

Prejudgment Interest for Personal Injury Litigants: A Summons for Indiana Lawmakers

I. INTRODUCTION

In Indiana, prejudgment interest¹ is sanctioned by statute for money due on loans or forbearances of money, goods or things;² for money due on a written instrument;³ for money due when an account stated or an account closed is proved; or for money had and received for the use of another person and retained without his consent.⁴ The allowance of prejudgment interest, however, is not solely a creature of statute,⁵ and courts looking to the common law have allowed awards of prejudgment interest as an element of damages where the loss is ascertainable by fixed rules of evidence and accepted standards of evaluation.⁶

Although prejudgment interest has been recognized as an appropriate element of damages in property torts,⁷ the Indiana Supreme Court early implanted a bar to recovery of prejudgment interest in personal injury actions.⁸ That bar, established by dicta in the 1911 case, *New York, Chicago & St. Louis Railway Co. v. Roper*,⁹ has remained even though it is inconsistent with the general rationale espoused for awarding prejudgment interest: "The award of interest is founded solely upon the

¹Prejudgment interest is interest awarded for the lapse of time before judgment and is often defined as interest as damages rather than interest as interest which accrues on a final judgment. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5 (1973). [hereinafter cited as *D. Dobbs*].

²IND. CODE § 24-4.6-1-102 (1982) provides: "When the parties do not agree on the rate, interest on loans or forbearances of money, goods or things in action shall be at the rate of eight percent (8%) per annum until payment of judgment."

³*Id.* § 24-4.6-1-103(a) provides: "From the date of settlement on money due on any instrument in writing which does not specify a rate of interest and which is not covered by IC 1971, 24-4.5 or this article."

⁴*Id.* § 24-4.6-1-103(b) provides: "And from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent."

⁵See *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979); *Portage Indiana School Constr. Corp. v. A.V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972); *New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

⁶*Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800 (7th Cir. 1971); *New York, C. & St. L. Ry. v. Roper*, 176 Ind. 497, 96 N.E. 468 (1911); *Brand v. Monumental Life Ins. Co.*, 396 N.E.2d 417 (Ind. Ct. App. 1979), *vacated on other grounds*, 417 N.E.2d 297 (Ind. 1981).

⁷*Roper*, 176 Ind. 497, 96 N.E. 468.

⁸*Id.* at 510, 96 N.E. at 473 (dictum).

⁹*Id.* After holding that prejudgment interest should be allowed as an element of damages in property torts, the court stated: "Of course, it does not follow that the above rule would apply to personal injury cases . . ." *Id.*

theory that there has been a deprivation of the use of money or its equivalent and that unless interest be added, the injured party cannot be fully compensated for the loss suffered."¹⁰ A personal injury litigant suffers the loss of the use of his money,¹¹ so the current denial of prejudgment interest to him results in an unjust denial of full compensation.

This Note will briefly review the history of prejudgment interest, including its development in Indiana case law, and will focus on the current inequity which results from denying prejudgment interest to personal injury litigants. Furthermore, and primarily, this Note will summon the Indiana bench and especially the Indiana legislature to modify, clarify, and expand the law to provide fair and full compensation for personal injury litigants. Only an explicit, mandatory prejudgment interest statute will guarantee that awards of prejudgment interest in personal injury actions are consistent. The enactment of explicit statutory guidelines will enable the courts to avoid the conflict and confusion which have pervaded Indiana courts' awards of prejudgment interest in the past.¹²

II. HISTORICAL EVOLUTION OF PREJUDGMENT INTEREST

A. *General Development of Prejudgment Interest*

From the early days of the common law, interest was considered usurious and was, therefore, viewed with disfavor by the courts.¹³ Gradually, conventional interest¹⁴ became acceptable as a way of compensating a creditor for the loss of the use of his money.¹⁵ From that point, acceptance of interest progressed, first being allowed where the sum owed was liquidated, that is, computable without relying on opinion or discretion,¹⁶ and then being extended to sums which were ascertainable.¹⁷

Awarding interest for damages has generally been within the province of the judiciary, as legislatures have given limited or no guidance to the courts.¹⁸ Some jurisdictions follow the traditional approach and allow prejudgment interest only when specified by contract or statute;¹⁹ a

¹⁰Fort Wayne Nat'l Bank v. Scher, 419 N.E.2d 1308, 1310-11 (Ind. Ct. App. 1981).

¹¹See *infra* notes 70-77 and accompanying text.

¹²See *infra* notes 41-50 and accompanying text.

¹³See generally C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 51 (1935).

¹⁴Conventional interest is also referred to as promised interest or interest *eo nomine*.

¹⁵See C. McCORMICK, *supra* note 13, at 209.

¹⁶See generally *id.* §§ 54-56. See also D. DOBBS *supra* note 1, § 3.5.

¹⁷See generally C. McCORMICK, *supra* note 13, § 55.

¹⁸Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising within the Sixth Circuit*, 46 CIN. L. REV. 151, 152 (1977).

¹⁹Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U.L. REV. 192, 199-203 (1982) [hereinafter cited as Comment, *Survey*].

majority of jurisdictions sidestep restrictive statutes and use a discretionary approach in awarding prejudgment interest;²⁰ still other states have adopted statutes or court rules which mandate awards of prejudgment interest under certain circumstances.²¹

This latter statutory approach has become the overwhelming trend in recent years as many states have responded to the need for a policy of fairness which mandates recovery of prejudgment interest in tort cases.²² Covered by these statutes are personal injury cases in which claimants had formerly been denied prejudgment interest because the claimants' damages were not ascertainable with accuracy before trial and because juries' awards of general damages were viewed as arbitrary.²³

B. *The Development of Prejudgment Interest in Indiana*

Although Indiana statutory law permits recovery of prejudgment interest in a contract setting or for money had and received for the use of another person,²⁴ judicial interpretations of the common law have allowed awards of prejudgment interest as part of recoverable damages in other actions.²⁵ In the torts area, the Indiana Supreme Court firmly established the award of interest in property torts in the landmark decision, *New York, C. & St. L. Ry. v. Roper*,²⁶ stating that "except

²⁰*Id.* at 204-209; *see id.* at 204 n.74 (identifying Indiana as state in which courts have "given themselves discretion to grant interest by judicial decision" and citing *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630, 635-36 (Ind. Ct. App. 1980)).

²¹Comment, *Survey, supra* note 19, at 209-213. *See generally* S. Carrol, *Jury Awards and Prejudgment Interest in Tort Cases* (May, 1983) (A Rand Note prepared for The Institute of Civil Justice, N-1994-ICJ; Rand, Santa Monica, CA 90406) [hereinafter cited as Rand Note]. *See also infra* note 129 and accompanying text.

²²Rand Note, *supra* note 21, at 1.

²³*See generally* C. McCORMICK, *supra* note 13, § 55. *See also* RESTATEMENT (SECOND) OF TORTS § 913 comment c (1979).

²⁴IND. CODE §§ 24-4.6-1-102, 24-4.6-1-103 (1982).

²⁵*See, e.g.,* *Miller v. Billingsly*, 41 Ind. 489 (1873) (interest upheld for gross breach of trust); *Pittsburgh, A.W. & C. Ry. v. Swinney*, 97 Ind. 586 (1884) (prejudgment interest allowed in trespass/conversion case); *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N.E. 487 (1891) (prejudgment interest awarded for fraudulent appropriation of corporate funds); *State v. Orcutt*, 211 Ind. 523, 199 N.E. 595 (1936) (prejudgment interest awarded in eminent domain proceeding); *Chicago, St. L. & P. R.R. v. Barnes*, 2 Ind. App. 213, 28 N.E. 328 (1891) (interest award upheld for negligent injury of land and cattle); *Wabash R.R. v. Williamson*, 3 Ind. App. 190, 29 N.E. 455 (1891) (interest allowed for damage to cattle); *Brand v. Monumental Life Ins. Co.*, 396 N.E.2d 417 (Ind. Ct. App. 1979) (prejudgment interest allowed where payment of life insurance proceeds withheld), *vacated on other grounds*, 417 N.E.2d 297 (1981); *Board of School Trustees v. Ind. Educ. Employment*, 412 N.E.2d 807 (Ind. Ct. App. 1980) (prejudgment interest awarded on damages from unfair labor practices).

²⁶*New York, C. & St. L. Ry v. Roper*, 176 Ind. 497, 508-09, 96 N.E. 468, 473 (1911).

when the amount of recovery is . . . limited by statute, the law declares the rule of full compensation."²⁷ The *Roper* court provided fixed guidelines for awarding this interest.

