

Preliminary Paper No 17

**ASPECTS OF DAMAGES: THE AWARD OF INTEREST
ON DEBTS AND DAMAGES**

A discussion paper

The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.

These should be forwarded to:
The Director, Law Commission, PO Box 2590, Wellington
by Friday, 3 April 1992

November 1991
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

The Commissioners are:

Sir Kenneth Keith KBE - President
 The Hon Mr Justice Wallace
 Peter Blanchard

The Director of the Law Commission is Alison Quentin-Baxter. The offices of the Law Commission are at Fletcher Challenge House, 87-91 The Terrace, Wellington. Telephone 0-4-473-3453. Postal address: PO Box 2590, Wellington, New Zealand.

Use of submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request, and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.

Preliminary Paper/Law Commission Wellington 1991

ISSN 0113-2245

This preliminary paper may be cited as: NZLC PP17

CONTENTS

	page	para
INTRODUCTION	1	1
 I DEVELOPMENT AND PRESENT STATE OF THE LAW	 5	 11
The nineteenth century cases	6	14
The <i>La Pintada</i> decision	10	21
<i>Hungerfords v Walker</i>	11	25
New Zealand cases since <i>La Pintada</i>	14	31
Equitable interest	15	35
Non-pecuniary loss	17	41
 II REFORM OF THE LAW	 19	 42
England	20	45
New Zealand	21	49
Australia	22	52
Canada	23	54
Hong Kong	25	62
 III THE SCHEME	 27	 64
Principles	27	66
Compensation	28	67
The defendant's conduct	30	73
Fairness and certainty	30	74
The scheme	30	75
Elements of the scheme	32	77
Interest on all money judgments	32	77
Meaning of "money judgment"	35	88
Setting the prescribed rate	40	103
A fluctuating rate	43	115
Compound interest	44	118
Making the rate available	45	121
Interest from the date of entitlement	46	124
Different dates of quantification and entitlement	47	127

Components of the award quantified on different dates	50	139
No interest on future losses	50	142
Cases where statutory interest should not be awarded	51	143
A limited discretion	54	159
Payments into court	56	165
Where damages are assessed in a foreign currency	58	170
Abolition of post-judgment interest	58	172
Commencement of new scheme	59	176

APPENDICES

A List of recommendations of the Law Reform Commission of British Columbia	61
B Enactments in other jurisdictions	69
C New Zealand enactments providing for the award of interest	77
D Summaries of New Zealand cases	91
E Select bibliography	115

Introduction

1 Money is the pervasive medium of exchange in modern life, whether by cash or by credit. This discussion paper is concerned with two aspects of money: first, that it has its own cost or rental value, better known as "interest"; and, second, that it does not retain a constant relative value, a phenomenon unable to be ignored during the high inflation of much of the 1970s and 1980s.

2 English and, by inheritance, New Zealand law includes many restrictions on the availability of interest. The reasons for this are generally to be found in the history of English law, reflecting a historical antipathy towards usury which extended not only to penalty interest rates but to any form of compensation for the use of money. The hostility to usury is illustrated in a passage from Aristotle:

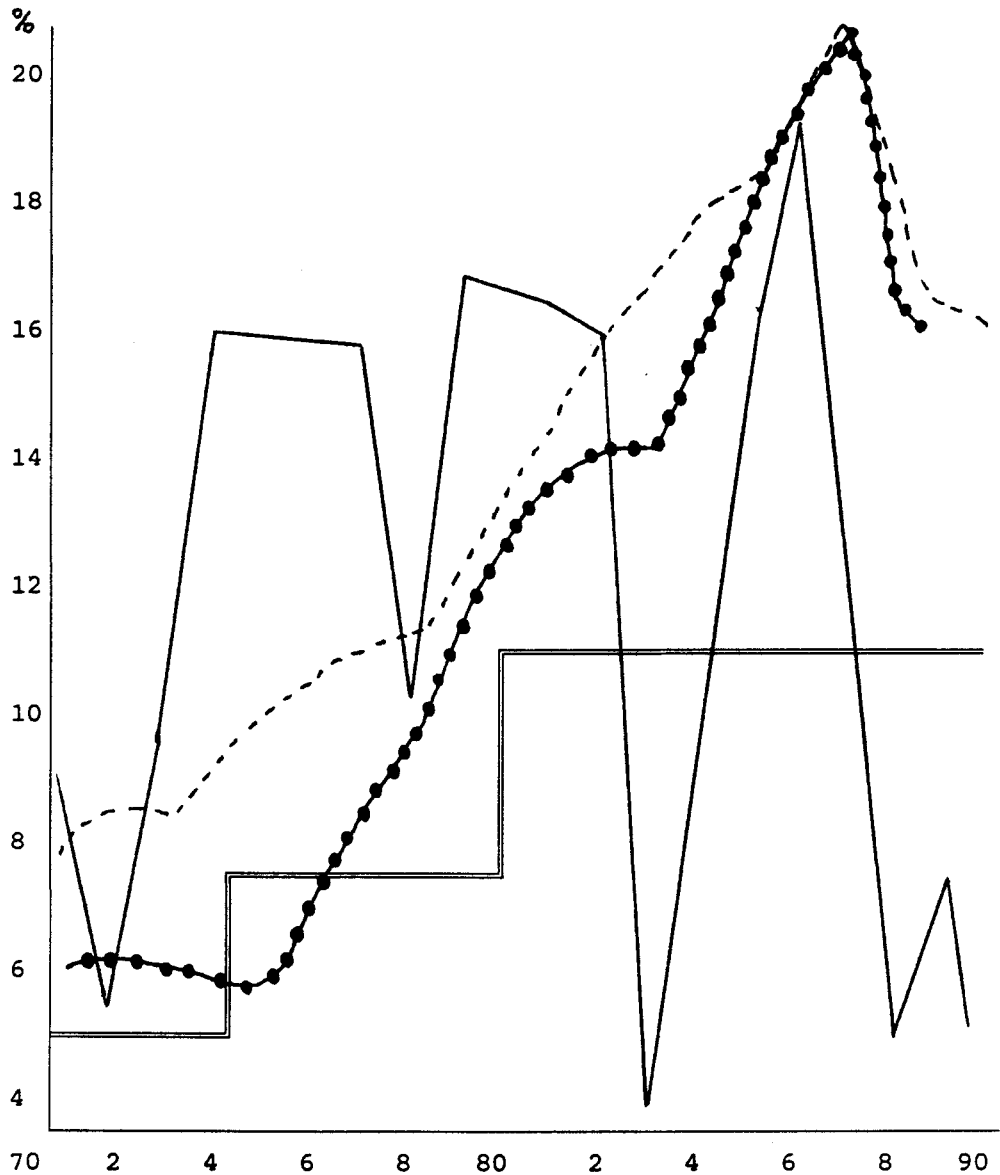
The most hated sort [of moneymaking], and with greatest reason, is usury. ... For money was intended to be used in exchange, but not to increase at interest. (*Politics*, Book 1, quoted in J K Galbraith, *A History of Economics*, Penguin, 1989, 12.)

Something of that attitude is still reflected in the existence of specific and detailed regulation of contracts for the lending of money or the extending of credit (Credit Contracts Act 1981, Hire Purchase Act 1971) in contrast to the absence of similar regulation of contracts involving goods or services. More relevantly for the purposes of this paper, that attitude is also reflected in the present rules limiting recovery of financial loss through being kept out of money which should have been paid over by another party (in economic terminology, the opportunity cost). The common law does not recognise a cause of action in damages for late payment of money. The major statutory provision which seeks to remedy this omission, s 87 of the Judicature Act 1908, is limited to the award of simple interest up to a maximum prescribed rate on debt or damages. The present rate is 11% per annum, fixed in 1980.

3 The discrepancies between the rates prescribed from time to time under s 87 and commercial indices of the value of money are indicated in the graph set out on the next page.

4 The Law Commission is of the view that the present New Zealand law about interest is unsatisfactory for a number of reasons. The most obvious problem is that illustrated by the graph: the complete failure of the rate of interest prescribed under s 87(3) of the Judicature Act 1908 (and its equivalent in the District Courts Act 1947) to reflect commercial reality. We recognise that 11%

INTEREST AND YIELD RATES IN NEW ZEALAND COMPARISON 1970-1990



Key: ——— "Prescribed rate" under section 87 of the Judicature Act 1908
 - - - - Interest rate on first mortgage housing (average)
 ——— Change in Consumer Price Index (converted to a percentage figure)
 ●●●● Trading bank overdraft interest rate (weighted average)

(Table based on figures from the *Reserve Bank Bulletin*.)

is now acceptable given current interest rates, but the relatively volatile nature of these rates makes it unlikely that this will be the case for long. And although s 87 gives a discretion to award interest at a rate *lower* than the prescribed rate of 11%, it is not clear whether courts will adjust the rate downwards where circumstances warrant that. The prescribed rate is therefore the most obvious matter of concern.

5 But there are other problems as well. Section 87 is drafted as a discretion. The rate of interest (subject to the prescribed rate), the sum on which it is awarded, and the period for which it is awarded, are all in the court's discretion; although it appears that interest is presently invariably awarded at the maximum rate. As will be explained in this paper, the Law Commission considers that a broad discretion is not satisfactory in this context. Further, the provision does not apply to debts paid at any time before judgment. Neither is interest available on consent or default judgments. The effect of all this is that many plaintiffs are not fully compensated for losses which they have suffered as a result of the late payment of money lawfully owing to them. Finally, the inadequacies of the statutory provision have led the courts to develop the common law in ways which are not always logical or in accordance with principle, and the relationship between the statutory provisions and the common law is increasingly uneasy and unclear.

6 All these matters have led the Law Commission to conclude that reform of the present rules would increase certainty and fairness in this area of the law, with consequent gains in efficiency, and put the law on a more principled basis.

7 The Law Commission is examining these questions as part of its ongoing review of "Aspects of Damages". It is publishing this paper to generate discussion and comment on a proposal that would replace s 87 with a more comprehensive statutory scheme.

8 That scheme is outlined in detail in Chapter III of the paper and includes the following major features:

- an automatic entitlement to interest to a party kept out of money lawfully payable to that party, the entitlement to arise on the institution of proceedings;
- extension of the entitlement to interest to sums obtained by default judgment;
- interest at historical commercial rates, adjusted monthly;
- interest calculated on a compounding basis; and
- elimination of the present distinction between pre- and post-judgment entitlements to interest.

The Law Commission is presently of the view, which is subject to further consideration in the light of submissions received on this paper, that such a scheme would represent a significant improvement on the present state of the law which may be fairly described as fragmented and unprincipled.

9 The balance of the paper is made up of a discussion of the development and present state of the common law and statutory rules (Chapter I), a review of law reform activity in other parts of the world (Chapter II), and an elaboration of the proposed scheme, including discussion of some of the major features (Chapter III). The Appendices include the summary of recommendations from the Report of the Law Reform Commission of British Columbia on this issue (Appendix A), examples of interest provisions from other common law jurisdictions (Appendix B), a list of New Zealand enactments providing for the award of interest (Appendix C), notes of New Zealand cases where interest has been awarded (Appendix D) and a bibliography (Appendix E).

10 In the course of preparation of this paper, we have had the advantage of consultation with a Wellington-based working group comprising the Hon Mr Justice McGechan, Michael Camp QC, Denis Clifford, Christopher Finlayson and Stephen Kos. Professor Conrad Blyth has also assisted us with advice on economic matters.

Development and Present State of the Law

11 The most important rules relating to awards of interest in court proceedings in New Zealand are found in s 87 of the Judicature Act 1908. The section has been in essentially the same form since 1952, apart from increases in the interest rate (initially 5% per annum) to 7.5% in 1974, and to 11% in 1980. It reads:

87. Power of Court to award interest on debt and damages - (1)

In any proceeding in the High Court or Court of Appeal 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, not exceeding the prescribed 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 judgment:

Provided that nothing in this section shall -

- (a) Authorise the giving of interest on interest; or
- (b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, or rule of law, or otherwise; or
- (c) Affect the damages recoverable for the dishonour of a bill of exchange.

(2) In any proceedings in the High Court or the Court of Appeal for the recovery of any debt upon which interest is payable as of right, and in respect of which the rate of interest is not agreed upon, prescribed or ascertained under any agreement, enactment, or rule of law or otherwise, there shall be included in the sum for which judgment is given interest at such a rate, not exceeding the prescribed rate, as the Court thinks fit for the period between the date as from which the interest became payable and the date of the judgment.

(3) In this section the term "the prescribed rate" means the rate of 7.5% per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council.

The 11% rate was prescribed in the Judicature (Interest on Debts and Damages) Order 1980. Section 62B of the District Courts Act 1947, inserted in 1982, is to similar effect, including a specified maximum rate of 11% per annum. This paper focuses discussion on s 87 but it should be noted that the same considerations apply to s 62B of the District Courts Act 1947.

12 Whereas s 87 deals with interest prior to judgment, Rule 538 of the High Court Rules 1985 is concerned with interest after judgment:

538. Interest on judgment debt - (1) Every judgment debt shall carry interest from the time of judgment being given until the judgment is satisfied.

(2) The interest shall be at the rate for the time being prescribed by or under the Judicature Act 1908 or at such lower rate as shall be fixed by the Court.

(3) The interest may be levied under any execution order upon the judgment.

Section 65A of the District Courts Act 1947 is to similar effect, except that, somewhat anomalously, s 65A(3) provides for the interest to "accrue from month to month" - that is, apparently, compound interest. Statutory post-judgment interest has been available since 1838, see Judgments Act 1838 (UK) s 17. Numerous other provisions prescribing or relating to awards of interest in various circumstances are noted in Appendix C to this paper.

13 The statutes and rules referred to in paras 11 and 12 are of great importance. However, they represent attempts to mitigate perceived deficiencies in the general law at the time of their adoption. As well, in recent years the courts have begun to re-assess their non-statutory power to award damages in the form of interest. It is therefore appropriate to begin with the case law and trace its development up to and beyond the point of statutory intervention. Accordingly, in the balance of this chapter we first consider the nineteenth century decisions in which the general prohibition against interest was established. Then we outline some more recent refinements to the law: a partial reassessment by the House of Lords within the last decade in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104, the High Court of Australia's decision in *Hungerfords v Walker* (1989) 84 ALR 119 not to follow earlier English precedent, and some recent New Zealand judicial developments. The availability of interest on judgments in equity is also discussed, since different rules were developed by courts exercising that jurisdiction, and those rules still apply to particular kinds of claim today. Finally in this chapter, we briefly note the different considerations which have been suggested to apply to losses, generally in tort, which are of a non-pecuniary nature; that is, losses which are not readily quantifiable in money terms (unlike those considered in the cases noted above in which the claims, whether grounded in tort or contract, are concerned with actions for an ascertainable sum of money).

THE NINETEENTH CENTURY CASES

14 In the early nineteenth century, English law on the availability of interest was uncertain. In *Arnott v Redfern* (1826) 3 Bing 353; 130 ER 549, the Court of Common Pleas considered the position of a plaintiff who had obtained a judgment

in Scotland, including interest, and sued on that judgment in England. The Court held that the plaintiff was entitled to judgment in England for a sum including the interest awarded in Scotland. The Chief Justice of the court, Best CJ, summarised the position under English law as he saw it:

In *Eddowes v Hopkins and Another* (Doug 376) [(1780) 99 ER 242], Lord Mansfield held, that in cases of long delay under vexatious and oppressive circumstances, juries, in their discretion, may allow interest. In *Craven v Tickell* (1 Ves Jun 60 [30 ER 230]), the Lord Chancellor said, "From conversations I have had with the Judges, interest is given either by the contract or in damages upon every debt detained". From these words, it appears there are two principles on which interest is given in our courts: first, where the intent of the parties that interest should be paid, is to be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the creditor. *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.* Upon the principle that the debt has been improperly detained, juries are allowed to give interest in actions on judgments. It is immaterial in such actions whether the original debt bear interest or not. (359-360; 551-552, emphasis added)

15 A completely different view was taken only a few years later in *Page v Newman* (1829) 9 B & C 378; 109 ER 140, where it was held that interest was not payable in proceedings brought on a promissory note. Mr Newman agreed to pay £135 within one month after arrival in England which subsequently occurred in 1815. Proceedings against him were commenced by Captain Page in 1819. Lord Tenterden CJ declined to adopt the approach articulated in *Arnott*:

If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in *Arnott v Redfern* would seem to warrant, viz that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at Nisi Prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that *we ought not to depart from the long-established rule, that interest is not due on money secured by a written instrument*, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. (380-381; 141, emphasis added)

16 It was the opinion of Lord Tenterden which prevailed: at common law, interest was not generally to be available. Nevertheless His Lordship very soon

promoted a limited reform in sections 28 and 29 of the Civil Procedure Act 1833 (UK), better known as Lord Tenterden's Act (see para 43). These sections provided that a jury might award interest in cases where there was:

- a written promise to pay a certain sum of money on a definite day (interest to run from the day fixed);
- any other form of promise to pay (interest to run from the date of a written demand for payment claiming interest);
- a claim for conversion; or
- a claim on an insurance policy.

Those provisions formed part of the English law inherited by New Zealand, remaining in force here until repealed in 1952 when the modern version of s 87 of the Judicature Act 1908 was enacted (see para 49).

17 The next case which should be mentioned, although not itself involving a claim for interest, is *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145, which has come to be regarded as the source of the common law rules limiting awards of damages in contract in terms of remoteness. (The corresponding limit in a tort action is the rule that the plaintiff may recover damages only for losses which are "reasonably foreseeable".) It was an action for losses resulting from delay by a carrier engaged to deliver for repair a broken millshaft. The "rule" laid down by the decision has two limbs.

We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special

circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. (Alderson B at 354-355; 150)

18 To be recoverable in an action in contract, damages must be of a kind which was reasonably foreseeable by the parties as likely to be caused by the breach. Foreseeability is, however, tested at the date of entry into the contract and depends on the knowledge then possessed by parties:

For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable. (*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539, Asquith LJ explaining *Hadley v Baxendale*.)

19 The House of Lords considered *Arnott and Page*, and the impact of Lord Tenterden's Act, in *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429, a dispute over a balance outstanding under a joint traffic agreement between two railway companies. The leading speech was given by the Lord Chancellor, Lord Herschell. After finding that the plaintiff was not entitled to interest on the overdue payment under Lord Tenterden's Act, he expressed sympathy for the plea that interest might be given by way of damages for wrongful detention of the debt:

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. (437)

... Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in [*Page v Newman*], and to the statute passed subsequently with obvious reference to it by the Legislature

[Lord Tenterden's Act], and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best CJ [in *Arnott v Redfern*] has received practical effect in any decision in any of the courts, I do not think it will be possible nowadays to re-open the question, even in this House, and to hold that interest in such circumstances could be awarded. (441)

20 In a concurring speech, Lord Shand regretted that English law differed from that in Scotland where

It is the common and ordinary practice, in bringing an action for money which is due, to conclude not only for the payment of that money but for the payment of interest upon it from the date of citation or service of the summons, and interest is decreed as a matter of course on whatever balance is found to be due. (443)

THE *LA PINTADA* DECISION

21 Many of the modern complexities of the rules on awards of interest were traversed by the House of Lords in 1984 in *President of India v La Pintada Compania Navegacion SA* [1985] AC 104. There had been belated payment of freight and demurrage under a charter of a ship. In an arbitration the umpire concluded that the money should have been paid in 1975 and 1979 rather than on the actual date of payment, in 1981. He awarded compound interest in respect of the late payments. The members of the House of Lords were unanimous that the umpire was incorrect, although Lords Fraser, Scarman and Roskill expressed regret and reluctance in reaching that conclusion in agreement with the reasoning in the principal speech, that of Lord Brandon.

22 In analysing the submission that the House of Lords should depart from its earlier decision in *London, Chatham and Dover Railway*, Lord Brandon identified the three situations or cases in which the absence of any remedy for damage or loss caused by the late payment of a debt might arise:

Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, and before they have been concluded. Case 3 is where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged. (122)

23 Lord Brandon went on to endorse the reasoning of the Court of Appeal in *Wadsworth v Lydall* [1981] 1 WLR 598, that the rule in *London, Chatham and Dover Railway* applied only to damages recoverable under the first part of the rule in *Hadley v Baxendale* ("general damages") but not damages recoverable under the

second part of that rule ("special damages"), and commented that

the effect [of this distinction] will be to reduce considerably the scope of the *London, Chatham and Dover Railway* case by comparison with what it had in general previously been understood to be. (127)

24 After noting that the Administration of Justice Act 1982 (UK) (see para 48) had extended the statutory rules on interest to cover both cases 2 and 3, although not case 1, Lord Brandon summarised his conclusions as follows:

First, an ideal system of justice would ensure that a creditor should be able to recover interest both on unpaid debts in case 1, and also in respect of debts paid late or remaining unpaid in cases 2 and 3. Secondly, if the legislature had not intervened twice in this field since the *London, Chatham and Dover Railway* case, first by the Act of 1934 and more recently by the Act of 1982, and if the Court of Appeal had not limited the scope of that case by its decision in *Wadsworth v Lydall* [1981] 1 WLR 598, I should have thought that a strong, if not an overwhelming, case would have been made out for your Lordships' House, in order to do justice to creditors in all three cases 1, 2 and 3, to depart from the decision in the *London, Chatham and Dover Railway* case [1893] AC 429. But thirdly, since the legislature has made the two interventions in this field to which I have referred, and since the scope of the *London, Chatham and Dover Railway* case has been qualified to a significant extent by *Wadsworth v Lydall* [1981] 1 WLR 598, I am of the opinion ... that the departure sought by the respondents would not now be justified. (129)

HUNGERFORDS v WALKER

25 Another major appellate review of interest as an aspect of damages was undertaken in 1989 by the High Court of Australia in *Hungerfords v Walker* (1989) 84 ALR 119. A firm of accountants negligently prepared tax returns for the plaintiffs. As a result, taxes were overpaid by the plaintiffs. By the time this was discovered it was too late to obtain a refund. The trial judge in the Supreme Court of South Australia held that the clients could recover from the accountants not only the amount of the overpayments but also damages in the form of compound interest for the loss of use of the overpaid amounts. The court accepted that if the plaintiffs had the money, most of it would have been put back into the partnership business. The rate of interest used to calculate damages was the highest rate at which the plaintiffs had borrowed funds; over 20% per annum. That decision was affirmed on appeal by the Full Court in South Australia, and on further appeal by the High Court of Australia.

26 The leading judgment in the High Court was delivered jointly by Mason CJ and Wilson J. Brennan and Deane JJ concurred in a separate brief judgment, and

Dawson J dissented. The leading judgment focused on *Hadley v Baxendale* and the distinction between damages and statutory entitlement to interest. The judgment said that

the argument in *London, Chatham and Dover Railway Co* made no reference to the principles enunciated in *Hadley v Baxendale* governing the recovery of damages for breach of contract. The explanation no doubt lies in what in 1893 was thought to be the paramountcy of the rules relating to the recovery of interest, so that the recovery of interest stood apart from the general principles governing damages. And we need to recall that until well into the present century the common law set its face against the recovery of pure economic loss in tort. ... Loss or damage due to late payment of a debt was not seen as recoverable by way of damages. Such loss or damage was regarded as too remote. (126)

27 After noting that *La Pintada* had "opened the way to a logical and principled development of the law of damages", Mason CJ and Wilson J went on to reject the distinction between general and special damages, in terms of *Hadley v Baxendale*, which had been endorsed by the House of Lords:

If a plaintiff sustains loss or damage in relation to money which he has paid out or foregone, why is he not entitled to recover damages for loss of the use of money when the loss or damage sustained was reasonably foreseeable as liable to result from the relevant breach of contract or tort? After all, that is the fundamental rule governing the recovery of damages, according to the first limb in *Hadley v Baxendale* (see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539) and, subject to proximity, in negligence. The object of the second limb in *Hadley v Baxendale* was to include loss arising from special circumstances of which the defendant had actual knowledge when that loss does not fall within the first limb because it does not arise from "the ordinary course of things" of which the defendant has imputed knowledge: see *Victoria Laundry*, *ibid.* To allow a plaintiff to recover special, but not general, damages, is illogical, subverts the second limb in *Hadley v Baxendale* from its intended purpose and introduces a new element into the general measure of damages for negligence. (127)

28 After noting that admiralty law had traditionally awarded simple interest for late payment, Mason CJ and Wilson J stated their conclusion in the following terms:

Although the admiralty model has obvious attractions, the common law has steadfastly declined over a very long time to adopt the admiralty approach in awarding compensation for late payment of damages in the general run of cases. But we see no reason for

allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld. The recovery of compensation for the loss may be ascribed to the operation of the second limb in *Hadley v Baxendale*. However, we would prefer to put it on the footing that it is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort. (133)

29 In their concurring judgment, Brennan and Deane JJ emphasised

a critical distinction between an order that interest be paid upon an award of damages and an actual award of damages which represents compensation for a wrongfully caused loss of the use of money and which is assessed wholly or partly by reference to the interest which would have been earned by a safe investment of the money and which was in fact paid upon borrowings which otherwise would have been unnecessary or retired.... To the extent that the reported cases support the proposition that damages cannot be awarded as compensation for the loss of the use of a specific sum of money which the wrongful act of the defendant has caused to be paid away or withheld, they are contrary to principle and commercial reality and should not be followed. (135)

30 The full consequences of the decision of the majority have yet to be ascertained. The *Hungerfords* decision was possible in part because of the wide saving provisions of the South Australian statute. But the relationship between the common law power to award interest - as an item of damages under the first limb of *Hadley v Baxendale* for breach of contract or as a reasonably foreseeable loss in a tort action - and the statutory provisions in other Australian states and territories remains unclear. It does seem, though, from the decision in *Commonwealth of Australia v Chessell* (1991) 101 ALR 182 that *Hungerfords* may be interpreted more narrowly than might have been expected. *Chessell* was an appeal in the Federal Court of an assessment of damages for personal injury. The appellant challenged the trial judge's award of interest (at common law: the relevant statutory provision had not been enacted when the cause of action arose) on damages awarded for the plaintiff's past loss of earnings. The majority (Sheppard and Wilcox JJ) concluded that *Hungerfords* authorised the award of interest as damages only if the plaintiff could prove actual consequential financial loss (189, 191). Since the plaintiff was unable to do this, no interest could be awarded. Einfeld J dissented, saying that *Hungerfords* did not impose a requirement to show direct evidence of quantifiable loss, merely that a loss resulting from late payment was reasonably foreseeable. That latter requirement had been satisfied in the present case since the loss could be inferred from the circumstances. It seems that the Australian debate is not concluded. And, as will

be seen below, the extent to which *Hungerfords* (whatever the actual scope of the decision) will influence New Zealand law is not yet clear either.

NEW ZEALAND CASES SINCE *LA PINTADA*

31 The summaries of New Zealand cases included in Appendix D to this paper show that, since the decision of Wallace J in *Dods v Coopers Creek Vineyards Ltd* [1987] 1 NZLR 530, damages for loss of use of money have often been awarded on the basis of the second limb of *Hadley v Baxendale*. Reliance on the first limb of *Hadley v Baxendale*, or on the direct approach in *Hungerfords*, has been less evident to date, although in at least one case the distinction between recoverability under the first and second branches of the rule in *Hadley v Baxendale* was described as "becoming unreal" (see *Roberts Family Investments v Total Fitness Centre (Wellington) Ltd* [1989] 1 NZLR 15, noted in Appendix D). The present conceptually unsettled state of the law is reflected in the careful discussions of this issue by Tipping J in *Glaister v McHaffie* (unreported, HC - Dunedin, 16 July 1990, AP 102/88), and by Holland J in *Krehic v Clark* [1991] 1 NZLR 315, both noted in Appendix D.

