#37: June 2015

Law Reform Notes

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UPDATE ON ITEMS IN PREVIOUS ISSUES

Advance Payments of Special Damages

Issues #31, #32 and #33 of these *Notes* discussed the possibility of developing an expanded version of s.265.6 of the *Insurance Act*, which permits a judge to order an advance payment of special damages "if the judge is satisfied that the plaintiff will prove that the defendant is liable for those damages". The section applies to auto accidents only. (Rule 47.03(3) of the Rules of Court is broader, but only applies after a judgment on liability.) In issue #33 we said we had decided to recommend that advance payments of the kind the *Insurance Act* permits should be made available in all claims for damages, whatever the cause of action and whoever the plaintiff or defendant.

We made that recommendation, but in subsequent discussions within the Department it was suggested that moving from where we are now, a very limited advance payments provision, to one that would be available in all claims for damages, might be going too far, too fast. As a result of this we are requesting feedback, one more time, on how far an expanded provision for advance payments of special damages should go. Should it apply to all claims for damages, to all plaintiffs and to all defendants, as we previously concluded? Or should it be more limited? If the latter, where should the line be drawn?

The previous issues of these *Notes* present the case for not creating limits. Briefly, it is that the rationale for making these advance payments available is equally valid in all kinds of claims, and experience with the auto accident provision has shown that the procedure works. By contrast, the reason for creating limits is, essentially, caution. It reflects the idea that auto accidents are a known quantity, whereas an unrestricted provision for advance payments in all claims for damages is anything but that, and may well

generate unintended results in unanticipated cases.

If there is to be a limit on an expanded advance payment provision, we believe it should at least allow advance payments to be ordered in claims for personal injuries. These are, we feel, the cases that most immediately come to mind when considering what kinds of plaintiffs are most likely to be in the predicament where advance payments of special damages are most needed – individuals with a valid claim who are suffering financially in the period before they are able to obtain either a summary judgment or a judgment following trial.

Are there other kinds of claims by individuals that readers would add to the list? Might it make sense, indeed, to expand the provision to all claims for damages brought by individuals, even at the risk that this could allow some unanticipated claims to slip in?

Excluded, obviously, from both the narrower and the broader suggestions above would be most commercial claims. Is this appropriate, or are commercial plaintiffs just as likely to be in need of the speedier access to a partial remedy that advance payment provisions are intended to bring?

We welcome feedback on this. We hope to be in a position to make final recommendations in the summer.

#33: June 2013

Law Reform Notes

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UPDATE ON ITEMS IN PREVIOUS ISSUES

Advance payment of special damages

Law Reform Notes #32, which presented our revised suggestions on advance payment of special damages, generated three additional responses. The first, from a practitioner, urged us to ensure that if R.47.03 is replaced, its replacement should retain the idea that an advance payment can be ordered in a split trial even if the finding of liability in the first phase of the trial is appealed (see *Stamper v CNR* [1988] 1 SCR 396). The second, also from a practitioner, supported the expansion of advance payments, urged that the expansion should at least include occupier's liability cases, and suggested that on a motion for an advance payment the judge should be informed of whether the defendant was insured. The third response was a further submission from the Canadian Medical Protective Association, reiterating the general opposition to pre-liability advance payments it had previously presented, but also suggesting some narrowings of the scope of our proposal if it did go ahead.

On the basis of everything we have seen so far, we have decided to recommend an expanded advance payments provision along the lines suggested in *Law Reform Notes #32.* Its main elements would be the following.

> It would deal with both pre-liability advance payments and post-liability advance payments, replacing both s.265.6 of the *Insurance Act* and R.47.03. It would probably be located in the *Judicature Act*, but possibly with some supplementary provisions in the *Rules of Court.*
> It would apply to all causes of action, to all plaintiffs and to all defendants.
> An advance payment ordered in the pre-liability phase of proceedings would be limited to special damages.

> An advance payment ordered in the post-liability phase would focus primarily on special damages, including future pecuniary loss in the period before damages are decided, but it could also include elements of general damages in limited circumstances.

Items that we decided needed further clarification in response to the comments received were (a) the circumstances in which general damages could form part of, or be relevant to, an advance payment, and (b) the test to be applied by the judge in deciding whether or not to order an advance payment in the pre-liability phase of the proceedings.

As for general damages (by which we mean both non-pecuniary loss and post-trial pecuniary loss), we believe that the new provision should reflect, in relation to all advance payments, the point made by Drapeau JA in *Smith v Agnew,* 2001 NBCA 83, that an advance payment of special damages "might justifiably be more generous if the likely award for general damages is such that it causes any risk of overcompensation to atrophy" (para.48). This is not, though, an advance payment of general damages. It is simply a recognition that the judge can bear in mind the prospective award of general damages when deciding how much can safely be awarded as an advance payment of special damages.