1. *Ascertainable Sum Standard.*—*Roper* went beyond the traditional distinction between liquidated and unliquidated damages,²⁸ and held that prejudgment interest is proper where damages are ascertainable by fixed rules of evidence and known standards of evaluation at a particular time.²⁹ *Roper's* "ascertainable sum" test has been reiterated by Indiana courts for over sixty years.³⁰ Furthermore, federal courts following Indiana law have applied the *Roper* ascertainable sum test in contract actions.³¹ The federal courts have gone beyond the limited guidelines of Indiana's interest statute³² and have applied the common law's ascertainable sum test, for example, in determining whether interest should be allowed on damages incurred from an owner's breach of implied contractual duty not to impede a subcontractor's performance.³³

The state courts, following the federal lead, have extended the ascertainable sum test to contract actions.³⁴ In a leading case, *Portage Indiana School Construction Corp. v. A. V. Stackhouse Co.*,³⁵ the court reviewed the federal decisions and applied the ascertainable sum test to the facts of the *Portage* case but concluded that the damages were not ascertainable.³⁶ In a post-*Portage* case in the same district, Judge Staton noted that only federal courts had extended the *Roper* test beyond tortious property damages.³⁷ Judge Staton questioned whether the *Roper* ascertainable sum test should be extended to contract actions, as statutory remedies were available.³⁸ The court, however, avoided the "ominous

²⁷*Id.* at 508-09, 96 N.E. at 473.

²⁸See *supra* note 16 and accompanying text.

²⁹*Roper*, 176 Ind. at 508-09, 96 N.E. at 472.

³⁰See, e.g., *Independent Five & Ten Cent Stores of New York v. Heller*, 189 Ind. 554, 127 N.E. 439 (1920); *Town & Country Mutual Ins. Co. v. Savage*, 421 N.E.2d 704 (Ind. Ct. App. 1981); *Portage Indiana School Constr. Corp. v. A.V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972).

³¹See *Luksus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800 (7th Cir. 1971); *North Shore Sewer and Water, Inc. v. Corbetta Constr. Co.*, 395 F.2d 145 (7th Cir. 1968).

³²See *supra* notes 2-4.

³³*North Shore*, 395 F.2d at 153 (where the circuit court found the damages were not fixed, definite or ascertainable even though the district court found the parties had stipulated that the prime contract unit prices would apply if the plaintiff were entitled to recover damages).

³⁴See *infra* notes 35, 40.

³⁵*Portage Indiana School Constr. Corp. v. A. V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972).

³⁶*Id.* at 373-75, 287 N.E.2d at 568-70.

³⁷*Lindenberg v. M & L Builders and Brokers*, 158 Ind. App. 311, 319-21, 302 N.E.2d 816, 821-822 (1973).

³⁸*Id.* at 320, 302 N.E.2d at 822.

implications'' of that question by deciding that the plaintiffs' claim did not satisfy *Roper's* requirements.³⁹

In 1981, the second district applied the ascertainable sum test and awarded prejudgment interest in a contract rescission case.⁴⁰ The application of the ascertainable sum test in property torts and in contract actions demonstrates the Indiana courts' willingness to extend prejudgment interest beyond the narrow confines of the statute.

Even though *Roper* firmly entrenched the ascertainability prerequisite, and later cases stated that "prejudgment interest is proper where the trier of fact need not exercise its judgment to assess the amount of damages,"⁴¹ the cases reflect uncertainty and inconsistency in construing the criteria necessary for establishing ascertainable damages. For example, one line of cases exhibits willingness to find ascertainability although variances exist between damages alleged and damages awarded,⁴² while a line of restrictive decisions denies prejudgment interest when differences exist between the amount in the complaint and the amount at judgment.⁴³

Further inconsistency in determining ascertainable amounts is evidenced in the consideration of fair rental value as an ascertainable sum by accepted standards of evaluation.⁴⁴ If fair rental value has not been agreed to before the dispute between the parties arises, most courts have

³⁹*Id.* Judge Staton's questioning the extension of *Roper's* ascertainable sum test to contract actions seems incompatible with Judge Sharp's application of that test to a contract situation only one year earlier. *See supra* notes 35-36 and accompanying text.

⁴⁰*Economy Leasing Co. v. Wood*, 427 N.E.2d 483 (Ind. Ct. App. 1981).

⁴¹*Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982); *see also* *Luksus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630 (Ind. Ct. App. 1980).

⁴²*See, e.g., Economy Leasing Co. v. Wood*, 427 N.E.2d at 488 (where prejudgment interest was awarded although the plaintiff failed to plead or obtain the full amount due). A federal case which also followed this liberal approach in determining ascertainability of the amount is *Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800, 805-06 (7th Cir. 1971). For a detailed discussion of this case, see D. DOBBS, *supra* note 1, at 167 (stating that the *Rausser* claim could not be fixed before trial and noting that courts have "a strong tendency to treat any contract claim as one that is ascertainable."). *See also* *Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982) (mere variances in numbers pleaded and numbers awarded do not indicate damages were not ascertainable if damages are subject to simple mathematical computation after liability is found); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d at 636.

⁴³*See, e.g., City of Anderson v. Salling Concrete Corp.*, 411 N.E.2d 728, 735 (Ind. Ct. App. 1980) (noting that a variance in the amount of demand and amount of judgment indicates that the damages were not ascertainable until judgment); *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979) (where prejudgment interest was denied because a disparity existed between the amount pleaded and the amount proved); *Portage Indiana School Constr. Corp. v. A. V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972) (where the court stated that a wide disparity between invoice, complaint, and actual figure awarded indicated damages were unascertainable before judgment).

⁴⁴*See infra* notes 45-46 and accompanying text.

denied prejudgment interest on the award.⁴⁵ However, in a well-reasoned decision, one court allowed prejudgment interest even where the reasonable rental value had to be determined by the trier of fact.⁴⁶ As a consequence of these conflicting decisions, plaintiffs may receive inconsistent results in identical fact situations. The distinction between ascertainable and unascertainable damages, therefore, has bred injustices as did the distinction between liquidated and unliquidated damages.

2. *Prejudgment Interest as a Matter of Right.*—*Roper* explicitly enunciated the principle that where damages are ascertainable, the award of interest should be mandatory, not discretionary. “The law dispenses no favors, and jurors . . . should not have the right to allow or refuse interest as one of the elements of just compensation, but in fixing the amount of damages . . . should be instructed to find the value . . . and . . . add interest thereon. . . .”⁴⁷

The Indiana Supreme Court reaffirmed this position in a 1920 case, *Independent Five & Ten Cent Stores of New York v. Heller*,⁴⁸ yet “a number of decisions over the years have continued to allude to the discretionary nature of including ‘prejudgment interest’ to compensate a party for the lost use of property.”⁴⁹ In *Fort Wayne National Bank v. Scher*, a 1980 decision, Judge Garrard emphasized that *Roper* correctly sets the rule that when damages are complete and ascertainable at a particular time, the award of prejudgment interest is a matter of right in negligent destruction of property cases.⁵⁰ Because prejudgment interest is an element of compensation, the courts should follow the *Roper* mandate and give prejudgment interest as a matter of right when the ascertainable sum test has been satisfied.⁵¹

3. *Bar to Recovery of Prejudgment Interest in Personal Injury Cases.*—Although *Roper* expanded prejudgment interest beyond statutory limits, the decision with one swift stroke felled recovery for personal

⁴⁵See, e.g., *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979); *Lindborg v. M & L Builders and Brokers*, 158 Ind. App. 311, 302 N.E.2d 816 (1973). For cases allowing prejudgment interest where fair rental value was agreed to, see *Luksus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Economy Leasing Co. v. Wood*, 427 N.E.2d 483 (Ind. Ct. App. 1981).

⁴⁶*New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

⁴⁷*Roper*, 176 Ind. at 509, 96 N.E. at 473.

⁴⁸189 Ind. 554, 127 N.E. 439 (1920).

⁴⁹*Fort Wayne Nat'l Bank v. Scher*, 419 N.E.2d 1308, 1311 (Ind. Ct. App. 1981). Judge Garrard suggested that a quotation from a Pennsylvania decision which was cited in a 1920 Indiana Supreme Court case (*Bryson v. Crown Oil*, 185 Ind. 156, 112 N.E. 1 (1916)) may account for the ensuing confusion in Indiana case law. 419 N.E.2d at 1311. That quotation asserted prejudgment interest was not recoverable as a matter of right. As Judge Garrard emphasized, however, that assertion was not language of the Indiana Supreme Court. *Id.*

⁵⁰*Ft. Wayne Nat'l Bank*, 419 N.E.2d at 1312.