32 The Court of Appeal did employ reasoning similar to that in *Hungerfords* in *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10. The judgment of the Court, delivered by Richardson J, referred to the Court of Appeal's earlier decision in *Broadbank Corporation Ltd v Mosgiel Ltd* [1985] 1 NZLR 257:

In that case the parties' contractual arrangements explicitly provided a return to Broadbank for financial accommodation it provided to Mosgiel over a set period. It was held by this Court that it was in the reasonable contemplation of commercial men in the position of Broadbank and Mosgiel that if Mosgiel did not put Broadbank in funds on the maturity date Broadbank would, in meeting its obligations as an acceptor, either have to borrow at interest, or use its own funds which might otherwise have been profitably employed. The loss thereby suffered by Broadbank was recoverable as damages. That was a straight-forward application of the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341 and, too, of the *Cook v Fowler* (1874) LR 7 HL 27 line of cases which are themselves explicable in terms of the standard rules concerning remoteness of damages in contract. (17)

33 In *Harris* the claim related to delayed payment of insurance for a tractor destroyed by fire, and the court again found the first limb of *Hadley v Baxendale* applicable:

The parties here expressly recognised in the policy that a finance company, Marac, had a financial interest in the tractor and was entitled to receive payment of or from any insurance proceeds. The

insurer may not have known the amount or details of the finance agreement, but as a reasonable business institution it must be taken to understand ordinary commercial and financial practice. The appellant must have known that finance agreements in relation to agricultural machinery were likely to provide for a finance rate far in excess of the 11% interest rate allowable under s 87 of the Judicature Act 1908 for delay in the payment of money. Such commercial institutions must be taken to appreciate that under standard provisions it is financially advantageous to make early payment to financiers. It must have been in the reasonable contemplation of these parties that failure to pay by 31 January 1983 the amount due in respect of the loss would cause loss to the respondent. It was a natural and probable consequence of the appellant's failure to pay by the due date that the respondent would lose the opportunity of profitably employing the funds by curtailing to that extent its actual and potential liability to Marac under the finance agreement. (17-18)

The manner in which damages as interest were calculated does not appear in the judgment, the parties having reached agreement on it.

34 The judgments in *Harris* are not expressed as laying down any general rule about the availability of interest as a head of damages at common law. Nor has our research discovered any case where the decision in *Harris* has been applied. Rather, recent New Zealand cases demonstrate a tendency to award interest as damages under the second limb of *Hadley v Baxendale* (or, in tort cases, where the loss is reasonably foreseeable) even in cases where it is not immediately apparent that there was knowledge of special circumstances. It may fairly be said that the law in this area, although perhaps more liberal to plaintiffs, is increasingly uncertain.

EQUITABLE INTEREST

35 Until this point we have considered only common law claims. But the equitable jurisdiction of the court to award interest is an important aspect of the general (non-statutory) law.

36 A helpful discussion of equitable interest is to be found in the decision of the English Court of Appeal in *Wallersteiner v Moir (No 2)* [1975] 1 QB 373. In that case, judgment for a sum of money plus interest was given against a company director for breaches of fiduciary duties owed to his company. The court concluded that the company was entitled to interest at a rate 1% per annum above the official bank rate or minimum lending rate in operation from time to time, and with yearly rests (ie, compound interest).

37 The judgments of the members of the Court of Appeal emphasised that the requirement for a party in breach of an equitable obligation to pay interest derives

from two rules: first, fiduciaries cannot make a profit from their position; and, secondly, a company is entitled to be fully compensated for the loss of use of money which it would have used in its business but for the equitable breach. The equitable approach involves a presumption that a party in trade using money in breach of equitable obligations will have derived an amount of profit "which persons ordinarily do make in trade", and thus should refund compound interest so as to be stripped of that profit.

38 On the rate of interest, Buckley LJ noted that

In earlier days, when interest rates were more stable than they are at present, the rate of interest used in such a case was 5% per annum. In the conditions of the present time I think it would be right to award interest at 1% per annum above the official bank rate or minimum lending rate in operation from time to time. (399)

39 The New Zealand Court of Appeal recently awarded interest on an equitable basis in *Hieber v Hieber* [1991] 1 NZLR 315, in which there was an issue relating to the rate of interest payable during a period where a purchaser was in possession of a supermarket complex and receiving the rents, without having paid the purchase price to the vendor. In equity, those circumstances result in a notional transfer where the vendor is to be treated as the owner of the money and the purchaser as the owner of the land during the period of possession, and the purchaser has an implied obligation to pay interest. After rejecting the applicability of prevailing contractual rates of interest for late settlement of sale and purchase transactions (the approach underlying the award of interest at 21% per annum in the High Court), the Court of Appeal identified three considerations relevant to fixing the rate of equitable interest:

- the desirability of a rate of interest reflecting a fair market return on money invested in a manner which affords security;
- the desirability of achieving certainty and uniformity - so over a long period of time 4% per annum was the rate adopted in the Court of Chancery in relation to legacies and generally where no breach of duty was involved; but
- continued adoption of a rate lower than actual interest rates would advantage those delaying performance of obligations and inadequately compensate the generality of sellers for loss of use of their purchase money.

40 The Court of Appeal went on to note New Zealand's experience of interest rates over the preceding 20 years:

Subject to some temporary fluctuations, low interest rates and modest inflation were features of the New Zealand economy over a long

period. The situation changed dramatically in the 1970s and 1980s. Thus the consumer price index multiplied 6.4 times between 1972 and 1987.... Clearly then, to fix a rate as low as 4% or 5% in this case would not be equitable and counsel did not suggest otherwise. (318)

On the basis of the relatively limited evidence before it, and disclaiming proclamation of a new general equitable rate, the court concluded that 15% per annum "would not have been out of line with a fair market return on a secure investment" and was equitable in the particular case and the period to which the claim related.

NON-PECUNIARY LOSS

41 The common law's attitude to the award of interest on tortious damages for non-pecuniary loss is inconsistent. In personal injury cases in England, the House of Lords has accepted the proposition that the portion of the award representing non-pecuniary loss should be subject to interest at 2% per annum, as a reward for foregoing the use of the capital sum for the time being: see *Wright v British Railways Board* [1983] 2 AC 773, Lord Diplock at 781. However, the leading English text, *McGregor on Damages* (15th ed, Sweet and Maxwell, London, 1988) comments on awards of interest in relation to other torts affecting the person as follows:

There has in the past been no sign of any move by plaintiffs to claim, or by courts to award, interest on damages in actions of defamation, false imprisonment, malicious prosecution and the like.... [Notwithstanding developments in relation to personal injury] it was to be hoped that interest on non-pecuniary loss might be avoided, and this has now happened in the context of deceit [see *Saunders v Edwards* [1987] 1 WLR 1116, CA, where the court declined to award interest on damages for deceit]. (para 598)

In the absence of a cause of action for personal injury, claims involving items of non-pecuniary loss do not arise with great frequency in New Zealand. The law is accordingly less developed. However, damages for such loss continue to be awarded in tort actions other than those for personal injury, and the question of interest requires consideration in that context.

Reform of the Law

42 The account of the development of common law rules on interest in Chapter I demonstrates their inadequacies. Since the courts have generally been unable or unwilling (at least until very recently) to address these, legislative intervention from time to time has attempted to put the matter on a better footing.

43 As has already been mentioned (para 16), the first statutory intervention took place in 1833 in the Civil Procedure Act of that year (3 & 4 Will 4, c 42) known as Lord Tenterden's Act after its promoter, the leading judge in *Page v Newman*. Sections 28 and 29 of the Act slightly extended the situations in which a jury might award interest:

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

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

Interest was still prohibited in most tort claims and any contract claim where the damages were unliquidated. Lord Herschell, in the leading judgment in *London, Chatham and Dover Railway* (see para 19 above), was to comment that

when [Lord Tenterden] dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem too narrow for the purposes of justice. (440-441)

44 After the decision in the *London Chatham and Dover Railway* case, that the rule that interest was not to be awarded to compensate for delay could not be reconsidered even by the House of Lords, it was apparent that further statutory intervention would be necessary if justice were to be done. And not only in England: the law on interest had in the usual way become part of the legal system in the other Commonwealth jurisdictions.

ENGLAND

45 Eventually in 1934, the Lord Chancellor referred this matter to a Law Revision Committee chaired by Lord Hanworth MR. That committee promptly recommended that the old rule should be altered in favour of wide discretion to award interest in all cases, saying:

In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and paid the appropriate sum for damages. There are of course some cases where it is reasonable that he should have had a certain time for investigation, and in those cases the Court might well award interest only from the date when such reasonable time had expired. ... There is no doubt that the present state of the law provides a direct financial motive to defendants to delay proceedings. (Law Revision Committee *Second Interim Report* Cmd 4546 (1934), para 8)

A provision giving effect to the committee's recommendation was enacted later that year as s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (the text of which is set out in Appendix B). The 1934 Act, with its wide discretion, was used as a model in several Commonwealth jurisdictions including New Zealand and Australia.

46 In England, concern that the discretion was not being exercised sufficiently widely led to the amendment of s 3 of the 1934 Act by s 22 of the Administration of Justice Act 1969. That provision made it mandatory for a court to award interest on damages in personal injury claims "unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages". This did lead to increased reference to the section and to guidelines (based mainly on economic factors) for the exercise of the discretion set out by Lord Denning MR in *Jefford v Gee* [1970] 2 QB 130.

47 While the 1934 Act was certainly an improvement on the common law, gaps in its coverage led the Lord Chancellor to give a reference to the English Law Commission in 1974 to consider the law relating to interest on debt and damages. In its final report on the topic (Law Com No 88, *Law of Contract: Report on Interest* Cmd 7229, (1978)), that Commission set out its major criticisms:

There are, however, a number of situations in which the plaintiff may

not recover interest under the 1934 Act even though the defendant has defaulted on his obligations to the prejudice of the plaintiff. ... The situations are concerned, for the most part, with the non-payment of contract debts and are as follows:-

- (a) where, before proceedings are started, the defendant tenders payment of the debt, but tenders nothing by way of interest for the period that the debt has been withheld;
- (b) where the debtor withholds payment for a time but pays the debt, without anything in respect of interest, before a judgment is obtained against him;
- (c) where the plaintiff obtains a judgment for the debt without a trial, for example, where the debt is admitted or where judgment is obtained in default of appearance or in default of a defence being delivered. (para 17)

The Commission recommended that interest should be available as of right in all claims for the recovery of debts - cases 1, 2 and 3 in the *La Pintada* analysis (see para 22 above) and that a discretion should be retained in relation to interest on damages. It also recommended changes in other areas, including payments into court and post-judgment interest.

48 The recommendations of the Law Commission were implemented in part only by the Administration of Justice Act 1982 which inserted a new s 35A in the Supreme Court Act 1981. The text of s 35A is set out in Appendix B. In particular, no provision was made for the recovery of interest on debts paid late but before the commencement of proceedings. The House of Lords in *La Pintada* (para 21 above), concluding that it was not open to them to change the law in this respect, expressed some concern in respect of this omission, but there has been no further legislative initiative on this question.

NEW ZEALAND

49 Section 87 of the Judicature Act 1908, with which this report is mainly concerned, was substituted for the original section (a re-enactment of s 45 of the Mercantile Law Act 1880) by s 3 of the Judicature Amendment Act 1952. The new provision (the text of which is set out in para 11 of this paper) provided the courts with a discretion to award interests in fit cases.

50 The present s 87 is based on the English Act of 1934: the wording is nearly identical with the exception that subs (3) of s 87 limits the rate of interest to the "prescribed rate". It seems from some of the statements made in Parliament in 1952 during the second reading of the Bill that the original rate of 5%, although considered reasonable at the time, also reflected Government policy that interest rates should be reduced, see (1952) 297 NZPD 585. When the rate was lifted to 7.5% in 1974, concern at the rise in interest rates necessitating the increase was

apparent, as well as a feeling that the new rate was nevertheless inadequate, see (1974) 394 NZPD 4648.

51 The rigid limit (now 11%) is the major problem with s 87, although, as suggested in para 47 of this paper, there are other serious inadequacies. And the relation of s 87 to the common law is also increasingly uncertain and complicated. Because we propose a new and rather different scheme for the award of statutory interest, we do not discuss s 87 in detail. Its deficiencies are well known, and specific areas of difficulty, where relevant, are considered in the commentary to the scheme in chapter III.

AUSTRALIA

52 Interest provisions in most Australian states are now based on the discretionary model, subject to some regional differences and refinements. For example, in some states the discretion as to whether interest will be awarded at all is replaced by a direction that the court must award interest "unless good cause is shown to the contrary". The earliest example of this direction seems to be s 79A of the Supreme Court Act 1958 of Victoria, enacted in 1962. The provision is also found in the Judiciary Act 1903 s 77MA (Aus) (High Court of Australia, but not applying to proceedings on appeal); Federal Court of Australia Act 1976 s 51A; Australian Capital Territory Supreme Court Act s 53A (ACT); Supreme Court Act 1935 s 30C (SA); Supreme Court Act 1958 ss 60, 78, 79A (Vic) and is recommended by the Law Commission of Tasmania in its *Report on Pre- and Post-judgment Debts*, Report 44, 1985.

53 Most of the Australian provisions still leave the rate of interest, the sum on which it is awarded, and the period for which it is awarded, to the court's discretion. The issue of practice notes and similar guidelines is not uncommon but variation in the manner in which the discretion is to be exercised is still apparent. This may contribute to higher costs and greater uncertainty in litigation. Perhaps by way of reaction, there seems to be an emerging trend towards tying the rate of interest to a floating indicator. In Victoria, ss 2 and 3 of the Penalty Interest Rates Act 1983 provided for the Attorney-General, having regard to the advice of the Treasurer of Victoria, to set a rate or a maximum rate (known as the long term Commonwealth Bond Rate). The Law Reform Commission of Tasmania in its report (9) recommended that a similar practice be adopted. The Penalty Interest Rates Act 1983 (Vic) was amended in 1989 to provide that the rate was to be fixed by obtaining a recommendation from the Treasurer as to an appropriate institutional rate of interest which is charged for loans or paid for borrowings by a public or commercial institution and reflects prevailing commercial rates of interest. (Selected Australian provisions about interest are set out in Appendix B.)

CANADA

54 Until very recently most Canadian provinces had provisions governing the award of interest on debt and damages based substantially on an early Ontario modification of Lord Tenterden's Act which provided that interest was payable in all cases in which it was usual for a jury to allow it. That phrase seems to have been interpreted to mean that interest was available on any "just debt wrongfully withheld", and, as may be imagined, gave rise to substantial litigation (see further Law Reform Commission of British Columbia *Interim Report on Debtor Creditor Relationships* (1973)).

55 A number of jurisdictions carried out extensive revision of these very limited provisions in the 1970s and 1980s. Some provinces have enacted a broad discretion similar to that in the English Act of 1934 (New Brunswick: Judicature Act RSNB 1973 c J-2; Nova Scotia: Judicature Act SNS 1972 c 2 s 38). Others provide that interest is to be awarded in accordance with a prescribed rate (as in Victoria, fixed to a commercial indicator) (Ontario: Courts of Justice Act SO 1984 c 11 ss 137-141; Alberta: Judgment Interest Act SA 1984 c J-0.5).

56 A continuing problem with the latter approach is that under these enactments the rate to be applied through the whole of the period on which interest is to be awarded is the prescribed rate at one particular time, usually the rate in the month before interest begins to run. If commercial interest rates rise or fall sharply that rate can become inappropriate. This can be cured by giving the court a discretion to depart from the prescribed rate, but that is unsatisfactory if there is a desire to maintain predictability and certainty.

57 Recognising this, Canadian law reformers began to develop other more sophisticated approaches. So the reports of the Saskatchewan Commissioners to the Uniform Law Commission of Canada in 1980 and 1982 recommended an averaging of rates over the relevant period, and this policy was reflected in cl 6 of the Uniform Judgment Interest Rate Act settled at the 1982 Conference (see Uniform Law Conference *Proceedings of the Sixty-fourth Annual Meeting held at Montebello, Quebec* August 1982, 32, Appendices T and U).

58 The 1982 Report of the Manitoba Law Reform Commission (*Report on Prejudgment Compensation on Money Awards: Alternatives to Interest*, Report 47, 1982) considered interest as a compensation device and expressed doubts about its suitability:

The fact that interest rates now fluctuate weekly and anticipate inflation levels causes this Commission to raise serious questions concerning their suitability as a measure for determining compensation for the postponement in payment of money awards. (23)

The solution adopted in the *Draft Uniform Act* is a positive measure which serves to accommodate better the depreciation in the value of

money. However, it is still dependant upon the accuracy of the inflation prediction built in to a current commercial interest rate. As indicated in the preceding Chapter, the success with which market forces have predicted inflation, to the extent of preserving a real return factor, has indeed been mixed. (29)

The Commission concluded

It is the Commission's view that the adoption of the restoration principle of compensation necessitates the abandonment of interest as the mechanism of assessing loss arising from delay in payment of money awards. ... generally an accurate determination of the loss will require separate calculations for loss of use and loss of value. The Commission designates the mechanism for determining loss of use to be the *real interest rate*. The tool to assess compensation for loss of value is called the *inflation rate*. (34-35)

If this were accepted, damages would be adjusted with reference to the Consumer Price Index (CPI) to compensate for loss of value. On top of the damages as adjusted for each year of the delay there would be added a real interest rate to compensate loss of use (the suggested rate was 3%). So the defendant would pay damages inflated by the movement in the CPI from time to time, plus 3% per annum compounded on an annual basis. In fact the legislation which was eventually enacted (now contained in Court of Queen's Bench Act, LM 1988-89, c 4 - Chap C280) departed from this recommendation in favour of the award of interest based on the (variable) rate at which the Bank of Canada makes short-term advances to chartered banks.

59 Finally, the Law Reform Commission of British Columbia, reviewing the Court Order Interest Act which had been enacted after one of the Commission's earlier reports (*Interim Report on Debtor-Creditor Relationships, Part 4: Pre-judgment Interest*, LRC 12, 1973), proposed a different and rather more comprehensive scheme in its *Report on the Court Order Interest Act* (Report 90, 1987).

60 The summary of recommendations contained in that report is reproduced in Appendix A of this paper. In essence, the report recommends the mandatory award of compound interest at a rate tied to a commercial indicator and changing monthly, the exact amount of statutory interest to be calculated by reference to two tables of multipliers:

The preparation of such tables is made possible by our conclusion that judgment interest should be payable at statutory rates. These rates apply to all amounts to be ordered to be paid in a judgment. It is possible to express the value of one dollar, with judgment interest, from the date the money ought to have been paid, to any other date, as a single figure - the multiplier. Tables of multipliers may then be

prepared to which reference can be made to determine the dollar value of a judgment. (90)

The British Columbia Commission recommended that the tables be calculated using the prime lending rate as it changed from month to month and incorporating regular compounding. Compensation for the loss caused by inflation tends to be built in to such an interest rate (see para 69 below). Interest for non-pecuniary loss was to be at a different rate to reflect loss of use only, not inflation. No interest was to be awarded on future loss or where there was an agreement about interest between the parties or where the creditor had waived an entitlement to interest.

61 We have found the report of the Law Reform Commission of British Columbia particularly helpful, and we have in part adopted its recommendations in the scheme presented in the next chapter.

HONG KONG

62 Most recently, in 1990, the Law Reform Commission of Hong Kong published its *Report on Interest on Debt and Damages (Topic 19)* which recommended (in very similar terms to the work of the English Law Commission) that there be a statutory entitlement to interest on debts and that the discretionary power of the court should be retained in respect of damages.

63 But, although it adopted the approach of the Law Commission in England on several matters of broad principle, the Law Reform Commission of Hong Kong deviated from it in several important respects. In particular, the Commission recommended that the rate of statutory interest should be the Best Lending Rate (set by the Hong Kong Association of Banks) plus 3%, and went on to recommend that that rate should fluctuate and compound on a monthly basis. To facilitate this, the Commission was attracted (as we have been) to the tables of multipliers recommended by the Law Reform Commission of British Columbia, and produced similar tables based on local information.

III

The Scheme

64 The Law Commission is of the view that the present New Zealand law about interest, as discussed in the two preceding chapters, is unsatisfactory. To recapitulate, the courts have a discretion to award statutory interest at a maximum rate of 11% per annum when giving a judgment for debt or damages, unless the judgment is given by default (see paras 94-95 below). The rate of interest (subject to the prescribed rate), the sum on which it is awarded and the period for which it is awarded are all in the court's discretion, although it appears that interest is presently invariably awarded at the maximum rate. In addition, interest at market rates may be available as a head of damages in contract cases where the defendant was aware of special circumstances which made it reasonably foreseeable that a loss measurable by a particular higher rate of interest would be suffered (ie, under the second limb of the rule in *Hadley v Baxendale*) but not where interest losses are a natural consequence of the breach (ie, the first limb of *Hadley v Baxendale*) except in some very special cases. Interest as damages may also be available in tort cases where losses measured by interest are reasonably foreseeable and in certain claims in equity.

65 The maximum rate of interest prescribed under s 87(3) of the Judicature Act 1908 (and its equivalent in the District Courts Act 1947) has been completely unrealistic for some years. Although 11% is presently acceptable given current market interest rates, the relatively volatile nature of these rates makes it unlikely that this will be the case for long. And although s 87 gives a discretion to award interest at a rate *lower* than the prescribed rate of 11%, it seems likely that calculation of appropriate lower rates will give rise to some difficulty. Other unsatisfactory features of the provision, such as its failure to apply to debts paid before judgment or in the case of consent or default judgments, were described by the English Law Commission (see para 47 above) in relation to the then parallel enactment in that jurisdiction. Further, the relationship between the statutory provisions and the common law is increasingly complicated and uncertain as the courts endeavour to avoid applying the statute in order to achieve fair results by compensating actual losses suffered by plaintiffs. The Commission inclines to the view that reform of this aspect of the law is required. After briefly outlining the principles which the Commission considers relevant to such reform, the remainder of this chapter is devoted to setting out its tentative proposal for change.

PRINCIPLES

66 Before outlining our provisional proposal, we set out the assumptions and

policies upon which the Law Commission believes that reform of the law relating to interest on damages should be based. They emerge in part from the discussion in the previous chapters.

Compensation

67 The primary principle is compensation. It is trite law that a major purpose of damages is to compensate: to make the plaintiff whole, or to restore the plaintiff to the position which would have pertained if no wrong had been committed. The plaintiff will not be fully compensated unless proper allowance is made for delayed payment. In the Law Commission's view, the courts should have allowed ordinary damages principles to apply to compensation for delay in payment of debt or damages. It should have been recognised that loss of the use of money flowed naturally from late payment and ought to be the subject of compensation by way of interest. It was the failure of the common law to make that allowance and develop a coherent approach to the issue which made legislative intervention necessary. But to distinguish interest *on* damages (under an enactment) and interest *as* damages is to draw "a distinction without a difference" (*Hungerfords v Walker* (1989) 84 ALR 119, Dawson J at 138). Both address the same need, being mechanisms to ensure full compensation for delay.

68 How can such compensation be measured? What is the nature of the loss suffered by the plaintiff because of the delay? In "Opportunity Cost: a Measure of Prejudgment Interest" (1983) 39 *Business Lawyer* 129, Keir and Keir describe the loss in terms of "opportunity cost":

The value of the funds withheld from an individual is the principal amount plus the opportunity cost. According to economic theory, opportunity cost is the benefit that is forgone when a resource is not used in its next best alternative. An individual that is not in possession of money that is rightfully his must forgo potential investment gains or even incur otherwise unnecessary borrowing cost. Borrowing costs are considered measures of opportunity cost in that money which goes to pay interest cannot be used to purchase another resource. (146)

69 Interest is a convenient way of calculating the loss which has accrued - the lost opportunity - *if* the interest rate used is appropriate (as it might be if fixed by reference to a borrowing cost continued to be incurred, or the rate at which the creditor could have invested the funds). It is not the only way of measuring this kind of loss. An alternative solution was offered by the majority of the Court of Appeal in *Drower v Minister of Works* [1984] 1 NZLR 26 when assessing delayed compensation for the compulsory acquisition of land under the Public Works Act. The opportunity cost there was analysed as

- loss of value caused by inflation (measured with reference to the

consumer price index), and

- loss of use (measured by an arbitrary "real" rate of return of 2% per annum).

It seemed to work satisfactorily in that particular context (although in the recent decision in *Chamberlain v Minister of Lands*, which is discussed at para 79 of this paper, the court experienced difficulty in applying the *Drower* formula on the evidence before it). And, in theory, the result should not be so very different from current interest rates. Interest rates supposedly reflect (in part) predictions or expectations about the future behaviour of inflation. But, at least in New Zealand experience, those predictions are not always accurate: see the graph at para 3, which demonstrates a very low correlation between inflation (measured by the consumer price index) and interest.

70 This mechanism of measuring compensation by means of inflation plus a component recognising a real riskless rate of interest may be conceptually purer than one based on a market interest rate, since it reflects *actual* historical results. By contrast, interest rates are based on predictions and tend to lag behind the economic indicators (including price indices) they reflect, particularly where these move rapidly. A real long-term rate of interest might be 3% (an approximation of the rate at which the government would borrow in an inflation-free environment, assuming a zero risk on the investment), or perhaps 4%, the higher rate reflecting compensation for unauthorised trade credits. This would be particularly appropriate in a commercial context, as is the case where businesses fail to pay suppliers on time. The 4% rate would reflect the profit rate in the firm which "grants" the "credit".

71 We can see the merits of these arguments, but our present view is that in this country, for debts and damages, the use of interest is the most appropriate way to compensate the plaintiff's opportunity costs. If we ask, "What would the average plaintiff have done with the money if it had been received the day the cause of action arose?", the answer in many, if not most, cases can be framed by reference to an interest rate of some kind (as described in para 68 above): on the view we take, a conservative investment. That being the case, the creditor could not have demanded a different (higher) rate from a hypothetical borrower, nor would the creditor agree to accept a lower rate, simply because of a belief that the market expectations about future inflation were wrong. Thus the view of the market, regardless of historical accuracy, should prevail.

72 It will be noted that we speak of an "average" plaintiff. A statutory scheme of the kind we envisage will provide a regime which reflects the behaviour of the generality of rational plaintiffs but will not attempt to account for the extremes: the plaintiff who may be a successful speculator, or a gambler who loses everything; or the plaintiff who may be able to borrow money at exceptionally low, or only at very high, rates of interest. The question, "What rate of interest is appropriate?" is discussed below (see paras 103-114).

The defendant's conduct

73 If the fundamental purpose is to compensate the plaintiff kept out of money, the defendant's conduct is essentially irrelevant. The defendant's gain can be presumed to be the converse of the plaintiff's loss: while the plaintiff has been unable to invest the money or has had to borrow funds, the defendant has enjoyed its use. But under the discretionary terms of s 87 of the Judicature Act 1908 (and in other jurisdictions where there is a similar discretion), there have been decisions based on the notion that interest is some form of punishment for the defendant, or that interest should run for a shorter period because the defendant needed time to investigate the claim or was unable to assess and pay unliquidated damages, or that interest should be withheld to encourage the prompt and efficient conduct of litigation. In the Commission's view those attitudes are wrong. Successful plaintiffs kept out of funds to which they were entitled should be compensated for the resultant loss.

Fairness and certainty

74 Two other principles are relevant to a new statutory interest regime:

- Fairness to individual litigants;
- Certainty and simplicity.

Fairness suggests that the court should be able to come to the "right" result in as many cases as possible. The plaintiff should be fully compensated but not overcompensated since that would be unfair to the defendant. But that ideal needs to be balanced against the resulting costs both in court time and in the lack of certainty for parties. Fairness points toward a wide judicial discretion; certainty and simplicity point toward a general statutory rule. The selection of a rate which will most often match the plaintiff's opportunity cost from time to time will lead to a fairer result. These considerations will be further developed in our discussion of the scheme which we propose.

