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DISCUSSION PAPER

INTERIM PAYMENT OF DAMAGES

**Law Reform Commission of Nova Scotia
January 2000**

WHAT DO YOU THINK?

The Law Reform Commission is very interested in what you think about the issues raised in the Discussion Paper, *Interim Payment of Damages*.

We have attempted, as much as possible, to describe the law relating to interim payment of damages, as well as problems associated with it, in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law relating to interim payment of damages should be reformed.

If you would like to comment on the Discussion Paper, you may:

- Fax the Commission at (902) 423-0222
- Send an e-mail to lawrefns@fox.nstn.ca
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In order for us to fully consider your comments before we prepare our Final Report, please contact us by **April 15, 2000**.

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*.

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The Commission's work is available on the Internet through the Chebucto Community Net at <http://www.chebucto.ns.ca/Law/LRC> and also from links at the Government of Nova Scotia Web site (<http://www.gov.ns.ca/>).

The Law Reform Commission receives funding from the Nova Scotia Department of Justice and the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support.

Canadian Cataloguing in Publication Data:

Law Reform Commission of Nova Scotia, Discussion Paper, *Interim Payment of Damages*, January 2000.

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INTERIM PAYMENT OF DAMAGES

SUMMARY

Damages are sums of money, awarded by a court to compensate a person (the *plaintiff*) for loss or harm resulting from the wrong of another person (the *defendant*). *Special damages* compensate the plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong. *General damages* compensate the plaintiff for intangible results of a wrong, such as pain and suffering, mental distress and loss of quality of life. General damages can also include amounts for lost future income and diminished future earning capacity. To obtain damages, the plaintiff commences a court proceeding or *action*. The aim of an action is to have the court declare the defendant legally responsible or *liable* to compensate the plaintiff. Ordinarily, damages are only awarded at the end of a trial, after all issues between the plaintiff and the defendant have been resolved. The court may reduce the amount of a damages award, to take into account any *contributory negligence*, the extent, if any, to which the plaintiff caused in part his or her injury and therefore the amount of damages suffered. If applicable, the court will also reduce a damages award by a proportion attributable to the plaintiff's failure to *mitigate* or minimize damages.

Interim payment of damages involves the court ordering the defendant to pay a portion of damages to the plaintiff before trial. In 1996, amendments were made to the Nova Scotia *Civil Procedure Rules*, which govern how actions begin and proceed. The amendments permit interim payment of damages in actions where the court is satisfied that the defendant has admitted liability, or the defendant's liability has been determined by the court. In addition, in *personal injury actions*, in which the plaintiff seeks compensation for bodily or physical injuries, interim payment is only available where the defendant is covered by insurance, is a public authority, or has adequate financial resources with which to make an interim payment.

Some people believe that the law relating to interim payment of damages should be expanded, to permit interim payment when the defendant's liability has not yet been established. This change, they maintain, would enable considerably more plaintiffs to apply for interim payment. Other people are concerned, however, that to allow for interim payment when liability is still in question would not be fair.

The Commission is of the view that interim payment of damages in Nova Scotia should be made more accessible, but in a balanced manner, which takes into account the interests of both plaintiffs and defendants. In this Discussion Paper, the Commission examines the nature of interim payment of damages and suggests how the relevant law can be clarified and made more effective.

Preliminary suggestions for reform

The Commission seeks public commentary to assist in developing recommendations for reforming the law relating to the interim payment of damages. In particular, the Commission invites comments on its preliminary suggestions, including:

- The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.
- The interim payment rule should continue to be available for personal injury actions.
- Special and general damages should be available, if relevant, for inclusion in an interim payment.
- The interim payment rule should not require a plaintiff to show need.
- A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.
- Mitigation of damages should be included as a factor which may be taken into account by the court when deciding the amount of an interim payment of damages.
- The interim payment rule should not include any specific formulas for determining the amount of payment.
- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.
- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.
- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning any applications for interim payment of damages should not be disclosed to the trial judge until the judgment is given.
- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. No change to the law would be required to bring this into effect.

- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

The Commission invites comments on what types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages. The Commission is also interested in suggestions about what means would be appropriate to prevent the disclosure of interim payment details to a trial judge until the judgment is given.

PAIEMENT PROVISOIRE DE DOMMAGES-INTERETS

SOMMAIRE*

Les *dommages-intérêts* sont une somme d'argent, dont le paiement est ordonné par le tribunal afin de dédommager une personne (le *demandeur*) pour une perte ou un préjudice résultant de la faute commise par une autre personne (le *défendeur*). Les *dommages-intérêts spéciaux* dédommagent le demandeur pour les pertes ou dépenses financières encourues avant le procès et qui résultent de la faute du défendeur. Les *dommages-intérêts généraux* dédommagent le demandeur pour les conséquences intangibles d'une faute, telles que les blessures et souffrances, la souffrance morale et la perte de qualité de vie. Les dommages-intérêts généraux peuvent aussi inclure des sommes pour le dédommagement de la perte de revenus futurs et de la diminution de la capacité de générer des revenus futurs. Le demandeur qui désire obtenir des dommages-intérêts doit intenter une procédure judiciaire ou *action*. Le but de l'action en justice est d'obtenir que le tribunal déclare que le défendeur est juridiquement *responsable* et doit dédommager le demandeur. La décision d'octroyer des dommages-intérêts est habituellement prise à l'issue du procès alors que toutes les questions entre le demandeur et le défendeur ont été résolues. Le tribunal peut réduire les dommages-intérêts en raison d'une *faute contributive* du demandeur qui a ainsi contribué au préjudice subi. De plus, le cas échéant, le tribunal réduira le montant des dommages-intérêts proportionnellement au défaut du demandeur de minimiser ou *d'atténuer* le préjudice subi.

Le paiement provisoire des dommages-intérêts survient lorsque le tribunal ordonne au défendeur de payer une partie des dommages-intérêts au demandeur, avant le procès. En 1996, des amendements ont été apportés aux *Règles de procédure civile* de la Nouvelle-Ecosse traitant de la façon d'intenter des actions en justice et leur déroulement. Ces amendements permettent le paiement provisoire de dommages-intérêts lorsque le tribunal est certain que le défendeur a admis sa faute et responsabilité ou que le défendeur a été reconnu responsable par le tribunal. De plus, dans les cas d'actions en *responsabilité civile pour dommages corporels*, le paiement provisoire de dommages-intérêts n'est possible que si le défendeur est couvert par une police d'assurance, est une autorité publique ou possède des ressources financières suffisantes pour faire ce paiement provisoire.

Certaines personnes sont d'avis que les règles juridiques relatives au paiement provisoire de dommages-intérêts devraient être élargies afin de permettre le paiement provisoire même lorsque la faute du défendeur n'a pas encore été déterminée. Cette modification, selon elles, permettrait à un nombre accru de demandeurs de demander le paiement provisoire de dommages-intérêts. Par contre, d'autres croient que de permettre le paiement provisoire de dommages-intérêts lorsque la faute n'a pas encore été déterminée serait injuste.

* Traduit de l'anglais par Me Nathalie Bernard, LL.M. (Dalhousie University), LL.B. (Dalhousie University), LL.B. (Université Laval).

La Commission estime que le paiement provisoire de dommages-intérêts en Nouvelle-Ecosse devrait être plus accessible, tout en étant équilibré, et prendre en considération les intérêts du demandeur et du défendeur. Dans le présent document, la Commission examine la nature du paiement provisoire de dommages-intérêts et présente des suggestions visant à rendre les règles actuelles plus limpides et efficaces.

Suggestions préliminaires de réforme

La Commission invite le public à contribuer au développement de recommandations pour la réforme des règles relatives au paiement provisoire de dommages-intérêts. Plus particulièrement, la Commission invite le public à commenter ses suggestions préliminaires, notamment:

- Les règles néo-écossaises en matière de paiement provisoire de dommages-intérêts devraient être élargies afin de permettre le paiement provisoire lorsque la faute et responsabilité sont toujours en litige. Les règles actuelles pourraient être modifiées de façon appropriée et prévoir le paiement provisoire lorsque la faute et la responsabilité sont toujours en litige en posant comme exigence que le tribunal soit satisfait que le demandeur gagnera son procès.
- Les règles relatives au paiement provisoire devraient continuer à couvrir les actions en responsabilité civile pour dommages corporels.
- Le paiement provisoire devrait pouvoir couvrir les dommages-intérêts spéciaux et généraux selon la pertinence.
- Les règles relatives au paiement provisoire ne devraient pas exiger que le demandeur démontre qu'il a besoin de ce paiement provisoire.
- La faute contributive du demandeur ne devrait pas empêcher le demandeur d'avoir accès aux bénéfices du paiement provisoire de dommages-intérêts mais devrait être prise en considération par le tribunal.
- Le devoir d'atténuation du préjudice devrait constituer un facteur qui pourra être pris en ligne de compte par le tribunal lorsqu'il décidera de la somme à payer à titre de paiement provisoire de dommages-intérêts.
- Les règles relatives au paiement provisoire ne devraient pas inclure de formules spécifiques pour l'évaluation du paiement.
- Les règles relatives au paiement provisoire devraient se limiter aux situations où il appert que le défendeur possède les ressources nécessaires pour effectuer ce paiement provisoire.
- Pour pouvoir obtenir une ordonnance de paiement provisoire contre un défendeur

en particulier, le demandeur doit prouver au tribunal qu'il est certain ou probable que le défendeur sera condamné à lui payer des dommages-intérêts.

- En cas d'élargissement des règles relatives au paiement provisoire aux cas où la faute et responsabilité sont encore en litige, les informations à l'appui de toute demande de paiement provisoire de dommages-intérêts ne devraient pas être divulguées au juge du procès jusqu'à ce que le jugement final soit rendu.
- Au moment du jugement final, le tribunal, dans le calcul des dommages-intérêts définitifs, devrait prendre en considération le paiement provisoire effectué par le défendeur et faire les ajustements nécessaires entre les parties, notamment, le cas échéant, une ordonnance de remboursement de sommes par le demandeur au défendeur. Aucun amendement aux règles n'est nécessaire pour réaliser cet objectif.
- Le tribunal devrait pouvoir émettre une ordonnance additionnelle ou une ordonnance modificative relativement à un paiement provisoire pour tout juste motif, notamment, un changement dans les circonstances.

La Commission invite le public à lui faire parvenir ses commentaires sur les types d'actions, en sus des actions en responsabilité civile pour dommages corporels, pour lesquelles les paiements provisoires de dommages-intérêts devraient être admis. La Commission aimerait aussi recevoir des commentaires sur les moyens appropriés visant à prévenir la divulgation au juge du procès des détails relatifs au paiement provisoire, jusqu'à ce que le jugement final soit rendu.