⁵¹See *supra* text accompanying note 47.

injury litigants. In dicta the court stated: "Of course, it does not follow that the . . . rule would apply to personal injury cases . . ." ⁵² Although over seventy years have passed since *Roper* was decided, no Indiana appellate cases offer any other analysis or reasoning to justify this inequitable denial of prejudgment interest. ⁵³ Indiana has doggedly followed that traditional rule of denying prejudgment interest in personal injury actions apparently solely for the reason that the damages are not ascertainable.

However, the distinction between personal loss and property loss is unfounded when viewed in the context of *Roper's* doctrine of full compensation for the injured party, including compensation for the deprivation of the use of the party's money or its equivalent. ⁵⁴ The loss of the use of money from a personal injury loss is no less than from a loss of property and should not go uncompensated simply because the damages may be more difficult to ascertain or calculate.

Indiana courts have extended prejudgment interest to claims not covered by statute. ⁵⁵ Furthermore, the ascertainable sum test has been applied in contract actions even though statutory remedies exist. ⁵⁶ The courts may elect, as they are not bound by a prohibiting statute, to extend the ascertainable standard to personal injury damages in determining prejudgment interest just as they have extended the awards of interest in other areas. ⁵⁷

Relief from the bar to recovery of prejudgment interest in personal injury suits could also come from the Indiana legislature. During the first regular session of the 103rd Indiana General Assembly in 1983, a bill which would have allowed prejudgment interest in tort cases was introduced in the House of Representatives. ⁵⁸ The Senate passed a more comprehensive version which allowed prejudgment interest in all civil actions. ⁵⁹ Although Senate Bill 366 passed only in the house of origin, and House Bill 1974 failed after leaving committee, the threshold endeavor reflects the legislature's willingness to address the current inequity in the law. ⁶⁰ Further legislative efforts in 1984 during the second

⁵²*Roper*, 176 Ind. at 510, 96 N.E. at 473.

⁵³The reiteration of the *Roper* dicta is noted in *Lindenberg v. M & L Builders and Brokers*, 158 Ind. App. 311, 302 N.E.2d 816 (1973).

⁵⁴*Roper*, 176 Ind. at 508-09, 96 N.E. at 472-73.

⁵⁵*See, e.g., Roper* 176 Ind. 497, 96 N.E. 468 (allowance of prejudgment interest on damages from property torts).

⁵⁶*See, e.g., Economy Leasing*, 427 N.E.2d 483.

⁵⁷*See supra* note 25.

⁵⁸H. 1974, 103d Ind. Gen. Ass., 1st Reg. Sess., § 6 (1983).

⁵⁹S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983).

⁶⁰The prejudgment interest bill was possibly overshadowed by a concentration of efforts on passage of other torts legislation. One was the comparative negligence bill (S. 287, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983)), a bill favoring plaintiffs which was

regular session of the 103rd Indiana General Assembly demonstrate the legislature's continued willingness to consider expanding the statutory bounds of prejudgment interest.⁶¹

III. THE TIME IS RIPE FOR INDIANA TO PERMIT PREJUDGMENT INTEREST

A. Policy Considerations

Indiana courts, like the majority of courts, in the absence of statutory guidelines, have divided torts into two major groups for determining awards of prejudgment interest:⁶² torts which affect a person's property or estate and those which affect a person's body or mind.⁶³ Prejudgment interest is awarded for fraud, trespass, conversion, and negligent destruction of property,⁶⁴ but is foreclosed for personal injuries.⁶⁵ The courts have limited their focus to the ascertainability of damages before trial,⁶⁶ a totally defendant-centered focus which concerns itself with a defendant's liability for interest when he cannot stop the accrual of interest by paying the damages.⁶⁷ When attention is concentrated on the defendant, the prejudgment interest is viewed more as a penalty than as an ordinary element of damages which fully compensates the injured party.⁶⁸ Because the purpose of damages, however, is to make the plaintiff whole,⁶⁹ the

successful during the 103rd General Assembly. In addition, another pro-plaintiff bill designed to repeal the guest statute (H. 1644, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983)) vied for the legislators' attention during that session.

⁶¹Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984); H. 1189, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984). Engrossed Senate Bill 141 passed in the house of origin and was reported out of committee in the House. House Bill 1189, which was a verbatim copy of 1983's Senate Bill 141, failed in committee.

⁶²*Roper*, 176 Ind. at 505, 96 N.E. at 471.

⁶³C. McCORMICK, *supra* note 13, at 226-227.

⁶⁴*See supra* note 25.

⁶⁵*Roper*, 176 Ind. 497, 96 N.E. 468. Prejudgment interest is also denied in cases of wrongful death. Although the rationale and the policies for allowing prejudgment interest in wrongful death actions are the same or similar to those for allowing prejudgment interest in personal injury cases, the scope of this Note is limited to a consideration of personal injury litigation.

⁶⁶*Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800, 805 (7th Cir. 1971); *New York, C. & St. L. Ry. v. Roper*, 176 Ind. 497, 510, 96 N.E. 468, 472 (1911).

⁶⁷*See Potter v. Hartzell Propeller, Inc.*, 219 Minn. 513, _____, 189 N.W.2d 499, 504 (1971) (After acknowledging that a personal injury claimant actually suffers the loss of the use of his money, the court rationalized its denial of prejudgment interest stating that "it would . . . be unreasonable to require defendant to compensate plaintiff . . . [for defendant] cannot ascertain the amount of damages for which he might be held liable [and] cannot . . . thereby stop the running of interest."); *see also D. DOBBS, supra* note 1, at 165. *But see Busik v. Levine*, 63 N.J. 351, _____, 307 A.2d 571, 575 (1973), *appeal dismissed*, 414 U.S. 1106 (1973).

⁶⁸*See Comment, Survey, supra* note 19, at 196-98.

⁶⁹T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 30 at 25 (9th ed. 1912).

focus in considering prejudgment interest as a part of damages should be on the plaintiff whose just compensation is the primary consideration. Three policies are noteworthy in shifting this focus from the defendant to the plaintiff.

1. *Lost Use of Money.*—Interest for the lost use of money is an element of compensation, for the “inherent income-producing ability of money cannot be separate from money itself.”⁷⁰ A denial of prejudgment interest deprives a plaintiff of full compensation. While the plaintiff is awaiting adjudication of his claim, which may take years,⁷¹ he must continue paying his medical bills and related expenses and providing for himself and his family. To worsen his plight, he may be forced to borrow money at the prevailing interest rate. Inflation may further undercut the value of his dollars when he finally does recover.⁷² Consequently, all the financial ills from the delay between the date an accident occurs and the date of the judgment are posted on the plaintiff’s ledger sheet. An award of prejudgment interest would adjust and convert time-of-accident damages into time-of-judgment damages.⁷³ Without an award of prejudgment interest, if Plaintiff A and Plaintiff B have exactly the same injury at exactly the same moment with identical losses, Plaintiff A will recover less if his trial is one year later than Plaintiff B’s trial, for he will have been deprived of the use of his money while Plaintiff B enjoyed the use of his.⁷⁴

Although Indiana has segregated classes of plaintiffs for prejudgment interest recovery, the loss of the use of money is as real for a personal injury claimant as it is for one who suffers loss from having his property negligently destroyed⁷⁵ or from a breach of contract.⁷⁶ Because compensation is the primary purpose of awarding damages in civil cases,⁷⁷

⁷⁰*Recent Developments—Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107, 109 (1962); see also *State v. Phillips*, 470 P.2d 266, 273 (Alaska 1970) (“[T]he economic fact [is] that money awarded for any reason is worth less the later it is received.”).

⁷¹Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1122-23 (1959) (noting that personal injury cases, especially with serious injuries and large recoveries, often require more than three years to reach judgment).

⁷²*Nedd v. United Mine Workers of America*, 488 F. Supp. 1208, 1223 (M.D. Penn. 1980) (“[I]nflation is a prevailing economic fact that provides sufficient compensatory justification, at least under federal law, for prejudgment interest award.”).

⁷³Comment, *Survey*, *supra* note 19, at 192.

⁷⁴*State v. Phillips*, 470 P.2d 266, 274 (Alaska 1970).

⁷⁵See *supra* notes 62-65 and accompanying text.