THE SCHEME

75 In the remainder of this chapter, we set out our tentative conclusions on the shape and nature of a statutory interest regime. It is premature to draft legislation, and we present our proposals as a scheme. The scheme is of course by no means final, and we would be pleased to receive comments on any aspect of it, or on any matter which we may have omitted. It does however represent the considered views of the Law Commission at this time.

76 The scheme is first set out in full, followed by comment on each element.

Interest on all money judgments

In general, interest must be awarded at the prescribed rate on all money judgments.

Meaning of "money judgment"

"Money judgment" should include any judgment or order given in any court which requires the payment of money or acknowledges the existence of a liability measurable in money.

Setting the prescribed rate

The prescribed rate should change monthly following the movement of a readily available commercial indicator such as the average first mortgage lending rate.

A fluctuating rate

The interest rate to be applied in each case should fluctuate to reflect the changes in the prescribed rate.

Compound interest

Statutory interest should be compounded monthly.

Making the rate available

Calculation of statutory interest should be expedited by the compilation and publication in the *New Zealand Gazette* of a table of multipliers for each month.

Interest from the date of entitlement to the date of payment

Statutory interest should be awarded from the date an entitlement to interest arises to the date of payment.

Where the date of quantification is different from that of entitlement

If an entitlement to money arises at one date but is quantified in respect of another, interest should be awarded from the date of quantification to payment. If the date of quantification is the date of trial (for example damages for defamation), interest should be payable from the date of judgment to payment.

Where components of the award are quantified on different dates

If different components of the award of damages are quantified on different dates, statutory interest should be separately awarded on each component of damages.

No interest on future losses

No statutory interest should be awarded on future loss.

Cases where statutory interest should not be awarded

No statutory interest should be awarded

- if the plaintiff does not claim it,
- on costs (except after judgment),
- on exemplary damages (except after judgment),
- where the parties have a valid agreement about interest,

- where another enactment provides for interest,
- to the extent that damages already compensate for opportunity costs.

A limited discretion

The court should have a limited discretion to depart from the terms of the scheme for statutory interest, to be exercised in exceptional cases.

Payments into court

Statutory interest should be deemed to be included in payments into court.

Where damages are assessed in a foreign currency

Where damages are assessed in a foreign currency, the statutory rate should not necessarily be applied, but interest should be awarded at a rate appropriate on the evidence.

Abolition of post-judgment interest

There should no longer be a separate scheme for post-judgment interest. Interest after judgment should be awarded on the same terms as interest before judgment in every case.

Commencement of new scheme

A new statutory interest regime should apply in any proceedings instituted after its commencement.

THE ELEMENTS OF THE SCHEME

Interest on all money judgments

In general, interest must be awarded at the prescribed rate on all money judgments.

77 Bearing in mind the principles in paras 66-74, the Commission has considered the shape which a new interest statute might take. Analysis of provisions in other jurisdictions presents three possibilities:

- a wide discretion;
- a statement of a presumptive regime, with a (more or less widely defined) discretion in the court to depart from that approach; or
- a mandatory regime.

78 The first approach, to enact a wide discretion not limited by a maximum rate as s 87 is, seems to allow full compensation and promote the goal of fairness. In theory, courts could reach a fair result in every case, provided all parties in the action bring the evidence necessary to fix an appropriate rate of interest.

79 But that approach is likely to be very time-consuming. We do not consider that the courts should be required to devote excessive resources to the calculation of interest, significant though the eventual sum may be. And it is not certain that the right result will always be reached. The factual and economic issues may be very complex and there is some indication that counsel and judges are not yet may have difficulty in providing or assessing the necessary evidence for fair decisions to be made. But in the meantime it seems likely that unnecessary costs are being incurred, not always with the prospect of a satisfactory result. In *Chamberlain v Minister of Lands* (unreported, HC - Wanganui, 20 December 1990, AP 17/89, 19/89, Chilwell J and I W Lyall Esq), a case about compensation for the compulsory acquisition of land where the court had a discretion to award interest, a Land Valuation Tribunal had made an assessment of the value of land in 1987, and ordered payment of interest on that capital amount at 15% per annum until payment. On appeal to the High Court, the capital valuation was upheld. As to interest, the plaintiff claimed 17% per annum and the Minister argued for interest measured by reference to the CPI. No evidence was presented on what a true rate of interest would be (over and above the inflation rate, which varied between 5% and 8% in the relevant periods). The court awarded 11% per annum from 1987 until payment, saying:

The rate of interest causes some concern because the only evidence is the page already referred to from the Monthly Abstract of Statistics as at October 1988. In those circumstances the safest course is to adopt, by analogy, the rate of 11% per annum prescribed by section 87 of the Judicature Act 1908. (53)

Clearly even if the court is willing to hear evidence as to an appropriate rate, it will not always be the case that such a rate can be ascertained. At present, the courts are frequently forced to fall back on the rate prescribed under s 87. And we have already mentioned (see paras 39-40) that in the equity jurisdiction the Court of Appeal in *Hieber v Hieber* chose a rate of 15% covering a period which overlapped that in *Chamberlain*.

80 Another unfortunate consequence of a wide discretion is that parties are unable to predict liability or make informed decisions (for example, about whether or not to settle) on the basis of any kind of reasonable expectation as to the final result in a particular case.

81 In our view, these factors seriously challenge the selection of a wide discretion as the basis of the statute. The fairness which it may potentially provide is outweighed by its inherent inefficiencies and uncertainties. We do note that in other jurisdictions where there is a wide discretion, in practice a standard rate will often be advised, for example in practice notes. It is also accepted that a discretion of this type is to be exercised judicially with the restraints that imposes. Even with those practical constraints, however, uncertainty remains. Changes and decisions can be erratic and the factors on which the choice of the rate is based unclear. A more regular and transparent structure is desirable.

82 Such a structure is set out in the report of the Law Reform Commission of British Columbia, (see para 60 above, and the list of recommendations set out in Appendix A). That Commission's recommended statute would establish a mandatory regime governing the rate of interest, the period for which it would be awarded, the components of damages on which it should be awarded and so on. Every facet of the award would be regulated by statute.

83 Such a regime should produce savings in time and money during the conduct of litigation: neither party will be encouraged to bring evidence and argue the merits of a different rate. Another beneficial consequence of a mandatory scheme is that the parties to litigation have a clear advance idea of the total award of damages if the plaintiff is successful (and if the matter has been on foot for some time, the amount of interest may substantially affect the final sum).

84 But although certainty and clarity of application are goals to be pursued, the Law Commission is of the opinion that in some instances an entirely mandatory regime may not produce a fair result. Although we can try to anticipate all contingencies and provide for them (see the proposals in paras 143-158), we are unlikely, at least initially, to achieve that goal. (The British Columbia Law Reform Commission had an advantage in this respect; it was considering a statute based on one of its own earlier reports and had had the opportunity of seeing it in practice for a number of years.) That being so, in the hard cases the court should be in a position to determine a fair result. The mandatory regime does not provide for this, and we believe that it also should be qualified.

85 Since neither a broad discretion nor a mandatory regime are entirely satisfactory, the Law Commission is of the view that the best solution is to provide a regime for the award of interest which is generally mandatory but also to state specific exceptions and to give the court a discretion to depart if special features of the case so warrant. This seems to fulfil all the goals set out at the beginning of this chapter. Hence our first statement that *in general*, interest *must* be awarded at the prescribed rate on all money judgments.

86 Not all components of all damages awards would automatically attract the entitlement to interest; there are good reasons for excluding some matters and the provision will direct that no interest be awarded on certain components of the award. And where a portion of the award already takes account of and compensates for the plaintiff's opportunity cost, that will be a ground for limiting the award of statutory interest. Those matters are discussed below. The nature and extent of the discretion are considered in paras 159-164.

87 It is also convenient at this point to note that we do not propose that awards of interest under the new scheme should take account of the incidence of income tax. We understand from the Department of Inland Revenue that generally an award of interest, so-called, will be assessable in the hands of the recipient. So to allow a discount on interest for unpaid income tax would disadvantage plaintiffs and provide a windfall for defendants in most cases. As well we agree with the

approach to this matter which was taken by the majority of the Court of Appeal in *North Island Wholesale Groceries v Hewin* [1982] 2 NZLR 176, 189, a case concerning breach of a contract of employment where Woodhouse P and Richardson J concluded that the court should not allow for unpaid income tax in assessing damages. There is a very slight advantage arising from deferred assessment of tax on interest accruing on compounded interest. To try to take this into account (unless perhaps by way of a very slight discount in the applicable rate) would, we think, cause disproportionate complexity. We would, however, find it helpful to receive views on this point.

Meaning of "money judgment"

"Money judgment" should include any judgment or order given in any court which requires the payment of money or acknowledges the existence of a liability measurable in money.

88 The wording of s 87 gives rise to some substantial difficulties and anomalies. Interest has been denied on a number of bases: that the proceedings were not for the "recovery of debt or damages", not in the High Court or Court of Appeal, or that no "judgment" was to be given. Under our proposal the right to interest will be more comprehensive but will always be dependant on the bringing of proceedings. We are *not* proposing that all debts shall attract interest in the absence of any agreement to that effect or of legal proceedings to enforce the debt.

89 *Proceedings for the recovery of any debt or damages:* The court has no power under s 87 to award interest unless the proceedings are for the recovery of a debt or damages and culminate in a judgment. Therefore, if the defendant has paid the principal (where a debt is owed) or the plaintiff has accepted a settlement before proceedings are commenced, or after commencement but before judgment (cases 1 and 2 in the analysis in *La Pintada*, see para 21 above) the court cannot award interest under s 87.

90 As discussed in Chapter I, there is no common law cause of action for the late payment of money. We do not propose to change that rule. It will continue to be the case that acceptance of tender of the full amount of the debt or other settlement before the institution of proceedings will put an end to the plaintiff's claim. But where proceedings have been commenced the scheme will apply and the plaintiff who accepts a part payment or what purports to be full payment from a defendant will have the right to apply to the court for outstanding interest. Ordinarily, of course, a settlement will be expressed as being "full and final", whether or not allowance is made for interest, and the plaintiff will be precluded from pursuing further proceedings. In the absence of other considerations, if a proposed settlement does not make sufficient allowance for opportunity costs the plaintiff will be unlikely to accept it but will instead proceed to judgment. Where the payment into court is made under the procedure in the High Court Rules, we

propose a change to the Rules so that the payment in is deemed to include interest, see paras 165-169.

91 We appreciate that this may appear to create an anomaly: the scheme ties the right to interest to the institution of proceedings. Although there is little difference in the loss suffered by the plaintiff paid before proceedings are commenced and the plaintiff paid after, the first will get no interest and the second will be compensated in full for the loss caused by late payment. But our proposal recognises that, generally speaking, the community seems satisfied with the concept that, absent express agreement, a debtor who is late should not immediately be burdened with an interest cost. There should be an element of give and take between debtor and creditor. On the other hand, we think that the law should encourage early payment of obligations and that, accordingly, where the delay is sufficient to induce the creditor to incur the expense of litigation (lawyers' fees or debt collector's commission and court fees), that should trigger the right to receive compensation for loss caused by the delay. (There will, in any case, still be some shortfall. The expense of litigation is unlikely to be fully recovered in an award of costs.)

92 It may be argued that the prospect of having interest if proceedings are commenced and being denied it if they are not will promote otherwise avoidable litigation: creditors will sue sooner than they would otherwise have done. It is, of course, desirable that if proceedings are going to be instituted at all, they are commenced early and delay avoided. However, it may be, overall, there will be less litigation concerning liquidated amounts because solvent debtors will have an additional incentive to pay quickly (without interest) or to negotiate an extension of time to pay before the creditor sues. We believe that most creditors will still prefer to avoid commencing proceedings. If the debt is paid after litigation has begun, some creditors may not insist on pursuing the claim for interest.

93 Under the proposed scheme, interest would be available in claims for money which are not, strictly speaking, proceedings for the recovery of debt or damages. Examples include claims for contribution or indemnity under the Law Reform Act 1936; an application for directions by a liquidator (see, eg, *Re Securitibank Ltd and others ex parte Goodman (No 40)* (1987) 3 NZCLC 100,020); and declaratory remedies, as in *Westpac v Nangeela Properties Ltd* [1986] 2 NZLR 1, where a liquidator applied for the recovery of a voidable preference under s 309 of the Companies Act 1955. (In that case, the Court of Appeal found that this was analogous to a debt and awarded interest under s 87.) It would also include a claim by a plaintiff for interest on a sum paid after the commencement of proceedings but before judgment, if the parties had not reached agreement on their position in relation to interest.

94 *Default judgment:* It seems that statutory interest is not presently available if a plaintiff uses the default judgment procedure contained in Part V of the High Court Rules. Rule 460 states:

460. Liquidated demand - If the relief claimed by the plaintiff is payment of a liquidated demand in money and the defendant does not file a statement of defence within the number of days stated for that purpose in the notice of proceeding, the plaintiff may at once seal final judgment for any sum not exceeding the sum claimed in his statement of claim, together with-

- (a) Interest (if any) payable as of right, if such interest has been specifically claimed in the statement of claim, calculated up to the date of judgment; ...

This provision applies only to liquidated demands (a default judgment cannot be obtained on an unliquidated demand without a trial to assess damages, see rule 463, and interest is then awarded in the normal way). However, only "interest payable as of right" can be recovered. This includes interest claimable under *Hadley v Baxendale* or in the equitable jurisdiction if facts are sufficiently clearly pleaded in the statement of claim to support it but excludes interest under s 87, see *McLeod Construction Co Ltd v Pavlovich* (unreported, HC - Auckland, 20 July 1978, A 1193/77, Chilwell J). Interest (except under an instrument) cannot be claimed in a default action in the District Court: if it is sought under s 62B of the District Courts Act 1947, the proceedings must be by way of ordinary action: *District Courts Practice: Civil Jurisdiction* R 73/7.

95 We are of the view that interest should be available when judgment is given by default. A plaintiff should not be penalised (by forfeiting the right to statutory interest) for taking advantage of the default procedure. (Compare a claim for summary judgment (para 96 below) which, in the event, is undefended or where the "defence" is merely a token: the court will routinely award interest under s 87 if it is sought.) The same conclusion has been reached by a number of other law reform bodies which have recently considered this question. To deny interest simply because the judgment is by default (a process which is desirable because it is quick and efficient, and keeps undisputed claims from the judicial process) is illogical and anomalous. The basic principle remains the same: a plaintiff entitled to money has been kept out of it, and has been forced to resort to the court to obtain payment. We are conscious that extending the right to interest to default judgments will allow interest on a whole new range of claims. We have considered the possibility that this may cause difficulties for consumers in particular. We think however that consumers are more likely to be detrimentally affected by loan or hire purchase arrangements or other credit agreements (which because they provide for interest already, fall outside the present scheme) than by a liability for interest on unpaid debts. Rule 460 should be amended to reflect the new regime.

96 *Summary judgments*: The summary judgment procedure allows a judgment to be given without a full trial in cases where there is no real defence (although a statement of defence may have been filed). Rule 136 of the High Court Rules provides:

136. Judgment where no defence - (1) Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant.

It is accepted that if the statement of claim properly claims and proves a right to interest other than under s 87, such interest can be awarded. In the alternative, since a judgment is given, the court is able to exercise its discretion under s 87, in contrast to the default judgment process. The court may also give summary judgment on liability and order a trial on quantum under rule 137. We propose that statutory interest under the new scheme should be available on sums awarded by summary judgment.

97 *Jurisdiction:* We propose that the scheme would apply to the District Courts and High Court alike. Different considerations may apply in tribunals such as the Disputes Tribunals. We are inclined to leave untouched s 20 of the Disputes Tribunals Act 1988, which gives a Tribunal power to include interest in an order. The "prescribed rate" under that section could, however, be the rate applicable from time to time under our scheme.

98 We do not at this stage propose to make special provision for arbitrators in the scheme. Arbitrators in New Zealand would appear to have the same powers in respect of interest as a court (see *K Sika Plastics Ltd v Earthquake and War Damage Commission* [1980] 2 NZLR 591; *Angus Group Ltd v Lincoln Industries Ltd* [1990] 3 NZLR 82). So they may award interest under s 87 or under the general law. We understand however that they may be particularly hampered by the "debt or damages" limitation in s 87 since many claims before an arbitrator cannot be so classified. A common example is a rent review under a commercial lease. Such an arbitration clearly is not analogous to a proceeding for debt or damages, but, if the review has been delayed beyond the date on which the new rent was to take effect, too much or too little rent may have been paid in the interim. The arbitrator's award, the primary purpose of which is to fix the revised rent, is also effectively the basis for determining the exact amount of the over- or under-payment, but it is not clear if that is sufficient to give rise to a right to interest, absent express provision in the lease. In our recent report on Arbitration (NZLC R20, 1991, paras 252-261) we recommended that a new Arbitration Act should confirm the proposition that an arbitral tribunal has the same powers as to remedies and relief as the High Court: draft s 10. The provision would also give a specific power to award interest on sums awarded or in issue in the proceedings, s 10(1)(b). The provisions of the proposed scheme for statutory interest would presumably apply to arbitrators under the present law, and would certainly do so on the enactment of the draft Arbitration Act. So there is no need to make provision in the scheme. Nor would s 10(1)(b) of the draft Act continue to be necessary if the scheme were adopted: we think that "money judgment" as defined above should include arbitral awards whatever the issue, and the extension of the entitlement to sums paid after the commencement of

proceedings will overcome the lack of jurisdiction to award interest in respect of part or interim payments, and also the type of situation exemplified by the rent review example above. We would be helped by comments on particular issues relating to issues dealt with in this paragraph.

99 *Effect on consumers:* It may also be suggested that this change in the law will adversely affect consumers or small businesses. We would of course be greatly concerned if adoption of our proposals were to cause hardship for either, particularly in the current climate. We think, though, that this is unlikely to happen. Where consumers purchase goods and services on credit they generally do so pursuant to a contract which gives the supplier the right to charge interest on late payments, and at a rate substantially higher than would apply under our scheme (credit card debts are a good example). Our proposals will not apply to such contracts. Statutory interest on small debts will itself be a comparatively small addition to principal in individual cases. Perhaps most importantly, the right to interest will only arise on the issue of proceedings. We think that if a creditor has been forced to resort to legal proceedings in an attempt to recover an outstanding debt, that creditor should be entitled to compensation for the loss suffered through the delay. While we are not unsympathetic to the position of those who have difficulty in paying their debts, we are also given to understand that overdue debt is a major problem for small businesses who are the most likely to have omitted to make contractual provision for the possibility of delay in payment. There seems to us to be no good reason for consumers to re-adjust their bargain with those who supply them on credit by unreasonably delaying payment after it falls due and, at the same time, making no compensation.

100 Finally, we note that other law reform bodies who have considered this problem have reached similar conclusions. They also noted much difficulty in finding satisfactory ways to exclude consumers from coverage, while also achieving the broad aim of the reform. The English Law Commission concluded:

In our working paper we suggested that no distinction should be drawn between debts incurred in the course of business (commercial debts) and those not so incurred (non-commercial debts). Everyone who sent us comments agreed with us on this point. We canvassed the idea of excluding small debts from the scheme by providing a cut-off point, say £100, below which debts should not carry statutory interest. The almost universal response was that the exclusion of small debts by means of an arbitrary limit would create anomalies and injustice and was not desirable. The general reaction was that the case for statutory interest on small debts was at least as strong as in relation to large ones; some maintained that it was stronger.... We think it would be more appropriate for problems concerning the payment of household bills to be dealt with by [other] means than by exempting such debts from carrying statutory interest. (para 53)

101 The Law Reform Commission of Hong Kong took a similar approach, emphasising the need for neutrality, and recommended that interest be available as of right on all debts. So did the Law Commission of New South Wales which considered the matter in the context of its community law reform program, the Law Reform Commissions of Manitoba and British Columbia (the former Commission recommended that the claim for interest be printed directly onto the prescribed claims forms so that all parties were aware of the legal position) and the Law Reform Commission of Western Australia which initially recommended that, to maintain consistency with a pre-existing rule about post-judgment interest, pre-judgment interest should not be available on judgments of less than \$750 obtained in Local Courts; in a later review of Local Courts, the Commission recommended that the limit should be abolished in both cases.

102 Even so, the Law Commission considers that the likely impact in practice of the proposal should be taken up directly with organisations that are representative of consumer, small business and community interests. It will take this step as part of the consultative processes following publication of this paper.

Setting the prescribed rate

The prescribed rate should change monthly following the movement of a readily available commercial indicator such as the average first mortgage lending rate.

103 Section 87 presently provides for the "prescribed rate" to be adjusted by the Governor-General by Order in Council. The most pressing problem with s 87 - the failure of the prescribed rate to reflect changing commercial conditions - would to a large extent be overcome if such an adjustment took place on a regular basis. In fact, the s 87 rate has been adjusted only once since 1974, when it was raised to 11% in 1980. Even if the rate were adjusted more frequently, uncertainty would be created unless adjustments were regular and clearly linked to some appropriate index. Accordingly, the Commission is of the view that periodic adjustment on a rough and ready basis should be rejected in favour of a more systematic, accurate - and consequently fairer - scheme.

104 We prefer the concept which has been adopted in a number of jurisdictions, particularly those in Canada (see Chapter II, and the provisions set out in Appendix B), where a rate of statutory interest is fixed by reference to a readily available commercial indicator. Such an approach is transparent. It also ensures that the prescribed rate reflects changing commercial conditions; that is vital to the provision of proper compensation. Once a procedure has been established to ascertain the rate and ensure its availability, the process of regular adjustment should become more straightforward, with advantages for those responsible for administering the system.

105 No matter what process is adopted for making the rate available to users (see paras 121-123), the prescribed rate should be based on an indicator which is readily available in raw form. First, it ensures that the statutory rate is based on commercial reality. Secondly, and more importantly, using a publicly available rate allows litigants to predict accurately the effect of the award of statutory interest on their claim or obligation. For the reasons set out below (paras 103-114) we have reached a tentative conclusion that an appropriate indicator on which to base statutory interest is the first mortgage interest rate. This information is readily available, for example in the tables published in the *Reserve Bank Bulletin*.

106 *Adjusting the rate:* The statutory interest rate might be adjusted (by reference to the change in the chosen indicator) at any interval from annually to daily. Very low or very high frequency of adjustment both cause some difficulty. As all of the indicators which might be appropriate are available as monthly averages, this frequency suggests itself as the most useful basis on which to proceed. Monthly adjustment of the rate ensures reasonable accuracy without the difficulties which more frequent change might cause.

107 *Choosing the indicator:* The primary function of the prescribed rate of interest is compensatory: it should therefore reflect what a successful plaintiff might have done with the money now being recovered if payment had not been delayed.

108 We have considered the indicators used as a basis for statutory interest in other jurisdictions. Some of these are set out below.

INTEREST RATES IN OTHER JURISDICTIONS

United Kingdom: Discretion. Several rates are used in practice, but the Short-term Investment Account rate is common in personal injury cases and the Minimum Lending Rate plus 1% in commercial cases.

British Columbia (recommended): Prime Lending Rate charged by [a named banker] to its most creditworthy borrowers.

Ontario: "Bank rate" - the Bank of Canada minimum rate for short-term advances to the chartered banks.

Northern Territory: The rate applying to Ten Year Commonwealth Bonds in that financial year.

Victoria: The "penalty interest rate" is a maximum rate, fixed by the Attorney-General after obtaining a recommendation from the Treasurer as to an appropriate rate charged for loans or paid for borrowings by a public or commercial institution, and which in the Treasurer's opinion, reflects prevailing commercial rates of interest. The rate is adjusted quarterly.

109 That comparative survey is of little help to us in choosing an indicator on which to base the statutory rate, since practice elsewhere does not suggest that any one indicator is the most appropriate. It is necessary therefore to assess the various indicators available in New Zealand. Some of the rates available in New Zealand which might be used are set out in the table below.

INTEREST RATES IN NEW ZEALAND

Reuters' rate: A wholesale rate used between banks for compensation for unjust enrichment, based on call-money market rate.

Call money market rate: A short term commercial investment rate.

Bank bill (30 or 90 day): A short-term commercial investment rate. (Although the primary purpose of bank bills is to raise short-term finance, there is a secondary investment market in the bills which are sold at a discount from face value. The "yield" represents the difference between the price paid and the bill's value on redemption, expressed as a percentage figure and so comparable to an interest rate.)

Government stock yield: Similarly government stock is sold at a discount and later redeemed for face value. Treasury bills and government securities are available over various terms from 90 days to 10 years and individual yields will reflect perceptions about future interest rate movements.

First mortgage housing rate (prime rate for new borrowers): A lending rate, traditionally low relative to commercial lending rates, but still significantly higher than any of the investment rates noted above. (The figure published in the *Reserve Bank Bulletin* is an average of trading bank rates.)

Base lending rate: The base lending rate for loans from trading banks: commercial rates of interest start at this point. (Again, the official figure is an average from the trading banks.)

110 On the compensation principle the chosen indicator should reflect as closely as possible the loss suffered by an average plaintiff. That suggests rejection of any of the "wholesale" rates, such as the Reuters' rate and other rates which have practical application only to transactions between banks and finance houses. Since plaintiffs do not usually have access to funds at these rates in the normal course of events, they should be rejected as a basis for the statutory rate. Similarly, the government stock rate is the rate which the *government* pays for borrowing funds, and has little reality as a borrowing rate for litigants, although it can of course be seen as a conservative investment rate.

111 A critical question is, "Should the statutory rate be a borrowing or an investment (or lending) rate?" It is inherent in money markets that borrowing rates are higher than lending rates. Practice elsewhere seems to show a preference for a lending rate in personal injury and other tort damages cases (if interest is justified at all), and a borrowing rate in commercial or contract cases. In the New

Zealand cases where interest has been awarded as damages, there seems to be a preference for a borrowing rate in the majority of cases, including some cases where the court has not relied on any particular evidence of the plaintiff's actual conduct.

112 The Law Commission, at this stage of its deliberations, holds the opinion that the statutory interest rate should be based on a conservative borrowing rate. That should create the correct incentive by encouraging early payment (and preventing defendants using creditors as de facto "bankers"), without causing unfairness to reasonable defendants exercising their right to litigate a disputed claim. And if the underlying assumption is, as we presently believe it should be, the compensation of a plaintiff who is in a financially neutral position, the failure to be paid whatever is ultimately held to be owing will require borrowing. If that is not the case, an investment or lending opportunity will have been lost. Overall, there seems to be sense in choosing a well understood but conservative borrowing rate.

113 The most conservative retail borrowing rate is the first mortgage housing rate (prime rate for new borrowers). Slightly higher (about 0.5% to 1%) is the average base lending rate for the trading banks, which reflects a more commercial context. Either of these rates would seem likely to be satisfactory, and both appear to have been relatively stable over time. Both are significantly lower than other lending rates, for example overdraft rates.

114 We have an initial preference for the first mortgage housing rate. It is a very familiar rate. It is credible as a lending rate for solvent plaintiffs. And statistics about it have been kept for many years (which seems likely to continue). We recognise that the first mortgage interest rate is one which cannot be said to have direct application to commercial matters, also that it can be prone to manipulation for political purposes. These are factors which may militate against its choice. It is a matter on which we will be very interested to receive comment.

A fluctuating rate

The interest rate to be applied in each case should fluctuate to reflect the changes in the prescribed rate.

115 Assuming for the present that the first mortgage interest rate is the appropriate indicator on which to base the prescribed rate, the next step is to consider how the prescribed rate is to be applied to litigation and the assessment of damages.

