



The power of prejudgment “Interest as Damages”

A VERY POWERFUL BUT UNDERUTILIZED LAW ON OUR BOOKS IS CIVIL CODE SECTION 3288

You can enhance damages awards by obtaining pre-judgment interest in cases involving a breach of a non-contract obligation (e.g., negligence, breach of fiduciary duty, etc.), or by proving malice or fraud by a *preponderance of the evidence* standard.

A very powerful, but underutilized law on our books is Civil Code section 3288. This statute empowers every jury or court sitting as the trier of fact to make a discretionary award of prejudgment “Interest as Damages” on past economic damages, even on unliquidated tort claims.

The law *requires* the trial court to allow the jury or itself as the trier of fact to consider no less than a reasonable rate of return on all incurred outlays of money or debt incurred, such as on past loss of household services, past medical expenses, past earnings, and similar such things.

Civil Code section 3288 says: “In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury.”

This provision was enacted in 1872 and has not been changed since. But it was not until 2005 that the Judicial Council amended its comments to CACI jury instructions to provide for the addition of a question on the verdict forms concerning the award of interest as damages for the jury to answer.

The Judicial Council approved of a change to standard CACI verdict forms for claims, such as negligence and other unliquidated claims involving breach of non-contract obligations or malice or fraud or oppression, to permit the jury to award interest *in its discretion at the end of the form*. But it was not until this year that the Judicial Council finally provided a

jury instruction to address the rise in use of Civil Code § 3288.

CACI Jury Instruction No. 3935:

If you decide that [name of plaintiff] is entitled to recover damages for past economic loss in one or more of the categories of damages that [she/he/it] claims, then you must decide whether [he/she/it] should also receive prejudgment interest on each item of loss in those categories.

Prejudgment interest is the amount of interest the law provides to a plaintiff to compensate for the loss of the ability to use the funds. If prejudgment interest is awarded, it is computed from the date on which each loss was incurred until the date on which you sign your verdict.

Whether [name of plaintiff] should receive an award of prejudgment interest on all, some, or none of any past economic damages that you may award is within your discretion. If you award these damages to [name of plaintiff], you will be asked to address prejudgment interest in the special verdict form.

This first rendition tells the jury to make an A/B decision on whether to compensate the plaintiff or cross-complainant with prejudgment interest. The instruction also correctly provides that interest is attributable to any past economic damages, but it does not provide any instruction on a date for when interest starts.

So, there may be some work left to do in respect to this instruction in the future in light of at least one precedent permitting the trier of fact to set the date. (*Brunson v. Babb* (1956) 145 Cal.App.2d 214, 230, 302 P.2d 647 [the trier of fact or jury may determine the date interest accrues based on the facts at trial].)

Therefore, being able to take a trial court through the proper analysis for this enhancement will definitely amplify the net recovery, sometimes up to 50 percent or more in light of the time it now typically takes to get to trial and through appellate matters. To be clear, though, this law does not permit enhancements of interest to damages for pure pain and suffering or mental anguish; but it does permit interest on the bills incurred or income lost and expenses incurred for services necessitated by the harm. (See, *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572, 8 Cal.Rptr.2d 907 [“Section 3288...allows interest from the date of monetary loss at the discretion of the trier of fact even if the damages are unliquidated.”]; *Curtis v. State of California ex rel. Dept. of Trans.* (1982) 128 Cal.App.3d 668, 686, 180 Cal.Rptr. 843 [“the action lies in tort and it is the generally accepted view that [prejudgment] interest cannot be awarded on damages for personal injury.”])

It’s the law and it’s the right thing

This is the standard in California and it is not about asking for too much or for the wrong thing at the wrong time. Letting the trier of fact or jury know that the court must give plaintiff the right to ask for interest as damages is the hallmark of civil compensatory justice in California. That means the jury must decide whether to award prejudgment interest based on evidence of the harm, i.e., breach, malice, fraud or oppression.

Thus, the power of invoking the law for prejudgment Interest as Damages arises from the rule of making the injured party completely whole, but also in recognition that the harm produces cascading losses. Historically, the loss of use of money through a totally

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unjustified reason required interest from the date that money was spent.