In relation to true advance payments of general damages, we are recommending that these should only be available in the post-liability phase, should only relate to pecuniary loss, and should only be ordered if the plaintiff can demonstrate the need for a special expenditure, sooner rather than later, of a kind that the judge is satisfied will eventually form part of the award of pecuniary damages.

Turning to the test to be applied by the judge when deciding whether to order an advance payment, we believe that for post-liability awards the approach outlined by Larlee JA in *Brunswick News Inc v Sears*, 2012 NBCA 32, should be maintained: "Once liability was found, an advance payment of damages should have followed, unless good cause was shown to the contrary".

In relation to pre-liability awards, however, we feel that more allowance should be made for the defendant's possible inability to pay the award. Though we accept, in general, the statement in *Smith v Agnew* that "neither the plaintiff's needs and resources nor the defendant's means drive the application of s.265.6" of the *Insurance Act*, and believe that the plaintiff should not normally be required to prove need, we do consider that a pre-liability advance payment should not be ordered if it will cause hardship to the defendant but little benefit to the plaintiff.

Turning, finally, to the points made by the practitioners, we agree that the new provision should ensure that advance payments can be ordered even though the decision on liability in a split trial is being appealed. We also agree that the motions judge should be able to know whether the defendant is insured, since this may affect, in particular, the determination of whether an advance payment would cause hardship to the defendant.

#32: December 2012

Law Reform Notes

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UPDATE ON ITEMS IN PREVIOUS ISSUES

Advance payment of special damages

Law Reform Notes #31 contained a lengthy item suggesting that New Brunswick should enact a much-expanded version of s.265.6 of the *Insurance Act*. That section, which applies to auto accidents only, allows an advance payment of special damages to be ordered, even before liability has been officially established, if the judge is satisfied that liability *will be* established. R.47.03 of the *Rules of Court* also provides for advance payments of special damages, but only *after* liability has been established. It applies to all causes of action.

The discussion below, like the previous one, will refer to advance payments ordered before liability is established as "pre-liability advance payments" and those ordered afterwards as "post-liability advance payments". Both terms, however, deserve a brief comment to prevent misunderstanding. "Pre-liability" does not mean before liability arises; what it describes is a scenario in which, although liability has not been formally established, the motions judge is confident that it exists. "Post-liability", though it is restricted to the time after liability is established, begins as soon as this occurs, and the passage to post-liability can be swift. For example, in a series of interconnected motions at a single hearing, a pre-trial determination of a point of law under R.23 can lead directly to a summary judgment under R.22 (see *Girouard v Druet*, 2012 NBCA 40) and then to an advance payment of special damages under R.47.03 (see *Brunswick News Inc v Sears*, 2012 NBCA 32).

Law Reform Notes #31 proposed that the expanded provision on pre-liability advance payments would have the following features:

> It would apply to all causes of action, to all plaintiffs and to all defendants.
> It would focus primarily on special damages (i.e., pecuniary loss in the pre-trial period), but in limited circumstances it would permit advance payments of general damages and of disbursements.
> It would include a restriction on lawyers' ability to deduct their fees from the advance payments awarded to their clients.
> It would probably be combined with the provision for post-liability advance payments under R.47.03, with the resulting blended provision being enacted as a new section in the *Judicature Act*.

We received a number of responses to this. Several individual lawyers wrote offering a brief comment in support of expansion, but primarily to explain why they thought the suggestion on fees was misguided. The Law Society also criticized the suggestion on fees, as did CBA-NB, who also mentioned some complexities the Department should bear in mind if it moved forward with legislation that extended to disbursements. (CBA-NB also suggested that the Department might consider expanding the provision for suit money that is now in R.72, Divorce Proceedings, to other family law matters. We are looking into this, and plan to discuss it in the next issue of these *Notes*.)

On issues other than fees, the only written criticism of our proposal came in a lengthy submission from the Canadian Medical Protective Association, who disagreed both with the general idea of an expanded pre-liability provision and with most of the specifics in the *Notes*. Two individual lawyers, in conversation, also said there should be no advance payments before liability had been established.

There are two additional factors, not mentioned in *Law Reform Notes #31*, that we have borne in mind when considering all of this.

The first, triggered by the comment that pre-liability advance payments are wrong in principle, is that the criteria for summary judgment under R.22 are not carved in stone, and that if they were made less stringent the most deserving of the cases that now fall into the pre-liability category might become post-liability cases instead. Ontario has recently relaxed its criteria for summary judgments somewhat (see *Combined Air Mechanical Services Inc v Flesch* [2011] OJ No. 5431), though an article by Joseph Griffiths in the *Lawyers Weekly* (August 31st 2012, p.10) questions whether the change has achieved its objective of resolving litigation expeditiously and with less cost.

