LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
DEBTOR-CREDITOR RELATIONSHIPS

(PROJECT No. 2)

PART IV- PREJUDGMENT INTEREST

LRC 12
1973

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALEX. B. MACDONALD, Q.C.,
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON DEBTOR-CREDITOR RELATIONSHIPS
(Project No. 2)
PART IV PREJUDGMENT INTEREST

This Report has been prepared in the Commission's study on Debtor-Creditor Relationships which is Project No. 2 in the Commission's Approved Programme.

The existing law relating to interest prior to judgment is in an unsatisfactory state. At present only a relatively narrow range of actions or claims are amenable to an award of prejudgment interest. The recovery of such interest is largely governed by an English statute of 1833 which was part of the English law "received" at the founding of the colony of British Columbia in 1858. That statute is badly out of tune with contemporary needs and conditions.

The Commission feels that reform is warranted and in this Report puts forward recommendations which would, if implemented, bring a degree of order and justice to this obscure corner of the law. The basic theme of the Commission's recommendations is that interest prior to judgment should be recoverable as a matter of right, regardless of the nature of the cause of action in all actions for the recovery of a judgment sounding in money.

CHAPTER I INTRODUCTION: THE PROBLEM AND ITS BACKGROUND

A. General

If A sues B in any court in British Columbia, and the court decides that B is liable to pay a sum of money to A, the latter is entitled to interest on that sum from the date of the judgment of the court to the date upon which it is satisfied, at five per cent. This simple and intelligible result is brought about by sections 12 to 14 of the federal *Interest Act*.[1] It is irrelevant to the operation of those provisions what the original source of the liability was whether, for example, B owed the money because he borrowed and failed to repay it, or because he had injured A through the negligent operation of a motor-vehicle.

If A sues B in any court in British Columbia, and the court decides that B is liable to pay a sum of money to A, the latter may or may not be able to claim interest on that sum for some period prior to the date upon which the court delivers judgment. Whether or not he will be able to do so depends on the effect of a body of law that has been described as "riddled with inconsistency."[2] This Report is concerned with whether it is possible and desirable to rationalize and reform that body of law, and how this might be done.

In March, 1973 the Commission completed a working paper on the subject of interest prior to judgment. That working paper set out the Commission's tentative conclusions and proposals for reform. The working paper was circulated for comment to a large number of knowledgeable persons and groups, including members of Bench and Bar. All were asked to submit their written comment on and criticism of the Commission's tentative conclusions. The number of responses received was not great. However, those comments which were received proved to be of great value to the Commission in evaluating the tentative conclusions and formulating the recommendations contained in this Report. The Commission wishes to thank all those who took the time to respond to the working paper.

Most of the respondents expressed general approval of the proposals made in the working paper, although there was some difference of opinion over points of detail. The comments made on specific points will be dealt with elsewhere in this Report in their appropriate context.

B. The Nature of Interest

It is generally accepted today that the basis of an award of interest by a court 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."[3] The essence of interest, as a distinguished

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1. R.S.C. 1970, c. I-18.

2. *McGregor on Damages* 316 (13 ed. 1972).

3. *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co.*, [19701 1 Q.B. 447, 468 (Lord Denning MLR.).

English judge has remarked:[4]

> ... 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. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute ... or was unliquidated and claimable. The essential quality of the claim for compensation is the same and the compensation is properly described as interest.

All this might seem self-evident, perhaps even reasonable and commonsensical, to anyone unencumbered by any knowledge of the law on the subject of interest. To one who is thus burdened, however, the matter is far from plain and, it may be thought, the very antithesis of common sense and reason.

C. The Legal Position - Common Law and Equity

The explanation is largely historical.[5] The mediaeval law, under the influence of religious structures against usury, adopted a hostile attitude toward the recovery of interest. As the conditions of commerce in the post-mediaeval era changed, however, the rigidity of the law was relaxed by stages, though the historical inheritance was never quite shaken. Interest was first acknowledged by statute, and the law was that if two parties agreed upon the payment of interest, such an agreement was enforceable. This worked satisfactorily enough in a relatively simple case where, for example, *A* lent $500 to *B* repayable with interest at five per cent on June 1. The agreement to pay interest was enforceable according to its terms. Much difficulty was encountered, however, with the common case in which *B* failed to repay on June 1, and the problem was whether *A* was entitled to interest for any period after that date, up to judgment, and, if so, on what basis. It was a problem that gave rise to considerable fluctuation of judicial opinion.

In *Robinson* v. *Bland*,[6] Lord Mansfield took the view that:

> ... [W]here the money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at a given time; and to pay interest for it from the given day, in case of failure of payment at that day. So that the action is, in effect, brought to obtain a specific performance of this contract. For pecuniary damages upon a contract for payment of money, are, from the nature of the thing, a specific performance; and the relief is defective, so far as all the money is not paid.

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4. *Riches* v. *Westminster Bank* Ltd., [1947] A.C. 390, 400 (Lord Wright).

5. *See generally* McCormick, *Damages* paras. 51-55 (1935).

6. (1760) 2 Burr. 1077; 97 E.R. 717, 722.

and, in a later case, *Eddowes* v. *Hopkins*,[7] he declared that interest was recoverable "in cases of long delay under vexatious and oppressive circumstances if a Jury in their discretion shall think fit to allow it."

It might have been thought that all contracts to pay money at a given time carried an obligation to pay interest if repayment did not take place timeously. This, indeed, seems the natural implication of Lord Mansfield's words. In fact, however, the courts did not finally take this view, and in 1829 Lord Tenterden declared, in *Page* v. *Newman* that:[8]

> We ought not to depart from the long established view that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.

This view of the common law position was authoritatively reaffirmed by the House of Lords in 1893, in *London, Chatham & Dover Railway* v. *S. E. Railway*.[9] In what is now the classic statement of the common law, Lord Herschell said:[10]

> ... I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authori ties ... that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

This view was accepted as accurate by the British Columbia Court of Appeal in *McKinnon & McKillop* v. *Campbell River Lumber Co. (No. 2)*, in 1922.[11]

The effect of the later cases seems to be, therefore, that mere non-payment of a debt does not give rise to any claim for interest by way of damages. The theory in these cases, at least as

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7. (1780) 1 Dougl. 376; 99 E.R. 242. *See also Arnott* v. *Redfein*, (1826) 3 Bing. 353; 130 E.R. 549.

8. (1829) 9 B. & C. 378; 109 E.R. 140.

9. (1893) A.C. 429.

10. *Id*. at 437.

11. (1922) 66 D.L.R. 266 (B.C.C.A.).

explained by Lord Denning in *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*,[12] is that interest is generally presumed not to be within the contemplation of the parties. "... [T]he consequences [of nonpayment] are as a rule too remote."[13]

There is, on the other hand, a line of cases which appear unaffected by the decision in the *Chatham Railway* case; suggesting that there is a right to interest, as damages, for breach of a contract which, if it had been performed, would have enabled the plaintiff to make a demand entitling him to interest. This would ordinarily be the case where the contract provides not merply for repayment on a specified date, but also for the payment of interest to that date. If the borrower defaulted, it would be reasonable to assume that the parties contemplated that his breach would give rise to a claim for damages measured, prima facie at least, by the contract rate of interest. So, for example, in *Cook* v. *Fowler*,[14] written security was given for the repayment of money on a certain day, with interest on the principal to that day at 60 per cent. The principal and interest were not paid on due date, and judgment for the total at the specified rate was given, together with interest at four per cent after that due date. The plaintiff protested at the reduction of the interest to four per cent. Lord Cairns pointed out that:

> ... any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.[15]

On the other hand, where a contract for the sale of goods provides for payment on a certain date, failure to pay on that date would not ordinarily give rise to any right to interest as damages. While arguable, it would have been a natural step from the *Cook* v. *Fowler* approach to contemplate interest as damages for mere non-payment or withholding of money, as has been seen, while this view was at one point noted, it was later rejected, the rejection being reaffirmed by the House of Lords in 1893.

