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INTEREST ON DAMAGES

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Requests that comment or parts of comment on the working paper be regarded as confidential will be respected. If no request for confidentiality or anonymity is made, the Commission will assume that respondents agree to the Commission's quoting from or referring to comments and ascribing comments to respondents.

Any persons or bodies wishing to make oral representations to the Commission should submit a brief resume of their proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 30 June 1992 at the address appearing on the previous page. Please contact the researcher if you cannot submit your comments in time.

The research worker responsible for the project, who may be contacted for further information, is Mr P A van Wyk. The project leader is Mr G G Smit.

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INTEREST ON DAMAGES

CHAPTER 1

A. ORIGIN OF THE INVESTIGATION

1.1 . On 21 March 1989 the Association of Law Societies requested the South African Law Commission to consider an investigation into the payment of interest on damages. On 27 April 1989 the Commission decided to publish a questionnaire to determine the need for such an investigation. The questionnaire was published in the Government Gazette on 27 October 1989. At the same time a press release was issued. The closing date for the submission of comments on the questionnaire was 30 January 1990.

1.2 The vast majority of respondents who responded to the questionnaire were of the opinion that the current legal position regarding the award of interest is unsatisfactory and that legal reform is essential. These respondents recommended that provision be made for the payment of interest on damages from a date earlier than the date of judgment. In view of the reaction to the questionnaire the Commission requested the Minister of Justice to approve the inclusion of the investigation in the Commission's working programme. On 18 April 1990 the Minister of Justice authorised that the investigation be carried out.

B. THE PROBLEMATIC NATURE OF PAYMENT OF INTEREST ON DAMAGES

1.3 A general rule of South African law is that a debtor is only liable for the payment of interest on the principal

debt if he fails or is he is in mora to perform.¹ This general rule applies unless the parties have contractually agreed that there is a liability to pay interest on the principal debt. A debtor is not liable for the payment of interest if he fails to perform when he does not know of either his liability to perform or of the extent of his liability. Furthermore, interest cannot start to accrue or be awarded should the claim or debt be for an unliquidated amount.² This general rule, namely that interest is not awarded in respect of unliquidated claims, and the definition of an unliquidated debt have been put as follows:³

The ordinary rule of our law is that liability for interest does not automatically attach to an unliquidated debt - an obligation which has not been reduced to a definite sum of money.

1.4 A liquidated claim is a demand for payment, the extent of which is determined by way of an agreement between the parties, by an order of the court or otherwise.⁴ A liquidated debt has also been defined as follows, namely it is liquidated or liquid if it is based on a liquidated document,

1 MM Corbett and JL Buchanan The Quantum of Damages: General Principles 3rd edition by JJ Gauntlett Cape Town: Juta 1985 at 30 (hereinafter "Corbett and Buchanan The Quantum of Damages"); HJ Erasmus and JJ Gauntlett "Damages" in The Law of South Africa Vol 7 at 12 (hereinafter "LAWSA Vol 7"); Applebee v Berkovitch 1951 3 SA 236 (C) 240H-241A (hereinafter "the Applebee case"); Victoria Falls and Transvaal Power Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 31-32 (hereinafter "the Victoria Falls case").

2 The Victoria Falls case at 31-32; West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 195 (hereinafter "the West Rand Estates case"); Union Government v Jackson 1956 2 SA 398 at 412E-416H (hereinafter "the Jackson case"); Adampol (Pty) Ltd v Administrator Transvaal 1989 3 SA 800 (A) at 817A (hereinafter "the Adampol case"); SA Eagle Insurance Co Ltd v Hartley 1990 4 SA 833 (A) at 841H-I (hereinafter "the Hartley case").

3 The Jackson case at 412D-E.

4 Kleynhans v Van der Westhuizen 1970 2 SA 742 (A) at 749F.

if the debt is acknowledged, if the money value thereof is determined, or if the debt is easily and quickly determinable.⁵ A liquidated document is a document in which the debtor unconditionally admits liability for a determined amount or in which he undertakes payment thereof.⁶

1.5 In Roberts v London Insurance⁷ the plaintiff requested the court to grant her interest from the time at which the court would have granted a judgment to the date on which the court actually gave judgment. Her argument was that she had been deprived of damages because she had unsuccessfully requested the court to reopen her case and consequently the court had not granted a judgment earlier. The court was of the opinion the considerations of reasonableness possibly favoured such an award of interest, but that such an order cannot be lawfully made. A plaintiff is not entitled to a specific of damages before the court has determined the damage and has granted judgment. The court held that a lawful right to demand payment only exists on the date of judgment.

1.6 The South African courts have indicated repeatedly that the general rule against the payment of interest on unliquidated amounts does not signify that an unliquidated claim will never be amenable to a payment of interest. Interests may indeed start to accrue, or the liability to pay interest may indeed exist, from a date that precedes the date of sentence or judgment by the court, if the amount owing is reasonably easy

5 Fattis Engineering v Vendick spares 1962 1 SA 736 (T) at 738F.

6 HN Pretorius Burgerlike Prosesreg in die Landdroshowe Vol 1 Durban: Butterworths 1986 at 390.

7 1948 2 SA 840 (W) at 840-841.

to ascertain.⁸

1.7 The problem that is involved here was explained as follows in Bailey NO v General Accident Insurance Co Ltd:⁹

It should always be remembered that during the period preceding the hearing of the appeal a judgment debtor has the use of the money whereas the judgment creditor foregoes such use. It is true that the same consideration also applies before judgment is delivered by the trial court. Sometimes compensation may be granted by basing the award on the damages suffered up to the date of trial, but I believe that the time is ripe to make statutory provision for the payment of interest on unliquidated claims for the period from the serving of summons to the judgment. The fact that they save interest in this way undoubtedly encourages debtors to dispute cases. This is obviously unjust and encourages unnecessary litigation. An existing injustice is merely aggravated by not allowing interest during the period after the trial judgment when the outcome of the appeal is being awaited. (Our translation)

1.8 In SA Eagle Insurance Co Ltd v Hartley¹⁰ the problem was stated as follows:

If a plaintiff through no fault of his own has to wait a substantial period of time to establish his claim it seems unfair that he should be paid in depreciated currency. Of course, in respect of many debts this problem is resolved (or partially resolved) by an order for the payment of interest, and the Prescribed Rate of Interest Act 55 of 1975 is flexible enough to permit the Minister of Justice to prescribe rates of interest which reflect the influence of inflation on the level of rates generally (see s 1 (2)). Its application is, however, limited to debts bearing interest (s 1 (1)); and it is trite law that there can

8 The Victoria Falls case at 32; the Jackson case at 195; Russell NO and Loveday NO v Collins Submarine Pipelines (Pty) Ltd 1975 1 SA 110 (A) at 155D (hereinafter "the Russell and Loveday case"); Clifford v Farinha 1988 4 SA 315 (W) at 325 E (hereinafter "the Clifford case"); the Adampol case at 817A and B.

9 1987 2 SA 702 (C) at 705I-706C (hereinafter "the Bailey case").

10 1990 4 SA 833 (A) at 841G-841I and 841J (hereinafter "the Hartley case").

be no *mora*, and accordingly no *mora* interest, in respect of unliquidated claims for damages It follows that there is no mechanism by which a court can compensate a plaintiff like the present for the ravages of inflation in respect of monetary losses incurred prior to the trial. In other jurisdictions a statutory power to award interest is used for this purpose Whether our Courts should have a similar power, and what precise form it should take, is not, however, something we can lay down. It is essentially a matter of policy which is for the Legislature to decide.¹¹

C. SCOPE OF THE INVESTIGATION

1.9 Although the investigation carries the title "Interest on damages" the question arises of whether it would be appropriate to consider focusing attention on all unliquidated claims. In the light of the remark by Burger, J, in die Bailey case¹² it is felt that this investigation should be focused on all unliquidated claims in order to provide a remedy for all unliquidated claims. Consequently the investigation will seek to ascertain -

- (i) whether awards of interest should be discretionary or mandatory;
- (ii) what the date should be upon which interest starts accruing; and
- (iii) at what rate interest should be paid.

1.10 The ensuing chapters will deal with -

- (i) the substantiation or rationale for liability for interest;
- (ii) awards of interest in foreign legal systems; and

11 The Hartley case at 841G, 841I and 841J.

12 See paragraph 1.7 above.

(iii) recommendations and draft legislation.

CHAPTER 2

A. THE RATIONALE FOR LIABILITY FOR INTEREST

(a) Background

2.1 The Old Testament of the Bible prohibited the levying of interest. This prohibition applied to the lending of money among Jews, although the levying of interest on loans between Jews and non-Jews was permissible. On the other hand, Biblical texts prohibited the levying of interest on loans between a Jew and a poor Jew and between Jews and foreigners who had been accepted in the Jewish community. The Bible denounced avarice and the accumulation of wealth through levying interest on the poor.¹

2.2 Roman law restricted the inequities of usury interest (interest at an unfair or illegal rate) by fixing specified rates of interest.² During the Middle Ages the development of usury interest was inhibited by the Canon law, which prohibited the levying of usury interest.³ The opinion of the Church was that defying the law against the levying of usury interest placed one in peril of not obtaining heavenly salvation. In addition to dogmatic considerations, the prohibition on the levying of interest was linked to economic considerations. It was thought that levying usury interest would impoverish debtors further and that levying interest amounted to exploitation of the indigent. The view was also that interest could not be recovered since money is not

1 N J Otto Gemeneregtelike en statutêre beheer oor woekerrente unpublished LLD thesis RAU 1989 at 13-15.

2 R Z Zimmerman The Law of Obligations: Roman Foundations of the Civilian Tradition Cape Town: Juta 1990 at 166 (hereafter "Zimmerman The Law of Obligations").

3 Zimmerman The Law of Obligations at 170.

fructuous by nature.⁴

2.3 Strict sanctions were applied against those who transgressed the prohibition on levying usury interest.⁵ That part of an amount of money that was greater than the original loan was regarded as stolen goods and such usury transactions were invalid. However, the levying of interest gradually came to be regarded in a different light during the 11th and 12th centuries owing to changing commercial circumstances. As a result a distinction was drawn between interest levied on legal commercial transactions that were conducted in good faith, on the one hand, and greed on the other.⁶ Although interest was commonly charged on loans, recognition was given to the recovery of usury interest only in 1654.⁷ At the same time there was a return to the principles of Roman law and maximum interest rates were set for ordinary loans.