116 We have already suggested that the prescribed rate should be adjusted monthly following movements in the first mortgage interest rate. That in itself does not provide a complete solution to the problem of providing proper compensation. We adverted in paras 56-59 to the concerns of some Canadian law

reformers about a prescribed rate that, once ascertained for the purposes of a particular award of damages, was fixed for the whole of the period for which interest was to be assessed, regardless of any fluctuation in market interest rates over the relevant time. The Manitoba Law Reform Commission, for example, had this to say:

The Commission has concluded that the use of a constant rate of interest may result in an inaccurate assessment of the loss which prejudgment interest attempts to repair. ... Given the fluctuation and the acceleration of Canada's inflation rate, a constant prejudgment interest rate fixed throughout the duration of a legal dispute will not necessarily accommodate the actual decline in the value of money from the date loss was incurred to the date of the judgment, a period of time which may extend to several years. Moreover, a constant rate may actually result in overcompensation to the plaintiff, thereby unduly penalising the defendant. (28)

We agree with that analysis. A constant rate, even if based on a commercially realistic indicator, cannot fulfil the compensation objective of statutory interest, particularly when rates are shifting rapidly.

117 We also agree with the solution advanced by the Law Reform Commission of British Columbia: that the rate applied in each individual case should fluctuate as the prescribed rate itself fluctuates. It is true that this will make the calculation of interest rather more complicated. But that has never been an excuse for denying a successful litigant proper compensation. We also believe that the calculations can be greatly simplified by the adoption and publication of a table of multipliers (see paras 121-123).

Compound interest

Statutory interest should be compounded monthly.

118 Interest at common law, if awarded at all, is invariably simple interest, although in contrast, *Wallersteiner v Moir (No 2)* confirmed that equity would award compound interest in certain situations (see para 36). The traditional common law reluctance to adopt this method of calculating interest is reflected in the statutory provisions, including s 87, which expressly prohibit the award of "interest on interest" or compound interest, although s 65A of the District Courts Act 1947 which was enacted in 1982 appears to provide for compound post-judgment interest.

119 But simple interest does not reflect current commercial or business practice. Usually interest on an investment will be compounded at least yearly, if not at more frequent intervals. Although rejected by the Law Commission in England in its review of interest on damages (on the grounds of complexity), compound

interest seems necessary to compensate a plaintiff properly. Particularly as the size of the debt or damages and the term for which it has been outstanding increase, the difference between compound and simple interest can be very large.

120 Compound interest can be easily generated with a simple computer program, and be built into the table of multipliers. Since we propose that the prescribed rate should be adjusted monthly, it seems appropriate that compounding take place monthly also. That will maintain consistency in application. We recognise that monthly compounding will affect the total interest payable, making it significantly higher than would semi-annual or annual compounding. That may be another reason for choosing a lower rate of interest like the first mortgage housing rate as the primary indicator. Additionally or alternatively the rate chosen for compounding could be slightly discounted.

Making the rate available

Calculation of statutory interest should be expedited by the compilation and publication in the *New Zealand Gazette* of a table of multipliers for each month.

121 To enact no more than that the prescribed rate is "the rate known as the first mortgage interest rate and published in the *Reserve Bank Bulletin*" or some similar formula may well create difficulties - in particular, of inaccessibility. We propose therefore that the prescribed rate should be used to generate tables of multipliers. Such a table (taken from the report of the Law Reform Commission of British Columbia whose recommendations we here adopt) is set out below.

ADJ. PRIME RATE MULTIPLIERS DEC. 1986

RATE

ADJ.> -0.25%*

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975.....	4.057	4.021	3.987	3.957	3.928	3.900	3.871	3.843	3.816	3.788	3.758	3.729
1976.....	3.699	3.670	3.642	3.613	3.583	3.553	3.524	3.495	3.466	3.437	3.409	3.381
1977.....	3.354	3.329	3.305	3.281	3.258	3.235	3.213	3.191	3.170	3.149	3.128	3.108
1978.....	3.087	3.067	3.046	3.026	3.005	2.982	2.960	2.938	2.916	2.893	2.870	2.844
1979.....	2.818	2.791	2.764	2.738	2.711	2.685	2.659	2.633	2.606	2.580	2.553	2.522
1980.....	2.492	2.461	2.432	2.402	2.370	2.338	2.312	2.287	2.264	2.242	2.219	2.196
1981.....	2.171	2.139	2.107	2.076	2.046	2.016	1.984	1.952	1.917	1.882	1.850	1.820
1982.....	1.794	1.769	1.746	1.722	1.699	1.675	1.652	1.628	1.605	1.584	1.565	1.548
1983.....	1.531	1.516	1.501	1.487	1.473	1.460	1.447	1.435	1.422	1.409	1.397	1.384
1984.....	1.372	1.360	1.348	1.336	1.323	1.311	1.298	1.285	1.271	1.257	1.244	1.232
1985.....	1.220	1.209	1.198	1.187	1.176	1.166	1.156	1.146	1.136	1.127	1.118	1.109
1986.....	1.100	1.091	1.081	1.069	1.059	1.049	1.041	1.032	1.024	1.016	1.008	1.000
1987.....												
1988.....												
1989.....												

* Discount. See para 120.

One rather apt description of such tables is that they resemble an escalator. The month of entitlement (or quantification) tells the user where to get on and the month of judgment where to get off. We are confident that the tables can be generated very easily with a simple computer programme. The table above would apply to any judgment debt paid in December 1986. The appropriate multiplier would be that given for the month in which the damages are quantified. Thus a debt arising in January 1982 would, for purposes of payment in December 1986, be multiplied by 1.794.

122 The only purpose of the tables is to simplify the process for users. As the Law Reform Commission of British Columbia put it:

It is important to stress that the use of a table of multipliers is not a new and radical method of awarding judgment interest. Instead it is intended as an easier method of calculating the *quantum* of judgment interest payable. ... The multiplier itself reflects the accrual of interest from the relevant date to the date the order was made. Counsel is thereby relieved of the tedious task of making interest calculations for each different rate that might have been in force during the prejudgment period.

And of course the effect of compounding interest will be built into the table.

123 We anticipate that the table would be generated in the Courts Division of the Department of Justice, using a computer and spreadsheet programme, and based on information from the Reserve Bank as published in its *Bulletin*. The tables should then be published in the *New Zealand Gazette* each month by a named official.

Interest from the date of entitlement

Statutory interest should be awarded from the date an entitlement to interest arises to the date of payment.

124 Interest should run from the time opportunity costs begin to be incurred. That is the moment when the plaintiff becomes entitled to the money and fails to receive it. Any later starting point for the award of interest results in undercompensation to the plaintiff. The relevant date will generally be the time the cause of action arose. (The treatment of a loss which arises on one date, but is quantified at another will be addressed below, see paras 127-138.)

125 The principle of compensation should not be compromised by the use of the interest mechanism to promote certain policies in relation to the conduct of proceedings. An example of that practice is provided by Turner J in *Tauranga Harbour Board v Clark* [1971] NZLR 197:

As for the date from which interest should run, principle may appear to support an award as from the date of death. I have already indicated the reasons why as a matter of pure theory Mr Hillyer's argument to this effect might be thought sound. But ... an award only from the date of the issue of the writ may encourage the prompt and efficient conduct of litigation; and perhaps it would be unwise to leave the plaintiffs in the position that they could defer the issue of a writ until the last possible moment, securely relying on the Court to make an award of interest in due course. (201)

Tauranga has since been disapproved as laying down any general principle, see *Day v Mead* [1987] 2 NZLR 443, 463 where Somers J said that interest should run between the time the cause of action arose and judgment. We are aware that, from time to time, interest continues to be reduced to penalise a plaintiff for delay. That will no longer be appropriate under our proposal. The defendant may be able to accelerate proceedings if the plaintiff is delaying. If the delay results from attempts to settle a dispute, it should be encouraged, since it is not desirable for unnecessary litigation to proceed. If the plaintiff has been guilty of inexcusable delay, the court has the ability to punish that conduct in other ways, in particular by using its discretion to award costs to mark its disapproval, or, in an extreme case, by striking out the proceedings.

126 Interest should run up to the date of payment of the judgment debt. We can see no good reason for maintaining the present distinction between pre-judgment and post-judgment interest. The matter is discussed further in paras 172-175.

Different dates of quantification and entitlement

If an entitlement to money arises at one date but is quantified in respect of another, interest should be awarded from the date of quantification to payment. If the date of quantification is the date of trial (for example, damages for defamation), interest should be payable from the date of judgment to payment.

127 It will not be appropriate in all cases to assume that interest should run on the awarded damages from the date on which the plaintiff became entitled to the debt or damages, that is, the date on which the cause of action arose. It is not uncommon for a plaintiff's loss to be assessed in money terms long after the cause of action arose.

128 We use the term "date of quantification" to refer to the date *in respect of which* damages are quantified. In a simple example, on 1 January 1988 the defendant breaches a contract. So, the cause of action or entitlement comes into existence on that date. The matter does not come to court until 1 March 1991, when an oral judgment is given. The judgment records the cost, on the day of judgment, of the thing contracted for and awards damages in that amount. The

date of quantification therefore is 1 March 1991 and differs from the date of entitlement which is 1 January 1988.

129 It is reasonably common in tort cases for damages to be assessed in this way: at the date of trial in current dollars. In defamation actions and other cases where general damages are awarded, the damages are generally regarded as an economic approximation for a non-economic loss, measured in current dollars, and the date of quantification will generally be the trial date. In some actions, like the example above, the damages may be of a pecuniary nature (for example, the cost of repair), but are assessed at the date of trial rather than the date of damage in order to ensure the plaintiff is indeed fully compensated. In all these cases the date of quantification will be different from the date on which the plaintiff became entitled to the sum due. In such cases, an inflationary component will already be built into the award. To award full statutory interest from the date when the cause of action arose would over-compensate the plaintiff.

130 *Current practice:* The courts often allow for these factors in assessing interest in such cases. For example, in the analogous case of compensation under the Public Works Act 1981, the usual approach is that set out by the Court of Appeal in *Drower v Minister of Works* (see para 69) which suggests that the dollar value of compensation should be adjusted by inflation (measured by change in the Consumer Price Index) to compensate for the change in the value of money since the date of valuation, plus an additional factor of real interest at a rate of 2%.

131 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 was a case about a defective building. In 1975 the High Court held that no negligence had been established but, in case this was wrong, also assessed damages based on the cost of repair at the time of trial. The Court of Appeal, finding the defendant negligent, allowed an appeal from that decision. The judges accepted the High Court's findings about loss. It seems to have been readily accepted that there was full compensation once inflation had been accounted for (by assessing current costs). The Court of Appeal did award interest under s 87 at 7.5% from the date of the High Court judgment, on the basis that repairs would cost a good deal more at the time of the appeal than at the time of trial. It did not accept an argument that, since the plaintiffs had not done the repairs, they had not been out of pocket.

132 A different approach was taken in *Dellabarca v Storemen and Packers Union* [1989] 2 NZLR 734, where a jury had made an award of \$15 000 general compensatory damages and \$20 000 exemplary damages. No interest was awarded on the exemplary component of the award (see para 149), but, in relation to the compensatory damages, Smellie J awarded interest at 11% for five years prior to the date of the judgment (the cause of action had arisen eight years earlier), saying

By that means I make some allowance for the fact that the jury were invited to take inflation into account and also for the fact that because of the complexity of the case the first defendant would require some

time to consider its position before deciding whether to admit liability or not in respect of the second cause of action.

133 In *Wilson v New Brighton Panel Beaters* [1989] 1 NZLR 74, a case concerning trespass and conversion of a car, the court assessed damages at the car's value at the date of the conversion and accordingly allowed interest at the statutory rate from the date the cause of action arose to judgment: "the appellant has of course been out of his money since the date when the vehicle was taken away" (at 81).

134 In some other cases no interest has been given on awards of general damages: see, for example, *Edwards v Attorney-General* [1986] 2 NZLR 232 (wrongful arrest); *SSC & B: Lintas New Zealand v Murphy* [1986] 2 NZLR 436 (misuse of confidential information, conspiracy). Interest was not discussed in the judgments, and was probably not sought.

135 Our proposal attempts to rationalise the matter by stating what we see as a clear principle: interest should be awarded from the date of quantification to the date of payment. If, as in the *Bowen* case, damages are assessed at the date of trial, there will be interest from judgment to payment. If they are assessed at the date the cause of action arose, statutory interest should be awarded for the full period. If damages are quantified in respect of a date somewhere between the time the cause of action arose and judgment, interest should be awarded from the date of quantification to the date the judgment debt is paid. Obviously the court will need to consider and clearly state the date of quantification of each component of the award.

136 *Real interest:* We accept that this approach, which would not allow pre-judgment interest where the damages are assessed in respect of the date of trial, has not been universally adopted so far as it denies compensation for loss of use from the time the cause of action arose. If damages are assessed in "trial" dollars, it is clear that the opportunity cost arising from *inflation* has been successfully compensated. But the analysis under the Public Works Acts, for example, suggests that another opportunity cost - the opportunity to earn a return, or "real" interest on the damages since the date of damage - has not been compensated. Under the Public Works Act 1981 and in some other jurisdictions this loss is compensated by the award of a small percentage of "real" interest (between 2 and 4% per annum) in addition to the inflation-proofing which results from the time of assessment. The problem was dealt with in a similar way by the House of Lords in England for interest on damages for non-economic loss in personal injury cases (*Wright v British Railways Board*, see para 41 above).

137 In this scheme, such compensation is not proposed for several reasons. In a case such as *Bowen*, where the damages are not for investment but for repair, it seems unlikely that the plaintiff would have earned the return contemplated by such an award; instead the funds would have been put to use immediately. And in the case of an award of general damages for distress or for defamation, the

figure is in any case a global one, at best an approximation. The degree of accuracy envisaged by the award of statutory interest could not result, since it would involve the application of economic criteria to an award which is not itself based on such criteria. More generally, comparison of inflation and interest rates shows that often there is no useful correlation between the two as demonstrated by the graph in para 3.

138 On the other hand, it may be argued that it is not the business of the court to enquire what the plaintiff will do with the funds - if the plaintiff does not wish to repair, for example, he or she is under no obligation to do so. Our scheme would, in this respect, create a (rather slight) anomaly. We look forward to responses on this matter.

Components of the award quantified on different dates

If different components of the award of damages are quantified on different dates, statutory interest should be separately awarded on each component of damages.

139 It follows from the last proposition that if an award of damages includes several different components which arise at different times, then interest should be assessed separately in respect of each.

140 Again, this is something which the courts are already doing in practice, both under s 87 and in respect of interest as damages. One recent example is provided in *Benjamin v Wareham Associates Ltd* (1990) 1 NZ Conv C 190,638 where the damages consisted in part of instalments of rent falling due on a monthly basis. McGechan J noted that the calculation of interest on sums accruing incrementally "can have its difficulties", but ordered interest under s 87 on each instalment as it fell due, reserving leave to apply for directions in the event of disagreement over the calculations.

141 Interim payments would be dealt with in a similar fashion. In the case of a part payment, interest should run on the total liability only to the date of part payment. After the payment common sense dictates that interest should only be assessed with reference to the total outstanding. This is not a matter with which the courts appear to have had difficulty in practice.

No interest on future losses

No statutory interest should be awarded on future loss.

142 It is self-evident that a plaintiff who has not yet suffered the loss for which damages are awarded, has not been kept out of money. Indeed, when the judgment is paid, the plaintiff will actually have received the money in advance.

Therefore no interest should be awarded on, for example, that part of an award of damages which is to compensate the plaintiff for future losses. Indeed the sum may well be discounted. This is a matter of limited relevance in New Zealand: elsewhere it usually arises in relation to personal injury claims. It will be relevant, for example, in cases where damages are assessed by reference to future earnings. Interest on future loss damages is expressly disallowed under the Victorian, Commonwealth and Canadian provisions. Proper compensation can be achieved by use of the discretion in a number of other jurisdictions.

Cases where statutory interest should not be awarded

No statutory interest should be awarded

- if the plaintiff does not claim it,
- on costs (except after judgment),
- on exemplary damages (except after judgment),
- where the parties have a valid agreement about interest,
- where another enactment provides for interest,
- to the extent that damages already compensate for opportunity costs.

143 *Where no application for interest is made:* Rule 108(c) of the High Court rules provides:

108. Statement of claim to show nature of claim, etc - The statement of claim- ...

(c) Shall state specifically any claim for interest; and ...

This provision appears to require any claim for interest to be notified, whether it arises within the general law or under s 87. However, in *A W Furby Ltd v Ultra Holdings Sixty Six Ltd* (unreported, HC - Blenheim, 13 March 1989, CP 2/89, Master Hansen) an amendment to the pleadings was allowed in respect of interest. The Master suggested that s 87 gave a complete discretion and interest need not be pleaded, although it was certainly preferable that it was.

144 Most jurisdictions which we have surveyed require an application to be made before an award of interest will be considered. The exception is British Columbia where the Court Order Interest Act provides that the court must award interest although a creditor may waive in writing the right to an award of interest (s 2(d)).

145 We think that if any party wishes to invoke one of the exceptions and argue that interest should be awarded at a rate other than the prescribed rate, the other parties and the court should have notice of that, so that the matter can be properly determined. For the sake of certainty it seems preferable that interest be pleaded in every case. If interest is so unimportant to a plaintiff that it is not sought, there seems no good reason to award it. Indeed, in some cases - as s 2(d) of the

Court Order Interest Act recognises - it may be that the plaintiff actively does not wish to pursue a claim for interest. If interest is mistakenly omitted from the statement of claim, that can be amended.

146 A requirement that interest be included in the statement of claim does not appear particularly onerous. Once the preliminary step is taken, our scheme would generally make it mandatory for interest to be awarded.

147 *On costs (except after judgment):* An award of costs represents compensation to the party to whom they are awarded (usually the successful party: "costs follow the event" in general) for the price of vindicating legal rights.

148 Pre-judgment interest on costs is expressly excluded by the Canadian enactments, and apparently excluded in practice under the other provisions surveyed. The Commission is of the opinion that this is the correct approach. Costs are assessed at or shortly after judgment. The bulk will have been incurred at the time of trial. In respect of amounts incurred earlier, disbursements in particular, it would simply be inefficient to assess interest on each and every component. Therefore, no interest should be awarded on costs for the period before judgment. Once costs are quantified however, they should attract interest until payment. There would be no change from the present rule that costs are included in the judgment debt for interest between judgment and payment.

149 *Exemplary damages:* As we have emphasised in the course of this paper, interest on damages is awarded to compensate a successful plaintiff for the delay in the payment of damages from the time they fell due. Exemplary damages fall outside this criterion because they are not compensatory, being used instead to punish the defendant for outrageous conduct and deter others from behaving in a similar fashion. Exemplary damages are already a windfall to the plaintiff and it would be inappropriate to award pre-judgment interest on them. This was recognised in *Dellabarca v Storemen and Packers Union* (see para 132 above) where a jury had awarded the plaintiff \$15 000 general damages and \$20 000 exemplary damages for his claim of inducing breach of contract. In the exercise of his discretion, Smellie J awarded the plaintiff interest on the general damages but said "because of their particular character and function, I decline interest in respect of the exemplary damages". (759)

150 In contrast is *Shattock v McDonnell* (unreported, HC - Whangarei, 8 January 1990, A 20/82, Wylie J), a trespass case in which the judge awarded both aggravated compensatory damages and exemplary damages against each defendant. The judge ordered that s 87 interest was due on all the amounts from the date of issue of the proceedings. On the view we take it would be necessary to divide up the award (indeed, the component parts were quite clear) and award interest only on the compensatory element.

151 Interest should, though, run on exemplary damages after judgment.

152 *Where there is an agreement between the parties:* Often the parties to a transaction will make specific contractual provision about any interest which must be paid in the event of default. As has been mentioned, this is very common in credit contracts, even where interest is not payable before the due date. Where the parties have made an agreement about interest, that should be upheld by the court in accordance with the express wishes of the parties and no statutory interest should be awarded, since that would overcompensate the plaintiff.

153 There may be some question about what constitutes an agreement about interest. The clearest case will be the one where it is provided in writing that late payment of a sum due under a contract will create a liability for interest at a particular rate until payment is made. A common example is provided by the REI-NZLS standard form contract for the sale and purchase of property which states:

3.3 If from any cause whatever save default of the vendor any portion of the purchase price is not paid on the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment;

That is a very straightforward example of a contractual term about interest but less certain cases can be envisaged. We think that the existence of an agreement about interest, like the existence of any term of a contract, should be a matter for the court in each case. If a party can establish that there was an agreement about interest, whether oral or in writing, effect should be given to it.

154 *Where another enactment provides otherwise:* Where another enactment such as s 57 of the Bills of Exchange Act 1908 or s 94 of the Public Works Act 1981 specifically provides for the award of interest, that should take priority over statutory interest. That is presently the case under the general saving for enactments in s 87(1)(b). (We would not think it necessary to carry over the present s 87(1)(c) which states that damages for the dishonour of a bill of exchange are not to be affected by the provision: since damages for the dishonour of a bill are permitted under s 57 of the Bills of Exchange Act, the matter is sufficiently addressed by a general provision relating to enactments.) Some statutes which provide for the assessment of "compensation" in a very general way have been held to include the award of interest if fair compensation cannot be given without taking that into account (see, eg, *Accident Compensation Corporation v Broadbelt* [1990] 3 NZLR 169, and the cases under the Public Works Act 1928). A preliminary list of provisions is set out in Appendix C. It is probably incomplete, and we would be pleased to be notified of other relevant provisions.

155 Some enactments may require amendment in light of our proposals. For example, s 27 of the Partnership Act 1908 provides that a partner making advances to the partnership over the agreed subscription is entitled to interest at

5% per annum. That figure reflects the traditional Chancery interest rate and, in any event, should be updated (see *Hieber v Hieber* (para 39) for the assessment of equitable interest by the Court of Appeal). We make some suggestions about other provisions which might benefit from amendment in Appendix C and hope for submissions on this matter as well as on the main body of the paper.

156 Section 87 is often used as a convenient yardstick to measure what interest is appropriate where the particular provision establishes merely that interest "may" be awarded. We think it likely that this would continue to occur with a new regime and there should be no difficulty with this.

157 *To the extent that damages already compensate for opportunity costs:* This provision effectively acknowledges the continuing existence of the common law rules which allow the award of interest. It is implicit in the statement that these rules should continue to develop. Efficiency arguments might suggest that the new scheme should be mandatory and the prescribed rate applied in every case; that it overtake the admittedly defective common law rules. However, an essential point which has weighed with us is that if a plaintiff can justify a higher rate of interest than under the statute (perhaps under the second limb of *Hadley v Baxendale*) this need not be prohibited by our statutory scheme.

158 Thus, in appropriate circumstances, the courts would continue to award damages measured by interest paid in fact. For example, in a situation similar to that in *Dods v Coopers Creek Vineyards Ltd* [1987] 1 NZLR 530 (see Appendix D) it might be appropriate for the court to award interest measured by the actual overdraft interest paid by the plaintiff. There are also the limited exceptions to the general prohibition, such as the rule in *Cook v Fowler* (1874) LR 7 HL 27, under which interest is clearly a head of damage naturally arising from breach and available as damages under the first limb of the rule in *Hadley v Baxendale*. (The rule applies where there is a written security for the payment of money on a certain date with interest to that date. If the principal and interest are not paid when due, they become a debt to which damages arising from the failure to pay attach, rather than an additional liability for interest on the debt). Another example of a remedy which includes opportunity costs is the equitable remedy of account of profits. In these and analogous situations, the plaintiff's loss is adequately compensated by the damages award: statutory interest is unnecessary.

A limited discretion

The court should have a limited discretion to depart from the terms of the scheme for statutory interest, to be exercised in exceptional cases.

159 The basic scheme (including the exceptions to it) is intended to provide an appropriate remedy in all cases. To trigger a departure from it in favour of a discretionary approach, the parties or the court should be required to point to special features of the individual case which make departure from the statutory

rate necessary or desirable.

160 Other jurisdictions which have enacted a limited discretion of some kind provide indicators as to what might be appropriate, as in the following examples.

- In England, interest must be awarded on damages for personal injury *unless the court is satisfied that there are special reasons to the contrary*.
- The Commonwealth of Australia model provides that interest must be awarded *unless good cause is shown to the contrary*. Several jurisdictions in Australia have statutes in very similar terms.
- In New Zealand, s 57 of the Bills of Exchange Act 1908 provides that interest may be withheld *if justice requires it*.
- In the original interest provision in Ontario, the judge could depart from the statutory rate on the basis that it was *just to do so in all the circumstances*. Similar provision is made under the Uniform Judgment Interest Act. The restatement of the Ontario rules now provides that when considering whether it is just to depart from the statutory rate, the court must *have regard to the changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration*.

In only the last of these cases is any specific circumstance mentioned as relevant to the exercise of the discretion, and the standard which must be met before the discretion is exercised varies widely between them. Both the wording and the nature of the discretion contribute to that. Only "exceptional" cases will meet the standard in England, but we understand that the first unfettered discretion under the Ontario statute was exercised frequently on broadly equitable grounds. It seems unlikely that the attempt to more clearly define the discretion will be successful: it remains broad which is unhelpful, and is unsatisfactory in principle so far as non-economic factors may be taken into account.

161 Since our proposal takes the form of a detailed and comprehensive scheme, and bearing in mind the need for certainty and efficiency, any discretion to depart from the statutory rate should be a narrow one, with wording that tends more towards the English example than the Canadian. We incline to the view that the discretion should be available only "in exceptional circumstances".

162 That should be sufficient to deal with any "hard" cases for which the proposed enactment may fail to provide. We hope that after we have concluded our research and consultation process there will be very few of those, but a failure of the provision to address a particular case should certainly be an exceptional circumstance. It may also assist in the cases where, for example, the plaintiff's delay has caused some real hardship or disadvantage to the defendant. But it will not allow a departure from the statutory rate for delay alone, which would be contrary to principle: in that case, the plaintiff has suffered a loss, and the

defendant enjoyed the use of funds over the period of delay.

163 The discretion might also be exercised where the loss that the plaintiff has suffered is so markedly different from that calculated by reference to the statutory rate that it would be completely unjust to apply that rate (for example, if the plaintiff was borrowing money at an especially high rate of interest). But again, the mere fact that the plaintiff was paying a rate higher than the statutory one should not be sufficient to trigger the discretion.

164 Since the discretion is to be exercised only in very limited circumstances, including those which we have not foreseen (or they would have been otherwise provided for), the court should be enabled to exercise it in a way which will best provide for the particular circumstances of the case. Once the initial high threshold has been reached, there should be freedom to award interest on any part of the sum due to the plaintiff at the rate and for the period which is appropriate on the facts, or to withhold interest.

Payments into court

Statutory interest should be deemed to be included in payments into court.

165 We do not think the present rules about interest on payments into court are satisfactory. Rule 363 of the High Court Rules provides:

363. Interest - (1) Where the Court would have jurisdiction in any proceeding to award interest to the plaintiff if it saw fit, a payment into Court shall be deemed not to include interest unless the notice of payment specifically states that it does; but it shall not be necessary to show any separate sum as being in respect of interest.

(2) Where a payment into Court does not include interest and is accepted in satisfaction, the plaintiff may, within 7 days of filing the notice of acceptance, make application to have the question of interest determined by the Court.

(3) For the purposes of determining whether, under rule 360, the plaintiff has recovered a greater sum than that paid into Court, any interest awarded shall be taken into account only where the payment into Court included interest.

(4) Nothing in this rule affects the power of the Court to decline to award interest in any particular case.