Quite apart from the common law, courts of equity would also, in certain circumstances, order interest prior to judgment as "damages" in cases where a relationship existed between the parties of a kind that equity would protect - such as that of mortgagor and mortgagee, principal and surety, and vendor and purchaser. In the latter case, for example, if a vendor transferred possession of land to the purchaser before the purchase price had been paid, the vendor was held in equity entitled to interest on the purchase price. Later, this was generalized into the principle

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12. [1952] 1 All E.R. 970.

13. *Id.* at 977.

14. (1874) L.R. 7 H.L. 27.

15. *Id.* at 32.

that wherever a vendor transfers possession of goods to the purchaser before the purchase price has been paid, and the contract is one that would be specifically performed, the vendor is entitled to interest on the purchase price in equity because, as it was put in *International Railway Co.*, v. *Niagara Parks Commission,*[16] it would be inequitable for the purchaser "...to have the benefit of possession of the subject matter of the contract and also of the purchase-money."[17]

In *Gregga* v. *Leippi*, the Saskatchewan Court of Appeal generalized this into the proposition that:

> ... interest may be allowed where payment of a just debt has been improperly withheld and it seems fair and equitable that the part in default should make compensation by way of interest to such time and at such rate as the Court may think fit.

The ultimate foundation of the doctrine in *Gregga* v. *Leippi*, is the judgment of the Privy Council in *Toronto Railway* v. *City of Toronto*.[18] That judgment, however, rests upon the particular wording of legislation in Ontario,[19] having no counterpart in the legislation of Saskatchewan or British Columbia, and it is at least arguable that the equitable claim to interest as damages, whatever its precise scope, is not as extensive in British Columbia as *Gregga* v. *Leippi* might suggest.

To describe the common law position both in England and in British Columbia as complex is, at the very least, an understatement. This much at least is clear, however, that interest proper is only claimable where payment of it is contracted for, and then only in respect of liquidated sums. Interest by way of damages may be claimed at common law in some cases but not in others, and an equitable right to interest may be asserted in some cases but not in others, it being very difficult to formulate any coherent statement of the circumstances in which either at law or in equity such claims will be allowed. Simply stated, the law on the subject is confused and uncertain.

Three particular aspects of the common law position should be specifically mentioned:

(a) Mere nonpayment of a debt does not give rise to any claim for interest on that debt.

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16. [1941] 2 W.W.R. 338, 348 per Luxmoore J.

17. [1944] 3 W.W.R. 396.

18. [1906)] A.C. 117.

19. R.S.O. 1897, c. 51, s. 113.

20. Cf. *Borthwick* v. *Elderslie Steamship Co.* (No. 2), [1905] 2 K.B. 516, 520-521; *Rowan* v. *Toronto Railway*, (1918) 43 O.L.R. 164, 168.

(b) No interest is recoverable, whether by way of damages or on any other basis, where the claim is founded on tort.[20] The theory here seems to be that since the amount owed by the defendant is not known until ascertained by judgment, it would be unfair to *penalize* the defendant for not having paid at an earlier date.

(c) There is some support for the view that a claim for damages for breach of a contract other than a contract to pay money will carry interest in certain circumstances. In *London, Chatham & Dover Railway* v. *S. E. Railway*, Lindley L.J. stated[21] that:

> ... if a person agreed to do something other than pay money, and he broke his agreement, an action for damages would lie against him, and, in estimating those damages and as part of them, interest might be reckoned on money which would have become payable by him with interest, if he had not broken his agreement, and thereby prevented the principal falling due.

The class of cases covered by this statement is somewhat narrow,[22] and it seems clear in any event that it does not authorize the awarding of interest upon unliquidated claims for damages for breach of contract, the theory here being identical to that applied in tort cases.

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21. [1892] 1 Ch. 120, 142.

22. Cf. 1 Holmstead & Gale, *Ontario Judicature Act* 267-268.

CHAPTER II LEGISLATIVE INTERVENTION

A. Lord Tenterden's Act

Legislation on the subject of prejudgment interest was enacted in England in 1833. Section 28 of the *Civil Procedure Act*[1] of that year, better known as Lord Tenterden's Act, provides:

> That upon all debts or sums certain, payable at a certain time or otherwise the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable. If such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. Provided that interest shall by payable in all cases in which it is now payable by law.

Section 29 provides:

> That the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seisure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

It will be seen that the effect of section 28 is that a jury may, if it thinks fit, allow interest upon:

(a) written promises to pay sums certain in money at a definite time, from the day fixed, and

(b) in the case of other promises to pay, from the date of a written demand for payment claiming interest.

Is Lord Tenterden's Act in force in this Province? There are a number of cases which appear to proceed on the assumption that it is effective here.[2] In *McKinnon & McKill*[3] for example, interest was denied on the ground that the facts did not fall into either of the two categories of promises

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1. 3 & 4 Will. 4, c. 42.

2. In *Okanagan Mainline Real Estate Board* v. *Canadian Indemnity*, (1969) 66 W.W.R. 257, 266 Brown J. considered the applicability of the Act "settled law."

   In *Re Bankruptcy of Northwest Electric Ltd.*, (unreported) Vancouver Registry (Bankruptcy), 166/72, Feb. 15, 1973, Ruttan J. stated, "The right to claim interest at law is in this province governed by the terms of *Lord Tenterden's Act*." *See also Emil Anderson Construction Co.* v. *Kaiser Coal Ltd.*, (Berger J., unreported), Vancouver Registry, 4921/69, September 11, 1972.

3. (1922) 66 D.L.R. 266 (B.C.C.A.).

to pay governed by section 28 of the Act, and, on the authority of the *London, Chatham & Dover Railway* case, no other basis for an award of interest existed. In *Re Brighouse*,[4] the court assumed the applicability of Lord Tenterden's Act, and the judgment was concerned with the question of whether the requirements of the first arm of section 28 had been satisfied, while in *North Star Services Ltd.* v. *Industrial Mortgage and Finance Corporation Ltd.*,[5] the same assumption was made, and the court was concerned with the requirements of the second arm of section 28.

Lord Tenterden's Act was also included in the "collection of English Statutes ... useful for reference" which was published as Volume IV of the Revised Statutes of British Columbia, 1911.[6] Nevertheless, no British Columbia court appears to have considered the Act in terms of the reception of English law into a settled colony, and its applicability under the English Law Act,[7] and specifically held that the Act was received as part of the law of England in 1858. There seems little doubt, however, that the Act would be held in force by a British Columbia court if that court were squarely confronted by the question in those terms.

No particular advantage is to be gained, in the context of this Report, from an exhaustive analysis of the considerable body of case law on the meaning of various phrases such as "a sum certain payable at a certain time," and "demand for payment" in section 28 of Lord Tenterden's Act.[8] As to the former, the governing principle was clearly stated by the Supreme Court of Canada in *Sinclair* v. *Preston*[9] to be that the instrument must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the sum could be made certain by some process of calculation or some act to be performed in the future. It is, however, sufficient if the instrument itself indicates the basis upon which any is to be made. So far as "demand" is concerned, the general principle seems to be that the demand must be a demand before action, so that the issuance of a writ or statement of claim claiming interest would not satisfy the

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4. [1924] 1 D.L.R. 150.

5. (1964) 48 W.W.R. 570 (B.C.).

6. Actually published in 1913. *See* pp. 3, 83. The revision commissioners added the cautionary note that the "insertion of any Act ... in this compilation ... or the omission therefrom ... must not be taken as 99 expression of opinion ... as to the applicability of those inserted or the inapplicability of [those] omitted. The judicial tribunals of the country can alone determine these questions."

7. R.S.B.C. 1960, c. 129, s. 2.

8. (1901) 31 S.C.R. 408. *See also Maine & New Brunswick Electrical Power Co.* v. *Hart*, [1929] A.C. 631.

