Retain the ½% interest reduction in the discount rate relative only to the cost of personal care services.

2. Undertake a more thorough review of the prejudgment interest rate, bearing in mind earlier decisions from the Court of Appeal and Supreme Court of Canada and also bearing in mind the resolution delay concern.

3. Given the unpredictable effect of Covid on the economy and on interest rates, we suggest that this Committee reconvene within the next two to three years to revisit the post-Covid reality in Ontario.



William Woodward
FOLA Chair

Michael Winward
FOLA Past Chair

Kristin Muszynski
FOLA 2nd Vice Chair

[9] Ontario Law Reform Commission Report on Compensation for Personal Injuries and Death, (supra) at pg. 204