The Law Commission

Working Paper No 66

Interest

LONDON
HER MAJESTY'S STATIONERY OFFICE
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This Working Paper, completed for publication on 6 January 1976, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1st October 1976.

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Contents

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PART I INTRODUCTION

Terms of reference

1. On 21 November 1974 the Lord Chancellor requested the Law Commission[1]

> "To consider the law and practice relating to interest on debt (where interest has not been provided for by contract) and on damages, and to make recommendations."

The present working paper is being published as a basis for consultation on the reform of this branch of the law. It should be noted that the terms of reference do not cover transactions in which a right to interest is provided for by contract, for example, moneylending or hire-purchase agreements: there will therefore be no discussion in this working paper of the law relating to such transactions. Nor will there be any discussion of interest on judgment debts, which were not intended to be covered by our terms of reference.[2]

Historical background

2. From the earliest times usury was outlawed by Church and State; claims for interest were therefore not made in the courts. However, with the rise of

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1 Law Commissions Act 1965, s.3(1)(e).

2 On this topic see the Report of the Payne Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909, paras. 1155-1171.

international commerce came a change of attitude. Trading ventures had to be financed and it seemed reasonable that a person who put his capital at risk should be entitled to a return on his money. Usury was therefore defined more narrowly so as not to deter the provision of risk-capital. The practices of bankers and insurers were no longer automatically stigmatised as usurious and money-lending itself ceased to be regarded as sinful provided that the rate of interest charged was related to the commercial risk involved. In the 16th century, to accommodate the practices of merchants and to discourage the rich from investing abroad, statutes[3] permitted the charging of interest on loans or debts provided that the rate did not exceed 10 per cent. per annum. Subsequent legislation varied the rate from time to time and from place to place in England. At the start of the 17th century, in his Essay on Usury, Bacon wrote:-

> "Two things are to be reconciled: the one that the tooth of usurie be grinded, that it bite not too much; the other that there be left open a meanes to invite moneyed men to lend to the merchants for the continuing and quickening of trade."

3. During the 18th and 19th centuries the practices of merchants were gradually absorbed into the common law of England. Where the payment of interest at a lawful rate was expressly provided for by contract it was recoverable as a debt, but the courts went further: they upheld claims for interest even where it had not been provided for expressly. In 1780 Lord Mansfield C.J. said:-[4]

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3 1545, 37.H.8, c.9; 1571, 13 Eliz.1, c.8.

4 Eddowes v. Hopkins (1780) 1 Dougl. 376; 99 E.R. 242.

> "Though by the common law, book-debts do not of course [5] carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it."

4. Some years later Lord Ellenborough C.J. took a less flexible attitude. He said, of the right to interest on unpaid debts:-[6]

> "My great object is, to have a fixed rule, and to exclude discretion."

The gist of his "fixed rule" was that interest should only be due if the parties had provided for it expressly or if it could be implied from the custom of the trade or from the nature of the transaction.

5. In 1826 the pendulum swung back in favour of the broader approach to interest. In Arnott v. Redfern, Best C.J. said:-[7]

> "Our law would not do what it professes to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest where a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor."

But the right to damages for the withholding of a debt never became established as part of the common law. In 1829, in Page v. Newman,[8] the Court of King's Bench decided not to

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5 That is to say "as a matter of course".

6 De Havilland v. Bowerbank (1807) 1 Camp. 50,51; 170 E.R. 872, 873.

7 (1826) 3 Bing. 353, 360; 130 E.R. 549, 552.

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

follow Arnott v. Redfern[9] but to reinstate Lord Ellenborough's "fixed rule" that interest should only be awarded where the contract provided for it either expressly or by implication.

6. Although the jurisdiction to award interest as damages for the withholding of a debt was thus rejected by the courts of common law, awards of interest were still being made in the High Court of Admiralty and in the courts of equitable jurisdiction. In Admiralty the practice was growing up of awarding interest on damages where the complainant ship-owner had lost the use of his money between the sinking of his ship and the judgment of the court.[10] The right to interest on damages in Admiralty cases has subsisted down to the present day. In the courts of equity interest was frequently awarded where money had been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position or where equitable remedies, such as specific performance or rescission, were granted. The equitable jurisdiction still exists today although now regulated in some respects by statute and by rules of court.

7. In 1833 the Civil Procedure Act, sometimes called "Lord Tenterden's Act", was passed. It sought to mitigate the harshness of the common law rule by allowing the court a discretion to award interest on debts or damages in certain cases. In particular it provided that interest might be awarded in respect of an unpaid debt where there was a written instrument which stipulated for the payment of the debt upon a certain day or where the creditor had made a

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9 (1826) 3 Bing. 353; 130 E.R. 549.

10 One of the early reported cases where such an award was made is The Dundee (1827) 2 Hagg. Adm. 137; 166 E.R. 194.

written demand for payment and had informed the debtor, in writing, that interest would be claimed.[11]

8. The Judgments Act 1838 provided[12] that all judgment debts should carry interest at a certain rate. This is still in force today although it should be noted that it does not apply to a judgment obtained in the county court[13] and that the original rate of 4 per cent. per annum has now been raised to 7½ per cent. per annum.[14] Before 1883 debts provable in bankruptcy did not carry interest unless the creditor had a right to it by contract or by statute, but the Bankruptcy Act 1883 provided that the bankrupt's creditor who had no such right might nevertheless claim interest on his debt in certain circumstances.[15] These provisions were reenacted in the Bankruptcy Acts of 1890 and 1914 and are part of the present law of bankruptcy.[16]

9. In 1893 the House of Lords heard an appeal in the case of London, Chatham and Dover Railway Co. v. South Eastern Railway Co.[17] The plaintiffs had obtained a judgment for a long-outstanding debt and claimed interest on it. The situation did not meet the requirements for an award under Lord Tenterden's Act[18] but the plaintiffs argued that they

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11 Civil Procedure Act 1833, s.28. Further, it was provided by s.29 that interest might be allowed as a matter of discretion where damages were awarded for trespass to goods or conversion or where the payment of insurance monies had been delayed. These two sections ceased to have effect when the Law Reform (Miscellaneous Provisions) Act 1934 came into force.

12 Section 17.

13 R. v. Essex County Court Judge (1887) 18 Q.B.D. 704; Sewing Machines Rentals Ltd. v. Wilson [1975] 3 All E.R. 553.

14 Administration of Justice Act 1970, s.44; Judgment Debts (Rate of Interest) Order 1971, S.I. 1971 No.491.

15 Bankruptcy Act 1883 s.40(5) and Sch. II, para. 20.

16 Bankruptcy Act 1914, s.33(8) and Sch. II, para. 21.

17 [1893] A.C. 429.

18 See para. 7, above.

had a right at common law to an award of interest by way of damages for the wrongful detention of the debt. Lord Herschell L.C. confessed that his sympathies were with the plaintiffs for the following reason:-[19]

> "I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use."

However, their Lordships concluded, with regret, that interest on an unpaid debt was only recoverable at common law where it was provided for by the agreement of the parties, express or implied, and that, on the facts of the particular case, the plaintiffs had no such right.

10. In 1934, following a short report by the Law Revision Committee,[20] the Law Reform (Miscellaneous Provisions) Act 1934 was passed: we shall refer to it hereafter as "the 1934 Act". It provided that all courts of record should have a discretion, after trying a claim for debt or damages, to award interest upon any sum for which judgment might be given.

11. Although the 1934 Act gave the court a discretion to award interest on damages as well as on debt, awards were seldom applied for where the claim was for damages in respect of personal injury or death. In 1968, however, the Committee on Personal Injuries Litigation, under the chairmanship of Winn L.J., reported[21] that interest should be added to

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19 [1893] A.C. 429, 437.

20 Second Interim Report (1934), Cmd. 4546.

21 Cmnd. 3691.

damages in respect of personal injury or wrongful death, whether applied for or not, as this would encourage litigants to bring disputed claims before the court with greater speed. This approach was adopted by the legislature and the Administration of Justice Act 1969 now provides[22] that, in every case of personal injury or wrongful death where the damages exceed £200, an award of interest should be made unless there are special reasons for refusing it.

12. Since 1969 the courts have, in various cases, considered the general principles governing the award of interest on debt or damages. In Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.[23] Lord Denning M.R. said:-

> "It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

This statement of principle was made in a case in which the substantive claim was for damages for breach of contract. However, in Jefford v. Gee[24] the Court of Appeal held, after reviewing the history of the 1934 Act and considering the practice in Admiralty,[25] that this statement of principle also applied to the award of interest on damages in tort and that it applied in the same way whether or not an award was required to be made by the provisions of the Administration of Justice Act 1969. It therefore seems to be the basis of an award of interest wherever the substantive claim is for damages.

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22 Section 22.

23 [1970] 1 Q.B. 447, 468.

24 [1970] 2 Q.B. 130.

25 See para. 6, above.

13. As for discretionary awards of interest on unpaid debts, there was some uncertainty before 1969 as to what the practice of the courts was or should be. The Payne Committee reported in 1969[26] that "the whole question of interest on claims under contract should be examined" and our examination of this question forms the major part of this paper. However, the Court of Appeal concluded in Jefford v. Gee[27] that the purpose of the 1934 Act was to enable the court to compensate the plaintiff for being kept out of his money whether it was due to him as a debt or as damages.[28] It therefore seems to be established that the general principle justifying an award of interest under the 1934 Act is the same whether the substantive claim is for debt or damages, namely that the defendant has kept the plaintiff out of his money and ought to compensate him accordingly.

Scheme of the paper

14. Our consideration of the matters within our remit has been divided up into five parts as follows:-

PART II THE PRESENT LAW

Here we make a detailed examination of the existing law and practice.

PART III INTEREST ON DEBTS - CRITICISMS OF THE PRESENT LAW
We are here concerned with the difficulties and anomalies that result in practice from the provisions of the 1934 Act, and of other statutes.

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26 Cmnd. 3909, para. 1165.

27 [1970] 2 Q.B. 130.

28 Ibid., at pp. 143-144.

PART IV INTEREST ON DEBTS - POSSIBLE REFORMS

We consider ways in which the 1934 Act might be amended or augmented and other remedies might be provided. We conclude with our provisional recommendations for changes in the law relating to interest on debts.

PART V INTEREST ON DAMAGES - CRITICISMS OF THE PRESENT LAW

Matters considered in this Part include the 1934 Act, the Admiralty jurisdiction to award interest,[29] the Jefford v. Gee guidelines[30] and practical problems that arise where money is paid into court in respect of damages.

PART VI INTEREST ON DAMAGES - POSSIBLE REFORMS

Here we set out our provisional recommendations for changes in the law relating to interest on damages.

APPENDIX INTEREST RATES FROM 1 APRIL 1973 TO 1 JANUARY 1976

We have made an analysis of recent fluctuations in certain interest rates and append a diagram and commentary. References to the Appendix are made at various relevant points in Parts II and IV.

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29 See para. 6, above.

30 Guidelines for the quantification of interest where an award is required by s.22 of the Administration of Justice Act 1969, being the guidelines laid down by the Court of Appeal in Jefford v. Gee [1970] 2 Q.B. 130.

PART II THE PRESENT LAW

The 1934 Act

Section 3(1)

15. First we consider the jurisdiction of the courts to award interest on debt or damages under the provisions of the Law Reform (Miscellaneous Provisions) Act 1934. Section 3(1) provides as follows:-

> "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

16. Although the ambit of the court's discretion appears to be very wide, it is not exercised in an arbitrary or capricious way. A number of principles have been established in decided cases and unless the discretion is exercised in accordance with these principles the decision may be reversed or varied by a higher court. The four important questions with which the courts are concerned are:-

(a) Should an award be made at all?

(b) On what sum?

(c) At what rate?

(d) Over what period?

Each will be considered in turn.

(a) Should an award be made at all?

17. The basic principle is that interest should only be awarded if the plaintiff has been kept out of his money[31] but this requirement does not usually present a difficulty. If the plaintiff is unable to obtain payment except by judgment then it will usually mean that he has been kept out of his money for some period at least. There are however some situations in which it might be proper on the present law to refuse an application for interest altogether, for example, where the plaintiff had agreed with the defendant that an award of interest would not be sought or where the plaintiff had been guilty of gross delay in bringing the matter to court.[32]

(b) On what sum?

18. So far as debts are concerned the interest, if awarded at all, is usually awarded on the whole sum due at the moment of obtaining judgment. With damages however there are difficulties depending on whether the damages are for pecuniary losses, such as loss of wages or out of pocket expenses, or for non-pecuniary losses, such as damages for pain and suffering. As regards pecuniary losses the broad

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31 Jefford v. Gee [1970] 2 Q.B. 130, 146.

32 Ibid., at p.151.

rule is that interest should be awarded on the whole of the sum that represents the losses. There are however two exceptions. If the plaintiff has already been indemnified by his insurers then he cannot recover interest on the sum covered by the indemnity[33] except where the insurance company has the right, by subrogation, to be repaid by the plaintiff out of the money recovered from the defendant.[34] The other exception is in relation to future losses. If the court gives judgment for the sum that would have compensated the plaintiff for all his losses if he had received it at the moment the cause of action arose then he should have interest added to the whole sum.[35] If, however, the court divides the past losses from the future losses at the date of giving judgment then, theoretically at least, interest should not be awarded in respect of the future losses but only in respect of the past ones.[36] In relation to awards made to dependants under the Fatal Accidents Acts the Court of Appeal suggested, in Jefford v. Gee,[37] that interest should not be limited to pecuniary losses down to the date of judgment but should be added to the whole award, so as to give interest on the sum awarded in respect of future pecuniary losses too.

19. In respect of non-pecuniary losses, such as general damages for pain and suffering, the Court of Appeal decided, in Jefford v. Gee,[38] that interest should be added to the whole award, without distinguishing between the part that was for past suffering and the part that was for suffering to come in the future.

