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A REPORT OF THE LAW REFORM COMMISSION

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

Q.L.R.C. 10

Queensland Law Reform Commission
September 1971

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RELATING TO INTEREST ON DAMAGES**

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How to make comments and submissions

Your are invited to make comments and submissions on the proposals in this Paper

Written comments and submissions should be sent to:-

The Secretary
Queensland Law Reform Commission
PO BOX 312
ROMA STREET QLD 4003

It would be helpful if comments addressed specific issues or paragraphs in the Paper.

Confidentiality

Submissions may be subject to release under the provisions of the *Freedom of Information Act 1992 (Qld)*. If you want your submission, or any part of it, to be treated as confidential, please indicate this clearly.

The Commission may refer to or quote from submissions in its final Report. If you do not want your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

COMMISSIONERS

Chairperson: **Mr W B Campbell**

Members: **Mr P R Smith**
Mr B H McPherson
Mr J J Rowell

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QUEENSLAND

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

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A REPORT OF THE LAW REFORM COMMISSION

In relation to an examination of the law
relating to Interest on Damages

Q. L. R. C. 10

To the Honourable P. R. Delamothe, O. B. E., M. L. A.,
Minister for Justice and Attorney-General,
BRISBANE.

Under Item 9 of Part A of its approved programme, the
Law Reform Commission is required:

"To examine the law in relation to
"interest on damages. "

The within Report comprises a draft Bill and commentary
and represents the recommendations of the Commission consequent
upon its examination of the law in this regard.

In the commentary it is explained that legislation in
England provided for the award of interest to successful plaintiffs
in certain cases and Queensland adopted this legislation in sections
72 and 73 of "The Common Law Practice Act of 1867". The
Commission is recommending that these sections be repealed and
new sections substituted.

A working paper was circulated for comment and criticism
to persons and bodies believed to be interested. Some of the
suggestions received have been incorporated into the proposed
amendments.

The Commission wishes to draw attention to its Report No.
9 which also recommends an amendment to the Common Law
Practice Act 1867-1970. If both recommendations are accepted
perhaps they could be combined in the one amending Act.

W. B. Campbell (Chairman)

P. R. Smith (Member)

B. H. McPherson (Member)

J. J. Rowell (Member)

10 SEP 1971
BRISBANE.

COMMENTARY

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.

The English Act of 1934 was preceded by a Report (Cmnd. 4546) published in 1934 by the Law Revision Committee. The Report said in paragraph 8: "In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and have paid the appropriate sum as damages. There are of course some cases when it is reasonable that he should have had a certain time for investigation and in those cases the courts might well award interest only from the date when such reasonable time had expired. . . .". The Report further stated that this principle should apply not only to special damages for tort but also to general damages in running down cases or for pain and suffering in personal injury cases. Section 3(1) of the English Act is reputed to "effect the reform which the Lord Chancellor, Lord Herschell, thought that justice required". (See London Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A. C. 429, 437).

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 on 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."

The mandatory character of these provisions suggests they were enacted because no interest was being awarded.

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. The New South Wales "Supreme Court Act, 1970" which was assented to on 14th October, 1970 has yet to be proclaimed. However, in s. 94 it contains provisions very similar to the English s. 3(1) (supra) and this section and s. 95 form the basis of the Commission's suggested amendments. The Victorian Supreme Court Act 1958 has provisions in ss. 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 the Court of Appeal in Jefford v. Gee [1970] 2 Q. B. 130, particularly in the judgment of the Court read by Lord Denning M. R. at page 146 et. seq. That was a case involving a claim for personal injuries heard in 1969 before the amended subsections 3(1A) and 3(1B) came into force on 1st January, 1970. The Court said at page 143 that it thought its decision will be applicable to cases tried after 1st January, 1970 which will be

governed by both the 1934 and 1969 Acts. Further that the Act of 1969 did not alter the principles applicable to awarding interest but "obliged" the court to apply those principles.

The judgment concludes at page 151: "In order to carry out the Act of 1969, the court will, in future, have to itemise the damages in most personal injury cases. The court should, in general, award interest on the items on the following lines:

Special damages - Interest should be awarded from the date of the accident to the date of trial at half the appropriate rate.

Loss of future earnings - No interest should be allowed.

Pain and suffering and loss of amenities - Interest should be awarded at the appropriate rate from the date of service of the writ to the date of trial.

Fatal Accidents Acts - Interest should be awarded at the appropriate rate from the date of service of the writ to the date of trial.

Appropriate rate - The appropriate rate should be the rate allowed by the court on the short term investment account, taken as an average over the period for which interest is awarded. It started in 1965 at five percent and has increased by steps of a half percent every year till it stands at seven percent from March 1, 1970. In most cases coming up for decision in this coming year, the average may be taken to be six percent.

Form of judgment - The judgment should state the rate of interest and the period for which it is awarded, and should state it as a gross sum without deducting tax.

Payment into court - Payment into court should be made as heretofore without regard to interest: and costs awarded accordingly.

Exceptional cases - In exceptional cases, such as when one party or the other has been guilty of gross delay, the court may depart from the above suggestions by diminishing or increasing the award of interest, or altering the periods for which it is allowed. "

As it is said in this judgment, courts will, in future, have to itemise the damages in most personal injury cases. The Court of Appeal pointed out in Watson v. Powles [1968] 1 Q.B. 596 that it has formerly not been considered the duty of the judge to divide up his total award into separate items. The stand that the High Court has taken is that the amount awarded for general damages is a single amount which is appropriate to the circumstances of the case and is not the sum of rigidly separate and independent items (per Windeyer J. in Teubner v. Humble 108 C. L. R. 491, at p. 505). However it is submitted that such a single amount can be arrived at only after consideration under such heads as "economic loss", "loss of amenities" and "pain and suffering" (see Paff v. Speed, 105 C. L. R. 549 at p. 559).

