

Appendix 2 — Precedents

Sample calculation of average interest rate for New South Wales using Schedule J to the Supreme Court Rules.

	A	B	C	D	E	F	G	H
1					White v Black			
2								
3					Date of Birth:	18/09/45		
4					Date of incapacity:	10/08/90		
5					Date of Hearing:	15/06/01		
6					Life expectancy:	24.48		
7				Multiplier @ 3%	To 65:	422	To death:	871
8								
9						Days	Rate %	Av Rate %
10								
11	1/09/89	31/08/90	21	10/08/90	31/08/90	21	21	1.20822
12	1/09/90	28/02/91	19	1/09/90	28/02/91	181	19	9.42192
13	1/03/91	31/08/91	17	1/03/91	31/08/91	184	17	8.56986
14	1/09/91	28/02/92	15	1/09/91	28/02/92	181	15	7.43836
15	29/02/92	31/08/92	13	29/02/92	31/08/92	185	13	6.57104
16	1/09/92	31/08/93	11.25	1/09/92	31/08/93	365	11.25	11.25000
17	1/09/93	28/02/95	10.5	1/09/93	28/02/95	546	10.5	15.70685
18	1/03/95	28/02/97	12	1/03/95	28/02/97	731	12	24.03288
19	1/03/97	31/08/97	10.5	1/03/97	31/08/97	184	10.5	5.29315
20	1/09/97	31/08/98	9.5	1/09/97	31/08/98	365	9.5	9.47404
21	1/09/98	31/08/00	10	1/09/98	15/09/00	745	10	20.41096
23	<u>1/09/00</u>		<u>11</u>	<u>1/09/00</u>	<u>15/06/01</u>	<u>287</u>	<u>11</u>	<u>8.64932</u>
24						3975		128.02659
								11.76

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This table may be used to calculate the average interest rate over a period using the periodic rates provided in Schedule J to the Supreme Court Rules to calculate the interest at market interest rates. This schedule applies in both the Supreme and District Courts.¹ For claims under the Motor Accidents Compensation Act 1999 the average so calculated should be reduced by one-third.²

With the appropriate variations in dates and rates the table may also be used to calculate average interest rates in Victoria pursuant to the Penalty Interest Rates Act 1983.

The table is neither necessary nor appropriate to derive the rate for general damages. Its primary purpose is to calculate the interest rate to be applied to the component of the damages in personal injury cases which represents past economic loss. That rate so derived may then be inserted in the formula ($I = p \times t \times r$) used to calculate the interest to be allowed on that aspect of the verdict. Where the loss has accrued over a period the result should be divided by two.

We have assumed an excessive delay in the hearing so that practitioners who wish to copy the table directly can cover as many interest changes as possible.

The table has been prepared using Microsoft Excel. Other spreadsheet programs, such as Lotus and Microsoft Works, may be used though the format of the formulae may be different. The coordinates will not normally be printed out; they are included to facilitate the explanation which follows.

The table assumes that the plaintiff is a male aged 55½ at the date of the trial.

- | | |
|------------|--|
| Row 4 | Insert the date from which interest is to run. In a personal injury case this will usually be the date of incapacity but in other cases, such as a claim for damages for conversion, if the statutory rate is claimed, it will be the date of the accrual of the cause of action. ³ Copy the date from G4 to D11 in the table. |
| Row 5 | Insert the anticipated date that the judgment will be pronounced. The difference between the dates in Rows 5 and 4 will be the figure inserted as t (time) in the formula used to calculate interest. Copy the date from G5 to E22 in the table. |
| Rows 6 & 7 | These figures will be obtained from the published statistics which forensic accountants issue to their clients, such as Howarth's Personal Injury Litigation Card, the July 2001 edition, which has been used in the preparation of this calculation, or from textbooks such as Luntz, <i>Assessment of Damages</i> . However, care should be taken to use up to date publications as life expectancy is not static. The figures have no direct relevance to the calculation of interest but are included for their value in calculating the present value of future losses, that to age 65 the loss of earning capacity and |

1. See [7.14].

2. Motor Accidents Compensation Act 1999 s 137(7). And see [11.8].

3. In cases of this kind the conditions for the award of *Hungerfords v Walker* interest will probably be satisfied.

Interest Awards in Australia

that for whole of life the future out of pocket and attendant care expenses.

