

Manitoba



Law Reform Commission

Commission de réforme du droit

INTERIM PAYMENT OF DAMAGES

June 1995

Report #87

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TABLE OF CONTENTS

	Page #
CHAPTER 1 - INTRODUCTION	1
A. CAUSE OF DELAY	2
B. EFFECTS OF DELAY	2
C. TEMPERING THE EFFECTS OF DELAY	3
CHAPTER 2 - REFORM	5
A. THE CASE FOR REFORM	5
B. LIMITATIONS ON THE POWER	7
1. When Available	7
(a) Causes of action	7
(b) Likelihood of success	8
2. Types of Damages	10
CHAPTER 3 - IMPLEMENTATION	12
A. MULTIPLE DEFENDANTS	12
B. FACTORS IN DETERMINING AWARD	13
1. Defendant's Financial Position	13
2. Set-off, Counterclaim and Mitigation	14
C. AMOUNT AND METHOD OF PAYMENT	15
D. SUBSEQUENT MOTIONS	16
E. RECONCILIATION WITH TRIAL JUDGMENT	17
CHAPTER 4 - THE COURT OF QUEEN'S BENCH AMENDMENT ACT (ANNOTATED)	19
CHAPTER 5 - LIST OF RECOMMENDATIONS	24

APPENDIX A - THE COURT OF QUEEN'S BENCH AMENDMENT ACT	27
EXECUTIVE SUMMARY	29
SOMMAIRE	33

CHAPTER 1

INTRODUCTION

In 1971, Billy [Semchuk], then six months, was badly burned by a steam humidifier while being treated for a bad cold at Grandview District Hospital.

....

His mother's claim for damages, filed shortly after the accident, has yet to go to court even though the hospital quickly admitted liability.

"It has taken 17 years and the hospital hasn't paid a penny," [Mrs.] Semchuk said.

....

"... [A settlement offer was refused because it] had already cost us thousands of dollars in medical expenses, like travelling to Winnipeg; paying for somewhere to be near Billy the many times he was in hospital; legal fees, and because we would be shelling out more money for years to come."¹

Traditionally, damages claimed in a legal action have been calculated and paid on a once-and-for-all basis. This meant that the damages were only quantified at trial and became due and owing when judgment was given. While this method of quantifying damages has been amended in Manitoba to allow for the payment of a judgment for personal injury or death to be made in installments rather than in a lump sum, there is still no provision by which a plaintiff can receive a partial payment of damages prior to the trial. A plaintiff is not entitled to receive any payment of money on account of the damages to which he or she will become entitled after judgment.

In 1987, this Commission lamented that "[t]he present once-and-for-all lump sum award system often involves lengthy delays between accidents and awards."² The statement is still true today. The delay between the injurious act³ and the trial of the action may be as brief as a few months or, as in Billy Semchuk's case, as long as several years. In a 1994 survey of personal injury victims, the English Law Commission found a very high number of victims had a delay of more than four years after the accident to receive their damage award.⁴ This was so of 28% of victims receiving less than £20,000, 56% of those receiving £20,000 to £49,999, 67% of those

¹M. Ward, "Scarred boy, widow wait 17 years for settlement", *Winnipeg Free Press*, June 8, 1988, 3.

²Manitoba Law Reform Commission, *Periodic Payment of Damages for Personal Injury and Death* (Report #68, 1987) 50. That Report focused on the lump sum payment aspect of the once-and-for-all system and recommended that the Court be able to order the damage award to be paid on a periodic basis rather than in one lump sum. This recommendation led to the enactment of Part XIV.1 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, which allows for periodic payments in the case of personal injury or death.

³The phrase "injurious act" refers to the action of the defendant which caused the proceeding to be commenced by the plaintiff. The act itself could be anything, including breach of contract, negligent behaviour, trespass to land or misappropriation of funds. All of these actions cause the plaintiff harm, whether physical, financial, to his or her reputation or otherwise, and reparation is sought by the injured plaintiff.