KASKWAPANKTUEMK DAMIJL

SUMMARY*

Kourt Kisut mimajuinul (plaintiff) apankituksilin suliewey (damages) ujit tan teli opla'l+sipnn kt+kl mimajuinul (the defendant). Miamuj nikani apankitkl (special damages) defendant ujit tan teli ks+ka'taj (plaintiff) msit koqowey, m+ta mu nuku pe'kwataq aq mu kis lukwek. General damages awarde'walujl (plaintiff) mita mu nuku tali wtapsunik kis natal lukwen wula wsitqamu'k. General damages nespiw apankitkl tan koqoweyek kpkwatusoq (plaintiff) L'pa na kisi lukwej. Plaintiff tan tli msenss damijl miamuj kourtiktuk elalatl (court action) defendantal. Kourtiktuk wji sutasitew defendant legally kisna layaple'win aq miamuj apankituan plaintiffal. Apjiw pas+k kourt awardewatekek kisi trial-ik, tan tijiw kisi ila'matultimk tan tla'sitew koqowey. Kourt kisi nise'kess tan tel awtik suliewey wen mesnik, kourt iloqapt+k plaintiffal nespi tla'lsilin (contributory negligence) tan teli ktpie'lij aw kourtiktuk tl'tek, kourt kisi tmasqate'ss damijl (damages) plaintiff amsami ktu oqomasij.

Kourt ika'lsit aq miamuj telsutk defendant amuj kaskwapankituatl plaintiffel ke'sk mu trialinuk. 1996ek, amendmensl ika'tasik+pnn Nopa Sko'sia civil procedure rules-iktuk, tan mesqnn wikasik tli msikesitesk. Amendmensl asite'tkip kaskwapankituksin plaintiff, tan tujiw defendant kis tlu'ej tela'lsij aq kourt nejpa ki's kejiatl tela'silitl.

Personal injury actions-ituk, tan plaintiff kwilut suliewey ujit tan teli ksitesink, kisi msentew suliewey pasik defendant insurance pma'toq, kisna public authoritie'wij, kisna tepi wsulieweymij kisi kaskwapankitmin.

Eykk wen teli tlamsitasit, na la law (tplutaqn) ujit interim payment of damijl tepawtiss asite'tmin kaskwapankitaqn (interim payment) tlia' defendant me mu kjiju'sin nekm wtla'taqnin. Etli te'tmik me ateli'tiss plaintiffaq applye'wultjik msnminew interim payment. Aq eykk wen tluwetew mu fair-i-nuk.

Kmisn etlite'tk kisi aji nqamasias interim payment of damijl ula Nopa Sko'sia, pas katu koqajalujik ki'tk plaintiffaq aq defendantaq. Wula wikatkn, kmisn iloqaptik tan nikey tel pukuik interim payment of damijl aq tan tplutaqn me kisi aji wuli ns+tasin klaman me wul lukwetew.

*Mi'kmaw translation by: Katherine Sorbey, Listuguj, Quebec

E'wsi ilsutaqnn ujit koqajataqn (*Preliminary Suggestions for Reform*)

Kmisn kwilk apoqnmasuti tan tl developewataq recommendationn wjit iljoqatunew tplutaqn tan maliapt+k interim payment of damijl. In particular, kmisn wiku'tkl commentl tan ki'ss kisi nikani suggest-ewa'tutij:

- Nopa Sko'sia tplutaqn tan nujo'tk interim payment me kisi aja'tuness, asite'tmin interim payment tlia liability me mektasik, tplutaqn kisi iljo'qatuness asite'tmin interim payment tlia mekt+mik tanwen liablewit, nuta'tiss kourt satisfyewin plaintiff mate'tew kourt action triale'maj.
- Interimey paymentey tplutaqn siawi applyewiss personal injury aktion-iktuk.
- Special aq general damijl asite'tasiss l'pa relevantewik, ujit wiaqten ula interim payment.
- Interimey paymentey tplutaqn mu nuta'tnus plaintiff miamuj muska'tn tel nuta'jj.
- Plaintiff ami tla'lsit teli ktpiej, mu tepawtinus naqaluksin kisi msnmin interim payment, katu mikwite'tmines tan tujiw kourtiktuk ika'j.
- Mitigation ujit damijl wiaqtes kourt ankapt+min tan tujiw ilut tan tla'wtitew interim payment.
- Interimey paymentey tplutaqn mu wiaqtenus specific formulas tan tla'wtitew payment.
- Interimey paymentey tplutaqn pasik confinewa'tasis tan defendant keju't tepnmat sulieway kis apankitmin interim payment.
- Wekaw kisi wja'tuaj interim payment defendantal, plaintiff miamuj satisfyewatoq kourt ks+putuatal trialiktuk defendantal.
- L'pa na interimey paymentey tplutaqn ankuwa'timk ujit wiaqten situe'tion tan liability mektasik, na information ujit application wjimsnmin interim payment, mu nimituis trial judge misoqo kisi iknmuetoq wjugementim.
- Kisi trialik aq judgement eliaq plaintiffewiktuk, kourt maw kijjass tan tel tepawtik interim paymensl ki'ss apankitkl defendant, aq nuta'q, miamuj plaintiff apaji apankituan defendantal, mu kis nutanuk tplutaqn ika'lsin tan tel settle-ewa'tutij.
- Kourt tepawtiss kisi asite'tmin tan tujiw piltua'sik koqowey, ula interim payment pilua'sitn.

Kmisn wikutkl commentl tan tlamuktiss pilue'l aktionn, me atelkl aq pasik personal injury aktionn, tan wula'siss kisna mu wula'sitnuss teli msnm+k interim paymensl. Kmisn elt

interestewa'ltl suggestionn tan wula'siss teli naqa'luj trail judge mu nmitn interime'l
paymente'l details-+l misoqo ki'ss kisutekej.

I INTRODUCTION

1. The project

Damages are sums of money, awarded by a court to compensate a person for loss or harm resulting from someone else's wrong.¹ A person seeking damages in the courts is the *plaintiff*, the person against whom the plaintiff's claim is made is the *defendant*, and the court proceeding by which the plaintiff makes his or her claim is an *action*. The plaintiff and defendant are often known as the *parties* to an action. If the court determines that the defendant's wrong has resulted in the plaintiff suffering loss or harm, then the defendant is deemed legally responsible or *liable* to compensate the plaintiff. A court *order* will be issued, requiring the defendant to pay the plaintiff a specific sum as damages.

Ordinarily, damages are only awarded by a court at the end of a trial, after all outstanding issues between the parties have been resolved. The *interim payment of damages* involves a court ordering the defendant to pay a portion of damages to the plaintiff before trial. Interim payment of damages is often associated with *personal injury actions*, in which a plaintiff seeks compensation for bodily or physical injuries. A plaintiff who has suffered personal injuries may not be able to work and may therefore have difficulty paying for medical treatment and other expenses in the period before trial.

In Nova Scotia, the *Civil Procedure Rules* govern how actions are commenced and how they proceed.² The topic of interim payment of damages was first suggested to the Commission in 1992, by a practising lawyer of the view that a new Rule should be created in order to allow an application to be made for interim payment of damages when a defendant's liability is not an issue. In November 1996, Rule 33 was amended to allow interim payment of damages in cases where a court is satisfied that the defendant has admitted liability, or the defendant's liability has been determined by the court. In personal injury actions, interim payment of damages is only available where the defendant is covered by insurance, is a public authority, or has adequate financial resources with which to make an interim payment.

In 1997, a practising lawyer contacted the Commission, to express the concern that the amendment of Rule 33, though desirable, had not gone far enough. In 1999, Commission staff spoke informally with a number of lawyers and insurance company representatives with particular knowledge about application of the rule pertaining to interim payment of damages. Opinions about the amended Rule 33 were mixed. Some people, in particular lawyers who represent personal injury plaintiffs, are of the view that Rule 33 should be expanded, to permit interim payment of damages when liability has not yet been established. This change, they maintain, would enable considerably more plaintiffs to apply for interim payment in the period

¹ See J. Munkman, *Damages for Personal Injuries and Death*, 9th ed. (London: Butterworths, 1993) at 1; D. A. Dukelow & B. Nuse, *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991) at 250.

² The *Civil Procedure Rules* are court rules made by the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia under authority of the *Judicature Act*, R.S.N.S. 1989, c. 240, ss. 2(h), 46-51.

before trial. Other people, however, consider that the current form of Rule 33 is satisfactory, as it restricts the interim payment of damages to cases where liability is clear. These people are concerned that to allow for interim payment when liability is still in question would provide plaintiffs with an undue advantage.

Given these differing perspectives, the Commission has decided to examine the topic of interim payment of damages and to seek input on the issues outlined in this Discussion Paper.

2. Legal language

This Discussion Paper attempts to present legal information as clearly as possible so that people who do not have legal training can understand and comment on the Commission's suggestions for reform. There are still some situations where the language relates to specific legal concepts, and the words used will not be familiar to everyone. This section provides definitions of those words as they are used in this Discussion Paper.

Action	-	The court proceeding by which a plaintiff makes a claim for damages.
Affidavit	-	A written statement, supported by the oath or solemn affirmation of the person making the statement.
Application	-	The pre-trial procedure by which a plaintiff seeks summary judgment. Also referred to as a motion.
Civil Procedure Rules	-	Court rules which govern how actions in Nova Scotia are commenced and how they proceed.
Common law	-	The law contained in court decisions rather than in legislation.
Contributory negligence	-	The extent, if any, to which a plaintiff caused his or her injury and therefore the amount of damages suffered.
Counter-claim	-	A claim by a defendant that he or she is entitled to a sum from the plaintiff in the same matter concerning which the plaintiff has brought an action.
Cross-claim	-	A claim made by a defendant against another defendant in the same action.
Damages	-	Sum of money, awarded by a court to compensate a person for loss or harm resulting from the wrong of another person.
Defendant	-	The person against whom a plaintiff's claim is made.
Discovery	-	Pre-trial disclosure of information and documents by the parties to an action.
Estate	-	Everything that a person owns at the time of his or her death.

General damages	-	Compensation to a plaintiff for the intangible results of a defendant's wrong. General damages can include pain and suffering, mental distress, loss of quality of life, future lost earnings, and future loss of earning capacity.
Interim payment of damages	-	Payment of a portion of a plaintiff's damages in the period before trial.
Legislation	-	Law made by elected members of government.
Liability	-	Finding by a court that a defendant is legally responsible to compensate the plaintiff.
Mitigation	-	The obligation of plaintiffs to take reasonable steps to minimize their damages.
Motion	-	See definition for application.
Order	-	Document issued by a court, requiring a defendant to pay the plaintiff a specific sum as damages.
Parties	-	The plaintiffs and defendants involved in an action.
Personal injury action	-	An action in which a plaintiff seeks compensation for bodily or physical injury.
Plaintiff	-	A person seeking damages in the courts.
Pleadings	-	Documents, filed with the court, which set out the parties' positions on the issues in dispute.
Set off	-	Application of an amount, owed to a defendant from an unrelated matter, to reduce an award in a proceeding before a court.
Special damages	-	Compensation to a plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong. Special damages can be objectively identified and assigned a precise monetary value.
Standard of proof	-	In relation to interim payment of damages, this refers to how satisfied a court must be that the plaintiff will succeed at trial.