The second additional factor is the theme of 'speedy justice when the case allows' that underlies recent Court of Appeal decisions such as *AMEC Americas Limited v MacWilliams*, 2012 NBCA 46, and *Brunswick News Inc v Sears*, 2012 NBCA 32. Both are wrongful dismissal cases. In *AMEC* Drapeau CJ commented: ". . . one discerns a greater awareness by the litigation bar of the benefits accruing from a skillful use of Rule 22 and a growing judicial openness toward summary judgment and advance payments of special damages in favour of deserving claimants. These are indisputably welcome developments in the pursuit of timely access to justice" (para.1). In *Brunswick News* Larlee JA added, when reversing a motions judge's decision not to award an advance payment under R.47.03, that "Once liability was found, an advance payment of damages should have followed, unless good cause was shown to the contrary".

After reconsidering our original proposals in light of the comments received and the additional factors just mentioned, we have revised our suggestions somewhat. We are still strongly inclined to recommend a much-expanded provision on pre-liability advance payments. However, we believe we should modify some of its details.

First, we have abandoned the idea that there should be a legislated restriction on the deduction of legal

fees from advance payments. The correspondence persuaded us that this was undesirable.

Second, we are no longer considering advance payments of disbursements. Though there is attraction in the idea, it does raise different considerations than advance payments of damages, and at this point in the development of an expanded advance payments provision, confining the focus to damages alone makes the initiative less complex.

With those two issues off the table, the central issues raised in *Law Reform Notes #31* remain. Should a provision for pre-liability advance payments of damages be expanded beyond its current auto accident context? If it should be, how far should the expansion go?

On the general question of whether an expanded pre-liability provision is desirable, we continue to believe it is. Experience with s.265.6 in relation to auto accidents has shown its value, and although summary judgments (and therefore post-liability advance payments) could be made more readily available by adjusting R.22, the criteria for a summary judgment will always be stringent, since they produce a formal determination of liability, and their application is often technically-based. In a pre-liability motion under s.265.6, by contrast, the motions judge has more latitude; the decision can be more factually-based, with the judge ordering an advance payment if the probable outcome of the case is clear enough to warrant one.

Admittedly, pre-liability payments present the theoretical possibility that they might be ordered in a case where the defendant is ultimately found not liable. But in the 11 years since *Smith v Agnew* clarified the parameters of pre-liability motions under s.265.6, we have not yet noticed any reported cases in which this has happened. More frequent are cases in which summary judgments or trial judgments are reversed, both of which raise the same possibility that an advance or ordinary payment of damages may have been ordered against a defendant who is ultimately found not liable.

At present, therefore, we feel that the risk that a defendant may lose a motion for an advance payment, then win at trial and be left attempting (probably unsuccessfully) to recover the advance payment, is probably no greater for pre-liability payments than for post-liability ones.

Turning next to the scope of an expanded pre-liability provision, *Law Reform Notes #31* considered whether it should be restricted by reference to the cause of action, the characteristics of the plaintiff or the characteristics of the defendant, and in all three cases suggested not. We are still of that view, for the reasons set out in the *Notes*: that there is no such restriction at present in the post-liability situation under R.47.03; that restrictions would be likely to exclude some plaintiffs who should not be excluded; and that if there was a concern that a broad provision might expose disadvantaged defendants to the increased disadvantage of a pre-liability award against them, the best safeguard would be that the judge has a discretion not to make an award. Further comment on this would still be welcome, however, since this is the central issue in the design of an expanded provision. At present we have received only one direct comment on these significant details of an expanded pre-liability provision.

If there is to be a judicial discretion to decline to award a pre-liability advance payment, how should it be expressed? This question must now be addressed in the light of the Court of Appeal's decision in *Brunswick News Inc v Sears* that, in the post-liability scenario under R.47.03, once liability has been established an advance payment should be granted unless good cause is shown to the contrary. The Court did not elaborate on what a good cause might be.

Here we think a distinction should probably be drawn between the pre-liability and post-liability situations. Pre-liability, the rationale for having an advance payment provision is bound up with the financial circumstances of the parties as they go through disputed litigation, and an advance payment might well not be ordered if it was going to cause hardship to the defendant but little benefit to the plaintiff. Post-

liability, the concern shifts; once it has been formally determined that the defendant must at least pay the plaintiff something, the primary concern is that the defendant should not be ordered to pay too much too soon.

Assuming this difference exists, how should it be expressed legislatively? It would be possible, perhaps, to leave it to the *Brunswick News Inc* criterion of "unless good cause [is] shown to the contrary", and make the reasonable assumption that the courts will apply the "good cause" test in a way that differentiates the pre-liability and post-liability situations appropriately. Alternatively, one could spell out an explicit test for the pre-liability phase to make sure that awards of pre-liability advance payments do not create or aggravate a situation of relative disadvantage for the defendant. We are inclined to follow the latter approach, though we do not have, at present, a specific form of words to put forward for consideration.

Another area where we now suggest that the pre-liability and post-liability situations should be treated slightly differently relates to the categories of damages which the advance payments can include. In the pre-liability phase, contrary to the recommendation in *Law Reform Notes #31* for an extension to general damages in some cases, we now believe that the *status quo* under s.265.6 should be maintained. This would mean that advance payments would apply to special damages only (i.e., past and future pecuniary losses in the period leading up to the trial), but that the judge, when deciding how much can safely be awarded, can take into account the fact that general damages will eventually be payable.