⁴As would be expected, some of the personal injury victims who were surveyed received their final damage award through settlement, while others proceeded to court.

receiving £50,000 to £99,000 and 71% of those receiving awards of £100,000 or more.⁵ There are no statistics available for Manitoba; however, there is no reason to believe that the process is faster here than in England.⁶

A. CAUSE OF DELAY

The cause of delay in the trial of the action can generally be classified as being either procedural or evidentiary in nature.

A procedural delay is the direct result of the court process. The *Queen's Bench Rules*, which govern all aspects of a court proceeding, contain pre-trial procedures which the parties are either entitled or required to perform prior to the trial. These include motions, examinations for discovery, interrogatories and pre-trial conferences. These procedures are intended to allow each party to obtain information about the other party's case so that the parties can consider the relative strengths and weaknesses of both sides and settlement of some or all of the issues can be facilitated. Pre-trial procedures usually require the presence of the parties, their lawyers and a third party, such as a court reporter or a judge. A procedure is often scheduled weeks or months in advance in order to enable all parties to be available. Often, additional time must be scheduled for a continuation of the procedure, which creates a further delay.

An evidentiary delay occurs because the evidence needed by each side to prove its case at trial is not yet available. The trial judge requires evidence respecting the past and future (immediate and long term) effects of the defendant's act on the plaintiff in order to calculate the plaintiff's damages. In many cases, this evidence is not available for months or years after the injurious act. This is particularly true where there are immediate damages caused by the wrongful act and secondary, less obvious damages. For example, it may be several years before the full extent of damage to farmland which was the subject of a hazardous chemical spill is known. The immediate effect, the destruction of the current crop, is apparent but the residual damage to the soil and the effect on subsequent crops will not be evident immediately. Likewise, there is a "need to await stabilization of a personal injury plaintiff's medical condition so that the most accurate medical prognosis can be obtained for a court to assess damages for future loss."⁷ Billy Semchuk's case is illustrative of this need. The effects of the injuries he sustained were still being determined 17 years after the accident.⁸

B. EFFECTS OF DELAY

A delay in the trial can have a severe negative effect on the plaintiff's financial position. A plaintiff often incurs extraordinary out-of-pocket expenses as a result of the defendant's act. These might include medical expenses, travel expenses, the cost of repairing damage caused by the defendant or hiring someone to perform services which the defendant had been retained to do. During the same period, the plaintiff's earnings may be either reduced or eliminated; this is

⁵The Law Commission (Eng.), *Personal Injury Compensation: How Much is Enough? A study of the compensation experiences of victims of personal injury* (Report #225, 1994) 71.

⁶Indeed, there is evidence that Canadian civil legal systems are as slow as the British system. Concern over "long delays, backlogs, lack of access and costs, and general skepticism about the efficiency of the civil justice system" was the reason that a review of the Ontario civil justice system was conducted earlier this year; the review found that there were "approximately 23,000 civil cases across the province [which] are now waiting for trial - 60 per cent of which have been waiting for more than a year." M. Conrod, "Ont. Civil Justice Review recommends attack on backlog of 23,000 civil cases", *The Lawyers Weekly*, March 24, 1995, 1 at 1.

⁷Manitoba Law Reform Commission, *supra* n. 2, at 50-51.

⁸Ward, *supra* n. 1, at 3. A settlement was reached in this case shortly after this article was published: Telephone conversation on April 24, 1995, with Clive Ramage of D.N. MacIver & Associates, who represented Billy Semchuk.

particularly true in cases of personal injury, wrongful dismissal or breach of an employment contract. In each of these situations, the plaintiff's ability to work has been directly affected because of the defendant's action. This dual effect can have catastrophic consequences, making it difficult for the plaintiff to pay for necessities, let alone luxuries, these consequences have been described as "shattering".⁹

A delay also has some secondary effects on many plaintiffs. A plaintiff who needs money is in a weakened bargaining position. There is an increased possibility that plaintiffs may either abandon their claim or settle for a reduced amount. Furthermore, a defendant who is aware of the plaintiff's financial difficulties could essentially force the plaintiff to accept a smaller settlement by refusing to negotiate. In its 1994 survey, the English Law Commission found that the possibility of abandoning the claim increased with the length of time it took to settle the claim.¹⁰ A committee established in England to examine the personal injury legal system, known as the Winn Committee, said "[t]oo many plaintiffs simply cannot wait for the day when their case will be tried and therefore settle for an inadequate sum."¹¹