The effect of this rule is very limited if the plaintiff accepts a payment into court and then applies for interest. It seems the Court can only award interest under r 363 where the plaintiff has a right to interest at common law, in equity or under an enactment other than s 87: see the decision in *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156. In that case it was accepted that s 87 could not apply since no judgment had been given. Section 87 cannot operate in the absence of a

judgment. Counsel for the plaintiff argued that r 363(1) gave rise to a presumption that the plaintiff was entitled to interest, but that argument was rejected.

166 Instead, Chilwell J viewed the matter as one of jurisdiction (substantive rather than procedural law), and held that interest can only be awarded under r 363(2) where there is a source for the award in equity, at common law or under a statute. Where the plaintiff claimed interest on a payment into Court in an action for damages there was no such source. It could not be presumed that Parliament would have extended the High Court's jurisdiction or amended s 87 "by a side wind in a schedule containing the rules" (17).

167 *Kenton* was followed in *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* (unreported, HC - Auckland, 23 May 1990, CL 104/88, Wylie J). Wylie J appears to have found the *Kenton* decision a matter of "surprise" but was unable to fault the reasoning employed. He noted that it would be an unfortunate consequence if r 363 was rendered meaningless but suggested it may retain some limited application.

168 So, if a plaintiff accepts a payment into Court which does not specifically provide for interest, the general law continues to apply. If the defendant has not provided for interest, the plaintiff will be a great deal better off going to trial - hardly the purpose of the payment in procedure. We think this unsatisfactory. We propose instead that r 363 should be amended to provide that all payments into court are deemed to include interest (where it has been claimed) to the date of payment. Under the new proposal, it should be fairly clear to litigants what an interest award will amount to. And if the payment in does not include interest, it will be less than the amount to which the plaintiff will receive at judgment (assuming success), and so no detriment in costs will be suffered by the plaintiff for refusing to accept it. Another advantage of this approach is that, if the plaintiff accepts the payment in, there is no need for further proceedings to determine the amount of interest to be paid; the matter is finally determined immediately on acceptance. That seems desirable.

169 Where the parties reach a settlement in the course of litigation without using the payment in to court procedure we see no need to make provision for interest. The parties will presumably have taken interest considerations, in particular the fact that (proceedings having commenced) the plaintiff is entitled to receive interest on any judgment received, into account in reaching their agreement. The interest liability will be easier to assess under the new scheme. If they have not, the plaintiff will be entitled to apply to the court for interest.

Where damages are assessed in a foreign currency

Where damages are assessed in a foreign currency, the statutory rate should not necessarily be applied, but interest should be awarded at a rate appropriate on the evidence.

170 From time to time, a money judgment will be given in a currency other than New Zealand dollars. In that case, it seems appropriate that interest should be awarded at a rate which reflects economic factors and legal rules prevailing in the jurisdiction in whose currency the award is given. To award interest on such awards at a rate based on the state of the New Zealand economy might well be meaningless and completely fail to compensate the plaintiff (for example, if inflation and interest rates in the other jurisdiction are high) or, conversely, it might overcompensate the plaintiff. An analogous situation arises in relation to exchange rates: see the decision of the English House of Lords in *Miliangos v George Frank Textiles* [1976] AC 443 where it was held, not only that judgment could be given in foreign currency but that the correct date for converting that judgment to sterling was the date of eventual payment (rather than breach or judgment) because that date "gets nearest to securing the creditor exactly what he bargained for" (Lord Wilberforce at 469A).

171 The Law Commission is of the view that where a judgment is given in foreign currency it may be appropriate to give the court some measure of discretion in respect of interest. If a party to proceedings can show that a rate other than the prescribed rate should apply in the circumstances, and bring sufficient evidence to establish what the correct rate might be, we think the court should be able to apply that rate.

Abolition of post-judgment interest

There should no longer be a separate scheme for post-judgment interest. Interest after judgment should be awarded on the same terms as interest before judgment in every case.

172 When a judgment is given the cause of action merges into it (26 Halsbury 4ed, para 551). The successful litigant is left with a right to enforce a judgment debt. Pre-judgment interest under s 87 cannot be awarded on the judgment debt. Instead, post-judgment interest is awarded from the date judgment is given to the time the judgment debt is paid or enforced. The same principle of compensation applies. Post-judgment interest is awarded under r 538 of the High Court Rules, which provides:

538. Interest on judgment debt - (1) Every judgment debt shall carry interest from the time of judgment being given until the judgment is satisfied.

(2) The interest shall be at the rate for the time being prescribed by

or under section 87 of the Judicature Act 1908 or at such lower rate as shall be fixed by the Court.

(3) The interest may be levied under any execution order upon the judgment.

Section 65A of the District Courts Act 1947 is to similar effect, although it applies only to sums above \$3000, and provides that interest should accrue from month to month..

173 It can be seen that the rate of post-judgment interest is generally tied to the rate of pre-judgment interest. The court does have a discretion to award a lower rate than the statutory maximum, which might presumably be exercised if pre-judgment interest were awarded at a rate lower than 11%. Given the mandatory wording of subs (1), it seems unlikely that a court could refuse to award any interest at all.

174 We think that, under the new scheme, post-judgment interest should be awarded at the same rate and in the same manner as pre-judgment interest. For statutory interest, the multiplier tables can be used in exactly the same manner. In fact there no longer seems any reason to maintain the distinction between the two. It is simpler to refer to statutory interest, and to use the same tables in the same manner for the entire period.

175 If taken as a general principle, this will overcome some anomalies in the present law. An illustration is provided by a contract which provides for the payment of interest at a particular rate, for example in the event of late payment of a debt. The court can award the contractual rather than the statutory rate of interest from the date the debt was due to the date of judgment. But once judgment has been given, the merger of the cause of action into the judgment, which was mentioned above, takes place and interest after judgment is only awarded at the statutory rate *unless* the contract has been drafted so as to make it clear that this merger is not to take place. In that case the contractual rate continues to apply until the judgment debt is enforced: see, for example, *Marac Finance Ltd v Hill* (unreported, HC - Auckland, 13 August 1987, CP 46/87, Wylie J), following *Economic Life v Osborne* [1902] AC 147. Logically, the contractual rate should run through to payment in all cases. So we propose that interest should not merge into a judgment.

Commencement of new scheme

A new statutory interest regime should apply in any proceedings instituted after its commencement.

176 The Commission thinks that the new proposal should apply only in proceedings instituted after its commencement. It should not apply to causes of action already the subject of litigation; the rights and liabilities of parties should

not be retrospectively affected in that way, see *Takaro Properties v Rowling* [1987] 2 NZLR 700. We do not think it should apply only to new causes of action arising after the commencement of the scheme; there might then be two regimes in force for a very long time, which is not satisfactory.

Appendix A

List of Recommendations of the Law Reform Commission of British Columbia

This appendix sets out the list of recommendations concerning the award of interest on debt and damages made by the Law Reform Commission of British Columbia. It is taken from that Commission's *Report on the Court Order Interest Act*, LRC 90 (1987) 110-115. Page references have been omitted.

B. List of Recommendations

- 1 (1) *The Court Order Interest Act* should be repealed and replaced by legislation (hereafter referred to as "the New Act") which embodies the recommendations made in this Report.

(2) Subject to those recommendations, the New Act should carry forward the policies of the *Court Order Interest Act*.
- 2 The New Act should not confer upon courts a general discretion to withhold prejudgment interest from a litigant otherwise entitled to it.
- 3 (1) Under the New Act courts should have a discretion to fix a rate of interest only in cases in which foreign interest rates are in issue.

(2) In all other cases, courts should be obliged to award prejudgment interest at a statutory rate or rates determined in accordance with the New Act.
- 4 (1) The rate of prejudgment interest should be based on the prime lending rate charged on loans to its most creditworthy borrowers by the banker referred to in Rule 58(5) of the Rules of Court.

(2) The rate of prejudgment interest should be determined monthly.
- 5 (1) The prohibition on awarding "interest on interest" should not be carried forward into the New Act.

(2) Under the New Act, prejudgment interest should be compounded.

- 6
 - (1) The New Act should carry forward the general principle that prejudgment interest runs from the date the cause of action arose.
 - (2) The court should not be bound to award prejudgment interest from the date the cause of action arose where the whole or part of an unliquidated claim for pecuniary loss is assessed with reference to a later date.
 - (3) In the circumstances described in paragraph (2), the court should have a discretion to set a date from which prejudgment interest runs.
- 7
 - (1) The New Act should require that all awards for pecuniary loss be apportioned into past and future components, including;
 - (a) expenses incurred or to be incurred;
 - (b) damages for wrongful dismissal;
 - (c) damages for lost support or the value of a dependency in fatal accident cases;
 - (d) damages for lost income or for lost earning capacity.
 - (2) Prejudgment interest should be awarded only on the past component of an award. The future component of the award should not attract prejudgment interest.
- 8 The New Act should carry forward the principle that the whole of an award of damages for non-pecuniary loss should attract interest throughout the period preceding judgment.
- 9
 - (1) The New Act should not carry forward the term "special damages" to describe pecuniary loss arising before judgment.
 - (2) The term "past pecuniary loss" should be adopted for this purpose.
- 10 Prejudgment interest should be payable on past pecuniary loss from the end of the month to which it relates.
- 11 The New Act should provide that in a trial by judge sitting with a jury the calculation of prejudgment interest be governed by the following rules:
 - (a) the calculation of prejudgment interest is a matter for the trial judge;
 - (b) the judge may make all findings of fact necessary to the calculation

of interest;

- (c) the judge has a discretion to ask the jury to make findings of fact which might assist in the calculation of prejudgment interest.

- 12 (1) The New Act should provide that where, having regard to all the circumstances of the case, it is not possible

- (a) to apportion a person's pecuniary loss between that arising before judgment and that arising after judgment; or
- (b) to allocate the portion of a person's pecuniary loss arising before judgment to specific one month periods;

then the court may apply either or both of the following presumptions:

- (c) the person's pecuniary loss is equally divided between that arising before judgment and that arising after judgment; and
- (d) the person's pecuniary loss arising before judgment is allocated equally among all the months of the period between the time the cause of action arose and the judgment.

- (2) The presumptions in paragraph (1) may be applied to any part of a person's pecuniary loss.

- 13 The New Act should provide that where, having regard to all the circumstances of the case,

- (a) the apportionment of pecuniary loss into prejudgment and post-judgment components under recommendation 7, or
- (b) the allocation of prejudgment loss to particular one month periods under recommendation 10,

and reliance on the presumptions set out in recommendation 12 would result in an injustice or an absurdity, then the court may assess the loss as a global amount with prejudgment interest running from a date to be selected in the discretion of the court.

- 14 Prejudgment interest payable on damages for non-pecuniary loss should be at the rate set by the Chief Justice under section 51(2)(b) of the *Law and Equity Act*.

- 15 (1) The New Act should continue to apply to "pecuniary judgments".

- (2) "Pecuniary judgment" should be defined as including an order for the payment of money or that money is owing.
 - (3) No prejudgment interest should be payable:
 - (a) if there is an agreement about interest between the parties;
 - (b) if a creditor has waived in writing his right to interest;
 - (c) if an enactment otherwise provides for the payment of interest;
 - (d) on an order for costs except to the extent that they consist of disbursements.
- 16 The *Legal Profession Act* be amended to provide that a registrar's certificate given under Part 10 is a pecuniary judgment for the purposes of the New [Court Order Interest] Act.
- 17 (1) In the New Act, "court" should be defined to include the Court of Appeal, Supreme Court, County Court, or Provincial Court.
- (2) The definition of "pecuniary judgment" should include an order allowing or dismissing an appeal, and an order varying an order given at trial, to the extent that the order involves the payment of money.
- 18 (1) Under the New Act, a court should be obliged to order the payment of prejudgment interest on a debt:
- (a) in respect of which an action has been commenced, and
 - (b) which is paid in full after the action was commenced, from the date the obligation to pay arose to the date of payment, unless the parties otherwise agree.
- (2) Paragraph (1) should not apply if payment is received as a result of the acceptance of a payment into court made pursuant to a defence of tender before action.
- 19 (1) The policy of section 4 of the *Court Order Interest Act* should be carried forward in a provision of the New Act.
- (2) For the purposes of that provision, in determining whether the plaintiff has recovered a judgment greater than the amount paid into court under Rule 37 of the Rules of Court, the court should not take into account prejudgment interest accruing after the date of payment into court.

- 20 The definition of "funds" in Rule 58(1) of the Rules of Court be amended so as not to exclude money paid into court pursuant to a garnishing order.
- 21 Post-judgment interest should be levied at the same rate, and compounded in the same manner, as prejudgment interest.
- 22
 - (1) The power of British Columbia courts to make *Larocque* orders [which relate to damages in respect of lost income] should be preserved. The New Act should provide, therefore, that nothing in it prevents a court from awarding damages, in whatever manner it sees fit, which compensate a plaintiff for delay in payment of a capital sum whose value has been discounted in accordance with actuarial practice.
 - (2) When such damages are awarded, no post-judgment interest should be payable on the portion of the judgment in respect of which such damages are assessed.
- 23 Where a judgment is stated in a foreign currency, or its Canadian equivalent at the date of payment, the court should have a discretion to fix an appropriate rate or rates of post-judgment interest.
- 24
 - (1) If there is an agreement concerning interest after judgment, that agreement should govern the entitlement of the parties to post-judgment interest rather than the New Act.
 - (2) For the purposes of paragraph (1), an agreement concerning interest after judgment includes an agreement containing provisions respecting interest that are stipulated to apply after default.
- 25 Interest under the New Act should be deemed to be included in the judgment for enforcement purposes.
- 26 Judgment interest should be calculated with reference to two tables of multipliers issued by the Registrar of the Supreme Court. The multiplier indicated for each month in a table would indicate the value of \$1.00, together with interest pursuant to the New Act to the month for which the table is released.
- 27 The tables should be prepared on the basis that the successful party is entitled to compound interest:
 - (a) on non-pecuniary loss at the rate of 3.5% per annum, compounded monthly, and
 - (b) on past pecuniary loss at the prime rate charged by the banker referred to in Rule 58(5) of the Rules of Court, in force on the last

day of the preceding month, appropriately adjusted to compensate for the effect of monthly compounding.

- 28 The tables would be issued monthly, and would be conclusive as to the *quantum* of a judgment, inclusive of judgment interest payable up to the month for which the table was issued.
- 29 The *quantum* of a judgment, inclusive of prejudgment interest would be determined in the following manner:
 - (a) Determine whether prejudgment interest is payable on the sum in issue.
 - (b) If it is, determine whether such interest runs from
 - (i) the date the cause of action arose,
 - (ii) the date the loss occurred, or
 - (iii) such other date as the court orders in accordance with the recommendations in this Report.
 - (c) If the loss is non-pecuniary, locate the special table in force for that type of loss. If the loss is pecuniary, locate the table in general use in force at the date judgment was given.
 - (d) Multiply the sum in issue by the multiplier indicated for the month from which prejudgment interest runs.
 - (e) Add together the products of all such calculations, plus any sums which do not bear prejudgment interest.
- 30 The amount outstanding on a judgment, inclusive of compound post-judgment interest, would be determined as follows:
 - (a) Locate the general table in force in respect of the month for which the determination is to be made.
 - (b) Multiply the original amount of the judgment by the multiplier indicated in the table for the month in which judgment was given.
 - (c) Multiply any unrealized execution costs by the multiplier indicated for the month in which they were incurred.
 - (d) Add the products obtained by (b) and (c).

- 31 Arrangements should be made to provide for a service whereby updated tables could be obtained by subscription on a timely basis.
- 32 Under the New Act, an interim payment by the defendant should be accounted for on a declining balance principle, as described in recommendation 37.
- 33 A no-fault benefit actually received by the plaintiff in respect of a past pecuniary loss should be accounted for under recommendation 32 as if it were an interim payment.
- 34 If a no-fault benefit was payable to the plaintiff by ICBC [Insurance Corporation of British Columbia], in respect of the period prior to judgment, but was not received by him prior to judgment, the value of the benefit should be deducted from the judgment only after prejudgment interest has been added to it.
- 35 The value of a no-fault benefit payable to a plaintiff by ICBC in respect of the post-judgment period should be applied only against damages for future pecuniary loss.
- 36 A voluntary interim payment should be applied first to that portion of the award representing past pecuniary loss, second to that portion representing non-pecuniary loss, and lastly to damages for future pecuniary loss unless the person making the payment has stipulated a different appropriation.
- 37 Where one or more interim payments have been received by the plaintiff, the quantum of a judgment determined under recommendation 29 should be reduced for each interim payment by the product of the amount of the payment and the multiplier for the month in which it was received.
- 38 Where money has been received in partial satisfaction of a judgment, to determine the amount outstanding on it, the amount calculated under recommendation 30 should be reduced by the product of the amount received and the multiplier for the month in which it was received.
- 39
 - (1) So far as the New Act provides for prejudgment interest, it should apply to all claims that have not yet become merged in a pecuniary judgment on the day the Act comes into force.
 - (2) Paragraph (1) is subject to recommendations 40, 41 and 43.
 - (3) In the recommendations referred to in paragraph (2) the term "implementation date" means the day the New Act, so far as it provides for prejudgment interest, comes into force.
- 40 The implementation date should occur 6 months after the enactment of the

New Act.

- 41 Recommendation 18 should apply only where the action was commenced after the implementation date.
- 42 The timing of the implementation of recommendation 20 should be the subject of consultation with the Ministry of Finance.
- 43 Recommendation 15(2), so far as it includes declarations, should apply only where the proceeding was commenced after the implementation date.
- 44 So far as the New Act provides for post-judgment interest, it should become effective on the date sections 12 to 15 of the *Interest Act* (Canada) cease to have effect in British Columbia.
- 45 For the purposes of the multiplier scheme, a judgment in existence on the date referred to in recommendation 44 should be treated as a judgment given on that date for the amount then due.

Appendix B

Enactments in Other Jurisdictions

SUPREME COURT ACT 1935 s 35A (UK) (as inserted by Administration of Justice Act 1982)

[35A Power of High Court to award interest on debts and damages]

(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—

- (a) in the case of any sum paid before judgment, the date of the payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment.

(2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—

- (a) with the substitution of “shall be included” for “may be included”; and
- (b) with the addition of “unless the court is satisfied that there are special reasons to the contrary” after “given”, where first occurring.

(3) Subject to rules of court, where—

- (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and
- (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Without prejudice to the generality of section 84, rules of court may provide for a rate of interest by reference to the rate specified in section 17 of the Judgments Act 1838 as that section has effect from time to time or by reference to a rate for which any other enactment provides.

(6) Interest under this section may be calculated at different rates in respect of different periods.

(7) In this section “plaintiff” means the person seeking the debt or damages and “defendant” means the person from whom the plaintiff seeks the debt or damages and “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.

(8) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.]

COURT ORDER INTEREST ACT RSBC 1979 c 76 (British Columbia)

COURT ORDER INTEREST ACT**CHAPTER 76***[Act administered by the Ministry of Attorney General]***Court order interest**

1. (1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of the order.

(2) Notwithstanding subsection (1), where the order consists in whole or part of special damages, the interest on those damages shall be calculated

- (a) on the total of the special damages incurred in the 6 month period immediately following the date on which the cause of action arose; and
- (b) on the total of the special damages incurred in any subsequent 6 month period, from the end of each 6 month period in which the special damages were incurred to the date of the order

(3) For the purpose of calculating interest under subsection (2), and notwithstanding subsection (2), where the date of the order occurs

- (a) before a date 8 months after the date on which the cause of action arose; or
 - (b) after the end of a 6 month period but before the end of the subsequent 6 month period,
- interest shall be calculated from the date on which the special damages were incurred to the date of the order.

1974-65-1.

Interest not awarded in certain cases

2. The court shall not award interest under section 1

- (a) on that part of an order that represents pecuniary loss arising after the date of the order;
- (b) where there is an agreement about interest between the parties;
- (c) on interest or on cost; or
- (d) where the creditor waives in writing his right to an award of interest.

1974-65-2.

Default order

3. Where an order is obtained by default under an Act or the Rules of Court, the registrar of the court may exercise and carry out the powers and duties of the court under this Act.

1974-65-3.

Payment into court

4. Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains an order for an amount equal to or less than that paid into court, the court shall, notwithstanding section 1, award interest only as if the date of payment into court had been the date of the order.

1974-65-4.

Interest included in judgment

5. Interest added to an order for payment under this act shall be included in the order for enforcement purposes.

1974-65-5.

Effective date

6. This Act does not apply to a cause of action that arose before June 1, 1974.

1974-65-6.

JUDICATURE ACT 1980 s 36 (Ontario. See now Courts of Justice Act 1984 ss 137-140)

36.—(1) In this section, "prime rate" means the lowest rate of interest quoted by chartered banks to the most credit-worthy borrowers for prime business loans, as determined and published by the Bank of Canada.

(2) For the purposes of establishing the prime rate, the periodic publication entitled the Bank of Canada Review purporting to be published by the Bank of Canada is admissible in evidence as conclusive proof of the prime rate as set out therein, without further proof of the authenticity of the publication.

(3) Subject to subsection (6), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon,

(a) at the prime rate existing for the month preceding the month on which the action was commenced; and

(b) calculated,

(i) where the judgment is given upon a liquidated claim, from the date the cause of action arose to the date of the judgment, or

(ii) where the judgment is given upon an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the judgment.

(4) Where the judgment includes an amount for special damages, the interest calculated under subsection (3) shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the notice in writing referred to in subclause (3) (b) (ii) and at the date of the judgment.

(5) Interest under this section shall not be awarded,

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the action;

(d) on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court;

(e) except by consent of the judgment debtor, where the judgment is given on consent; or

(f) where interest is payable by a right other than under this section.

(6) The judge may, where he considers it to be just to do so in all the circumstances,

(a) disallow interest under this section;

(b) fix a rate of interest higher or lower than the prime rate;

(c) allow interest under this section for a period other than that provided,

in respect of the whole or any part of the amount for which judgment is given. 1977, c. 51, s. 3 (1), *part*.

(7) This section applies to the payment of money under judgments delivered on or after the 25th day of November, 1977, but no interest shall be awarded under this section for a period before that date. 1977, c. 51, s. 3 (2).

UNIFORM JUDGMENT INTEREST ACT (Uniform Law Conference of Canada)

JUDGMENT INTEREST ACT

Part I

General

1. In this Act,
 - (a) "interest rate" means the rate of interest published in *The Gazette* as required in section 3;
 - (b) "judgment" includes order of a court.
2. Her Majesty is bound by this Act.
3. (1) The Lieutenant Governor in council may make regulations respecting the method of determining and the frequency of publishing interest rates and the periods with respect to which interest rates are in effect.
 - (2) The (*fill in title of appropriate official*) shall determine and publish in *The Gazette* interest rates in accordance with the regulations.

Part II

Interest Before Judgment

4. In this Part, "pecuniary loss" does not include pain and suffering, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings, loss of amenities and of expectation of life or loss of society of spouse or child.

5. (1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest on the judgment calculated in accordance with this Part.
- (2) The court shall not award interest
 - (a) or that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;
 - (b) on interest awarded under this Part;
 - (c) on exemplary or punitive damages;
 - (d) on an award of costs in the action;
 - (e) on money, and interest on that money, borrowed by a party in respect of damages described in section 6(2);
 - (f) on money that is paid into court and accepted in satisfaction of a claim;
 - (g) where the judgment is given on consent, unless agreed to by the parties;
 - (h) where there is an agreement between the parties respecting interest; or
 - (i) where the payment of interest is otherwise provided by law.
- (3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or any part of the amount for which judgment is given, refuse to award interest under this Part, or award interest under this Part at a rate or for a period or both other than a rate or period determined pursuant to section 6.
- (4) In a jury trial, the judge shall exercise the powers of the court under this Part.
- (5) In the case of a default judgment, the registrar of the court shall award interest calculated in accordance with this Part, but shall not exercise any discretion granted to the court under subsection (3).
6. (1) Subject to subsections (2) and (3), the court shall calculate interest under this Part from the day on which loss or damage is first sustained to the day of judgment at the rate determined by averaging the interest rates in effect during that period.
- (2) Where a judgment includes damages for expenses incurred or income lost, the court shall
 - (a) determine the total of those damages sustained within the three-month period commencing on the day on which loss or damage is first sustained and within each subsequent three-month period; and

(b) calculate interest from the last day of each three-month period described in clause (a) to the day of judgment, on the total of the damages sustained within the three-month period, at the interest rate in effect on the last day of the three-month period.

(3) Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount less than or equal to the amount paid into court, the court shall award interest,

(a) from the day on which loss or damage is first sustained to the day of payment into court, calculated in accordance with this Part; and

(b) from the day of payment into court to the day of judgment, in an amount equal to the actual interest earned on the portion of the money paid into court that is equal to the amount of the judgment.

NOTE: Jurisdictions should review their Rules of Court to ensure that it is specified whether a judgment is inclusive or exclusive of interest in comparing the amount of the judgment awarded to the amount paid into the court for the purpose of determining costs.

7. For the purpose of enforcing a judgment, interest awarded under this Part is included in the judgment.
8. This part does not apply to a cause of action that arises before the coming into force of this Part.

Part III

Post-judgment Interest

9. Notwithstanding that the entry of judgment may have been suspended by any proceeding in an action, including an appeal, every judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied
 - (a) with the respect to interest to be applied during the period from January 1 to June 30 in a year, at the interest rate in effect on January 1 of the year; and
 - (b) with respect to interest to be applied during the period from July 1 to December 31 in a year, at the interest rate in effect on July 1 of the year.

JUDICIARY ACT 1903 ss 77MA, 77N (Australia)

Interest up to judgment

77MA. (1) In any proceedings, other than proceedings on appeal, for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the High Court shall, upon application, unless good cause is shown to the contrary, either—

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) Sub-section (1) does not—

- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) affect the damages recoverable for the dishonour of a bill of exchange;
- (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
- (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

(3) Where the sum for which judgment is given (in this sub-section referred to as “the relevant sum”) includes, or where the High Court, in its absolute discretion, determines that the relevant sum includes, any amount for—

- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;
- (b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or
- (c) exemplary or punitive damages,

interest, or a sum in lieu of interest, shall not be given under sub-section (1) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the Court represents any such amount.

(4) Sub-section (3) shall not be taken to preclude interest or a sum in lieu of interest being given, pursuant to this section, upon compensation in respect of a liability of the kind referred to in paragraph (3) (a) where that

liability has been met by the plaintiff, as from the date upon which that liability was so met.

Interest on judgment debts

77N. A judgment debt under a judgment of the High Court carries interest, at such rate as is fixed by the Rules of Court, from the date as of which the judgment is entered.

PENALTY INTEREST RATES ACT 1983 ss 2-3 (Victoria)

2. (1) For the purposes of this Act interest payable under the provisions of the enactments referred to in this Act shall be payable at the rate of 15·8 per centum per annum or, where interest is payable under such a provision at a rate to be determined, at a rate not exceeding 15·8 per centum per annum until 30 September 1983 or the proclaimed day (whichever is the later) and thereafter at such rate as is fixed by the Attorney-General, having regard to the advice of the Treasurer of Victoria, by notice published in the *Government Gazette* in respect of each quarter year or part thereof commencing on and from 1 October 1983.

(2) Where, in respect of a quarter, a rate is not so fixed before the commencement of the quarter the rate so fixed in respect of the preceding quarter shall continue to be the rate fixed under this section until another rate is so fixed.

(3) In sub-section (1), "proclaimed day" means the day on which a notice is published in the *Government Gazette* under sub-section (1) in respect of the quarter commencing on 1 October 1983.

3. The rate of interest to be fixed by the Attorney-General from time to time under the provisions of section 2, having regard to the advice of the Treasurer of Victoria, shall be the rate known as the long-term Commonwealth Bond rate for the time being or, if there is no such rate, such rate as the Attorney-General, having regard to the advice of the Treasurer of Victoria, thinks fit.