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33 Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447.

34 H. Cousins & Co. Ltd. v. D. & C. Carriers Ltd. [1971] 2 Q.B. 230.

35 Bold v. Brough, Nicholson & Hall Ltd. [1964] 1 W.L.R. 201.

36 Jefford v. Gee [1970] 2 Q.B. 130, 147; Clarke v. Rotax Aircraft Equipment Ltd. [1975] 1 W.L.R. 1570.

37 [1970] 2 Q.B. 130, 148.

38 Ibid., at pp. 147, 148.

(c) At what rate?

20. Before section 22 of the Administration of Justice Act 1969 came into force interest was usually only awarded in commercial cases and the practice had grown up of awarding interest at 1 per cent. over the Bank rate prevailing at the relevant time. In Jefford v. Gee the Court of Appeal considered whether having regard to section 22 of the 1969 Act[39] a similar practice should apply to awards of interest on damages for personal injuries. They rejected it on the grounds that the fluctuations in the minimum lending rate (which replaced "Bank rate") were so frequent that the calculations became too complicated to be useful.[40] They considered, as an alternative, awarding interest at the rate applicable to judgment debts which at the time stood at 4 per cent. per annum, but rejected this as it seemed unrealistically low. They eventually decided to adopt the rate payable on the Short Term Investment Account,[41] which is the rate fixed by the Lord Chancellor, with the concurrence of the Treasury, for money paid into court and invested to await the trial of the action. The practice seems to be to vary the rate from time to time to reflect economic conditions and, although usually below the minimum lending rate, it aims to give the depositor a fair return on his deposit.[42] Having taken this as the "appropriate rate" the Court of Appeal suggested that it should be used wherever interest was awarded in personal injury cases. In relation to pecuniary losses incurred prior to judgment (so-called "special damages") however, the Court of Appeal considered that since such losses were usually sustained at different times between the accident and the trial of the action it would usually be fair to assume that they accrued at an even rate day by day over that period.

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39 See para. 11.

40 For details of recent fluctuations see the Appendix.

41 Jefford v. Gee [1970] 2 Q.B. 130, 148-149.

42 The rate has been 9 per cent. per annum since 1 March 1974: see the Appendix.

In theory interest should be awarded on each such loss on the period elapsing between its accrual and the date of judgment but for convenience the Court of Appeal suggested that all pecuniary losses sustained prior to judgment ought usually to carry interest from the date of the accident, at half the "appropriate rate", or for half the period or on half the sum.[43]

21. Since the decision in Jefford v. Gee there have been two important developments. One is that the rate payable on judgment debts obtained in the High Court was raised in 1971 from 4 per cent. to 7½ per cent. per annum.[44] The other is an indication given in the Commercial Court by Kerr J. that:-

> "...it seems highly likely that the short-term investment account rate, together with the rate on judgment debts, will provide a reliable and convenient basis [for assessing the rate of interest in cases coming before the Commercial Court] in the near future."[45]

It seems therefore that, in cases not involving personal injury, the interest rate for an award made under the 1934 Act will in future be more closely related to the rates payable on the Short Term Investment Account and on judgment debts than to the Bank of England minimum lending rate.[46]

(d) Over what period?

22. Where the claim arises out of the non-payment of a debt the interest is usually calculated from the date on which the debt ought to have been paid according to the commercial expectations of the parties, down to the date of judgment.[47] Where the claim is in respect of pecuniary losses whether in

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43 Ibid., at p. 146.

44 Judgment Debts (Rate of Interest) Order 1971, S.I. 1971 No. 491.

45 Cremer v. General Carriers S.A. [1974] 1 W.L.R. 341, 357.

46 See the Appendix.

47 Kemp v. Tolland [1956] 2 Lloyd's Rep. 681, 691, per Devlin

tort or arising out of a breach of contract, it might be argued that the interest should be calculated from the date the losses were incurred down to the date of judgment. In practice however this leads to difficulties: pecuniary losses, such as wages or profits, accrue from day to day and some of the items of loss may be very small, particularly in personal injury cases, for example, the cost of medicine or of travelling to a hospital. This is why the Court of Appeal suggested in Jefford v. Gee[48] that it would be more convenient in most personal injury cases to calculate the interest on half the sum awarded or over half the period from the date of the accident until the date of judgment or scale the award down by applying half the appropriate rate of interest. In respect of non-pecuniary losses the Court of Appeal suggested that interest should be calculated from the date of service of the writ down to judgment,[49] and that, in respect of a claim under the Fatal Accidents Acts, the interest should be calculated over the same period, that is to say from the date of service of the writ down to judgment.[50] In commercial cases not involving personal injury or death, slightly different principles are applied. In General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd.[51] the House of Lords accepted that the wrongdoer should as a general rule pay interest on damages over the period for which he had withheld the money adjudged payable. However, it was stressed that, in a commercial setting, it would be proper to take account of the manner in which and the time

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48 [1970] 2 Q.B. 130, 146. See para. 20, above.

49 Ibid., at pp. 147, 148. In the case of a claim against a third party in the course of such proceedings interest should be calculated from the date of service of the third party notice: Slater v. Hughes [1971] 1 W.L.R. 1438.

50 Ibid., at p. 148.

51 [1975] 1 W.L.R. 819.

at which persons acting honestly and reasonably would pay and, correspondingly, that account ought to be taken of any unreasonable or obstructive conduct on the part of the debtor.[52]

Proviso (a): interest upon interest

23. The court's discretion to award interest as it thinks fit under the 1934 Act is qualified by the proviso that nothing in section 3(1) "shall authorise the giving of interest upon interest." Thus the 1934 Act provides for simple interest not compound and where the creditor has a contractual right to interest on his debt, the court has no jurisdiction to award interest under the 1934 Act on the interest element in the claim. Interest may however be awarded on damages even where the damages are assessed by reference to interest which the plaintiff has had to pay.[53]

Proviso (b): the debt upon which interest is payable as of right

24. The discretion to award interest under section 3(1) may not be exercised in respect of "any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise"; this is the effect of proviso (b) to section 3(1). Interest on a debt may be payable as of right at common law or by statute.

25. At common law interest may be claimed as of right where the parties to a contract have provided for it expressly, but these situations fall outside our terms of reference. Interest may also be claimed as of right where a promise to pay interest may be inferred from the course of

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52 Ibid., at pp. 836-7, per Lord Wilberforce.

53 Bushwall Properties Ltd. v. Vortex Properties Ltd. [1975] 1. W.L.R. 1649.

dealing between the parties, from the custom of the trade or from the circumstances of the particular transaction. It is, for example, well established that interest may be claimed where a vendor fails to return the deposit which has been paid by the purchaser in respect of land to which the vendor cannot make title,[54] and where a surety has had to pay a creditor on the debtor's behalf and the debtor has failed to reimburse him.[55] If the rate has not been fixed by the parties interest will be awarded at a conventional rate. At the end of the 18th century the conventional rate was 5 per cent. per annum in commercial transactions and 4 per cent. per annum in others. The conventional figures fell by 1 per cent. per annum in the early 19th century but later returned to the earlier figures. They have risen again recently. For example in Babacomp Ltd. v. Rightside Properties Ltd.[56] the plaintiff purchaser recovered a deposit from the vendor with interest at the rate of 10 per cent. per annum. Rules of court provide that where judgment is obtained in the High Court in default of appearance by the defendant and the claim is for a liquidated sum which includes interest at an unspecified rate, the interest between the date of the writ and the date of entering judgment is to be computed at the rate of 5 per cent. per annum.[57]

26. Interest may be payable as of right by statute in respect of certain debts. For example:-

(a) A partner may claim interest at 5 per cent. per annum on money advanced to the firm, subject to agreement to the contrary[58] and

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54 De Bernales v. Wood (1812) 3 Camp. 258; 170 E.R. 1375.

55 Petre v. Duncombe (1851) 20 L.J.Q.B. 242.

56 (1975) 234 E.G. 201.

57 R.S.C., O. 13, r. 1(2).

58 Partnership Act 1890, s.24(3).

interest may be claimed at the same rate in partnership dissolution accounts as an alternative to claiming a share of the profits attributable to the use of the money.[59]

(b) Interest may be recovered by the Inland Revenue on overdue taxes at prescribed rates in certain circumstances.[60]

(c) Solicitors are entitled to charge their clients with interest on their bills for non-contentious business in certain circumstances, at a rate not exceeding the rate payable on judgment debts.[61]

(d) A person who is entitled to be paid money out of the estate of a deceased person is sometimes entitled to interest on the money at specified rates.[62]

(e) Where land is compulsorily acquired and entered before compensation is paid interest accrues from the date of entry at a rate prescribed by the Treasury.[63]

This list is not exhaustive. We have in particular omitted from it interest payable on judgment debts and interest on debts provable in bankruptcy.[64]

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59 Ibid., s. 42(1).

60 Taxes Management Act 1970, ss.86-92.

61 Solicitors' Remuneration Order 1972, S.I. 1972 No. 1139, r. 5(1).

62 See in particular the Trustee Act 1925, s.31(3), the Administration of Estates Act 1925, s.46(1)(i) and R.S.C., O. 44, rr. 18 and 19.

63 Land Compensation Act 1961, s.32(1). For details of the rates prescribed recently see the Appendix.

64 Bankruptcy Act 1914, ss. 33(8), 66(1) and Sch. II, para. 21.

Proviso (c): bills of exchange

27. The discretion to award interest under section 3(1) of the 1934 Act may not, by proviso (c), be exercised so as to affect "the damages recoverable for the dishonour of a bill of exchange". At common law, the right to damages by way of interest upon the dishonour of a bill of exchange was provided for in Lord Ellenborough's "fixed rule".[65] The remedy was not always worth pursuing, however, as the interest could not be sued for as a debt but had to be assessed by a jury after a trial, even when there was no defence to the action: this meant incurring additional costs and, in many cases, throwing good money after bad. The Bills of Exchange Act 1882 therefore provided that the holder of a bill that had been dishonoured might calculate the sum that would have been due as interest if a stipulation for interest had been agreed and might sue for it as liquidated damages.[66] If there appeared to be no defence to the action he could thus avoid having to take his case to trial and could instead apply for summary judgment.[67] As a safeguard against abuse of this procedure, however, it was provided that the court that heard the application for summary judgment might disallow or reduce the amount of interest claimed.[68] A remedy has thus been made available that is partly discretionary; the interest may be claimed as of right but the court has a discretion to reduce it or to reject it altogether. The Act did not take away the remedies at common law, so where a bill is dishonoured the plaintiff now has a choice: he may sue for interest as damages at common law, or as his statutory entitlement under the Bills of Exchange Act 1882.[69]

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65 De Havilland v. Bowerbank (1807) 1 Camp. 50, 57; 170 E.R. 872, 873. See para. 4, above.

66 Section 57(1)(b).

67 London & Universal Bank v. Earl of Clancarty [1892] 1 Q.B. 689.

68 Section 57(3).

69 In re Gillespie, ex parte Robarts (1885) 16 Q.B.D. 702.

Other jurisdictions

28. We have considered awards of interest under the 1934 Act, debts on which interest is payable as of right and interest recoverable upon the dishonour of a bill of exchange. We have yet to examine the Admiralty jurisdiction to award interest, the equitable jurisdiction and the matrimonial jurisdiction.

Admiralty

29. The power of the old Court of Admiralty to award interest on damages still exists today so the plaintiff in an Admiralty case may claim interest as his entitlement under the old rules or he may seek a discretionary award of interest under the 1934 Act.[70] In either case the court will probably award interest at the rate obtainable on the deposit of money in the Short Term Investment Account.[71] The period over which it will be calculated, if claimed as a right, depends on the nature of the loss or damage. It has been held, for example, that on the sinking of an unladen vessel the plaintiff is entitled to interest from the date of sinking;[72] on the damaging of a vessel from the date of paying for the repairs;[73] and on death or personal injury at sea from the date of the registrar's report to the trial judge.[74] It should be noted that where interest is claimed as of right and the defendant makes a payment into court he must include provision for interest in his payment.[75] If however the plaintiff seeks a discretionary award of

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70 The Aldora [1975] Q.B. 748.

71 The Funabashi [1972] 1 W.L.R. 666.

72 Straker v. Hartland (1864) 2 H. & M. 570; 71 E.R. 584.

73 The Hebe (1847) 2 W. Rob. 530; 166 E.R. 855.

74 The Aizkarai Mendi [1938] P. 263.

75 The Norseman [1957] P. 224.

interest under the 1934 Act the defendant need only pay into court enough money to cover the damages; he need not make provision for interest as well.[76]

30. We have mentioned the jurisdiction of the old Court of Admiralty to award interest on damages. It also had the power to award interest in salvage actions. The old Court of Admiralty was abolished in 1875 but its jurisdiction to award interest may still be exercised by the courts in which Admiralty cases are at present tried.[77]

The equitable jurisdiction

31. The equitable jurisdiction to order the payment of interest may be exercised in a variety of situations. For instance, interest rates may be invoked by the courts when making an apportionment of capital and income between tenant for life and remainderman; awards of interest of this kind are outside our present terms of reference. Interest may also be awarded in decrees for specific performance and in actions for rescission of contracts. Furthermore the payment of interest may be ordered where money has been obtained and retained by fraud,[78] or where it has been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position. The court's jurisdiction has been slightly narrowed by legislation and rules of court,[79] but the courts still have considerable latitude to order the payment of interest, as a matter of equity, at such rates and on such sums as justice may require. For example, in Wallersteiner v. Moir (No.2)[80] the defendant was ordered to repay money that he had appropriated wrongfully and to pay compound interest on the sum due, calculated at 1 per cent. over the minimum lending rate with yearly rests.

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76 Jefford v. Gee [1970] 2 Q.B. 130, 149.