Furthermore, the recuperating or grieving process is hindered in personal injury cases or in cases of wrongful death by delays between the accident and resolution of the matter, whether through settlement or trial.¹²

C. TEMPERING THE EFFECTS OF DELAY

Many procedural delays can be reduced through the use of the *Queen's Bench Rules*. In certain situations, a party can apply for a quick resolution of the matter by way of summary judgment¹³ or expedited trial,¹⁴ which allow for a trial to be conducted quickly without all of the normal pre-trial procedures. Where it is not possible to proceed to trial in such a speedy fashion, a judge can set dates by which the pre-trial procedures must be performed and can determine the scope and the issues which are to be dealt with in these proceedings. The judge can also compel a party to attend a scheduled procedure where the party has unreasonably refused to attend.

However, the *Queen's Bench Rules* cannot have the same ameliorating effect on an evidentiary delay. An evidentiary delay will only end when the necessary evidence is ready for the court.

Some defendants nonetheless voluntarily make payments to plaintiffs prior to the trial.¹⁵

⁹Anecdotal evidence of this was given to the Winn Committee: England (R. Winn), *Report of the Committee on Personal Injuries Litigation* (1968) 29-30.

¹⁰This conclusion was reached on the basis of anecdotal evidence collected by the Commission: The Law Commission (Eng.), *supra* n. 5, at 72.

¹¹Winn Committee, *supra* n. 9, at 31.

¹²The Law Commission (Eng.), *supra* n. 5, at 72.

¹³*Queen's Bench Rules*, R. 20.01-20.04. While the proceeding takes the form of a motion, with the evidence being presented in affidavits and cross-examination of the affidavits, there is one substantial difference between a summary judgment proceeding and an ordinary motion: a summary judgment is a final judgment while the order granted at normal motions is time-limited and the issues contained in the order will be re-examined at a trial.

¹⁴*Queen's Bench Rules*, R. 20.06. An expedited trial is held without the usual pre-trial procedures and requires court approval. The judge would have to ensure that the matter is uncomplicated and could be appropriately handled in an expedited manner.

¹⁵There are several reasons why a defendant who has admitted liability will want to make a voluntary interim payment. First, the defendant may simply be generous and agree to pay where there is a needy plaintiff. Secondly, making an interim payment will reduce the amount of prejudgment interest which the defendant will have to pay after the trial. Thirdly, a plaintiff who receives interim payments may be able to recuperate faster as he or she has less to worry about; if so, this would reduce the total amount of damages the defendant will owe. Waddams refers to voluntary interim payments as a "desirable practice" which should not be discouraged.: S.M. Waddams, *The Law of Damages* (1983) 506.

Defendants' insurance companies "may make interim payments in good faith where liability is certain and a good relationship exists between the insurer and the plaintiff's lawyer."¹⁶ Furthermore, in claims involving government agencies, the latter are often authorized to make payments to the plaintiff prior to a trial.¹⁷ However, there is no authority for a court to order an interim payment to be made.

In this Report we will examine the advisability of allowing the Court of Queen's Bench to grant interim payment orders in civil proceedings. In Chapter 2, the case for reform, as well as the circumstances in which an interim payment should be allowed, is examined. Chapter 3 focuses on how an interim payment power should be implemented, examining a variety of issues including factors in determining the amount of the award, cases with multiple defendants, subsequent motions and adjustments of final damage awards. Chapter 4 contains draft amendments to *The Court of Queen's Bench Act* which implement our recommendations, together with annotations explaining their intent and effect; Chapter 5 restates our recommendations. A draft of our suggested amendments, without annotations, is attached to this Report as Appendix A.

¹⁶Manitoba Law Reform Commission, *supra* n. 2, at 53.

¹⁷For example, under the previous insurance regime, the Manitoba Public Insurance Corporation was authorized to make payments to a plaintiff prior to the trial for lost earnings, expenses paid and compensation for physical impairment caused by the accident: *A Regulation Respecting Coverage Under The Manitoba Public Insurance Corporation Act*, Man. Reg. 290/88 as am., Part II, Divisions VI and VII. Even under the current no-fault compensation system, the corporation may make indemnity payments or reimburse expenses prior to an application for compensation having been approved, if the corporation is satisfied that the application is well founded.: *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215, s. 153(1).