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).

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 150 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.

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".

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 District Courts and Magistrates Courts because of the absence of similar provisions relative to those jurisdictions. This difference will warrant attention on some future occasion.

The Commission's original proposal was to apply the provisions of s. 72 to the Supreme Court and District Courts only, but it is now of the opinion that these provisions should also be applied to Magistrates Courts and consequently there has been a return to the original English words "a court of record". Thus Magistrates Courts will be included and in view of the doubts concerning arbitration proceedings raised by Chandris v. Isbrandtsen-Moller Co. Inc. [1951] 1 K. B. 240 it has been decided to apply the power expressly to an arbitrator or umpire by inserting subsection (2) in the proposed s. 72.

Clause 27 of an Arbitration Bill suggested by the Commission provides for interest at the same rate as a judgment debt. Section 95 of the New South Wales Act does not specify a rate but refers to "the prescribed rate". The Commission favours a definite rate and for this reason has provided for eight percent which it considers appropriate in view of current interest rates, particularly the bank overdraft rate. The implementation of this section may necessitate amendment to O. 47 r. 17 of the Rules of the Supreme Court which at present provides for interest at the rate of five percent per annum.

A number of comments have set out certain circumstances in which it might be unfair to award interest. However, it is felt that proper use of discretion by the court and adherence to the within guidelines will overcome these objections.

It is recommended that legislation be implemented similar to those in the English and New South Wales Acts. These recommendations are embodied in the attached draft.

No. of 1971

A Bill to Amend the Common Law Practice Act 1867-1970 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:-

cf. N.S.W. 52
of 1970, s. 94.

72. Interest to judgment. (1) 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 a court of record for the recovery of any money (including any debt or damages or the value of any goods) 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 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 given.

(2) The powers conferred on a court of record by the preceding subsection may be exercised by an arbitrator or umpire:

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 and new section 73. The Principal Act is amended by repealing section 73 and inserting in its stead the following section:-

cf. N.S.W. 52
of 1970, s. 95.

73. Interest on debt under judgment or order. (1) Where judgment is given or an order is made for the payment of money, interest shall, unless the court otherwise orders, be payable at the rate of eight per centum per annum from the

date when the judgment or order takes effect on so much of the money as is from time to time unpaid.

(2) Notwithstanding subsection (1) of this section, where the court directs the entry of judgment for damages, and the damages are paid within twenty-one days after the date of the direction, interest on the judgment debt shall not be payable under subsection (1) of this section unless the court otherwise orders.

(3) Notwithstanding subsection (1) of this section, where the court makes an order for the payment of costs and the costs are paid within twenty-one days after ascertainment of the amount of the costs by taxation or otherwise, interest on the costs shall not be payable under subsection (1) of this section unless the court otherwise orders.

4. Savings and transitional. Sections 72 and 73 of the Principal Act shall, notwithstanding their repeal and the insertion of new sections in lieu thereof, 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.

CIRCULATION LIST

A Working Paper on this topic was circulated to the following:-

- The Minister for Justice and Attorney-General for Queensland
Ministers of Queensland Cabinet
Judges of the Supreme Courts, Brisbane, Townsville, Rockhampton
The Chairman of the District Courts, Brisbane
The Dean of the Faculty of Law, University of Queensland
The Vice-Chancellor, University of Queensland
Professor Millner, London University College
The Honourable Sir Harry Gibbs, Sydney
Sir George Paton, Law Foundation, Melbourne
The Law Commission, London
The Law Reform Commission, Sydney
The Law Reform Committee, Adelaide
The Law Reform Committee, Perth
The Law Reform Committee, Hobart
The Law Reform Commission, New Zealand
Parliamentary Draftsman, Brisbane
Parliamentary Draftsman, Melbourne
- * The Solicitor General, Brisbane
 - * The Under Secretary, Department of Justice, Brisbane
 - * The Under Secretary, Treasury Department, Brisbane
 - * The Public Curator, Brisbane
 - * The General Manager, State Government Insurance Office,
Brisbane
 - * The Insurance Commissioner, Queensland
 - The Bar Association of Queensland
 - * The Queensland Law Society Inc.
 - * The North Queensland Law Association, Townsville
 - The Central District Law Association, Rockhampton
 - The Gold Coast District Law Association, Surfers Paradise
 - The Downs and South-Western Law Association, Toowoomba
 - Ipswich and District Law Association
 - The City Solicitor, Brisbane City Council
 - O'Sullivan, Currie & Co., Solicitors, Brisbane
 - Thynne & Macartney, Solicitors, Brisbane
 - * Morris Fletcher & Cross, Solicitors, Brisbane
 - * Quinlan Miller & Treston, Solicitors, Brisbane
 - Chambers McNab & Co., Solicitors, Brisbane
 - O'Shea Corser & Wadley, Solicitors, Brisbane
 - Scott & Scott, Solicitors, Brisbane
 - Hill Collas & Bradley, Solicitors, Brisbane
 - * Mr. M. G. Morley, Barrister, Brisbane
 - * Fire & Accident Underwriters Association of Queensland
 - Non-Tariff Insurance Association (Queensland Branch)

* those from whom comment was received.