In the post-liability period, by contrast, some changes can be made. The scenario here is that there has been either a summary judgment or a split trial, and in either case liability has been decided, but damages have not. One thing we suggest is that it should be made clear that future pecuniary loss in the period after the decision on liability but before the assessment of damages is "special damages" for the purpose of the section. A second change would be to make post-liability advance payments of general damages available in the limited circumstances outlined in *Law Reform Notes #31*, namely, when the defendant has created a need for a special expenditure by the plaintiff, the plaintiff cannot afford that expenditure out of the special damages or otherwise, and the amount awarded will not be an overpayment in light of the unresolved dispute between the parties on the quantum of damages.

Overall, therefore, the modified suggestion we are now making on advance payments of damages would have the following features:

> It would deal with both pre-liability advance payments and post-liability advance payments, replacing both s.265.6 of the *Insurance Act* and R.47.03. It would probably be located in the *Judicature Act*, but possibly with some supplementary provisions in the *Rules of Court.*
> It would apply to all causes of action, to all plaintiffs and to all defendants.
> An advance payment ordered in the pre-liability phase of proceedings would be limited to special damages.
> An advance payment ordered in the post-liability phase would focus primarily on special damages, including future pecuniary loss in the period before trial of damages, but it could also award advance payments of general damages in limited circumstances based on the plaintiff's special need.
> The nature of the judicial discretion to award an advance payment should be clarified, with the judge having greater latitude in the pre-liability phase to consider whether awarding an advance payment would cause greater disadvantage to the defendant than the benefit the it would bring to the plaintiff.

We welcome further comments. We hope to finalize our recommendations on this subject shortly after the close of the consultation period mentioned at the end of these *Notes* – February 15th, 2013.

#31: June 2012

Law Reform Notes

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NEW ITEMS

Advance payments of special damages

In 1996 the Legislature enacted s.265.6 of the *Insurance Act*, enabling plaintiffs in auto accident cases to obtain advance payments of special damages before liability is established. Rule 47.03(3) of the Rules of Court also provides for advance payments of special damages; it applies to all kinds of cases, but only after liability is established. We have been considering recently whether the principle of pre-liability advance payments on the model of s.265.6 should be extended to other cases, and if so, what other changes to the law of advance payments might be made at the same time.

This has involved an analysis of the case-law, as well as consideration of just how far an expanded provision should go. Should it apply across the board, to all kinds of civil proceedings, all plaintiffs, all defendants and all kinds of damages? Or should there still be limits in one or more of these areas? These issues have also been examined in two Canadian law reform studies, the Manitoba Law Reform Commission's report on *Interim Payment of Damages* (1995) and the Nova Scotia Law Reform Commission's report by the same name (2001). We have also looked at some of the recent English case-law under R.25.7 of the *Civil Procedure Rules*, which is their equivalent of our s.265.6 and R.47.03(3).

Our tentative conclusion is that the principle of pre-liability advance payments should be expanded to all kinds of proceedings, to all plaintiffs and to all defendants, but that it should remain primarily focused on awards of special damages for the pre-trial period. If expanded along these lines, s.265.6 would be relocated to an Act such as the *Judicature Act* or the *Law Reform Act* with appropriate changes of wording. This expanded legislation would subsume R.47.03(3), which would be repealed.

The remainder of this note will set out the train of thought that leads to this conclusion and invite comment on it. A different decision on any of its interconnected elements could produce a substantially different legislative proposal.

(a) Background to s.265.6

S.265.6 was one of several amendments made to the *Insurance Act* in 1996 as part of a broader package of changes. In the leading case on s.265.6, *Smith v Agnew*, 2001 NBCA 83 (CanLII), the Court of Appeal looked at the section in the context of the other amendments being made to the *Insurance Act*, noted that it was the only one that was plaintiff-friendly, and commented that it had been "brought into the mix as a trade-off for the more defendant-friendly companion amendments" (para.64).

The complete package of changes in 1996, however, was more extensive. Accompanying the amendments to the *Insurance Act* were (1) an expansion of the government's recovery of auto-related health care costs through the levy on insurers under s.242.1 of that Act, and (2) substantial improvements to Section B benefits.

This package came together gradually. It began with the government's desire to increase its recoveries under the levy, but with no increase in insurance premiums. The insurance industry replied that this would only occur if something else changed to offset the increased levy, and it identified some common law rules that Ontario had already altered on the ground that they generated over-recoveries in respect of particular aspects of a plaintiff's loss. The department analyzed Ontario's amendments and agreed with Ontario on some of them (see *Law Reform Notes* #4 and #5). Noting, however, that if the industry's financial estimates were accurate these amendments would more than offset the added cost of the levy, the department took the opportunity to increase Section B benefits substantially at the same time. Thus all injured parties benefited under Section B at the same time that those of them with tort claims lost the benefit of several rules that had been identified as generating over-recoveries.