⁷⁶See Hare, *Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness*, 5 AM. J. TRIAL ADVOCACY 81, 85-86 (1981) (noting that the party to a contract voluntarily entered the relationship whereas one suffering personal injury loss has forcibly incurred his loss); see also F. HARE, *MY LEARNED FRIENDS*, p. 6 (1976) for an analysis of the distinction between a contract debt and a tort debt.

⁷⁷See generally, D. DOBBS, *supra* note 1, § 3.1; C. MCCORMICK *supra* note 13, § 5; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971).

a distinction among classes of plaintiffs should not be made in awarding prejudgment interest to compensate for the lost use of money.

2. *Unjust Enrichment.*—The counterpart of the personal injury litigant's losing the use of his money while awaiting the adjudication of his claim is the defendant's unjust enrichment from having the use of the plaintiff's money.⁷⁸ The purpose of an award of prejudgment interest is not to punish the defendant⁷⁹ but is simply to require him to disgorge the inequitable benefits derived from the use of the plaintiff's money.⁸⁰ The defendant's gain is a practical consideration in personal injury actions where the defendants are generally covered by insurance,⁸¹ and "the carrier receives income from a portion of the premiums on hand set aside as a reserve for pending claims."⁸²

The tortfeasor should not be allowed to profit from the use of money owed to the injured plaintiff. Although referring to a tortfeasor in property destruction rather than personal injury, a quote from the *Roper* decision is equally appropriate for one who causes a personal injury: "Surely the law ought not to hold out to a tort-feasor a premium on delay."⁸³

3. *Settlement of Claims.*—A third policy consideration is that prejudgment interest will promote settlement, and the judicial system, consequently, will be aided in administering justice.⁸⁴ Increased settlements would aid in decongesting court dockets.⁸⁵ When prejudgment interest is banned, the defendant has little or no incentive to negotiate, to offer or to accept a reasonable settlement, for he has little to lose by delay as his money lies accumulating interest, especially if he is liable for a large judgment.⁸⁶ As the Michigan Supreme Court stated, "Without such

⁷⁸See Hare, *supra* note 76, at 89; Note, *supra* note 18, at 154-155.

⁷⁹See *supra* text accompanying note 10.

⁸⁰*Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 594-95 (2d Cir. 1961) (stating that regardless of whether defendant is at fault for delay, the plaintiffs have lost, and the defendant has benefitted), *cert. denied*, 368 U.S. 989, 370 U.S. 937 (1962).

⁸¹North Carolina's prejudgment interest statute specifically limits interest to compensatory damages where claims are covered by liability insurance. See N.C. GEN. STAT. § 24-5 (Supp. 1981).

⁸²*Busik v. Levine*, 63 N.J. 351, _____, 307 A.2d 571, 575-76; see also *Cree Coach Co. v. Wolverine Ins. Co.*, 366 Mich. 449, 463, 115 N.W.2d 400, 407 (1962) ("All the time the defendant insurance companies have been withholding payment, they have had the use of the money due to the plaintiffs with the consequent possibility of realizing income therefrom.").

⁸³*Roper*, 176 Ind. at 508-09, 96 N.E. at 473.

⁸⁴*State v. Phillips*, 470 P.2d 266, 274 (Alaska 1979); *Denham v. Bedford*, 407 Mich. 517, _____, 287 N.W.2d 168; 175 (1980).

⁸⁵See *State v. Phillips*, 470 P.2d at 274; *Busik v. Levine*, 63 N.J. at _____, 307 A.2d at 575.

⁸⁶*Denham v. Bedford*, 407 Mich. at _____, 287 N.W.2d at 175. However, the delay argument cuts both ways. If the defendant should not be allowed to benefit from delay,

an incentive, the insurer may refuse to settle a meritorious claim in hopes of forcing plaintiff to settle for less than the claim's true value."⁸⁷ Prejudgment interest not only compensates the claimant, but liability for prejudgment interest may serve as an incentive for the insurer promptly to settle a meritorious claim.⁸⁸

B. Courts Could Allow Prejudgment Interest Under Present Standards

As Professor McCormick stated almost fifty years ago, "Courts have usually summarily discountenanced interest in all personal injury cases. This generalization (like so many dicta about interest, thrown off hurriedly as relating to a minor feature of the case) is hasty and injudicious."⁸⁹ The time is long overdue for Indiana courts to institute a policy of fairness by dispensing with the dictum in *Roper* which injudiciously bars the recovery of prejudgment interest in personal injury suits. Justice and parity in reasoning dictate that Indiana courts at least allow recovery for purely pecuniary losses such as medical bills and lost wages as these are sums which are ascertainable at a particular time by fixed rules of evidence.⁹⁰

Although some Indiana cases have stated that prejudgment interest is only proper when the trier of fact need not exercise its judgment to assess the amount of damages,⁹¹ the court in *New York Central R.R. v. Churchill*⁹² allowed prejudgment interest even though the fact finder had to make a determination of the reasonable rental value of certain destroyed property.⁹³ The court acknowledged that there was language in *Roper* suggesting that "[i]n all personal injury cases . . . where the damages are . . . peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible."⁹⁴ However, the *Churchill* court emphasized that this dictum was not language from the Indiana Supreme Court but was from a Utah case cited by the Indiana Supreme Court.⁹⁵ The court in *Churchill* further noted that "[t]he [*Roper*] court did not conclude that merely because the assessment of damages was peculiarly within the province of a jury or court, that interest on

neither should the plaintiff. See ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983) (suspending interest during a plaintiff-requested continuance of greater than thirty days).

⁸⁷Denham v. Bedford, 407 Mich. at _____, 287 N.W.2d at 175.

⁸⁸See *supra* text accompanying note 10; Hare, *supra* note 76 at 90; Podgers, *Prejudgment Interest Held Available in DC-10 Suits*, 66 A.B.A. J. 137 (February, 1980).

⁸⁹See MCCORMICK, *supra* note 13, § 56 at 224.

⁹⁰See D. DOBBS, *supra* note 1, at 165 n.4; C. McCormick, *supra* note 13, § 57.

⁹¹See *Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982).

⁹²*New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

⁹³*Id.*

⁹⁴*Roper*, 176 Ind. at 507, 96 N.E. at 472.

⁹⁵*Churchill*, 140 Ind. App. at 435-36, 218 N.E.2d at 378.

such damages should not be allowed.”⁹⁶ The *Churchill* decision to allow prejudgment interest even if the trier of fact must make a value determination⁹⁷ is a sound one, because a plaintiff should not be deprived of interest simply because the jury must make a value determination.

Although the rule in Indiana is that damages for medical expenses are awarded based on reasonable value as determined by the trier of fact,⁹⁸ prejudgment interest for medical expenses would not be precluded under the *Churchill* rationale. Medical bills are ascertainable before trial, and they are evidence for the jury’s consideration in determining reasonable damages for medical expenses.⁹⁹ The plaintiff should not be deprived of prejudgment interest on these costs simply because the jury must assess their reasonableness.

Other damages in a personal injury suit, however, would not qualify under the ascertainable standard. Because nonpecuniary damages such as those for pain and suffering are not compensatory in the ordinary sense of making the plaintiff whole or replacing his loss,¹⁰⁰ and because there is no market value by which they can be measured, these losses are not liquidated or ascertainable and, therefore, would not receive prejudgment interest under the ascertainable sum standard.¹⁰¹

Indiana courts recognize that prejudgment interest is not solely a creature of statute but is allowed as an element of damages for compensation by the judicial branch.¹⁰² However, the courts have refused to extend their discretion to the recovery of prejudgment interest in personal injury suits as an element of compensation, even though in a 1980 fraud case the court noted that prejudgment interest was not “a question of equity, but an element of compensatory damages.”¹⁰³ Still, the courts have maintained an impenetrable barrier against prejudgment interest for personal injuries.¹⁰⁴ Dicta from the 1911 *Roper* decision and a tenacious clinging to the ascertainable standard against all parity in reasoning have kept the courts’ doors closed on this injustice.

As no statute prohibits the award of prejudgment interest for personal injury damages, the courts could remove the barrier to recovery of prejudgment interest for personal injury litigants by applying the standard

⁹⁶*Id.*

⁹⁷See *supra* text accompanying notes 92-93.

⁹⁸See, e.g., *Herrick v. Saylor*, 160 F. Supp. 25, 29 (N.D. Ind. 1958); *Havanagh v. Butorac*, 140 Ind. App. 139, 144, 221 N.E.2d 824, 828 (1966); *Kampo Transit, Inc. v. Powers*, 138 Ind. App. 141, 161, 211 N.E.2d 781, 793 (1965).

