



QUEENSLAND

LAW REFORM COMMISSION

CONFIDENTIAL

WORKING PAPER IN RELATION TO
AN EXAMINATION OF THE LAW
RELATING TO INTEREST ON DAMAGES

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PREFACE

The Law Reform Commission has been functioning since 1st March, 1969 and has been constituted by the Law Reform Commission Act, 1968. The members are:-

The Honourable Mr. Justice W.B. Campbell, Chairman

Mr. P.R. Smith

Mr. B.H. McPherson

Mr. J.J. Rowell.

The Secretary of the Commission is Mr. K.J. Dwyer. The office of the Commission is at William Street, Brisbane.

The short citation for this working paper is Q.L.R.C.W.6.

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The first programme of the Law Reform Commission of Queensland on reform as approved by the Honourable the Minister for Justice and Attorney-General includes an examination of the law in relation to the above.

The enclosed working paper contains suggestions for a proposed Bill and other explanatory matter and is being circulated to persons and bodies known to be interested, from whom comment and criticism is invited. Recipients of the working paper will appreciate that it does not necessarily represent the concluded view of the Commission, nor is it intended that any implications be drawn as to Government Policy.

This paper is circulated on a confidential basis and recipients should bear in mind that any recommendations for the reform of the law which may ultimately be formulated by the Commission are required to be submitted to the Minister and must have the approval of the Governor in Council before being laid before Parliament.

It is requested that any comment you care to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland 4000, so as to be received no later than Monday, 1st March, 1971.

W.B. Campbell
(W. B. Campbell)
CHAIRMAN.

Dated: 4/1/71
BRISBANE.

WORKING PAPER IN RELATION TO
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ON DAMAGES

Item 9 of Part A of the programme of the Law Reform Commission requires an examination of the law relating to interest on damages.

As the authors of Mayne & McGregor on Damages (12th ed.) say at paragraph 278: "The case law upon the recovery of interest is riddled with inconsistency. This stems from the gradual weaning away of the law from the stigma attached by the religion and thought of an earlier day to the taking of usury". The common law rule established by Lord Mansfield in Eddows v. Hopkins (1780) 1 Douglas 376 was that interest cannot, in the absence of express agreement, be recovered. (see also Page v. Newman (1829) 9 B. & C. 378). Thus no interest can be awarded at common law if the obligation was not certain or capable of being made certain and interest was initially added to a cause of action only when the debtor had agreed to pay interest. The Admiralty Courts and the Court of Equity held themselves entitled to award interest.

In Riches v. Westminster Bank Ltd. [1947] A. C. 390, Lord Wright said at page 400: "the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law". The same principle was applied in Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447. Lord Denning M. R. at page 468 said: "the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly".

The Civil Procedure Act 1833 (Lord Tenterden's Act) corrected to some extent the limitations of the common law courts' powers in this matter. By s. 28 of that Act the jury were to be entitled, if they should think fit, to allow interest to the successful plaintiff in a limited class of cases, that is, where the debt was a sum certain under a contract in writing payable at a time certain or, if otherwise made payable by a demand in writing fixing a certain date and notifying the debtor that in default interest would be claimed. Section 29 similarly enabled the jury to give damages "in the nature of interest" in certain torts and also on claims upon policies of insurance. These provisions were adopted in Queensland as s. 72 and s. 73 of "The Common Law Practice Act of 1867".

In The London Chatham & Dover Railway Company v. The South Eastern Railway Company [1893] A. C. 429 Lord Herschell L. C. considered the principle which he thought should be applied (page 437). At page 440 he said: "When Lord Tenterden dealt with the allowance of interest in this statute he certainly introduced a language which kept such claims within very narrow limits; speaking for myself they seem to be too narrow for the purposes of justice".

In England in 1934 the Law Reform (Miscellaneous Provisions) Act was introduced, s. 3(1) of which is as follows:-

"In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section -

- (a) shall authorise the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

Under these provisions the court is given a fourfold discretion, whether to award interest at all, at what rate, on what part of the damages, and for what period.

Paragraph 278 of Mayne & McGregor (supra) goes on to suggest that two propositions merit consideration, firstly that cases in which prior to 1934 interest was recoverable as damages as of right should stand on the same footing after 1934 and should not attract interest only at the court's discretion as do cases which fall solely within the statute's provisions; secondly that where a case falls within the statute a full statement of the subject is necessary to indicate what factors should guide the court in the exercise of its discretion. In paragraphs 279 et. seq. various situations likely to arise are discussed and appropriate conclusions reached.

In paragraph 290 dealing with torts affecting the person it is suggested that the question of interest can never arise where damages are awarded for non-pecuniary loss such as for pain and suffering or for injury to feelings or reputation. Also there should be no interest on pecuniary loss so far as it is a prospective loss. However, other pecuniary loss such as wages and salary, loss of profits and medical expenses could provide a good case for the award of interest, but it would be small and its assessment very complicated.