That s.265.6 became part of the mix was a coincidence. The trade-off just described was developing at the same time the Manitoba Law Reform Commission released its 1995 report (see *Law Reform Notes* #5, p.11). The report included a recommendation for the enactment of pre-liability awards of the kind that already existed in England. The idea was attractive, and the ongoing discussion about auto accident compensation provided a context into which it could easily be inserted. What made this late addition possible was the fact that pre-liability advance payments were assessed as being financially neutral; in principle, they involved the same amount of money being paid as damages either sooner or later. They could therefore be added to the mix in 1996 without affecting the trade-off between the levy, the tort rules and the Section B benefits that was the preoccupation at the time.

There was then, and is now, no reason of legal principle why a provision for pre-liability advance payments would be restricted to auto accidents. There was, however, an important practical consideration beyond the window of opportunity that the auto insurance discussions provided. Auto accidents, with their framework of universal mandatory insurance coverage, provided a safe context in which to try out the novel idea of allowing courts to award part of a defendant's damages before liability had been established.

(b) Application of s.265.6

Since it came into force on January 1st 1997, s.265.6 has now had a 15-year test drive. How has this gone? This is the first question on which we would welcome feedback. Our assessment is that s.265.6 has proved its worth. In *Smith v Agnew* the Court of Appeal complained strongly that the section had left far too many gaps for the courts to fill, but the Court then filled them. Apart from some adjustments we mention below, we believe the result is satisfactory. Are there differing views on this?

Since we see the existing law as providing the framework for expanded legislation, we will summarize here our understanding of its outlines.

- A motion for an advance payment can be made at any time after the proceedings are commenced. Successive motions are possible, but normally there should be only one motion, covering both past and future special damages until the anticipated date of the trial. If there are successive motions, they should normally be heard by the same judge.

- The plaintiff's notice of motion must identify both the nature and the amount of the special damages claimed.

- Based on such preliminary evidence as the court considers necessary, the plaintiff must satisfy the court that he or she will recover those damages at trial. The standard of proof is the ordinary civil standard of "balance of probabilities". (The standard of proof is an issue we will comment on below, though we do not propose any change.)

- The analysis of a motion for an advance payment follows a two-stage process. In the first stage the plaintiff must satisfy the court that he or she will be awarded at trial the special damages identified in the notice of motion. In the second stage, the court determines the amount of the advance payment, taking into account any alleged contributory negligence or other offsets or deductions (including Section B benefits) and reducing the amount of the advance payment accordingly, in order to minimize the risk of overpayment if the plaintiff is ultimately unsuccessful.

- Though s.265.6(e) permits the judge to consider "the needs and resources of the plaintiff and the means of the defendant", it will only be appropriate to do so in exceptional cases. (This is another issue we discuss below. On this point we do suggest some changes.)

- Although an advance payment of *general* damages cannot be ordered, a brief comment in *Smith v Agnew* indicates that an award of special damages "might justifiably be more generous if the likely award for general damages is such that it causes any risk of overcompensation to atrophy" (para.48). The most likely scenario for this is when the award of special damages is subject to an offset, for example for contributory negligence, but the judge is satisfied that the total amount that will be awarded at trial will nevertheless comfortably cover the full amount of the special damages.

- The trial judge can be made aware that an advance payment has been ordered, but the order does not predetermine the trial judge's decision on either liability or quantum.

- If an advance payment is ordered and paid but the plaintiff is ultimately unsuccessful at trial or recovers less than the advance payment, the difference must be repaid to the defendant.

There have been several reported decisions applying the *Smith v Agnew* framework. They have related to various heads of special damages – often to loss of income, but also things such as medical and travel expenses, among others. Many of the cases are simply applications of the law to their particular facts, but a few of them highlight issues that are worth mentioning.

- *Pelletier Plumbing and Heating Ltd v Cyr* 2011 NBCA 13 (CanLII) clarifies the relationship between advance payments and Section B benefits. In principle, both past and future pre-trial Section B benefits must be offset against an advance payment. In this particular case, though, there was no offset because the insurer that was resisting the motion for an advance payment was also, in a related but technically separate action, denying that the Section B benefits were available to the plaintiff.

- There is some ambivalence in the case-law about the relevance of the "needs and resources" element of the test in s.265.6. In *Smith v Agnew*, reiterated in *Pelletier Plumbing*, the Court of Appeal said these should only be considered in exceptional circumstances. Several decisions by motions judges, however, refer to, and sometimes consider, the needs of the plaintiff when applying the section (e.g., *Fasquel v Boucher*, 2011 NBQB 150 (CanLII)).

- Several auto accident cases in which liability has been admitted have cited both s.265.6 and R.47.03(3), and have applied the *Smith v Agnew* framework for pre-liability advance payments to post-liability advance payments under R.47.03. *Bernschein v Bernschein*, [2008] NBJ No.333, takes this one step further by ordering an advance payment under R.72 in matrimonial proceedings.