⁹⁹*Herrick v. Saylor*, 160 F. Supp. 25, 29.

¹⁰⁰See D. DOBBS, *supra* note 1, at § 8.1 at 544-45; C. McCORMICK, *supra* note 13, § 57.

¹⁰¹*Id.*

¹⁰²*Floyd v. Jay Rural Elec. Membership Corp.*, 405 N.E.2d 630, 636 (Ind. Ct. 1980).

¹⁰³*Id.*

¹⁰⁴See, e.g., *Lindenberg v. M & L Builders and Brokers*, 158 Ind. App. 311, 318-319, 302 N.E.2d 816, 821 (1973).

of ascertainability enunciated in *Roper* to personal injury cases and disarming the *Roper dicta* which have heretofore totally denied prejudgment interest.

C. *Legislative Action is the Preferable Solution for the Denial of Prejudgment Interest in Personal Injury Actions*

Indiana courts, like other courts,¹⁰⁵ could address the denial of prejudgment interest in personal injury cases based on a sense of equity, and award prejudgment interest in personal injury suits without legislative guidelines.¹⁰⁶ However, the lack of precedent in Indiana and the necessity for the courts to square the decisions with rulings in other types of prejudgment interest cases would likely result in inconsistent judgments as the courts struggled to establish standards in personal injury cases. Litigants would, consequently, be at a loss to discern which factors control an award of prejudgment interest in a certain case, and outcomes of similar cases would be unpredictable. Already inconsistencies and varying requirements plague the predictability of awards of prejudgment interest in other cases in Indiana.¹⁰⁷ Adding another line of cases would result in inconsistent judgments as the common law developed in the different courts, especially in light of the various damages involved in a personal injury suit.¹⁰⁸

A more appropriate response to the current inequity caused by the denial of prejudgment interest would be for the Indiana legislature to follow the lead of the many states¹⁰⁹ which have adopted statutes which allow prejudgment interest for personal torts as well as property torts.¹¹⁰

¹⁰⁵See, e.g., *American Ins. Co. v. Naylor*, 103 Colo. 461, 87 P.2d 260 (1939) (permitting plaintiff to claim interest on personal injuries from date suit filed); *Lucas v. Leggit & Myers Tobacco Co.*, 51 Hawaii 34, 461 P.2d 140 (1960) (stating that since prejudgment interest was not expressly forbidden by state statute, the court was free to permit it). See Brennan, *Prejudgment Interest in Wisconsin Personal Injury Cases*, 56 Wis. B. BULL. 18 (1983) (discussing the developing trend in the Wisconsin judiciary to allow prejudgment interest in personal injury cases and arguing that the legislature is best suited to implement a fair and workable policy of prejudgment interest in personal injury cases).

¹⁰⁶See *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 480 F. Supp. 1280, 1285 (N.D. Ill. 1979) (determining that as a matter of law "fair and just compensation . . . must include interest on a judgment in a wrongful death case from the date of death."), *aff'd*, 644 F.2d 633 (7th Cir. 1981).

¹⁰⁷See *supra* notes 41-46 and accompanying text.

¹⁰⁸See *supra* notes 90-100 and accompanying text.

¹⁰⁹According to a 1983 Rand study, twenty-six legislatures have enacted prejudgment interest statutes for personal torts. Rand Note, *supra* note 21 at 1. For a look at how Canadian lawmakers have dealt with this issue, see *Pre-judgment Interest and the Personal Injury Action*, 4 ADVOCATES' Q. 219 (1983) (reviewing the development of the law regarding awards of pre-judgment in personal injury suits in Ontario in the six years since Ontario effected a radical change in its statutory law relating to damage awards).

¹¹⁰See *infra* note 93 and accompanying text.

In 1983 legislative sessions, at least twenty-six states proposed new or expanding prejudgment interest legislation.¹¹¹ Indiana was among the states proposing new legislation with the introduction in both houses of bills which sanctioned prejudgment interest in personal injury actions and with the passage of the Senate version in that house.¹¹² Indiana also considered prejudgment interest legislation in its 1984 legislative session.¹¹³

Even though the 1983 and 1984 efforts which would have allowed prejudgment interest in all tort cases failed, the Indiana legislature remains the proper vehicle through which to insure that personal injury litigants are fully compensated for their losses and that juries are provided with clear guidelines for awarding prejudgment interest rather than randomly and indiscriminately "adding in" what they consider a fair amount to compensate for the plaintiff's loss of the use of his money while awaiting final adjudication of his claim.¹¹⁴ As one federal court noted, "[N]o one would be so naive as to suppose that juries do not throw into the scales the years that a plaintiff may have had to wait before his case can be heard by a jury Likewise judges doubtless make some allowance for loss because of the law's delay."¹¹⁵

Furthermore, legislative action would avoid the confusion which might result from the courts' endeavor to forge new guidelines for personal injury recovery.¹¹⁶ Although limited interest could be recovered by the application of current common law rules, results would likely be inconsistent as courts varied in their application of those rules.¹¹⁷ The courts would be faced with the confusion between mandatory awards and discretionary awards which has surfaced in property torts cases.¹¹⁸ The problems which have occurred in other cases when the trier of fact must determine value might also breed the confusion in personal injury cases which has been apparent in other actions.¹¹⁹ Therefore, the more satisfactory resolution would be enactment of a prejudgment interest statute by the Indiana legislature.

¹¹¹Rand Note, *supra* note 21, at 1.

¹¹²H. 1974, 103d Ind. Gen. Ass., 1st Reg. Sess., § 6 (1983); S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983).

¹¹³See *supra* note 61.

¹¹⁴See, e.g., *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 594 (2d Cir. 1961); *Chicago v. Barnes*, 2 Ind. App. 213, 28 N.E. 328 (1891) (where plaintiff had a loss of \$165 to land and \$100 to cattle, jury returned a \$277.41 verdict. Court on appeal allowed jury to add this interest.); Keir and Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW 129 (1983); Hare, *supra* note 76, at 90; Rand Note, *supra* note 21, at 13 (Results of Cook County, Illinois, study show juries provide an implicit 3.7% interest rate for delay over and beyond the interest rate.).

¹¹⁵*Moore-McCormack Lines*, 295 F.2d at 594.

¹¹⁶See, e.g., *supra* notes 42-46, 49-50 and accompanying text.

¹¹⁷*Id.*

¹¹⁸See *supra* notes 47-50 and accompanying text.

¹¹⁹See *supra* notes 41-46, 91-92 and accompanying text.

IV. SUGGESTIONS FOR A STATUTE TO PROVIDE JUST COMPENSATION FOR PERSONAL INJURY LITIGANTS

Even though the Indiana Senate's efforts in considering a prejudgment interest statute are laudable, the 1983 proposed bill left the award of prejudgment interest, including date of accrual, rate of interest, types of damages to receive interest, and the determination of what constitutes a bona fide settlement offer, totally to the courts' discretion.¹²⁰ Although the award of prejudgment interest remained discretionary, the Senate's effort in 1984 mended some of the 1983 defects. The date of accrual was fixed; the rate of interest was still discretionary in the 1984 version, but the range of discretion was narrowed by fifty percent; and the settlement offer was specifically defined.¹²¹

¹²⁰S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983) provides:

SECTION 1. IC 24-4.6-2 is added to the Indiana Code as a NEW chapter to read as follows

Chapter 2. Prejudgment interest.

Sec. 1. This chapter does not apply to actions against the state or against any other governmental entity.

Sec. 2. In a civil action resulting in a judgment awarding damages, the court may award interest on the judgment over the period between the date on which the cause of action arose and the date of the judgment, or over a lesser period of time. In deciding whether to grant interest under this section, the court shall consider the following factors;

- (1) Whether the action concerned money or goods wrongfully taken.
- (2) Whether the action was to recover money or goods withheld in an unreasonable manner.
- (3) Whether the action was to recover damages based upon bodily injury, property damage, or death.
- (4) Whether the plaintiff suffered unusual expense between the date on which the cause of action arose and the date of the judgment as a result of the defendant's actions.
- (5) If the action was to recover an amount due under a promissory note or other contract, whether the amount due and due date under the note or contract were reasonably ascertainable.