CHAPTER 2

REFORM

A. THE CASE FOR REFORM

Parties often seek interim relief in civil proceedings¹ to govern their relationship for the period of time prior to the trial and final judgment.² A wide variety of interim relief can be requested, including the preservation of an asset, the appointment of a receiver, garnishment of monies from a bank account or an injunction. However, as mentioned in Chapter 1, the Court of Queen's Bench cannot make a interim order for the payment of some or all of the damages which a plaintiff has suffered, even where the defendant has admitted liability.

Courts in England, Scotland, South Australia and Bermuda do have the power to order a defendant to make interim payments to a plaintiff.³ The most common reason given for according courts this power is a desire to relieve the financial hardship of plaintiffs; many plaintiffs incur considerable expenses during the period prior to the trial and, at the same time, have experienced a reduction or termination of their income as a result of the matter for which they are suing.⁴

England's Winn Committee identified several additional advantages to granting courts the power to award interim payments of damages.⁵ First, settlements might be encouraged; the Committee suggested that a defendant may be encouraged to settle the claim where he or she is required to make interim payments to the plaintiff. Second, the delays in the trial process might be lessened; the interim motion may provide the court the opportunity to influence the proceedings at an early stage, which may cause the matter to proceed to trial much faster than it

¹Interim relief is also available in both family and criminal law.

²The Court receives its authority to make interim orders from Part X of *The Court of Queen's Bench Act*, C.C.S.M. c. C280.

The procedure by which interim relief is sought is a motion. A motion is a hearing at which the evidence is presented in an affidavit, rather than orally. A motion results in an interim order; the final judgment is granted after a trial. An interim order is time-limited. Some orders will actually state that the order expires within either a set period of time or upon further order of the court. If no expiry date is included in the order, it is still understood that the order is only in effect until a final judgment is granted in the matter.

Motions can be held before a judge or a master. Whereas a judge has unrestricted jurisdiction to hear motions, a master cannot hear some motions, such as injunctions and the appointment of a receiver. Except in exceptional cases, the motion judge will not later hear the trial in the same case. This restriction is designed to ensure that the trial judge will base his or her decision only on the evidence which is adduced at trial and that he or she will not be influenced by anything that was said, denied or done at a motion.

³*Supreme Court Act, 1981* (U.K.), 1981, c. 54, s. 32; *Rules of the Court of Session 1994*, R. 43.8-43.10 (Scot.); *Supreme Court Act, 1935-1975*, s.30b (S. Aust.); *Law Reform (Miscellaneous Provisions) (No. 2) Act 1977* (No. 52 of 1977) (Bermuda), as reported in 4 *Commonwealth Law Bulletin* (1978) 528.

⁴England (R. Winn), *Report of the Committee on Personal Injuries Litigation* (1968) 29-30.

⁵*Id.*, at 31-32.

ordinarily would.⁶ Third, granting courts this power may serve as a model for out-of-court dealings: the defendant may voluntarily make an interim payment to the plaintiff because he or she is aware that the court is empowered to order the payment;⁷ by making the payment voluntarily, the defendant would save legal fees and costs. Fourth, the power would strengthen the bargaining position of the plaintiff which may result in a more accurate settlement: the positions of the parties would be equalized if the defendant were required to make interim payments of damages to the plaintiff; even an indigent plaintiff would be able to withstand a lengthy court case against a wealthy defendant in these circumstances. Finally, the Winn Committee found some evidence to suggest that a physically injured plaintiff might recuperate more quickly after receiving an interim payment;⁸ the plaintiff's financial worries would be eased and he or she could concentrate on his or her medical condition (this may also benefit the defendant as the final damage award may be reduced).