- *Fasquel v Boucher* also highlights, though without directly addressing it, the issue of whether a lawyer's 25% contingency fee should appropriately be paid from the advance payments ordered.

- *Mason v Beckett*, 2011 NBQB 333 (CanLII) demonstrates that costs can be awarded against a plaintiff whose motion for an advance payment lacks merit.

- Also worth noting if an expanded s.265.6 applies to wrongful dismissal cases is *Morrow v Aviva Canada Inc.*, 2004 NBCA 100 (CanLII). Here it was held, in a case under Rule 47.03(3), that damages in lieu of reasonable notice are special damages in New Brunswick. (Some other provinces apparently treat them as general damages. See *Jean v. Pêcheries Roger L. Ltée,* 2010 NBCA 10 (CanLII), para.74.)

(c) The case for expansion

Should the principle of s.265.6 – the idea that plaintiffs should be able to obtain advance payments even before liability has been established – be expanded to cases other than auto accidents? We believe it should. As mentioned previously in this Note, s.265.6 was initially confined to auto accidents because of the policy context of the time, and because auto accidents, with their framework of mandatory universal insurance coverage, seemed a safe context in which to try the idea out.

However, from the plaintiff's point of view there is no difference between auto accidents and other personal injury scenarios such as slips and falls or medical misadventure. For the plaintiff, likewise, things like property damage or unfair dismissal may also create financial stress while the claim is being resisted. We believe that the real question for New Brunswick now is not *whether* s.265.6 should be expanded beyond auto accidents but whether there are limits to *how far* it should be expanded.

There are several possible boundaries that might be created. Headings (d) to (g) below discuss potential limits based on the nature of the claim, the characteristics of the plaintiff, the characteristics of the defendant and the categories of damages involved. Headings (h) and (i) then go on to address some additional

issues relating to legal fees and disbursements and to the burden of proof.

(d) The nature of the claim
The Manitoba and Nova Scotia Law Reform Commissions both took the position that advance payments, whether ordered before or after liability had been established, should apply to all civil proceedings, since the predicament of the plaintiff could be the same whatever the claim (Manitoba Report, p.8; Nova Scotia Report, p.25). Both saw personal injury claims as being the normal case, but nevertheless recommended that advance payments should not be restricted to personal injury or other specified kinds of claims.

We agree. Advance payments under New Brunswick's R.47.03(3) are already available for all kinds of claims once liability has been established, and we see no reason to apply tighter restrictions to an expanded provision on pre-liability advance payments.

This does mean that some of the cases that qualify for advance payments could be very different from that of the impoverished plaintiff who is trying to struggle through until trial. For example, the English decision of *Heidelberg Graphic Equipment Ltd v Commissioners for HM Revenue and Customs*, [2009] EWHC 870 (BAILII), is apparently (the facts are unclear) a claim by a large corporation against the Revenue to recover tax that had been wrongly collected. To accept that cases like this can come within an expanded s.265.6, however, seems preferable to narrowing the section by reference to the nature of the claim, and thereby excluding even the impoverished claimants whose claims happen to fall outside the scope of the section.

The English Rule also includes the requirement that, in pre-liability cases (but not post-liability cases), an advance payment can only be ordered if the court is satisfied that the plaintiff will obtain a judgment for "a substantial amount of money". We are not inclined to copy this. Its purpose is presumably to serve as a screening device, and to restrict pre-liability advance payments to serious cases. However, it is hard to know how much money is a "substantial amount", and the sum might well be different for one plaintiff than another. It seems better to simply leave it up to the plaintiff to decide whether his or her particular situation makes an application for an advance payment worthwhile, bearing in mind the potential liability for costs if the motion is without merit.

(e) The characteristics of the plaintiff
Should it matter, for purposes of an expanded advance payment provision, who the plaintiff is? Should the provision be limited to individuals, for example? Or should it be restricted to plaintiffs who are in need?

In both cases, we think not. The Manitoba and Nova Scotia Law Reform Commissions did not even address the question of the corporate or individual (or other) status of the plaintiff, and we are not inclined to introduce it. Although individuals have normally been the applicants under these provisions, corporations will sometimes have a genuine interest in obtaining an early partial payment, and individuals may well be dependent on a corporation.

Whether the provision should be limited to cases where the plaintiff is in need is more debatable. The main reason for having a pre-liability provision such as s.265.6 is certainly to relieve financial stress, but having to demonstrate need in all cases would complicate advance payment motions considerably. The Manitoba report did not discuss creating a prerequisite of need, and the Nova Scotia Report recommended against it (pp.29-3). So do we, though we do suggest under heading (g) below a particular scenario in which proof of need would be essential under an expanded provision.