Sec. 3. In any action, if a bona fide offer of settlement was previously made in writing by the party against whom judgment is subsequently entered, and the amount of the offer was:

- (1) substantially identical to the amount of the judgment; or
- (2) more favorable to the prevailing party than the judgment;

no interest may be allowed under section 2 of this chapter for the period between the date on which the offer of settlement was made and the date of the judgment.

Sec. 4. The rate of the interest on a judgment under section 2 of this chapter may not exceed the rate set by IC 24-4.6-1-101 for interest on the judgment from the date of the judgment until satisfaction.

¹²¹Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984) provides:

SECTION 1. IC 34-2-36 is added on the Indiana Code as a NEW chapter to read as follows:

Chapter 36. Prejudgment Interest.

Sec. 1. In any civil action, other than an action based on contract, the court

In order to avoid discrepancies in prejudgment interest awards among personal injury litigants who should each receive full compensation for the lost use of money, the legislature should enact a mandatory statute. Only a mandatory statute will assure full compensation and consistent judgments.

Several factors should be considered by the Indiana legislature in order to avoid later conflicts when the courts construe that statute. The more carefully these factors are considered and the more specifically the guidelines are drafted, the more equitable will be the awards granted to individual litigants.

A. *Date of Accrual*

Some states' prejudgment interest statutes set the date of accrual at the date the cause of action accrued.¹²² Some leave the date of accrual to the courts' discretion.¹²³ A majority of states, however, set the date of accrual as the date the complaint was filed.¹²⁴ This latter alternative

may award prejudgment interest in accordance with this chapter. However, such interest may not be awarded until judgment has been rendered in the action.

Sec. 2. The period with respect to which prejudgment interest may be awarded begins one (1) year after the cause of action arose and may not extend past the date of judgment. In addition, the period may not exceed forty-eight (48) months.

Sec. 3. Prejudgment interest that is awarded under this chapter must be awarded as simple interest. The rate of simple interest awarded under this chapter must be equal to or greater than six percent (6%) per year but may not exceed twelve percent (12%) per year.

Sec. 4. Prejudgment interest may not be awarded under this chapter:

(1) if within one hundred eighty (180) days after the filing of the action a written offer of settlement was made by the party against whom the prejudgment interest is requested, if:

(A) the term of the offer included payment within sixty (60) days after the time of acceptance of the offer of settlement; and

(B) the amount of the offer of settlement was at least eighty percent (80%) of the amount of the judgment; or

(2) as to any award of punitive damages.

Sec. 5. The state and its political subdivisions (as defined in IC 36-1-2-13) are not liable for prejudgment interest).

Sec. 6. This chapter does not prevent a court from awarding prejudgment interest in a civil action based on contract.

SECTION 2. This act does not apply to actions that arise before September 1, 1984.

¹²²See, e.g., ALASKA STAT. §§ 45.45.010 (Supp. 1983), 09.50.280 (1973); COLO. REV. STAT. § 13-21-101(1) (Supp. 1983); OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1982); R.I. GEN. LAWS § 9-21-10 (Supp. 1983); UTAH CODE ANN. §§ 15-1-4, 78-27-44 (1977).

¹²³See, e.g., TENN. CODE ANN. § 47-14-123 (1979); W. VA. CODE § 56-6-31 (Supp. 1983).

¹²⁴See, e.g., IOWA CODE ANN. § 535.3 (West Supp. 1983-84); LA. REV. STAT. ANN. § 13:4203 (West 1968); ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983-84); MASS-GEN.

seems the most equitable in light of the policy of preventing a party from benefiting from delay.¹²⁵ If a plaintiff's suffering the loss of the use of his money as a result of delay caused by the defendant's refusal to negotiate is unfair, then holding a defendant liable for prejudgment interest for a time period before the plaintiff has summoned the defendant to the negotiating table is equally unfair. Therefore, a defendant should not be liable for interest accruing before the complaint is filed.¹²⁶

B. *Mandatory or Discretionary Award*

In explicit terms, the Indiana Supreme Court announced in *Roper* that when an award is due for prejudgment interest in a property loss case, it should be as a matter of right, not at the jury's discretion.¹²⁷ "The law dispenses no favors, and jurors should mete out equal and exact justice, and should not have the right to allow or refuse interest as one of the elements of just compensation . . ." ¹²⁸ The *Roper* rationale is equally pertinent to an award for personal injury loss. In recognition of this principle, Indiana should join the majority of the states which have mandatory prejudgment interest statutes.¹²⁹

LAWS ANN. ch. 231, § 6B (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84); NEV. REV. STAT. § 17.130 (1981); N.H. REV. STAT. ANN. § 524:1-b (1974); N.C. GEN. STAT. § 24-25 (Supp. 1983); OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1983-84).

¹²⁵See *supra* notes 78-83 and accompanying text. See also Comment, *Availability of Prejudgment Interest in Personal Injury and Wrongful Death*, 16 U.S.F.L. REV. 325, 341-46 (1982).

¹²⁶Indiana's Engrossed S. 141, *supra* note 121 at § 2, offered a hybrid accrual date wherein the interest accrues one year after the cause of action arose. This arbitrary point of accrual will unfairly allow plaintiffs who file a complaint after one year to collect interest before the complaint was filed, yet plaintiffs who file a complaint before one year cannot recover prejudgment interest for the period between date of filing until one year from the date of the cause of action. Although this hybrid accrual date is an improvement over the wholly discretionary accrual date of the 1983 Senate Bill 366, *supra* note 120, the most equitable date would be the date on which the complaint was filed.

¹²⁷New York, *C. & St. L. Ry. v. Roper*, 176 Ind. 497, 509, 96 N.E. 468, 473 (1911); see also C. McCORMICK, *supra* note 13, § 55, at 221 ("A rule, however, which leaves the award of this important element of compensation to the unbridled caprice of the jury, in cases where a fairly measurable sum has been withheld from plaintiff, seems hard to support.").

¹²⁸*Roper*, 176 Ind. at 509, 96 N.E. at 473. See also *Fort Wayne Nat'l Bank v. Scher*, 419 N.E.2d 1309, 1311-12 (Ind. Ct. App. 1981).

¹²⁹See, e.g., ALASKA STAT. §§ 45.45.010 (Supp. 1983), 09.50.280 (1973); CAL. CIV. CODE § 3291 (West Supp. 1984); COLO. REV. STAT. § 13-21-101 (Supp. 1983); GA. CODE § 51-12-14 (1982); IOWA CODE ANN. § 535.3 (West Supp. 1983-84); LA. REV. STAT. ANN. § 13:4203 (West 1968); ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983-84); MASS. GEN. LAWS ANN. ch. 231, § 6B (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84); NEV. REV. STAT. § 17.130 (1981); N.H. REV. STAT. ANN. § 524:1-b (1974); N.C. GEN. STAT. § 24-5 (Supp. 1983); OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1983-84); R.I. GEN. LAWS § 9-21-10 (Supp. 1983); UTAH CODE ANN. §§ 15-1-4

Mandatory awards would assure consistency in plaintiffs' compensation and encourage settlement by eliminating any economic incentive for a defendant to postpone settlement negotiations.¹³⁰ Therefore, both plaintiffs and defendants could benefit from the predictability of judgments, and crowded court dockets would be relieved by the increase of serious settlement endeavors, especially in cases where liability is indisputable.

C. *Types of Damages to Which Statute Applies*

A statute should enumerate the types of damages which are eligible for prejudgment interest. Although most statutes mandate interest on the entire judgment,¹³¹ this often results in overcompensation for the plaintiff. Exemplary damages, for example, should not be included, as the purpose of exemplary damages is punishment for the defendant, not compensation for the plaintiff.¹³² Awarding prejudgment interest on punitive damages would result in overcompensation or a windfall for the plaintiff and an excessive penalty for the defendant.¹³³

Another consideration is whether to allow prejudgment interest for future damages such as loss of future earning capacity and future medical expenses. Although most jurisdictions award interest on the entire judgment,¹³⁴ the plaintiff is overcompensated when prejudgment interest is awarded on future losses such as earning capacity and future medical expenses, for the plaintiff has not lost the use of that money as of the date of the judgment.¹³⁵ Therefore, future losses should not be included in the prejudgment interest calculation as the purpose of prejudgment interest is to compensate for the lost use of money.¹³⁶

(1977), 78-27-44 (1977); WIS. STAT. ANN. § 807.01(4) (West Supp. 1983-84). Some states, however, have discretionary statutes. See, e.g., HAWAII REV. STAT. § 636-16 (Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 11-301 (Supp. 1983); OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1982); TENN. CODE ANN. § 47-14-123 (1979).