The Winn Committee argued that interim payments should be allowed so as to produce a real benefit to the plaintiff without causing any injustice or prejudice to the defendant.⁹ This is also our goal and we agree that the courts should have the discretion to order a defendant to make interim payments to a plaintiff in appropriate cases. Such a power would be consistent with the very reasons courts are permitted to make orders before a trial:

. . . to prevent hardship or prejudice to one or other of the parties, to preclude one party from overreaching or outwitting the opposite party, to preserve a fair balance between the parties and to give them due protection while awaiting the final outcome of the proceedings, . . .¹⁰

RECOMMENDATION 1

The judges of the Court of Queen's Bench should have the discretionary power to order a defendant to make an interim payment of damages to a plaintiff.

However, we also recognize that there are a number of dangers inherent in allowing courts to make interim orders for the payment of damages. The risk of overpayment to the plaintiff is very real. If the motion judge errs, the plaintiff might receive more in interim payments than the amount the trial judge ultimately determines he or she is entitled to. Obviously, the plaintiff could and should be ordered to repay the defendant; however, the plaintiff may not be able to do so if the money has been spent or his or her earning capacity has been hampered. Furthermore, granting a plaintiff part of his or her damages in advance of the trial may have the ironic effect of creating dissatisfaction on the part of the plaintiff with the final award. The amount ultimately received by the plaintiff, after deducting the amount of the interim payment, may seem exceedingly low and inadequate for his or her future needs, especially if the plaintiff has already spent some or all of the interim amount. Finally, although it is argued that interim payments of damages reduce the advantage which most defendants have over plaintiffs and strengthen the bargaining position of plaintiffs, it may also be argued that the interim payments may unfairly alter the balance of power; for example, if an uninsured defendant is ordered to make an interim

⁶The motion judge does not replace the pre-trial conference judge, whose primary role is to facilitate an open discussion of the strengths and weaknesses of the parties' positions and to encourage settlement on some or all of the issues. However, the motion judge can supplement the actions of the pre-trial conference judge, as he or she becomes involved in the proceeding at an earlier stage and can influence the parties at that time.

⁷According to the Law Commission of England, the interim payment Rules have, indeed, had the effect of encouraging defendants to make interim payments to plaintiffs voluntarily: The Law Commission (Eng.), *Structured Settlements and Interim and Provisional Damages* (Report #224, 1994) 90, referring to evidence provided by two insurance companies.

⁸Winn Committee, *supra* n. 4, at 31.

⁹Winn Committee, *supra* n. 4, at 32-33.

¹⁰*Halsbury's Laws of England*, vol. 37 (4th ed.) 243.

payment to a plaintiff who does not "need" the money, the defendant may be placed in a disadvantageous negotiating position.¹¹

We recognize the validity of these concerns and, although we have recommended that courts should have the discretion to make interim payment orders, we would temper this recommendation with several important limitations which respond to these concerns and which ensure a balance between the needs and rights of the parties. These limitations are discussed in the next section.

B. LIMITATIONS ON THE POWER

In our view, fairness between the parties requires that judges have the discretion to make interim payment orders only in defined circumstances and with respect to certain types of damages.

1. When Available

(a) Causes of action

There are many reasons why law suits are begun. Although negligence and personal injury are the best known examples, other causes of action include wrongful dismissal, product liability, breach of contract, nuisance and trespass. However, interim payment provisions have historically been examined only in the context of personal injury claims.¹² Thus, the Bermuda legislation and the Scottish Rules which authorize interim payment orders are restricted to personal injury cases.¹³

In our view, such a restriction denies the advantages which interim payment orders would bring to our justice system without in any way addressing the risks which we have identified. While plaintiffs in personal injury cases may have the greatest need for financial assistance,¹⁴ other plaintiffs also sustain financial difficulties while waiting for the trial. As the Winn Committee noted:

The problem whether the Court should have power to make an interim order for the payment of money by one party to another before the trial of the action . . . is a general one, and it applies to proceedings of all kinds.¹⁵

The South Australian legislation allows interim payment orders to be made in any action.¹⁶ Although the English Rules list specific types of claims where an interim payment motion may

¹¹On the other hand, several types of interim orders which are currently available can have a negative financial effect on one of the parties. For example, the preservation of an asset would deny the responding party the right to sell the asset; a garnishment before trial order actually allows funds to be withdrawn from a party's bank account to be put into court pending the trial.