9. This view is supported by the balance of authority. *See*, e.g. *Northern Trust Co.* v. *Coldwell*, (1914) 6 W.W.R. 1165; *Pearson-Burleigh Ltd.* v. *Pioneer Grain Co.*, [1933] 1 D.L.R. 714; *Rhymney Railway* v. *Rhymney Iron Co.*, (1890) 25 Q.B.D. 146. There is contrary authority, e.g., *Dusbabek* v. *Bjornstad*, [1918] 3 W.W.R. 79 - but in principle it seems unsound.

requirements of the Act.[10]

A reading of Lord Tenterden's Act makes it clear that relatively little significant change was accomplished. It does not apply to tort claims, except to the extent specified in section 29, nor to contract claims for unliquidated sums, and it is now clear beyond doubt that, as was held by the British Columbia Court of Appeal in *Triangle Storage Ltd.* v. *Porter*,[11] interest does not attach because payment has been 'improperly withheld.'

This state of the law led Lord Herschell, in the *London, Chatham & Dover Railway* case, to lament that Lord Tenterden's Act confined claims for interest within limits that were ... too narrow for the purposes of justice,"[12] a view that was shared by Lord Shand in the same case,[13] and echoed by McPhillips J.A. in the *McKinnon & McKillop* case.[14]

The injustice referred to in those cases, along with the obscurity, complexity and uncertainty of the present law relating to interest prior to judgment highlights the need for reform.

The Commission recommends:

Legislation be enacted to clarify and reform the subject of interest prior to judgment.

B. Modifications of Lord Tenterden's Act

1. CANADA

Lord Tenterden's Act has been modified in almost every province[15] of Canada except British

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10. [1941] 4 D.L.R. 301,.305 per O'Halloran J.A. (B.C.C.A.)

11. [1893] A.C. 429, 440-441.

12. *Id.* at 443-444.

13. (1922) 66 D.L.R. 266, 272.

14. Alberta: *Judicature* Act, R.S.A. 1970, c. 193, s. 34(16); Manitoba: *Queen's Bench Act*, R.S.M. 1970, c. C280, ss. 71-72; New Brunswick: Judicature Act, R.S.N.B. 1952, c. 120, ss. 44-45; Newfoundland: Supreme Court Rules, 0.50, rr. 62-63; Ontario: The *Judicature Act*, R.S.O. 1970, c. 228, ss. 38-39; Prince Edward Island: *Judicature Act*, R.S.P.E.I. 1951, c. 79, ss. 34-35; Saskatchewan; Queen's Bench Act, R.S.S. 1965, c. 73, s. 47.

15. South Australia, *Supreme Court Act Amendment Act*, No, 40, 1972, section 3OC; N.S.W. Act 52, 1970, s. 94.

Columbia. It has been modified in Australia,[16] Great Britain,[17] and the United States.[18] In British Columbia, it applies unaltered, although two private member's Bills on the subject were introduced in the 1972 and 1973 Sessions of the Legislature.[19]

The Canadian provisions are largely based upon Ontario legislation originally enacted in 1837, [20] which now[21] appear as sections 38 and 39 of the *Judicature Act*. They provide as follows:

> 38. Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.
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> 39. (1) On the trial of an issue or on an assessment of damages upon a debt or sum certain, payable by virtue of a written instrument at a time certain, interest may be allowed from the time when the debt or sum became payable.
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> (2) If such debt or sum is payable otherwise than by virtue of a written instrument at a time certain, interest may be allowed from the time when a demand of payment was made in writing, informing the debtor that interest would be claimed from the date of the demand.
>
> (3) In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon.

The significant difference between Lord Tenterden's Act and these provisions of the Ontario *Judicature Act* lies, of course, in the concluding words of section 38, and it becomes important, therefore, to determine the circumstances in which it was usual for a jury in Ontario to award interest.

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16. *Law Reform (Miscellaneous Provisions) Act*, 1934, 24 & 25 Geo. 5, c. 41, s. 3, as amended by the *Administration of Justice Act, 1969*, c. 58, s. 22.

17. *See generally*, New York *Law Revision Commission Act, Recommendation and Study relating to the Award of Interest on Causes of Action for Personal Injury* (1966).

18. The Bills were sponsored by Mr. G. Gardom, M.L.A.

19. 7 Will. 4, c. 3.

20. *Supra, note* 14.

21. (1895) 26 O.R. 467, 475.

22. (1904) 7 O.L.R. 78, 84.

In *McCullough* v. *Clemow*,[22] Osler J.A. expressed his difficulty in understanding those words, while in *City of Toronto* v. *Toronto Railway*,[23] Street J. remarked that the provision is "... so loosely expressed as to leave a great latitude for its application." In the same case, the Privy Council offered the following authoritative exposition of section 38, in the light of earlier Ontario practice.[24]

> The result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.

This view, it will be recalled, is precisely that which was rejected by the House of Lords in the *London, Chatham & Dover Railway* case, and by O'Halloran J. in *Triangle Storage Ltd.* v. *Porter*. Indeed, on this view, the Ontario legislation remedies the defect in Lord Tenterden's Act that was complained of by Lord Herschell in the *Chatham* case, and by McPhillips J.A. in the *McKinnon* case. Apart from this, however, it suffers from almost all the restrictive provisions of the original legislation. In particular, it would not ordinarily cover unliquidated claims for damages[25] or, except to the extent provided for in section 39, tort claims.[26]

2. GREAT BRITAIN: LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, c. 41, s. 3(1)

If the principle that interest is a form of compensation for loss of use be accepted, it is clear that neither Lord Tenterden's Act nor the Ontario modification of that provision go very far in implementing the principle. In 1934 the Law Revision Committee, in its Second Interim Report, concluded that "the time has come when the old and rigid Rule should now be altered."[27] The Report continued:[28]

> The courts, including all appellate tribunals, should have the power to award interest in every case in their discretion where it is not already provided for by statute, or by the contract, or otherwise.
>
> In practically every case a judgment against the defendant means that he should have

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23. [1906] A.C. 117, 121. *See generally*, Holmstead & Gale, *Ontario Judicature Act*.

24. *See supra*, page 11.

25. Cf. *Rowan* v. *Toronto Railway*, (1918) 43 O.L.R. 164, 168.

26. Cmd. 4546, 1934, para. 8.

27. *Ibid*.

admitted the claim when it was made and have paid the appropriate sum for damages. There are of course some cases where it is reasonable that he should have had a certain time for investigation, and in those cases the Court might well award interest only from the date when such reasonable time had expired. This is often done at present in claims under insurance policies. There is no doubt that the present state of the law provides a direct financial motive to defendants to delay proceedings.

It has often been suggested that although this might at once be conceded so far as debts, damages for breach of contract and special damages for tort are concerned, the cases where general damages are given, as for instance in running down cases, or indeed for say libel or slander, or for pain and suffering in personal injury, they might be left as they are, as standing on a different basis.

There seems, however, to be no reason for a different rule in these latter cases.

To take as an extreme example, a libel action in which the defendant is held liable. The Court is in effect deciding that he has defended the case wrongly and without sufficient grounds. He ought, that is to say, to have admitted the claim when made and have offered a proper sum by way of damages. In any event the Court will have a discretion which can be exercised in cases accordingly where it would be unreasonable to award interest.

In Admiralty cases the rule is thus stated in *Liesbosch Dredger* v. *Edison S.S.* ([1933] A.C. at p. 468) where the damage claimed was for the loss of a vessel owing to the wrongdoer's tort. "it is on the true value (of the vessel) *so ascertained that the interest at 5 per cent from the date of the collision will run, as further damages, on the principles of the Court of Admiralty stated by Sir C. Butt in the Kong Magnus ([l89l] P.223) that is damages for the loss of the use of the money representing the lost vessel as from the date of the loss until payment.*"

and concluded by recommending that the discretion should be vested in the judge rather than in the jury.

Section 3(1) of the *Law Reform (Miscellaneous Provisions) Act* was enacted pursuant to this recommendation in 1934. It provides:

> 3. (1) 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.

Section 3 (2) of the Act repealed sections 28 and 29 of Lord Tenterden's Act.

