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Computation of Interest on Damages in Patent Infringement Cases

A decision issued last month contains a useful synopsis by Justice Zinn of principles applicable to damages awards in patent infringement cases: *Eli Lilly & Co. et al. v. Apotex Inc.* 2014 FC 1254.

Eli Lilly successfully sued Apotex for patent infringement on patents relating to a process for making the antibiotic ceflacor. The Statement of Claim was issued in June 1997, with a trial decision issued in 2009. Eli Lilly elected its own damages, rather than an accounting of Apotex' profits. The damages decision issued in January 2015, more than 17 years after the commencement of the action.

One of the key features of Justice Zinn's decision is his treatment of prejudgment interest, and in particular, his creation of a judicial presumption that the plaintiff would have earned compound interest on the damage award. The issue of simple vs. compound intrest under Section 36 of the *Federal Courts Act* is a frequent topic of litigation. For example, in *AlliedSignal*, the Federal Court held that a compound rate of return on prejudgment interest was exceptional (*AlliedSignal Inc. v. Du Pont Can. Inc*. (1998) 78 CPR (3d) 129, aff'd (1999) 86 CPR (3d) 324 (F.C.A.)) In the ceflacor case, Justice Zinn came to an entirely different proposition: "…in today's world there is a presumption that a plaintiff would have generated compound interest on the funds otherwise owed to it and also that the defendant did so during the period in which it withheld the funds". As for the rate of interest, Justice Zinn awarded a rate based upon the plaintiff's own profit margin from its business activities during the relevant time period.

While the legal theory behind calculation of pre-judgment interest may not be the stuff of thrillers and newspaper reports, the effect of Justice Zinn's decision is to grant $74M of prejudgment interest, a sum that dwarfs the $31M damages award. While each party attempted to attribute litigation delay to the other in an effort to alter the interest calculation, Justice Zinn refused to engage, and simply concluded that both parties bore responsibility.

Apotex has appealed the decision to the Federal Court of Appeal.