- Summary judgment** - Determining liability through a court judgment in the period before trial.
- Wrongful death action** - Where a person is killed as a result of someone else's wrong, an action by the dependants of the deceased to seek compensation for the value of lost financial and emotional support.

II GENERAL INFORMATION

1. What is an interim payment of damages?

At *common law*,³ damages in an action can only be determined “once and for all.” Courts have no power at common law to award damages before trial.⁴ A plaintiff’s entitlement to damages would therefore date from the time of trial judgment, when all outstanding issues between the parties to an action would be decided. The common law has been changed in a number of jurisdictions, including Nova Scotia,⁵ to permit a plaintiff to recover before trial a certain proportion of damages suffered, known as an interim payment of damages,⁶ even though the court has yet to decide all issues in dispute.

2. What are the perceived benefits of interim payment of damages?

This Discussion Paper concerns court-ordered interim payment of damages.⁷ It has been suggested that court-ordered interim payment of damages may accelerate settlement between the parties to an action.⁸ A defendant who is required to pay a portion of damages may choose to bring an earlier end to legal proceedings, by electing to pay all damages at once. Earlier court involvement in a dispute may speed up any ultimate resolution of the issues in dispute between the parties. The existence of an interim payment procedure may also encourage more out-of-court negotiations between parties. In addition, it has been suggested that the availability of

³ Common law is the law contained in court decisions rather than in *legislation*. Legislation is law made by elected members of government.

⁴ Western Australia Law Reform Committee, *Interim Payments in Personal Injury Claims* (Project 5) (Perth, W.A.: Western Australia Law Reform Committee, 1979) [hereinafter Western Australia Report] at 6.

⁵ Nova Scotia, *Civil Procedure Rules*, r. 33.01(A)(1) [hereinafter Nova Scotia rule]; Bermuda, *Law Reform (Miscellaneous Provisions) (No. 2) Act 1977* (no. 52 of 1977) [hereinafter Bermuda rule], as reported in (1978) 4 Commonwealth Law Bulletin 538; England & Wales, *Rules of the Supreme Court*, Ord. 29, r. 11 [hereinafter English rule]; New Brunswick, *Rules of Court*, r. 47.03(3) [hereinafter New Brunswick rule]; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 265.6 [hereinafter N.B. *Insurance Act*]; New South Wales, *Supreme Court Act 1970*, s. 70E [hereinafter N.S.W. rule]; Scotland, *Rules of the Court of Session 1994*, rr. 43.8-43.10 [hereinafter Scottish rule]; South Australia, *Supreme Court Act 1930*, s. 30B [hereinafter South Australia rule].

⁶ Interim payment of damages is also sometimes known as advance payment of damages.

⁷ Court-ordered interim payment is distinct from *Section B benefits* provided by authority of Schedule B to Part IV of the *Insurance Act*, R.S.N.S. 1989, c. 231. Section B benefits are mandatory benefits provided to people who sustain bodily injury or death arising from the operation or use of an insured automobile. These benefits are paid by the vehicle’s insurer to compensate for such aspects as medical expenses, rehabilitation costs, and lost employment income attributable to a motor vehicle accident. The benefits available for medical and related expenses are limited to \$25,000. The amount of section B benefits payable for lost employment income is the lesser of \$140 per week or 80% of a person’s gross weekly income from employment. Ordinarily, benefits for lost income do not last more than 104 weeks. Section B benefits may not meet all of a plaintiff’s financial needs.

⁸ The suggested benefits of court-ordered interim payment of damages are identified in U.K., *Report of the Committee on Personal Injury Litigation* (London: HMSO, 1968) (Chairman: R. Winn) [hereinafter Winn Report] at 32. A defendant is also free to make voluntary payments to a plaintiff in the period before trial.

interim payment may strengthen a plaintiff's bargaining position, thereby providing for more equality between the parties in situations where the plaintiff has little money, but the defendant has considerable financial resources. The most often suggested benefit of interim payment is that it can lessen economic hardship suffered in the pre-trial period by a plaintiff, whose income has declined or been reduced to nothing because of the defendant's wrongful act. In the period before trial, a plaintiff may incur significant expenses for such items as medical care, travel, repairs, and personal assistance. The period between the time of an injury and court judgment may be lengthy. A considerable time, for example, might elapse before the full effects of a medical condition resulting from an injury are known. Completing pre-trial procedures such as *discovery* also takes time.⁹ Without the benefit of interim payment of damages, plaintiffs may decide that they cannot afford to wait for an action to proceed to trial. Such plaintiffs might therefore accept a settlement offer which is lower than the amount of damages they might have obtained at trial.

3. What are the concerns about interim payment of damages?

It is possible that interim payment of damages could be used to finance litigation by paying lawyers' fees rather than meeting a plaintiff's basic economic needs. Defendants might object to interim payment as an encouragement to litigation. It has also been suggested that the availability of interim payment can result in overpayment, which a plaintiff may not be able to pay back to the defendant after trial.¹⁰ Most importantly, if available even though the defendant's liability has not been established, interim payment may result in the balance of power between the parties to an action shifting too much in the plaintiff's favour. For example, an uninsured defendant may not be able to gather sufficient funds with which to pay an interim award. Such a defendant could suffer the same inability to continue with litigation, because of a lack of finances, which interim payment is meant to remedy for plaintiffs.¹¹

4. Is interim payment of damages available in Nova Scotia?

Since 1996, the Nova Scotia *Civil Procedure Rules* have provided for the interim payment of damages. This can occur as a result of the defendant admitting liability or as a consequence of the court deciding the defendant is liable, with damages remaining to be assessed.¹² Where an action for personal injuries is involved, the defendant must have insurance to cover the plaintiff's claim, must be a public authority, or must be a person financially able to make an interim

⁹ Discovery involves pre-trial disclosure of information and documents by the parties to an action: Dukelow & Nuse, note 1, above, at 288. Discovery helps the parties to gauge the strength of their respective positions and can help to promote a settlement before trial.

¹⁰ Manitoba Law Reform Commission, *Interim Payment of Damages* (Report 87) (Winnipeg: Manitoba Law Reform Commission, 1995) [hereinafter Manitoba Report] at 6.

¹¹ Note 10, above, at 6-7.

¹² *Hall v. Woodland* (1997), 164 N.S.R. (2d) 149 at 152 (S.C.), aff'd (1998), 165 N.S.R. (2d) 78 (C.A.).

payment. In any event, interim payments are not mandatory, but are subject to the court's discretion.¹³ The relevant rule, 33.01(A)(1) ("the Nova Scotia rule"), reads as follows:

Interim payment

33.01(A)(1) *Notwithstanding the provisions of rule 33.01, the court may order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set off, cross-claim or counter-claim on which the defendant may be entitled to rely, if the court is satisfied:*

- (a) *that the defendant against whom the order is sought has admitted liability for the plaintiff's damages, or*
 - (b) *the plaintiff has obtained judgment against the defendant for damages to be assessed.*
- (2) *No order shall be made under subsection (1) in an action for personal injuries if it appears to the court that the defendant is not a person falling within one of the following categories:*
- (a) *a person who is a party to a contract of insurance pursuant to which the insurer is obliged to contribute or to indemnify the plaintiff in the event that the defendant is found liable to the plaintiff,*
 - (b) *a public authority, or*
 - (c) *a person whose means and resources are such as to enable the person to make the interim payments.*
- [Amend. 29/11/96]*

5. Is there a need to establish a defendant's liability?

For an interim payment of damages to be ordered in accordance with the Nova Scotia rule, a defendant's liability must first be established, either through an admission or as a result of a court judgment. In *Armoyan Group v. Dartmouth (City)*,¹⁴ the court considered how a defendant's liability could be established through an admission. The court accepted that liability through an admission can result, if "there is a clear admission of facts in the face of which it would be

¹³ *Bogaczewicz v. Faulkner* (14 May 1997), S.H. 93-5464 (N.S.S.C.).

¹⁴ (1998), 167 N.S.R. (2d) 398 (C.A.)

impossible for the party making it to succeed.”¹⁵ The court also held that “admissions of liability under Rule 33.01(A)(1) are not limited to admissions in pleadings or in open court.”¹⁶ Other potential sources of admissions, not mentioned in the *Armoynan* decision, would include evidence in a defendant’s *affidavit*,¹⁷ answers given to questions posed as part of the discovery process,¹⁸ and correspondence arising either before or after the action was commenced.¹⁹

Liability can also be determined through a court judgment. In the period before trial, such a determination takes the form of a *summary judgment*. The pre-trial procedure by which a plaintiff seeks summary judgment is known as an *application*, which in some jurisdictions is called a *motion*. A plaintiff who applies for summary judgment in essence argues that the defendant has no real defence to the claim being made, and that the only issue remaining for the court to decide is the amount of damages. The plaintiff therefore seeks a judgment against the defendant for damages to be assessed. By virtue of Rule 13.01, which governs summary judgment in Nova Scotia, once the plaintiff has clearly established a claim, the defendant must then be able “to set up a bona fide defence or raise an arguable issue to be tried....”²⁰ A mere assertion that a defence is available is not enough. Rather, in order to avoid summary judgment, the defendant must reveal the nature of his or her defence and must disclose such facts which will be sufficient to support the defence or a fairly arguable point.²¹ The defendant’s burden is not considered to be a heavy one,²² which means that in practice plaintiffs do not often obtain summary judgment.

6. How have Nova Scotia courts treated the issue of interim payment of damages?

There have been few case decisions in Nova Scotia relating to interim payment of damages. In *Hall v. Woodland*,²³ it was held that an application for summary judgment had been properly dismissed, so no liability had been established, and consequently no interim payment was to be

¹⁵ Note 14, above, at 399, citing *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532 at 537 - 538 (N.S.S.C.A.D.).

¹⁶ Note 14, above, at 399. In an action, the *pleadings*, documents which are filed with the court, set out the parties’ positions on the issues in dispute: see Dukelow & Nuse, note 1, above, at 725.

¹⁷ *MacNeil v. Black* (1998), 166 N.S.R. (2d) 127 at 128-129 (C.A.). An affidavit is a written statement, supported by the oath or solemn affirmation of the person making the statement: Dukelow & Nuse, note 1, above, at 25.

¹⁸ Manitoba Report, note 10, above, at 18, n. 19.