In 1957, the Scottish Law Reform Committee, in its Third Report, declared that its enquiries revealed that section 3 (1) of the 1934 legislation "is seldom used by the English Courts and

scarcely ever invoked by the parties to a litigation,"[29] though it suggested that "where there is inordinate delay, a Judge, in assessing the amount of damages, may have in view in arriving at his figure the loss of interest to a claimant."[30]

It is quite clear that, under the 1934 legislation, interest is awardable prior to judgment on any claim for debt or damages, without any restriction related to the nature of the cause of action in respect of which the claim is made. Nevertheless, as the English Law Commission pointed out in its 1971 Working Paper on Assessment of Damages in Personal Injury Litigation,[31] despite the Law Revision Committee's rejection of any differential treatment of claims for general damages in tort:

> It is a curiosity of legal history that from 1934 to 1969 there appears to have been only one contested personal injury case in England (apart from claims dealt with under the Admiralty jurisdiction) in which interest on damages in respect of the period between the date of the injury and the date of the award was included in the amount of the award.

In 1968, the Winn Committee on Personal Injuries Litigation in Great Britain recommended[32] that "... all awards of general damages for personal injuries should carry interest on the amount awarded from the date of injury and on six-monthly totals of special damage." In apparent response [33] to this recommendation, section 22 of the *Administration of Justice Act*, 1969 was enacted. This section added a further provision to the 1934 legislation reading as follows:

> (IA) Where in any such proceedings as are mentioned in subsection (I) of this section judgment is given for a sum which (apart from interest on damages) exceeds L 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.
>
> (IB) 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 (A) of this section.

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28. Cmnd. 141, 1957, para. 4.

29. *Ibid*.

30. Law Commission Working Paper, No. 41, p. 133-134 (1971).

31. Report of the Committee on Personal Injuries Litigation, Cmnd. 3691, 1968, paras. 324-325.

32. The extent to which the Winn Committee's recommendations were implemented in the 1969 legislation, at least as that legislation has been understood and applied in the courts, is discussed in Walker, Interest on Damages, (1970) 120 New L.J. 308. *See also* Note (1971) 34 Mod. L. Rev. 71.

(IC) For the avoidance of doubt it is hereby declared that in determining, for the purposes of any enactment contained in the *County Courts Act*, *1959*, whether an amount exceeds, or is less than, a sum specified in that enactment, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power.

(ID) In this section "personal injuries" includes any disease and any impairment of a person's physical or mental condition, and any reference to the *County Courts Act, 1959* is a reference to that Act as (whether by virtue of the *Administration of Justice Act, 1969* or otherwise) that Act has effect for the time being.

Comparable legislation has recently been recommended for adoption in Queensland by the Law Reform Commission of that State,[34] and has recently been enacted in South Australia,[35] and New South Wales.[36] The impact of this legislation is examined in Chapter III.

33. Report of the Queensland Law Reform Commission, Q.L.R.C. 10, (September, 1971).

34. *Supra*, note 15.

35. *Ibid*.

CHAPTER III THE QUESTION OF PRINCIPLE

It seems useful to approach the problem of determining whether prejudgment interest should be awarded and, if so, upon what basis, by considering some specific situations:

A. Economic Harm: Breach of Contract, Etc.

(a) *A* lends $100 to *B*, repayable upon a specified date. *B* does not repay on due date.

The present law appears to preclude recovery of interest prior to judgment in this case, unless the promise to repay falls within the terms of section 28 of *Lord Tenterden's Act*. It seems clear beyond doubt, however, that if *B* had repaid on due date, *A* would have been able to invest that money at market rates of interest. Elementary justice would seem to require that *B* compensate *A* for his failure to put *A* in funds at the proper time.

(b) *A* performs services for or supplies goods to *B*, the money value of which is either stated

in the contract or is ascertainable by mathematical computation from a standard fixed

in the contract, or from established market prices or some other objective criteria.[1]

The situation here does not differ in any significant respect from that under (a) above, except that the amount of liability of *B* is marginally less precise. A simple example would be where *A* contracts to sell *B* all the potatoes to be grown on *A's* farm during a specified year, at one dollar per bushel. The potatoes are delivered as agreed, the actual amount being 100 bushels. No part of the price has been paid.[2] The fact is that *B* should have paid $100 upon delivery, and his failure to do so has caused *A* precisely the same deprivation as if *A* had lent *B* $100 repayable upon a specified date, and *B* failed to do so. The extent of *B's* liability is of course dependent upon the extent of *A's* performance, but this cannot affect the extent of A's deprivation once his performance has been measured. Accordingly, it is suggested that *B's* liability to pay interest on the $100 rests upon precisely the same principles as in (a).

B. Cases Where the Contract That Is Broken Does Not Fall Into Class (a) or (b)

The problem about cases of this kind is that "the damages awarded for breach of contract often include not only the value of a promised performance regarded as a subject of exchange, but also compensation for many kinds of consequential injury. The amount to be awarded for such injury is often very difficult to determine ..."[3] But the fact is that at some point the plaintiff has

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1. Cf. American Law Institute, Restatement of Contracts, para. 337 (a) (1932).

2. *Id.*, Illustration 3.

3. *Id.*, Comment (a) on clause (b).

suffered a "distinct and measurable financial loss,"[4] and that, to the extent that the defendant, at that point, fails to compensate the plaintiff, the latter will suffer an additional loss that can only be adequately compensated for by payment of interest.

The problem may be illustrated by an example. Suppose *B* undertakes, for $10,000, to build and install a machine for *A*, with a productive capacity of 500 units per day. The machine is installed, and the price paid, but the machine is totally defective, and completely worthless. *A* claims damages for breach of contract. He will recover the $10,000, plus an amount for loss of profits, at a rate, say, of $3,000 per annum. What he will not recover is the income flow from the first dollar of profit he would have received had the machine performed as promised - in other words, he will not recover the investment value of that dollar for the period from the date when he would have earned it, to judgment.

The point about an award of damages for breach of contract is, of course, that it is designed to place the plaintiff in the position he would have been had the contract been properly performed when performance was due. To the extent that reasonable compensation takes no account of the delay in restoring the plaintiff to his bargained for position, (i.e., in our example, the investment value of the first dollar) it fails to do a complete job. In principle, therefore, it would seem to follow that interest should be recoverable as a matter of right in this case too.

The argument against a right to interest in this situation turns on the imprecision, at the date of the breach, of the cost of the breach to the plaintiff. For this reason, some jurisdictions have taken the view that an award of interest should not be made in these circumstances; others have allowed interest on a discretionary basis only. In 1927, however, New York enacted legislation giving a right to interest on unliquidated claims for damages for breach of contract.[5] There is no evidence that adoption of this provision has caused undue difficulty for the courts or hardship to defendants,[6] and it is suggested, therefore, that the appropriate principle to adopt in contract cases is to allow interest as damages as a matter of right in contract based claims for pecuniary loss.

C. Economic Harm: Tort

The law of British Columbia at present allows interest in the discretion of the court only in the two cases referred to in section 29 of *Lord Tenterden's Act*: trover, which is essentially conversion of chattels, and trespass de *bonis asportatis*, essentially the damage, destruction or other interference with chattels in the possession of another. In these cases, the normal measure of recoverable damage is the value of the goods at the time of the wrongful interference, and the statute permits an award of interest over and above that sum.

There does not seem any sound reason for distinguishing, in respect of entitlement to interest, between cases in which economic loss is due to the two named torts, and those where it is due to any other tortious activity of the defendant, nor is there any sound policy that requires a distinction to be drawn between invasion of personal and real property interests. Moreover, there is no reason at all why liability in tort for economic loss should, in respect of interest, be a matter of discretion, while in contract, if the arguments in the preceding paragraphs are sound, it should

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4. McCormick, Damages (1935).

5. *See generally*, Report of New York Law Revision Commission, *supra*, chapter II, B., *note* 17.

6. *Ibid*.

be a matter of right. The point was succinctly expressed by the Supreme Court of Utah in *Fell* v. *Union Pacific Ry. Co.*,[7] as follows:

> If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to someone, he certainly would be entitled to interest, and, if he borrowed it from someone, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in status quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish. Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property. In all such cases the party sustaining the loss is limited in his recovery to the market or actual value of the property at the time of the injury or destruction. Moreover, he must establish the amount of the loss by some fixed rule or standard, and the evidence must be confined thereto, and either the court or jury must find the value in accordance with the evidence. In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is - there can be - no reason why interest should be withheld merely because the damages are unliquidated.