2.4 Although there was an initial prohibition on the recovery of usury interest, the recovery of interest was justified when a debtor or contractor neglected or failed to meet his obligations.⁸ The power to recover interest legally upon non-fulfilment of obligations was substantiated saying that such interest was lawful and honest and served as compensation to the creditor for damage suffered.⁹

2.5 Ulrich Huber defined interest in a narrow sense as the calculation of damages, reduced profits derived, or profits

4 Ibid.

5 Zimmerman The Law of Obligations at 171.

6 Ibid.

7 Zimmerman The Law of Obligations at 174-175.

8 Zimmerman The Law of Obligations at 799.

9 Ibid.

that someone was prevented from earning.¹⁰ Where a purchaser fails to pay for a thing sold that is payable the purpose of interest is not to provide reward for the return or fruits of the thing sold but to compensate the seller for being without his money.¹¹ In such cases the seller is entitled to claim interest from the purchaser even if the thing sold has not yet provided the purchaser with a return or fruits equal to the interest claimed from him by the seller. Furthermore, the seller is entitled to claim interest from the purchaser even if the purchaser recovers no return or fruits and even if the purchaser was unable to recover any fruits or return. The seller may claim interest even if the thing sold would not have yielded him (the seller) any return or fruits during the period of the purchaser's default.¹²

2.6 Considerations of fairness are further grounds for the recovery of interest in addition to failure to meet an obligation.¹³ At present these two grounds are often confused, as they were by certain common law writers.¹⁴ In Milner v Friedman's Trustee a distinction was however drawn

10 Heedendaegse Rechtsgeleertheyt 3.36.2 translated into English by P G Gane The Jurisprudence of my Time Vol 1 Durban: Butterworth 1939 at 571.

11 Simon van Leeuwen Censura Forensis 1.4.4.12 translated into English by S H Barber and W A MacFadyen Obligations and Contracts, Both Norninate and Innorninate, and Actions Resulting Therefrom Cape Town: Juta 1896 at 27 (hereafter "Van Leeuwen Censura Forensis").

12 Ibid.

13 I van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Req Cape Town: Nasionale Pers 1929 at 75 (hereafter Van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Req").

14 I van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Req at 76.

between the two grounds and the court remarked as follows:¹⁵

It is, however, argued that, apart from the question of mora, defendant is bound to pay interest from the date of his occupation of the property, as it would be inequitable for him to enjoy the benefit of the property while retaining the purchase price, without paying interest by way of compensation for the use, and several authorities were quoted in favour of this proposition. It appears to me that these authorities are dealing with cases in which the purchaser is in default by failing to pay the purchase price which has become due, and that they have no application to cases such as this, in which there has been no default by the purchaser, and which, therefore, as regards a claim to interest, are dependent on the existence, or otherwise, of mora.

But, in the present case, the vendor was not kept out of his money, as it was paid before it was due, so that the equitable ground for compensation on which the commentators lay stress would here find no place.

2.7 This consideration of fairness implies that it is unfair, for example, for a purchaser to receive a benefit from the possession of the thing sold while not meeting his obligation to pay the seller the purchase price of the thing sold.

The modern rule is in principle based in reality upon the same grounds as the Roman. If the purchaser has received the thing sold and has made default in payment, it is not equitable that he should have what he contracted for, viz.: the use and enjoyment whether accompanied by material benefits in the shape of fruits or not, without refunding to the seller the material benefit which the payment of the money would have enabled him to enjoy.¹⁶

2.8 In Becker v Stusser the court confirmed that the damage suffered by a creditor because a debt is not paid when

15 1925 OPD 296 at 305 and 306; see also Van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Req at 77.

16 H G MacKeurtan The Sale of Goods in South Africa third edition by G N Holmes Cape Town: Juta 1949; see also Van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Req at 75.

it is payable amounts to a loss of interest.¹⁷ In Bellairs v Hodnett¹⁸ the court remarked that interest awarded for neglect because the creditor does not receive the amount due and cannot apply it productively, amounts to the damages that flow naturally from breach of contract. In Linton v Corser the court remarked that there is no reason to draw a distinction between interest derived from an agreement and interest derived from non-fulfilment of obligations or mora.¹⁹ The court held as follows:²⁰

The old authorities regarded interest a tempore morae as 'poenaal ende odieus' Such interest is not in these modern times regarded in that light. To-day interest is the lifeblood of finance, and there is no reason to distinguish between interest ex contractu and interest ex mora.

(b) Interest on illiquid and liquid claims

2.9 Victoria Falls & Transvaal Power Co v Consolidated Lanqlaagte Mines is the locus classicus of South African law in which the principle is laid down that interest cannot be recovered on an illiquid claim.²¹ The court found that a debtor cannot be held liable for failure to perform if he is unaware of his liability and of the amount owing.

2.10 In substantiation of this principle Chief Justice Innes pointed to the Digest of Justinian, text 50.17.99, which

17 1910 CPD 289 at 294.

18 1978 1 SA 1109 (A) at 1147A-B.

19 1952 3 SA 68 (A) at 695G (hereafter "the Linton case").

20 Ibid.

21 1914 AD at 32 (hereafter "the Victoria Falls case").

reads as follows:²²

Non potest improbus videri, qui ignorat, quam solvere debeat.

2.11 Freely translated the Digest text means that someone cannot be regarded as dishonest if he does not know how much he should pay.²³ However, the text cannot serve as substantiation for the view that interest cannot be awarded on an unspecified amount (illiquid claim).

2.12 The second text on which Chief Justice Innes relied was that of Johannes Sande, namely Decisiones 3.14.9, according to which there can be no question of failure or mora if a person does not know what and how much he should pay.²⁴

2.13 In a submission to the Commission Mr J Dyason points out that the two texts referred to above do not provide

22 Ibid.

23 "Someone who does not know how much he should pay cannot be regarded as being dishonest", The Digest of Justinian Vol iv T Mommsen ed Latin text and A Watson ed English text Pennsylvania: Pennsylvania Press 1985 at 964.

24 Decisiones Frisicae, si veterum in Suprema Frisiorum Curia judicatarum, Libri quinque 1635; Daar kan gheen mora of vertoef schynen geschiedt te zijn/ voor ende aleer men weten kan niet alleen wat/maer oock hoe veel men schudich is/want van een onseeckeren somma en kan gheen meer betalinghe gheschien als van een onsekeren schuldt. Hier toe dient de regel van de Rechten/welke fendt/ dat hy niet en schijnt onvroom te zijn/dat is/ ghebreeklijk of in mora te zijn/welcke niet weet hoe veel hy betalen sal. Over sulcx so beginnen de renten van Melioratien niet te loopen van de tijdt dat sy zijn toegewijst/ maer van de tijdt dat de Melioratien zijn ghetaxeert. Want de condemnatie en is niet ghenoech/ ten zy saecke oock volght Taxatie van de condemnatie/ opdat men weten mach wat ende hoe veel men volghens het ghewijsde schuldich is/ so vaeck als de somma onseecker is van de condemnatie. En also heeft het Hoff gheoordeelt."

specifically that interest cannot be claimed on an illiquid amount.²⁵ He notes, too, that Johannes Voet²⁶ did not spell out the principle elevated to a Roman law principle by the Appellate Division. Simon van Leeuwen, too, merely states that interest is due on the grounds of an agreement or owing to failure to pay.²⁷

2.14 It appears that the courts accepted the general rule against the award of interest for illiquid claims as a rule of practice without question, although it has no basis in Roman law.²⁸ This so-called Roman law principle is applied regularly by the courts and it is qualified time and again by saying that it is possible to charge interest if the extent of the illiquid claim is readily determinable.²⁹ The principle that the award of interest for illiquid claims is not possible when the extent of the claim is difficult to determine, or because the debtor, contractor or perpetrator of the delict is not aware of his liability, is hardly convincing.³⁰

2.15 Before looking at solutions to the problem in foreign legal systems the question may be asked whether there is any justification for granting the liable party the benefit of evading his obligations for some time and then meeting his obligations at a lower monetary value. Such an approach does not seem to be compatible with the principle that a person suffering delict should be fully compensated for damage that

25 Interest on damages - a comparison between the position in South African Common Law and Admiralty Law 21 July 1981 at 4 (hereafter "Dyason Interest on damages").

26 See The Selective Voet being the Commentary on the Pandects translated by P Gane Vol 3 Durban: Butterworth 1956 22.1.1 et seq. and 22.2.1 et seq.

27 Dyason Interest on damages at 4; Censura Forensis 1.4.4.12.

28 Dyason Interest on damages at 4.

29 See 1.3 above.

30 Dyason Interest on damages at 5.

arose through the delictual action of another party. Damage is the difference or interest between the pecuniary position of the injured party before the delict and thereafter.³¹ In damages awards, consequential damages, damnum emergens or the actual positive damages suffered as well as mesne profits, lucrum cessans or profit that the plaintiff was prevented from earning are taken into account when calculating damages.³²

2.16 It seems logical that the plaintiff would suffer further damage if his damage was recompensed at a lower monetary value a considerable time after the damage arose if no additional compensation were awarded to him. Thus it does not seem far-fetched or unfair to create an obligation in terms of which liability would exist in all cases, whether a claim is liquid or illiquid, to pay interest from the date on which liability arose to the date of settlement of the debt.

31 Santam Versekeringsmaatskappy v Byleveldt 1973 2 SA 146 (A) at 150B; Corbett and Buchanan The Quantum of Damages at 5.

32 Corbett and Buchanan The Quantum of Damages at 6.

CHAPTER 3

AWARD OF INTEREST IN FOREIGN LEGAL SYSTEMS

A. ENGLAND

(a) Statutory interest provisions

3.1 Interest on damages has been awarded on a general basis in the English admiralty courts since about 1827. In 1833 the ordinary courts were given the power to award interest in a discretionary manner in damages cases.¹ Today the English courts still have wide discretionary powers to order the award of interest in damages cases.²

3.2 The courts have wide discretion with regard to the award of interest, namely -

- (i) the discretion to award interest or not;
- (ii) a discretion with regard to rate of interest;
- (iii) a discretion with regard to the amount on which the award of interest is made;
- (iv) a discretion with regard to the period for which interest is awarded; and
- (v) a discretion with regard to the award of different

1 H McGregor McGregor on Damages 15th edition London: Sweet & Maxwell 1988 at 368 (hereafter "McGregor McGregor on Damages").

2 The Supreme Court Act 1981, section 35A and the County Courts Act, 1984, section 69; McGregor McGregor on damages at 369.

rates of interest for different periods.³

3.3 In claims for physical injury and wrongful death, where the amount of the claim exceeds £200, the courts are obliged to order the award of interest unless there are special circumstances why interest should not be ordered. With the exception of this mandatory provision the legislation does in fact provide the remainder of the above-mentioned discretionary powers, i.e. with regard to the rate of interest, the amount of damages or part thereof that is considered for an award, the period for which the award is made and different rates of interest for different periods. Interest is also payable where damages are paid after summons has been served but before judgment. If damages are paid before an action is brought for payment thereof there is no obligation in terms of legislation to pay interest.⁴

3.4 In General Tyre v Firestone Tyre the object of an award of interest was stated as follows:⁵

-Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment. No one suggests that the appellants acted dishonestly or unreasonably in withholding the money for five years; or that they caused any of the delay in the granting of the patent. This, however, in my view, has little relevance. They enjoyed the use of the money during the whole of this time and in law it is deemed to have been due to them from the beginning of that period.

3 McGregor McGregor on Damages at 370-371.

4 McGregor McGregor on Damages at 371.

5 (1975) 1 WLR 819 (HL) at 841E.