¹³⁰See *supra* notes 85-87 and accompanying text.

¹³¹See *supra* note 129 and accompanying text (all states with mandatory statutes allow prejudgment interest on the entire judgment with the exception of Massachusetts (limited to pecuniary and consequential damages); Nevada (not allowed on future damages); North Carolina (only on compensatory damages); and Utah (special damages only)). Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess., 84 (1984) specifically denies prejudgment interest on punitive damages.

¹³²See *Roper*, 176 Ind. at 510, 96 N.E. at 473; C. MCCORMICK, *supra* note 13, at 227; Comment, *supra* note 125, at 355.

¹³³See Comment, *Survey*, *supra* note 19, at 210 n. 103, ¶ 2.

¹³⁴See *supra* note 131.

¹³⁵See NEV. REV. STAT. § 17.130 (1981) (prejudgment interest not allowed on future damages). *But see* *Carlton v. H.C. Price Co.*, 640 F.2d 573 (5th Cir. 1981) (awarding prejudgment interest on future medical damages); *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), *appeal dismissed*, 414 U.S. 1106 (1973).

¹³⁶See *supra* notes 70-77 and accompanying text.

Although the trend with recent legislation is to allow prejudgment interest on all losses,¹³⁷ there are two strong arguments against awarding prejudgment interest on non-pecuniary losses such as pain and suffering.¹³⁸ First, damages for non-pecuniary losses do not constitute compensation for loss in the traditional sense of making the plaintiff whole or replacing his loss,¹³⁹ because pain and suffering cannot be measured in dollars or eliminated by the payment of money. Second, the jury's awards are arbitrary, as there is no market value on these losses, and an award of prejudgment interest would result in undue compensation.¹⁴⁰ Both arguments have merit when one looks to the policy of providing fair compensation to the plaintiff.¹⁴¹ Fair, not excessive, compensation is the objective of prejudgment interest.

Granting an award of prejudgment interest which unjustly enriches the plaintiff, by allowing him interest on money of which he has not lost the use, would simply be trading the current injustice where the defendant is unjustly enriched by being allowed to benefit from the use of the plaintiff's money for a new injustice. An award on the total judgment, including non-pecuniary losses, would be as unfair as denying prejudgment interest on the entire judgment. To achieve just compensation, a compromise is appropriate.¹⁴²

However, the division of damages for the purpose of awarding prejudgment interest will affect the policy consideration of promoting settlement. Limiting prejudgment interest to pecuniary losses such as lost wages and medical expenses will necessarily reduce the defendant's liability for interest and, consequently, prejudgment interest will not provide as much incentive for the defendant to avoid delay and negotiate a set-

¹³⁷Rand Note, *supra* note 21, at 1; *see supra* note 131. *But see* MASS. GEN. LAWS ANN. ch. 231, § 6B (West Supp. 1984-85) and R.I. GEN. LAWS § 9-21-10 (Supp. 1983) (allowing prejudgment interest only on pecuniary losses).

¹³⁸Professor McCormick defines pecuniary loss as loss from injury which can be measured in money by a standard, whereas non-pecuniary loss such as pain and suffering and mental anguish cannot be measured by a standard of valuation. C. McCORMICK, *supra* note 13, §§ 56-57, at 224-26. For commentary supporting allowing prejudgment interest only on pecuniary losses, *see* C. McCORMICK, *supra* note 13, § 56; Note, *supra* note 18, at 161 ("segregate pecuniary from nonpecuniary and . . . award damages on the former."); Comment, *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 CUM. L. REV. 521, 535 (1977). *Contra* State v. Phillips, 470 P.2d 266, 273-74 (Alaska 1970) ("All damages, then . . . should carry interest.").

¹³⁹*See* D. DOBBS, *supra* note 1, § 8.1, at 544-45.

¹⁴⁰*Id.*

¹⁴¹*Contra* Comment, *supra* note 125, at 341-46.

¹⁴²*See* Feirich, *Pre-Judgment Interest or Conflict of Interest*, 71 ILL. B. J. 526 (1983) (where the president of the Illinois State Bar Association discusses the association's draft legislation which offered to the legislature a compromise position similar to the one advocated in this Note). For an in depth view of the Illinois debate over prejudgment interest, *see* Londrigan, *Prejudgment Interest The Case For . . .*, 72 ILL. B.J. 62 (1983) and Smith, *The Case Against . . .*, 72 ILL. B.J. 63 (1983).

tlement. The legislature, therefore, must weigh the divergent effect of two policies—just compensation and promotion of settlement—in determining whether to allow interest on the non-pecuniary damages.

Although dividing an award into pecuniary and non-pecuniary damages, punitive damages, and future losses requires some computations, this need not be an overburdening complexity for the juries.¹⁴³ Instead of returning a general verdict, the jury could be instructed to complete a form distinguishing the amounts awarded for non-pecuniary and pecuniary losses, and past and future damages.¹⁴⁴ The court could then assess the interest to the appropriate damages, or the jury could be instructed to assess the interest.

D. Effect of Settlement Offer

Because promoting settlement is a major policy consideration in the allowance of prejudgment interest, some states' statutes include contingencies regarding the offer of settlement.¹⁴⁵ Some require that the award obtained must be equal to or greater than previous settlement offers before prejudgment interest is allowed for the entire period before final judgment.¹⁴⁶ Such a contingency would require that the plaintiff, too,

¹⁴³Both courts and legislatures have likely been concerned with the calculation involved in dividing the damages for computing prejudgment interest. This concern may be partially responsible for many legislatures awarding prejudgment interest on the entire judgment. As Professor McCormick noted, "[d]oubtless, due to a fear that undue complexity in instructions to juries, and excessive intricacies of calculation might be called for, courts have been slow thus to analyze damages in personal injury cases into their component parts and authorize interest in some and not in others." C. McCORMICK, *supra* note 13, § 56, at 225. As juries must necessarily do calculations to arrive at any award and since modern technology has made the calculator a commonplace aid, dividing an award should cause minimal computation difficulty.

¹⁴⁴Courts now return general verdicts pursuant to IND. R. TR. P. 49 which abolished special verdicts. However, the court could furnish a form similar to that which the legislature described in the Comparative Fault Act, Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 6, 1983 Ind. Acts 1930, 1933 (codified at IND. CODE § 34-4-33-6 (Supp. 1984) which provides that:

The court shall furnish to the jury forms of verdicts that require the disclosure of:

- (1) The percentage of fault charged against each party; and
- (2) The calculations made by the jury to arrive at their final verdict.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of the verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty.

¹⁴⁵See *infra* note 146.

¹⁴⁶See, e.g., CAL. CIV. CODE § 3291 (West Supp. 1984) (interest calculated from date of plaintiff's written offer if plaintiff receives a more favorable verdict than that offer); GA. CODE § 51-12-14 (1982) (plaintiff gives defendant a written offer; if not paid by defendant within thirty days, plaintiff gets interest from date of offer if award is equal to or greater than that offer); PA. R. CIV. P. 238, § 231, (award must be greater than 125% of offer or interest accrues only to date of offer); WIS. STAT. ANN. § 807.01(4)

make a good faith effort to settle if a reasonable offer were extended by the defendant. If a plaintiff refuses a reasonable, legitimate offer of settlement, perhaps he should be denied recovery of prejudgment interest, for the plaintiff should not benefit from delaying the litigation or holding out for a higher award any more than the defendant should benefit from delay. In fairness, the settlement promotion argument must cut both ways.

The most equitable solution is a moderate approach which tolls the accrual of prejudgment interest after the offer is made.¹⁴⁷ Indiana's Senate Bill 366, introduced in 1983, offered this alternative approach.¹⁴⁸ Interest accrual was tolled after a written offer of settlement by the defendant if the amount of the offer was "substantially identical to the amount of the judgment; or more favorable to the prevailing party than the judgment."¹⁴⁹ Although the Senate's alternative is an attractive one, the "substantially identical" language is vague and ambiguous, and invites incongruous awards of interest.¹⁵⁰ The use of "equal to or greater than" language would result in consistent awards and avoid trial courts' or juries' varying determinations of what amount is "substantially identical."

Although the 1984 Engrossed Senate Bill 141 defined the settlement offer in explicit terms, interest is totally prohibited if the defendant's offer was made within one hundred eighty days after the complaint was filed, if the offer included payment within sixty days after acceptance of the offer, and if the offer was at least eighty percent of the judgment amount.¹⁵¹ The 1983 version, with a modification of the "substantially identical" language, is the more equitable proposal.