¹⁹ R. F. Wagner, “Interim Payments from the Section A Insurer” (Paper presented to the Canadian Bar Association, Nova Scotia Branch, 16 April 1999) [unpublished] at 3.

²⁰ *Canadian Imperial Bank of Commerce v. Tench* (1991), 97 N.S.R. (2d) 325 at 327 (N.S.S.C.A.D.).

²¹ *Hall*, note 12, above, at 150-151.

²² *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 at 270 (C.A.).

²³ Note 12, above.

made. In *Armoyan*,²⁴ it was found there had been no admission of liability, and thus no interim payment was allowable. In a third case, *MacNeil v. Black*,²⁵ a personal injury action arising from a motor vehicle accident, the Court of Appeal held that the application for summary judgment had been improperly dismissed and awarded \$20,000 to the plaintiff as an interim payment without prejudice to the plaintiff's right to reapply. No further remarks were made about interim payments. In a fourth case, *Bogaczewicz v. Faulkner*,²⁶ also a personal injury action which followed an automobile accident, the Nova Scotia Supreme Court awarded \$18,000 as an interim payment to the plaintiff, who had sought an interim payment of \$45,000. This is the only reported decision in Nova Scotia to consider in any detail the nature of the interim payment rule. A motor vehicle collision was also involved in *MacDonald v. MacPherson*,²⁷ where summary judgment was allowed, but no interim payment was granted to the plaintiff. The court in *MacDonald*, which only had affidavit evidence to consider, held that determining the amount of an interim payment in the circumstances would be no more than a haphazard guess, because of issues raised about the plaintiff's claim for lost income and about the plaintiff's credibility. It was considered more appropriate for these issues to be left to the trial court, which could make both findings of fact and of credibility with the benefit of oral testimony by witnesses. Aspects of these decisions are mentioned below, where appropriate.

In the remainder of this Discussion Paper, the Commission examines the nature of interim payment of damages in more detail and suggests how the relevant law in Nova Scotia can be clarified and made more effective.

²⁴ Note 14, above.

²⁵ Note 17, above.

²⁶ Note 13, above.

²⁷ (June 16, 1999), S.H. 146076 (N.S.S.C.), aff'd (December 7, 1999) C.A. 157445 (N.S.C.A.).

III SUGGESTIONS FOR REFORM

1. Should interim payment of damages be available if liability has not yet been established?

The Nova Scotia rule permits interim payment of damages only where a defendant has admitted liability or liability has been established by a court. A similar rule applies in New Brunswick,²⁸ the only other Canadian jurisdiction which provides for interim payment, as well as in South Australia,²⁹ and Bermuda.³⁰ It was also recommended by the Winn Committee, which studied this issue in England,³¹ as well as by the New South Wales Law Reform Commission.³²

In some jurisdictions, interim payment is available even though liability is still in question, where a court is of the view that the plaintiff will be successful at trial. The fact that a court order is made, despite liability still being in question, has no bearing, however, on the issue of the defendant's liability, which will be decided by the trial judge. In England, seemingly the first jurisdiction to provide for court-ordered interim payment of damages,³³ an order for interim payment can be made where the court is "satisfied" that "if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the [defendant]...."³⁴ Similar language is used in legislation in New South Wales.³⁵ An equivalent provision in Scotland allows for interim payment where the court is satisfied that the plaintiff "would succeed in the action on the question of liability without any substantial finding of contributory negligence on his part...."³⁶ A section in the New Brunswick *Insurance Act* also enables a judge to make an interim payment order if "satisfied that the plaintiff will prove that the defendant is liable for those damages."³⁷

²⁸ The New Brunswick rule, note 5, above, states: "Where liability is established before damages are assessed, the court may direct advance payments of special damages and, for the purpose of giving such directions, may receive such preliminary evidence as it considers necessary."

²⁹ South Australia rule, note 5, above, s. 30B(2).

³⁰ Bermuda rule, note 5, above.

³¹ Winn Report, note 8, above, at 35.

³² New South Wales Law Reform Commission, *Working Paper on Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Postponement of Assessment and on the Relevance of Remarriage or Prospects of Remarriage in an Action Under Lord Campbell's Act* (Sydney: Government Printer, 1969) [hereinafter N.S.W. Commission Working Paper] at 23.

³³ Interim payment of damages is provided for generally in the *Supreme Court Act, 1981* (U.K.), 1981, c. 54, s. 32. Interim payment, a response to recommendations in the Winn Report, note 8, above, was first made available in England in 1969: *Schott Kem Ltd. v. Bentley*, [1991] 1 Q.B. 61 at 69 (C.A.).

³⁴ English rule, note 5, above, r. 11(1). The full text of this rule is in Appendix "A".

³⁵ N.S.W. rule, note 5, above, s. 76E(3)(c).

³⁶ Scottish rule, note 5, above, r. 43.9(3)(b).

³⁷ N.B. *Insurance Act*, note 5, above, s. 265.6(2). The full text of this section is in Appendix "B".

The Manitoba Law Reform Commission suggested that to restrict the availability of interim payment of damages to situations where a defendant's liability has been admitted or determined would significantly reduce the number of plaintiffs who could benefit from a such a provision. On the other hand, the Manitoba Commission recognized that making interim payment too accessible might result in situations of overpayment, with a plaintiff being unable to repay the defendant after trial. It might also force certain defendants to give up legitimate defences because of their own financial hardship.³⁸ The Manitoba Commission concluded that an appropriate balance would be achieved by limiting interim payment orders to situations where a judge hearing an application "believes that the plaintiff will wholly succeed against the defendant at trial on the issue of liability."³⁹

As shown above, those jurisdictions which allow interim payment of damages even though liability is still in question differ in their choice of language to describe what the plaintiff must establish about the likelihood of his or her success at trial. A related issue involves the *standard of proof*, which refers to how satisfied the court must be that the plaintiff will succeed at trial. In criminal trials, the standard of proof is beyond a reasonable doubt. In civil (non-criminal) trials, a lower standard applies. It is often referred to as on the balance of probabilities, meaning more probable than not.⁴⁰ Courts in England have interpreted the burden placed upon a plaintiff seeking interim payment to be something more than a *prima facie* (at first glance) standard, but something less than the criminal standard. In *Shearson Lehman Inc. v. Maclaine, Watson Ltd.*,⁴¹ Lloyd, L.J. explained:

Something more than a prima facie case is clearly required; but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden. This involves no lasting hardship on the defendant since there is a provision for readjustment at the trial in case of an overpayment.

This decision was followed in *Ricci Burns Ltd. v. Toole*,⁴² where Ralph Gibson, L.J. noted:

³⁸ Manitoba Report, note 10, above, at 8-9.

³⁹ Manitoba Report, note 10, above, at 9.

⁴⁰ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 141-143.

⁴¹ [1987] 1 W.L.R. 480 at 489 (C.A.). On at least one occasion, a court in New South Wales has followed the approach used in England: see comments about *Frellsen v. Crosswood Pty. Ltd.* (1992), 15 M.V.R. 343 (N.S.W.S.C.), in New South Wales Law Reform Commission, *Provisional Damages* (Report 78) (Sydney: New South Wales Law Reform Commission, 1996) [hereinafter *Provisional Damages*] at 25-26.

⁴² [1989] 1 W.L.R. 993 at 1004 (C.A.).

The standard of proof on the probabilities is high but it is not necessary to exclude every possibility of failure because the order for interim payment may be reversed at trial.

In turn, Ralph Gibson, L. J. was following the reasoning given by May, L.J. in the case of *Gibbons v. Wall*,⁴³ where further explanation of the civil burden of proof in cases involving interim payments was provided:

[T]he civil burden of proof...is a flexible test...and it depends upon the nature of that which has to be proved where on the flexible scale of the balance of probabilities one has to pitch the burden...in the context of an application for an interim payment...the burden is a high one within that standard if only because litigation of its nature involves no certainties. A plaintiff with what may appear on paper to be a strong case may find it fail at trial. If he does then he will have to repay the whole or to the extent that he fails, part of the interim payment. But...the plaintiff may spend it....If he does it may be difficult...to recover if he fails ultimately at trial. Clearly the burden resting upon an applicant in those circumstances is towards the top of the flexible scale.

A higher standard applies in Scotland, where the relevant rule requires a court to be “satisfied” that a plaintiff “would succeed in the action on the question of liability....” Scottish courts interpret “satisfied” in this context to mean that a plaintiff was “practically certain” to succeed, or “would almost certainly do so.”⁴⁴ In other words, the standard is “something less than complete certainty, but more than probability or even high probability.”⁴⁵

In *Roy v. St. Pierre*,⁴⁶ the only reported decision to consider interim payment of damages in the context of the New Brunswick *Insurance Act*, the New Brunswick Court of Queen’s Bench seems to have applied a lower standard than those used in England or Scotland. In allowing for an interim payment of \$15,000 in a personal injury action which followed an automobile accident, Deschênes, J. stated his satisfaction “in terms of probabilities that the defendant [would] be held liable for the accident...,” and that it was “more likely than not the plaintiff [would] be entitled to recover damages....” as a result of the accident.⁴⁷ Deschênes, J. added that interim payment was awarded “on the basis of probabilities.”⁴⁸

⁴³ (12 February 1988), (C.A.) [unreported], cited in *Ricci*, note 42, above, at 1002-1003.

⁴⁴ *Cowie v. Atlantic Drilling Co. Ltd.*, [1995] S.L.T. 1151 at 1154 (Ct. Sess.)

⁴⁵ Note 44, above, at 1154.

⁴⁶ (1999), 208 N.B.R. (2d) 92 (Q.B.)

⁴⁷ Note 46, above, at 96-97.

⁴⁸ Note 46, above, at 97.

This Commission notes that a major justification of interim payment of damages is to help lessen the financial needs of plaintiffs in the period before trial. Keeping this justification in mind, the Commission takes the view that to restrict interim payment to situations where liability has been established may deprive a significant number of plaintiffs from access to interim payment. Defendants may choose not to admit liability, either for tactical reasons or because they truly believe they are not responsible for a plaintiff's injury. Plaintiffs do not often succeed in applications for summary judgment, as the standard to be met by defendants is not a difficult one. The Commission takes the position that the interim payment rule, which in its current form requires liability to be established, is too restrictive.

On the other hand, the Commission does not wish to make interim payment of damages too accessible, so that unwarranted applications for interim payment are made. There is also the issue of overpayment to consider. If a judge who allows an application for interim payment is found later to be wrong at trial, yet the plaintiff has spent the money in the meantime, the defendant may not be able to recover the amount of the interim payment. It also makes little sense to redress a perceived imbalance by imposing upon defendants a financial burden that is as difficult as the one interim payment is meant to remedy for plaintiffs. An unduly high interim payment might prevent a defendant from continuing with litigation in the same way as financial need could compel a plaintiff to settle or to discontinue an action.