In the working paper, the Commission tentatively concluded that all cases involving damages to the economic interests of the plaintiff should be treated according to the same principle: that interest as damages be recoverable as a matter of right. Moreover, the Commission could see no reason of principle for distinguishing claims in respect of economic loss arising in contract or tort, from those arising in any other way. The working paper proposed that all be treated alike in respect of the entitlement to interest.

Most of the responses to the working paper which the Commission received favoured the approach[8] we had taken. The submissions of those respondents who were critical of the approach have not persuaded the Commission that the principle should be abandoned.

D. Future Economic Loss

It remains to be considered whether there should be any exceptions to this general principle. In *Jefford* v. *Gee*,[9] Lord Denning M.R., interpreting the provisions of the 1969 amendment to the

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7. (1907) 88 P. 1003.

8. One respondent favoured drawing a distinction between claims in tort and claims in contract. He felt that the "inflationary" trend in personal injury awards put a premium on delay by plaintiffs which would be aggravated by an award of interest as a matter of right. He favoured the award of prejudgment interest to be in the discretion of the trial Judge as to both entitlement and the period during which it accrues. Another respondent thought the award of interest as of right might cause defendants to compromise actions or appeals which ought to vigorously defended. He, too, favoured leaving prejudgment interest to the discretion of the judge. The giving of a discretion to deny interest to the plaintiff who would be otherwise entitled to it is discussed in Chapter 4 C of this Report.

9. [1970] 2 Q.B.D. 130. The remarks of the learned judge were, strictly speaking, obiter, since the legislation did not apply to the case before him. It is clear, nevertheless, that the judgment in *Jefford* v. *Gee* is accepted by the English courts as laying down the relevant guidelines.

10. [1970] 2 Q.B.D. 130, 147.

11. *Fatal Accidents Act*, 1846-1959.

English legislation, concluded[10] that:

> Where the loss or damage to the plaintiff is *future pecuniary loss*, e.g. loss of future earnings, there should in principle be *no* interest. The judges always give the present value at the date of trial, i.e., the sum which, invested at interest, would be sufficient to compensate the plaintiff for his future loss, having regard to all contingencies. There should be no interest awarded on this: because the plaintiff will not have been kept out of any money. On the contrary, he will have received it in advance.

On the other hand, Lord Denning considered that in cases arising under the United Kingdom *Fatal Accidents Act*,[11] which corresponds to the *Families' Compensation Act*[12] in British Columbia there should be no special treatment accorded to future economic loss. All elements of the award should carry interest from the date of service of the writ. The basis for this view is that, in *Families' Compensation Act* cases, the courts

> ... award one lump sum calculated by taking the yearly pecuniary loss and multiplying it by a number of years' purchase. The courts do not divide it into two parts, such as special damage up to date of trial and future loss after the date of trial. *They treat it as damage inflicted once and for all at the time of the accident.*[13]

The conflict between these two approaches is readily apparent, and, indeed, Lord Denning's view has been criticized precisely on the ground of inconsistency:[14]

> In this type of case invariably about 80 per cent of the damages is in respect of future financial loss running from the date of trial onwards and it is difficult to appreciate the logic of the arguments used by the court to justify the payment of interest on these damages and yet to refuse it for other claims for future financial loss.

It may be conceded that the inconsistency is difficult to justify. The question nevertheless remains as to which of the two approaches is preferable. The Commission has concluded that post-trial economic loss should not carry interest for any pretrial period. The purpose of an award of interest is to compensate the plaintiff. The method of calculating damages in *Non-Fatal Accident Act* cases referred to by Lord Denning involves a calculation of present value at the date of trial. That should properly compensate the plaintiff, and, in this sense, is good economics. Any further sum could only be justified on a penalty theory, which the Commission rejects.

E. Non-Economic Harm: Contract and Tort

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12. R.S.B.C. 1960, c. 138.

13. [1970] 2 Q.B.D. 130, 148 (emphasis added).

14. Walker, Interest on Damages, (1970) 120 New L.J. 308,310.

The commonest example of the law "compensating" for non-economic harm is, of course, the case of damages for pain and suffering and loss of amenities in personal injury cases. But this is not the only case: compensation for non-economic loss may also be recovered in libel and slander, and in certain matrimonial causes.

It will be recalled that the Law Revision Committee in 1934 expressly rejected the notion that "compensation" for non-economic loss should be treated differently than for economic loss.[15] The argument that such a distinction should be drawn has, however, been made, and must be dealt with.

A concise statement of the grounds for not awarding interest on damages for non-economic loss is set out by McCormick:[16]

> It is true that courts award money damages for pain, mental suffering, humiliation, and disgrace, but the process of measurement is in a sense an arbitrary one, in which the court or jury assessing damages exercise a latitude and freedom different in kind from the discretion allowed in the measurement of injuries of a pecuniary sort. Where a jury considers, without any standards except a general standard of reasonableness and restraint, the amount of money to be awarded a plaintiff for the disgrace of being falsely accused of murder, it would serve little purpose to give them specifically a further discretion to add interest, where the figure to be arrived at is almost wholly discretionary or "at large." Consequently, it is generally agreed that juries should not be directed to allow even as a matter of discretion, interest upon damages given for pain, suffering, humiliation, and other like nonpecuniary injuries in actions for assault, libel or slander, personal injuries, breach of promise of marriage, seduction, malicious prosecution, false imprisonment, or criminal conversation. Similar considerations apply to exemplary damages which are awarded, not as compensation at all, but as punishment.

This argument, it will be noted, has been rejected by the United Kingdom Parliament in the 1969 amendment to the *Law Reform Act* of 1934. The substance of it was rejected by the Law Revision Commission of the State of New York in 1966, when it recommended legislation creating a right to recover interest in personal injury cases.[17] It has been rejected in a large number of other states in the United States,[18] and in Australia.[19]

The essence of the argument is that since the loss is non-economic, it is absurd to apply economic criteria to it. This, of course, would warrant an exception in the case of awards for non-economic loss, to the normal rule that interest does run from the date of judgment. Yet no one has made this argument, and doubtless few would. This, however, may be a debating point.

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15. *Supra*, page 14.

16. McCormick, Damages, 226 (1935).

17. *See* Report of New York Law Revision Commission, *supra*, chapter II, B., *note* 17.

18. *Ibid.*

19. *Supra*, chapter II, B., *note* 15.

The substantial argument is that the effect of the judgment is to declare a liability to pay which, had the defendant discharged it when the claim was made, would have enabled the plaintiff to enjoy the fruits of those funds from the date of payment. The defendant's failure to discharge the liability deprives the plaintiff of the use of those funds and for that deprivation, the defendant ought to compensate the plaintiff.

The simple fact is, however, that, as McCormick puts it:[20]

> Whatever the nature of the claim, a satisfaction by a payment of $1,000 one year after demand is worth more to the claimant than the same sum awarded two years after demand. Interest is awarded after judgment on such a claim. Why should not the amount of the latter verdict be adjusted to accord with the economic facts?

McCormick uses this argument to support a discretion in the court to award interest. In the opinion of the Commission, however, it is equally apt to support a right to interest in these cases, and this is the Commission's recommendation.

The question once again arises whether a distinction should be made between pretrial and post-trial losses. In the Commission's opinion, it should not. As Lord Denning pointed out in *Jefford* v. *Gee*, "It is not possible to split those misfortunes into two parts; those occurring before the trial and those after it. The court always awards compensation for them in one lump sum which is by its nature indivisible."[21] This view is, of course, different to that taken by the Commission in respect to post-trial economic loss. But Lord Denning's view is a practical one, the more so in British Columbia, where actions of this kind are so frequently tried before juries.