The general idea is that the money paid out or expense incurred (even by way of an incurring credit card charge, for instance) was a hindrance that the aggrieved plaintiff suffered, but should have been able to use for their personally directed benefit. One can therefore carefully convey the depth of harm by introducing evidence of harm supporting a claim of prejudgment interest.

The law requires a showing of a breach of a non-contract obligation, or oppression, fraud or malice, connected to and/or causing the harm. Thus, a skilled trial attorney may want to assess how to present damages as a continuum. For example, practitioners can frame the case to show tangible proof that the harm the defendant caused resulted in more than pain and suffering, and the money spent for healing plaintiff was accounted for so that the jury can fully compensate the injured party.

There are a number of particulars to know that will help navigate through this law to maximize the utility of the evidence and authorized awards of interest. Importantly, ever since 1871 the minimum standard of proof of preponderance of the evidence was applied to establishing the elements for this remedy under Civil Code section 3288. Courts typically start the analysis with the leading California Supreme Court case, *Bullis v. Sec. Pac. Nat. Bank* (1978) 21 Cal.3d 801, 148 Cal.Rptr. 22.

Bullis was a heavily litigated check-fraud case, in which the Court upheld an award of interest as damages. *Bullis* affirmed the historical rule of law that permitted a jury or court sitting as the trier of fact to award interest as damages at its discretion. That California Supreme Court held that the plaintiff was specifically entitled to prejudgment Interest as Damages even though the claims were *unliquidated tort claims*. (*Id.*, 21 Cal.3d at p. 814.)

That Court explained that only one of the various elements of Civil Code § 3288 authorized the entitlement to interest.

It is clear from [the statutory] language that a party does not have to

prove both a breach of a noncontractual obligation and oppression, fraud or malice. Even if plaintiff's damages are not liquidated, prejudgment interest may be awarded. (*Ibid.*)

Quantifying the hard costs

The Supreme Court enforced the mandatory remedy accorded to all cases involving one of either a breach of a non-contract duty, or oppression, fraud or malice. That differential is also significant because it quantifies the hard costs of a plaintiff's lost opportunities. In other words, Civil Code section 3288 authorizes a trial attorney to directly and systematically speak to every dollar and penny that was spent to heal the plaintiff, or fully compensate a plaintiff for back pay or front pay during litigation, or for money spent on or incurred for loss of household services.

The year after *Bullis* was decided the Supreme Court clarified the scope of Civil Code § 3288 by refusing to extend its application of interest on general damages. In *Greater Westchester HOA v. City of LA* (1979) 26 Cal.3d 86, 102-103, 160 Cal.Rptr. 733, the Court held that the trial court had incorrectly permitted the trier to award Interest as Damages on pure pain and suffering and mental anguish damages. *Greater Westchester HOA* clarified that interest awards under section 3288 only applied to past economic losses:

[D]amages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an "averaging" method applied to both the amount and duration of the loss. In

our view this process was impermissibly speculative.

Furthermore, a fact finder in assessing a claim of general damages for physical, mental and emotional suffering, possesses full authority to consider the duration of the alleged suffering. Accordingly, the disallowance of any interest on such a claim does not deprive the claimant of compensation for an element of actual damage. To the contrary, its allowance, in fact, may in a given case create a double recovery. (*Id.*, 26 Cal.3d at p. 103.)

Though interest as damages was strictly to apply to past economic losses, after *Greater Westchester HOA*, there could be no doubt that a government entity, such as the City of Los Angeles in that case, could be held liable for prejudgment under Civil Code section 3288.

Injury and financial devastation are bedfellows

Also, it is important to emphasize that a very powerful opportunity is made available to re-emphasize that pain and suffering go hand in hand with financial devastation. That is, a skilled trial attorney will confirm to the jury that "when you are hurt, it's not just physical pain that you feel real hurting from." Thus, a skilled trial lawyer should give the trier of fact everything necessary to establish the underlying damage, including, without limit, testimony on payments to a helper or agency providing replacement household services, as well as proof of the harm in the underlying case. The Legislature intended this reimbursement to help offset the loss of an accretion of wealth or gain that might have otherwise been realized on the sums in dispute or expense incurred.