¹²This was the focus of the Winn Committee in England, the Western Australia Law Reform Committee and, according to the latter Committee, the New South Wales Law Reform Commission and the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand: Western Australia Law Reform Committee, *Interim Damages in Personal Injury Claims* (Project #5, 1969) 3.

¹³*Law Reform (Miscellaneous Provisions) (No. 2) Act 1977* (No. 52 of 1977) (Bermuda), as discussed in 4 *Commonwealth Law Bulletin*, *supra* n. 3; *Rules of the Court of Session 1994*, R. 43.8 (Scot.). The English Rules were initially limited to personal injury claims, but this is no longer the case: The Law Commission (Eng.), *Structured Settlements and Interim and Provisional Damages* (Consultation Paper #125, 1992) 69.

¹⁴Winn Committee, *supra* n. 4, at 31.

¹⁵Winn Committee, *supra* n. 4, at 31.

¹⁶*Supreme Court Act, 1935-1975*, s. 30b(1) (S. Aust.).

be commenced, the list is so comprehensive that it in effect covers every sort of action.¹⁷ We agree that there is no reason to limit the causes of action in which interim payment orders may be made.

RECOMMENDATION 2

The discretion to order an interim payment should be available in all civil proceedings.

(b) Likelihood of success

Although we would place no restrictions on the causes of action in which interim payment orders could be made, we believe that limitations relating to the plaintiff's likelihood of success are essential.

Clearly, interim payment orders should be available where the liability of the defendant is not in doubt. This can arise where the defendant has admitted liability, either in the pleadings¹⁸ or in his or her evidence.¹⁹ It can also arise where the defendant's liability has been judicially determined, that is, where the court has made a final judgment on the issue of liability, but the amount of damages has yet to be resolved. The liability issue can be separated from the other issues, and a trial can be held on that issue alone²⁰ (this might happen where all evidence respecting liability is available but it will be some time before the extent of the plaintiff's damages are known) or a default judgment can be granted where a defendant does not file a Statement of Defence.²¹ In these cases, the defendant would have to pay the plaintiff damages at some time, so he or she is not harmed by having to make a payment in advance of the final judgment determining the amount of the damages. The statutes and court rules in England, Scotland, South Australia and Bermuda allow interim payments to be ordered in circumstances where the defendant's liability has been admitted or judicially determined.²²

The more difficult question arises where the defendant's liability has not been admitted or determined; in that case, are there any circumstances in which the courts should have the discretion to make an interim payment order? We recognize that, if there are no such circumstances, the utility of this remedy would be significantly affected: the number of plaintiffs who would benefit would be greatly reduced. At the same time, we are cognizant of the danger of overpayment (and the plaintiff's potential inability to repay the defendant) referred to above and the risk of shifting the balance between the parties to such an extent that defendants are forced to give up legitimate defences because of their own financial hardship.

¹⁷According to Order 29, Rules 11(1) and 12 (Eng.), as cited in Sir J.I.H. Jacob, ed., *The Supreme Court Practice*, vol. 1 (1992) 539-546, an interim payment order may be sought in proceedings for:

1. any claim for damages whether for contract or tort;
2. any claim for debt;
3. any action which includes a claim for possession of land or a claim in respect of the defendant's use or occupation of land; and
4. any claim for any other sum (such as quantum meruit or a guarantee or indemnity issue).

¹⁸The defendant can admit liability in the Statement of Defence.

¹⁹This admission can be made directly or can be inferred from the evidence in the defendant's affidavit, cross-examination on that affidavit or at an examination for discovery.

²⁰By way of summary judgment or expedited trial; those proceedings are discussed in Chapter 1.

²¹*Queen's Bench Rules*, R. 19.01 and R. 19.04.

²²In fact, in Bermuda and South Australia, these are the only circumstances in which interim payments are permitted: *Law Reform (Miscellaneous Provisions) (No. 2) Act 1977* (No. 52 of 1977) (Bermuda), as reported in 4 *Commonwealth Law Bulletin*, supra n. 3; *Supreme Court Act, 1935-1975*, s. 30b (S. Aust.). The Western Australia Law Reform Committee has recommended that a similar approach be adopted in that jurisdiction: Western Australia Law Reform Committee, supra n. 12, at 10.