Appendix C

New Zealand Enactments Providing For the Award of Interest

This appendix lists provisions relating to interest in enactments other than the Judicature Act 1908, the High Court Rules and the District Courts Act 1947. We would be pleased to be notified of any omissions.

The enactments set out below demonstrate that Parliament has often accepted that it is appropriate to make provision for the payment of interest in respect of debts and other money. Although the statutory provisions may initially appear to be scattered and inconsistent, some patterns emerge. The Law Commission is of the view that increased consistency is desirable in this, as in other areas, of legislation.

We make some initial suggestions below about amendments which might be necessary in light of the proposals set out in this discussion paper. The Commission will address this matter more directly in the next stage of its work. We would be happy to receive submissions on possible changes to the provisions below or any others which are relevant to this review, including any cases where interest should be and is not provided for by statute.

More generally, we would also hope to draw conclusions on ways in which standard approaches might be adopted for new statutes where this matter arises. The material could then be incorporated in the *Manual on Legislation* which the Law Commission is preparing. That would help increase consistency in the future. For example, in what circumstances should interest be authorised by statute? Should the award of interest be required or discretionary in particular cases? Are there circumstances in which the Crown should have special rights? Should the rate be tied to the rate of statutory interest, a fixed rate, or discretionary? Are penalties assessed by reference to interest desirable?

We noted above that patterns are apparent in the existing provisions: there are a number of "categories" of enactments about interest. The provisions which we

have collected can be classified as follows (the full text of them is set out at the end of the list).

1 Provisions which apply the general rules to particular situations

These enactments provide that the same rules about interest shall apply to some particular situations as apply to debts and damages in the High Court, eg

- Arbitration Act 1908 s 13
- Crown Proceedings Act 1950 s 19
- Disputes Tribunal Act 1988 s 20
- Reciprocal Enforcement of Judgments Act 1934 s 4.

We discussed considerations relating to arbitration in the text of the paper (see para 90). The Crown Proceedings Act provision is satisfactory in principle in so far as it applies the same law to the Crown as to citizens (see NZLC R17, *A New Interpretation Act: To Avoid "Prolivity and Tautology"*, 1990). We suggested in the paper (para 97) that special considerations might apply to Disputes Tribunals and we were inclined to leave that provision largely untouched. We would be interested in views on the merits of that proposal. Similarly, we do not think any amendment to the Reciprocal Enforcement of Judgments Act 1934 is required.

These provisions may be compared with s 33(4) of the Matrimonial Property Act 1976 which, rather than applying the general rules to matrimonial property proceedings, merely authorises the court to award interest where that is appropriate. The flexible and discretionary approach may be appropriate in that context.

2 Provisions enacting distinct rules about interest on particular monies

This category of provisions includes statutory enactments of some common law rules, and other new rules to apply in particular situations where debts or damages are owing, eg

- Administration Act 1969 s 39
- Bills of Exchange Act 1908 s 57
- Companies Act 1955 s 243
- Insolvency Act 1967 s 94
- Land Transfer Act 1952 s 179
- Life Insurance Act 1908 s 41A
- Matrimonial Property Act 1976 s 33
- Partnership Act 1908 s 27
- Unit Trusts Act 1960 s 27
- Workers' Compensation Act 1956 s 73.

This is a varied group of provisions. Some of them are enactments of common law provisions, as in the Bills of Exchange Act 1908 and Partnership Act 1908. Others, like the Land Transfer Act 1952 and the Workers' Compensation Act 1956, relate to duties or entitlements created by statute.

Amendments may be required to these enactments for a number of reasons. For example, the rate of interest in some provisions might usefully be tied to the rate of statutory interest as it is presently in s 41A(3) of the Life Insurance Act 1908; but compare the Administration Act 1969, the Land Transfer Act 1952 and the Workers Compensation Act 1956 which specify a rate or a maximum rate, while the Bills of Exchange Act 1908 does not specify any rate (in practice, a commercial or contract rate tends to be used), the Unit Trusts Act 1960 gives a discretion and the Partnership Act 1908 specifies the traditional equitable rate of 5% (the cases discussed in the text show that this requires revision, see eg paras 28-29 and Appendix D). In contrast, the rate in the Companies Act 1955 of 20% on funds retained by liquidators is presumably punitive and so should be higher than statutory interest.

The Workers Compensation Act 1956 has of course been overtaken by the Accident Compensation Act 1982. That latter Act does not expressly authorise interest on delayed payments although it has been held that interest may be awarded to fulfil the "compensation" purpose of the Act where payment is delayed (see para 154 above).

It has been suggested to us that s 41A of the Life Insurance Act 1908, inserted in 1985, should be amended to make interest payable from the date of death (rather than from the 91st day after death) where payment on policies is delayed. We see some merit in this proposal. An insurer may wish to investigate a claim, but if the insurer withholds payment of money due under the policy while the investigation takes place, the insurer has the benefit of using of that money (often a substantial sum) and should compensate the beneficiary accordingly.

3 Penalties for the late payment of taxes and charges

Some enactments which levy taxes or charges on citizens provide that a penalty for late payment may be assessed by way of interest on the sum due, eg

- Gaming Duties Act 1971 ss 8, 12
- Road User Charges Act 1977 s 21A
- Stamp and Cheque Duties Act 1971 ss 57, 86E.

The Road User Charges Act 1977 provision is not a true interest penalty but is somewhat similar. The provisions in the Stamp and Cheque Duties Act demonstrate different drafting approaches: the original provisions are less direct than s 86E which was inserted later. We see no immediate need to change these provisions: it is of course appropriate in this context to fix a particular rate of interest since the emphasis is not on compensation for delay in payment as much as fixing a penalty for the failure to comply.

4 Compensation provisions: applications of the Public Works Act

As discussed in the text, the courts concluded that the power in the Public Works Act 1928 to fix "compensation" included a power to award compensation for delayed payment even before the direct authorisation in the 1981 Act. A number

of Acts which empower the taking of land provide that compensation is to be fixed by reference to the procedure in the Public Works Act 1981, eg

- Crown Minerals Act 1991 s 76
- Electricity Act 1968 s 16
- Land Drainage Act 1908 ss 29, 70
- Local Railways Act 1914 s 70
- Public Works Act 1981 s 94
- Resource Management Act 1991 s 86(3)
- River Boards Act 1908 s 7
- Soil Conservation and Rivers Control Act 1941 ss 19(4), 145B

So long as the basic procedure in the Public Works Act itself is satisfactory, these provisions do not seem to require adjustment. As discussed in the text, see para 69 above, the Courts appeared (until recently) to have found a workable approach to the issue. However, the *Chamberlain* decision, and our conclusions in respect of general statutory interest, raise the question whether s 94 of the Public Works Act should itself be tied to the new scheme. We will be interested in comments on this.

5 *Money withheld by or wrongly paid to or by the Crown*

These provisions (relating to the Crown) parallel some enactments applying to transactions between private persons (see category 2 above). They include

- Gaming and Lotteries Act 1977 s 104
- Goods and Services Tax Act 1985 ss 38, 46
- Government Superannuation Fund Act 1956 s16A.

The 1956 and 1985 provisions are generally straightforward. Section 104 of the Gaming and Lotteries Act 1977 appears to imply that there *is* an entitlement to interest if the Lotteries Commission has no reasonable grounds for withholding the payment. Compare Unclaimed Money Act 1971, s 11.

6 *Deposits and advances*

These provisions relate to transactions between the Crown and individuals and include

- District Railways Act 1908 s 26
- Family Benefits (Home Ownership) Act 1964 s 21
- Insurance Companies Deposits Act 1953 s 13
- Maori Housing Act 1935 s 10
- Public Trust Office Act 1957 ss 30, 40.

The provisions are fairly self-explanatory. It may be noted that in this group the rate of interest is often left to the discretion of a Minister or official. By this means a measure of flexibility is built in, perhaps appropriate in this case which is analogous to an agreement.

7 *Savings*

- Sale of Goods Act 1908 s 55.

This is the only example we have found of a savings provision for the common law (as opposed to a codification of particular rules).

The text of the enactments is set out below (in alphabetical order).

ADMINISTRATION ACT 1969 (RS 19)

39. Interest on legacies and annuities - (1) In any case where a legacy is charged upon both land and chattels, unless the will otherwise provides, interest shall be payable on the legacy and be a charge on the land and chattels in accordance with the rules of law that would apply if the legacy were charged upon the land only.

(2) While interest is payable on any legacy or on any arrears of an annuity, in accordance with the will or instrument pursuant to which the legacy or annuity is payable or any enactment or rule of law, unless the will or instrument otherwise provides or the Court otherwise orders, the interest on the legacy or arrears of the annuity shall be payable at the rate of 11 percent per annum.

(In subs (2), the rate of interest was raised to 11% in 1987 (No 130); it had been 5% per annum.)

ARBITRATION AMENDMENT ACT 1938 (RS 1)

13. Interest on awards - A sum directed to be paid by an arbitrator shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

BILLS OF EXCHANGE ACT 1908 (RS 1)

57. Measure of damages against parties to dishonoured bill - Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows-

(a) The holder may recover from any party liable on the bill ...

(i) The amount of the bill;

(ii) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

...

(c) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part, and, where a bill is expressed to be payable with interest at a given rate, interest

as damages may or may not be given at the same rate as interest proper.

COMPANIES ACT 1955 (RS 15)

243. Payments of liquidator into bank -

...

(2) If any such liquidator at any time retains for more than 10 days a sum exceeding \$100, or such other amount as the Court in any particular case authorises him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of 20 percent per annum ...

CROWN PROCEEDINGS ACT 1950 (RS 1)

19. Interest on debts, costs, etc - (1) Any judgment debt due from or to the Crown shall carry interest if it would carry interest if it were due from or to a subject, and any interest so payable shall be at the rate at which it would be payable if the judgment debt were due from or to a subject.

(2) Any costs awarded to or against the Crown shall carry interest if the costs would carry interest if they were awarded to or against a subject, and any interest so payable shall be at the rate at which it would be payable by a subject.

(3) Any judgment in any civil proceedings by or against the Crown may award interest to any party to whom interest could be awarded if the proceedings were between subjects at the rate at which interest could be so awarded.

(4) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

DISPUTES TRIBUNAL ACT 1988

20. Power of Tribunal to award interest - (1) Subject to subsection (2) of this section, where a Tribunal makes an order under section 19(1)(a) or section 47(3)(b) of this Act that a party to the proceedings pay money to another party to the proceedings, the Tribunal may, if it thinks fit, order that there be included in the amount so ordered to be paid interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of that amount for the whole or any part of the period between the date when the cause of action arose and the date of the making of the order.

(2) Subsection (1) of this section does not-

(a) Authorise the giving of interest upon interest; or

(b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, rule of law or otherwise.

(3) Where a Tribunal makes an order under section 19(1)(a) of this Act in respect of a debt upon which interest is payable as of right, and in respect of which the rate is not agreed upon, prescribed, or ascertained under any agreement, enactment, rule of law, or otherwise, there shall be included in the amount ordered to be paid interest at such rate, not exceeding the prescribed rate, as the Tribunal thinks fit for the period between the date as from which interest became payable and the date of the making of the order.

(4) The monetary restrictions provided for by section 10(3), section 13(2), and subsections (4) to (7) of section 19 of this Act do not apply in respect of any interest claimed, payable, or ordered to be paid under this section.

(5) In this section the term "the prescribed rate" means the rate of 11 percent per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council.

DISTRICT RAILWAYS ACT 1908 (RS 6)

26. Compensation to be given for land taken or affected -

...

(2) In respect of land taken under this Act the words "mortgage debt" in section 94 of the Public Works Act 1928 shall not include the interest payable on such mortgage up to 6 months beyond the day on which notice was received by the mortgagee, but it shall include the capitalised value of the difference between 5 percent and the rate of interest payable on the mortgage, to be calculated up to the time when the principal due on the mortgage can be paid off.

84. Price to be paid where railway charged with money borrowed by company -

...

(3) If the money charged, or any part thereof, bears interest at a higher rate than 5 percent per annum, the arbitrators who determine the price to be paid for the purchase shall determine what (if any) is a proper sum to be allowed to the Governor-General as a rebate in respect of any interest on the amount charged in excess of 5 percent per annum, and the amount so ascertained (if any) shall be added to the principal money, and as between the Governor-General and the company shall be deemed to be charged upon the railway.

FAMILY BENEFITS (HOME OWNERSHIP) ACT 1964 (RS 16)

21. Interest on unpaid balance of advance - (1) Where an order is made under s 18(2)(a) of this Act declaring that the unpaid balance of an advance became repayable on the death of a child, the unpaid balance of the advance shall bear interest from that date at the rate of \$5 per cent per annum.

GAMING AND LOTTERIES ACT 1977

104. No entitlement to interest - No person shall be entitled to the payment of interest in respect of a prize in a New Zealand lottery unless the Commission had no reasonable grounds for

- (a) Questioning entitlement to that prize
- (b) Withholding payment of that prize.

GAMING DUTIES ACT 1971 (RS 19)

8. Interest on unpaid totalisator duty - (1) Interest at the rate of 5 percent for every month or part of a month shall be payable on the amount of all totalisator duty unpaid within one month after the time specified in subsection (1) of section 6 or, as the case may be, subsection (1) of section 7.

(2) For the purposes of recovery, all interest payable under this section shall be deemed to be totalisator duty.

12. Interest on unpaid lottery duty - (1) Interest at the rate of 5 percent for every month or part of a month shall be payable on the amount of all lottery duty unpaid within one month after the time specified in subsection (1) of section 11 and shall be calculated from the expiration of the time specified in that subsection.

(2) For the purposes of recovery, all interest payable under this section shall be deemed to be lottery duty.

13. Refund of duty or interest paid in error or in excess - (1) Where, at any time within 8 years after the date of payment, or if application for the refund is made in writing within that period, the Commissioner is satisfied that any duty or interest payable under this Act or any previous Act imposing totalisator duty or lottery duty has been paid in error or excess, he may refund the amount paid in error or excess to the person entitled.

(2) All money payable under this section by way of refund of duty or interest shall be paid out of [the Consolidated Account] without further appropriation than this Act.

GOODS AND SERVICES TAX ACT 1985 (RS 19)

46. Interest on refunds -

(5) ... in any case where the Commissioner is required by subsection (1) of this section to refund any amount to any registered person ... there shall, subject to this section, be paid by the Commissioner to the registered person interest on so much, if any, of the amount as is required to be refunded ...

(6) Interest payable in accordance with this section shall ... be calculated in accordance with the following formula:

$$\frac{x \times y}{365} \times z$$

where-

x is the number of days in the period that commences on whichever of the following days is the latest:

...

y is the amount required to be refunded; and

z is the specified rate of interest, being, in relation to any period of 12 consecutive months commencing on any 1st day of April, the interest percent per annum applicable to the period in accordance with the determination and notification made and given under subsection (9) of this section:

...

(9) The rate percent per annum that is to apply for the purposes of this section shall be the rate determined by the Secretary to the Treasury pursuant to subsection (8) of section 34A of the Income Tax Act 1976, and that rate shall have application for the same period as specified for the purposes of the said section 34A.

GOVERNMENT SUPERANNUATION FUND ACT 1956 (RS 21)

16A. Interest on money held in error - Where for any reason whatsoever any money is or has been held in error by the Fund on behalf of any person, whether before or after the commencement of this section, the Board may in its discretion pay to that person, in addition to the said money, interest thereon from the date on which payment should have been made to that person to the date of actual payment at such rate as the Minister of Finance may from time to time determine.

This provision was inserted in 1976.

INSOLVENCY ACT 1967 (RS 18)

94. Interest - (1) Unless authorised by any enactment or rule of law, no interest shall be included in any proof of debt unless-

(a) It has been allowed by a Court in entering judgment; or

- (b) The claim is based on an agreement which provided for the paying of interest.
- (2) Where interest may be so included, it shall be calculated only up to the date of adjudication.

INSURANCE COMPANIES DEPOSITS ACT 1953 (RS 7)

13. Investment of cash deposits - All money deposited with the Public Trustee before the passing of this Act under the provisions of any enactment repealed by this Act shall be invested in the Common Fund of the Public Trust Office, and shall bear interest at the rate from time to time determined by the Governor-General in Council under the provisions of section 30 of the Public Trust Office Act 1957.

LAND TRANSFER ACT 1952 (RS 22)

179. Measure of damages - No person shall, as against the Crown, be entitled to recover any greater amount [than the value of land at the time of deprivation plus the value of buildings and improvements] with interest at the rate of five per cent per annum to the date of judgment recovered.

(Section 172 of the Act provides that a person who has suffered loss through the mistake or misfeasance of the Registrar may bring an action against the Crown for the recovery of damages.)

LIFE INSURANCE ACT 1908 (RS 6)

41A. Interest payable from 91st day after date of death - (1) Where

- (a) Any money becomes payable by a company under a policy as a result of the death, on or after the 1st day of April 1986, of the person on whose life the policy was effected; and
- (b) That money is not paid, within 90 days after the date of death, to the person entitled to that money,-

the company shall, in addition to that money and at the same time as that money is paid to that person, pay to that person interest on that money in respect of the period beginning on the 91st day after the date of death and ending with the close of the day on which that money is paid to that person.

...

(3) The interest payable pursuant to subsection (1) or subsection (2) of this section shall be paid at the rate specified in the policy or at the rate from time to time prescribed for the purposes of section 87 of the Judicature Act 1908, whichever is the greater.

MAORI HOUSING ACT 1935 (RS 8)

10. Rate of interest on advances - The rate of interest to be charged upon advances made under the provisions of this Act shall be such as the Board may determine, but not in excess of the current rate fixed by the Housing Corporation of New Zealand in respect of loans granted by it.

MATRIMONIAL PROPERTY ACT 1976**33. Ancillary powers of Court -**

...

(4) Where under any order made under this Act one spouse is or may become liable to pay to the other a sum of money, the Court may direct that it shall be paid either in one sum or in instalments, and either with or without security, and otherwise in such manner and subject to such conditions (including a condition requiring the payment of interest) as the Court thinks fit.

PARTNERSHIP ACT 1908 (RS 10)**27. Rules as to interests and duties of partners -**

...

(c) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount which he has agreed to subscribe is entitled to interest at the rate of 5 percent per annum from the date of the payment or advance ...

PUBLIC TRUST OFFICE ACT 1957**30. Common Fund -**

...

(4) Subject to the provisions of this Act, the interest payable to the respective estates the money of which constitutes the Common Fund shall be at a rate or rates to be determined from time to time by the Governor-General in Council, and interest at such rate or rates shall be credited to the respective estates half-yearly ... or at such other time or times ... as the Public Trustee may from time to time determine ...

40. Advances to beneficiaries

...

(2) All such advances with interest thereon at such rate as is fixed from time to time by the Public Trustee shall by the force of this Act and without instrument of assignment be a first charge on the share against which the advances are made.

PUBLIC WORKS ACT 1981

94. Interest on compensation money - The Land Valuation Tribunal may, if it thinks fit, order that there be included in the sum of any award interest at such rate as it thinks fit on the whole or any part of the award for the whole or any part of the period between the specified date or, where appropriate, the date on which the claimant gives vacant possession of the land (whichever is later) and the date of making of the award.

(A number of other enactments invoke the compensation provisions in the Public Works Act 1981 for assessing compensation, see the list at page 80)

RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT 1934 (RS 4)

4. Application for, and effect of, registration of judgment -

...

(2) Subject to the provisions of this Act with respect to the setting aside of registration,-

...

(c) The sum for which a judgment is registered shall carry interest;

...

as if the judgment had been a judgment originally given in the High Court and entered on the date of registration ...

(6) In addition to the sum of money payable under the judgment of the original Court, including any interest which by the law of the country of the original Court becomes due under the judgment up to the time of registration ...

8D. Registration -

...

(2) A registered judgment or order to which this Part of this Act [about enforcement of judgments of Australian Federal Court] applies shall-...

(b) In the case of a judgment or order under which a sum of money is payable, carry interest on that sum

...

as if it had been a judgment or order or injunction originally given or made or granted in the High Court and entered on the date of registration.

...

(5) In addition to any sum of money payable under the judgment or order, including any interest which by the law of the Commonwealth of Australia becomes due under the judgment or order up to the time of registration ...

11. Issue of certificates of judgments obtained in New Zealand -

... the Court shall, on an application made by the judgment creditor and on payment of such fee as may be fixed by rules of Court for the purposes of this section, issue to the judgment creditor a certified copy of the judgment, together with a certificate including the causes of action, and the rate of interest, if any, payable on the sum payable under the judgment, as may be

prescribed ...

ROAD USER CHARGES ACT 1977 (RS 21)

21A. Additional charges for default in payment of amounts due - (1)
[If any debt due to the Crown is not paid within 3 months of the date it comes due, an amount calculated by reference to subs (2) shall be added to the debt]

(2) For the purposes of subsection (1) of this section, an additional charge shall be an amount equal to 10 percent of the debt.

(Substituted in 1989.)

SALE OF GOODS ACT 1908 (RS 11)

55. Interest and special damages, or recovery of money paid -
Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

STAMP AND CHEQUE DUTIES ACT 1971 (RS 23)

57. Penalty for late presentation - If any instrument on which stamp duty is payable is not presented for stamping within the time required by this Act, there shall be paid, together with the duty and any other penalty due, a penalty of 1 cent for each complete \$1 of the stamp duty payable on the instrument for every month, and for such period less than a month, that default is made in presenting the instrument; but in no case shall the penalty be less than \$1.

(The Act contains a number of other similar penalty provisions.)

86E. Interest on unpaid credit card transaction duty - (1) Interest at the rate of 5 percent for every month or part of a month shall be payable on the amount of all credit card transaction duty unpaid within one month after the time specified in section 86D(1) of this Act ...

(This provision was inserted in 1981.)

UNCLAIMED MONEY ACT 1971 (RS 21)

11. Commissioner may make payment to claimant -

...

(4) No claimant shall be entitled to interest on the amount of any money for which demand on the Commissioner ... is made by him or on the amount of any money payment of which is made to him under this section.

UNIT TRUSTS ACT 1960

27. Power of Court to assess damages against delinquent directors of manager - (1) If in the course of winding up any company that is the manager of a unit trust, it appears that the company has misapplied ... any money ... the Court may ... examine into the conduct of any past or present director, manager ... and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just ...

WORKERS' COMPENSATION ACT 1956 (RS 9)

73. Court may direct payment of interest in case of undue delay - If in any action or proceeding for the recovery of compensation the Compensation Court is of opinion that there has been unreasonable delay in the payment of that compensation, the Court may, if in its discretion it thinks fit, increase the compensation payable under this Act by adding thereto interest calculated as from the date of the commencement of incapacity or from the death of the worker, as the case may be, up to the date of the assessment of compensation, at any rate not exceeding 6 percent per annum on the total amount of compensation in the case of a lump sum, and on the aggregate amount of weekly payments up to the date of the said assessment in the case of weekly payments.

Appendix D

Summaries of New Zealand Cases

*(In this appendix, "P" refers to the plaintiff, and
"D" to the defendant)*

National Mutual v Attorney-General [1954] NZLR 754

P held stock and debentures under a contract which provided that the principal and interest be paid to P in Melbourne "free of exchange". P alleged short payment and claimed damages and interest.

Held: (Court of Appeal: Fair, Hay and North JJ) No interest should be awarded apart from that due under the contract. The minority (Gresson and Stanton JJ) would have awarded interest at 3.5% on the underpaid principal but not on the underpaid interest (although commenting that the prohibition in s 87 on "interest on interest" probably refers to interest under s 87).

Hrstich v Hrstich [1954] NZLR 934

P's husband (deceased) had put money in safe deposit box to evade income tax. After his death, his brothers (with P's agreement) removed the money from the box, then refused to return it to P. P sued the brothers for the money, plus interest from the date of its removal from the safe deposit box to judgment.

Held: (Barrowclough CJ) The discretion under s 87 should not be exercised to the extent sought: the removal of the money was part of P's scheme to defraud the revenue, and the money would not in any case have earned interest. Interest would be awarded at 5% from the date of writ to judgment.

Tauranga Harbour Board v Clark [1971] NZLR 197

Action for damages for death by accident. The court directed interest on damages be paid only from date of judgment to payment. P appealed, claiming that interest should be awarded on the damages from the date of death.

Held: (North P, Turner and Haslam JJ) *Jefford v Gee* (see para 46 above) noted. Interest from date of death may be just in principle (P has been kept out of money) but to award it only from the date of issue of a writ may encourage "prompt and efficient conduct of litigation". Interest was awarded at 5% from that date to judgment.

Stephenson v Waite Tileman Ltd [1973] 1 NZLR 152

Action for damages for personal injury. The application was for general relief and did not include a specific claim for interest which was only sought on appeal.

Held: (Court of Appeal: judgment of Richmond J) The discretion under s 87 is to be exercised by trial judge who alone is in a position to properly assess damages to be allocated to future economic loss, delay etc. No interest was awarded. The application of *Jefford v Gee* in New Zealand was left open.

Blackley v National Mutual Life Assn of Australasia Limited (No 2) [1973] 1 NZLR 668

D denied liability under a life insurance policy. The Court of Appeal held that D was liable and remitted the matter to the High Court for the assessment of damages. In the second proceedings, P claimed interest on the sum due from one month after death.

Held: (Mahon J) The discretion in s 87 should be exercised on the principle that interest is to compensate P for the loss suffered by being kept out of money and commented that the approach to damages/debt may vary. Interest was awarded from the date of repudiation (much later than the date of death but fair on the facts) at the maximum rate: 5% is conservative by current rates.

JUDICATURE AMENDMENT ACT 1974 s 7: NEW RATE OF 7.5% PER ANNUM SUBSTITUTED FROM 21 OCTOBER 1974

McAlpines Saw Milling Ltd v Airwork Engineering Ltd [1976] 2 NZLR 131

An action in negligence after P's sawmill destroyed. P claimed damages for reinstatement and loss of profits, plus interest.

Held: (Roper J) Section 87 authorised award of interest in negligence claim. Delay by P led judge to award interest from 6 months after the date of the writ to judgment. New rate (7.5%) was applied over the *whole* period, although it had been enacted during that time.

Tawharanui Farm v Auckland Regional Authority [1976] 2 NZLR 230

Claim for balance of compensation for compulsory acquisition of land: only part had been paid. P claimed outstanding principal plus interest.

Held: (Wild CJ) Interest could be awarded under the Public Works Act 1908. Although that Act contained no express authority in it, the award was authorised by s 87 of the Judicature Act 1908: "in any proceedings ...". Interest was awarded on the part payment at 7.5% from 21 October 1974 to the date of that payment. Interest was awarded on the outstanding principal at 6% (taken from contract) to 21 October 1974; and at 7.5% from that date to the date of eventual payment.

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394

Action against a builder for negligence in respect of a failed house. The Supreme Court found the builder had not been negligent, but assessed damages on the basis of current (time of trial) cost of repair. On appeal, the Court of Appeal held D negligent. They accepted the Supreme Court's assessment of damages. P also claimed interest on damages.

Held: (Court of Appeal: Richmond P, Woodhouse and Cooke JJ concurring) It was agreed that if damages were assessed at current costs, interest should not be awarded from the date of damage. D submitted that since P had not carried out repairs (and so was not out of pocket) no interest should be awarded. However the court noted that the cost of repairs had increased since the date of trial, and awarded interest on the damages under s 87 at 7.5% from the date of the Supreme Court judgment to the date of the Court of Appeal judgment.

Fraser v Perpetual Trustees Estate & Agency Co of NZ Ltd [1978] 1 NZLR 620

P had contracted to buy land which formed part of an estate in which he had an interest. Settlement was to be on or before 31 January 1974. Difficulties in obtaining probate delayed settlement until 10 June 1975. The question whether P (who had been in possession) should pay interest or rent was submitted to an arbitrator who awarded the vendor interest at 7%, with credit to be given for rent paid by P. P moved to set the award aside.