77 The Aldora [1975] Q.B. 748.

78 Johnson v. R. [1904] A.C. 817.

79 See p.18, n. 62, above, and C.C.R., O.29, rr.14 and 15.

80 [1975] Q.B. 373.

The matrimonial jurisdiction

32. The matrimonial jurisdiction to award interest is very slight but it is mentioned for the sake of completeness. The Matrimonial Causes Act 1973 allows the court a wide discretion in making orders for financial provision by one spouse for the other or for the children and for the adjustment of the property rights of the spouses.[81] The court does not have power to award interest as such but where a spouse has been kept out of money that should have been paid the court may redress the balance by a lump sum payment to compensate him or her for having to live on borrowed money in the meantime. We are considering whether similar powers should be given to magistrates in the exercise of their matrimonial jurisdiction.[82]

33. Certain courts have jurisdiction by the Married Women's Property Act 1882[83] to decide disputes over property between husband and wife and to make such orders as they think fit. If it appears to the court that a spouse is entitled to a sum of money representing his or her share of the proceeds of sale of disputed property and that payment has been withheld the court would seem to have the power to award interest on the sum due. Awards of interest are however not usually made.[84]

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81 Sections 23 and 24.

82 Matrimonial Proceedings in Magistrates' Courts (1973), Working Paper No. 53, para. 59.

83 Section 17, as amended by the Matrimonial Causes (Property and Maintenance) Act 1958 s.7. The section was extended by the Law Reform (Miscellaneous Provisions) Act 1970 s.2(2) to disputes between formerly engaged couples.

84 Cf. Harrison v. Harrison reported at (1975) 5 Family Law 15.

Tax

34. Payments of interest are, with one exception, taxable as income, whether they are recoverable under contract or by statute or whether they are awarded as a matter of discretion under the 1934 Act.[85] An exception has been made for the discretionary award of interest on damages payable for injury or wrongful death; this is not subject to tax.[86] Where the person liable to pay the interest is an individual or a firm the interest must usually be paid gross: it is then the responsibility of the recipient to see that the tax is paid. However, where the person liable for the interest is a limited company or a local authority the tax must usually be deducted and remitted to the Inland Revenue by the person making the deduction.[87] The person who is entitled to receive the interest less tax is also entitled to insist on the delivery of a certificate of deduction of tax whether the interest is paid to him direct or whether it is paid into court.[88]

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85 Riches v. Westminster Bank Ltd. [1947] A.C. 390.

86 Income and Corporation Taxes Act 1970, as amended, s.375A.

87 Ibid., s.54(1).

88 Ibid., s.55(1); The Norseman [1957] P. 224.

PART III INTEREST ON DEBTS - CRITICISMS OF THE PRESENT LAW

Areas of the present law of which no criticism is made

35. So far as the equitable jurisdiction is concerned, we were at one time worried by an apparent tendency to treat 5 per cent. per annum as a "commercial" rate, regardless of market conditions. However, the very recent decision of the Court of Appeal in Wallersteiner v. Moir (No.2)[89] is strong authority for a more realistic approach: where the payment of money has been deferred and the equitable jurisdiction is invoked the courts are to have regard to prevailing interest rates when determining what compensation would be adequate. We agree with this approach and our provisional view is that the equitable jurisdiction to award interest is not in need of further or more detailed reform although we should be interested to receive comments and criticisms. As for the matrimonial jurisdiction our provisional view is that the courts should be empowered to compensate a spouse from whom money has been wrongfully withheld by the other spouse by ordering the payment of a lump sum, not necessarily identified as interest.[90] Here again comments and criticisms would be welcomed.

36. The present law and practice in relation to the payment of interest in respect of dishonoured bills of exchange is complicated but well-established. We should welcome comments and criticisms but our provisional view is that no changes are needed.

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89 [1975] Q.B. 373. See para. 31, above.

90 See para. 32, above.

Where interest is payable as of right

37. Where interest is payable as of right but no rate has been agreed between the parties we have two criticisms to make at this stage. First where the rate of interest has not been fixed by statute there is some uncertainty as to the rate that will be ordered by the court: this creates a difficulty for the defendant who wishes to make a payment into court to cover his indebtedness. Second, there seems to be some inconsistency in the rates fixed by statute, for example under the Partnership Act 1890[91] as compared with the Solicitors' Remuneration Order 1972.[92] We shall have more to say about these points later.[93]

The 1934 Act

38. This brings us to the 1934 Act and the discretionary award of interest in respect of unpaid debts. Where the court has power to award interest under the 1934 Act the discretion is exercised in accordance with well-settled principles which we have already considered[94] and of which we are not, in the main, critical, although comments and criticisms from readers would be welcomed. Broadly speaking where the defendant has kept the plaintiff out of his money and had the use of it himself the courts will, where they can, require him to compensate the plaintiff accordingly.[95] Our major criticism of the present law is

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91 Partnership Act 1890, ss. 24(3), 42(1); 5 per cent. per annum. See Sobell v. Boston [1975] 1 W.L.R. 1587.

92 S.I. 1972 No. 1139, r. 5(1): currently 7½ per cent. per annum.

93 See paras. 66-68 and 94, below.

94 Paras. 16-22, above.

95 See in particular the dictum of Lord Denning M.R. in Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447, 468 which is quoted in para. 12, above.

that there are many situations in which the creditor is kept out of his money and his debtor has the use of it, yet the creditor cannot apply for interest under the 1934 Act or at all. In the paragraphs that follow we shall examine these situations in detail. In Part IV we shall consider how the law relating to interest on debts might be reformed.

Judgment without trial

39. The court has the power under the 1934 Act to award interest on a debt where proceedings for the recovery of the debt have been "tried".[96] If, for example, the defendant disputes the debt and contests the case but loses, the successful plaintiff may apply for an award of interest. But the plaintiff may obtain a judgment without having the proceedings tried where the defendant admits the claim or fails to defend it. Actions to recover debts in the High Court and in the county courts are very largely uncontested by the debtors. In the main they have no defence, and they either allow judgment to be entered against them by default or on admission or they fail in their resistance to have a summary judgment entered against them.[97]

40. It may be that a distinction should be drawn here between a judgment in default of appearance or defence, which is obtained without the plaintiff having to adduce evidence in support of his claim, and a summary judgment, whi is obtainable in the High Court upon proof that the claim is well-founded.[98] Where the plaintiff obtains a summary

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96 For the text of s.3(1) see para. 15, above.

97 Report of the Payne Committee on the Enforcement of Judgment Debts (1969), Cmnd. 3909, paras. 61-64.

98 R.S.C., O.14, r. 2(1).

judgment by submitting evidence in support of an application under R.S.C., Order 14, it may be argued that this constitutes a trial of the proceedings for the purposes of the 1934 Act and that an award of interest may be made.[99] However, summary judgment is only applied for in a minority of cases.[100] It cannot be applied for unless the defendant has entered an appearance and it is inappropriate where the defendant has made a formal admission of his indebtedness.

41. As for judgments obtained in the High Court in default of appearance or defence, the editors of the Supreme Court Practice suggest that the plaintiff may ask for final judgment for the principal sum and for interlocutory judgment for interest to be assessed by analogy with an assessment of damages.[101] However, little use is made of this in practice: no doubt in many cases where it appears that the defendant cannot pay the debt the plaintiff is reluctant to lay out further money in obtaining an award of interest. There would seem to be no comparable procedure in the county court for obtaining a discretionary award of interest except where the action itself is "tried", so no interest may be recovered under the 1934 Act where the debt is undisputed and judgment is obtained without a trial, as happens in the majority of cases.[102]

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99 Wallersteiner v. Moir (No.2) [1975] Q.B. 373, 387-388, per Lord Denning M.R.

100 In 1974 there were 46,154 default judgments in the Queen's Bench Division in London as against 2,571 summary judgments.

101 Supreme Court Practice, para. 6/2/7A (1976 ed.).

102 Civil Judicial Statistics for the year 1974 (Cmnd. 6361) show that in that year in 1,091,541 cases in the county court judgment was entered for the plaintiff without a contest; only 45,175 cases were tried.

Payment before judgment

42. On the present state of the law the debtor who settles his debt before judgment cannot be ordered to pay interest on it under the 1934 Act however long he may have withheld it. This is because there has been no judgment. Furthermore where money is paid on account, even after proceedings have been commenced, the plaintiff must credit the payment against the debt and may only obtain judgment for the balance.[103] It was decided in The Medina Princess[104] that interest may only be awarded under the 1934 Act in respect of the amount for which judgment is given. Accordingl the debtor who has the means to pay his debt may obtain a period of interest-free credit by delaying payment until the last moment before judgment and even if he does not pay it all before judgment he can only be ordered to pay interest in respect of the balance left outstanding.

43. The Bolton Committee of Inquiry on Small Firms reported in 1971 that they received dozens of well substantiated complaints that powerful customers - large companies, nationalised industries, even local authorities - were deliberately delaying the payment of bills in order to improve their own liquidity.[105] We do not know how general such practices are or how serious are the consequences; we should welcome comments and information from readers. We do, however, make the point that the 1934 Act does not provide the creditor with a means of redress for the period that he is kept out of his money provided that it is paid before judgment.

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103 Hughes v. Justin [1894] 1 Q.B. 667.

104 [1962] 2 Lloyd's Rep. 17.

105 (1971), Cmnd. 4811, para. 12.77.

Tender before action

44. As we have already mentioned, the debtor who settles his debt before judgment cannot be ordered to pay interest on it.[106] Nor can the debtor who tenders payment of the debt before proceedings have been started. There may have been a wrongful withholding of the debt for a considerable period but the debtor is not obliged to tender a sum in respect of interest as his creditor has no right to it. The creditor must therefore accept the tender; if he refuses to accept it and brings proceedings the tender by the debtor provides a good defence to the action. There is thus no way in which the creditor to whom payment of the debt has been tendered may bring himself within the scope of the 1934 Act.

Summary

45. A creditor whose debt has been wrongfully withheld may seek a discretionary award of interest under the 1934 Act where the debtor disputes his liability to pay the debt but loses the case. If, however, the debtor admits that the debt is owed, or does not defend the proceedings or pays the money before judgment or tenders the money before action the creditor may not, as a general rule,[107] apply for interest under the 1934 Act however long he may have been kept out of his money. Our provisional view is that this is unsatisfactory and that the law should be changed.

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106 See para. 42, above.

107 Subject to certain exceptions considered in paras. 40 and 41, in relation to judgments obtained in the High Court.

PART IV INTEREST ON DEBTS - POSSIBLE REFORMS

46. We have examined the situations in which a debtor may withhold money that is due without having to compensate the creditor by paying interest on it. If the general principle governing awards of interest is sound, namely that the creditor should be compensated for being kept out of his money, then surely it ought to apply to at least some of the situations examined in Part III. Our provisional opinion is that the general principle is indeed sound and that it should be so applied. These are the assumptions on which the rest of this Part is written but we should, of course, welcome criticisms of them.

A wider discretion or statutory interest?

47. The reform of the law relating to interest on debts may be approached in two ways. By one approach the courts' jurisdiction to make discretionary awards should be increased. For example, it might be provided that a creditor should be entitled to apply for a discretionary award of interest under the 1934 Act wherever he has been kept out of his money, whether or not the debt is disputed and whether or not it is paid before judgment or, indeed, before proceedings.

48. Another approach might be the introduction of what we shall call "statutory interest" on contract debts. By this we mean a provision that contract debts should, as a general rule, carry interest at a rate fixed by statute from the date on which they should have been paid. Such a provision would tend to cut down the discretion of the court under the 1934 Act because the interest on contract debts would then be "payable as of right" and would be excluded

from the ambit of section 3(1) of the 1934 Act by proviso (b).[108]

49. Before considering in greater detail the provisions that either approach might involve we shall examine the factors relevant to an increased jurisdiction to make discretionary awards on the one hand and statutory interest on the other.

The advantages of flexibility

49. The 1934 Act gives the court a fourfold discretion in the matter of interest on debts; it may refuse to make an award altogether but if it makes an award it has a discretion as to the amount on which to award interest, the rate at which it should run and the period over which it should be calculated. The argument in favour of a wide discretion is that it enables the court to do justice on the facts of the particular case. In practice, however, so far as interest on debt is concerned, the discretion always seems to be exercised in broadly the same way. We have found no reported case in which a successful plaintiff's application for interest on the debt has been refused altogether or where it has been granted in respect of part only of the sum for which judgment is given. Some variations occur in the matter of rates and period but the discrepancy in award from case to case is slight.

50. What then are the situations in which the court might properly refuse an application for interest on a debt, or be justified in awarding less than the norm? There are, we think, three situations at least that deserve special mention.

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108 See paras. 15 and 24-26, above.

(a) Waiver by the creditor

51. If a creditor were to promise his debtor that he would not apply for an award of interest under the 1934 Act and were to make an application in breach of his promise, the court would no doubt take his conduct into account in deciding whether to accede to his application. It may be said that if interest were to be payable as of right and not merely as a matter of discretion, the court would have no power to refuse an award in such a case. This is only partly true. If the promise were given for consideration the creditor would be bound by it and even if it were not given for consideration the debtor might be able to meet his claim with a defence of promissory estoppel.[109] We intend to examine the doctrine of consideration and the defence of promissory estoppel in greater depth in subsequent working papers and we shall then consider what reforms, if any, are needed in the law relating to waiver, including the waiver by a creditor of a claim for interest. We mention it now to show that we are alive to the possible difficulties but we do not propose to consider them further in this paper.