(b) Mandatory versus discretionary award of interest

3.5 The discretion as to whether to order interest is exercised in accordance with the principle that a plaintiff is entitled to an award of interest if he "had been kept out of his money".⁶ The English Law Commission recommended in 1978 that the courts should retain the discretionary power to decide whether or not to award interest.⁷ However, the following arguments were advanced in favour of prescribing mandatory awards of interest in legislation:⁸

- (i) The matters in dispute between parties could be restricted by a mandatory provision that prescribes the award of interest - thereby avoiding legal costs.
- (ii) In terms of the admiralty jurisdiction a calculation of interest has to be taken into account by the court in settlement offers and payments into court. In 1978 the rules of court did not yet provide that interest had to be taken into account in payments and settlements in other cases. In this way the mandatory award of interest could have established legal certainty in such cases too.

2.6 The following arguments were advanced in favour of

6 The Law Commission Working Paper No 66 Interest London: Her Majesty's Stationery Office 1976 at 11 (hereinafter "Law Commission England Working Paper No 66 on Interest").

7 The Law Commission Law of Contract: Report No 88 on Interest London: Her Majesty's Stationery Office at 41 et seq. (hereafter Law Commission England Report No 88 on Interest).

8 Law Commission England Working Paper No 66 on Interest at 66.

the discretionary award of interest:⁹

- (i) Since the date from which interest has to accrue causes problems, be it the date on which liability arose or the date of service of process or a later date, a discretionary provision is preferable to a mandatory provision.
- (ii) A mandatory provision on the award of interest could result in procedural complications when the plaintiff is expected to set out his request for interest in detail in pleadings. If the interest is awarded at the discretion of the court, interest need not be claimed in full detail in pleadings. If the discretionary award of interest is ordered the court could award interest according to general and broad guidelines at its own convenience and that of the parties at a later stage after a decision on the extent of the damages has been made.
- (iii) On receipt of collateral benefits in compensation of damages it is difficult to decide which benefits should be taken into consideration by the court. Thus it may be advantageous if the court has a discretion in awarding interest.
- (iv) If the court has a discretion to award interest the court may refuse an award of interest if the plaintiff delays in bringing his damages claim to court to the detriment of the defendant. Such powers could encourage plaintiffs in general to bring their cases to court as soon as possible. On the other hand, the English Law Commission doubts whether the practice of awarding interest for physical injury claims would in

⁹ Law Commission England Working Paper No 66 on Interest 66 et seq.

fact lead to cases being heard sooner. Nevertheless the English Law Commission was hesitant to recommend that the courts should be bound in all cases to award interest for damages at the same rate of interest for the same period without considering the degree of delay in instituting and continuing proceedings.

(c) Award of interest in claims for physical injuries and wrongful death

3.7 In 1969 legislation for the first time made possible the award of interest in claims for physical injury and wrongful death. Before that date neither the common law nor legislation allowed for the award of interest for such claims.¹⁰ Consequent upon this legislation guidelines for the award of interest in such cases were laid down in the case of Jefford v Gee.¹¹ Since then the award of interest has been based on these guidelines.¹²

3.8 The four guidelines laid down in Jefford v Gee are the following:

- (i) Interest is awarded at a rate of half of an appropriate rate from the date of the delict to the date of the hearing for special damage, i.e. loss of income and medical expenses up to the date of the trial. The decision to award interest at half of the appropriate rate was taken so that an approximate but fair award could be made in compensation of cash expenditure that was incurred over a period and that sometimes consists of small and insignificant amounts.

10 McGregor McGregor on Damages at 381.

11 (1970) 2 QB 1301.

12 McGregor McGregor on Damages at 381; Law Commission England Report No 88 on Interest at 33.

- (ii) Future (post-judgment) general pecuniary damages do not bear interest. Here the plaintiff does not forego receipt of an outstanding amount of money but receives compensation before he suffers damage.
- (iii) General damage, i.e. damage owing to loss of the amenities of life and pain and suffering, bears interest from the date of service of process to institute the action up to the date of the trial.
- (iv) Claims in terms of the Fatal Accidents Act bear interest at the full appropriate rate of interest from the date of the service of process to the date of the trial.

3.9 These four guidelines are to be applied in general cases, but in cases of gross negligence the court may either reduce or increase the interest rate, or extend or shorten the period for which interest is awarded.¹³ The award of a rate of interest of 2% in cases of pain and suffering and loss of the amenities of life is ascribed to the probability that the courts are uneasy about in awarding any interest at all in such cases.¹⁴

3.10 It appears that the English Court of Appeal showed good judgment in its decision not to award interest in claims for damages in cases of fraud. Also, interest was not awarded in the past in claims for damages for libel, unlawful imprisonment and malicious prosecution.¹⁵

13 McGregor McGregor on Damages at 382.

14 McGregor McGregor on Damages at 386.

15 Ibid.

B. CANADA

(a) Statutory award of interest prescriptions

3.11 In the Canadian province of New Brunswick the courts have unlimited discretion to award prejudgment interest.¹⁶ The Canadian Uniform Judgment Interest Act provides that a court may refuse to award interest on the full judgment amount or part thereof if it is proved to the satisfaction of the court and with consideration of all circumstances that it is fair to make such an order, or the court may order interest at another rate or over a different period or at a different rate as well as over a different period.

3.12 In Ontario the Courts of Justice Act provides that a person who is entitled to an order for payment of an amount of money is in the first place entitled to claim interest and in the second place that the award of interest should be included in the court order. This power is, however, limited by the provision that the court may refuse interest if it finds that it is fair not to award interest in respect of the full amount or part thereof with consideration of -

- (i) the market-related interest rates;
- (ii) the circumstances of the case;
- (iii) the manner in which the case was conducted; and

16 Law Reform Commission of British Columbia Report on The Court Order Interest Act Vancouver: Queen's Printer for British Columbia 1987 at 14 (hereafter "Law Commission British Columbia Report on Interest").

- (iv) any other relevant consideration.

If the courts decide not to award interest in the application of the last three factors the power to award discretionary interest is applied as a punitive measure.¹⁷

3.13 The discretionary award of interest powers in the province of Nova Scotia provide that the court may award discretionary interest if -

- (i) the plaintiff was not deprived of the money that is to be awarded by the court for the full pre-judgment period; or
- (ii) the plaintiff was responsible for undue delays during the judgment process.¹⁸

(b) Mandatory versus discretionary award of interest prescriptions

3.14 - The Law Commission of British Columbia doubts whether a judicial discretion to determine rates of interest from one case to the next makes it possible to award damages to the plaintiff more fully.¹⁹ The Commission is of the opinion that it would be detrimental if the plaintiff were allowed in each case to adduce evidence in order to prove that he is entitled to a certain rate of interest and that the damage he suffered

17 Law Reform Commission of British Columbia The Court Order Interest Act Working Paper No 49 Vancouver: Law Reform Commission of British Columbia 1985 at 61 (hereafter "Law Commission British Columbia Working Paper No 49 on Interest").

18 Law Commission British Columbia Report on Interest at 14.

19 Law Commission British Columbia Working Paper No 49 on Interest at 91.

had a special value.²⁰ According to one argument a discretionary rate of interest has the advantage of keeping pace with fluctuations in the market-related rate of interest, which is not the case when a single rate of interest is laid down by statute. The interest rate determination in terms of the British Columbia Court Order Interest Act is however interpreted as being capable of fluctuation according to market-related fluctuations. The British Columbia Commission therefore recommended that judicial discretion for rates of interest be retained only in cases where foreign rates of interest have to be taken into account and that a statutory rate of interest be used in other cases.²¹

3.15 It is argued that the defendant is obliged to compensate the plaintiff with an interest payment since he was in possession of the amount owing, or had the benefit of an interest saving if he had to borrow money later, while the plaintiff was deprived of the use of his money.²² On the other hand, it is argued that the defendant is prejudiced by a mandatory interest payment prescription while he did not have actual use of the amount owing during the prejudgment period. Also, it is felt that a plaintiff should bear the blame if he delays in instituting and continuing an action. This argument implies that plaintiffs can limit their damage by the early institution and continuation of actions.

3.16 The British Columbia Law Commission indicates that the law of civil procedure makes it possible for a defendant to

20 Law Commission British Columbia Working Paper No 49 on Interest at 93.

21 Law Commission British Columbia Working Paper No 49 on Interest at 94.

22 Law Commission British Columbia Working Paper No 49 on Interest at 73 et seq.

force a plaintiff to expedite an action.²³ Consequently it is the opinion of the Commission that a defendant does have the necessary remedies to prod a plaintiff when he delays. If a defendant is prejudiced by a delay he has himself to blame if he does not avail himself of the existing remedies. On the other hand a defendant bears the blame if his delictual action causes a plaintiff to institute an action. To prevent interest being charged he can make a fair settlement offer, or he can pay a fair amount into court, or he can agree to a fair judgment amount. If it appears at the end of the case that there is no merit in the defence brought by the defendant it should be kept in mind that his denial of liability was in fact responsible for the delay in the action.

3.17 The British Columbia Commission is of the opinion that it is highly unlikely that a defendant would have no knowledge of his liability or of the extent thereof.²⁴ The Commission proposes that a defendant who is aware of a possible claim against him should make provision for payment. If the dispute between the parties cannot be resolved he can establish a reserve fund and begin settlement negotiations. The vital question is whether a defendant enjoys the use of the amount owing or the benefit of a saving in interest because he borrows money only at the later trial stage to meet his liability. The British Columbia Commission notes that there can be no justification for a plaintiff having to finance a defendant's investigation into the extent or merits of a claim.²⁵ A delay by plaintiffs and ignorance of the extent of liability should therefore not be the basis for the general discretionary award of interest powers.

23 Law Commission British Columbia Working Paper No 49 on Interest at 74-75.

24 Law Commission British Columbia Working Paper No 49 on Interest at 78.

25 Ibid.

3.18 The British Columbia Commission is also of the opinion that damages that will be suffered in future and that are calculated according to a monetary value as determined in the judgment stage do not permit a general discretion for awards of interest.²⁶ Permitting such a discretion goes further than the problems experienced with consideration of inflation and the calculation of prejudgment and post-judgment damages. The Commission feels that it would be better to exempt interest on future pecuniary damages completely from awards of interest.

3.19 The receipt of a collateral benefit does not justify the granting of a general discretion to make or refuse an award of interest.²⁷ The question here is merely whether the court should order an award of damages and does not affect the award of interest at all. The relevance of the receipt of collateral benefit as an argument in favour of discretionary powers to award interest is therefore highly doubtful.

3.20 It is argued that since the time of determining damages holds certain problems it would be beneficial to grant powers of discretionary award. Such discretion leads to lengthy and expensive litigation, however. Because of legal uncertainty, the passage of time and the expensive litigation process brought about by discretionary powers, statutory prescriptions are greatly preferable to discretionary powers.²⁸

3.21 The court should merely ask itself whether the defendant enjoyed the use of money, or otherwise had the benefit of not having had to borrow money earlier. Therefore the Commission does not accept the argument that discretionary powers should be granted according to which the court may decide whether an amount owing was unlawfully withheld by the defen-

26 Law Commission British Columbia Report on Interest at 20-21.

27 Law Commission British Columbia Report on Interest at 21.

28 Ibid.

dant and whether interest should be awarded in such cases.