The Commission takes the position that the Nova Scotia rule should be expanded, to allow for interim payment of damages where liability is still in question. The Commission suggests that the rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

The Commission suggests:

- The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

2. Should interim payment of damages be restricted to a particular type of action?

Concerns have been expressed about the Nova Scotia rule by some litigation lawyers who represent plaintiffs in personal injury matters. These lawyers are concerned that an injured plaintiff, whose income has been significantly reduced or even cut off, following the effects of a wrongfully caused injury, occupies a disadvantaged position in relation to a financially secure defendant, such as an insurance company. Such a plaintiff might choose to settle for an amount

lower than that to which he or she was entitled, simply because he or she felt unable to afford continuing the litigation.

The Nova Scotia rule does not restrict interim payment of damages to any type of action. The New Brunswick rule contains no such restriction, but its *Insurance Act* confines interim payment to actions stemming from automobile accidents.⁴⁹ The Bermuda rule⁵⁰ is restricted to personal injury cases, and the Scottish rule⁵¹ applies both to actions for personal injuries and for death resulting from personal injuries. In South Australia⁵² and in New South Wales,⁵³ interim payment orders can be made in any type of action for damages. In England, where the approach is to identify particular types of claims in which an interim payment may be made, the rules essentially cover every type of action.⁵⁴

The Western Australia Law Reform Committee recommended that the court power to order interim payment of damages should apply in all personal injury cases. That Committee was concerned about the hardship a plaintiff might suffer while waiting for damages to be ascertained.⁵⁵ The Manitoba Law Reform Commission recommended that interim payment should be available in all civil proceedings. The Manitoba Commission noted that though plaintiffs in personal injury cases may have the greatest need for financial assistance, other types of plaintiffs might sustain financial difficulties while awaiting trial.⁵⁶

This Commission recognizes that interim payment of damages can be especially needed in the context of a personal injury claim. A plaintiff who has suffered bodily injury may no longer be able to work, and therefore may have no income with which to pay for expenses arising because of his or her injuries. Financial hardship brought on by a defendant's wrong is not, however, confined to personal injury situations. For example, a plaintiff whose livelihood depends on particular property, such as a vehicle, equipment, or a building, might similarly have his or her income reduced or cut off if the defendant's wrong damaged or destroyed the property. Delays in going to trial could result in financial hardship for plaintiffs in such other proceedings as

⁴⁹ N.B. *Insurance Act*, note 5, above, ss. 265.1 & 265.6(1).

⁵⁰ Bermuda rule, note 5, above.

⁵¹ Scottish rule, note 5, above, r. 43.8(1).

⁵² South Australia rule, note 5, above s. 30B(1).

⁵³ N.S.W. rule, note 5, above, s. 76E(1). S.76H of the New South Wales *Supreme Court Act*, note 5, above, provides that claims arising from motor vehicles accidents are excluded. Rather, such claims are governed by s. 45 of the *Motor Accidents Act 1988* (N.S.W.), which also provides for interim payment from insurers, but only where liability is admitted or judicially determined. As the authority for such payments comes from the *Motor Accidents Act*, no court order is required.

⁵⁴ England & Wales, *Rules of the Supreme Court*, Ord. 29, rr. 11 & 12.

⁵⁵ Western Australia Report, note 4, above, at 7.

⁵⁶ Manitoba Report, note 10, above, at 7-8.

contractual claims, actions for *wrongful death*,⁵⁷ product liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damage. The Commission does not seek to limit unnecessarily the situations in which a claim for interim payment could be made. On the other hand, the Commission does not wish to extend interim payment to a specific type of action if the nature of that action might make interim payment inappropriate. The Commission suggests that the interim payment rule⁵⁸ should continue to be available for personal injury actions. The Commission also invites comments about what types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages.

The Commission suggests:

- The interim payment rule should continue to be available for personal injury actions.

The Commission invites comment on:

- What types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages.

3. Should both special and general damages be available for an interim payment?

Special damages compensate a plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong.⁵⁹ Special damages can be objectively identified and assigned a precise monetary value. Examples include lost wages, medical bills, repair expenses, and travel costs. *General damages* compensate a plaintiff for intangible results of a wrong, such as pain and suffering, mental distress and loss of quality of life.⁶⁰ General damages can also include a claim for future lost earnings⁶¹ and for future loss of earning capacity.⁶² Given the intangible or unknown factors involved, which cannot be measured with mathematical precision, calculating general damages is a matter of great subjectivity.

⁵⁷ Where a person is killed as a result of someone else's wrong, the victim's dependants may seek compensation, through a wrongful death action, for the value of lost financial and emotional support: see J.R. Nolan & M.J. Connolly, *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979) at 1446.

⁵⁸ For this suggestion and those which follow, the Commission has in mind an expanded rule, which can provide for interim payment of damages where liability is still in question.

⁵⁹ See Munkman, note 1, above, at 42; Dukelow & Nuse, note 1, above, at 1009.

⁶⁰ See Munkman, note 1, above, at 42; Dukelow & Nuse, note 1, above, at 43.

⁶¹ Munkman, note 1, above, at 42.

⁶² *Newman v. LaMarche and Black* (1994), 134 N.S.R. (2d) 127 at 132 (C.A.).

No explicit limitation on the type of damages available for an interim payment is found in the the Nova Scotia rule.⁶³ In both *MacNeil*⁶⁴ and *Bogaczewicz*,⁶⁵ general damages were awarded. The New Brunswick rule⁶⁶ and *Insurance Act*⁶⁷ limit interim payment to special damages. The rules in England,⁶⁸ Scotland,⁶⁹ and New South Wales⁷⁰ are not restricted to special damages. Where an action for personal injury is involved, the rule in South Australia occupies a middle ground. Generally, general damages are not to form part of an interim payment. One exception is “where serious and continuing illness or disability results from the injury....”⁷¹ Another exception applies in the case of a plaintiff who is incapacitated or partially incapacitated for employment, and whose *contributory negligence* has diminished the amount of special damages to which he or she is entitled.⁷² The limit on general damages then is set by reference to the amount of special damages incurred.⁷³

The Western Australia Law Reform Committee was not in favour of including general damages in an interim payment. It stated that the concept of a rewarding damages once and for all should be interfered with as little as possible, with the only justification for interference being to lessen economic hardship. It suggested it would not be a good idea to fragment a general damages award. Given their subjective nature, assessing general damages can be difficult. This could be made more difficult by the need to ensure that what is awarded at trial does not include amounts which had already formed part of an interim payment. It was also suggested that including general damages might lead to an overpayment, which a defendant might not be able to recover. Moreover, should a claimant die after an interim award of general damages was made, this amount would be awarded to that person’s *estate*.⁷⁴ The Western Australia Committee questioned the appropriateness of such a windfall.⁷⁵ It suggested that an interim payment should

⁶³ In *Bogaczewicz*, note 13, above, general damages comprised the total amount awarded as an interim payment.

⁶⁴ Note 17, above.

⁶⁵ Note 13, above.

⁶⁶ New Brunswick rule, note 5, above.

⁶⁷ N.B. *Insurance Act*, note 5, above, s. 265.6(1).

⁶⁸ English rule, note 5, above.

⁶⁹ Scottish rule, note 5, above.

⁷⁰ N.S.W. rule, note 5, above.

⁷¹ South Australia rule, note 5, above, s. 30B(2)(b).

⁷² Contributory negligence refers to the extent, if any, to which a plaintiff, by failing to take reasonable care, caused his or her injury and therefore the amount of damages suffered: see *Dukelow & Nuse*, note 1, above, at 211-212. Courts reduce damages in proportion to the amount which can be attributed to the plaintiff’s contributory negligence. This is discussed further at Part III.5, below.

⁷³ South Australia rule, note 5, above, s. 30(B)(2)(b).

⁷⁴ An estate includes everything that a person owns at the time of his or her death: see *Black’s Law Dictionary*, note 57, above, at 491.

⁷⁵ Western Australia Report, note 4, above, at 8.

include special damages to the date of hearing and if necessary, could take the form of periodic payments thereafter to cover established future loss of earnings, hospital and medical expenses and other necessary expenses pending a further hearing.⁷⁶

The New South Wales Law Reform Commission and the Manitoba Law Reform Commission were also in favour of limiting interim payment to special damages.⁷⁷ The Manitoba Commission suggested that the purpose of interim payment is not to compensate the plaintiff for the total amount of damages he or she would receive if the trial were held the day of the application. Rather, the Manitoba Commission suggested that interim payment is to prevent a plaintiff from suffering undue financial difficulty prior to trial which would force him or her to settle for less than full entitlement.

The Manitoba Commission gave additional reasons for a limitation on interim payment of damages:⁷⁸

1. Special damages represent real financial losses.
2. They are easily established.
3. General damages are more subjective. It is consequently harder to maintain judicial consistency.
4. The risk of overpayment will be increased if general damages are provided as a basis for interim payment.
5. The plaintiff may be disappointed when the final award of damages is made if most of the award takes the form of general damages which have already been provided.

The Manitoba Commission acknowledged that interim payment which includes general damages could more accurately reflect the amount a plaintiff is entitled to receive as of the date of his or her motion, but concluded that the negative factors outweighed this positive aspect.

This Commission acknowledges that general damages, which involve a great deal of subjectivity, can be difficult to calculate. Nonetheless, in some situations, awarding only special damages may not be adequate to meet a plaintiff's needs. This could be especially so if courts, fearing the possibility of overpayment, choose to be conservative about the amount of interim payment they award. At the time of applying for an interim payment, a plaintiff may also not have available the information required to prove all aspects relating to the special damages portion of his or her claim. The Commission does not consider it helpful to impose a restriction on the interim payment rule which could mean that the plaintiff's financial difficulties might not be redressed in some instances. This would be contrary to a key justification for the interim payment rule. The Commission therefore suggests that both special and general damages should be available, if relevant, for inclusion in an interim payment.

⁷⁶ Note 4, above, at 10.

⁷⁷ N.S.W. Commission Working Paper, note 32, above, at 23.

⁷⁸ Manitoba Report, note 10, above, at 10-11.

The Commission suggests:

- Both special and general damages should be available, if relevant, for inclusion in an interim payment.

4. Should a plaintiff have to demonstrate need?

The most frequently mentioned justification for the availability of interim payment of damages is that it can help to alleviate a plaintiff's economic hardship in the period before a court can determine all the issues between the parties.