- Cols A & B These are the opening and closing dates of the interest rates in Schedule J. Except for the figures in A11 they will be copied to the equivalent cells in Columns D & E. They will not appear in the final print out.
- Column C These are the interest rates appearing in Schedule J. The column will not appear in the final print out. The figures are copied to Column G.
- Column D This is a copy of Column A except for cell D11 which is copied from cell G4.
- Column E This is a copy of Column B except for cell E22 which is copied from cell G5.
- Column F These are the number of days between the dates in Columns E and D. They may be calculated using a computer program. In Microsoft Excel the format for the formulae are =E11-D11, =E12-D12, etc. Alternatively, they may be entered from the ready reckoner provided with Schedule J in Appendix 2. The figure in F22 is the sum of the figures in this column. Again in Microsoft Excel the format for the formula is =SUM(F11:F22).
- Column G This is a copy of column C.
- Column H This column shows the annual interest rate reduced to a daily rate and multiplied by the number of days in the period. The format of the formula in Microsoft Excel is =F11*G11/365, etc. For strict accuracy the divisor for periods which include an intercalary day should be 366, but strict accuracy is not appropriate when calculating damages in personal injury cases. This column, except for Cell H24, should be formatted to 6 decimal places.
- Cell H23 This is the sum of the figures in column H. The format of the formula is =SUM(H11:H22).
- Cell H24 This is the final figure we are looking for, the average interest rate per annum over the whole period. The formula is =(H23*365/F23).

The table may now be printed out, omitting columns A to C. As printed it should appear as follows.

Appendix 2 — Precedents**White v Black**

	Date of Birth:		18/09/45	
	Date of incapacity:		10/08/90	
	Date of Hearing:		15/06/01	
	Life expectancy:		24.48	
Multipliers @ 3%	To 65:	441	To death:	908
		Days	Rate %	Av Rate %
10/08/90	31/08/90	21	21	1.20822
1/09/90	28/02/91	181	19	9.42192
1/03/91	31/08/91	184	17	8.56986
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1/09/92	31/08/93	365	11.25	11.25000
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1/09/00	15/06/01	287	11	8.64932
		3975		128.02659
				11.76

The table should then be saved under an appropriate name, perhaps that of the plaintiff. As several tables for different cases are prepared an index identifying the commencing and terminal dates should be prepared. When next the practitioner is called on to calculate an average interest rate the saved table whose commencing and terminal dates most closely approach those of the new case should be called up and amended.

**Statement of Claim (Omitting Formal Parts)
Including Compound Interest in a Claim for
Compensatory Damages**

1. The Plaintiff is a Barrister.
2. The Defendant is a company incorporated pursuant to the Corporations Act which carries on business as a Chartered Accountant and registered Tax Agent.
3. In the years 1995 to 2000 the Plaintiff employed the Defendant for reward to prepare and lodge his income tax returns.
4. For that purpose the Plaintiff provided to the Defendant in each of these years full details of his financial affairs and, in each such year, undertook to provide the Defendant with such further information as it would require for the purpose of preparing his said tax returns.

Interest Awards in Australia

5. For the year 2000, the Defendant prepared and lodged with the Australian Taxation Office the Plaintiff's return, showing a net taxable income of \$100,000.
6. The Plaintiff paid the Defendant \$1,000 for the preparation and lodgment of the said return.
7. It was the obligation of the Defendant to the Plaintiff that the Defendant would use reasonable care and skill in the preparation and lodgment of the Plaintiff's tax returns.
8. The Australian Taxation Office, relying on the return prepared by the Defendant, assessed the Plaintiff's income tax for the year ending 30 June 2000 at \$34,380.
9. On 1 September 2000 the Plaintiff paid the said amount of \$34,380 to the Australian Taxation Office.
10. The Plaintiff carried on his profession from Chambers which he had purchased for \$600,000, \$300,000 of which was, during the financial year ending 30 June 2000, the subject of a mortgage to the National Australia Bank at an interest rate of 14% per annum calculated at six monthly rests.
11. The Defendant was aware of this mortgage and the rate of interest payable on it.
12. During the year ending 30 of June 2000 the Plaintiff paid \$42,000 in interest to the National Australia Bank.
13. The Defendant failed to include in the Plaintiff's 2000 tax return as a deductible expense the said sum of \$42,000.
14. Had that sum been included the Plaintiff's taxable income would have been reduced to \$58,000 and the amount of tax payable thereon to \$14,740.
15. In failing to include the said deduction of \$42,000 the Defendant failed to exercise due care in the preparation of the Plaintiff's income tax return and caused the Plaintiff loss of \$33,260.
16. The Plaintiff would have used the said \$33,260 to discharge part of the mortgage.

The Plaintiff claims:

- (a) Compensatory damages in the amount of \$33,260 together with compound interest on the said sum at six monthly rests at 14% per annum from 1 September 2000 to the date of judgment.
- (b) In the alternative to the above prayer for interest as part of the damages, interest pursuant to s 84A of the District Court Act 1973 (NSW) from 1st September 2000 until the date of judgment.
- (c) Costs.