(b) Inordinate delay by the creditor

52. A creditor who takes no steps to recover his debt may be regarded as less deserving of an award of interest than a creditor who presses for the recovery of his money. It may be said, in favour of the discretionary award, that this enables the court to see that the dilatory creditor gets less interest than the diligent, and that in cases where there has been gross or inordinate delay he gets none at all. There is some authority for the proposition that a refusal of interest on the grounds of

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109 Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130, but see also Foakes v. Beer (1884) 9 App. Cas. 605.

inordinate delay would be a proper exercise of the court's discretion,[110] although we have found no reported case in which an award of interest on a debt (as opposed to damages) has been refused on this ground. In the ordinary way the delay will of course prejudice the creditor more than the debtor. By leaving the debt outstanding without taking legal proceedings the creditor not only loses the use of the money but runs the risk that the debt itself may prove irrecoverable, for example because the debtor has become bankrupt or the limitation period has expired. The relevant limitation period for the recovery of a simple debt is six years[111] and this applies to interest on the debt as well.[112] Delay in bringing proceedings for the recovery of the debt will not usually prejudice the debtor except where he has a defence to the claim and its presentation is made more difficult by the lapse of time, for instance because documents have been lost or witnesses have died. Where the debt is not disputed it is to the debtor's advantage for legal proceedings to be delayed as long as possible, and it is often said that "it is the duty of the debtor to seek out his creditor."[113]

(c) The poor debtor

53. The Payne Report on the Enforcement of Judgment Debts drew a distinction between "the hard core" of debtors who, although able to pay their debts, deliberately exploit the processes of the law to obtain the maximum amount of credit and those debtors who would like to clear themselves of their debts but are unable to do so due to circumstances beyond their control.[114] It may be said that

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110 Jefford v. Gee [1970] 2 Q.B. 130, 151.

111 Limitation Act 1939, s.2 (1) (a).

112 Elder v. Northcott [1930] 2 Ch. 422.

113 For example, Bremer Oeltransport G.M.B.H. v. Drewry [1933] 1 K.B. 753, 765 per Slesser L.J.

114 (1969) Cmnd. 3909, paras. 1002-1003.

statutory interest would increase the financial burden on the badly off. Many people would be affected. Litigation results in about a million judgment debtors a year and, on average, judgment debts are discharged in three years from judgment.[115] Where the award of interest requires the exercise of the court's discretion the court is, in theory at least, able to "temper the wind to the shorn lamb",[116] and the creditor may be reluctant to ask for a discretionary award of interest which the debtor is clearly unable to pay. Perhaps the creditor would be less reluctant to claim interest if it became payable as of right and could be obtained by the same process and in the same way as the judgment for the debt on which it was calculated.

54. It is for consideration whether the additional hardship that might be imposed on those who were unable to pay their debts would make the introduction of statutory interest socially undesirable. It should be noted that, as a general rule, the courts have no power to relieve a debtor from paying interest on the grounds of his poverty. For instance judgment debts obtained in the High Court carry interest; so, in certain circumstances, do debts provable in bankruptcy; no special rules exist for poor debtors. Nor has the court the power to excuse the debtor from paying interest where he has contracted to pay it at a lawful rate for example, under the terms of a hire-purchase agreement or a building society mortgage. Nor have we found any reported case in which the court has refused a discretionary award of interest on the ground of the debtor's inability to pay. Our provisional view is that the debtor's obligation to pay interest on a debt should not depend upon whether he has the means to pay it. We should welcome comments.

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115 Ibid., para. 68.

116 Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447, 468, per Lord Denning M.R.

The advantages of certainty

55. The possible advantage of flexibility which characterises the discretionary award, must be balanced against the disadvantage of uncertainty. On the present state of the law the debtor who disputes his liability to pay the debt does not know what if anything the court may award by way of interest if he loses the case. He may not know from the pleadings in the case at what rate or over what period interest will be claimed nor indeed whether an application for an award of interest will be made. These are not matters that the plaintiff is required to put in his pleadings.[117] Even where the plaintiff notifies the defendant of his intention to apply for interest on a certain sum over a certain period at a certain rate some doubt remains as to what the court will, in its discretion, award. By way of contrast, where interest is payable as of right the plaintiff has to give details in his pleadings of the amount claimed and the facts relied on in support of the claim, so as to let the defendant know what his total liability will be if he loses the case, and what he should pay into court.[118] A scheme of statutory interest on contract debts would, arguably, benefit both parties by its greater certainty. It would be better for the defendant because he would know how much he would have to pay by way of interest if he lost. It would be better for the plaintiff because the defendant who made a payment into court in respect of the debt would have to make a payment that covered interest as well.[119]

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117 Riches v. Westminster Bank Ltd. [1943] 2 All E.R. 725.

118 Sheba Gold Mining Co. Ltd. v. Trubshawe [1892] 1 Q.B. 674.

119 See para. 29, above.

Legal costs

56. The legal costs involved in obtaining a discretionary award of interest on an undisputed debt must be greater than those which would be involved in obtaining statutory interest. The latter would, unless exceptional provision were made, be recoverable by the same default procedure as the debt itself, without a court hearing. The exercise of the court's discretion, on the other hand, must involve a court hearing, the submission of evidence and the address of argument. Even if the evidence and argument are reduced to the merest formality some extra costs must be involved, and these must be borne in the first instance by the plaintiff; no doubt the usual order would be for the defendant to pay them even though he did not contest the plaintiff's application for an award. A system of statutory interest on contract debts would therefore be cheaper for the debtor than an enlarged jurisdiction to make discretionary awards. From the creditor's point of view it would have the advantage of being not only cheaper but quicker.

The law and practice in other countries

(a) Europe

57. Outside England, Wales and Northern Ireland,[120] the general rule in Europe is that the withholding of a debt entitles the creditor to interest. In Scotland, for example, it is a rule which has received general effect, that where money is shown to have been due and to have been

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120 Section 17(1) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 follows the wording of section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934; see para. 15, above.

demanded, interest runs if the demand or request for payment is not acceded to;[121] the interest is recoverable as of right.[122]

58. Within the European Economic Community there is only one country outside the United Kingdom in which the withholding of a debt does not entitle the creditor to interest and that is the Republic of Ireland. In that country not even a discretionary award of interest may be made: interest down to judgment may only be recovered where it is provided for by contract. In all other member states the creditor may demand interest at a prescribed rate for the period of default prior to judgment. The rates of interest and the period over which it may be claimed vary from country to country but the notion that interest should be payable as of right is generally accepted.

59. In Belgium interest is recoverable as of right from the service of the summons on the debtor. The rate, which is fixed by Royal Decree, is currently 8 per cent. per annum.[123] Since 1970 the same rate has been provided for commercial transactions as for others. The courts have a discretion to award interest over a longer period or at a higher rate where the debtor has acted in bad faith. In Denmark the rule in relation to sale of goods is that interest is payable from the date when the price should have been paid; where the purchase is not

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121 London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429, 443 per Lord Shand.

122 Riches v. Westminster Bank Ltd. [1947] A.C. 390, 412 per Lord Normand.

123 Royal Decree, 14 October 1974.

made in the course of business interest runs from the date when the purchaser receives the bill.[124] With other contracts the creditor is entitled to interest from the date on which payment should have been made but where no date for payment has been fixed the creditor must remind the debtor that payment is due when reasonable considerations require such notification.[125] The interest rate was altered in 1975 from 5 or 6 per cent. per annum to 2 per cent. over the official bank rate of the Danish National Bank in all cases.

60. In France interest on commercial debts runs automatically from the date of demand for payment, and on other debts it runs from the service on the debtor of the summons. The rate is fixed in all cases by reference to the official discount rate of the Bank of France.[126] In Germany there is a distinction as to rate between commercial transactions, on which interest is payable at 5 per cent. per annum[127] and others, on which the rate is 4 per cent. per annum.[128] The interest runs from the date for payment where a date has been fixed; otherwise from the date of formal warning. In Italy obligations that involve the payment of money carry interest at 5 per cent. per annum according to the Italian Civil Code.[129] In Luxembourg interest is payable on debts at the rate of 6 per cent. per annum: it runs from demand in respect of commercial debts; otherwise from the service of the summons.[130] In the Netherlands interest on debts is recoverable at a prescribed rate,

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124 Sale of Goods Act 1906, art. 38, as amended.

125 Bonds Act 1938, art. 62, as amended.

126 Code Civil, art. 1153, Décret-loi No. 75-619, 11 July 19

127 Commercial Code, s. 352.

128 Civil Code, s. 288.

129 Articles 1224, 1284.

130 Code Civil, art. 1153.

currently 10 per cent. per annum,[131] calculated from the service of the summons or from any earlier date on which the debtor was advised that payment was due and that interest would be claimed. In all these countries a rate of interest is prescribed, but a higher rate may be recovered where it has been agreed between the parties.

61 Outside the European Economic Community the general rule is that interest on debts that have been withheld is payable as of right. The law of Sweden deserves particular notice as it has been changed recently. As from 1 January 1976 interest runs on all unpaid debts at 4 per cent. over the official discount rate of the Riksbank, except where a higher rate has been agreed between the parties. It runs from the date for payment where this has been fixed by agreement; otherwise it runs from one month after the demand for payment where the demand includes notice that a failure to make payment will involve the debtor in an obligation to pay interest.

(b) The Uniform Laws on International Sales Act 1967

62. The Uniform Laws on International Sales Act 1967 provides[132] that, in international sales to which the Act applies,[133] the seller is entitled to interest on the contract price where the buyer delays payment in breach of contract. The rate of interest provided is 1 per cent. over the official discount rate in the country in which the seller carries on business or resides.

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131 As from 1 May 1974.

132 Sch. I, Art. 83.

133 Section 1(3) and (5) and Orders in Council made thereunder. By the Uniform Laws on International Sales Order 1972, S.I. 1972 No. 973, the following countries are now Contracting States for the purposes of the relevant convention: Belgium, Israel, Italy, The Netherlands, San Marino and the United Kingdom.

(c) The United States of America

63. In the United States of America the creditor is generally entitled to interest as of right where the payment of a debt has been withheld.[134] In some States the right to interest has been held by the courts to exist at common law,[135] in others it is expressly provided for by State Code. A fairly typical example of the latter is to be found in the Civil Code of the State of California, section 3287(a) of which provides:-

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."[136]

64. Some State Codes allow the debtor a period of time in which to pay the debt before interest starts to run.[137] Of the other State Codes a few provide that interest is only recoverable where the parties have provided for it, expressly or impliedly,[138] and a few provide that the award of interest should be left to the discretion of the jury.[139]

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134 Restatement of the Law of Contracts (1932), s.337(a).

135 For example in Arizona and Minnesota.

136 Others that are broadly similar are the Codes of Alabama, Colorado, Connecticut, Delaware, Georgia, Illinois, Kansas, Kentucky, Louisiana, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Washington, West Virginia and Wisconsin, and the Codes of Puerto Rico and the Virgin Islands.

137 Hawaii, Idaho, Iowa, Nebraska, New Jersey, New Mexico and Texas.

138 Maine, Michigan and Vermont.

139 Arkansas, District of Columbia, Maryland, Tennessee and Virginia.

Statutory interest: a provisonal view

65. It seems to be accepted by the courts as just that a creditor who is kept out of his money should be compensated for the period over which payment is delayed.[140] Yet there are many situations in which such compensation is not available. Our provisional view is that most of the main difficulties and injustices that we examined in Part III[141] could be remedied by the introduction of a system of statutory interest on contract debts. The principal arguments for preferring such a system to an enlarged jurisdiction to make discretionary awards are that it would provide greater certainty, it would be cheaper in terms of legal costs and it would be broadly consistent with the laws of other countries in the western world. We are impressed by these arguments and accordingly make the provisional recommendation that a system of statutory interest should be introduced. This is not to say that the discretion to award interest on debts under the 1934 Act should be entirely abolished, but rather that its function should be subordinate to the scheme of statutory interest which we favour. In the paragraphs that follow we consider where the boundaries of such a scheme should be drawn and how the present law on discretionary awards might be revised to cover the areas outside those boundaries.

Debts which should carry statutory interest

(a) Contract debts

66. To what debts should a scheme of statutory interest apply? In most foreign countries it is confined to contract debts and judgment debts. We are not concerned

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140 Jefford v. Gee [1970] 2 Q.B. 130.

141 Paras 39-44, above.

in this paper with judgment debts[142] and so will take interest on contract debts as a starting point.

67. The basis of Lord Ellenborough's "fixed rule" in relation to contract debts[143] was that unless the creditor stipulated for the payment of interest he was presumed to have agreed to do without it. This rule was later seen to be too harsh and successive attempts were made to modify it. We think that the time has come to reverse the rule and to provide that contract debts should carry interest at a statutory rate and over a statutory period except where, or to the extent that, the parties have stipulated to the contrary.

68. The reversal of the old common law rule would mean that where the contract was silent as to interest a right to statutory interest would be implied. On the other hand where the parties provided for a rate and period of interest that differed from the rate and period applicable to statutory interest the intention of the parties would prevail and interest would be due by contract rather than by statute. No doubt, where the right to interest had been provided for expressly without specifying the rate of interest or the period over which it should be payable it would be appropriate to infer an intention that the rate or period should be that provided by the proposed scheme of statutory interest. This would answer the criticism of uncertainty that is made of the existing law for allowing interest in some situations to be recovered as of right at an unspecified rate.[144]

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142 See para. 1, above.

143 De Havilland v. Bowerbank (1807) 1 Camp. 50; 170 E.R. 872.

144 See para. 37, above.

(b) Quasi-contract

69. Interest is sometimes payable as of right at common law in respect of debts due in quasi-contract. For example, the purchaser of land may recover the return of his deposit, as money "had and received", together with interest on it, where the vendor has defaulted.[145] To take another example, the surety who is required to meet the principal debtor's obligations may recover an indemnity in quasi-contract, together with interest on the amount paid to the creditor.[146] If statutory interest were to apply to all contract debts, except where, or to the extent that, the parties have otherwise agreed, our provisional view is that it should apply in a like way and to the like extent in respect of debts arising in quasi-contract. Hereafter we shall use the phrase "contract debts" as including debts owed in quasi-contract.