The Nova Scotia rule is silent as to whether or not a plaintiff must demonstrate need. In *Bogaczewicz*, the Nova Scotia Supreme Court, in examining the nature of the Rule, did not insist upon a needy plaintiff. Although stating, "[u]ndoubtedly, part of the rationale for adopting this new rule was to alleviate hardship," Goodfellow, J. added, "the drafters have not made need a prerequisite for recovery."⁷⁹ The New Brunswick rule does not refer to need, but the New Brunswick *Insurance Act* permits a judge to take into account the plaintiff's "needs and resources."⁸⁰ The English,⁸¹ Scottish,⁸² and New South Wales⁸³ rules do not mention need.

As pointed out by the New South Wales Law Reform Commission, the needs of individual plaintiffs can vary greatly. The New South Wales Commission therefore considered it appropriate to take into account a plaintiff's earning capacity, if any, as well as what would have been the plaintiff's standard of living, if he or she had not suffered a wrongfully caused injury. That Commission seemed to suggest an interim payment must be adequate to provide, in the period before trial, for the maintenance of the plaintiff and his or her dependants and for the relief of the plaintiff's medical expenses, as well as for any physical and mental distress.⁸⁴

In its discussion of previous issues, this Commission has indicated how avoiding financial hardship by the plaintiff is a major justification for the interim payment rule. In approaching the issue of need, the Commission is aware of how variable a concept "need" can be. For some commentators, need could pertain merely to the basic necessities of life, while for other people,

⁷⁹ Note 13, above, at 9.

⁸⁰ N.B. *Insurance Act*, note 5, above, s. 265.6(4)(e).

⁸¹ English rule, note 5, above.

⁸² Scottish rule, note 5, above.

⁸³ N.S.W. rule, note 5, above. At least one court in New South Wales has indicated that a plaintiff's need is not a precondition to receiving an interim payment of damages. Rather, the absence of need or hardship on the plaintiff's part would be a factor to be taken into account by the court in deciding whether to order an interim payment: see *Provisional Damages*, note 41, above, at 26.

⁸⁴ N.S.W. Commission Working Paper, note 32, above, at 20.

need could involve such additional aspects as transportation, education, and recreation. Even if one can agree on the elements of need, the needs of individual people vary. In terms of quantity and quality, for example, what can suffice for one person may not be adequate for another. Need can also be immediate, future or both. As need tends to be a highly variable concept, the Commission is of the view that the interim payment rule should not require a plaintiff to show need.⁸⁵

The Commission suggests:

- The interim payment rule should not require a plaintiff to show need.

5. Should a plaintiff's contributory negligence prevent access to interim payment of damages?

One of the issues which a court may have to decide at trial is whether there was any contributory negligence by the plaintiff. Contributory negligence refers to the extent, if any, to which a plaintiff, by failing to take reasonable care, contributed to his or her injury and therefore the amount of damages suffered. At trial, if contributory negligence by a plaintiff is found, the court will determine its effect and, if relevant, reduce the amount of any damages award accordingly. For example, it might be found that a plaintiff injured in a motor vehicle accident would not have been hurt to the same extent had he or she been wearing a seat belt. The Nova Scotia rule requires the court, in determining the amount of an interim payment, to take into account "any relevant contributory negligence" of the plaintiff.⁸⁶ Similar provisions are in place in England⁸⁷ and New South Wales.⁸⁸ The New Brunswick rule does not mention contributory negligence, but its *Insurance Act* allows a judge, as one of a number of factors, to take into account the extent, if any, to which the plaintiff may be found contributorily negligent.⁸⁹ In South Australia, a plaintiff's contributory negligence will not by itself disentitle him or her to an interim payment. Rather, if a plaintiff's contributory negligence reduces his or her entitlement to special damages, the court will consider whether general damages might be used to provide the funds for an interim payment.⁹⁰ The Scottish rule is more restrictive, requiring a court to be satisfied that a

⁸⁵ If a plaintiff does not have to show need, then similarly a plaintiff should not have to prove an ability to repay the amount of an interim payment.

⁸⁶ *Bogaczewicz*, note 13, above, at 9.

⁸⁷ English rule, note 5, above, r. 11(1).

⁸⁸ N.S.W. rule, note 5, above, s. 76E(6).

⁸⁹ N.B. *Insurance Act*, note 5, above, s. 265.6(4)(c).

⁹⁰ South Australia rule, note 5, above, s. 30B(2)(b).

plaintiff would succeed at trial on the issue of liability “without any substantial finding of contributory negligence on his part....”⁹¹

The Winn Committee recommended that interim payment of damages should not apply in any case where a defendant could properly allege the plaintiff had been contributorily negligent. The Winn Committee suggested it would be difficult for a court to examine the issue of liability at a preliminary stage, with only written evidence, as opposed to the oral testimony of witnesses who would testify at trial, to consider. The Winn Committee did not believe that such a rule would be abused by defendants’ lawyers, as “[e]thics or sanctions [would] exclude merely tactical pleas of contributory negligence.”⁹² Referring to that Winn Committee conclusion, the Manitoba Law Reform Commission agreed that interim payment should only be available where a plaintiff would succeed entirely at trial. The Manitoba Commission, noting the subjectivity involved in determining the amount of contributory negligence, suggested it would be difficult to achieve a consensus on that issue between the judge hearing the application for interim payment and the trial judge. The Manitoba Commission pointed out that deciding upon the existence and effects of contributory negligence was a matter of great subjectivity.⁹³

In approaching this issue, the Western Australia Law Reform Committee was guided by the need to relieve economic hardship. As a result, it recommended that even where a plaintiff had been contributorily negligent, the court should have the power to order payment up to the full amount of special damages suffered, where not to do so would cause hardship. The Western Australia Committee acknowledged a possibility of overpayment, in that the plaintiff would receive an amount which would eventually have to be reduced in proportion to the consequences of his or her own negligence. The Committee therefore added that in making an interim payment in spite of the plaintiff’s contributory negligence, it should appear to the court that a final award of general damages would exceed the amount of the additional payment.⁹⁴ Similarly with a needy plaintiff in mind, the New South Wales Law Reform Commission was of the view that the plaintiff’s contributory negligence should not affect the amount to be received under an interim relief order. Such an amount should represent “substantially, what the plaintiff must have to meet his needs until the damages are assessed.”⁹⁵

This Commission takes the position it would be unfair to deprive a plaintiff entirely of an interim payment because of contributory negligence. On the other hand, the Commission acknowledges that a plaintiff should not enjoy at a preliminary stage greater relief than is likely at trial. If it is apparent to a court that the plaintiff’s award would be diminished at trial because of contributory negligence, then this issue should be taken into account at the time of an application for interim payment. The Commission therefore takes the position that to accommodate both concerns, a

⁹¹ Scottish rule, note 5, above, s. 43.9(3)(b).

⁹² Winn Report, note 8, above, at 35.

⁹³ Manitoba Report, note 10, above, at 9.

⁹⁴ Western Australia Report, note 4, above, at 11.

⁹⁵ N.S.W. Commission Working Paper, note 32, above, at 24.

plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

The Commission suggests:

- A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

6. Should other factors be used to lessen or prevent interim payment of damages?

a. Mitigation of damages

Other factors with a bearing on the amount of any ultimate damages awarded at trial may have to be taken into account as part of an interim payment. Plaintiffs who have suffered from a defendant's wrong have an obligation to take reasonable steps to *mitigate* or minimize their damages.⁹⁶ For example, a plaintiff who has suffered bodily injuries might be advised by his or her physician to undergo physiotherapy. A plaintiff who without good reason fails to follow such advice would not be making all reasonable efforts to lessen the effect of his or her injuries. At trial, a court will, if applicable, reduce a damages award by a proportion attributable to the plaintiff's failure to mitigate.

The Nova Scotia rule does not mention mitigation of damages. In South Australia, a failure by the plaintiff "without reasonable cause" to undertake "reasonable medical treatment" means that a court "shall not award damages for such disability, pain or suffering as would have been remedied but for such failure."⁹⁷ Similarly, an incapacitated or partially incapacitated plaintiff who fails to mitigate by rehabilitation for employment will only be entitled a maximum of 75% of his or her loss of earnings.⁹⁸ The New Brunswick *Insurance Act* permits a court to take into account any failure by the plaintiff to mitigate.⁹⁹ The Manitoba Law Reform Commission suggested that since a plaintiff does not benefit at trial from a failure to mitigate his or her

⁹⁶ See Dukelow & Nuse, note 1, above, at 647.

⁹⁷ South Australia rule, note 5, above, s. 30B(7).

⁹⁸ Note 5, above, s. 30B(8).

⁹⁹ N.B. *Insurance Act*, note 5, above, s. 265.6(4)(d).

damages, a plaintiff should not benefit from such a failure at the time of applying for an interim payment.¹⁰⁰

As with contributory negligence, this Commission agrees that a plaintiff should enjoy no greater relief at the time of making an application for interim payment than he or she would receive at trial. As a result, the Commission suggests that mitigation of damages be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.

b. Set off, counter-claims, and cross-claims

Another factor which might be taken into account by a court in assessing damages is whether a defendant has a legitimate claim that could be used to reduce the amount of any award which the defendant is ordered to pay. This could take a number of forms. *Set off* involves applying an amount, owed to a defendant from an unrelated matter, to reduce an award in a proceeding before a court.¹⁰¹ By way of *counter-claim*, a defendant can assert that he or she is entitled to a sum from the plaintiff in the same matter concerning which the plaintiff has brought an action.¹⁰² A *cross-claim* is a claim made by a defendant against another defendant in the same action.¹⁰³ To illustrate these concepts, imagine that plaintiff A was a pedestrian, struck and injured by a car driven by defendant B. In the accident, B's car was also damaged. When B's car stopped, in order to avoid hitting A, another car, driven by defendant C, struck the back of B's car. The force of impact helped to propel B's car into A. Coincidentally, some time before the accident, A and B had business dealings. When A did not pay a debt, B commenced an action against A for the amount owed. As a defendant to A's personal injury action, B could claim that the amount owed by A should be set off or deducted from any damages award obtained by A. If B considered A to be responsible for the accident, as for example, by not paying proper attention when crossing the street, then B could counter-claim against A for the cost of repairs to B's car. In addition, if B believed that C had contributed to the accident, B could cross-claim against C for some or all of the damages which A might be awarded.

The Nova Scotia rule requires a court to take into account any set off, cross-claim, or counter-claim on which the defendant may be entitled to rely.¹⁰⁴ In England, a court is required to consider any relevant set off and counter-claim.¹⁰⁵ The New Brunswick *Insurance Act* permits a judge to take into account any amount counter-claimed by the defendant.¹⁰⁶ Courts in New South

¹⁰⁰ Manitoba Report, note 10, above, at 15.

¹⁰¹ See Manitoba Report, note 10, above, at 14, n. 10.

¹⁰² See Dukelow & Nuse, note 1, above, at 226.

¹⁰³ Dukelow & Nuse, note 1, above, at 238.

¹⁰⁴ *Bogaczewicz*, note 13, above, at 9.