Statement of Claim (Omitting Formal Parts) Including Compound Interest in a Claim for Restitutionary Damages

1. The Defendant is a stockbroker with Dodgy Pty Ltd.
2. On 1 January 2002, the Plaintiff telephoned the Defendant seeking some investment advice. The Defendant said to the Plaintiff that he knew of a publicly listed company, Blue Star Industries Pty Ltd, that was

Appendix 2 — Precedents

highly profitable ('the Representation') and that if the Defendant sent him \$100,000 he would invest the money in the company.

3. On 1 January 2002, Blue Star Industries Pty Ltd did not exist and still does not exist.
4. By reason of the Defendant's position as a stockbroker the Defendant knew, or was reckless, as to the existence of Blue Star Industries Pty Ltd.
5. On 2 January 2002 the Plaintiff sent the Defendant a cheque for \$100,000.
6. The proceeds of the cheque were deposited into a new savings account at the Commonwealth Bank in the name of the Defendant on 5 January 2002 (the 'Savings Account').
7. On 5 January 2004 the Savings Account was frozen.
8. From 5 January 2002 until 5 January 2004 the Defendant had the use of the money in the Savings Account.
9. The average market rate of interest between 5 January 2002 until 5 January 2004 was 10%, compounded six monthly.

The Plaintiff claims:

- (a) Restitutionary damages in the amount of \$100,000, together with compound interest on the said sum at six monthly rests at 10% per annum from 5 January 2002 until 5 January 2004.
- (b) In the alternative to the above prayer for interest as part of the restitutionary damages, interest pursuant to section 32 of the Supreme Court Act 1932 (WA) from 5 January 2002 until the date of judgment.
- (c) Costs.

Statement of Claim (Omitting Formal Parts) Including Compound Interest in a Claim for Restitution for Unjust Enrichment

1. On 1 January 2002, the Plaintiff telephoned the Defendant seeking some investment advice. The Defendant said to the Plaintiff that he knew of a publicly listed company, Blue Star Industries Pty Ltd, that was highly profitable and if the Defendant sent him \$100,000 he would invest the money in the company.
2. On 1 January 2002, Blue Star Industries Pty Ltd did not exist and still does not exist.
3. The Plaintiff mistakenly believed that Blue Star Industries Pty Ltd did exist.
4. As a result of his mistake the Plaintiff sent the Defendant a cheque for \$100,000 and the Defendant was unjustly enriched at the Plaintiff's expense.
5. The proceeds of the cheque were deposited into a new savings account at the Commonwealth Bank in the name of the Defendant on 5 January 2002 (the 'Savings Account').
6. On 5 January 2004 the Savings Account was frozen.
7. From 5 January 2002 until 5 January 2004 the Defendant had the use of the money in the Savings Account.

Interest Awards in Australia

10. The average market rate of interest between 5 January 2002 until 5 January 2004 was 10%, compounded six monthly.

The Plaintiff claims:

- (a) Restitution for unjust enrichment in the amount of \$100,000, together with compound interest on the said sum at six monthly rests at 10% per annum from 5 January 2002 until 5 January 2004.
- (b) In the alternative to the above prayer for interest as part of the restitutionary damages, interest pursuant to section 32 of the Supreme Court Act 1932 (WA) from 5 January 2002 until the date of judgment.
- (c) Costs.

Statement of Claim (Omitting Formal Parts) Including Compound Interest in a Claim for Disgorgement Damages or an Account of Profits

1. The Defendant is the trustee of the Jetson Family Trust and a signatory to the trust deed for the Jetson Family Trust (the 'Trust Deed').
2. The Plaintiff is the sole beneficiary of the Jetson Family Trust.
3. Clause 1 of the Trust Deed for the Jetson Family Trust provides that the trustee shall not invest any funds other than for the benefit of the Jetson Family Trust.
4. On 1 January 2002, the Defendant withdrew \$100,000 from the Jetson Family Trust and invested the said \$100,000 in an account in the name of the Defendant for a fixed term with Dodgy Bank Pty Ltd ('the Account').
5. The terms of the Account were that the Defendant would receive 20% interest per annum compounded annually on the \$100,000 deposit.
6. On 1 January 2003, the Account was credited by Dodgy Bank Pty Ltd with \$20,000 interest.
7. On 1 January 2004, the Account was credited by Dodgy Bank Pty Ltd with \$24,000 interest.

The Plaintiff claims:

- (a) Disgorgement damages (an account of profits) in the amount of \$100,000, together with compound interest on the said sum at annual rests at 20% per annum from 1 January 2002 until the date of judgment.
- (b) In the alternative to the above prayer for interest as part of the disgorgement damages (account of profits), interest pursuant to section 32 of the Supreme Court Act 1932 (WA) from 1 January 2002 until the date of judgment.
- (c) Costs.