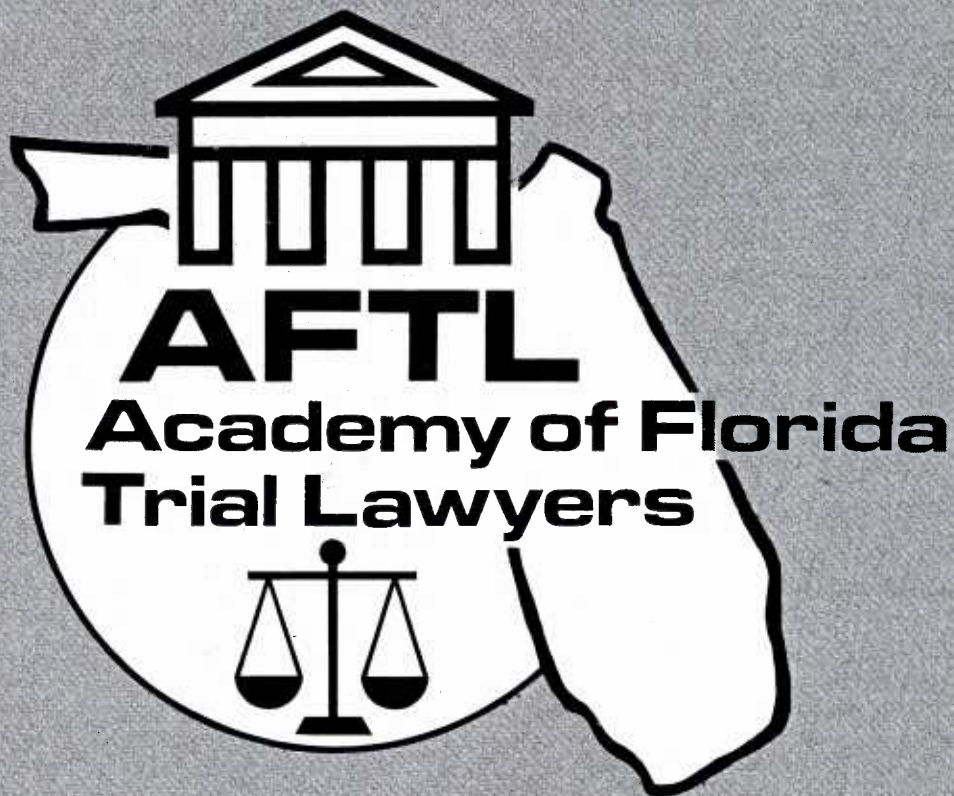


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"The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."
Sec. 21, Dec. of Rights, Fla. Constitution
(Adapted from Par 40, Magna Carta.)

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PREJUDGMENT INTEREST AND THE FAIR, JUST, AND SPEEDY DISPOSITION OF CONTROVERSIES

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Whether prejudgment interest should be allowed in suits where the damages are unliquidated has been debated for some time now. Plaintiff's attorneys have argued pro, claiming full compensation and efficient judicial administration require it. Defendant's attorneys argue con, decrying prejudgment interest as the imposition of a de facto penalty. The courts, uncertain of the correct rationale, have traditionally denied prejudgment interest where the damages are unliquidated. But of late the courts of several jurisdictions have begun to expand the scope of claims within which prejudgment interest will lie. The rationales have varied, but regardless of rationale, the trend is proper, because prejudgment interest tends to reduce total accident costs.

"Ordinary care" has been the standard of care imposed on defendants in the majority of negligence cases. For years, it is regarded as the proper standard, absent some overriding public policy, because it encourages the reduction of accident costs to the social optimum. Learned Hand gave an algebraic expression to ordinary care in *Carroll Towing*:¹ $B = PL$. That is, the burden of accident prevention upon the defendant is equal to the probability of the accident occurring, multiplied by the cost of the accident (the loss realized), should it occur. Stated affirmatively, one must buy accident prevention up to the point where the expected cost of an accident equals the preventive cost.

The principle of diminishing marginal utility will cause the rational defendant to buy accident prevention to a point consistent with hand formula. One will buy safety until the cost of the additional unit of safety purchased equals the benefit derived from the purchase of that last unit. In other words, if a unit of safety costs a defendant \$1.00, he will buy safety until the incremental reduction in the expected cost of the accident equals one dollar, the price of a unit of safety. He will buy no less because it is cheaper for him to buy safety than to pay the plaintiff his accident costs. He will spend no more because it would be cheaper to pay the plaintiff his accident costs than it would be to buy additional safety. The legal incentives are not in conflict with the natural incentives.

One can see that so long as the object of the law is to minimize total accident costs, the hand formula is the correct rule. Anything which disrupts this rule tends to impede the minimization of the total accident costs. The disallowance of prejudgment interest tends to disrupt this rule.

Assume that the probability of an accident occurring after the purchase of the optimal amount of accident prevention is 0.1. Assume also that the cost of the accident, i.e., the loss,

will be \$1000 if the accident should occur. The hand formula demands that the defendant spend \$100 on accident prevention or be liable for the whole loss (assuming that he is the least cost avoider). However, if the defendant does not have to pay the sum until after one year, then he sees it as being less than \$1000 because of the time value of money. Assuming a discount rate of just over 11%, he will see the value of the potential loss as \$900. The rational defendant will spend only \$90 on accident cost prevention because that is where the last dollar spent on safety will equal the incremental reduction in the expected cost of the accident. The distortion in the recovery causes an underinvestment in accident prevention from the perspective of the plaintiff and society. Total accident costs are not minimized.

Where there is an underinvestment in accident prevention, more than the optimal number of accidents will occur. Where more than the optimal number of accidents occur, more litigation is apt to arise. Failure to institute prejudgment interest then tends to increase the burden on the court system, and hence, impedes the administration of justice.

Courts have cited considerations of judicial economy in support of the granting of prejudgment interest. Of late, several states have introduced rules of procedure which award prejudgment interest.² While discussing the veracity of N.J.R.C.P. 4:42-11 *Levine*,³ the Supreme Court of New Jersey said in support of the rule:

(A) refusal to allow interest in tort matters has been criticized. (Citation omitted) It is questioned whether justice is thereby done as between parties to the suit. But beyond their interest, there is also a public stake in the controversy, for tort litigation is a major demand upon the judicial system. Delay in the disposition of those cases has an impact upon other litigants who wait for their turn, and upon the taxpayers who support the system. And here there is a special inducement for delay, since generally the claims are covered by liability insurance, and when payment is delayed, the carrier receives income from a portion of the premiums on hand set aside as a reserve for pending claims. (citation omitted)

Hence, prejudgment interest will hopefully induce prompt defense consideration of settlement possibilities. In that meaningful way, prejudgment interest bears directly upon the judicial machinery and the problems of judicial management. It is this facet, added to the consideration of justice between the litigants, which warrants our holding that prejudgment interest be payable in these matters.⁴

This appears reasonable at first reading. But upon analysis, the judicial economy rationale loses its credibility. The reasoning of the court is muddled. The court should defend its position based upon either the compensation rationale or the judicial economy rationale. Instead, the court falls back upon the one to defend the other. That sort of intellectual fudging only confuses the issue. When one differentiates a function with respect to one variable, he generally holds all other variables constant so that he can determine the effect of the change on the function by the variation of the variable.

Similarly, if courts wish to discuss prejudgment interest in terms of its effect on the administration of justice, they