(f) The characteristics of the defendant
Should it matter for purposes of an expanded advance payments provision, particularly in relation to a pre-liability advance payment, who the defendant is? Part of the reason why it seemed safe to try out s.265.6 in relation to auto accidents (only) was the context of mandatory universal insurance. Admittedly, as *Smith v Agnew* points out (para.31), s.265.6 is not actually confined to cases where the defendant is insured. Nonetheless, for most practical purposes, the auto insurance system does mean that if there is an overpayment under the section – in the sense that a defendant is ordered to make an advance payment greater than the amount of the final judgment – and if the defendant is unable to recover the difference from the plaintiff, the overpayment will probably be absorbed into the auto insurance system

rather than directly borne by the specific defendant.

The English Rule contains a requirement that, in some cases, the defendant must be insured or a public body before an advance payment can be ordered. The Nova Scotia Law Reform Commission considered that advance payments should be confined to situations where the defendants had the means to make the payments (p.38). The Manitoba Commission thought that concerns about the financial position of the defendant were better addressed by saying that the court should consider the means and resources of the defendant when deciding whether to order an advance payment and/or how much the order should be for (p.14).

We prefer the Manitoba approach. Although this approach could make it possible, in theory, for a wealthy plaintiff to seek an advance payment from an impoverished defendant, we believe the defendant has both a legal and a practical protection. The legal one is that the judge can take into account the defendant's limited means and resources when deciding whether or not to order the advance payment. The practical one is that suing impoverished defendants is often not worth the effort, and that an advance payment order, if obtained, may still have to be enforced before it actually affects the defendant's financial position. Potentially, moreover, the judge could also be given the power to impose conditions on the enforcement of the order in order to maintain balance between the plaintiff and the defendant.

Overall, then, the prospect that an advance payment order will be obtained and enforced against a defendant of modest means seems limited.

(g) All kinds of damages?

S.265.6 and R.47.03(3) are both limited to special damages. Should the new legislation go further, and allow an advance payment of general damages as well? The English Rule does so, and the Nova Scotia Law Reform Commission recommended it (p.28). The Manitoba Law Reform Commission did not (p.11).

In New Brunswick (though perhaps not elsewhere) we understand that the term "special damages" means "past pecuniary loss calculable to the date of trial": *Morrow v. Aviva Canada Inc.*, 2004 NBCA 100 (CanLII). A provision limited to "special damages", therefore, excludes any possibility of an advance payment on account of non-pecuniary loss or post-trial pecuniary loss. Those last two headings are components of "general damages".

Should an expanded provision be limited in the same way? Our answer at present is yes, but with some modifications.

The "yes" part of this reflects the idea that the principal purpose of the provision, even though its literal scope may be wider, is to help the plaintiff through the period leading up to the judgment that the judge is confident the plaintiff will obtain. The special damages are a natural measure of the plaintiff's actual loss during that period.

The "with some modifications" part, on the other hand, comes from acknowledging that in some cases the maximum that will be awarded for special damages may fall short of meeting the plaintiff's immediate pecuniary needs. An example from the English case-law is that of the seriously injured plaintiff who needs special accommodation, preferably sooner rather than later, but who cannot possibly fund this out of special damages alone (e.g., *Cobham Hire Services Ltd v Eeles*, [2009] EWCA Civ 204 (BAILII)).

In relation to special and general damages, therefore, we suggest reworking s.265.6 along the following lines:

- The normal rule would be that the amount to be awarded as an advance payment would be the pre-trial special damages, minus the offsets that are likely to be applied to that amount. There would be no necessity to show "need".

- If those offsets will reduce the advance payment, but general damages will be awarded at trial, the judge can take the general damages into account in order to "offset the offset", up to a maximum of 100% of the special damages. There would still be no necessity to show "need".

- If, however, the plaintiff can demonstrate that in the pre-trial period he or she has a special need that was created by the defendant's actions and cannot be met by

> the advance payment and all other available resources, the judge can order an advance payment of general damages in order to meet that need. The judge must be satisfied that the increased advance payment will still be within the range that will subsequently be awarded as damages, and the judge can impose terms and conditions in order to ensure that the money is only spent for the purpose for which it was awarded.

(h) Other issues #1: fees and disbursements
A related question is whether the judge should be able to order advance payments to cover legal fees and disbursements. Similar is the question of whether a new section on advance payments should provide either for or against the application of an advance payment to cover a lawyer's contingency fee or other fees.

Our suggestion on this is that disbursements should be able to be the subject of an advance payment if they are necessary payments to third parties for the purpose of proving the plaintiff's claim, but that legal fees should not. The disbursements are a necessary out-of-pocket pre-trial expense that the plaintiff will be able to recover if successful in obtaining judgment. Enabling them to be paid in advance would fall within the natural scope of an expanded s.265.6, though we would apply here the same qualifications that we suggest for advance payments of general damages: the plaintiff must demonstrate need, and the judge can impose conditions to ensure that an advance payment for disbursements is only used for disbursements.