Held: (Somers J) There was an implied promise to pay interest. Equitable interest reflects two concerns: need for a fair return on secure investment, and provision of certainty and uniformity. Present case not an appropriate one in which to set a general rate but on the facts the arbitrator's award was appropriate and should not be disturbed.

JUDICATURE (INTEREST ON DEBTS AND DAMAGES) ORDER 1980: NEW RATE OF 11% PER ANNUM SUBSTITUTED FROM 31 MARCH 1980

Isaac Naylor & Sons v New Zealand Co-operative Wool Marketing Assn [1981] 1 NZLR 361

Claim for exchange losses on wool transactions, including claim for interest.

Held: (Court of Appeal: Cooke, Richardson and McMullin JJ) Interest claimed under contract terms was disallowed on facts; other grounds (as damages under *Hadley v Baxendale*) for its award were argued on appeal but not allowed: they had not been pleaded in the original claim and there was no evidence in support. However an award of interest under s 87 was upheld.

Wallace v Proceeds of the ship "Otago" [1981] 2 NZLR 740

In an Admiralty action P sought a maritime lien for unpaid wages against the proceeds of a ship.

Held: (Chilwell J) P was entitled to the disputed wages. As to interest, it could be awarded under Admiralty jurisdiction but there was no need because of s 87. Since the latter had been enacted as a code, it should be preferred to the original jurisdiction. Award of interest at 11% from date of arrest of ship to judgment.

General Bills v McQuoid [1984] 2 NZLR 55

Claim for interest under the Bills of Exchange Act 1908 on overdue bills of exchange.

Held: (Casey J) Interest should be awarded at commercial rates under this Act; in this case 20.5% was appropriate, as the rate set in the facility arrangement between the parties.

Drower v Minister of Works [1984] 1 NZLR 26

Appeal from [1980] 2 NZLR 691 on claim for compensation under the Public Works Act 1928. There was a question whether the loss should be assessed with reference to interest or to inflation and interest.

Held: (Court of Appeal: Woodhouse P, Roper J) The terms of the Act were that "full compensation" should be made. That requires provision for (a) inflation (by reference to Consumer Price Index: 15% compound) to maintain equivalence in terms of capital (warning against using income approaches to remedy a capital problem); and (b) some "true interest" on the revised capital sum to make up for loss of use of money (fixed at 2%). Somers J (dissenting): Inflation makes it necessary to re-examine an area of law which in more stable times gave rise to little difficulty. "Nominalism as a theory is under stress today". But the law never allows total recovery for loss of value, so the appropriate relief is interest at ordinary commercial rates on the nominal value of the capital sum.

Broadbank Corporation Ltd v Mosgiel Ltd [1985] 1 NZLR 257

After some bills of exchange were paid late P sued for damages or interest (from maturity date to date paid) to compensate for the loss of use of funds. The High Court refused to award interest: the relevant debt had not been the subject of proceeding in any court in the terms of s 87.

Held: (Court of Appeal: Richardson, McMullin, Somers JJ) The appeal was allowed and the claim remitted to the High Court for an inquiry into damages.

Richardson J: Section 87 only applies to *actual* proceedings for recovery of debt: not the case here. Unnecessary to consider common law or *La Pintada* as the present case fell within a "well established line of authority outside the common law rule": in the case of a failure to pay money on fixed day at fixed rate, damages measured by interest are allowed. The loss must be in the reasonable contemplation of the parties and the rule is a direct application of the first limb of the rule in *Hadley v Baxendale*.

McMullin J: Discussed the English cases at some length and suggested that, were it necessary, he would be prepared to not follow the *London, Chatham and Dover* case. However the present case could be decided under *Cook v Fowler*.

Somers J: The cases on damages/interest are explained by the rules about remoteness. "Should pause long before agreeing" that interest should be paid on every case in which money not paid on due date: interest would be available on all tradesmen's accounts.

Edlin Holdings v Carlisle [1986] 1 NZLR 198

D breached agreement for sale and purchase of house, including \$30 000 mortgage back to P (vendor). P later resold, then sued D claiming legal costs, and interest: (1) at 17% of full price to date of cancellation (as provided in contract); (2) at 20% (rate in mortgage contract) on the \$30,000 between cancellation and resale; and (3) 11% on the remaining proceeds for the period between cancellation and resale (P claimed it would have invested if no cancellation): less extra profit from resale.

Held: (Hardie Boys J) Judgment for P: in all, P was in a worse position than if the sale had been completed. Interest was available as special damages under the second limb of *Hadley v Baxendale*; the loss was within the reasonable contemplation of D.

Callander v Murphy [1986] 1 NZLR 202

D failed to settle an agreement for sale and purchase. P (vendor) cancelled in accordance with contract, resold and sued D for damages for loss suffered on the resale, and the costs of commission and extra bridging finance (ie, interest). The contract did not provide for the last remedy.

Held: (Thorp J) Having relied on contractual right to cancel, P was limited to remedies under contract which did not include interest on finance. *Edlin Holdings* doubted. (Obiter) If that were not the case, he would have allowed interest as special damages under the second limb of *Hadley v Baxendale*: D knew that P was committed to the purchase of another property.

Goodman v Securitibank (1986) 3 NZCLC 100,020; 2 BCR 209

Application to the High Court by a liquidator to discover whether surplus funds at the end of winding up should be used to pay interest to creditors (who had been kept out of their money for 10 years). Interest was claimed by different groups of creditors variously under contracts, s 87 and the Bills of Exchange Act 1908.

Held: (Barker J) The surplus should be paid out. There was no difference in priority between types of creditors. Interest to be calculated at contractual/s 87 rates and divided pro tanto. (Section 87 interest to be calculated at 7.5% and 11% as appropriate: increases in the rate do not operate retrospectively.)

Nauru Local Govt Council v NZ Seamen's Union IUW [1986] 1 NZLR 466

Union strike kept P's ship from sailing for 112 days. P claimed damages for loss of use of asset.

Held: (Court of Appeal: Richardson, Somers and Casey JJ) The High Court judgment (as varied by Court of Appeal) should carry s 87 interest at 11% to date of High Court judgment, thereafter interest under R 538 (interest on judgment debts).

Somers J: It may seem that D is thus put to paying interest on interest (prohibited by s 87) but there are two points in answer to this: interest under s 87 "is itself in the nature of damages or compensation to the plaintiff for being kept out of his money". He also referred to the structure of the two provisions. "We do not think it can be described as unfair".

Kendall Wilson Securities Ltd v Barraclough [1986] 1 NZLR 576

Nominee company sued D (valuer) for negligence, claiming damages of \$94,000 for loss of capital and interest and rates on sale of security.

Held: (Jeffries J) Once the capital loss is conceded, no reason in policy or logic why interest and rates should be excluded; that is the case whether losses classified as general or special damage. Damages for loss of capital and interest were awarded under *Hadley v Baxendale* (from 15 May 1977 to 15 November 1978), also s 87 interest at 11% on total judgment from issue of proceedings (18 November 1978) to judgment. The whole award was upheld on appeal by the Court of Appeal.

Westpac v Nangeela Properties Ltd [1986] 2 NZLR 1

Shortly before its liquidation, D (company) paid \$25,000 to bank (in overdraft to nearly that amount). The liquidator claimed this was a voidable preference. The High Court agreed, and ordered the bank to transfer money back to liquidator with s 87 interest from date of transfer to date of judgment. Bank appealed.

Held: (Court of Appeal: Richardson, McMullin and Somers JJ) The voidable preference was analogous to recovery of debt, and so interest was available under s 87: the bank rather than the creditors had had the use of the money. However, as the liquidator's cause of action arose only on liquidation, interest ran from that date, rather than the date D transferred the funds to the bank.

Seatrans (Fiji) Ltd v Attorney-General [1986] 2 NZLR 240

P had made a payment into court under the High Court rules. When the matter was not immediately resolved, the Registrar was ordered to place the money in an interest-bearing account. That was not done. P claimed damages for the interest lost between 16 March 1979 and 10 March 1982.

Held: (Hillyer J) Interest as damages was awarded, also interest under s 87 from the issue of proceedings (11 March 1983) to judgment "in accordance with normal principles".

Volk v Hirstlens (NZ) Ltd [1987] 1 NZLR 385

Claim for breach of contract. P sued for unpaid royalties, interest and losses from exchange rate changes.

Held: (Henry J) Damages measured by lost royalties only payable from 1981: 6 years prior to judgment (Limitation Act). Section 87 interest awarded only from date of issue of proceedings in 1982 (P had slept on rights and delayed). The exchange losses were recoverable at law under the second limb of *Hadley v Baxendale* even for late payment of debt (*La Pintada, President of India v Lips Maritime Corporation* [1987] 1 Lloyd's Rep 131, *Isaac Naylor, Trans Trust v Danubian* [1952] 2 QB 297 considered).

Dods v Coopers Creek Vineyards Ltd [1987] 1 NZLR 530

Claim for loss from breach of contract for sale of grape crop. Ps had emphasised they would only sell to D if paid on due date because of their overdraft problems. In fact they were paid late. They sued for interest (measured by their bank overdraft rate of 27.5%) under the second limb of *Hadley v Baxendale*. D argued that interest was only available under s 87 at 11%.

Held: (Wallace J) Notes approval of *Wadsworth v Lydall* [1981] 1 WLR 598 in New Zealand in *Isaac Naylor, Broadbank and Volk*. "A claim for interest for a late payment of a debt is maintainable if the evidence establishes that it falls within the second limb of the rule in *Hadley v Baxendale*." The issue is one of remoteness (*Lips, International Minerals & Chemical Corporation v Karl O Helm AG* [1986] 1 Lloyd's Rep 81). On the facts, reasonable contemplation on the part of D was established. Section 87 did not affect the matter, see s 87(1)(b): saving for "interest payable as of right". Obiter: recommends reform along English lines. Interest awarded at 27.5% from date of default to: date of payment (in respect of part payment), and date of judgment (outstanding amount). Indicated post-judgment interest would be limited to 11%.

Clemence v Hollis [1987] 2 NZLR 471

Claim in tort for deceit in relation to sale of kiwifruit orchard. Ps claim damages for loss of value, interest lost on capital used for purchase (\$325,000 at 17.5% for four years eight months), and other heads.

Held: (Gallen J) Awarded common law damages for consequential loss of use of introduced capital measured by interest at 17.5%.

Day v Mead [1987] 2 NZLR 443

D (solicitor) induced P (client) to invest in a company which later went into liquidation. P sued for breach of fiduciary duty, claiming \$100,000 loss and interest on that sum.

Held: (Court of Appeal) Interest awarded under s 87 from date of receivership to 31 March 1980 at 7.5% and from that date to judgment at 11%.

Somers J: Considers s 87 in some detail: discretionary; to enable proper

compensation; doesn't apply if there is an agreement to pay interest; cases excluded where equity would award compound interest. Generally just that interest run between cause of action and judgment - *Tauranga* disapproved. Hillyer J considered that s 87 rate did not operate retrospectively, others disagreed but held 7.5% before 31 March 1980 was fair on facts.

Takaro Properties v Rowling [1987] 2 NZLR 700

Claim against Minister for carelessly refusing consent to share issue, subsequent failure of company. Value of "lost opportunity" assessed by Court of Appeal at \$300,000 plus interest (at 11% from date of Minister's decision to date of judgment).

Held: (Privy Council) Appeal allowed. As to interest and effect of amendment to s 87 rate (obiter): "Their Lordships are unable to infer an intention on the part of the legislature that the prescribed rate should be retrospective. The results if it were so would be unfair and even bizarre ... the intention of the enactment was that regard should be had to the rate of interest from time to time prescribed during the period between the arising of the cause of action and judgment, and that the maximum rate of interest for each part of the period should be reckoned accordingly". (See also judgment of Court of Appeal [1986] 1 NZLR 22.)

General Bills v Barnao (unreported, HC - Auckland, 17 February 1987, CP 387/86, Sinclair J)

Application for summary judgment on two bills of exchange, damages \$70 000 and interest as identified in contract.

Held: (Sinclair J) Judgment as sought for \$70 000 and interest in accordance with contract which included a provision that the contractual rate be paid up to payment (in effect, rule ousted that claim merges in judgment and interest after that is only available under r 383 at 11%).

Marac Finance Ltd Services v Hill (unreported, HC - Auckland, 13 August 1987, CP 467/87, Wylie J)

Application for summary judgment on defaults under loans, also interest under contract (which set a rate to accrue "after as well as before judgment").

Held: (Wylie J) P was certainly entitled to contractual interest down to judgment. As to interest after judgment, he noted the contractual term, held that s 87(1)(b) did not apply to these facts (it only governs interest *before* judgment), and held that r 538 did not apply in the face of a specific contract term, following *Economic Life v Usborne* [1902] AC 147. The debt did not merge in the judgment, and interest ran until payment at 31%.

Followed in *Picot v Hunter* (unreported, HC - Auckland, 9 March 1989, CP 2209/88, Tompkins J); *IFC Securities v Sewell* [1990] 1 NZLR 177.

Angus v Kinraid (unreported, HC - Dunedin, 10 November 1987, CP 16 & 17/86, Hardie Boys J)

D defaulted on agreement for sale and purchase of two flats - standard contract. P (vendor) cancelled the contract and sued for damages under the contract and the Contractual Remedies Act 1979.

Held: (Hardie Boys J) Seems P was not limited to remedies under the contract: interest was considered under *Hadley v Baxendale*, and damages measured by interest awarded to date of resale in respect of one flat (registered mortgage): loss not too remote on facts. "Indeed I incline to the view that the case comes within the first limb" - like *Broadbank Corporation v Mosgiel*. The loss claimed was held too remote in respect of the other flat. Interest was awarded at 11% under s 87 on the damages from the respective dates of sale to judgment.

Kis (Australia) Ltd v Adams (unreported, CA, 13 November 1987, CA 202/84, McMullin, Somers and Bisson JJ)

P sued for breach by Kis of a sole distributorship contract for machines, claiming reasonable notice had not been given before termination. The High Court measured damages by the profit on the number of machines that would have been sold if reasonable notice given, totalling general damages in mid 1980 of \$13,192. P also claimed (as special damages) interest on his overdraft (to the extent it was not reduced by sales) to time it was cleared in October 1981, and lost investment income after that. The High Court allowed the first head of interest at 17.75% (bank rate) under second limb of *Hadley v Baxendale*, but said the second was speculative and allowed only 11%, seemingly under s 87.

Held: (Court of Appeal: Bisson, Somers and McMullin JJ) Upheld award of interest as damages at 17.75% on overdraft and awarded interest on total damages (that interest and lost sales) at 11% from date damages assessed to date of judgment.

Bisson J: Accepted High Court finding in respect of first head that interest loss was reasonably foreseeable; refused investment rate interest on second head: High Court didn't find special damage and s 87 "does not allow interest to be awarded on the proceeds of the notional sale of the six machines". But s 87 interest should be awarded on damages from proper termination date to judgment.

Somers J: Overdraft interest sustainable. Second head: s 87 can't apply since there is "neither debt nor damages". But P entitled to interest on assessed damages down to judgment at 11%. (Interest on interest provision does not apply - "what is called overdraft interest is in fact money paid out by Adams as a result of the breach of the contract.... It is not really interest at all but a loss measured by interest paid.")

McMullin J: Upholds award on first head. Concurs with Somers J on second head.

Williams v Kirk [1988] 1 NZLR 452

After purchaser's breach of agreement for sale and purchase of a farm P (vendor) sued, claiming (on appeal) damages for lost profits and s 87 interest (which was neither claimed nor awarded in the High Court).

Held: (Court of Appeal: Cooke P, Somers and Bisson JJ) Award of s 87 damages at 11% from the date of resale to judgment. Somers J: Section 87 is compensatory and P's conduct is relevant. Here, P's delay was "not sufficiently serious to be marked by a refusal to award interest or by limiting the amount to be awarded particularly as the maximum statutory rate is so far below commercial rates". *Stephenson v Waite Tileman Ltd* (above) does not lay down a general rule about whether the Court of Appeal can award interest.

Pendergrast v Chapman [1988] 2 NZLR 177

Breach of agreement for sale and purchase. Deposit paid by cheque postdated to 20 October 1983 which was dishonoured. P(vendor) cancelled and claimed damages under three causes of action: debt due; on the dishonoured cheque; or as damages for breach of contract.

Held: (Wylie J) P succeeded on all three grounds and interest under s 87 ran from date of dishonour rather than later cancellation. If P had succeeded only on the damages claim, interest would have run from last day for settlement (6 April 1984).

Lincoln Industries v Angus Group (unreported, HC - Auckland Commercial List, 3 February 1988, CL 43/87, Barker J)

A contract for the sale of a business as a going concern included a term that the vendor be paid royalties quarterly (at 5% of product price) for five years. P (vendor) sued, claiming unpaid royalties between 1 July 1981 to 31 March 1984. The parties agreed on \$46 000 as the outstanding amount, and that interest should run from 15 March 1983 to payment date. Inquiry as to whether interest available, and if so whether under s 87 or the second limb of *Hadley v Baxendale*.

Held: (Barker J) "Sufficiently well known that most manufacturing businesses operate on credit, whether by way of bank overdraft or by commercial bills; it must have been in the reasonable contemplation of the defendant ... no doubt at all that, at very least, the plaintiff is entitled to Judicature Act interest". As to interest at market rates: adopted *Dods, Volk* and held the loss was not too remote. "In this essentially commercial transaction, the plaintiff is entitled to interest more in line with its actual loss than Judicature Act interest." As to the appropriate basis for calculating interest, P offered figures but these were "too complicated". The appropriate rate is the overdraft rate from time to time payable by P: "more appropriate, more within the reasonable contemplation of the parties and more easily recognised than one based on the idiosyncrasies of the bill market".

Roberts Family Investments Ltd v Total Fitness Centre (Wellington) Ltd [1989] 1 NZLR 15

Application for summary judgment for arrears of rent and interest at 25% per annum.

Held: (McGechan J) Accepted interest must be allowed if facts within the second limb of *Hadley v Baxendale*. "At the risk of heresy, I think the distinction between recoverability under the first and second branches of the rule in *Hadley v Baxendale* in this field is becoming unreal.... it now verges on the unreal to say the law does not presume losses where payments are delayed, at least in a business context.... However, as there are policy matters involved which may need resolution (vide the perhaps differing approaches of McMullin and Somers JJ in *Broadbank* ...), and as it is not necessary in this case to go so far, I will not rely on the first branch." He awarded interest at bank rates (25% found to be appropriate) from date of re-entry by P to summary judgment. The question of the appropriate rate for the period to final judgment was left to be determined at the hearing on quantum.

Dellabarca v Northern Storemen & Packers Union [1989] 2 NZLR 734

P brought claims for damages for inducement of breach of contract and conspiracy against his employer.

Held: (Smellie J) P was successful and was awarded \$15 000 compensatory and \$20 000 exemplary damages. Exercising the discretion under s 87, interest was awarded for five years prior to judgment (cause of action had arisen in January 1981): "By that means I make some allowance for the fact that the jury were invited to take inflation into account, and also for the fact that because of the complexity of the case the first defendant would require some time to consider its position.... Because of their particular character and function, I decline interest in respect of the exemplary damages".

Klaus v New Zealand Guardian Trust Co (1989) 3 BCR 307

Unequal distribution of partnership proceeds. Question whether P could claim damages for interest lost as a result of inequality in capital.

Held: (Doogue J) P was entitled to equitable interest for advantage lost by a partner who has not had his share. As to the rate, he rejected the older partnership/trustee cases which set a maximum of 5%: these bear no relationship to modern interest rates. *On the facts*, 11% (by analogy from s 87) seems fair: seems analogous to a loan. Awarded from date of incorrect distribution to date of death (partnership then dissolved and matter to be reassessed).

Clyde Investments Ltd v Harrison (unreported, CA, 28 February 1989, CA 126/87, Cooke P, Richardson and Somers JJ)

Sale and purchase of farm never completed; real estate agent paid out \$50 000

deposit to rogue who left country. P (purchaser) sued the agent for that sum and interest. The High Court had awarded 18% interest apparently on basis that P had borrowed money at bank rates.

Held: (Court of Appeal: judgment of Richardson J) There was not sufficient evidence for loss to be assessed at 18%. The award of interest was reduced to 11%.

Furby v Ultra Holdings Ltd (unreported, HC - Blenheim, 13 March 1989, CP 2/89, Master Hansen)

Application for summary judgment on debt, and amended claim for interest.

Held: (Master Hansen) Section 87 gives the court a complete discretion and need not be specifically pleaded, although obviously it is preferable that it is. Here the amendment was in D's favour and should be allowed.

Cornish v Currie (unreported, HC - Auckland, 4 May 1989, CP 1468/86, Thorp J)

Agreement for sale and purchase breached. P (vendor) resold to another and claimed \$49 000, alleged to be difference in value between the two contracts based on the terms of mortgages back. P relied on remedies under contract.

Held: (Thorp J) Reconsidered *Callander* (comparing it to *Edlin*) and said present claim weaker: "claim for the present value of a future interest". To allow it would be to give a very broad meaning to cl 8.4(2) of the REI contract use of "loss": "encompassing notional as well as actual interest lost as matters properly to be brought into the calculation of damages". Also notes *Blanchard*, purpose of cl 8 (but suggests possible conflict caused by simply adding contractual to common law remedies). Nominal price should continue to be starting point. No good reason to retreat from *Callander*. Judgment for defendant, no award of damages for loss of potential interest payments.

Neeson v Wrightson NMA (unreported, HC - Auckland, 2 June 1989, CP 2368/88, Wallace J)

Sale of farm fails through negligence of D (agent of P (vendor)). D knew P was unconditionally bound to purchase another farm. P sued agent claiming \$145 000 damages, including damages for interest costs on bridging finance and a mortgage which P claimed was required because of a deterioration in P's "general financial position".

Held: (Wallace J) D knew that if sale fell through, P would have to obtain bridging finance - squarely within *Wadsworth v Lydall* and the New Zealand cases. *Williams* distinguished. But recovery of damages for the mortgage interest was refused: simply not within the reasonable contemplation of D on the facts. *Dods* noted. P also entitled to interest under s 87 at 11% on recoverable damages, although not from date of cause of action (delay), instead from 1 January 1985, an arbitrary date which seemed fair.

Aalders v Stevens (unreported, CA, 22 June 1989, CA 174/87, Somers, Hardie Boys and Wylie JJ)

Appeal and cross appeal in respect of a matrimonial property award. Wife claimed costs and interest on award.

Held: (Court of Appeal: judgment of Wylie J) Interest is discretionary in this type of case. Here it would be awarded on the basis that the wife had been kept out of her share. She did have use of the matrimonial home until July 1986, so interest awarded under s 87 at 11% from August 1986 to judgment.

Dewavrin Segard (NZ) Ltd v UEB Wool Processing Ltd (unreported, HC - Wellington, 7 September 1989, CP 673/87, Master Williams QC)

Losses incurred on wool transaction. Judgment for P for \$24 000 damages. Question about what interest should be awarded on damages.

Held: (Master Williams QC) Evidence given that most wool traders fund purchases by borrowing at commercial rates to be recouped in sale price, and that P had done this at average rate of 16%. D must have known of this practice. P to be compensated for increase in value of wool in any case so proper course seemed to be to award interest at 16% from date of judgment on liability (29 August 1988) to date of the present judgment on quantum. Oral evidence in this case about interest said to be sufficient - actual records not needed.

Boyd Construction v Dolheguy (unreported, HC - Auckland, 25 September 1989, CP 1079/86, Gault J)

Breach of contract for sale of crane. P (vendor) claimed loss of \$22 000 (as difference between agreed and actual sale prices), also special damages measured by interest on \$50 000 loan allegedly needed after default.

Held: (Gault J) Actual loss found to be \$15 000. As to claim for special damages for interest actually incurred on the (now) \$42,000 sum, he considered *Kis* and *Dods* and found present to be "clear case" where P entitled to interest at actual overdraft rates, (which varied from 27% to 16%) to judgment.

Towers v R & W Hellaby Ltd (unreported, HC - Auckland, 27 October 1989, CP 185/86, Robertson J)

Contracts of employment had been prepared to take effect in the event of a takeover. When this happened, P brought a claim for the assessment of unpaid salary.

Held: (Robertson J) Damages assessed. As to interest, in this case interest could not be awarded under *Hadley v Baxendale*: no evidence D had any particular knowledge of P's financial position, question of fact and reasonable contemplation of loss not established. Section 87 interest was however available for the period P kept out of money.

Molineaux v Molineaux (unreported, HC - Auckland, 3 November 1989, M 1299/88, Tompkins J)

Matrimonial property claim by wife for interest in husband's superannuation. She did not take her share until the fund was distributed, some time after the dissolution.

Held: (Tompkins J) Wife entitled to interest on her share up to distribution; her contributions were earning interest and she did not have the use of the money during that time. Difficult to fix rate: fluctuation in Government stock and interest rates. 12.5% seemed fair as a broad average for the period, and interest was awarded from date of separation to date of distribution.

Chinnery v Guild (unreported, HC - Wellington, 13 November 1989, CP 406/87, Jeffries J)

Agreement for sale and purchase. Some uncertainty about interest if settlement did not take place on 30 January 1987. In fact, it was delayed and did not take place until 13 May 1987. P (vendor) claimed interest either under contract or in equity.

Held: (Jeffries J) The contract did not provide for interest if settlement was late. The court can in proper circumstances award equitable interest: see *Fraser* [1978] 1 NZLR 620. But on facts, P should not be reimbursed for being kept out of money when it seemed the loss was their own fault for failing to meet their obligations, so interest was denied.

New Zealand Insurance Co v Harris [1990] 1 NZLR 10

P had bought a tractor, financed through a loan. When the tractor was destroyed by fire, D (insurer) refused to indemnify P who commenced proceedings. P was successful and judgment was given for the value of the tractor and charges incurred under the loan agreement as a result of late payment. D appealed.

Held: (Court of Appeal: judgment of Richardson J) P was successful and entitled to judgment for the value of the tractor and damages for late payment, measured by payments made to the finance company. D knew of the financial agreement (although not the details) and it was in D's reasonable and natural contemplation that a natural result of delayed payment would be a loss to P resulting from the inability to repay the finance company. Interest as damages was awarded under the first limb of *Hadley v Baxendale*.

Shattock v Devlin [1990] 2 NZLR 88

Action for aggravated and exemplary damages for trespass.

Held: (Wylie J) P successful and awarded aggravated and exemplary damages against both parties. Interest was awarded under s 87 at 11% (not discussed) on all damages from date of issue of writ to judgment.

Angus Group Ltd v Lincoln Industries Ltd [1990] 3 NZLR 82

This was a further claim arising out of the contract considered in *Lincoln Industries Ltd v Angus Group Ltd* (above). The present dispute concerned an umpire's award which provided inter alia that P should pay interest at 23.5% on the unpaid purchase price to the time of the award. The terms of reference did not mention interest. P sought to set aside this aspect of the award.

Held: (Henry J) The arbitrator had power to award interest (*K Sika Plastics Ltd v EQWDC* [1980] 2 NZLR 590; *Kenneth Williams & Co Ltd v Martelli* [1980] 2 NZLR 596). However since there was no question of breach of contract, the maximum rate which could be awarded was 11% under s 87. The award was varied to this extent. "I comment that this result does highlight the unduly restrictive nature of s 87, which in general will operate only in favour of a defendant who has had the use of funds properly payable to the plaintiff. In today's conditions of inflation and fluctuating commercial interest rates it would seem preferable for the court to be given a broad discretion ..."