(c) Other debts

70. Outside the fields of contract and quasi-contract there are other civil obligations to pay debts, such as taxes and rates. The obligations are imposed by statute and a right to interest is sometimes provided by statute. The policy considerations that lead to the provision in some cases of a right to interest are not necessarily the same as those relevant to interest on contract debts and we do not think it appropriate to include provisions for interest on civil debts of such a character in our proposals on statutory interest.

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145 De Bernales v. Wood (1812) 3 Camp. 258; 170 E.R. 1375.
146 Petre v. Duncombe (1851) 20 L.J. Q.B. 242.

(d) The equitable jurisdiction

71. We said earlier[147] that we did not consider the equitable jurisdiction to award interest to be in need of reform. It is not our intention to include trust monies generally in our proposals for statutory interest, but a situation may arise in which money is due as a contract debt and, at the same time, held on trust by the debtor.[148] Our provisional view is that the debt should carry statutory interest in such a situation and that the equitable jurisdiction, if invoked, should be limited to awarding or refusing interest in excess of the statutory entitlement.

(e) Small debts

72. Should all contract debts, however small, carry statutory interest? It should be noted that judgment debts of under £100 do not usually entitle the creditor to an order in respect of his legal costs[149] and that judgment debts entered in the county court, as opposed to the High Court, do not usually carry interest after judgment.[150] The Payne Committee on the Enforcement of Judgment Debts recommended that creditors ought to recover interest after judgment on county court judgments above a certain figure say £100, but it was thought that, below such a figure very difficult questions with regard to the calculation and collection of interest on county court judgments would arises.[151]

147 Para. 35, above.

148 Barclays Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567.

149 County Courts Act 1959, s.47, as amended: C.C.R., O.47, r.5, as amended by the County Court (Amendment No. 2) Rules 1975, S.I. 1975 No. 1345.

150 R. v. Essex County Court Judge (1887) 18 Q.B.D. 704. However county court judgments carry interest where the debt is due to or from the Crown; Crown Proceedings Act 1947, s.24(1).

151 (1969) Cmnd. 3909, paras. 1169, 1170, 1171(8).

It may be argued, by analogy, that the creditor should only be entitled to statutory interest before judgment where the amount of the debt exceeds a prescribed minimum, say £100.

73. The drawing of a line below which no statutory interest should accrue would lead to complications. For example, what if the debtor were to bring himself below the line by a payment on account? Should the debt no longer carry interest? And what if he owed sums under different transactions; should the sums be aggregated for the purpose of deciding whether the indebtedness was above or below the line? Moreover the drawing of an arbitrary line would lead to anomalies; the person whose debt was one penny above the line would have to pay significantly more than the person whose debt was one penny below. We are not satisfied that the drawing of such a line would be justified by arguments of social justice or administrative convenience. Administrative problems that might attend the addition of interest after judgment would not arise in the same way in respect of the period down to the commencement of proceedings, as the burden of calculating and pleading the amount due by way of interest would fall not on the court but on the creditor.[152] Furthermore none of the foreign systems that provide for statutory interest on contract debts make an exception for interest on small debts. Our provisional conclusion is that the availability of statutory interest should not be limited to debts of over a certain figure, but we should welcome the views of readers.

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152 The question of interest for the period between the commencement of proceedings and judgment will be considered at paras. 88 and 89, below.

(f) Commercial debts and non-commercial debts

74. Some foreign systems of law distinguish between commercial debts, incurred in the course of a business and non-commercial debts, incurred otherwise than in the course of a business, typically by consumer transactions. Commercial debts carry a higher rate of interest than non-commercial in Germany and at one time carried a higher rate of interest in Belgium, Denmark, France and Sweden. However, in the latter countries this distinction has recently been removed. The tendency in these and other countries has been to bring interest on non-commercial debts up to commercial rates and our provisional view is that this is as it should be. As the Payne Committee on the Enforcement of Judgment Debts observed "... defaulters ought not to be allowed unduly to increase the price of commodities to the general public."[153] This would seem to apply to the defaulting consumer in the same way as it applies to the defaulting trader and our provisional conclusion is that, in respect of the interest payable on default, no distinction should be drawn between the commercial and the non-commercial debtor.

A statutory rate of interest on contract debts

75. Until recently the approach of the Commercial Court was to choose a rate of interest for the purposes of an award by taking the bank rate for the period in question and adding something towards the cost of borrowing over that period. A usual order was "1 per cent. over bank rate," although it was acknowledged that the actual cost of borrowing over the relevant period was higher.[154] In Denmark the present rate of interest on contract debts is

153 (1969) Cmnd. 3909, para. 1156.

154 F.M.C. (Meat) Ltd. v. Fairfield Cold Stores Ltd. [1971] 2 Lloyd's Rep. 221, 227.

2 per cent. over the official bank rate of the Danish National Bank and in Sweden it is 4 per cent. over the official discount rate of the Riksbank. It may be argued that statutory interest on contract debts in this country should be linked, in a similar way, to the Bank of England minimum lending rate (which replaced the traditional "bank rate").

76. The objection to linking interest to the Bank of England minimum lending rate is that the rate is likely to change often; this makes the calculation of the sum due by way of interest over a long period a complicated matter.[155] In Jefford v. Gee[156] bank rate was, for this reason, rejected as the basis for calculating interest in personal injury cases. The practice of the Commercial Court was reviewed in Cremer v. General Carriers S.A.[157] and, in that case, interest was awarded at 7½ per cent. per annum which was marginally higher than the average rate payable on the Short Term Investment Account and marginally lower than the average figure for the bank rate and minimum lending rate over the material period; it happened to coincide with the rate of interest payable on judgment debts. Our provisional opinion is that it would be more convenient for the rate of interest on contract debts to be fixed by statutory instrument and revised as may be appropriate[158] than for it to be related directly to the Bank of England minimum lending rate.

77. How should the figure for statutory interest be arrived at? No doubt its purpose should be to provide

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155 See the Appendix.

156 [1970] 2 Q.B. 130, 148.

157 [1974] 1 W.L.R. 341.

158 Cf. the observations of Donaldson J. on the rate of interest after judgment or award; R.Pagnan & Fratelli v. Tradax Export S.A. [1969] 2 Lloyd's Rep. 150 at p. 155.

compensation to the creditor for the loss of use of his money, but there are two ways, at least, in which that loss may be measured. One is by taking the cost to the creditor of borrowing the money over the relevant period. The other is by taking the rate of interest that the creditor has lost by not having the money to invest. The latter must ordinarily be lower than the former. The practice of the Commercial Court has always tended towards compensating the creditor for having to borrow the money rather than for losing investment income and in our view the statutory rate of interest on contract debts ought to be in line with this practice; it should not be set at a figure that is lower than the rate of interest payable on the Short Term Investment Account. On the other hand it ought not, in our opinion, to be set very much higher, or creditors might find statutory interest on uncollected debts an attractive form of investment income. We would not wish to encourage creditors to be dilatory.[159] The rate ought, for the same reason, to be computed on a simple rather than compound basis. If the creditor wishes to protect himself more fully against the other party's default he should see that the contract provides for interest at a higher rate or on a compound basis. Our provisional conclusion is that the statutory rate of interest should at least be high enough to compensate the creditor for the income he might have derived from a short term investment of the money but not so high as to indemnify him completely for the interest he would have had to pay if he had borrowed on an unsecured short term loan.

The period over which statutory interest should be payable

(a) Commencement

78. The next question we consider is the date from which interest should run. Sometimes the parties provide expressly for the date on which payment is to be made. The

159 See para. 52, above.

money is not due until the date arrives: thereafter if payment is not made the payer is in default. Our provisional view is that the date fixed for payment, where one has been agreed, should be the date from which statutory interest should run.

79. Where the parties have not fixed a date for payment the date from which statutory interest should run is more controversial. One possibility is that the debt should carry statutory interest from the moment that the cause of action arises. Sometimes the cause of action is made complete by a demand for payment, but this is not the general rule. Usually where services are performed under a contract and no date for payment has been fixed, the cause of action for payment accrues as soon as the services have been performed. The limitation period starts to run with the completion of performance although the demand for payment may not be made until later.[160] So too with the simple loan, where no date for repayment has been fixed: the creditor's cause of action accrues when the loan is made, not when repayment is demanded.[161] In situations such as these liability for the debt precedes the demand for payment. The gist of the claim for statutory interest under our proposals is that it should be payable where the debt has been withheld,[162] so where no date for payment has been fixed by prior agreement it would seem fair, as a general rule, that statutory interest should not run before demand for payment, even though the cause of action may have accrued at an earlier time.

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160 Emery v. Day (1834) 1 Cr.M. & R. 245; 149 E.R. 1071; Coburn v. Colledge [1897] 1 Q.B. 702.

161 Garden v. Bruce (1868) L.R. 3 C.P. 300.

162 Para. 65, above. Cf. the dicta of Lord Herschell L.C., quoted at para. 9, above, and of Lord Denning M.R., quoted at para. 12, above.

80. There is however, one situation that may qualify for exceptional treatment. It is where the debt is a sum of money that has become payable under an insurance policy.

81. For our purposes it is necessary to draw a distinction here between two kinds of insurance. There is the insurance provided by a policy of indemnity, of which insurance against third party claims and against damage to property are typical. In this class of insurance the amount recoverable is measured by the extent of the insured's pecuniary loss and a claim under the policy is a claim for damages.[163] Even where, by the terms of the policy, the insurers expressly undertake to make good the loss or damage up to a specified sum, the contract is nevertheless one of indemnity, and of indemnity only.[164] Insurance contracts of this class are to be contrasted with contracts of insurance where the amount recoverable is not measured by the extent of the insured's loss, but is payable whenever the specified event happens, irrespective of whether the insured in fact sustains a pecuniary loss.[165] Typical examples are contracts of life assurance, personal accident insurance and sickness insurance: these are not contracts of indemnity. Money due under a contract of such a kind may be recovered as a debt. We should make it clear that we are confining ourselves, in this Part, to interest on debts due under a contract of insurance such as a life assurance policy. Claims under contracts of indemnity are claims for damages, and interest on damages is considered later in Parts V and VI.

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163 Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139, 143.

164 MacGillivray & Parkington on Insurance Law (6th ed., 1975), para. 3; E.R. Ivamy, General Principles of Insurance Law (3rd ed., 1975) pp. 7-9.

165 Dalby v. India and London Life-Assurance Co. (1854) 15 C.B. 365, 387; 139 E.R. 465, 474, per Parke B.

82. Our provisional view is that interest on contract debts should be a matter of right rather than discretion and the arguments in support of this approach would seem to apply to interest on a debt due under a contract of insurance as they apply to interest on other contract debts. However, where an insurance contract such as a life assurance policy provides for the payment of a specified sum upon the happening of an event, the circumstances under which the money becomes due are usually the subject of detailed contractual provisions. It is understandable that insurers should wish to protect themselves by reasonable provisions against being liable to make a payment under the policy before they have had time to investigate the merits of the claim. But once the money is payable under the detailed provisions of the policy it ought to be paid without further ado and, if not paid, should in our provisional view carry statutory interest from the date for payment. We accordingly make the provisional recommendation that in the case of money due under a contract of insurance, not being a contract of indemnity, statutory interest should run from the moment that the money becomes payable under the policy. Comments are invited.

83. With the exception of money due under certain kinds of insurance policy, as outlined above, our provisional view is that, unless the date for payment of the debt has been agreed in advance, statutory interest on it should not start to run before there has been a demand for payment. But what form should that demand take? An extreme view, to be found in legal systems of some other European countries,[166] is that only a demand in the form of court proceedings served on the debtor should be sufficient to start interest running. This would deprive the creditor of interest in respect of the whole of the period prior to service of the writ or summons and would mean allowing it for a shorter period than is usually

166 See paras. 59-61, above.

allowed when a discretionary award is made under the 1934 Act. In the Commercial Court interest under the 1934 Act is ordered to run from the commercial time for payment. This may mean allowing the debtor a short interval for reflection after being apprised of the claim, but no more: it would be contrary to business practice and contrary to the present attitude of the courts[167] to treat the time for the payment of a debt as being the date when proceedings were served on the debtor. In our view entitlement to interest should not turn on the institution of proceedings.

84. We accordingly make the provisional recommendation that where no date for the payment of the debt has been agreed in advance statutory interest should as a general rule run from the date of demand for payment or - as we suggest later - shortly thereafter.[168]

85. Should there be any formal requirement in relation to the demand? The value of a formal requirement, such as a notice in writing, is that it reduces the area of possible controversy between the parties concerned; a communication in writing is usually less easily misunderstood or disputed than one that is made orally, for example in a telephone conversation. The disadvantages of detailed formal requirements are that non-compliance with one or other of the detailed rules may be exploited unjustly by the person they were designed to protect and also may lead to the drawing of subtle distinctions, as was the case under section 4 of the Statute of Frauds 1677. Where, by our proposals, the accrual of interest is made contingent upon a demand for payment of the debt it seems appropriate that the debtor, who may not be a businessman, should be entitled to have the

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167 Kemp v. Tolland [1956] 2 Lloyd's Rep. 681, 691; The Rosarino [1973] 1 Lloyd's Rep. 21, 27.

168 See para. 86, below.

demand made in writing. On the other hand it would, we think, be undesirable to specify in detail the content of the demand; it should sufficiently identify the debt and indicate that it is due for payment but if the creditor were required to do more, for instance to notify the debtor that statutory interest would be payable at a certain rate after a certain time, it could result in litigation over whether the formalities had been complied with, and claims for interest that were otherwise meritorious might fail on technical grounds.[169] Comments are invited on the advisability of a requirement of writing or on the need for other formal requirements.