Legal fees are a different matter. Though they are likely to be ordered in due course if an advance payment is ordered, there is not the same urgency from the plaintiff's point of view that they be paid sooner rather than later. We suggest, therefore, that it should not be possible to order an advance payment to cover legal fees. We suggest, indeed, that the Act should go further, and say that a retainer agreement that entitles a lawyer to retain his or her fees out of any amount awarded by a court should not apply to an amount awarded as an advance payment. This restriction would not prevent the plaintiff from paying the lawyer from the funds received if he or she was in a position to do so. It would, however, mean that the full amount awarded as an advance payment makes its way to the plaintiff.

(i) Other issues #2: burden of proof.
The other main issue we wish to comment on is the burden of proof. On this we propose no change, but we wish to clarify what "no change" means in this context, especially since the Manitoba and Nova Scotia reports, reflecting the English case-law, both recommended that the burden of proof should be higher than the ordinary civil standard of "balance of probabilities".

Smith v Agnew confirms that in New Brunswick the ordinary civil standard applies. Significantly, though, the court went on to explain what that meant in this context:

> I conclude that an order under s. 265.6 may be made whenever the court is judicially satisfied on the evidence that the plaintiff will more likely than not prove at trial that the defendant is liable for the special damages in question. See *Roy v. St-Pierre et al., supra.* The plaintiff will have met that standard if the motions judge is more than 50 per cent certain that the defendant's liability for the special damages will be established at trial. If after considering all of the evidence, the motions judge is left in a state of indecision about the likely outcome at trial, the motion must be dismissed. (para.66)

Though the judgment underlined the words "more likely than not", the further explanation of when that standard will be met is important. The court differentiates cases where the motions judge is "more than 50 percent certain" from those where he or she is "in a state of indecision". This seems a good explanation of how a "balance of probabilities" standard should be applied to the actual words of s.265.6. Those words are categorical. An advance payment can be ordered if the judge "is satisfied" that the plaintiff "will prove" that the defendant is liable for those damages. "Is satisfied" (« est convaincu ») is a strong verb, and "will prove" (« prouvera ») is a strong requirement. If the legislation sets the bar at this level, proving it on a balance of probabilities is a reasonably demanding standard, without the need for any special standard of proof.

Some decisions on motions, however, contain looser formulations of the ordinary civil standard, some of which seem inconsistent with the legislation. For example, "more than 50%

satisfied, that a final judgment will probably provide . . ." (*Steeves v McLong* 2001 NBQB 270 (CanLII), para.24) is not the same thing as "is satisfied" that the plaintiff "will prove". However, there is no way to avoid these differences of expression, and little likelihood that any attempt at a legislative clarification could do any better than *Smith v Agnew*. We are therefore inclined to leave the burden of proof as it is, simply noting that the ordinary civil standard of "balance of probabilities" must be applied to the actual wording of the legislation.

Summary

Based on this lengthy discussion, the following is our suggestion for the main features of an expanded provision on advance payment of damages:

- There should be a single statutory provision on advance payment of damages, probably located in the *Judicature Act*. It should permit both pre-liability advance payments and post-liability advance payments.

- It should be modelled on s.265.6, and worded similarly, except where it is intended to make a change of substance. *Smith v Agnew* will therefore continue to be authoritative where no changes are made.

- There should be no restriction on the kinds of claims to which, or plaintiffs or defendants to whom, the provision applies. However, there should be some protection for defendants who do not have the resources to make the advance payment. The judge should have the discretion not to make an advance payment order at all, or to impose conditions relating to the defendant's payments under it or to the plaintiff's enforcement of it.

- The advance payment should normally be of special damages only (by which we mean pecuniary losses incurred or to be incurred before the date of trial).

- If there is an offset against the full amount of special damages because of contributory negligence or similar defences, the motions judge can take into account the general damages that will probably be ordered at trial, and award more of the special damages as an advance payment, up to a maximum of 100% of the special damages.

- An advance payment of general damages (by which we mean damages for non-pecuniary loss or pecuniary loss after the date of trial) can be made if the plaintiff can establish the following three conditions:

  (a) he or she is entitled to an advance payment of special damages;

  (b) he or she has a need to incur special expenditure before the trial because of the harm caused by the defendant;

  (c) the advance payments of special damages and general damages combined are unlikely to amount to an overpayment, taking into account the offsets or defences that the motions judge considers plausible.

- If an advance payment of general damages is ordered the judge can impose conditions to ensure that the advance payment is used for the purpose for which it was ordered.

- A lawyer has no right to deduct legal fees from an advance payment.

- Disbursements necessary to proving the plaintiff's claim can be claimed as though they were a category of special damages. The judge can impose conditions on the use of the money awarded for necessary disbursements.

Responses to any of the above should be sent to the address at the head of these Notes, marked for the attention of Tim Rattenbury, or by e-mail to lawreform-reformedudroit@gnb.ca. We would like to receive replies no later than July 15th 2012, if possible.

We also welcome suggestions for additional items which should be studied with a view to legislative reform.