It should be re-emphasized at this point that in the opinion of the Commission, the entitlement to interest is based upon the fact that the plaintiff ought to be compensated for the fact that he has been forced to wait for payment. It is simply irrelevant whether the defendant had any good reasons for failing to put the plaintiff in funds at an earlier date. Defendants must pay interest because they have delayed in paying the "principal," not because they have delayed *unnecessarily* in doing so. Indeed, it is perhaps as well to point out that such evidence as exists on the impact of statutory provisions for the payment of prejudgment interest upon litigation delay is, at best, equivocal.[22]

The Commission recommends:

1. *Reforming legislation should clearly embody the principle that interest is a form of compensation for the loss of use of money.*

2. *Interest prior to judgment be recoverable as a matter of right, regardless of the nature of the cause of action, in all actions for the recovery of a judgment sounding in money.*

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20. *Supra*, note 15, at 227.

21. [1970] 2 Q.B.C. 130, 147.

22. *See* Report of New York Law Revision Commission, *supra*, chapter II, B., *note* 17, at 26-32.

3. *The only exception to the recommendation that interest prior to judgment be recoverable as a matter of right should be that no interest be recoverable on economic losses arising after the date of trial.*

CHAPTER IV SOME SPECIAL PROBLEMS

A. The Date from Which Interest Should Run

The United Kingdom legislation confers a discretion on the court to determine the period over which interest prior to judgment should be calculated,[1] and in *Jefford* v. *Gee*, Lord Denning laid down the following propositions concerning the exercise of that discretion in personal injury cases.

1. Special Damage - Actual Pecuniary Loss to the Date of Trial

While "in principle, the plaintiff should be awarded interest on the sum which represents the loss as from the date it was incurred"[2] the amounts of interest at stake are generally not large enough to warrant minute attention to detail, and "in all ordinary cases ... it would be fair to award interest on the total sum of special damages from the date of the accident until the date of trial" at half the normal rate.[3]

2. Pain and Suffering and Loss of Amenities

"Interest should be awarded on this lump sum as from the time when the defendant ought to have paid it, but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but at the latest it should be the date when the writ was served."[4]

These observations are confined, of course, to personal injury claims. Even within that context, they have been severely criticized. It should be noted, moreover, that the Winn Committee on Personal Injuries Litigation recommended that interest awards on all general damages should un from the date of injury, and on six-monthly totals of special damage.[5]

The most trenchant criticism of Lord Denning's views as to the period over which interest should be calculated has been made in an article in the New Law Journal, by John Walker,[6] and it is worth setting out in full:

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1. *Supra*, page 15.

2. (1970) 2 Q.B.D. 130, 146.

3. [1970] 2 Q.B.D. 130, 147.

4. *Ibid*.

5. Report of the Committee on Personal Injuries Litigation, Cmnd. 3691, 1968, paras. 324-325.

6. Walker, Interest on Damages, (1970) 120 New L.J. 308, 309.

> While the court has decreed that interest on special damages will run as from the date of accident, it has said that this date cannot be the starting date for interest on pain and suffering. The court gives as its reason the fact that the misfortunes arising from the physical injury do not belong to the time of the accident but are spread indefinitely into the future and must by their nature be quantified later. They also quote again the ex more principle that interest should only run on the lump sum as from the time the defendant ought to have paid, but did not.

Having said all that, the court went on to say, with a logic which is difficult to understand, that the effective or starting date in some cases will be the date of the letter before action, but in no case should it be later than the date of the service of the writ. One might imagine from this that there is some *mystique* connected with the making of a claim or the serving of a writ which enables a defendant immediately to quantify the value of the plaintiff's claim for damages, but everyone knows that this is not so. But if the reasoning of the Court of Appeal is to be considered seriously, then the court appear to think that although a pain and suffering claim cannot possibly be valued at the date of the accident, it can be valued at the date of the letter of claim - or at the latest at the date of the service of the writ. The fallacy in this reasoning is evident: given an intelligent plaintiff and a competent solicitor, the writ can be issued and served the day after the accident.

Why was this date (the date of the service of the writ) chosen ultimately by the court? The answer appears from a later paragraph in the judgment which was to the effect that the use of that date will "stimulate a plaintiff's advisers to issue and serve the writ without delay."

While one may, with every justification, ask, what the stimulation of the plaintiff's solicitors has to do with an award of interest to a plaintiff, the effect of such a direction can only be to force a plaintiff's solicitor to issue proceedings at a very early date, to the very probable detriment of negotiations for a settlement and with the inevitable result of adding substantially to the cost of these actions. Applications for legal aid will multiply alarmingly and, even supposing the action lies dormant after the writ has been served, all that will have been achieved will be an increase in costs. This is a proposition which can only result in trouble and unnecessary cost. It reveals, it is submitted, a lack of knowledge on the part of the Court of Appeal of the lengthy negotiations which go on, prior to action, between the parties' advisers and which result, as was found by the Winn Committee, in the settlement *without litigation* of about 80% to 90% of this type of case. Very few cases indeed will now be settled without the issue of proceedings. And what a disastrous effect this will have on the already long list of cases waiting.

Mr. Walker suggests that for general damages the period should, in both cases, begin to run from the date of letter before action.[7] While the Commission agrees with these criticisms of Lord Denning's approach, the solution offered by Walker is thought to be no less arbitrary and unprincipled. In respect of actual pecuniary loss to the date of trial, the Commission, in the working paper, preferred the approach of the Winn Committee, that interest be awarded from the date of accrual of the cause of action, on six-monthly totals.

One respondent to the working paper, however, preferred Lord Denning's approach. He wrote to us:[8]

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7. *Id.* at 310.

8. Contained in a letter to the Commission dated April 3, 1973.

9. *Supreme Court Rules*, 1961, Order XXII, rule 1(1)(1961); *Small Claims Act*, R.S.B.C. 1960, c. 359, s. 32, as amended.

10. *Supreme Court Rules*, 1961, order XXII, rule 2(1)(1961); *Small Claims Act*, *supra note* 8, s. 32.

> On page 30 of the working paper you quoted Lord Denning's remarks on the subject from *Jefford* v. *Gee*. I have been unable to find any comment contradicting his opinion that in "all ordinary cases" interest at half the normal rate would be a fair award on special damages. It seems to me that, on the assumption that special damages are spread throughout the period from accident to trial, the fifty per cent of the normal rate would be a simpler allowance than the full interest on the six-monthly total suggested.

While that suggestion does have the appeal of simplicity, the assumption that special damages are spread evenly throughout the period from accident to trial, is open to serious question. It seems to the Commission that, to take the example of a typical personal injury case arising out of a motor-vehicle accident, the greatest special damages would be concentrated very early in that period. Necessary car repairs are likely to be made in the first six months. The heaviest medical expenses will also usually occur then. Toward the end of the period and closer to the trial, few expenses are likely to be incurred apart from routine medical attention and physiotherapy to the extent that it may be needed. In such a case, the accrual of interest on the basis of six-monthly totals will more accurately reflect the compensation to which the plaintiff is entitled.

The Commission recommends:

In the case of special damages, interest for the prejudgment period be calculated upon six monthly totals from the date of accrual of the cause of action.

In respect of all other components of a money judgment, the Commission feels that interest should be awarded from the date of accrual of the cause of action.

The Commission recommends:

In the case of general damages, interest for the prejudgment period be calculated from the date of accrual of the cause of action.

B. Payment into Court

In all three Civil Courts in British Columbia, a defendant is allowed to pay into court "a sum of money in satisfaction of the claim" in actions for "a debt or damages."[9] The defendant must notify the plaintiff of the payment in, and the plaintiff then has a right to accept the money or proceed with the action.[10] If he elects to proceed despite the payment in, he does so at the risk of having to pay the defendant's costs after the date of payment, if, although successful, the plaintiff recovers less than the amount paid in.[11] The purpose of these provisions is, as Lord Devlin

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11. *Supreme Court Rules*, 1961, Order XXII, rule 6 (1961); *Cowling* v. *Balsevich*, (1965) 53 W.W.R. 190.

12. [1961] 1 Q.B. 96, 103.

13. *Bouck & Roberts*, A Proposal for the Reform of the British Columbia Supreme Court Rules, 1961 47 (1972).