86. Interest should run, we think, not from the date of demand but from a time shortly thereafter. As for the length of time that the debtor should be allowed after demand before statutory interest started to run it should, in our provisional view, be sufficient to enable the ordinary debtor in the ordinary case (a) to decide whether he should pay and if so how much and (b) to make the appropriate arrangements for payment or tender. We should welcome suggestions on the length of the period. Our provisional view is that a period of one month from service of the demand would be reasonably appropriate and convenient. We would contemplate that service of the demand might be effected on the debtor (a) personally or (b) by posting the demand to him, in which case the period (of, say, one month) would start with the day it was delivered.[170] Detailed rules would no doubt, be needed to deal with service of the demand on firms, companies, absentee debtors and the like, but we do not propose to discuss them in this paper.

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169 See, for example, London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429 in which the creditors failed to comply with the requirements of the Civil Procedure Act 1833, s.28, and In re Rolls-Royce Co. Ltd. [1974] 1 W.L.R. 1584 in which the creditors failed to bring their claim within r.100 of the Companies (Winding-up) Rules 1949, S.I. 1949 No. 330.

170 There is a statutory presumption of delivery in the ordinary course of post; Interpretation Act 1889, s.26.

(b) Termination

87. Having considered the time from which statutory interest on contract debts should start we must now consider when it should stop. First, and most obviously, it should stop once the contract debt has been paid. If the principal debt is paid in part, interest should continue to accrue in respect of the balance, although it should be noted that where the debtor makes a payment generally on account it will usually be appropriated to outstanding interest first.[171] Second, it should cease to run once judgment has been entered in respect of the contract debt whether or not interest under the Judgments Act 1838[172] is available in respect of the period between judgment and payment; on judgment the debt changes its character and becomes a debt of record, and we indicated earlier that we would not be concerned, in this paper, with interest on judgment debts.[173]

88. Third, it might be argued that statutory interest on contract debts should cease to run after the commencement of proceedings. The argument in favour of such a limitation is based on administrative considerations and would seem to apply only to proceedings that are brought in the county court or are remitted to the county court from the High Court. At present the creditor who is entitled to interest on a debt, whether by contract, statute or otherwise, and who wishes to sue for the interest in the county court must specify the sum due in his particulars of claim and, provided that he limits his claim to the sum due at the commencement of proceedings, he may use the default process. This enables him to obtain a judgment for the sum claimed without a court

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171 Chase v. Box (1702) 2 Freem. Ch. 261; 22 E.R. 1197; Bower v. Marris (1841) Cr. & Ph. 351; 41 E.R. 525; Re Morris [1922] 1 Ch. 126, 136, per Younger L.J.

172 Section 17. See para. 8, above.

173 See para. 1, above.

hearing if no defence to the claim is delivered within 14 days from the service of the summons. If, on the other hand, he wants to recover the interest accruing before and after the commencement of proceedings it can be done but he then has to use the ordinary process.[174] This means that a day has to be fixed for the registrar to conduct a "pre-trial review" of the proceedings at which he may dispose of the case summarily or give directions or fix a date for the trial. Where the claim is undisputed, as the great majority are,[175] the default process is speedier than the ordinary process and procedurally less complicated; no doubt creditors are generally willing to forego their rights in respect of interest accruing after the commencement of proceedings for the sake of a quick judgment.

89. At present the right to sue for interest in the county court will usually only arise where the payment of interest is required by the terms of the contract. Under our proposals, however, a liability for interest would be the ordinary consequence of default in payment of every contract debt. A possible result of our scheme might be that the creditor who now uses the default process, because he has no contractual right to interest on the debt, might turn to the ordinary process to recover the statutory interest accruing before and after the commencement of proceedings. A general shift from default to ordinary process could result in an increase in the administrative work of the county courts and a resultant increase in public expenditure if delays in court hearings were to be avoided. We doubt whether this would happen in fact; in most cases we would expect the creditor to limit his claim for statutory interest to the sum due at the commencement of proceedings in order to retain the procedural advantages of the default process. Administrative

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174 C.C.R., O.6, r.2(1)(e).

175 See p. 27, n. 102, above.

questions apart, however, our provisional view is that statutory interest ought to continue to run after the commencement of proceedings in the same way as contractual interest and that it should be recoverable according to the same procedures.

A judicial discretion to disallow

90. Our theme in this Part of the paper has been that, so far as contract debts are concerned, interest should be a matter of right rather than discretion. However there is a middle course that it is convenient to consider now. It might be provided that statutory interest should be recoverable as of right but that the court should have a discretion to disallow the claim in whole or in part as might be just in all the circumstances of the case. An example of a judicial discretion to disallow interest is to be found in the Bills of Exchange Act 1882, where it deals with the measure of damage recoverable from parties to a dishonoured bill. Section 57 provides that the measure of damage may include, amongst other things, interest from the time of presentment for payment if the bill is payable on demand, otherwise from maturity, and that the sum "shall be deemed to be liquidated damages". However it is also provided that "such interest may, if justice require it, be withheld wholly or in part ...". Something along similar lines might be provided for statutory interest on contract debts, so that the interest could be claimed as of right but the court might, on the application of the debtor, disallow the claim wholly or in part. Our provisional view is that such a provision would be undesirable. It would introduce an element of uncertainty and an increase in legal costs and would be out of step with the laws of other countries that provide for statutory interest on contract debts. Comments are invited.

Revision of the 1934 Act

91. Earlier[176] we expressed the provisional view that the discretion to award interest on debts under the 1934 Act should not be abolished but should be subordinate to our scheme of statutory interest, the boundaries of which have been outlined. We must therefore consider again the period between the date when the debt becomes due, although not fixed beforehand by the parties, and the expiry of the period allowed for payment following the creditor's demand.[177] Although by our proposals statutory interest would not run during this period there may be cases in which it might be just for interest to be awarded, for example where the debtor evinces an intention of avoiding payment even before the debt is due. Here it would, in our provisional view, be appropriate for the courts to make a discretionary award of interest, if applied for, in respect of the period between the date when the debt became due, and the date when statutory interest started to run. We accordingly make the provisional recommendation that the exclusion from the scope of the 1934 Act of "any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise"[178] should be revised. We propose that the exclusion should be limited to any period for which the debtor is liable to pay interest by our proposals, by agreement or otherwise.

92. As we pointed out above[179] the discretion to award interest on debts under the 1934 Act has serious limitations. It does not empower the court to award interest on a contract debt that is paid after the start of proceedings but before judgment nor where a judgment for the debt is obtained without a trial. Our provisional view is that the

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176 Para. 65, above.

177 See paras. 84-86, above.

178 Para. 15, above.

179 Paras. 39-43, above.

courts' jurisdiction to make awards under the 1934 Act should be exercisable even where the judgment has been obtained without trial or where the debt is paid before judgment. However, where the debt is paid before the commencement of proceedings other considerations may apply. In such circumstances the court has no power under the existing law to order the debtor to pay the creditor such legal costs as the creditor may have incurred: there is no legal peg upon which such an order may be hung. Perhaps there is a parallel in this respect between the discretionary award of costs as between party and party and the discretionary award of interest.[180] Applications may be made in respect of either in the course of proceedings that are already before the court, but neither may be the basis of the proceedings themselves: otherwise there would be no end to litigation. It seems desirable that the discretion to make awards in relation to adjectival matters should only be invoked where matters of substance are being litigated. We have therefore reached the provisional conclusion that the courts' discretion to award interest for a period when it is not otherwise due should only be exercisable where the principal debt has become the subject-matter of legal proceedings.

93. As we said earlier,[181] the broad principles that are at present followed by the courts in making discretionary awards of interest on contract debts appear to be satisfactory. It does not seem desirable that guidelines should be laid down. There are, however, two further points to be considered. If a statutory rate were to be provided for contract debts should the court have a discretion to award interest at any other rate in respect of any period for

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180 See the judgment of John Stephenson J. in the Harbutt's "Plasticine" case [1970] 1 Q.B. 450, 452.

181 Para. 38, above.

which statutory or other interest might not be payable? Further, should the proviso against awarding interest on interest[182] be retained? It may be said that if compound interest may be justified by the misapplication of trust money[183] it might sometimes be justified by the withholding of a debt "under vexatious and oppressive circumstances".[184] Our provisional opinion is that it would be better from the point of view of certainty, simplicity and consistency that the discretion should be confined to making awards at the statutory rate and should not extend to making awards of compound interest. Comments are invited.

Other statutes

94. Finally we must refer to other statutes that provide for the payment of statutory interest on contract debts. We have given the examples of interest payable under the Partnership Act 1890[185] and under the Solicitors Remuneration Order 1972;[186] there are others.[187] We make the general comment that it would seem desirable, if our proposals on statutory interest on contract debts were to be acceptable, that the rates and periods of statutory interest on contract debts provided by other statutes should be made broadly consistent with the scheme that we propose.[188]

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182 Proviso (a). Para. 23, above.

183 Para. 31, above.

184 Para. 3, above.

185 See paras. 26 and 37, above.

186 Ibid.

187 See for example, the Bankruptcy Act 1914, ss. 33(8), 66(1) and Sch. II, para. 21; Companies Act 1948, s. 322; Companies (Winding-up) Rules 1949, S.I. 1949 No. 330, r. 100.

188 In Sobell v. Boston [1975] 1 W.L.R. 1587, 1593, Goff J. drew attention to the change in interest rates since the Partnership Act 1890 was passed and suggested that the rate referred to in s. 42 of that Act might be increased.

Summary of proposals

95. The proposals set out below are a summary of the provisional conclusions and recommendations contained in this Part. They do not represent concluded views but are intended as a basis for discussion. Comments and criticisms are invited.

(a) The present law and practice relating to interest on debt (where interest has not been provided for by contract) is in need of reform (paras. 35-46).

(b) A scheme of statutory interest on contract debts should be introduced (paras. 47-65).

(c) Statutory interest should be payable on all contract debts, by which we mean liquidated sums due in contract or quasi-contract, save where, or to the extent that, the parties have otherwise agreed (paras. 66-74).

(d) The statutory rate of interest should be simple, rather than compound, and should be fixed by statutory instrument. The rate should be at least high enough to compensate the creditor for the income he might have derived from the short term investment of the money but not so high as to indemnify him completely for the interest he would have had to pay on an unsecured short term loan. The rate should be reviewed and, if appropriate, varied in the light of market conditions (paras. 75-77).

(e) The date from which statutory interest should run should be the date on which the contract debt falls due:

(i) where a date for payment has been fixed by agreement (para. 78), or

(ii) where the contract debt is due under a contract of insurance, not being a contract of indemnity (paras. 79-82).

(f) Except as provided in (e) the date from which statutory interest should run should be a specified period, say a month, from the making by the creditor of a demand for payment of the contract debt (paras. 83-86).

(g) For the purposes of (f) the demand should be in writing but no particular form should be laid down (para. 85).

(h) Statutory interest should not run in respect of any period:

(i) subsequent to payment of the contract debt nor

(ii) subsequent to judgment (paras. 87-89).

(i) Statutory interest should be payable as of right and the court should have no power to disallow it wholly or in part (para. 90).

(j) Every court should have a discretionary power to award interest at the statutory rate on the whole or any part of any contract debt due at the commencement of proceedings for the whole or any part of the period between the date when the cause of action arose and the date of judgment or prior payment, except for

the period, if any, for which the debtor is liable to pay interest by the proposals above or by agreement or otherwise (paras. 91-93).

(k) Where interest is payable on contract debts by statutes already in force the rates and periods of interest allowed should be reviewed in the light of our proposals (para. 94).

(l) No changes should be made in the redress available under the existing law upon the dishonour of a bill of exchange (para. 36).

PART V INTEREST ON DAMAGES - CRITICISMS OF THE PRESENT LAW

Interest on damages as of right

96. The 1934 Act empowers the courts to make awards of interest on damages. The award may be made or refused as a matter of discretion and as a result of the decision in Jefford v. Gee [189] the principles governing awards in cases of personal injury or death have been clarified. We have some criticism to make[190] of two of the guidelines propounded by the Court of Appeal in Jefford v. Gee, but otherwise the guidelines seem not to have caused difficulty or injustice in practice. The general principles governing discretionary awards in cases not concerning personal injury or death were considered in detail in Part II[191] and we do not propose to set them out again.

97. Before proceeding further with our consideration of the law and practice relating to interest on damages we should mention the work of the Royal Commission on Civil Liability and Compensation for Personal Injury. On 19 December 1972 the then Prime Minister announced the setting up of a Royal Commission under the chairmanship of Lord Pearson to consider, amongst other things, "to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury" in certain specified situations. There is thus an overlap between our terms of reference and those of the Royal Commission to the extent that interest on damages for death or personal injury is common to each. The provisional recommendations with which we end this paper are, of course, made without prejudice to

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189 [1970] 2 Q.B. 130.

190 Paras. 116-117, below.

191 Paras. 15-22, above.

the work and recommendations of the Royal Commission, but we hope that our discussion of the matters within the overlap may be of assistance to them.

98. The basis of the award of interest on damages is that the plaintiff should be compensated where he has suffered by being kept out of the damages to which he may be entitled. We do not challenge the justice of this. There is however one striking inconsistency in the existing law relating to interest on damages. It is that, in cases to which the rules of the old Court of Admiralty apply, interest on damages may be recovered as of right, whereas in other cases it may only be awarded as a matter of discretion.[192] This distinction has important practical implications. The plaintiff in an Admiralty case has a right to interest on his damages. The defendant must therefore take the interest element into account when calculating the amount to pay into court[193] or to offer by way of settlement out of court. In other cases the plaintiff does not have such a right, and, for the purposes of negotiating an out of court settlement his bargaining position may therefore appear to be weaker. Moreover, if money is paid into court in respect of the damages and the plaintiff recovers judgment for less he may not usually aggregate an award of interest under the 1934 Act with the damages for the purpose of avoiding an order that he pays the defendant's costs from the date of payment in.[194]

99. There may also be differences in practice in relation to the period over which interest is recoverable on damages for death or personal injury. In Admiralty cases, where the assessment of damages for injury or death has been referred to a registrar for a report, the plaintiff is

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192 Paras. 29-30, above.