An Act passed by the Legislature of the State of New York in September 1967 amended the Civil Practice Law and Rules in relation to the recovery of interest in an action for personal injury. The New York Law Revision Commission expressed itself as being in favour of an award of interest as a matter of right in all personal injury actions. It recognised that this necessarily entails the award of interest of future losses (e. g. future pain and suffering, future loss of earning capacity, etc.) but suggests this would not be unique and draws attention to awards in some contract actions where interest is awarded from the date of the breach even though part of the verdict includes future losses.

The position in England has recently been clarified by s.22 of the Administration of Justice Act 1969 which added the following subsections to s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934:-

"(1A) Where in any such proceedings as are mentioned in subsection (1) of this section [section 3 of the Act of 1934], judgment is given for a sum which (apart from interest on damages) exceeds £200 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the court considers appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(1B) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section."

New Zealand, in s.87 of the Judicature Act, 1908, has legislation in a form similar to the English s. 3(1) previously mentioned. That legislation differs in that it stipulates a rate of interest not exceeding five percent and by the addition of a further subsection. On 8th September, 1969 the Law Reform Commission of New South Wales submitted a report on Supreme Court procedure. In its draft Bill it included a clause 94 which differs little from the English section. The Victorian Supreme Court Act 1958 has provisions in sections 77 to 79A dealing with interest. However, under s.79A it is mandatory upon the court to award interest. There are additional provisions not contained in the English Act.

It is submitted that the present-day principles to be applied in awarding interest are as were enumerated by Lord Denning M. R. in Jefford v. Gee [1970] 2 W.L.R. 702 at page 709 et. seq. This case involved a claim for damages for personal injury and the court stated these principles were not altered by the provisions of the additional subsections 3(1A) and 3(1B). Under the English statute interest may be awarded on the whole or any part of the money between the date when the cause of action arose and the date of judgment. It should be noticed that it would not be necessary for a plaintiff to claim interest in his pleadings as it could be awarded by the court without any claim (see Riches v. Westminster Bank Ltd. [1943] 2 All E. R. 725).

The article entitled "Final Judgment on Mortgage Covenant. Recovery of Interest" (3 A. L. J. page 176) has relevance to the case where interest is payable as a right. The author, Mr. R. R. Sholl (as he then was) refers to Ex Parte Fewings. In re Sneyd (1884) 25 Ch. D. 338, and says: "There are certain remarks of a very strong court (Cotton, Lindley and Fry, L. J.J.) which decide that the plaintiff could have entered judgment for interest to the date of judgment".

A plaintiff who would be entitled to interest under the amendment about to be proposed would not receive interest if he takes out of court the money paid into court in satisfaction of his claim because the matter has not been "tried" nor has "judgment been given" in the terms of the section (see Jefford v. Gee (supra) page 713E and the Supreme Court Practice 1970 at 6/2/7A). On the other hand, if the entitlement is of right unrelated to the proposed provisions the plaintiff will keep that fact in mind in deciding whether or not to accept the amount paid into court. Payments into the Supreme Court attract increments in accordance with the provisions of "The Supreme Court Funds Acts, 1895 to 1958". This is not the case in the District Court because of the absence of similar provisions relative to that jurisdiction. It is suggested that the District Court Rules be amended in order to allow money paid into court to be invested so that it will attract interest in the same manner as money paid into court in a Supreme Court action.

It is recommended that legislation be implemented similar to that in the English Act and the New South Wales proposal. Our recommendations are embodied in the attached draft.

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No. _____ of 1971

A Bill to Amend the Common Law Practice Acts 1867 to 1964 in certain particulars.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

1. Short title and citation. (1) This Act may be cited as the Common Law Practice Act Amendment Act 1971.

(2) The Common Law Practice Act of 1867 as amended from time to time is in this Act referred to as the Principal Act.

(3) The Principal Act as amended by this Act may be cited as the Common Law Practice Act 1867-1971.

2. Repeal of and new section 72. The Principal Act is amended by repealing section 72 and inserting in its stead the following section:-

72. In any proceedings in respect of a cause of action arising on or after the commencement of the Common Law Practice Act Amendment Act 1971, tried in the Supreme Court or any District Court for the recovery of any money (including any debt or damages or the value of any goods) that Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment is satisfied:

Provided that nothing in this section -

- (a) shall authorise the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

3. Repeal of section 73. The Principal Act is amended by repealing section 73.

4. Savings and transitional. Sections 72 and 73 of the Principal Act shall, notwithstanding their repeal and, in the case of section 72, the insertion of a new section 72 in lieu thereof pursuant to section 2 of this Act, be deemed to continue in force with respect to any action referred to in either of those sections where the cause of action in relation thereto has arisen prior to the commencement of this Act.