14. [1970] 2 Q.B.D. 130, 149.

explained in *A. Martin French* v. *Kingswood Hill Ltd.*,[12] to enable a defendant to make "... an offer to dispose of the claim on terms."

> The question arises whether the allowance of interest prior to judgment should affect or be affected by a payment into court. The recently published Proposal for the Reform of the British Columbia Supreme Court Rules, 1961, in urging the adoption of provisions dealing with prejudgment interest, states that, "Account should also be taken of any payment into court in calculating this interest,"[13] but gives no indication of just how the matter should be taken into account.

The question was considered by Lord Denning M.R. in *Jefford* v. *Gee*, where, after pointing out that interest is not a cause of action in itself - "it is more like the award of costs than anything else"[14] and that the Rules of Court only permit payment in respect of a "cause of action," he concluded that no payment in could be made in respect of interest.

> The defendant should, therefore, in future make his payment into court in the same way as he always has done, namely, an amount which he says is sufficient to satisfy the cause of action apart from interest. If the plaintiff recovers more (apart from interest) he gets his costs. If he recovers no more (apart from interest) he does not get his costs from the date of the payment in and he will have to pay the defendant's costs. The plaintiff will, of course, in either case, get the appropriate award of interest irrespective of the payment into court.[15]

Commenting on this passage in *Newall* v. *Tunstall*,[16] Ashworth J. said:

> It seems to me that this paragraph contemplates an action which proceeds to trial and results in a judgment, and that judgment may be for a sum greater than the payment in, or equal to the payment in, or less than the payment in. Whichever figure the court awards earns a rate of interest, because it is a judgment for an award of damages for personal injuries. It may be that if payment into court exceeds the amount of the judgment, there will be a fairly close balance between the interest which the plaintiff recovers under the subsection and the amount of costs which in the normal course he will have to pay the defendant in respect of the period after the payment in.

The substantial effect of these opinions, then, is that payment into court neither affects, nor is affected by, the question of prejudgment interest. If the plaintiff takes the payment out of court (whether or not pursuant to court order) there is no "judgment" in respect of which any calculation

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15. *Ibid.*

16. [1970] 13 All E.R. 465, 467.

would be made.[17] It might be thought that the distinction between-a payment received late by a plaintiff pursuant to a judgment, and one received late pursuant to a payment into court, is technical and artificial, and that if the former carries accrued interest, so should the latter. It seems to the Commission, however, that the true analogy is with acceptance of payment in and settlement, rather than with judgment. While the mechanics of payment into and out of court, on the one hand, and settlement, on the other, are different, they are functionally similar. In each case the defendant is saying, in effect: "I offer this amount in full satisfaction of all (or some particular) outstanding claims."

The Commission prefers the English view in those cases where the plaintiff elects to accept the payment into court, and to put the point beyond any argument, feels that where the plaintiff does accept the payment, it be deemed to include a sum in respect of interest to the date of payment in.

The Commission recommends:

Where a payment made into court by a defendant is accepted by the plaintiff, that payment be deemed to include an amount in respect of interest to the date of payment in.

Where the plaintiff elects not to accept payment into court, but rather proceeds to judgment, he will, of course, be entitled to interest on that judgment for the prejudgment period in accordance with the principles outlined earlier. If the judgment recovered exceeds the amount paid in, no difficulty arises. If, however, the plaintiff recovers less than the about paid in, it seems unreasonable that the defendant should be required to pay any interest accruing after the date of payment into court. The English view on this appears to be that the amount payable as interest will be balanced by the costs that the plaintiff will have to bear for the period after payment into court. This, at least, was the view taken in *Newall* v. *Tunstall*.[18] It seems to the Commission, with respect, however, that while this may be true in some cases, it will not necessarily be so, nor, indeed, is it likely to be in the majority of cases.

It might be thought that if the plaintiff has no right to interest after the date of payment into court where he recovers less than the amount of the payment, he should be similarly deprived if he rejects a *bona fide* offer to settle, and then obtains a less advantageous judgment. In the opinion of the Commission, however, the settlement case is distinguishable, since the defendant retains the benefit of the funds - a benefit of which he is deprived when he pays into court. The view of the Commission on this question is not irreconcilable with the basic position it has taken, that interest is compensation. The plaintiff who fails to accept a sufficient payment into court has deprived himself of the use of the money. Any solution advanced must be consistent with the dictates of common sense, and common sense requires that the plaintiff not recover interest after the date of payment into court, where he recovers less than the amount so paid in.

The Commission recommends:

Where a plaintiff elects not to take out money paid into court, and the judgment in the action is for an amount less than that paid in, no interest be recoverable f6r any period after the date

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17. *Newall* v. *Tunstall*, (1970) 3 All E.R. 465; *Waite* v. *Redpath Dorman Long Ltd.*, [1971] 1 All E.R. 513; *Blundell* v. *Rimmer*, [1971] 1 All E.R. 1072.

18. *Supra note* 16.

of payment into court.

C. Denial of Right to Interest

The general principle from which the Commission has proceeded in this Report is that the plaintiff has a right to recover interest for some part of the prejudgment period, regardless of any question as to the "guilt" of the defendant. This was the view taken by the Winn Committee on Personal Injuries Litigation in relation to personal injury claims, and the Commission adopts it as a general proposition.

The English legislation, however, following the recommendation of the Winn Committee, permits the court to order that no interest be recovered in personal injury actions if there are "special reasons" for so ordering,[19] and in *Jefford* v. *Gee*, Lord Denning suggested that "gross delay" on the part of a plaintiff would constitute such good cause.[20] In the working paper, the Commission made the following observations regarding Lord Denning's comments:

> In principle, this seems unsound. A plaintiff is not deprived of damages merely because he has been guilty in claiming them, and the Commission sees no reason why interest as damages should be differently regarded. Limitation periods, procedural devices such as motions to dismiss for want of prosecution, and to some extent, orders as to costs, are all available to deal with the problem of plaintiffs' delay, seem adequate to the task, and are unaffected by the Commission's proposals.

The working paper went on to propose that the Court not be given a power to deprive the plaintiff of prejudgment interest where he is otherwise entitled to it.

It was that proposal which evoked the largest volume of critical comment from those who responded to the working paper. In almost every case, delay on the part of the plaintiff was the primary situation in which it was felt might be denied to the plaintiff. Hardship to the defendant was suggested as being a main consideration. The following comment is typical:[21]

> Recovery of interest should always be subject to discretion. A case may arise where a plaintiff deliberately delays the resolution of an action and this may work unnecessary hardship on a defendant, especially where the plaintiff has not had to utilize other moneys.

The Commission seriously questions the proposition that requiring the defendant to pay prejudgment interest, even where the plaintiff has been guilty of unnecessary delay, would visit an unnecessary hardship on the defendant. In cases where the defendant has funds continuously available to satisfy the judgment, he is always able to invest those funds at an appropriate interest rate and thus suffers no loss if required to pay those funds, plus accrued interest at the legal rate, to the plaintiff. The defendant who invests wisely may even profit from the plaintiff's delay.

The defendant who does not have funds continuously available to satisfy the judgment must

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19. *Law Reform Act*, 1934, as amended by *Administration of Justice Act, 1969*, section 3 (IA), *supra* page 17.

20. [1970] 2 Q.B.D. 130, 151.

21. Contained in a letter to the Commission dated April 27, 1973.

obviously borrow. If the plaintiff's delay causes him to borrow at a later, rather than an earlier date, surely the defendant has saved the cost of borrowing during the interval. It does not seem to work a hardship on the defendant to require him to pass that saving, or a portion thereof, on to the plaintiff.

The question of delay was dealt with from a somewhat different viewpoint in another response received:[22]

> It is well settled that a plaintiff cannot claim as damages loss which he himself aggravated; a good illustration of this is the rule requiring the plaintiff to mitigate his damaged arising from a breach of contract. A plaintiff who is claiming interest which has accrued largely as a result of his inducements to the defendant to delay a resolution of the dispute should be in no different position from the plaintiff who has aggravated his loss arising from a breach of contract or has failed to mitigate his loss.