3.22 One argument raised is that legislation should permit parties to agree contractually that the agreement excludes liability to pay interest. Also, it is said that this requires a discretion so that the courts can decide whether or not to allow the exclusion of liability for interest. However, it is difficult to see why the court should be expected to refuse such a contractual provision at its discretion if legislation allows contractors the power to relinquish the payment or receipt of interest.²⁹ The Commission remarks as follows against the existence of a general discretion:³⁰

The *Court Order Interest Act* should not be regarded as an omnibus vehicle for *ad hoc* law reform. Prejudgment interest should be viewed as a purely economic phenomenon designed to achieve compensation for the litigant who has been kept out of his money.

C. THE UNITED STATES OF AMERICA

3.23 In the USA interest is awarded on the basis of legislation, rules of court and the principles of fairness and justice.³¹ The capacity to award interest differs greatly from one state to the next. In general, the courts are not too concerned with laying down principles in accordance with which the extent of prejudgment interest should be determined

29 Law Commission British Columbia Report on Interest at 21.

30 Law Commission British Columbia Report on Interest at 22.

31 Law Commission British Columbia Working Paper No 49 on Interest at 8; American Jurisprudence Vol 22 DP van Kapp ed 2nd edition New York: Lawyers Cooperative Publications 1988 par 648 (hereafter "American Jurisprudence Vol 22"); AE Rothschild "Prejudgment interest: Survey and suggestion" 1982 Northwestern University Law Review 192 at 194 (hereafter "Rothschild NWULR").

or awarded.³² In some states interest may be awarded only if so determined by a contract or if legislation expressly prescribes awards of interest. In other states a more flexible approach is followed and awards of interest are left to the discretion of the presiding officer (judge) and members of the jury. A disadvantage of such discretion is that insufficient guidelines are laid down for other courts and litigants according to which they can determine which factors should be present and what to take into account before awarding interest.³³

3.24 Prejudgment interest is awarded to compensate a plaintiff who could not use the amount owing in the prejudgment period, while the defendant did in fact have use of the money during that period.³⁴ The interest payable because a defendant failed to pay at the stage when the money was due, is generally known as default interest or moratore interest.³⁵ A plaintiff has a general right to claim interest if the claim amount is liquidated.³⁶

3.25- If the parties do not agree on the extent of the claim or if it was not determined by court order or otherwise, such a claim was unliquidated in the past and was not susceptible to the award of interest. The reasoning was that a

32 Law Commission British Columbia Working Paper No 49 on Interest at 8.

33 Rothschild NWULR at 194.

34 KW Seifried "Recovery of prejudgment interest on an unliquidated state claim arising within the Sixth Circuit" 1977 Cincinnati Law Review 151 at 155 (hereafter "Seifried 1977 Cincinnati Law Review"); JC Keir and RC Keir "Opportunity cost: A measure of Prejudgment Interest" 1983 The Business Lawyer 129 at 136 (hereafter "Keir JC and RC Business Lawyer").

35 American Jurisprudence Vol 22 paragraph 648.

36 Ibid; Rothschild 1982 NWULR at 196 et seq.; Seifried 1977 Cincinnati Law Review 153-154.

defendant could not be obliged to pay interest owing to failure to pay the plaintiff since he could not prevent interest from accruing by making a payment to the court.³⁷ Interest was payable only if a defendant knew exactly how much and when he should perform.³⁸ The present legal position in the USA is that prejudgment interest is awarded if the amount owing can be calculated mathematically or, although the claim is illiquid, it can be calculated with relative ease on the basis of market values.³⁹ Also, there is a tendency to award interest in favour of illiquid claims on the basis of fairness and justice.⁴⁰

3.26 Legislation in certain states permits the award of interest in illiquid claims if a writ was issued. Here the institution of an action is regarded as the demand required for interest to begin accruing. The criterion for awarding interest is the question of whether the extent of the damage is determined by the circumstances existing during the advent of the damage, even if the exact amount of damage is has not been determined at that stage. Interest is awarded from the date of delict if the extent of the damage as at the date of the delict can be determined.⁴¹

3.27 In most states the courts have a discretion to award interest in illiquid claims. The view is that plaintiffs are insufficiently compensated, both in cases where no interest may be awarded with regard to illiquid claims and in cases where discretion is used in deciding against the award of interest.

37 Seifried 1977 Cincinnati Law Review at 153; Rothschild 1982 NWULR at 195 et seq.

38 American Jurisprudence Vol 22 paragraphs 651 and 654.

39 American Jurisprudence Vol 22 paragraph 653; Seifried 1977 Cincinnati Law Review at 154; Rothschild 1982 NWULR at 198.

40 American Jurisprudence Vol 22 paragraph 655

41 Ibid.

The argument is that plaintiffs are compensated fully only if they have an automatic right to the award of interest.⁴²

3.28 Delictual cases are mostly illiquid since the defendant usually does not know the exact extent of his liability before judgment is given.⁴³ American courts have in the past held that in such cases no awards of interest are made in the absence of statutory provisions. In the case of, for example, damage to property, interest is awarded since the damage is reasonably certain and can be calculated according to market value.⁴⁴ In claims for physical injury the damage continues after the causation of the damage and it is usually not possible to determine the damage accurately before judgment.⁴⁵ However, the American courts have realised that there is no justification for distinguishing between physical injury claims and other damages claims.⁴⁶ Consequently interest is in fact awarded for losses suffered up to the judgment stage. Since it is difficult to determine at what stage the separate damage arose, an arbitrary rule was made that interest is to accrue from either six months after the delict or from of the date of death, whichever comes first. However, interest is not awarded for future damage, such as future loss of consortium or pain and suffering, or as punitive damages.⁴⁷

3.29 The general rule is that, in the absence of legislation to the contrary, interest is not awarded for physical

42 Rothschild 1982 NWULR at 199.

43 American Jurisprudence Vol 22 paragraph 664.

44 Ibid.

45 American Jurisprudence Vol 22 paragraph 667.

46 American Jurisprudence Vol 22 paragraph 667.

47 Ibid.

injury, emotional damage or libel.⁴⁸ The time that expires between the date of the delict and the trial is, however, taken into consideration in the calculation of damages.⁴⁹

3.30 Usually interest accrues from the date of the delict to the date of judgment. In claims for negligent loss or destruction of property interest is awarded from the date of loss or destruction. If damage is determined by the cost of repairs to a thing, which is left to the exclusive discretion of the plaintiff but which is subject to a test by the other party as to whether the repairs were essential and reasonable, interest is calculated from the time of repair. The reason for this is that the extent of the damage can be determined only once the damage has been repaired and the cost determined. If there is no need to incur repair costs but these can be determined immediately, interest is awarded from the date when the damage arose.⁵⁰

3.31 When the plaintiff contributes materially to the delay in receiving the damages owing to him it may happen that no interest is awarded. In the past, courts found that plaintiffs were not entitled to any award of interest if they failed to continue their claims or claimed excessive or inconsequential damages or refused a reasonable settlement amount.⁵¹ The non-allocation of interest is in line with the idea that prejudgment awards of interest serve as a punishment for wrongful action by the parties.⁵² If the nature of the award of interest is regarded as compensatory, plaintiffs who delay can be disciplined without making use of an archaic punitive measure. A plaintiff's delay can be used against him

48 American Jurisprudence Vol 22 paragraph 668.

49 Ibid.

50 American Jurisprudence Vol 22 paragraph 674.

51 Seifried 1977 Cincinnati Law Review at 162.

52 Seifried 1977 Cincinnati Law Review at 163.

by adjusting the determined interest rate. If the interest rate is set higher than the market-related interest rate it may be that the plaintiff could benefit from delaying his action. In such a case the court can lower the interest rate to the market-related interest rate.⁵³

3.32 In certain states interest is awarded only if the extent of the claim for damages cannot be contested on reasonable grounds.⁵⁴ Such a provision is, however, contrary to the modern approach to compensation. Also, settlement negotiations are discouraged to a large extent by such provisions.⁵⁵

D. AUSTRALIA

(a) Award of interest in New South Wales, Queensland, Western Australia and the Northern Territory

3.33 Awards of interest in these four areas are prescribed by legislation.⁵⁶ Legislation provides a fourfold discretion, namely -

- (i) to award interest or not;
- (ii) to determine the rate of interest;
- (iii) to award interest on the full amount of the damages, or part thereof; and
- (iv) to determine the date of origin of the action and the

53 Ibid.

54 Seifried 1977 Cincinnati Law Review at 164.

55 Ibid.

56 Respectively the Supreme Court Act 1970 (NSW) sec 94, Common Law Practice Act 1867 (Qld) sec 72, Supreme Court Act 1935 (WA) sec 32 and Supreme Court Act (NT) sec 84.

judgment date in terms of which interest is awarded.⁵⁷

3.34 The purpose of an award of interest in the exercise of judicial discretion has been described as follows:⁵⁸

The interest is awarded to compensate the plaintiff for the detriment that he has suffered by being kept out of his money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim.

3.35 The courts in New South Wales receive guidance on the exercise of the discretionary interest rate determination by means of the interest rate that is announced from time to time by the Chief Justice in practice notes.⁵⁹ In an appeals case from the Supreme Court of the Northern Territory, the Australian Federal Court found that the appropriate discretionary interest rate has to be a commercial interest rate.⁶⁰

3.36 The discretionary capacity to award interest is restricted in the four states to the following extent:⁶¹

- (i) Compound interest, that is interest on interest, may not be awarded.
- (ii) The legislation does not apply to debts where interest may be claimed automatically as of right. The reason for this and the aim of the provision is that

57 DW Creig and JLR Davis The Law of Contract Sydney: The Law Book Co 1987 at 1431 (hereafter "Creig and Davis The Law of Contract").

58 John Fairfax v Kelly (1987) 8 NSWLR 131 at 137A.

59 Creig and Davis The Law of Contract at 1431; see practice notes No 25 (1982) 2 NSWLR at 442, No 30 (1984) 2 NSWLR at 635 and No 37 (1985) 3 NSWLR at 173.

60 Creig and Davis The Law of Contract at 1431.

61 Creig and Davis The Law of Contract at 1432.

the plaintiff should be able to recover interest, for example as stipulated in a contract, and that the award of interest may not be subject to the discretion of a court. The result, however, is that a plaintiff is bound to a contractually agreed interest rate - he will not be able to insist on a higher commercial interest rate.

- (iii) Since the Bills of Exchange Act⁶² already makes provision for the award of interest, interest may not be claimed in terms of other legislation when bills of exchange constitute the grounds for litigation.

3.37 In New South Wales legislation makes it possible for a court to award interest even after a plaintiff has instituted an action for debts or liquid damages and the defendant has paid in full or in part, without the case having progressed to the judgment stage.⁶³ The advantage of this provision is that the plaintiff can accept an offer by the perpetrator of the delict or debtor for the payment of the principal debt or damages, but he retains the right to request the court to exercise its discretionary power to award interest. In such a case the court may order interest from the date on which payment was due to the date of payment.⁶⁴ If no action was instituted for the recovery of debts or damages and the debts or damages were paid, the provision is not applicable. The Australian Law Commission was of the opinion that legal reform in terms of which all debts would bear interest from the time that payment becomes due fell outside its brief. In England, the English Law Commission recommended that all debts should be susceptible to an award of interest from the date on which they

62 Bills of Exchange Act of 1909.

63 Sec 94 (1A) of the Supreme Court Act of 1983.

64 Creig and Davis The Law of Contract at 1432-1433.

become payable.⁶⁵ However, the recommendation was not accepted by Parliament. A creditor does, however, still have the right to claim damages for the damage suffered owing to late payment.

