Application of Interest in New York Article 50 Cases

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New York Article 50 deals with personal injury and wrongful death actions, and provides the circumstances under which and the values to which the 9% statutory interest is to be applied. The relevant sections of Article 50 are

- **Pre-verdict interest**
- **Pre-judgment interest**
- **Pre-payment interest**
  - **Interest on Settlement**

Pre-verdict Interest.

In Millbrandt, The Court of Appeals provided the overall direction "(1) that no pre-verdict interest should be added to an Award for post-verdict losses if the award has not been discounted to a time prior to the award; and (2) that the pre-verdict interest on an award for past losses that have accrued from the date of death to the date of the verdict should be calculated under the method in CPLR 5001 (b)." That section provides in part that

> Interest is to be applied "...from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred".
>
> The date that 'the cause of action existed' means the date of death in wrongful death actions or the date that liability was established in personal injury actions.

In Wrongful Death actions, interest is to be applied to pecuniary damages as follows;

- Future Damages and Lump Sums are discounted back to the date of death
- Past damages are discounted back to the date the individual items of loss were incurred. [As a practical matter, a weighted average incurred date can be used in lieu of individual item dates.]
- If included, Conscious Pain and Suffering occurring prior to death should not be discounted. (See position paper on Pain and Suffering)

Bifurcated cases are those where the liability verdict occurs at a date earlier than the Award . Case decision has set the total Award as the amount which is discounted and to which interest is then applied.

As the first and only guidance on the subject of discount rates, the formulas in Amended 50A have also been applied to original 50A and 50B cases. Court decisions have interpreted 'the rate in effect on the date of the verdict ' as daily yield on the date of the verdict. The applicable formulas are as follows;

- For future Award elements with payment periods of 20 years or less, apply the 10-year Treasury rate in effect on the date of the verdict.
- For future Award elements with payment periods of more than 20 years, calculate the weighted average of the 10 year Treasury rate for the first 20 years, and 2 percentage points above the 10 year Treasury rate for periods beyond 20 years [e.g. for an element with a future payment period of 30 years - 6 months,((20 X .03) + (10.5 X .05))/30.5), or ((.6 + .525)/30.5), 1.125/30.5 or .036885].

The discount rate applicable to past damage elements would seem to be the rate applicable to related future award elements. The best single rate would then seem to be the weighted average discount rate for future Award elements ([e.g. the sum of ((element future award/total future Award) X element discount rate).

For Medical Malpractice wrongful death, all future award elements are, in effect, treated as lump sums. The Original 50A Wrongful Death provides that the verdict will be returned without including the future periods to which element awards relate, and Amended 50A Wrongful Death provides that all future elements will be treated as lump sums. As all are due at the date of the verdict, the discount rate should be the index rate on the date of the verdict.

Interest to verdict is applied to the total award as discounted to dates earlier than Award.

Interest to Judgment

Sec. 5002 provides that interest will be applied to the total sum awarded, including interest prior to verdict. The Court has consistently interpreted this to be the total valued Award as set out under Articles 50A and 50B after adjustment for taxes and Collateral Source offsets and incorporating deducted expenses and contingent fees.

Interest to Payment

Sec. 5003 provides that every order directing payment of money which has been docketed as a judgment shall bear interest from the date of such docketing. This includes the total valued Award, pre-verdict interest and pre-judgment interest.

Interim Payments

Under Medical Malpractice wrongful death there are no future payments that the defendant must 'offer and guarantee'.

Otherwise, award future first payments are due as of the date of the verdict. Under Amended 50A, this is also true unless some other date is returned in the verdict. Payments due between verdict and resolution (judgment or payment) should to be paid in cash. There is no direction on the application of interest to interim payments, but it should include the following;

- The number of interim monthly payments should be the same for all elements as the determining dates are the same.
- If the Interim period exceeds one year and statutory inflation applies to the element, the payments for each year beyond the first year are factored by 4%.
- Total payments are the sum of the monthly payments factored by the 4%, as appropriate, for the number of months plus 1 (reflecting that the first payment is front-ended)
- As any monthly Collateral Source offsets may be factored at a different COLA or inflation rate before being adjusted for expense and fees, different offset amounts may be applied against the award payments.
- In the event of a deferred payment date (Amended 50A provision), the number of payments will be adjusted for the deferred date, as will the sum of monthly payments and the weighted average discount rate.
    1. The pre-verdict discount rate is the sum of the weighted average of future award element rates.
    2. If the deferred date is beyond Judgment or payment, the discount rate is the average of the non-deferred elements.
    3. When the deferred payment date falls within the date of the judgment or payment, the number of payments is the number of months between the deferred date and the determining event plus 1. The deferred discount rate should be the same rate as under 1. above.

- In line with the discounting of past damages before calculating pre-verdict interest, total interim payments should be discounted back from the defining point (judgment or payment) to an average payment date before applying interest. When deferred payments are included the simple average date is adjusted.
- To adjust the net element values for interim payments, total interim payments should be discounted back to the verdict date before applying interest to the Net Award elements.
- As the interim payments are extracts from future payments, the Award weighted average discount rate should be employed for interim payments.
- Interest, of course, should be applied at 9.00% per annum

Payments to Judgment

Total months from verdict to judgment plus 1 are the payments to verdict.

Payments to Payment

Because of intricacies associated with the judgment cutoff, the best answer can be achieved by first calculating interim payment components for the period from verdict to payment, and then deducting the components for the period from verdict to judgment.

As periodic payments from an annuity are delayed for at least 30 days from funding, an extra month can be added to the payment date to account for all future payments.

Simple Interest or Compound interest

As mentioned above, the statutes add interest for each section before applying the next level of interest. The statutes seem to be silent on whether interest is compound or simple. The judgment form seems to imply modified simple interest as it calls for the daily interest.

Daily simple interest is the annual amount of interest divided by the number of days in the year. The pre-verdict daily interest is based on an Award amount discounted to a period prior to the verdict. The judgment daily interest is based on the Award amount discounted to the verdict plus pre-verdict interest. The payment daily interest is based on the Award amount discounted to the verdict plus pre-verdict interest plus pre-judgment interest. As a result, there can be as many as three daily interest amounts.

Compound interest is calculated by applying the interest rate raised to the power of total days between events divided by the days in the year. (First day interest uses 1 day divided by the days in the year. Succeeding daily amounts increase through the year.) The pre-verdict first daily interest is based on an Award amount discounted to a period prior to the verdict. The judgment first daily interest is based on the Award amount discounted to the verdict plus pre-verdict interest. The payment daily interest is based on the Award amount discounted to the verdict plus pre-verdict interest plus pre-judgment interest. The days are reset to -0- at each level of interest.

The first day compound interest is always lower than the first day simple interest. Total first year interest for simple and compound are the same. Beyond the first year, total compound grows exponentially beyond total simple interest.