The Commission feels that the analogy between delay in pursuing an action, and the failure of a plaintiff to mitigate his damages arising from a breach of contract is not wholly apt. The difference, it seems to us, is that a loss caused by the failure of a plaintiff to mitigate his damages is one against which the defendant would be unable to protect himself, were he liable. Extra interest which may be payable as a result of the plaintiff's delay is, however, something against which the defendant can protect himself by investing the funds available to satisfy the judgment, by not incurring the cost of borrowing funds until required, or by making a payment into court.

A logical extension of the arguments in favour of the discretion to deny interest which are set out above, would be that the courts should also have a discretion to deny postjudgment interest to the plaintiff who has been guilty of undue delay in issuing execution proceedings on a judgment which has been obtained. A suggestion to that effect, however, has, to the knowledge of the Commission; never been advanced. It is doubtful if such a suggestion would ever be acceptable. There seems little reason why a suggestion that prejudgment interest be subject to a judicial discretion should be any more acceptable. The Commission, therefore, has not altered the conclusion set out in the working paper.

The Commission recommends:

The court should not be given a discretionary power to deprive a plaintiff of prejudgment interest where he is otherwise entitled to it.

D. Rate of Interest

The working paper did not deal extensively with the rate of interest which should be recoverable. We simply stated:

> The Commission proposes that the plaintiff be entitled to recover interest at the rate allowed by law. At present, this is established under the *Interest Act* at five per cent.

That proposal was the subject of some comment. One respondent stated:[23]

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22. Contained in a letter to the Commission dated April 25, 1973.

23. Contained in a letter to the Commission dated March 22, 1973.

> I would suggest, however, that ... five per cent is hardly an adequate rate in commercial transactions where it costs anywhere from eight per cent to eighteen per cent to replace the money not paid.

Another respondent suggested:[24]

> ... [I]nterest should not be at the legal rate, which at present is five per cent ... Perhaps ... [it could be] dealt with in the fashion ... His Honour Judge Darling disposed of *Roberts* v. *Kroll* (1971) 5 W.W.R. 133 at 141 "A fix a rate of interest at the going average bank rate between the date of the receipt of the money ... and the date of the completion of the trial period."

Another respondent suggested that interest be recoverable at the then existing prime bank rate.[25]

The Commission has considerable sympathy with those who feel that the existing legal rate of interest is too low. We agree that five per cent is an inadequate rate to compensate the plaintiff for the loss of use of money, either before or after judgment.

In proposing that interest prior to judgment accrue at the legal rate, the considerations which were borne in mind by the Commission were largely constitutional ones. The difficulty is that section 91(19) of the *British North America Act*[26] places interest within the exclusive legislative authority of the Parliament of Canada. If Provincial legislation were enacted to implement the reforms we recommend, and anything but the legal rate of interest were specified, that legislation would be open to constitutional challenge.[27]

In addition, if reforming legislation were to specify a higher interest rate, it would create the anomalous situation that the award would accrue interest at a higher rate before judgment than after judgment. It is felt that this would be undesirable. It may be that the entire *Interest Act* is in need of reform; however, this Commission is not the appropriate body to formulate the necessary recommendations. In its first annual report the Law Reform Commission of Canada stated:

It is possible that during the next year we will undertake a study of interest on judgment debts.

We hope that appropriate recommendations will emerge from such a study which will deal with the criticism which has been made regarding this aspect of our conclusions.

The Commission recommends:

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24. Contained in a letter to the Commission dated March 30, 1973.

25. Contained in a letter to the Commission dated April 27, 19?3.

26. 30 & 31 Vict., c. 3 (U.K.).

27. *See Case* v. *Godin* (1914) 7 W.W.R. 396.

The rate at which a plaintiff be entitled to recover interest be that allowed by law.

E. Interest on Interest[28]

The Commission recommends:

The legislation should specifically provide that it does not operate to authorize the recovery of interest upon interest.

F. Express Provision for Interest

Where the parties to a transaction have made express provision for the payment of interest, that provision should prevail to determine the plaintiff's entitlement.[29] So, too, where some statutory provision concerning interest has been made.

The Commission recommends:

The legislation should specifically provide that it does not operate where interest is payable as of right, whether pursuant to an Agreement or otherwise.

G. The Mechanics of Reform

The Commission feels that the recommendations contained in this Report should be implemented by means of amendment to the *Laws Declaratory Act*,[30] rather than by way of separate amendments to the jurisdictional statutes of the three courts having civil jurisdiction in the Province.

The Commission recommends:

The legislation providing for interest prior to judgment should apply in all courts of record in the Province, and should be embodied in amendments to the Laws Declaratory Act.

H. Commencement

The Commission recommends:

The legislation should apply only in respect of causes of action arising after the coming into force of that legislation.

I. The Crown

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28. *See Law Reform Act*, 1934, section 3(l)(a), *supra* page 15.

29. *See Law Reform Act*, 1934, section 3(l)(b), *supra* page 16.

30. R.S.B.C. 1960, c. 213.

In our Report on the *Legal Position of the Crown*[31] the Commission recommended:[32]

> The British Columbia *Interpretation Act* be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary.

If that recommendation be accepted then it would follow that the Crown would be bound by reforming legislation.[33] In the Commission's view this is the correct result. The Crown should be in no better position than the subject with respect to a liability to pay prejudgment interest.

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31. Law Reform Commission of British Columbia, *Report on Civil Rights, Part 1: Legal Position of the Crown* (L.R.C. 9, 1972).

32. *Id.* at 67.

33. Assuming that the Crown was not specifically exempted from its operation.

CHAPTER V CONCLUSION

The present law governing interest prior to judgment is uncertain, complex and obscure. It is frequently the cause of injustice and hardship. These considerations have led the Commission to make the recommendations for reform contained in this Report. We are satisfied that our recommendations, if implemented, will make available to the plaintiff a fair degree of compensation for the loss of the use of his money without visiting any unnecessary hardship on the defendant.

In conclusion, we wish to express our gratitude to Professor Leon Getz, former Counsel to the Commission, for the contribution he has made to this study. He undertook the basic research for the Commission and prepared the working paper which formed the basis of this Report. We gratefully acknowledge his able assistance.

The recommendations of the Commission are set out below. The page at which each recommendation may be found in the body of the Report is indicated.

The Commission recommends:

1. *Legislation be enacted to clarify and reform the subject of interest prior to judgment*

2. *Reforming legislation should clearly embody the principle that interest is a form of compensation for the loss of use of money.*

3. *Interest prior to judgment be recoverable as a matter of right, regardless of the nature of the cause of action, in all actions for the recovery of judgment sounding in money.*

4. *The only exception to the recommendation that interest prior to judgment be recoverable as a matter of right should be that no interest be recoverable on economic losses arising after the date of trial.*

5. *In the case of special damages, interest for the prejudgment period be calculated upon six-monthly totals from the date of accrual of the cause of action.*

6. *In the case of general damages, interest for the prejudgment period be calculated from the date of accrual of the cause of action.*

7. *Where a payment made into court by a defendant is accepted by the plaintiff, that payment be deemed to include an amount in respect of interest to the date of payment in.*

8. *Where a plaintiff elects not to take out money paid into court, and the judgment in the action is for an amount less than that paid in, no interest be recoverable for any period after the date of payment into court.*

9. *The court should not be given a discretionary power to deprive a plaintiff of prejudgment interest where he is otherwise entitled to it.*

10. *The rate at which a plaintiff be entitled to recover interest be that allowed by law.*

11. *The legislation should specifically provide that it does not operate to authorize the recovery of interest upon interest.*

12. *The legislation should specifically provide that it does not operate where interest is payable as of right, whether pursuant to an agreement or otherwise.*

13. *The legislation providing for interest prior to judgment should apply in all courts of record in the Province, and should be embodied in amendments to the* Laws Declaratory Act.

14. *The legislation should apply only in respect of causes of action arising after coming into force of that legislation.*

E. D. FULTON
Chairman

J. N. LYON
Commissioner

R. C. BRAY
Commissioner

May 16, 1973.