

Memorandum 75-22

Subject: Study 80 - Prejudgment Interest in Civil Actions

The attached letter from Professor Ronan E. Degnan, Boalt Hall, indicates a willingness to prepare a background study on prejudgment interest for the Law Revision Commission. He stated to me that he believes that \$3,500 would be a minimum amount of compensation for the study.

We have expended all our research money for the current fiscal year. Our budget for 1975-76 is still under consideration by the Legislature. It includes a minimum amount of research funds--not more than \$7,500--which we may need to use to pay the extraordinary printing costs during 1974 and 1975 in printing the eminent domain recommendations. Accordingly, at this time, the staff cannot assure that there will be any money available for research in 1975-76 fiscal year. It would be extremely risky to give Professor Degnan the go ahead now on the assumption that state contract regulations will remain the same when moneys for the 1975-76 year become available and on the assumption that any such moneys will actually be available for research contracts when our printing bills for work now in progress have been paid.

The basic problem is caused by Professor Degnan's desire to work on this matter this summer. We would be in a position to determine whether funds were available early in 1976, but that will be too late.

The Commission is, of course, aware that we are now engaged in a number of major projects--eminent domain, creditors' remedies, and non-profit corporations. In addition, I have in hand the first draft of the study on adoption (which has been accepted for publication in the summer

issue of the USC Law Review). This is another major project and we should begin work on it during 1975.

I discussed the prejudgment interest topic with Assemblyman McAlister. His view was that it would be a political question, and he did not believe the study should be given any priority. On the other hand, it should be noted that this topic was added to our agenda by the Legislature at the request of the State Bar which struggled with the problem for a number of years and then decided to request that the Law Revision Commission study the matter. There has been no recent pressure to put this topic on our agenda of topics under active study.

The staff has mixed feelings about this topic and Professor Degnan's proposal. While we would like to have a background study prepared--even if we would not get to the study within the next couple of years--we do not see how we can undertake now to commission Professor Degnan to prepare the study in view of the very many competing demands for our funds for 1975-76 and the possibility of new regulations governing research contracts.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720
TELEPHONE [415] 642- 0338

March 3, 1975

Mr. John DeMouilly
California Law Revision Commission
Stanford University
Stanford, California

Dear John:

You said that you have been authorized ("you" being the Commission) to make a study of and recommendation on pre-judgment interest. (I would include post-judgment interest, although that might involve a constitutional problem you would prefer to avoid.) I promised that I would write a memo to you about it, and why I think it is important. It is freshly in my mind because I just taught the subject in Remedies, and the study appeals to me because I would like to be paid to do what I may do anyway -- write an article, although of a much more general coverage than merely California.

Why is interest important? Taking just personal injury, what is the average time lapse between accrual of the injury, commencement of the action and the date of final judgment -- the latter being the date interest begins to accrue under the existing law? Or take a contract case, one in which part of the damages are liquidated, and thus subject to the interest rate, and other parts are unliquidated. Is the whole sum outside the interest rule because the total is unliquidated, even though part is not? Further, why should the rule be that only liquidated sums, or those which can be made certain by calculation, are subject to pre-judgment interest?

Are there not alternatives to interest, such as restitutionary allocations when the defendant who has had the use of the money between accrual of interest and time of judgment in fact made more than the legal rate? Such as a financial institution which in fact invests at the market rate (now high, but sometimes lower than the legal rate), but invests on a compound interest rate when the law figures interest at simple interest only?

The California law is wholly and hopelessly out of date, although I confess that most American law is, and only New York (by legislation) and New Hampshire (by judicial decision) have made any changes. England made important changes in 1970. California judges have struggled with the problem, and sometimes have come up with fashioned solutions to particular problems, most often in defiance of or deviation from the law.

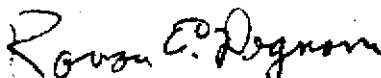
What could a study reveal? It might do two things: (1) show how hopelessly 19th century the present structure is, (2) show that the subject is of larger importance than even judges and lawyers generally recognize.

What proposals could emanate from the Study? I think that a sensible structure that focussed on the general damages principles of giving the plaintiff and defendant both the contract benefit of the bargain standard and the tort objective of making the defendant whole, while deterring this defendant or future ones but at the same time not imposing punitive damages without showing of malice or the like, could be worked out. I have the outlines of these solutions in my mind. What I need is a full study of the law in other jurisdictions (especially admiralty, which has its own interest rule) in order to refine them. In short, I could write a better interest statute than California now has without leaving this typewriter. But if I am to write a good one -- one that would be the best in the country -- I need both time and money.

Would you ask the Commission to consider whether they would fund such a study? Needless to say, I would not ask for compensation for studying the law of New Hampshire as such, although my article would require that. But studying New Hampshire's rule, and its successes and failures, would be necessary for me to formulate a rule for California.

You mention that your present budget is committed. Most are at this time of the year. But I would be willing to extend credit in the sense that I would begin the project immediately if I had your assurance that the Commission would enter into a progress-payment contract when new funds become available in mid-1975.

Sincerely,



Ronan E. Degan
Professor of Law