In an unliquidated tort claim with a real measure of past economic losses, trial courts have upheld this type of interest enhancement in all types of claims and cases including, wrongful-death and personal-injury actions, as well as other torts such as breach of fiduciary duty. (See e.g., *In re Pago-Pago Air Crash of 1/30/74* (1981, CD Cal.) 528 F.Supp. 1007 [wrongful death]; *Canavin v. PSA*

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(1983) 148 Cal.App.3d 512, 196 Cal.Rptr. 82; *Southern Pacific Transportation Co. v. State of California* (1983) 115 Cal.App.3d 116, 171 Cal.Rptr. 187 [personal injury]; and *Greater Westchester HOA v. City of LA*, *supra*, 26 Cal.3d 86 [breach of fiduciary duty].)

Awards of Prejudgment Interest as Damages under Civil Code section 3288 have also been upheld in cases where contract interest under Civil Code section 3287 was previously denied. (*Canavin v. PSA*, 148 Cal.App.3d at pp. 524-526.) Thus, when it is shown that a breach of fiduciary duty or willful taking had taken place but no contract was sufficiently shown, the trial court was still obligated to give the trier of fact an opportunity to exercise its discretion to award "Interest as Damages" under Civil Code section 3288. (*Id.*, at p. 524.)

California courts are still split on a few issues related to awards of interest under Civil Code section 3288. In particular, courts have not settled parameters for who decides when interest starts accruing, and courts have not resolved the debate on whether interest accrued is compound or simple interest. (See, e.g., *Wheeler v. Bolton* (1891) 92 Cal. 159, 172, 28 P. 558; *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 712, 271 P.2d 90 [compound interest properly awarded because evidence supported conclusion that defendant was guilty of fraud].)

Cases often naturally lend to a specific date or dates for when clients incurred hard expenses that are subject to Civil Code section 3288 when suffered. It is also acceptable to have different start dates so long as the trier of fact is given

guidelines in an exhibit or in closing argument. It is often best to prepare a detailed chart or spreadsheet showing the losses, start dates, as well as accurate amounts to award as interest.

But, *Brunson*, *supra*, will be important to your client because it holds that the trier of fact decides when the interest started accruing. Therefore, your verdict forms may include a special interrogatory asking the jury for a past date(s) that accurately represents when Prejudgment Interest as Damages should commence accruing.

The amount of interest

As for setting the amount of interest that the trier of fact is supposed to award, our laws have it covered. Civil Code section 3289 provides guidance and specifies that prejudgment interest on a tort claim is set at seven percent (7 percent) per annum, in *simple interest*. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1455, 1485, 36 Cal.Rptr.2d 343.) *Michaelson* articulated that there is no legislative act that sets a rate of interest for claims for fraud, and that thus the constitutional rate of 7 percent per annum was appropriate in that case.

When considering interest awards, though, the prudent practitioner must also consider whether *simple* or *compound* interest is available. The general rule is that prejudgment interest is only *simple* interest, but the rule changes when there is a breach of some magnitude such as breach of a fiduciary duty, fraud or other wrongful act. Therefore, the proof of the severity of the conduct causing the loss of use of such monies must be shown to

deprive a future gain or result from discorded relationships.

In aggravated cases, plaintiff should have the power to convince the trial court to award *compound* Interest as Damages under Civil Code § 3288. See, e.g., *Wheeler v. Bolton*, *supra*, 92 Cal. at 172 ["in cases of mere negligence, no more than simple interest is ever added to the loss or damage resulting therefrom."]; *McNulty v. Copp*, *supra*, 125 Cal.App.2d at 712 [compound interest properly awarded because evidence supported conclusion that defendant was guilty of fraud].

There have been instances where a trial court has awarded prejudgment interest at higher rates, over 20 percent per annum, which have been upheld on appeal because of the intensity of the wrongful acts causing the past financial losses. Such awards are found in circumstances where there is intentional or deliberated harm, fraud or conversion by theft, but have been left to the discretion of the trial court on a case-by-case basis.

Thus, circumstances forcing a plaintiff to use her own money or incur expenses and mounting debt, have a remedy of Prejudgment Interest as Damages under Civil Code section 3288.

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