AGC (NZ) Ltd v East Brewster Urquhart & Partners [1990] 2 NZLR 167

P provided bridging finance for D's client, D (solicitor) giving undertaking that the finance would be repaid by a certain date. The client did not repay and eventually P sued D for the sum due and interest, claiming that no loss would have been suffered if D had honoured the undertaking.

Held: (Fisher J) There had been a breach of the undertaking and the lost interest was a direct consequence of that. For the purpose of disciplining solicitors, it should be taken into account. "Bearing in mind the occupation of the plaintiff as a professional lender of money I think it entirely appropriate that interest at its conventional rates as reflected in this particular mortgage should be paid or at least compensated for on the basis that the loan has remained outstanding down to the date of this judgment."

Accident Compensation Corporation v Broadbelt [1990] 3 NZLR 169

P (English) had been injured in New Zealand, and brought a claim against the Corporation for money he had spent in the United Kingdom on compensation expenses, also interest for the time he had been kept out of money.

Held: (Tompkins J) P was successful in the claim for the principal. As to interest, the Act speaks of "compensation", therefore P entitled to cost of money used - consistent with *Day v Mead*. (Also interest is incentive to ACC not to delay.) An appropriate rate was 11%, being the rate prescribed under s 87. The Court of Appeal (judgment of Richardson J) upheld the decision (although adding that if P had paid compensation expenses from savings, rather than by borrowing money, interest probably would not be awarded).

National Bank of New Zealand v DFC [1990] 3 NZLR 257

This was a claim about the priority of securities for advances to a company. In

the High Court, P obtained judgment for \$75 000 and interest at 11% under s 87 (a claim that D had held the funds as a fiduciary was disallowed). D appealed as to liability and P cross-appealed claiming a higher rate of interest.

Held: (Court of Appeal: judgment of Somers J) D was in effect a trustee and so the court had power to order an award of equitable interest, the power to be exercised on the basis that D should be charged the interest received or that so clearly to be supposed was received that D cannot deny its receipt. In the present case, an account of profits or compound interest were not appropriate, instead a simple rate approaching that charged by institutions such as the parties over the period would do justice; this was fixed at 14% per annum simple interest.

General Communications Ltd v DFC [1990] 3 NZLR 406

P sought to recover funds owed to it which had been repaid to D by D's solicitors (holding the money allegedly on trust for P). P succeeded in the High Court and was given judgment for the sum due plus equitable interest at 17% as a "fair but conservative rate" compound (following *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849). D appealed.

Held: (Court of Appeal: judgment of Hardie Boys J) The decision was upheld including the rate of interest, and on the evidence the judge was fully entitled to award compound interest. The case was consistent with the reasoning in *National Bank v DFC* but the facts were quite different.

Brooks v Vernon [1990] 3 NZLR 601

P had obtained a judgment in the District Court against D for damages of \$11 496 plus interest at 11% from the date of filing proceedings. The interest awarded brought the total over \$12 000, the then jurisdictional limit under s 29 of the District Courts Act 1947. D appealed on (inter alia) that basis.

Held: (Gallen J) Matter should be considered afresh. Interest under s 62B is discretionary and the Act clearly distinguishes between "a claim for debt or damages" and "an amount of interest". Discretion means that plaintiff can't accurately predict final amount (unlike claim for contractual interest). Historical distinction of interest and damages noted. Concluded that the jurisdictional limit in s 29 does not include interest (at least under s 62B).

Fletcher v National Mutual Life [1990] 3 NZLR 641

Action for negligence: P claimed it had been caused to pay away \$6.75 million. It claimed interest on that sum from date of loss: would have had to borrow or been unable to invest.

Held: (Henry J) "Although in one sense the claim can be described as being for interest on damages, ... a claim for interest on damages is not prohibited at common law merely because it has that characteristic, but when that is its only true nature and proper classification, in which case s 87 comes into play." Interest was awarded as damages, suffered as a foreseeable loss

because of the breach of duty. The appropriate rate was held to be the 90 day bank bill rate.

Kenton v Rabaul Stevedores Ltd (1990) 2 PRNZ 156

Claim for damages for breach of employment contract. D made a payment into court which P accepted. P claimed interest as well, but D claimed that the payment in had included interest although this was not specifically stated in the notice in terms of r 363. P did not rely on s 87 (no judgment had been given) but suggested r 363 itself supplied a basis for interest.

Held: (Chilwell J) Agreed s 87 could not apply and found the crucial issue was one of jurisdiction. No interest at common law: was it available in equity or under a statute? The lacuna in s 87 has been filled in England by s 35A of the Supreme Court Act 1981; but r 363 does not have the same effect in New Zealand. The High Court rules regulate practice and procedure, not substance. Rule 363 is not sufficient to effectively amend s 87, that would need to be done expressly. There was no power to award interest in this case.

If the matter was to be reformed, that should not be merely by a discretion to award interest in these cases: to do justice, it may be necessary to hear the merits (and the payment in rules are designed to prevent that inconvenience).

Followed in *Taspac Oysters Limited v James Hardie & Co Ltd* (unreported, HC - Auckland (Commercial List), 23 May 1990, CL 104/88, Wylie J).

Carr v Minister of Works & Development (unreported, HC (Admin) - Dunedin, 16 February 1990, CP 89/86, LVP 110/86, Holland J)

Compensation for taking land had been awarded under the Public Works Act; this was a subsequent application for costs.

Held: (Holland J) Jurisdiction exists for award of interest on costs: under s 94 Public Works Act interest can be given on "any award". P probably needs to show accounts etc paid, and that P has been out of pocket. "Although s 87 of the Judicature Act does not restrict the rate of interest in claims for compensation under the Public Works Act, I nevertheless consider that the rate of interest prescribed by that Act is an appropriate rate to adopt for an award for interest on costs." Interest was awarded on the costs at 11%.

Foodstuffs Ltd v Minister of Works & Development (unreported, HC - Dunedin, 19 February 1990, M 29/85, Holland J)

A claim for compensation under Public Works Act, settled except for interest and costs.

Held: (Holland J) Seems to be a practice of allowing for both interest and inflation (measured by the CPI) on such awards. The court is bound by *Drower*. The capital sum was adjusted with reference to the CPI plus interest at 2%.

National Bank of New Zealand v Lethbridge (unreported, HC - Auckland, 29 March 1990, A 1175/84, Master Williams QC)

Application by D to set aside a default judgment entered against them for a debt relating to an overdraft. The judgment included allowance for compound interest from the time of default.

Held: (Master Williams QC) The default judgment was varied, upholding D's liability but ordering a hearing about quantum. The question whether the bank had power to continue to charge compound interest after the relationship between the parties changed to one of debtor and creditor depended on the application in New Zealand of *National Bank of Greece SA v Pinios Shipping Co No 1 v Tsitsilianis (The Maira) No 3* [1988] 2 LI LR 126 which would need to be considered at a hearing on quantum.

Glaister v McHaffie (unreported, HC - Dunedin, 16 July 1990, AP 102/88, Tipping J)

Claim (originally in District Court) for breach of contract: failure to pay for grazing of cows. On appeal, interest was claimed under s 87 and s 62B of the District Courts Act 1947.

Held: (Tipping J) Thorough examination of the authorities. Question whether interest can be awarded under the first limb of *Hadley v Baxendale*. Answers the point made in Lennon [1990] NZLJ 90: "what we are concerned with ... is an award of damages measured by an interest rate, not interest as such. Therefore interest in these circumstances is not payable as of right in the sense in which that expression is used in s 87(2) nor is there a date from which interest became payable." Cites *Hungerfords*, especially Brennan and Deane JJ.

Summarises the law in New Zealand: the law does not presume that loss by way of interest is within first branch of *Hadley v Baxendale* (if it did, ss 87 and 62B would be obsolete). In the absence of any contractual right to interest, there is a discretion in the court, to award a maximum of 11% over all or part of the relevant period. "Parliament's clear indication".

Commercial injustice might be reduced in two ways: the legislative correction of the prescribed rate ("vain hope"); or by the "courts adopting a commercially realistic approach to the question whether or not the facts of the instant case can properly be brought within the second branch of the rule" in *Hadley v Baxendale*. Notes the two branches of the rule "shading in" to each other.

Logically, loss of opportunity of investing sum of late-paid debt is inevitable: should come within first limb of *Hadley v Baxendale* as less remote than, for example, interest paid on loan, but of course that conflicts with *London Chatham and Dover Railway*. Matter for Parliament: reform long overdue.

On facts: even though there were no special circumstances, as a reasonable person D must have regarded it as a serious possibility that P would have been running an overdraft and that non-payment of the debt would result in a cost to P measured by P's overdraft rate; this was a commercial

transaction. Interest was awarded from one month after debt due to judgment in District Court at 22%, and after at 11% as post-judgment interest under s 65A(2).

Benjamin v Wareham Associates (1990) 1 NZ Conv C 190,638

After unsuccessful summary judgment application, P brought a new claim for damages for breach of lease: failure to pay rent. P claimed arrears of rent until new tenant found and difference in rent thereafter.

Held: (McGechan J) P entitled to damages claimed. As to interest, noted difficulty in sums where incremental accrual of damage. On principle interest refused for period before proceedings issued: should prevent delay. Neither should the summary judgment application be the starting date since it had failed and such unproductive proceedings should be discouraged. Interest was awarded under s 87 at 11% from date of issue of proceedings to judgment, to be calculated from date each instalment fell due. Counsel were given leave to seek further directions if the calculations were too difficult.

W C Fowler & Sons Limited v St Stephens College Board of Governors (unreported, HC - Auckland, 22 November 1990, CP 494/87, Thomas J)

This was a second oral judgment on interest and costs. In the first judgment ([1991] 3 NZLR 304), Thomas J had indicated an inclination to award s 87 interest from issue of proceedings to judgment. Counsel submitted memoranda.

Held: (Thomas J) Interest was awarded for this term, *less* five months which represented the period P's request for an adjournment had delayed proceedings. "The School is not a commercial organisation and it must raise the monies to satisfy the judgment, including the interest awarded on the judgment, as an item of expenditure rather than the realisation of an investment. This is an appropriate case in which interest can properly be disallowed ..."

BNZ v Gardner (unreported, HC - Christchurch, 28 November 1990, CP 556/88, Holland J)

Claim by P for indemnity in respect of an obligation under a guarantee. P had paid \$1.225 million and sold the security to obtain \$388 203. Sought recovery of outstanding \$836 500 and interest at 24.75% (prime lending rate + 5%).

Held: (Holland J) Although indicating sympathy for D, "satisfied that any arrangement between an individual on one hand and a bank on the other would carry with it the expectation of both parties at the time it was entered into that in the event of a breach there would be a loss of interest to the bank". However, difficulty in finding that contract would set interest at the rate sought. On the facts, the judge ordered interest at 15% from the date of demand (taking into account part payment) as "estimate of what the bank might have lost, not by virtue of not recovering interest on this transaction but by virtue of being out of the sum of \$836 500 for the period".

Chamberlain v Minister of Lands (unreported, HC(Admin) - Whangarei, 20 December 1990, AP 17 and 19/89, Chilwell J and I W Lyall Esq)

An appeal by D from Land Valuation Tribunal hearing which had awarded compensation (as at 10 December 1987) of \$300 000 plus interest at 15% under s 94 of the Public Works Act 1981. (P had contended for 17%, referred to statistics and argued majority view in *Drower* inappropriate when inflation low. D argued for the *Drower* approach.) On appeal, P argued that *Drower* did not establish any binding principle, that the approach of the majority was inappropriate in times of low inflation and that compensation required a commercial interest rate, D that rate should be CPI (ie, inflation only).

Held: (Chilwell J and I W Lyall) *Drower* formulated guidelines but the 2% rate was not intended as a binding precedent. Question about what was "true rate": 2% or other rate? There was no evidence on this point so safest course was to adopt the rate under s 87 of the Judicature Act, and award interest at 11% from 10 December 1987 to judgment.

Hieber v Hieber [1991] 1 NZLR 315

Equitable claim about option to purchase interest in a supermarket. D had taken possession and was receiving rent but had not paid the purchase price. Claim for interest on purchase price for the period. High Court held (on the evidence of a valuer) that the rate should be 21% from 9 October 1987 to date of settlement.

Held: (Court of Appeal: judgment of Richardson J) There was an implied promise to pay interest in these circumstances. See *Fraser*, three considerations: (a) rate which fairly reflects market conditions, (b) it is desirable that there be certainty (so the 4% rule in Chancery) and (c) allow for change where market rates higher than rate usual under (b) so as to prevent unfairness. The present case was not appropriate one in which to fix a general rate for equitable interest because there was insufficient economic evidence. 15% (from date of proposed settlement to actual settlement) seemed fair in this case, but there should be no suggestion that that is a general rule. Interest was also awarded at 11% under s 87 from date of settlement to judgment.

Krehic v Clark [1991] 1 NZLR 703

P, successful in an action for indemnity for a sum paid, sought also damages measured by lost investment income (part of sum paid had been realised from investments for that purpose), or interest at 22% on total. In the alternative, P sought interest under s 87.

Held: (Holland J) *Glaister* adopted, but reservations expressed at failure by Tipping J (and McGechan J in *Roberts*) to refer to any need for the claim to be by way of special damage: "I am concerned that such a 'commercially realistic' approach will lead to claims by way of damages for interest in practically all cases ... the failure to distinguish between special and general damages, if such occurred, is changing the law.... While I entirely agree ... [that it] is unjust ... I do not consider that the topic is an appropriate one in this decade for judicial legislation". Since *London, Chatham and Dover*

Railway applies in New Zealand, the courts are prevented from awarding damages in accordance with ordinary law (ie reasonable contemplation). There is a need for substantial investigation before a fair and practical solution can be devised. For example, the rule in *Wadsworth v Lydall* is unfair and discriminatory. "In my view there is a great deal to be said for the application of a section equivalent to s 87 of the Judicature Act to all claims for damages except where there is some specific contractual provision for interest or some exceptional circumstance is proved. Clearly the rate of interest should be higher and should bear some close relationship to normal overdraft rates of interest with a leaning towards being higher rather than lower than the normal because it is the defendant who is in default."

Acknowledged that this is a view different from many other judges (eg, Wallace, Tipping, McMullin, McGechan JJ) so obliged to apply *Dods* and award interest as a head of special damage which had been proved. Interest awarded at 21% on lost investment and 22% on borrowings, plus interest under s 87 at 11% on the total.

Wild v Bank of New Zealand [1991] 2 NZLR 454

Negligent misrepresentation by D (bank) about turnover caused P to buy a business. The business failed and P sued for damages for capital loss, operating losses, loss of opportunity, loss of investment income etc. D counterclaimed for outstanding debt and interest.

Held: (Smellie J) The loss of capital and trading losses were recoverable, others were too remote. Interest payments were recognised in the recoverable losses, but interest payable after the partial recovery of capital after the sale (when the bank debt could have been cleared if P had wished) was too remote. (D succeeded on counterclaim for principal and interest at unspecified rate.) Interest on capital loss and, from mid point of three years and six weeks business kept open, on operating losses. The interest should be non-compounding and at 11%.

Brake v Boote [1991] 2 NZLR 757

Agreement for sale and purchase, deposit of \$20 000 and mortgage back to P (vendor) of \$455 000 without interest. The deposit was payable on 31 March 1987 and the agreement contained a penalty interest clause, setting the rate at 25%. Mortgage was not registered since transfer could not be completed (owner of house deceased and difficulty with probate). P was told that the money was invested awaiting settlement - not true. Settlement took place, leaving interest dispute to be determined in court. P claimed interest at deposit rate (not 25%).

Held: (Holland J) No contractual agreement to pay interest. The question was whether there was an equitable obligation as in *Hieber*. This case was different because the delay was the fault of the vendor. Ask has the purchaser suffered any loss/has the vendor profited from default? On facts, if interest is awarded P gets no more than if contract had been carried out

and D is no worse off; so interest should be awarded. As to the rate: on evidence National Bank rate on solicitors' trust accounts was 16.5-19%, varying from month to month. Trustbank rate was 15-17%. Notes that "the appropriate interest may no doubt vary from time to time according to the circumstances". Deposit in a solicitors' trust account is not necessarily what P would have done with funds. On facts, rate should be 15% from date settlement should have been completed to date when it was. In a further unreported judgment, interest at 11% was awarded on the damages under s 87 from the date of actual settlement to judgment.

McIntosh v Hawke's Bay Bakeries Ltd (unreported, HC - Napier, 5 February 1991, CP 146/88, Heron J)

Question about what interest should be awarded where payment into court (including sum for interest) had been made but not accepted, and so returned to D.

Held: (Heron J) Although D had calculated correct amount at time when payment made, the money had been returned and D had enjoyed its use. Therefore D must pay interest under s 87.

Moylan Assurance Consultants v Hughes (unreported, HC - Auckland, 4 March 1991, CP 951/89, Henry J)

Action for recovery of debt, originated in New South Wales. Judgment given in High Court in New Zealand dollars. P claimed interest at 14.5%, the rate applicable to judgments obtained in New South Wales at the relevant time.

Held: (Henry J) The question of interest is one of foreign law which must be established by expert evidence if it is to be applied here and there had been no such evidence (reference to the rate by court official in a document insufficient). He awarded interest under s 87 at 11%.

Ashe v Tauranga Marina Society (unreported, HC - Tauranga, 6 March 1991, CP 134/88, Anderson J)

P had obtained judgment for damages but, for a variety of reasons including P's failure to claim interest in pleadings or evidence, no interest had been awarded. P sought recall of the judgment and its reissue with interest.

Held: (Anderson J) Interest would normally be awarded in this type of case, but undesirable that present judgment be reopened: inconsistent with finality. Application dismissed.

Harris v Grose (unreported, HC - Christchurch, 15 March 1991, CP 690/88, Fraser J)

Claim for damages for, inter alia, defamation.

Held: (Fraser J) Judgment was given for \$10 000 damages for defamation. Interest was not awarded or discussed.

Rees-Jones v Primary Export Services (NZ) Limited (unreported, HC - Napier, 22 March 1991, M 111/90, Master Williams QC)

P applied for the winding up of D, alleging D owed P about \$93 000. P also claimed interest.

Held: (Master Williams QC) The Court was not a position to make any allowance for interest in the winding up proceedings, since it had not been claimed in the prayer for relief (understandable given the nature of the proceedings). And these were not proceedings for the recovery of any debt or damages. There was a question whether interest was payable as of right, but this application was also declined: the contract between the parties provided for payment within 14 days of consignment but did not specify interest in the case of default.

Bay Automotive Supply Co v Fuji Auto Parts (unreported, HC - Auckland (CL), 19 April 1991, CL 22/90, Barker J)

Application by D for setting aside of judgment, or a stay of execution, in effect on the basis of a counterclaim.

Held: (Barker J) The application was dismissed. D's remedy was to bring proceedings in the District Court; in the meantime the judgment must be paid. The Court quoted Henry J in *Heaven Farms Ltd v Aylett* (CP 480/87, 10 March 1988): "The plaintiff has an immediate entitlement to the judgment debt and the right to use that money to its best advantage, and to allow that to happen rather than have to wait for payment with the debt attracting interest at only 11% per annum while defendants prosecute their claim is not unjust ...".

Air New Zealand v Johnston (unreported, CA, 26 June 1991, CA 91/90, Cooke P, Casey J, Jeffries J)

Appeal over quantum of Labour Court award of compensation arising from unjustified dismissal.

Held: (Court of Appeal: judgment of Cooke P) Substituted award (comprising compensation for future economic loss and injury to feelings) was to carry interest at 11% from the date of dismissal.

Dhaya v Dhaya (No 4) (unreported, HC - Wellington, 9 August 1991, M 5/86, Eichelbaum CJ)

This was a matrimonial property claim by the wife for a share in the matrimonial home. The original decision refusing the claim had been successfully appealed. This particular judgment related to the interest to be awarded on the capital sum to the wife. The High Court had originally awarded 15% from 2 September 1986.

Held: (Eichelbaum CJ) Counsel for the husband had submitted that the rate must have been influenced by the husband's bad conduct, but Eichelbaum CJ said that he had simply awarded a compensatory rate based on "the realism of

the economic circumstances of that time". Although interest rates had since fallen, 15% remained appropriate as taking into account the varying economic circumstances over the whole period.

Appendix E

Select Bibliography

TEXTS

- Finn (ed) *Essays in Contract* (The Law Book Company, Sydney, 1987)
Kercher, Noone *Remedies* (2nd ed, The Law Book Company, Sydney, 1990)
McGregor *McGregor on Damages* (15th ed, Sweet and Maxwell, London, 1988)
Mann *The Legal Aspect of Money* (4th ed, Clarendon Press, Oxford, 1982)
Ogus *The Law of Damages* (Butterworths, London, 1973)
Pitch, Snyder *Damages for Breach of Contract* (2nd ed, Carswell, Toronto, 1989)
Treitel *The Law of Contract* (7th ed, Stevens & Sons, London, 1987)

ARTICLES

- Arnheim "Some Damaging Truths About Damages" (1987) 131 *Solicitors Journal* 642
Bowles and Whelan "Compound Interest: Could Multipliers be the Way Forward?" (1986) *New Law Journal* 876
Bowles and Whelan "The Law of Interest: Dawn of a New Era?" (1986) 64 *Canadian Bar Review* 142
Epstein "Beyond Foreseeability: Consequential Damages in the Law of Contract" (1989) 18 *Journal of Legal Studies* 105
Exall "Summary Judgment and Interim Payments in Personal Injury Cases" (1991) 135 *Solicitors Journal* 441
Feldman and Libling "Inflation and the Duty to Mitigate" (1979) *Law Quarterly Review* 270
Hammond "Compensation for the Lost Value of Money: A Canadian Proposal" (1983) 99 *Law Quarterly Review* 68
Keir and Keir "Opportunity Cost: A Measure of Prejudgment Interest" (1983) 39 *Business Lawyer* 129
Lennon "Interest on Late Payments of Debts or Damages in New Zealand: Legal Theory Clashing with Commercial Reality" (1990) *New Zealand Law Journal* 90
MacIntosh and Frydenlund "An Investment Approach to a Theory of Contract Mitigation" (1987) 37 *University of Toronto Law Journal* 113
McMorland "Interest as Damages" (1991) 6 *Butterworths Conveyancing Bulletin* 26

- Mann "On Interest, Compound Interest and Damages" (1985) 101 *Law Quarterly Review* 30
- Maynes, Pincus and Robinson "Calculating Periodic Interest" (1991) 17 *Canadian Business Law Journal* 415
- Michel "Interest on Debt and the Late Payer" (1987) *The Law Society's Gazette* 2173
- Rothschild "Prejudgment Interest: Survey and Suggestion" (1982) 77 *Northwestern University Law Review* 192
- Samuels "Impecuniosity: Can the Plaintiff Recover Interest on Money Borrowed?" (1987) *The Law Society's Gazette* (973)
- Tenquist "Interest on Costs and Damages in the High Court" (1991) 135 *Solicitors' Journal* 656
- Waldron "Workshop: Remedial Aspects of Money" (1989) Paper presented at the *International Symposium on the Law of Remedies* Windsor, October 1989
- Williams "Prejudgment Interest: An Element of Damages Not to be Overlooked" (1977) 8 *Cumberland Law Review* 521

LAW REFORM

AUSTRALIA

- New South Wales Law Reform Commission LRC 35 *Community Law Reform Program Second Report: Interest on Certain Debts* (1983)
- Law Reform Commission of Queensland *Working Paper in Relation to an Examination of the Law Relating to Interest on Damages* (1971)
- Law Reform Commission of Tasmania *Report No 44: Report on Pre- and Post-Judgment Debts* (1985)
- Law Reform Commission of Western Australia Project No 70 Part I *Report on Pre-judgment Interest* (1981)

CANADA

- Law Reform Commission of British Columbia Report 12 *Interim Report on Debtor Creditor Relationships: Part 4 - Pre-judgment Interest* (1973)
- Law Reform Commission of British Columbia Working Paper No 49 *The Court Order Interest Act* (1985)
- Law Reform Commission of British Columbia Report 90 *Report on the Court Order Interest Act* (1987)
- Manitoba Law Reform Commission Report 47 *Prejudgment Compensation on Money Awards: Alternatives to Interest* (1982)
- Uniform Law Conference of Canada *Proceedings of the Sixty-Second Annual Meeting* (1980)
- Uniform Law Conference of Canada *Proceedings of the Sixty-Fourth Annual Meeting* (1982)

HONG KONG

The Law Reform Commission of Hong Kong *Report on Interest on Debt and Damages (Topic 19)* (1990)

UNITED KINGDOM

Law Revision Committee *Second Interim Report* Cmd 4546 (1934)

Law Commission Working Paper No 66 *Interest* (1976)

Law Commission (Law Com No 88) *Law of Contract: Report on Interest* (1978)

UNITED STATES

California Law Revision Commission *Recommendation Relating to Interest Rate on Judgments* (1980)

Other Law Commission publications:

REPORT SERIES

NZLC R1	Imperial Legislation in Force in New Zealand (1987)
NZLC R2	Annual Reports for the years ended 31 March 1986 and 31 March 1987 (1987)
NZLC R3	The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987)
NZLC R4	Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
NZLC R5	Annual Report 1988 (1988)
NZLC R6	Limitation Defences in Civil Proceedings (1988)
NZLC R7	The Structure of the Courts (1989)
NZLC R8	A Personal Property Securities Act for New Zealand (1989)
NZLC R9	Company Law: Reform and Restatement (1989)
NZLC R10	Annual Report 1989 (1989)
NZLC R11	Legislation and its Interpretation: Statutory Publications Bill (1989)
NZLC R12	First Report on Emergencies: Use of the Armed Forces (1990)
NZLC R13	Intellectual Property: The Context for Reform (1990)
NZLC R14	Criminal Procedure: Part One - Disclosure and Committal (1990)
NZLC R15	Annual Report 1990 (1990)
NZLC R16	Company Law Reform: Transition and Revision (1990)
NZLC R17	A New Interpretation Act: To Avoid "Prolixity and Tautology" (1990) (and Summary Version)
NZLC R18	Aspects of Damages: Employment Contracts and the Rule in <i>Addis v Gramophone Co</i> (1991)
NZLC R19	Aspects of Damages: The Rules in <i>Bain v Fothergill</i> and <i>Joyner v Weeks</i> (1991)
NZLC R20	Arbitration (1991)
NZLC R21	Annual Report 1991 (1991)

PRELIMINARY PAPER SERIES

NZLC PP1	Legislation and its Interpretation: the Acts Interpretation Act 1924 and Related Legislation (discussion paper and questionnaire) (1987)
NZLC PP2	The Accident Compensation Scheme (discussion paper) (1987)
NZLC PP3	The Limitation Act 1950 (discussion paper) (1987)
NZLC PP4	The Structure of the Courts (discussion paper) (1987)
NZLC PP5	Company Law (discussion paper) (1987)
NZLC PP6	Reform of Personal Property Security Law (report by Prof J H Farrar and M A O'Regan) (1988)
NZLC PP7	Arbitration (discussion paper) (1988)
NZLC PP8	Legislation and its Interpretation (discussion and seminar papers) (1988)
NZLC PP9	The Treaty of Waitangi and Maori Fisheries - <i>Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi</i> (background paper) (1989)
NZLC PP10	Hearsay Evidence (1989)
NZLC PP11	"Unfair" Contracts (discussion paper) (1990)
NZLC PP12	The Prosecution of Offences (issues paper) (1990)
NZLC PP13	Evidence Law: Principles for Reform (discussion paper) (1991)
NZLC PP14	Evidence Law: Codification (discussion paper) (1991)
NZLC PP15	Evidence Law: Hearsay (discussion paper) (1991)
NZLC PP16	The Property Law Act 1952 (discussion paper) (1991)