¹⁰⁵ English rule, note 5, above, r. 11(1).

¹⁰⁶ N.B. *Insurance Act*, note 5, above, s. 265.6(4)(b).

Wales are required to take into account “any cross-claims on which the defendant may be entitled to rely.”¹⁰⁷

The Commission takes the position that set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court. This will help to ensure that a plaintiff’s entitlement to relief is no greater at the application stage than at trial.

The Commission suggests:

- Mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.
- Set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court when deciding the amount of an interim payment of damages.

7. Should specific formulas be used to determine the amount of interim payment of damages?

Under the Nova Scotia rule, the amount of an interim payment is in a court’s discretion. An amount must, however, be “just” and not exceed “a reasonable proportion of the damages” which in the court’s opinion are likely to be recovered by the plaintiff, after the factors identified at Parts III.5 and 6 above are taken into account.¹⁰⁸ In South Australia, an incapacitated or partially incapacitated plaintiff who fails to mitigate by rehabilitating for employment will be entitled in an interim payment to a maximum of 75% of his or her loss of earnings.¹⁰⁹ The Winn Committee suggested that in determining the amount of an interim payment, a limit of 33 1/3% of the estimated total likely to be recovered at trial should be imposed.¹¹⁰ The Manitoba Commission was not in favour of such percentages, suggesting they would tend to reduce the discretion of the judge hearing the application for interim payment.¹¹¹

The circumstances which surround an action for damages can vary considerably, in such aspects as the amount of damages claimed, the plaintiff’s income and savings, and the plaintiff’s role, if any, in contributing to his or her damages. Given the variety of circumstances that can be involved, this Commission does not consider it useful to suggest any specific formulas for an amended interim payment rule.

¹⁰⁷ N.S.W. rule, note 5, above, s. 76E(6).

¹⁰⁸ *Bogaczewicz*, note 13, above at 9.

¹⁰⁹ South Australia rule, note 5, above, s. 30B(8).

¹¹⁰ Winn Report, note 8, above, at 34.

¹¹¹ Manitoba Report, note 10, above, at 15.

The Commission suggests:

- The interim payment rule should not include any specific formulas for determining the amount of payment.

8. Should the interim payment rule only apply to defendants with adequate financial means?

If interim payment of damages is meant to redress an imbalance between plaintiffs and defendants, this justification would be lost if interim payment actually put defendants at a disadvantage. Imposing a large interim payment on a defendant could produce the same inability to carry on with litigation that interim payment is meant to remedy in relation to plaintiffs. Where an action for personal injuries is involved, the Nova Scotia rule confines interim payment to defendants who would seemingly have sufficient resources with which to make an interim payment. A defendant must be insured in relation to the plaintiff's claim, must be a public authority, or must be "a person whose means and resources are such as to enable the person to make the interim payments."

The rules in both England¹¹² and Scotland¹¹³ similarly require in personal injury actions that the defendant be covered by insurance, be a public authority, or be a person with means and resources to enable him or her to make the interim payment. In addition to the requirements of insurance or being a public authority, an equivalent rule in New South Wales provides there will be no interim payment order if "the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made."¹¹⁴

The Commission is of the view that to make interim payment of damages workable, it should only be available where the defendant is financially capable of making the payments. The Commission takes the position that it would not be helpful simply to transfer the plaintiff's financial hardship to the defendant, without regard for whether this might equally make it difficult for the defendant to continue with litigation. The Commission also points out that obtaining an interim payment order will be of no use to a plaintiff if the defendant is unable to pay that amount. As a result, the Commission suggests that the interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.¹¹⁵

¹¹² English rule, note 5, above, r. 11(2).

¹¹³ Scottish rule, note 5, above, r. 43.9(5).

¹¹⁴ N.S.W. rule, note 5, above, s. 76E(4)(c).

¹¹⁵ The current requirement for a defendant to have sufficient resources is limited to personal injury actions: Nova Scotia rule, note 5, above.

A plaintiff may not have available all relevant information relating to the defendant. The Commission therefore suggests that if a defendant wishes to argue he or she does not have sufficient means and resources with which to make an interim payment, that defendant should be required to prove the details of his or her financial situation.

The Commission suggests:

- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.
- A defendant who wishes to claim that he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

9. Should the presence of multiple defendants affect the availability of interim payment of damages?

Establishing liability can be more difficult for a plaintiff when more than one defendant is involved. For example, at the time of making a claim, a plaintiff may be aware of multiple parties who may have been responsible for causing the plaintiff's injury, but the plaintiff may not know the identities of all the parties. The plaintiff may also not be aware of any relationship among the parties which may have a bearing on apportioning liability. As a result, obtaining an interim payment could be more difficult for a plaintiff who has to establish not only liability amongst a number of defendants, but also to show liability on the part of a particular defendant. It has therefore been suggested that it would be unfair to deprive a plaintiff of an interim payment simply because he or she is unable to identify, at the time of applying for the interim payment, the party from whom he or she is going to recover damages. On the other hand, it might also be unfair for one defendant to have to make an interim payment because another defendant, who is ultimately found liable, refused to admit liability.¹¹⁶

The Nova Scotia rule is silent on this issue. In England, in order to obtain an interim payment order against a particular defendant, a plaintiff must satisfy the court that he or she will recover substantial damages from that defendant at trial.¹¹⁷ In Scotland, a plaintiff need establish only that he or she will succeed at trial against at least one of the defendants in order to obtain an interim payment order applicable against all of them.¹¹⁸

¹¹⁶ The Law Commission (Eng.), *Structured Settlements and Interim and Provisional Damages* (London: HMSO, 1994) at 92.

¹¹⁷ Munkman, note 1, above, at 180. Similarly, at least one court in New South Wales has held that an order for interim payment can only be applied against a defendant if that defendant was specified in the application for interim payment: see *Provisional Damages*, note 41, above, at 26.

¹¹⁸ Law Society of Scotland, *The Laws of Scotland* (Edinburgh: Butterworths, 1989) at para. 1395.

The Manitoba Law Reform Commission was of the view that the English approach was fairer, as it subjects each defendant to the same standard. In England, a defendant is required to make an interim payment based upon what seems to be his or her own liability, rather than simply because another defendant seems liable. The Manitoba Commission suggested that requiring one defendant to make an interim payment, merely because liability could be clearly demonstrated against another defendant, would unfairly and unnecessarily expose the first defendant alone to the risk of the plaintiff not being able to repay after judgment.¹¹⁹

Taking the view that the interim payment rule should be balanced, this Commission agrees with the conclusion of the Manitoba Law Reform Commission. A defendant required to make an interim payment will have to bear the risk of the plaintiff not being able to repay part of this amount in the event of overpayment or an error on the part of the judge hearing the application. As a result, out of fairness, in order to obtain an interim payment from a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

The Commission suggests:

- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

10. Should details of an interim payment of damages order be disclosed at trial?

The existence of an interim payment, if known to a trial judge, could be perceived as exerting an influence on the judge's ultimate decision. For example, it might be perceived that the judge could consider it influential that a colleague had, at a preliminary hearing, found the defendant's liability to be so apparent that an interim payment was justified. It might also be perceived that knowledge of a voluntarily made interim payment could be taken as a sign of the plaintiff's acceptance of liability. It is important for the public to have confidence in the impartiality of judges. To prevent perceptions of potential undue influence, the English *Rules of the Supreme Court* explicitly require that information concerning any interim payments not be disclosed to the trial judge until after the judgment is given.¹²⁰ This is not mentioned in the Nova Scotia rule and is currently not necessary. As the Nova Scotia rule requires an establishment of liability before the question of interim payments is considered by a court, the defendant's liability will be no

¹¹⁹ Manitoba Report, note 10, above, at 13.

¹²⁰ Note 54, above, Ord. 29, r. 15.

secret to the trial judge.¹²¹ This issue will become relevant in Nova Scotia if the interim payment rule is expanded to include situations where the defendant's liability is still in question.

The Manitoba Law Reform Commission was in favour of the safeguard used in England. The Manitoba Commission suggested that disclosure of such information has the potential to prejudice the defendant while having no value as evidence.¹²² A trial judge does not require such information in order to decide the issues before him or her.¹²³

This Commission agrees that if the interim payment rule is to be expanded to include situations where liability is still in question, details concerning an interim payment should only be revealed at trial, after judgment has been provided on all outstanding issues between the parties. This is necessary to ensure public confidence that the trial judge is not influenced by knowledge of an interim payment having been refused or made.¹²⁴ One way of doing this would be to place all documents pertaining to the interim payment application in an envelope which is sealed, then left in the court file, with instructions that the envelope not be opened until after trial judgment. A potential problem, though, is that the mere presence of the envelope could alert the trial judge to the possibility of an interim payment having been made. The Commission invites comments on what means would be appropriate for ensuring that details relating to interim payment are not disclosed to a trial judge until after judgment is given.

The Commission suggests:

- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should not be disclosed to the trial judge until after the judgment is given.

The Commission invites comments on:

- What means would be appropriate for keeping interim payment details undisclosed until the relevant time.

¹²¹ The Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 120, prohibits details of certain voluntary advance payments from being revealed to judge or jury until judgment has been provided.

¹²² Manitoba Report, note 10, above, at 17.

¹²³ Once judgment is provided, and if the defendant is found to be liable, the trial judge will need access to details of the interim payment order, to credit the defendant for any amount already paid and to determine whether an overpayment occurred at the interim payment stage. Such information would also be required if one defendant, who has provided more than his or her share of an interim payment, seeks contribution from another defendant. See Part III.12, below.

¹²⁴ This would be similar in effect to a current rule which requires that the fact of an offer to settle having been made not be brought to the court's attention until questions of liability and damages are decided: see Nova Scotia, *Rules of Civil Procedure*, r. 41A.05(2).

11. Timing, form and variation of interim payment of damages orders

a. Timing of payment

Another issue is the relevant time at which an interim payment should be calculated, namely whether it should be limited to damages incurred by the date of an application, or whether a judge will be entitled to calculate damages that should accrue up to the time of trial. In Nova Scotia,¹²⁵ England,¹²⁶ Scotland,¹²⁷ and South Australia,¹²⁸ interim payment can be based on the amount that a judge hearing an application believes will be awarded at the trial. The Nova Scotia rule, for instance, refers to an amount “not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff....”¹²⁹ An interim payment therefore need not be limited to damages which have incurred up to the date of the application.