193 The Norseman [1957] P. 224.

194 Jefford v. Gee [1970] 2 Q.B. 130, 149.

entitled to interest from the date of the report until the date of judgment.[195] However, a discretionary award under the 1934 Act would, according to the Jefford v. Gee guidelines, run from an earlier date, namely the service of proceedings.[196] Thus the widow of a drowned sailor might be awarded interest as of right over one period and as a matter of discretion over another. There is the further difficulty that the rates of interest awarded as of right in Admiralty cases are not necessarily the same as the rates usually used under the 1934 Act, although the practice in this respect seems to be approaching uniformity.[197]

100. The reason for the difference in practice between Admiralty and other cases is historical and it seems hard to justify. Where there is a collision between vessels at sea one would have thought that the plaintiff's right, if any, to interest on his damages should be broadly the same as where there is a collision between vehicles on dry land. This is the provisional view that we have formed and we should be interested to receive comments from readers. If the distinction has no basis in logic or justice then it should, in our view, be removed. Either the entitlement to interest in Admiralty cases should become the basis of a general rule applicable to all cases involving damages or it should be abolished. In relation to contract debts we propose the introduction of statutory interest payable as of right.[198] Should statutory interest be payable as of right on damages too?

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195 The Aizkarai Mendi [1938] P. 263.

196 [1970] 2 Q.B. 130, 147-148.

197 The Funabashi [1972] 1 W.L.R. 666.

198 The proposals are summarised in para. 95, above.

The case for statutory interest on damages

101. In favour of a scheme of statutory interest on damages it may be said that the interest under the 1934 Act is so seldom refused when applied for that it might as well be made a statutory entitlement. A step in this general direction may appear to have been taken by section 22 of the Administration of Justice Act 1969 since this section requires the court to award interest under the 1934 Act on damages for personal injury or death, unless the damages are less than £200 or there are special reasons for awarding no interest at all. We shall consider later[199] whether the courts should have a duty to award interest under the 1934 Act on damages generally, but we are concerned first with the arguments for and against statutory interest on damages, by which we mean the introduction by statute of an entitlement to interest on damages at specified rates over specified periods. By making statutory interest payable on damages two things would be achieved. First the greater certainty that such a scheme would provide would narrow the issues between plaintiff and defendant and lead to a saving in legal costs. Second the defendant would have to take the interest element into account when making an offer of settlement or a payment into court, and the difficulties facing the plaintiff under the existing law[200] would be overcome.

The case against statutory interest on damages

(a) Difficulties of assessment

102. Perhaps the most formidable objection to statutory interest on damages is the difficulty in fixing the date from which statutory interest should run. One possibility

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199 Paras. 109-111, below.

200 Para. 98, above.

is that it should run from the date on which the cause of action arose. This would have the advantage of simplicity but would lead to overcompensation wherever the pecuniary losses comprised in the claim were sustained at a later date. To take a simple example let us say that damage has been caused to the plaintiff's vehicle by the negligence of the defendant. The plaintiff continues to use the vehicle in its damaged state for a few months. Eventually it is repaired and he pays the bill. Should he be entitled to interest on the cost of the repairs, backdated to the day of the accident? If interest should only accrue where the plaintiff has been kept out of his money then it should not accrue until the money for which he sues has been laid out. This is the rule in Admiralty cases[201] and the Court of Appeal seems to have accepted the justice of it in Jefford v. Gee.[202] Our provisional opinion is that, on the facts supposed, it would produce a fairer result than would a rule that backdated interest to the accrual of the cause of action. This leads us to consider a second possible formula, namely that the interest should in every case run from the date that the loss is incurred. This would seem to be the principle on which the Admiralty rules were founded. For example, where a ship is sunk when in ballast interest on the capital value of the ship runs from the date of the sinking, but when there is freight payable interest on the capital value of the ship runs from the date of the natural termination of the voyage.[203] Where the vessel is damaged and towed to safety interest on the salvage claim runs from the date when the services are terminated.[204] The proposition that interest should as a general rule accrue from the moment that the relevant loss is sustained has its attractions although it could result in some cases in the

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201 The Hebe (1847) 2 W. Rob. 530; 166 E.R. 855.

202 [1970] 2 Q.B. 130, 146.

203 The Northumbria (1869) L.R. 3 A. & E. 6, 12.

204 The Aldora [1975] Q.B. 748.

interest pre-dating the cause of action.[205] It is, however, doubtful whether such a formula could be conveniently applied to non-pecuniary losses and with pecuniary losses it would lead to difficult problems of arithmetic and accountancy. Even in the comparatively simple situation of a claim by an injured plaintiff in respect of loss of wages, it would be necessary to make a separate calculation of interest on each payment of wages that he would, but for his accident, have received. The claim by a company for loss of profits arising out of a breach of contract or the infringement of a patent would lead to even greater problems. These difficulties were acknowledged in Jefford v. Gee[206] and that is why the Court in that case suggested a rough and ready approach to interest on special damages in personal injury cases, namely that the special damages should be aggregated and interest awarded on the whole sum at half the appropriate rate from the date of the accident. This would, of course, be inappropriate for the case where the only item of special damage was the destruction in the accident of the plaintiff's car: there justice would seem to require that interest should run from the date of the accident at the full rate. It would, we think, be extremely difficult to devise a single rule or set of rules for determining the date from which interest on damages should run that was certain and would work fairly in every case. We should welcome suggestions from readers.

(b) Difficulties of pleading

103. Even if a formula for determining when interest on damages should start to run could be devised, there are procedural objections to making interest on damages payable

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205 Cf. Anglia Television Ltd. v. Reed [1972] 1 Q.B. 60.
206 [1970] 2 Q.B. 130, 146-147.

as of right. If the interest were part of the plaintiff's entitlement details of it would have to be pleaded in the claim.[207] Where many different kinds of loss were comprehended in a single claim, the pleading of the entitlement to interest down to the issue of the writ would be complicated. It is arguably more convenient for the parties and for the court to postpone consideration of the interest question until the damages have been quantified and then to deal with interest along broad lines. This is the present practice of the Commercial Court and it does not seem to have led to hardship or injustice.

(c) Insurance and other collateral benefits

104. Another complication arises where the plaintiff is indemnified in whole or in part by insurance monies, which may come to him under a policy that he has taken out and paid for or under the National Insurance scheme. The same point also arises where he is indemnified against loss of income by the receipt of Social Security benefits. It is difficult to draw a satisfactory line between the benefits which should be taken into account and those which should not,[208] for the purpose of deciding whether the plaintiff has been kept out of his damages, and it may seem better to allow the court a discretion to deal with the particular merits of each individual case in a broad way.

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207 Perestrello e Companhia Limitada v. United Paint Co. Ltd. [1969] 1 W.L.R. 570.

208 Jefford v. Gee [1970] 2 Q.B. 130, 146.

(d) The dilatory plaintiff

105. One of the supposed advantages of leaving awards of interest to the courts' discretion is that the court may deprive a plaintiff of interest if he delays unreasonably in bringing his claim for damages to trial, to the prejudice of the defendant. Such an exercise of the courts' discretion would, it has been argued,[209] encourage other plaintiffs to bring their claims for damages to trial more speedily. Certainly where the claim is in respect of personal injuries it is in the public interest that it should not be delayed by either plaintiff or defendant.[210] We are not satisfied that the practice of awarding interest in personal injury litigation since 1969 has, in fact, led to cases being heard more quickly,[211] but we would be reluctant to recommend that the court should be bound in every case to award interest on damages at the same rate and over the same period however gross the delay of the plaintiff or of the defendant.

(e) Payment into court

106. We adverted earlier[212] to the dilemma of the plaintiff who is faced by a payment into court of a sum that covers the damages that he is likely to be awarded but does not include a sum in respect of interest. If the plaintiff takes the money out of court he may not apply for interest as there has been neither trial nor judgment.[213]

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209 Report of the Committee on Personal Injuries Litigation (1968), Cmnd. 3691, paras. 322-325.

210 Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 Q.B. 229, 244-245, per Lord Denning M.R.

211 Report on Personal Injury Litigation - Assessment of Damages (1973), Law Com. No. 56, para. 271.

212 Para. 98, above.

213 Waite v. Redpath Dorman Long Ltd. [1971] 1 Q.B. 294.

If, on the other hand, the case is tried but he is awarded no more by way of damages than the sum in court he may also be awarded interest but he will usually be ordered to pay the defendant's costs from the date of the payment in.[214] A solution to the difficulty was suggested by the Court of Appeal in Butler v. Forestry Commission[215] namely that the plaintiff, when faced with a payment into court of a sum that is adequate to cover the damages but not the interest, should write an open letter to the defendant inviting him to make a further payment in respect of interest and indicating a willingness to accept the money in court on these terms. If the defendant fails to offer anything for interest and, at the trial, the plaintiff recovers no more by way of damages than the sum in court, the plaintiff may apply for interest and may rely on the letter as a ground for being allowed his costs from the date of payment into court and for not having to pay the defendant's costs. In our Report on Personal Injury Litigation - Assessment of Damages[216] we welcomed this suggestion as an acceptable solution.[217] We have not changed our minds since.

A provisional view

107. Our provisional view is that, on balance, it is better to leave the award of interest on damages to the discretion of the court than to give the plaintiff a statutory right to it. The corollary is that we do not think there is any justification for retaining the right to interest

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214 Jefford v. Gee [1970] 2 Q.B. 130, 150.

215 (1971) 115 S. J. 912,

216 (1973), Law Com. No. 56.

217 Ibid., para. 285.

in Admiralty cases. Awards that may be claimed as of right under the existing law might be made, instead, as a matter of discretion under the 1934 Act and we would recommend that the Admiralty rules for determining the date from which interest should be awarded should remain as guidelines for discretionary awards in Admiralty cases. The only area in which we would recommend a change of practice is in cases of death or personal injury. Here it seems to us that the old Admiralty practice of awarding interest only from the date of the registrar's report should be replaced by the guidelines offered in Jefford v. Gee.[218] We make no recommendations about the rate at which interest should be awarded in Admiralty cases as it appears that in this respect the practice in Admiralty cases is already substantially in line with the general practice.[219]

Revision of the 1934 Act

108. Our provisional view is that the award of interest on damages should be left to the court's discretion but it is for consideration whether the statutory jurisdiction provided by the 1934 Act is in need of revision. There are five points that we shall consider in connection with the award of interest on damages under the 1934 Act:-

(a) The mandatory award
(b) Judgment without trial
(c) Payment before judgment
(d) Interest on interest and
(e) The rate of interest.

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218 [1970] 2 Q.B. 130.
219 The Funabashi [1972] 1 W.L.R. 666.

(a) The mandatory award

109. As we mentioned earlier,[220] where damages exceeding £200 are awarded in respect of personal injuries or wrongful death, interest on those damages, or on such part of them as may be appropriate, must be awarded by the court unless there are special reasons why no interest should be given.[221] This provision was recommended by the Winn Committee on Personal Injuries Litigation[222] and was intended as a material inducement for progress in litigation and an effective sanction for delay.[223] In our Report on Personal Injury Litigation - Assessment of Damages[224] we doubted whether the introduction of a mandatory award of interest (as we shall call it) had produced any significant increase in the speed with which cases were brought to trial but concluded that it had added slightly to the legal costs and substantially to the sums recovered by successful plaintiffs. This did not then appear, by itself, to be unjust, nor does it now, although we remain critical of some of the Jefford v. Gee guidelines for the assessment of interest in personal injury cases.[225]

110. It is for consideration whether the mandatory award of interest should be confined to cases of personal injury or wrongful death or should become of general application wherever damages are awarded above a certain figure. This might appear to be more in line with our proposal for interest as of right on debt and it would also make less radical the change which we have suggested in

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220 See paras. 11 and 101, above.

221 Subsections (1A), (1B) and (1C) to this effect, were added to section 3(1) of the 1934 Act by section 22 of the Administration of Justice Act 1969.

222 (1968), Cmnd. 3691, para. 379.

223 Ibid., para. 322.

224 (1973), Law Com. No. 56, paras. 271-272.

225 See paras. 116-117, below.

paragraph 107 with regard to the award of interest in Admiralty cases. For reasons that we come to later[226] the award of interest on non-pecuniary losses can, in our view, lead to over-compensation, but so far as pecuniary losses are concerned an award of interest would seem to be an integral part of the compensation where payment of the damages has been delayed. It may be argued that interest should, for this reason, be awarded on damages for pecuniary losses as a matter of routine, and only refused where a refusal was justified by special circumstances. The court would then be under a duty to exercise its discretion to make an award of interest, whether applied for or not.

111. An extension of the mandatory award of interest to cases not concerned with injury or death might have certain disadvantages from the litigants' point of view. One is that it would upset the present practice of compromising a dispute over damages by a consent judgment for a global figure. If the court were under a duty to make an award of interest the global figure would have to be apportioned part as to damages and part as to interest; this would have tax implications that the parties can at present avoid.[227] Second, a plaintiff who is paying tax at a high rate may not want an award of interest on his damages since a judgment for the interest would increase the liability that the defendant had to meet without conferring a corresponding net benefit on the plaintiff. Third, the extension of mandatory interest would increase costs, albeit only slightly, by putting an extra matter of contention between the parties. In disputes where insurance companies are concerned on both sides, such as damage-only claims arising out of accidents on the roads, it is not unusual for damages to be agreed on both sides subject to liability and for questions of interest to be left out of account, with a view to saving costs. There are therefore

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226 Para. 116, below.