3.38 In Bennett v Jones the court dealt as follows with the relevant factors to which attention should be given in the exercise of judicial discretion:⁶⁶

If a plaintiff fails in some respects to give a defendant all the information required under the court procedures, or fails before the action, to volunteer all information that would enable a defendant to tender or pay the sum eventually awarded, or, if the plaintiff defaults in court procedures in some other way, ought this attract a discretion to limit the award?⁶⁷

A number of questions arise. Is the power to award interest such that it should be used punitively, so a plaintiff or defendant is penalised for delay or failure to observe court procedures; or is it entirely compensatory, so as to do no more than which is fair in a pecuniary sense between the parties? Is the jurisdiction to be exercised, or not exercised, simply by inquiry whether the defendant ought to have paid money to the plaintiff at some earlier date; or is it to be awarded on some neutral basis, as that, for some reason, the money has been outstanding for a period, in which the defendant had the benefit of not paying it and the plaintiff the detriment of not having it, and that delay and the conduct of a party is relevant, only so far as by reason of it, there is, or may be, economic disadvantage to the opposing party by an award of interest being, or not being made?⁶⁸

Is the court to enquire whether the plaintiff was asking too much or the defendant offering too little; or the plaintiff exaggerating his symptoms or the defendant unreasonably contesting liability?⁶⁹

Such delay may be because the consequences of the plaintiff's injuries have not been revealed sufficiently for him to formulate his claim and his case, or because it is

65 Ibid.

66 (1977) 2 NSWLR (hereafter "the Bennett case").

67 The Bennett case at 367B.

68 The Bennett case at 367E.

69 The Bennett case at 368E.

unwise in his interest, and perhaps that of the defendant, to have fixed by agreement or trial that sum which must cover all the future. The delay may be reasonably required by the defendant, or his insurer to become aware of the details of claims made and of the plaintiff's condition or to ascertain by inquiry or trial whether he is liable to pay anything. It may be due to the court processes.⁷⁰

Unless it can be seen that there is likely to have been some detriment to the defendant, it will be irrelevant that the plaintiff has not proceeded with complete promptness, or that he, or his solicitor, has not properly and fully complied with court procedures. Such cases of which the present is an example, are to be distinguished from cases of deliberate delaying tactics of a plaintiff or defendant, where it appears there is likely to be financial detriment to the other party. In these cases the conduct of the parties is relevant because of the detriment to the other party. Delay of the plaintiff in this context is of particular significance where the delay is in commencing proceedings. Delay therefore will normally be of less significance because the defendant has some opportunity to prevent delay once proceedings are instituted.⁷¹

Thus some order, limited as to time or rate of interest, will be appropriate in the case of gross delay of a plaintiff, where the past losses are substantial and the effect of inflation considerable, so that an award of interest, particularly one at a going commercial rate, will be likely to exceed the effective benefit to a defendant or his insurer, of not having to pay the money earlier.⁷²

(b) South Australia and the Australian Capital Territory

3.39 In these two areas, too, legislation provides discretionary powers for the award of interest.⁷³ Here the courts also have the following powers, namely -⁷⁴

70 The Bennett case at 369.

71 The Bennett case at 371B.

72 The Bennett case at 371D.

73 Creig and Davis The Law of Contract at 1433

74 In South Australia the Supreme Court Act 1935 sec 30c and in the Australian Capital Territory the Supreme Court Act 1933 sec 53A.

- (i) to award interest;
- (ii) to determine the rate of interest awarded;
- (iii) to determine the period for which the award is made between the origin of the action and the date of judgment; and
- (iv) to determine which part of the damages amount bears interest.

3.40 The legislation of these two areas restricts the discretionary powers by providing that awards of interest will be refused if reasonable grounds for non-award are proved. The meaning of the phrase "good cause is shown to the contrary" has not been yet considered in these two jurisdictions.⁷⁵ In Victoria it was held that a payment into court does not constitute such grounds for refusing an award of interest. Furthermore, the legislation does not permit compound interest, the legislation is not applicable where interest may be claimed as an automatic right, and the capacity to claim damages owing to the dishonouring of a bill is not affected.⁷⁶

3.41 Also, the legislation is applicable only if a court hands down judgment for a specific amount. Therefore if a debtor or perpetrator of a delict pays the creditor or aggrieved person the amount owing so that there is no trial, the creditor or aggrieved person cannot recover any interest in terms of the legislation.

3.42 In Clarke v Pamiani the prevailing Australian approach that is applied in the exercise of judicial discretion

75 Creig and Davis The Law of Contract at 1433.

76 Creig and Davis The Law of Contract at 1434.

is set out as follows:⁷⁷

If the plaintiff does not prove that he has proceeded with sufficient diligence, then he has not proved his right to an award for the full period from the service of the writ until delivery of the judgment. The section puts no onus on the defendant either to take proceedings to penalise the plaintiff for not complying with the times for filing and serving documents set down in the Rules of Court, neither does it refer anywhere to the fact that the true payer of the money is not the defendant but the defendant's insurance company. Under these circumstances in my opinion the normal rules apply. The court undoubtedly has a discretion in this matter but that discretion must be exercised in accordance with well-settled rules, and one of those rules is that the party invoking the exercise of the Court's discretion in his favour must prove his case ... For these reasons I remain of the opinion that if the plaintiff by reason of his dilatory conduct does not take reasonable steps to bring an action on for trial or for hearing, he to that extent fails to prove his entitlement to interest and the period for which interest is given should be reduced accordingly.

3.43 Nevertheless, there is no consensus as to how these judicial discretionary awards of interest should be ordered. In Honey v Keyhoe the court found as follows:⁷⁸

Modern systems of procedure provide effective machinery for defendants to take steps to expedite hearings and to procure the summary dismissal of state claims. In my view, if a defendant wants to argue that a plaintiff should be penalised for delay by the loss of interest, it behoves him to show that he took some steps to bring the action on for hearing himself or at least that he endeavoured unsuccessfully to prod plaintiff into activity. Delay may be due to all sorts of causes, such as protracted negotiations for settlements or requests for the medical or psychological examination of the plaintiff by the defendant's experts.

77 (1974) 8 SASR 463 (SA SC) at 470.

78 (1973) 5 SASR at 470.

(c) Victoria

3.44 The discretionary award of interest powers of Victoria are more limited than those of the other Australian states that have been mentioned.⁷⁹ The legislation of Victoria provides that interest must be awarded in respect of the full recovery of debt or damages or a part thereof, unless good cause to the contrary is submitted to the court.⁸⁰ Furthermore, interest is awarded from the institution of the action and not from the origin of the action as in the other states that have been mentioned. The interest rate awarded in Victoria may not be higher than the Commonwealth bond rate or any other interest rate determined by the Attorney-General on advice of the Treasurer.

3.45 Interest may not be awarded for any damage that provides compensation for any future (post-judgment) losses.⁸¹ This provision is not only of great importance in damages claims for physical injury and death, but also for unfair dismissals. Damages are divided into pre-judgment and post-judgment compensation and interest is awarded in respect of pre-judgment damages only.⁸²

(d) Tasmania

3.46 Legislation in Tasmania⁸³ differs significantly from other Australian legislation on the award of interest.⁸⁴ Legislation in the other areas provides that it applies to debt

79 Creig and Davis The Law of Contract at 1434.

80 Supreme Court Act 1958 section 79A.

81 Creig and Davis The Law of Contract at 1434.

82 Ibid.

83 Supreme Court Civil Procedure Act 1932 section 34.

84 Creig and Davis The Law of Contract at 1434.

and damage, whereas legislation in Tasmania is applicable to actions involving a certain debt or sum. Tasmanian legislation provides further that interest - 85

- (i) may not be awarded at a rate of interest higher than seven per cent; and
- (ii) may be awarded only if the debt was payable in terms of a written contract and was payable on a specific date or at a specific time or if a writ was issued in which the debtor was informed that interest would be claimed from the specific time of the writ or a date later than the date of the writ.

3.47 With the exception of New South Wales and Tasmania a creditor cannot recover interest in terms of the legislation of the other states if a court has delivered no judgment. In Victoria, however, it was held that where a debtor paid a liquid amount after the issuing of summons this is equivalent to the amount collected having been recovered by means of such an action and that it is then susceptible to an award of interest in terms of the the legislation in Victoria.⁸⁶ In this case interest was awarded up to the time of payment, although no judgment was handed down for payment of the principal sum. It would appear that the position in Tasmania is the same since the legislation is similar.

(e) Arbitration proceedings

3.48 The Standing Committee of Attorneys-General proposed that uniform legislation be adopted in Australia in terms of which powers are conferred on an arbitrator to award discretionary interest in commercial arbitration cases. This

85 Creig and Davis The Law of Contract at 1434-1435.

86 Creig and Davis The Law of Contract at 1435.

recommendation provides that arbitrators and umpires -87

shall have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court) on the whole or any part of the money for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

E. THE NETHERLANDS

3.49 According to Dutch law⁸⁸, a debtor or perpetrator of a delict who fails to pay a debt or compensate damage is obliged to pay interest for moratory damages from the date on which the money is exacted.⁸⁹ There is no requirement that the amount should be determined or that it should be a fixed sum of money.⁹⁰ The object of section 1286 of the Dutch Burgerlike Wetboek is to -

- (i) provide compensation for expenditure, damage and interest at a fixed rate of interest;
- (ii) avoid uncertainties about the legal position of the parties; and
- (iii) eliminate disputes and evidence as regards the question of whether the delay in the case concerned gave rise to damage and, if so, what the extent of

87 Ibid.

88 Burgerlike Wetboek section 1286

89 AR Bloembergen (editor) et al Onrechtmatige daad Kluwer: Deventer updating service Sept 1989 par 131 at II 82 (hereafter Bloembergen Onrechtmatige daad").

90 Bloembergen Onrechtmatige daad par 139 at II-86b.

such damage is.⁹¹

3.50 Interest on default is payable from the time when the amount owing is legally exacted.⁹² When a creditor issues a letter of demand to a debtor for an amount due and payable, interest is payable from the date of the letter of demand. Such interest accrues to the date on which the obligation to pay is discharged.⁹³ Interest on future damage is payable only if the damage has been suffered by the date of trial, unless the value of the future damage can be calculated mathematically as at the date of issue of the summons.⁹⁴ Interest is payable on all damage in the Netherlands - also in respect of incorporeal damage.⁹⁵

F. HONG KONG

(a) A general discretion to award interest

3.51 Section 48(1) to (4) of the Supreme Court Ordinance of Hong Kong corresponds word for word with section 35A(1) to (4) of the English Supreme Court Act of 1981. Both statutes provide a general discretion with regard to the award of inte-

91 "Het in art 1286 BW vervatte stelsel, daarop neerkomende dat in verbintenissen die alleen betrekkelijk zijn tot betaling van zekere geldsom - waarvan de dezen sprake is - de vergoeding van kosten, schaden en interessen, uit vertraging in de uitvoering voortkomende, is gefixeerd als in dat artikel aangegeven, strekt ertoe onzekerheden omtrent de rechtspositie van partijen op dit punt te vermijden en in het bijzonder om discussies en bewijslewing te voorkomen ten aanzien van de vraag of in een bepaald geval schade door vertraging is geleden en zo ja, tot welk bedrag. Het strookt niet met deze strekking om de wettelijke interessen slechts over een gedeelte van het bedrag toe te wijzen". Bloembergen Onrechtmatige daad par 139 at II-86b.