The Western Australia Law Reform Committee recommended that interim payment should include special damages incurred up to the time of a motion, as well as loss of earnings and expenses expected to be incurred prior to trial.¹³⁰ The Manitoba Law Reform Commission agreed that a motion judge should not be restricted to award damages which have been incurred up to the date of the motion. Rather, the Manitoba Commission suggested, the judge should have discretion to award damages which are expected to be incurred between the date of the motion and the anticipated date of trial.¹³¹

Keeping in mind the variety of circumstances that can surround an action for damages, this Commission is of the view that a judge, in granting an application for interim payment, should have considerable discretion. This would enable a judge to ensure that the specifics of the interim payment take into account all relevant circumstances. The Commission therefore suggests that a court should have the discretion to order an interim payment which takes into account damages expected to be incurred up to the anticipated date of the trial. In all cases, the exact date of the trial may not be known. By enlisting the help of those court officials involved in scheduling court sessions, obtaining a rough idea of when a trial will be held would be possible.

b. Form of payment

¹²⁵ Nova Scotia rule, note 5, above.

¹²⁶ English rule, note 5, above, r. 11(1).

¹²⁷ Scottish rule, note 5, above, r. 43.9(3)(b).

¹²⁸ South Australia rule, note 5, above, s. 30B(2)(a).

¹²⁹ Nova Scotia rule, note 5, above.

¹³⁰ Western Australia Report, note 4, above, at 10.

¹³¹ Manitoba Report, note 10, above, at 15.

An additional issue involves whether interim payment must take the form of a lump sum or whether it can be made in a series. In Nova Scotia, England, South Australia, and Scotland, there is no restriction on how interim payment is to be made. The Western Australia Law Reform Committee recommended that courts should have the discretion to order interim payments to be made in the form of a lump sum or in a series.¹³² The Manitoba Law Reform Commission agreed, recommending that a motion judge should be able to order the defendant to make an interim payment in a lump sum, periodic payments, or a combination thereof.¹³³

Similarly keeping in mind the variety of circumstances that might prevail, this Commission takes the position that a court should be able to order a defendant to make an interim payment in the form of a lump sum, periodic payments, or a combination thereof.

c. Additional orders

Circumstances might change between the time of an application for interim payment and the time of trial. The Nova Scotia rule is silent on the issue of additional interim payments to take into account changed circumstances. In *MacNeil*, the court indicated that the plaintiff had a right to reapply for an interim payment,¹³⁴ and in *Bogaczewicz*, the court stated there did not appear to be any reason why the rule should preclude more than one application from being made.¹³⁵ In England,¹³⁶ Scotland,¹³⁷ and South Australia,¹³⁸ subsequent applications relating to interim payments are possible.

The Manitoba Law Reform Commission recommended that a party should be able to make a subsequent motion for an order or variation of an order pertaining to interim payment upon any ground which seems just, including a change of circumstances.¹³⁹ For example, damages actually incurred by a plaintiff may turn out to be greater than anticipated at the time of making an application. Conversely, damages may be lower than expected, which might lead a defendant to seek a change in an order.

This Commission agrees with the Manitoba Law Reform Commission's approach, as it is consistent with allowing a judge considerable discretion in relation to interim payment. The Commission suggests that subsequent applications for an order or variation of an order pertaining

¹³² Western Australia Report, note 4, above, at 10.

¹³³ Manitoba Report, note 10, above, at 16.

¹³⁴ Note 17, above, at 130.

¹³⁵ Note 13, above, at 10.

¹³⁶ Manitoba Report, note 10, above, at 16.

¹³⁷ Scottish rule, note 5, above, r. 43.9(6).

¹³⁸ South Australia rule, note 5, above, s. 30B(6)(b).

¹³⁹ Manitoba Report, note 10, above, at 16-17.

to interim payment should be possible upon any ground which seems just, including a change of circumstances.

The Commission suggests:

- It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to the anticipated date of trial.
- A court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof.
- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

12. Should interim payment of damages be taken into account by the trial judge?

Prior to awarding a final amount of damages, a trial judge will have to take into account any interim payment made by the defendant. Any amounts already paid will have to be deducted from the final damages award. To fail to do so would mean that a defendant who has made interim payment would be paying some or all of the damages twice. If the Nova Scotia interim payment rule is to be expanded, to allow for interim payment where liability is still in question, then it is possible that a defendant who made an interim payment will be found not liable at trial. In such a situation, at the time of trial judgment the plaintiff will no longer have any entitlement to the interim payment, which will have to be returned to the defendant.

The relevant rules in England,¹⁴⁰ Scotland,¹⁴¹ and New South Wales¹⁴² are wide enough to permit financial adjustments between the parties, which would include taking into account any interim payment made by the defendant. These rules also specifically empower their respective courts to order a repayment where the amount of damages awarded at trial is less than what the plaintiff has already received in the form of interim payment. In South Australia,¹⁴³ courts are required to credit against a final damages award any interim payment made by the defendant. The Manitoba Law Reform Commission agreed with a court's ability to take into account what a defendant has paid by the time of trial and to order repayment if necessary.¹⁴⁴

¹⁴⁰ England & Wales, *Rules of the Supreme Court*, Ord. 29, r. 17(a).

¹⁴¹ Scottish rule, note 5, above, r. 43.10(a).

¹⁴² N.S.W. rule, note 5, above, s. 76G(2).

¹⁴³ South Australia rule, note 5, above, s. 30B(5).

¹⁴⁴ Manitoba Report, note 10, above, at 18.

This Commission takes the position that it would be unfair for defendants to be required to pay all or a portion of damages twice. It would also be unjust for a plaintiff to retain an interim payment, awarded prior to a determination of liability, if the defendant is held at trial not to be liable for the plaintiff's damages. At the time of trial judgment, in calculating a final damages award, the court should therefore take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. No change to the law would be required to bring this into effect. The Commission is of the view that the Nova Scotia *Civil Procedure Rules* currently empower courts to credit a defendant for the amount of any interim payments made and to order a plaintiff to repay the defendant in the event of an overpayment of damages.¹⁴⁵ The current law in Nova Scotia also allows a defendant who has paid more than his or her fair share of damages to seek contribution from other people responsible for the plaintiff's damages.¹⁴⁶ As a result, the Commission is not suggesting any change to empower courts to make adjustments between the parties.

The Commission suggests:

- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

13. Should changes to the availability of interim payment of damages take the form of legislation or amended rules?

In a previous Final Report,¹⁴⁷ the Commission took the position that changes to the law should be made through legislation, though amendments to the *Civil Procedure Rules* may also be required. The Commission indicated that changes to the law by amending the Rules do not receive the kind of scrutiny and public debate that precedes the adoption of legislation. The Commission added that amendments to the Rules may be made in conjunction with legislation, but should not be a

¹⁴⁵ R. 33.01(1)(f), in the context of assessing damages, empowers the court to “give such other directions as it thinks just.”

¹⁴⁶ *Tortfeasors Act*, R.S.N.S. 1989, c. 471, s. 4.

¹⁴⁷ Law Reform Commission of Nova Scotia, *Mortgage Foreclosure and Sale in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, 1998) (Final Report) at 60.

substitute for legislation. In 1996, interim payment of damages became available by way of amendments to the Rules. The Commission invites comments on whether reform of the law concerning interim payment of damages should be made through legislation, the *Civil Procedure Rules*, or both.

The Commission invites comments on:

- Whether reform of the law concerning interim payment of damages should be made through legislation, the *Civil Procedure Rules*, or both.

IV SUMMARY OF SUGGESTIONS

- 1. Should interim payment of damages be available if liability has not yet been established?** [pages 11- 14]
 - The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

- 2. Should interim payment of damages be restricted to a particular type of action?** [pages 15 - 16]
 - The interim payment rule should continue to be available for personal injury actions.
 - The Commission invites comment on what types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages.

- 3. Should both special and general damages be available for an interim payment?** [pages 16 - 19]
 - Both special and general damages should be available, if relevant, for inclusion in an interim payment.

- 4. Should a plaintiff have to demonstrate need?** [pages 19 - 20]
 - The interim payment rule should not require a plaintiff to show need.

- 5. Should a plaintiff's contributory negligence prevent access to interim payment of damages?** [pages 21 - 22]
 - A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

- 6. Should other factors be used to lessen or prevent interim payment of damages?** [pages 23 - 25]

a. Mitigation of damages

- Mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.

b. Set off, counter-claims, and cross-claims

- Set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court when deciding the amount of an interim payment of damages.

7. Should specific formulas be used to determine the amount of interim payment of damages? [page 25]

- The interim payment rule should not include any specific formulas for determining the amount of payment.

8. Should the interim payment rule only apply to defendants with adequate financial means? [pages 26 - 27]

- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.
- A defendant who wishes to claim that he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

9. Should the presence of multiple defendants affect the availability of interim payment of damages? [pages 27 - 28]

- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

10. Should details of an interim payment of damages order be disclosed at trial? [pages 28 - 29]

- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should not be disclosed to the trial judge until after the judgment is given.
- The Commission invites comments on what means would be appropriate for keeping interim payment details undisclosed until the relevant time.

11. Timing, form and variation of interim payment of damages orders [pages 30 - 32]

a. Timing of payment

- It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to the anticipated date of trial.

b. Form of payment

- A court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof.

c. Additional orders

- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

12. Should interim payment of damages be taken into account by the trial judge? [pages 32 - 33]

- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

13. Should changes to the availability of interim payment of damages take the form of legislation or amended rules? [page 34]

- The Commission invites comments on whether reform of the law concerning interim payment of damages should be made through legislation, the *Civil Procedure Rules*, or both.

Appendix “A”
Ord. 29, r. 11, Rules of the Supreme Court (Eng.)

11. - (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied -

(a) that the defendant against whom the order is sought (in this paragraph referred to as “the respondent”) has admitted liability for the plaintiff’s damages, or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,

the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amounts as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, crossclaim or counterclaim on which the respondent may be entitled to rely.

(2) No order shall be made under paragraph (1), in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely -

(a) a person who is insured in respect of the plaintiff’s claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment.

Appendix "B"

S. 265.6, New Brunswick, *Insurance Act*, R.S.N.B. 1973, c. I-12

265.6(1) At any time after an action for damages arising out of an accident is commenced, the plaintiff may apply to a judge of The Court of Queen's Bench of New Brunswick for an order requiring the defendant to make an advance payment of special damages.

265.6(2) The judge may make an order under subsection (1) on any terms he or she thinks appropriate, if the judge is satisfied that the plaintiff will prove that the defendant is liable for those damages.

265.6(3) The judge may order that payment under subsection (1) be made by lump sum, by instalment or by a combination of both.

265.6(4) In calculating the amount of an advance payment, the judge may take into account any circumstances he or she considers relevant including

(a) the amount of special damages already incurred or likely to be incurred before judgment by the plaintiff,

(b) the amount, if any, counterclaimed by the defendant,

(c) the extent, if any, to which the plaintiff may be found to be contributorily negligent,

(d) any failure by the plaintiff to mitigate the amount of special damages, and

(e) the needs and resources of the plaintiff and the means of the defendant.

265.6(5) This section applies only to accidents occurring on or after the commencement of this section.