(West Supp. 1983-84) (interest allowed if plaintiff recovers a judgment greater than the offer of settlement).

¹⁴⁷See, e.g., MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84) (interest may be tolled after date of offer if offer was equal to or greater than judgment); cf. IND. R. TR. P. 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, [offer must be made by the defendant more than ten days before the trial begins] the offeree must pay the costs incurred after the making of the offer.").

¹⁴⁸See the text of S. 366, ch. 2, § 3 at *supra* note 120.

¹⁴⁹S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess., § 3 (1983). However, this section failed to specify a particular time within which the offer must be made. IND. R. TR. P. 68, *supra* note 146, requires that the offer be made ten days before trial. Such a provision could be included in a prejudgment interest statute.

¹⁵⁰The "substantially identical" language opens a range of considerations which require unwarranted judicial discretion which will result in inconsistent awards among similarly-situated plaintiffs. How will the court determine what is substantially similar? Percentages? Dollar amounts? Is one percent variance substantially identical? On a \$3,000 judgment that would amount to only \$30, whereas if the court were considering a \$1 million award, one percent would amount to \$10,000. If one percent is not substantial, where should the line be drawn? Five percent? Ten percent? The courts will likely disagree on this line drawing, and plaintiffs, consequently, will be subject to uncertain judgments.

¹⁵¹See *supra* note 121; cf. PA. R. CIV. P. 238, § 231 (wherein interest is tolled after the date of offer).

In weighing the importance of the policy of promoting settlement, the legislature should carefully consider the various contingency alternatives that are available.

E. Rate of Interest

Most statutes award interest on tort actions at a fixed rate of interest¹⁵² while a few allow a discretionary rate with a maximum rate defined.¹⁵³ Even though only one state has adopted an indexed rate of interest,¹⁵⁴ a "floating" rate of interest would assure that rates awarded reflect current market rates as they would be indexed to an economic activity. Indiana's House Bill 1974 proposed that interest be indexed at six-month intervals based on treasury bills.¹⁵⁵ A floating rate is probably the most equitable interest alternative, but a fixed rate would be preferable to the discretionary rate proposed by Senate Bill 366 in 1983,¹⁵⁶ or the six to twelve percent range proposed by 1984's Engrossed Senate Bill 141.¹⁵⁷ There is no justification for similarly-situated plaintiffs' receiving interest calculated at different rates. Therefore, in drafting a prejudgment interest statute, the legislature should explicitly set interest rates, so the courts will not calculate awards at their discretion, resulting in indiscriminate variations in plaintiffs' compensation.¹⁵⁸

¹⁵²See, e.g., CAL. CIV. CODE § 3291 (West Supp. 1984); IOWA CODE ANN. § 535.3 (West Supp. 1983-84).

¹⁵³See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 11-301 (Supp. 1983); TENN. CODE ANN. § 47-14-123 (1979). See also Engrossed S. 141, *supra* note 121, which is unusual because it offers a range, i.e. a floor of 6% and a ceiling of 12%.

¹⁵⁴DEL. CODE ANN. tit. 6, § 2301 (Supp. 1982) (interest rate 5% over the Federal Reserve discount rate).

¹⁵⁵See H. 1974, § 6 (adding IC 34-2-22.5-1) 103d Ind. Gen. Ass., 1st Reg. Sess. (1983). Section 1(b) provides that:

To establish the rate of interest to be applied, the director of the department of financial institutions shall identify the average annual yield on twenty-six (26) week term treasury bills, as reported by the United States Federal Reserve Board, and shall round that figure to the nearest one-quarter percent (0.25%).

¹⁵⁶See the text of S. 366, ch. 2, § 4 at *supra* note 120. The provision for the interest rate would allow courts to vary the interest rate as long as the rate did not exceed the twelve percent (12%) rate set by IND. CODE § 24-4.6-1-101 (1982).

¹⁵⁷See *supra* note 152.

¹⁵⁸For a contrary view, see Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW 129 (1983) where the authors propose that awards of prejudgment interest be based on opportunity cost to the injured party rather than by a static, inflexible rule and that, in addition, the rates be compounded. The proposal offers two calculation provisions: (1) For business entities, the opportunity cost can be calculated within a range where the minimum award would be the company's cost of capital and where the maximum would be calculated on the company's historical rate of return, if higher. (2) For individuals, the opportunity costs can be calculated at the rate of a low-risk, liquid investment such as money market instruments or treasury bills and, if higher, the maximum rate would

Ordinarily, prejudgment interest is not compounded.¹⁵⁹ Indiana follows the majority rule and currently does not allow compound interest, that is, interest on interest, when prejudgment interest is awarded.¹⁶⁰

Determining the date of accrual, deciding on a mandatory or discretionary approach, defining types of damages eligible for interest, and setting the rate of interest to be awarded are the foremost considerations in drafting a prejudgment interest statute. Finally, the legislature may also want to consider whether the state, when a defendant in a personal injury suit, is subject to prejudgment interest.¹⁶¹

VI. CONCLUSION

Limited legislation and ambiguous standards in judicial interpretation of the common law have produced inequitable judgments for plaintiffs in the recovery of prejudgment interest in Indiana. Personal injury litigants have suffered the ultimate injustice, for the entire class has been totally barred from recovery of prejudgment interest on any damages under all circumstances.

Case law is devoid of thoughtful analysis or sound reasoning in barring the personal injury claimant from full and just compensation for his damages. Since full and fair compensation for the plaintiffs should be the focus in an analysis of prejudgment interest, the courts' emphasis on the defendant and the courts' adherence to the ambiguous

be the greater of the individual's historical return on investments or the average yield of a mutual fund including dividends. *Id.* at 152.

¹⁵⁹See D. DOBBS, *supra* note 1, at 164. *But see* COLO. REV. STAT. § 13-21-101(1) (Supp. 1983) (calculation shall include compound interest from the date suit filed); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84) (compound interest included from date complaint filed until judgment satisfied); Comment, *Survey, supra* note 19, at 218 (proposing that "[c]ourts should uniformly give *compound* interest for the prejudgment period.").

¹⁶⁰*Indiana Tel. Corp. v. Indiana Bell Tel. Co.*, 171 Ind. App. 616, 641, 360 N.E.2d 610, 613 (1977) (holding that interest could not be compounded by figuring interest on the award of interest as damages); *see* Engrossed S. 141 at Sec. 3, *supra* note 121, which requires awards to be simple interest.

¹⁶¹Some states do not hold the government liable for prejudgment interest when the government is a defendant. *See, e.g.*, CAL. CIV. CODE § 3291 (West Supp. 1984); CIV. PRAC. RULES GOVERNING COURTS OF THE STATE OF N.J., Rule 4:42-11(b); *see also*, S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. § 1 (1983) (proposing exclusion of the state or any other governmental entity from prejudgment interest) and Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess., § 5 (1984) (excluding the state and its political subdivisions). *See also Tort Law: State Immune From Prejudgment Interest Statute*, 17 SUFFOLD U.L. REV. 473 (1983) (where the judiciary refused to construe the statute waiving the State's immunity in tort as extending liability for prejudgment interest to the state and indicated that rendering the state liable for prejudgment interest was a legislative, not judicial, function).

“ascertainable sum” standard create injustice for personal injury claimants. In recognition of this injustice, the courts could apply the ascertainable damages prerequisite in personal injury suits and allow prejudgment interest on pecuniary losses which are ascertainable before trial.

The more appropriate solution to the inequity in the law, however, would be enactment of a mandatory prejudgment interest statute by the Indiana legislature. A legislative mandate would accomplish dual goals of providing just compensation for the plaintiff and encouraging defendants to settle meritorious claims. The Indiana legislature showed a willingness to address this problem in 1983 and 1984 even though the prejudgment interest bills introduced were unsuccessful.

Full compensation should include prejudgment interest on all pecuniary losses incurred between the date the complaint is filed and the date of judgment. Future damages and exemplary damages should not be included in the interest computation. If the primary policy for giving prejudgment interest is just compensation for the plaintiff, then non-pecuniary losses should also be excluded from the interest calculations as those awards are inherently arbitrary and cannot be assigned a market value. On the other hand, if the major policy consideration is settlement promotion, interest on those damages would provide an increased incentive for the defendant to make a good faith effort to settle.

By weighing the policy considerations, the Indiana legislature can reach a fair compromise by which the plaintiff will be justly compensated yet will not receive the windfall which results from awarding interest on the entire judgment.

MITZI H. MARTIN