92 Bloembergen Onrechtmatige daad par 141 II-86d.

93 Bloembergen Onrechtmatige daad par 143 II-88b.

94 Bloembergen Onrechtmatige daad par 140 II-86b.

95 Bloembergen Onrechtmatige daad par 140 II-86c.

rest. The Law Reform Commission of Hong Kong (hereafter the Hong Kong Commission) recommends that this discretionary power, which is left to the courts, should be retained.⁹⁶ On the other hand, the Hong Kong Commission recommends that there should not be a general right to an award of interest on damages, but that the court should have a discretion to make a decision in this regard.⁹⁷

3.52 Section 48(2) of the Supreme Court Ordinance restricts the judicial discretion to award interest by providing that interest on physical injuries and death may be awarded if the amount exceeds \$30 000. The limit set by the English provision (section 35A(2)) in this regard is £200. In terms of section 49(4) of the Hong Kong District Court Ordinance interest is awarded if the damages award for physical injury or death exceeds the amount of \$3 000.

(b) An appropriate rate of interest

3.53 The Hong Kong Commission assumes that the party that suffered special damages in the form of physical injury and that has no funds available has to borrow money. Therefore the Hong Kong Commission is of the opinion that the appropriate rate of interest for special damages is half of the sum of 3% above the prime interest rate.⁹⁸

96 Report on Interest on Debt and Damages (topic 19) Hong Kong: Government Printer of Hong Kong 1990 at 611 (hereafter "Hong Kong Commission Report on Interest").

97 Hong Kong Commission Report on Interest at 67.

98 Hong Kong Commission Report on Interest at 58.

3.54 The Hong Kong Commission⁹⁹ agrees with the English decision in Birkett v Hayes¹⁰⁰, in which the ruling on general damages for pain and suffering and loss of the amenities of life was as follows:

... to award interest on this sum as though it were a debt is to call on a defendant to pay interest on a figure that was never demanded and which at the date of the writ is usually sheer guesswork.

3.55 The Hong Kong Commission consequently recommends that an award of interest for general damages should be ordered at 2%, calculated from the date of issue of the summons to the date of trial. The Hong Kong Commission argues that the higher damages award ordered by the court already makes provision for inflation and that the exact amount as determined by the court later during the trial stage is not fixed at the time of service of summons.¹⁰¹

G. NEW ZEALAND

3.56 The courts have the following discretionary powers in the award of interest, namely -¹⁰²

- to determine the rate of interest at which interest is awarded, subject to a fixed maximum rate of 11%;
- to determine the amount with regard to which the

99 Hong Kong Commission Report on Interest at 59.

100 (1982) 1 WLR 816 AC 824.

101 Hong Kong Commission Report on Interest at 67.

102 New Zealand Law Commission Aspects of Damages; the Award of Interest on Debts and Damages Preliminary Paper No 17 Wellington: New Zealand Law Commission November 1991 at 3 et seq. (hereinafter "New Zealand Law Commission Aspects of Damages pp 17"); the most important relevant legislation is sec 87 of the Judicature Act, 1908, and sec 65 of the Districts Courts Acts, 1947.

award is made; and

- to determine the period for which the award is made.

3.57 Owing to shortcomings in the award of interest the New Zealand Law Commission reviewed the matter of the award of interest. Although interest is an easy way to calculate a loss that has been suffered because the defendant does not pay a due amount, there are also other ways of calculating such a loss.¹⁰³ The loss can be calculated with reference to the consumer price index as a loss in value that is caused by inflation and also as a loss of use that can be calculated at an arbitrary real rate of interest. Since rates of interest amount to a prediction of the future inflation pattern, they are not always accurate. When inflation plus a true risk-free rate of interest is used to calculate compensation this is more likely to indicate true historic results than the use of historically untrue market-related rates of interest. Since an answer has to be found to the question of what the average plaintiff would have done with the money if he had received it on the day on which his cause of action arose, the New Zealand Law Commission feels that a market-related rate of interest should be used. The point of departure is that the proposed New Zealand award of interest scheme should make provision for general rational plaintiffs and not for exceptional plaintiffs such as the successful speculator, the gambler who loses everything or a plaintiff who lends money at unusually low or high rates of interest.¹⁰⁴

3.58 The New Zealand Law Commission suggests that interest in general and interest on all pecuniary judgments should be payable at a prescribed rate of interest.¹⁰⁵ Pecuni-

103 New Zealand Commission Aspects of Damages pp 17 at 28-29.

104 New Zealand Commission Aspects of Damages pp 17 at 29.

105 New Zealand Commission Aspects of Damages pp 17 at 31.

any judgments are defined as any judgment or order given in any court that prescribes pecuniary payment or that recognises the existence of a liability payable in money. The prescribed rate of interest should be amended every month, it should follow a readily available commercial indicator, such as the average first mortgage lending rate, and the rate of interest should fluctuate to indicate changes in the prescribed rate of interest. Compound interest should be calculated monthly. The calculation of the statutory rate of interest should be facilitated by tables that are drawn up and published monthly. Interest should be awarded from the date on which the liability to pay arises to the date of payment. If the date on which a person becomes entitled to payment differs from the date on which the amount is determined, interest should be awarded from the date on which it is determinable to the date of payment. When the date on which the amount is determined is the date of trial, as in a libel claim, interest should be payable from the date of judgment to the date of payment. Where damages comprise different categories and are determined on different dates, interest should be awarded separately for each category. No interest should be awarded in respect of future (post-judgment) losses. No interest should be awarded -

- (i) if the plaintiff does not claim interest;
- (ii) with regard to costs (except from date of judgment);
- (iii) with regard to punitive damages (except from the date of judgment);
- (iv) where the parties have contracted validly as regards interest;
- (v) where other legislation prescribes the award of interest; and

- (vi) where damages already make provision for opportunity costs.

3.59 The New Zealand Law Commission considered the following arguments in order to answer the question of whether the proposed legislation on the award of interest should contain discretionary or mandatory prescriptions. If the courts were to have a general discretion to decide which rate of interest to award, a great deal of time would probably be lost during the course of proceedings.¹⁰⁶ Also, parties would not be able to predict liability or to take informed decisions, for example to settle, since there could be no reasonable expectation of what the outcome of the case would be. The potential fairness that discretionary powers could entail would be outweighed by inherent uncertainties and ineffectiveness. A standard rate of interest is often announced even where there are discretionary powers. Although discretionary powers have to be exercised within the framework and limitations of judicial discretion, this still leads to legal uncertainties.¹⁰⁷

3.60 A compulsory award of interest scheme that is applicable to the rate of interest, the period for which interest is awarded and the part of the amount of damages that is susceptible to an award of interest, would entail a saving of time and money.¹⁰⁸ A compulsory award of interest scheme would mean that parties would be discouraged from adducing evidence and arguing about which rate of interest should apply. Also, it would lead to litigants knowing with certainty beforehand what the extent of damages would be should their action succeed. Consequently, the New Zealand Law Commission proposes a general compulsory award of interest scheme. However, this is qualified so that interest may, in exceptional circumstances, be

106 New Zealand Commission Aspects of Damages pp 17 at 33.

107 Ibid.

108 New Zealand Commission Aspects of Damages pp 17 at 34.

awarded in a discretionary manner.¹⁰⁹ Delay by a plaintiff in instituting his action would not necessarily constitute exceptional circumstances. However, where the defendant suffers true hardship and disadvantage it could constitute exceptional circumstances.

3.61 Further exceptional circumstances where a plaintiff would not be compensated sufficiently by a compulsory award of interest would be if he had had to borrow money earlier at an exceptionally high rate of interest.¹¹⁰ Nonetheless, the mere payment of a high rate of interest should not automatically result in the exercise of discretion in deviation from the mandatory award of interest prescription. If the proposed discretionary powers were to be exercised this would mean that a court would be entitled to -

- (i) order interest on any part of the amount due;
- (ii) order interest at any rate of interest;
- (iii) order interest for any period; or
- (iv) refuse an award of interest completely.

109 New Zealand Commission Aspects of Damages pp 17 at 55-56.

110 New Zealand Commission Aspects of Damages pp 17 at 56.

CHAPTER 4

PROPOSED AWARD OF INTEREST IN SOUTH AFRICA

A. THE OBJECT OF A PROPOSED AWARD OF INTEREST PRESCRIPTION

4.1 The object of creating an obligation on someone who is liable for the payment of a debt or compensation for damage to pay interest on the amount owing if time has passed between the date on which the liability arose and the date of payment, is to achieve fairness towards the creditor or prejudiced person. It is unfair to the creditor or prejudiced person if he has to receive payment at the old monetary value when the monetary value at payment is much lower than the prevailing monetary value. The defendant either saves interest because he did not have to borrow money earlier to pay the amount owing, or he earns interest on the money that he does not pay over to the plaintiff, when he does in fact have the amount owing available and is able to pay.

4.2 The argument that is so often heard against the award of interest on illiquid claims is that it is unfair to the defendant that he has to pay interest on an amount when the extent of his liability is uncertain. The counter-argument is that the plaintiff should not be prejudiced by having to finance the defendant's investigation into the merits and extent of the claim. If the plaintiff is treated fairly the defendant's objection to illiquid awards of interest is not valid.

4.3 In a submission to the Commission the Actuarial Society of South Africa refers, among other things, to the affordability of higher damages awards. The Society believes that if courts were permitted to supplement damages with adjustments to make provision for the decline in monetary value this would lead to a general increase in the cost of damages that are compensated with public funds. The Society notes that the receipt by plaintiffs of compensation and pensions that are deductible from damages would on the other hand lead to a significant decrease in awards for damages. The Society therefore, believes that the cost inherent

in the compensation for lost purchasing power is insignificant if it is compared with the cost of damages claims in general. The Society suggests that the repeal of the Assessment of Damages Act¹ be considered. In this way consideration could be given to making the receipt of collateral benefits of damages awards deductible to a greater extent. In terms of the Assessment of Damages Act the receipt of insurance money, pension or a benefit which has been or will be paid out as a result of a person's death is not taken into account in a damages claim.² The receipt of such compensation therefore does not allow for the damages claim to be reduced by the amount already received. Mr R J Koch, an actuary, also believes that South Africa is not financially in a position to afford generous damages awards such as those of the Western welfare states.³

4.4 In the Commission's opinion, the argument about the affordability or otherwise of the creation of an obligation to the payment of parties is not valid. In fact, the argument strengthens the view that a plaintiff is prejudiced if he has no claim to interest. The fact that awards of interest may in specific cases constitute a burden on the Treasury is not an acceptable reason for prejudicing creditors. Besides, the State as ordinary litigant will sometimes be the creditor and sometimes the defendant. The principle at issue also does not, in the opinion of the Commission, affect the Assessment of Damages Act, 1969.