227 Interest on damages in respect of personal injuries or wrongful death is not liable to tax. See p.23, n.86, above.

many situations in which the plaintiff has good reasons for not applying for interest under the 1934 Act on his damages. Would it be right, in these cases, for an award of interest to be forced upon him? If he wants it of course he may apply for it but our provisional view is that an extension of mandatory interest on damages beyond its present limits would not be justified. We should welcome the views of readers.

(b) Judgment without trial

112. In Part III we criticised the 1934 Act for giving the courts no power to make an award of interest on a contract debt where judgment had been obtained without a trial.[228] A judgment for unliquidated damages may also be obtained without a trial although there is this difference that there has to be an assessment by the court of the amount to be awarded by way of damages before judgment for a specific sum may be entered. It is not clear whether such an assessment of damages amounts to a "trial" for the purposes of the 1934 Act,[229] although it would seem to be inconvenient and unjust if it did not. Our provisional view is that the court should have the power to make an award of interest on damages whenever the plaintiff has obtained a judgment for damages, whether after a contested trial or by default or by consent.

(c) Payment before judgment

113. We pointed out, in Part III,[230] that the 1934 Act gives the court no power to award interest on a contract debt that is paid between the commencement of proceedings and judgment, and that if part is paid interest may only be awarded on the balance for which judgment is obtained.

228 Paras. 39-41, above.

229 Waite v. Redpath Dorman Long Ltd. [1971] 1 Q.B. 294, 299.

230 Paras. 42-43, above.

Perhaps the same difficulty can arise where a payment on account of damages is made by the defendant before judgment, although we have not discovered a reported decision on the point. It would, in our view, be undesirable if the award of interest could only be made in respect of the balance outstanding at the date of judgment. We therefore make the provisional recommendation that the court should have a discretion to award interest on the damages for which the defendant may be adjudged liable including damages that may have been paid prior to judgment. We are, however, concerned that such a provision might have the effect of discouraging defendants' insurers from making payments on account of damages. This would be most unfortunate and information and comments on this point would be welcomed. In connection with interest on contract debts there is also a difficulty where the debtor tenders the debt before action without making a tender of the interest.[231] However the problem does not arise where the liability is to pay damages rather than a debt as the defence of tender is not available where the claim is for an unliquidated sum.[232]

(d) Interest on interest

114. The 1934 Act does not allow the court to award interest on interest. If the sums recovered by way of damages represent interest paid by the plaintiff it would seem odd that the court should have no power to award interest in respect of them, and our provisional view is that it should have such power. The proper construction of the Act on this point is open to argument.[233] It is for

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231 Para. 44, above.

232 Davys v. Richardson (1888) 21 Q.B.D. 202, 205, per Lindley L.J.

233 Bushwall Properties Ltd. v. Vortex Properties Ltd. [1975] 1 W.L.R. 1649.

consideration whether the courts should have the further power, in appropriate cases, to order interest on interest, in the form of interest on a compound basis. Our provisional view is that this would lead to undesirable complications and that interest awarded under the 1934 Act should always be in the form of simple interest. Comments would be welcomed.

(e) The rate of interest

115. In Part IV we proposed that interest on contract debts should always be awarded at the statutory rate, except to the extent that the parties had otherwise provided. If these proposals were to be accepted it might seem convenient that the courts should always resort to the statutory rate when making an award of interest on damages. No doubt the statutory rate could conveniently replace the "appropriate rate" in cases of personal injury or death, where the present practice is to take the rate of interest payable on the Short Term Investment Account.[234] However there may be situations in which the court needs to take a higher rate in order to do justice between the parties,[235] or a lower rate because of the plaintiff's gross delay.[236] It is, we accept, desirable that there should be general consistency in the rates of interest awarded by the courts but this principle has been acknowledged and applied by the courts.[237] Our provisional conclusion is that the rate of interest to be awarded on damages should be left to the court's discretion.

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234 Para. 20, above; see also the Appendix.

235 See, for example, Bold v. Brough, Nicholson & Hall Ltd. [1964] 1 W.L.R. 201, where damages for wrongful dismissal were assessed by reference to the cost of purchase of an annuity at the date of dismissal.

236 Jefford v. Gee [1970] 2 Q.B. 130, 151.

237 The Funabashi [1972] 1 W.L.R. 666; Cremer v. General Carriers S.A. [1974] 1 W.L.R. 341, 357.

The Jefford v. Gee guidelines

(a) Non-pecuniary losses

116. In our Report on Personal Injury Litigation - Assessment of Damages,[238] we made two criticisms of the Jefford v. Gee guidelines which it is convenient to repeat now for the sake of completeness. The first concerns the award of interest on non-pecuniary losses, such as pain, suffering and loss of amenity. The Jefford v. Gee guideline requires that, as a general rule, the compensation for non-pecuniary losses should carry interest at the appropriate rate from the date of service of the writ down to judgment. Our criticism of this guideline is that it overlooks the fact that judges assess the award for pain, suffering and loss of amenity by reference to the "scale" figure being applied at the time of trial, not by reference to the figure that would have been appropriate if the award had been made at the time of the accident. The plaintiff thus gains by being kept out of his money and ought not to reap a second gain by an award of interest.[239] We recommended that interest should not be awarded in respect of non-pecuniary losses arising out of personal injury.[240]

(b) The Fatal Accidents Acts

117. The Jefford v. Gee guideline requires that, in cases arising out of wrongful death, interest on damages awarded to a dependant under the Fatal Accidents Acts should be calculated at the appropriate rate from the date of service of the writ down to judgment. Our criticism of this

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238 (1973), Law Com. No. 56.

239 Ibid., paras. 273-277.

240 Ibid., para. 286(c).

guideline is that the court, by not separating pre-trial loss of dependency from further loss, allows interest not only on past losses but on future losses that are being compensated in advance.[241] Our earlier recommendation was that interest on awards of damages under the Fatal Accidents Acts should only be calculated on the loss of dependency down to the date of judgment, and should be calculated from the date of death at half the appropriate rate.[242]

(c) Generally

118. Save for two particular exceptions mentioned above our general conclusion on the award of interest in personal injury litigation was that the practice advocated in Jefford v. Gee[243] and since followed by the courts has worked justly and has not led to difficulties.[244] We are still of this view.

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241 Ibid., paras. 278-279.

242 Ibid., paras. 286(d).

243 [1970] 2 Q.B. 130.

244 Report on Personal Injury litigation-Assessment of Damages (1973), Law Com. No. 56, paras. 271-272.

PART VI INTEREST ON DAMAGES - POSSIBLE REFORMS

119. Our provisional conclusion is that the present law and practice relating to interest on damages is not in general need of reform. Where the court has a discretion, under the 1934 Act, to award interest on damages the discretion is exercised by the courts in a way that works substantial justice between the parties. The tendency since the decision in Jefford v. Gee[245] has been towards a uniformity of practice throughout the courts and we do not think it appropriate to suggest further guidelines nor to add to the criticisms of the existing guidelines that we made in our Report on Personal Injury Litigation-Assessment of Damages.[246] Nor do we believe that the discretion to make awards should be more narrowly defined by statute.

120. Our principal proposals for reform of the law are for the widening of the discretion given to the courts by the 1934 Act and for the abolition of the right to interest in Admiralty cases. The provisional conclusions and recommendations contained in this Part are summarised below. They do not represent concluded views but are intended as a basis for discussion. Comments and criticisms are invited.

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245 [1970] 2 Q.B. 130.

246 (1973), Law Com. No. 56, paras. 263-286.

(a) Awards of interest on damages should be made by the courts in their discretion (paras. 96-107).

(b) It would not be desirable to introduce a scheme of statutory interest on damages (paras. 96-107).

(c) Courts should retain the power to award interest on some or all of the damages for which the defendant may be adjudged liable, at such rate as they think fit and over such period as they think fit between the date on which the cause of action arose and the date of the award. However,

(i) the discretion should be exercisable whether the judgment is obtained after a trial or by default or by consent (para. 112)

(ii) where payments have been made by the defendant before judgment the court should have the power to award interest in respect of all the damages for which the defendant may be liable, not just the balance for which judgment may be given (para. 113) and

(iii) the award should be of simple not compound interest (para. 114).

(d) The existing rules of practice relating to discretionary awards of interest on damages do not need reform, save to the extent indicated in our Report on Personal Injury Litigation-Assessment of Damages (1973) Law Com. No. 56 paras. 263-286 (paras. 115-118).

(e) In Admiralty cases the plaintiff should no longer be entitled to interest as of right (paras. 96-107).

(f) In making discretionary awards of interest in Admiralty cases, other than cases concerning personal injury or wrongful death, the courts should take into account the practices of the old Court of Admiralty in determining the periods, if any, over which interest should be awarded (para. 107).

APPENDIX

INTEREST RATES FROM 1 APRIL 1973 TO 1 JANUARY 1976

On the facing page we have plotted fluctuations in certain interest rates from 1 April 1973 to 1 January 1976. The numerals in the vertical line are rates of interest per cent. per annum; the letters on the horizontal line are the months of the year, starting with April (A) 1973.

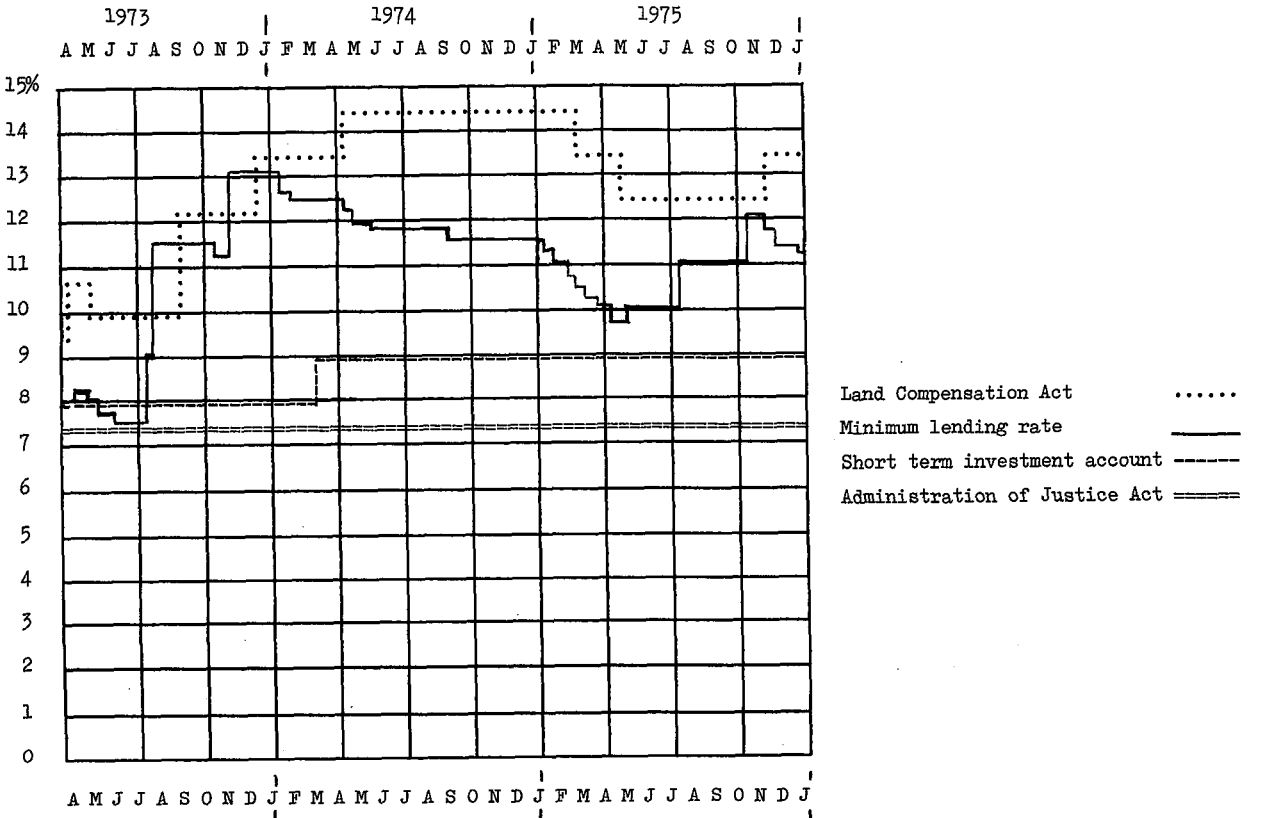
The four lines plotted in the diagram, all of which are approximate only, are as follows:-

(1) At the top is the rate of interest on compensation in respect of the compulsory acquisition of an interest in land where the land has been entered before the compensation has been paid. The entitlement to interest is provided by the Land Compensation Act 1961 section 32(1) and the rate is prescribed by regulations made by the Treasury. The rate has varied from 9½ per cent. on 1 April 1973 to 13½ per cent. on 1 January 1976, the maximum shown being 14½ per cent.

(2) The next line down is the minimum lending rate fixed from time to time by the Bank of England. This rate has varied from 8 per cent. on 1 April 1973 to 11¼ per cent. on 1 January 1976, the maximum shown being 13 per cent.

(3) The third line down is the rate of interest in respect of money paid into court and deposited on the Short Term Investment Account. Section 7 of the Administration of Justice Act 1965 empowers the Lord Chancellor, with the concurrence of the Treasury, to make rules regulating the rate at which interest is to accrue. The only change since 1 April 1973, when it was 8 per cent., took place on 1 March 1974, when it was increased to 9 per cent.

(4) The bottom line is the rate payable on judgments which section 44(1) of the Administration of Justice Act 1970 empowers the Lord Chancellor, with the concurrence of the Treasury, to fix by statutory instrument. The rate has in fact not been changed since 20 April 1971, when it was fixed at 7½ per cent.



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