4.5 The Commission is of the opinion that the object of an illiquid award of interest prescription should be to achieve fairness to both plaintiff and defendant and to create legal certainty through simple prescriptions. The Commission believes that the Prescribed Rate of Interest Act is the appropriate Act that should be amended to provide for such awards of interest.

1 Act 9 of 1969.

2 Section 1(1).

3 "Discounting to date of delict - fair or unfair" 1987 THRHR 105 at 109.

B. MANDATORY VERSUS DISCRETIONARY INTEREST PRESCRIPTIONS

4.6 South African legislation already makes provision for the award of interest. In certain instances the power to award interest is mandatory, while in others it is discretionary. The Admiralty Jurisdiction Regulation Act⁴ is couched in discretionary terms. In the exercise of admiralty jurisdiction a court may order what it regards as fair in respect of interest, the rate of interest with regard to an amount awarded by it and the date on which interest begins to accrue, whether before or after the date of institution of the action.

4.7 The Expropriation Act⁵ contains a mandatory provision in term of which interest must be awarded if the State expropriates movable or fixed assets. This Act prescribes the date from which interest must be awarded, namely the date on which the State takes possession of the goods concerned. The Act also provides that interest is not payable if the amount of compensation payable to the expropriated person is paid over to the Master of the Supreme Court by the Minister.⁶ Interest is not payable for any period during which -

- (i) there is a dispute or doubt as to who should receive any compensation payable;
- (ii) an interdict is issued with regard to the payment of the compensation;
- (iii) the owner and bond holder or purchaser have not informed the Minister as regards payment of the compensation;
- (iv) the owner (expropriated person) occupies or utilises the

4 Act 105 of 1983 section 5(2)(f).

5 63 of 1975 section 12(3) (hereafter "the Expropriation Act").

6 The Expropriation Act sections 12(3)(a) and 21(4).

goods or any portion thereof, on so much of the outstanding amount as, in the opinion of the Minister, relates to the occupied or the property so occupied or utilised.⁷

4.8 These two examples clearly show the possible legal uncertainty that discretionary powers may hold, as against the legal certainty that mandatory and clearly defined powers may bring. In the previous chapter it was also clear that legal uncertainty and high legal costs are used in many countries as an argument against the existence of the discretionary award of interest powers.

4.9 In 1990 the Law Promotion Branch of the Department of Justice circulated for comment a Bill, the object of which was to give the courts the power to use their discretion to award interest with regard to illiquid debt recoveries. The relevant part of the Bill, which would constitute an amendment of the Prescribed Rate of Interest Act, 1975, read as follows:

Section 1A. A court of law may, if it is reasonable under the circumstances, in any action arising from an illiquid cause of action order that the judgment debt, or a part thereof, shall bear interest for the period between the date of service of the summons by which the action was instituted and the date of judgment, or any portion thereof, at the rate of interest prescribed under section 1(2) that was applicable for the period contemplated or any portion thereof or, where different rates of interest were thus applicable with regard to different portions of the period, at such different rates of interest with regard to such different portions.

4.10 The main objection to the Bill is that legal certainty will not be promoted by such a prescription on awards of interest. The majority of respondents who replied to the Commission's questionnaire⁸ were in favour of a discretionary award of interest prescription. The preliminary finding of the Commission is that a mandatory interest prescription is preferable to a

7 The Expropriation Act section 12(4).

8 See Chap 1 par 1.1 and 1. 2.

discretionary award of interest prescription because of the saving on legal costs and the legal certainty that such prescription would ensure. At the same time, a mandatory award of interest prescription implies that provisos such as "reasonable or fair under the circumstances", or "unless the court is persuaded of the contrary" or "unless good grounds to the contrary are advanced to the satisfaction of the court" would be done away with. A proviso that would entail that the mandatory prescription could be deviated from under certain circumstances, would merely contribute to further legal uncertainty.⁹

C. ALL ILLIQUID DEBTS AND DAMAGES BEAR INTEREST

4.11 In order to ensure fairness towards plaintiffs, all illiquid damages or debts would have to bear interest. It has been pointed out above that it is to the advantage of the defendant if he is first able to investigate the extent or merit of his liability, since time is lost before he makes payment to the plaintiff and he still pays at the original monetary value as at the date of liability.

4.12 In Community Development Board v Mahomed¹⁰ the court noted as follows with regard to the Expropriation Act:

Counsel for the appellant pointed to the fact that under the common law no interest accrued on an as yet unliquidated amount of compensation ... and from that base argued that the liability to pay interest which is imposed on the Minister by s 12(3) should not be extended beyond what was strictly necessary according to the language used. In my view there is no room for such an argument in the context of the issue to be decided in this case. By enacting the main provision of s 12(3) the legislation clearly intended to bring about a radical departure from the common law position, and it is clear that it did so because of considerations of equity.

4.13 It was shown above that in certain foreign jurisdictions no interest is awarded on damages amounts for, inter-alia, libel.

9 See 4.33 et seq. below.

10 1987 2 899 (A) at 915E-G.

The preliminary finding of the Commission is that there is no justification for drawing a distinction between different categories of illiquid damages or debt. The fundamental point of departure should be that damage was suffered, that the liability to pay debt or damages arose on a certain date and that the liability was not met. Since the creditor or person prejudiced by the delict has been kept out of his money or suffered damage, apart from the extent of the debt or damage, the defendant should be obliged to pay interest as calculated on the date of liability.

D. AS PER AGREEMENT BETWEEN THE PARTIES OR AS DETERMINED BY ARBITRATION OR ORDERED BY THE JUDGMENT OF A COURT

4.14 A prescription in terms of which all damages or debts bear interest on the amount as determined by agreement between the parties concerned, by arbitration or by a judgment of the court, could, in the preliminary opinion of the Commission, remove all uncertainty surrounding the question of an illiquid claim. Interest could therefore be awarded on the damage or debt, regardless of when the extent of the claim was determined, whether at the beginning or end of the proceedings.

E. SHOULD COURT PROCEEDINGS BE INSTITUTED TO ESTABLISH AN OBLIGATION TO PAY INTEREST?

4.15 The question arises whether it would be fair to introduce an obligation to pay interest in all cases without an action being brought in a court of law for payment of the amount owing. In other words, should interest still be payable even if the debt is collected without an action in a court of law? In principle it does not seem unreasonable that liability for payment of interest should apply to all actions for recovery of debt. The preliminary view of the Commission is that the obligation to pay interest should not be made dependent on the institution of an action. It may be, too, that an obligation to pay interest in all cases, that is without an action necessarily being brought in court and taken to its conclusion, could lead to debts being paid

sooner and damages being compensated without long delays. In the Bailey case¹¹ the court noted that before the commencement of the Prescribed Rate of Interest Act a plaintiff was entitled under the common law to a payment of interest from the date of judgment. The proviso was that a plaintiff had to specifically claim payment of interest from the date of judgment. The court pointed out that the Prescribed Rate of Interest Act now embodies the common law position, but that a judgment creditor at present receives interest on the judgment debt without having to claim it specifically.

4.17 One of the objections raised against the Bill of the Department of Justice referred to above is that the obligation to pay interest is dependent on the role of the courts. A mandatory payment of interest liability without the necessity of intercession by a court would be a step towards achieving legal certainty. Legal certainty could be achieved if a debtor or perpetrator of a delict were liable in each instance for payment of interest when his liability for debt or damages arose. The Commission's preliminary recommendation is therefore that interest should be payable automatically on illiquid damages and debts without the necessity of obtaining a court order.

F. BEGINNING OR COMMENCEMENT OF AN INTEREST OBLIGATION

4.18 Next, existing prescriptions will be considered to determine from what date interest is awarded at present. The Prescribed Rate of Interest Act provides that all judgment debt bears interest from the day on which the judgment debt is payable, unless the court order or judgment provides otherwise.¹² Interest in terms of this Act therefore begins to accrue on the judgment date or the date of the court order, unless the court

11 The Bailey case at 359C-D.

12 Section 2(1).

orders otherwise.¹³ As seen above and in subject to the provisos, when interest does not accrue for certain periods, interest in the case of expropriations under the Expropriation Act begins to accrue from the date on which the outstanding balance of the amount payable is due.¹⁴ Interest accrues until the compensation has been paid in full.

4.19 Interest on the damages amount awarded in terms of the Multilateral Motor Vehicle Accidents Fund Act¹⁵ and the Compulsory Motor Vehicle Insurance Act¹⁶ is payable fourteen days after the issuing of the court order that awarded damages.

4.20 As seen above in the discussion of foreign legal systems, the argument is raised time and again that a defendant cannot be obliged to pay interest and that interest cannot begin to accrue until he has determined the extent of his liability. However, this argument implies that the plaintiff, who is already being paid with money whose value has depreciated, has to wait even longer and receive less payment as long as the defendant is determining his liability. In South African damages law the principle is that a plaintiff must claim "once and for all". This means that the plaintiff must recoup all damages, both future damages and what he has already suffered, in one claim.¹⁷ Owing to the existence of this rule it can happen that a plaintiff in a claim for personal injuries has to wait for some time before he can determine the full extent of his damages. One argument holds that the inevitable passage of time means that a defendant is

13 See also Clifford v Farinha 1988 4 SA 315 (W) at 325F-H.

14 Davehill v Community Development Board 1988 1 SA 290 (A) at 297H-I (hereafter "the Davehill case").

15 Act 93 of 1989 section 42(a).

16 Act 56 of 1972 section 21(A).

17 J Neethling, JM Potgieter and PJ Visser Deliktereq Durban: Butterworths 1989 at 184 (Hereafter "Neethling, Potgieter and Visser Deliktereq"). DJ Joubert General Principles of the Law Contract Cape Town: Juta 1987 at 255; PQR Boberg The Law of Delict Vol I Cape Town: Juta 1981 at 476.

prejudiced if time passes for which he is not to blame and which results in him having to pay interest for that period. Without dragging a versari tenet in through the back door, the defendant is in the first place liable towards the plaintiff because he caused the damage. Consequently a defendant cannot in all fairness raise this defence and he has to bear the burden of an interest obligation if there is a question of the inevitable passage of time.

4.21 The question of when interest should begin to accrue is influenced by the general rule that the extent of the damage is usually determined as at the date of delict.¹⁸ However, damages are often calculated according to the monetary value as at the trial date, as in the case of future loss of amenities of life and loss of ability to earn an income. The argument raised here is that plaintiffs would be benefitted and defendants prejudiced if interest were awarded from the date of origin of liability and moreover at an ordinary rate of interest. In New Zealand, for example, interest is awarded from the date on which damages are determined (for example the date of trial in libel cases) if damages cannot be determined as at the date of origin of liability.

4.22 The counter-argument to the plaintiff being benefitted to the detriment of the defendant if he receives his award of interest from the date of origin of damage or debt in all cases is that even if damages are awarded at a higher monetary value as at the date of trial, the fact remains that the plaintiff did not receive and could not use the money earlier. Consequently the Commission believes that one cannot state categorically that the defendant would be prejudiced if interest were awarded in all cases from the origin of the liability. The defendant could, in turn, possibly benefit from a provision that interest should be awarded according to the rate of interest as at the date of origin of liability. Consequently the Commission believes that there is

18 General Accident Insurance v Summers; Southern Versekeringssassosiasie v Carstens; General Accident Insurance v Nhlumayo 1987 3 SA 577 (A) at 662.

no need to create separate classes according to which interest should be awarded if damage or debt is determined on a date other than the date of origin of liability.

4.23 The preliminary recommendation of the Commission is that interest on illiquid damages and debt should begin to accrue and be awarded from the date of origin of the damage or debt and that the interest should continue to accrue to the date of payment.

G. THE APPROPRIATE RATE OF INTEREST

4.24 In a submission to the Commission the Actuarial Society of South Africa proposes that legislation should make it possible for the courts to adjust losses of income or of maintenance. The adjustments should make provision for the decline in the purchasing power of money that occurs in the period between the date of the loss and the date of trial or the date of settlement. The Actuarial Society proposes that the same adjustment be made with regard to medical and related expenses already paid by the plaintiff. According to the Society's proposal the adjustment should be made with reference to the consumer price index of all products as published by the Central Statistical Service. It is further proposed that the adjustment be left to the discretion of the court.

4.25 The Society proposes that the adjustments be permissible without it being necessary for the plaintiff to present evidence to prove to what purpose he would have applied the relevant earnings and maintenance if he had received them. However, the Society believes that such legislation should not prevent the plaintiff or defendant from adducing evidence in order to prove that a higher or lower rate should be applied in that particular case. The Society believes that the court should have a discretion to decide on an appropriate rate on the basis of the evidence adduced. The Society believes that the consumer price index is preferable since it is a generally accepted standard for determining the rate of inflation. The Society notes that the

Matrimonial Property Act¹⁹ gave the consumer price index statutory recognition as a measure of the rate of inflation.

4.26 The question arises as to whether it would not be preferable in awards of interest to make use of a market-related rate of interest rather than making the consumer price index applicable to such awards. The Commission believes that the approach according to which consideration is given to the return that an average plaintiff could have earned if he had received payment without delay is preferable to using the consumer price index as a measure for compensation. Such a rate of interest prescribed by statute would also be preferable to a discretionary rate of interest. As pointed out above, discretionary rates of interest mostly lead to guidelines being published and binding rates of interest being prescribed by means of rules of practice. It may be possible to achieve further fairness to the parties by retaining the current rate of interest prescription of the Prescribed Rate of Interest Act. In terms of the Act interest is at present awarded at the prescribed rate of interest, unless a court of law orders otherwise on the basis of exceptional circumstances that relate to the debt. In the Davehill case²⁰ the court pointed out that exceptional circumstances are not defined in the Prescribed Rate of Interest Act and that exceptional circumstances therefore depend on the facts of each particular case. The exceptional circumstances should relate to the specific case and do not affect debts in general. The court found that the mere fact that the Minister of Justice has the power to adjust the rate of interest from time to time does not constitute exceptional circumstances.

4.27 The rate of interest awarded at present in terms of the Prescribed Rate of Interest Act is 18,5%.²¹ In a submission to the Commission Mr RJ Koch, an actuary, suggests that rates of

19 Act 88 of 1984.

20 The Davehill case at 301D-F.

21 As prescribed by the Minister of Justice in the Government Gazette, Government Notice R.1342/1989 on 30 June 1989.

interest be adjusted and published annually and that average rates of interest be determined for the preceding years. He believes that this would simplify the application of the Prescribed Rate of Interest Act and would keep pace with increases and decreases in rates of interest. The preliminary view of the Commission is that a compulsory annual rate of interest determination would entail an unnecessary administrative burden and would bring about unnecessary inflexibility. The usefulness of such a prescription when rates of interest, or circumstances that affect rates of interest, remain the same for considerable periods, or even for years, can hardly be justified. If the rate of interest remained the same an obligation to prescribe would imply that the same rate of interest would have to be prescribed after each year.

4.28 : The preliminary recommendation of the Commission is that awards with regard to all illiquid damages and debts be calculated and ordered at the prescribed rate of interest under the Prescribed Rate of Interest Act. Furthermore, the preliminary recommendation of the Commission is that the provision that the Minister of Justice may from time to time prescribe the prescribed rate of interest in terms of the Prescribed Rate of Interest Act²² is satisfactory and that no amendment is necessary.

H. SHOULD DIFFERENT RATES OF INTEREST BE SET?

4.29 In British Columbia it was proposed that interest be awarded at a nominal or lower rate where the value of damages is calculated as at the date of trial. The British Columbia Commission believes that interest in other cases where the damages are calculated at the lower monetary value, as at the origin of liability, should be awarded at higher market-related rates of interest. In other jurisdictions a distinction is also generally drawn between the award of interest where damages are calculated either according to the date of trial or the date of origin of the action. In New Zealand interest is awarded from the later date of determination of the value if the value could not be calculated

22 Section 1(2)

earlier. Consequently, an answer has to be found to the question of whether the fact that a plaintiff is compensated at monetary value as at the date of trial plays a role. The Commission does not agree with the argument that an award of interest at a fully market-related rate of interest over-compensates the loss suffered by the plaintiff to the detriment of the defendant. The criterion should still be that the defendant was liable to compensate damage or debt and that the plaintiff was kept out of his money because the defendant did not perform earlier. Therefore the preliminary recommendation of the Commission is that regardless of the date of determination of liability and regardless of the class of damage or debt, the defendant should still be obliged to pay interest at a full market-related rate.

I. INTEREST IS AWARDED AT THE RATE THAT IS APPLICABLE ON THE DATE ON WHICH INTEREST BEGINS TO ACCRUE

4.30 This provision applies at present in terms of the Prescribed Rate of Interest Act²³, and the question arises whether a plaintiff should be entitled to insist on another rate under normal circumstances. In principle it does not seem as if either the defendant or the plaintiff could have any valid objection to the continuation of the current prescription of the Prescribed Rate of Interest Act. On the one hand it may be that the rate of interest that applied on the date on which interest began to accrue was higher than at the date of trial. On the other hand, however, it may be that the rate of interest was lower on the earlier date than on the date of trial. In addition the plaintiff still has the right in terms of the Prescribed Rate of Interest Act to request the court to order that a rate other than the prescribed rate be applied on the basis of exceptional circumstances.

4.31 At the time when Enteka Verspreiders v Ellis &

23 Section 1(1)

Geldenhuys Bpk²⁴ was decided there was no fixed rate of interest in terms of the Prescribed Rate of Interest Act. Here the court laid down a rule of practice that in future interest would be awarded at 8% in the Orange Free State Provincial Division, that is at 2% higher than the applicable rate of interest at which interest was awarded for default, subject to the 8% being subject to changed circumstances. The court decided on the rate of 8% since it was of the opinion that the 6% rate "is unrealistically low in view of the prevailing circumstances in the business world and should be increased" (translation).²⁵ In Pillay Bros v FM Cash Store²⁶ the court noted as follows as regards the moratore rate of interest:

The rate of interest is, however, variable, and, depending as it does upon the state of the money market at the relevant time, can be altered where there is a change of circumstances in the money market justifying such alteration.

4.32 The Commission's preliminary recommendation is that the general rule for all illiquid damages and actions for recovery of debt should be that interest is awarded at the rate prevailing on the date on which interest begins to accrue and that this rate of interest should be awarded for the full period up to the date of payment. The proviso that an award may be ordered at a different rate will apply in exceptional circumstances, the existence of which will have to be proved by the defendant or plaintiff.

J. SHOULD LEGISLATION PROVIDE A RESIDUAL DISCRETION?

4.33 The question arises whether there is not a need in South African law for the courts to use discretion in not awarding interest for the full period, for the full damages amount, at the full prescribed rate of interest or at a higher rate. As shown above, the following factors were raised abroad as justification for the

24 1975 4 SA 792 (0) (hereafter "the Enteka case").

25 The Enteka case at 796D-F.

26 1976 2 SA 660 (SECLD) at 661F-G.

existence of such residual discretion, namely -

- (i) failure by the plaintiff to institute his claim or continue the action;
- (ii) the way in which the trial was conducted by the plaintiff or the defendant;
- (iii) gross neglect by the defendant to make payment; and
- (iv) receipt of collateral benefits by the plaintiff.

4.34 Convincing arguments were advanced above as to why there is no need for the existence of such discretion.²⁷ The introduction or establishment of residual discretionary powers to deviate from the general rule that all illiquid damages or debts should bear interest for the full period, at the full applicable rate and on the full damages amount, would contribute to legal uncertainty. The whole purpose of the introduction of award-of-interest legislation along clear, simple and fair guidelines would be defeated by such discretion.

4.35 The preliminary recommendation of the Commission is that it is in the interest of the administration of justice in South Africa not to include a residual discretionary award-of-interest prescription in the proposed legislation. The only discretionary powers that should be permitted are the existing powers in terms of the Prescribed Rate of Interest Act to deviate from the prescribed rate of interest only in exceptional circumstances.

K. THE LEGISLATION IS APPLICABLE TO DAMAGES AND DEBTS WHERE A SUMMONS IS SERVED OR THE LETTER OF DEMAND CLAIMING THE DEBT IS ISSUED AFTER THE DATE OF COMMENCEMENT

4.36 The Commission recommends that this obligation to pay

27 See the discussion of the recommendation of the British Columbia Law Commission in Chapter 3, paragraphs 3.14-3.22, and the recommendations of the New Zealand Law Commission in Chapter 3, paragraphs 3.59 - 3.61

interest be should applicable to all cases of damages or debt where the summons that institutes the action has been served or the letter of demand claiming the damages has been issued after the date of commencement of the Act.

L. DRAFT LEGISLATION

General explanatory note

[] Words in bold print in square brackets indicate proposed deletions from existing provisions.

_____ Words underlined with an unbroken line indicate proposed insertions into existing provisions.

Bill

To amend the Prescribed Rate of Interest Act, 1975, in order to provide that debts arising out of illiquid claims shall bear interest from the date when the claim arises on the amount of the claim as determined by agreement or arbitration or a sentence or order of a court; to repeal the application of the Act in Namibia; and to provide for incidental matters.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

Amendment of section 2 of Act 55 of 1975

1. Section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975, hereinafter referred to as the Principal Act), is hereby amended -

(a) by the substitution for the heading of the following heading:

Interest on [a] certain judgment [debt] debts";

(b) by the insertion after subsection (1) of the following subsection:

"(1A) Every debt arising out of an illiquid claim shall bear interest, as contemplated in subsection (1), as from the date when the cause of action arose, on the amount of the debt, irrespective of whether such amount is determined by agreement between the parties concerned or by arbitration or a sentence or order of a court of law.";

(c) by the substitution for subsection (2) of the following subsection:

"(2) Any interest payable in terms of subsection (1) or (1A) may be recovered as if it formed part of the judgment debt on which it is due."

Repeal of section 4 of Act 55 of 1975

2. Section 4 of the Principal Act is hereby repealed.

Transitional provision

3. The provisions of section 2(1A) of the Principal Act are not applicable to a debt in respect of which the summons

commencing the action or the letter of demand claiming payment of the debt was issued before the commencement of this Act.

Short title

4. This Act shall be called the Prescribed Rate of Interest Amendment Act, 19...