In our opinion, an appropriate balance is achieved by limiting interim payment orders to situations where the judge hearing the motion is convinced that the plaintiff will be successful at trial in obtaining a final judgment for damages against the defendant. This is the position taken in both England and Scotland. However, we note that the English and Scottish courts are empowered to order an interim payment even where the plaintiff has been contributorily negligent;²³ that is, where the judge believes that the plaintiff will succeed in proving the defendant's liability at trial but also believes that the plaintiff will be found to be partly responsible for his or her own damages. In such cases, the motion judge is required to reduce the amount of the interim payment by the proportion of contributory negligence he or she feels will be attributed to the plaintiff at the trial.

The Winn Committee recommended to the contrary; it felt that an interim payment order should only be allowed where the court believed that the plaintiff would not be found contributorily negligent at trial.²⁴ We agree and believe that making interim payment orders in the face of the plaintiff's contributory negligence would tip the balance too strongly in favour of the plaintiff and against the defendant. We believe that there will generally be a high level of consensus among judges (and, in particular between the motion judge and the trial judge) on whether a plaintiff will be successful at trial. There may even be a high level of consensus among judges as to whether the plaintiff has been contributorily negligent. However, we doubt that such a consensus can be relied on in respect of the *degree* of contributory negligence. This is an issue of great subjectivity. Where one judge might hold a plaintiff to be contributorily negligent to the extent of 10%, another might find 25% to be more appropriate. We are concerned that the result of an incorrect prediction of the apportionment of liability will be an overpayment to a plaintiff with the attendant risk of an inability to repay the defendant.

We recognize that this restriction may be viewed as an invitation to defendants to put forward unmeritorious claims of contributory negligence. However, we believe that judges will be able to separate the true contributory negligence claims from the hollow claims. Furthermore, "[e]thics or sanctions will exclude merely tactical pleas of contributory negligence."²⁵

In short, we do not believe the motion judge should be placed in the position of predicting how liability will ultimately be apportioned. We support the Winn Committee's recommendation that interim payment orders not be allowed where the motion judge believes that the plaintiff will be found contributorily negligent at the trial. The plaintiff should be required to convince the motion judge that he or she will wholly succeed on the issue of liability at trial.

RECOMMENDATION 3

The Court of Queen's Bench should be able to order interim payments in the following situations:

- (a) where the defendant has admitted liability;***
- (b) where the liability of the defendant has been judicially determined; or***
- (c) where the Court believes that the plaintiff will wholly succeed against the defendant at trial on the issue of liability.***

²³Order 29, Rule 11(1) (Eng.) as cited in Jacob, *supra* n. 17, at 541-542; *Rules of the Court of Session 1994*, R. 43.9(3)(b) (Scot.).

²⁴The Winn Committee felt that it was not appropriate or effective to ask the motion judge to determine the issue of contributory negligence on a motion, based upon affidavit evidence: Winn Committee, *supra* n. 4, at 35.

²⁵Winn Committee, *supra* n. 4, at 35.

2. Types of Damages

Generally speaking, two types of damages are awarded to compensate a plaintiff for a loss or injury resulting from the defendant's wrongful actions: special damages and general damages.²⁶ Special damages are damages which can be objectively quantified; they include items such as lost wages or other earnings and out-of-pocket expenses resulting from the incident (such as the cost of repairing damage caused by the defendant or non-reimbursable medical expenses). General damages are damages which can only be quantified more subjectively;²⁷ they are for items such as pain and suffering, personal inconvenience, annoyance and frustration.

It is appropriate that special damages form the basis of an interim payment order. These are real financial losses of the plaintiff which were caused by the defendant. Where liability of the defendant is admitted or determined to be probable, an interim payment of special damages would address the primary purpose of such orders: to alleviate the plaintiff's financial difficulties.

However, different considerations apply to interim payments of general damages. All of the risks of interim payments which we have identified come to the fore with the payment of general damages. Special damages are easily established at an interim hearing; the plaintiff would be able to provide proof of expenses incurred and loss of income. General damages, on the other hand, are subjectively determined and, like the degree of contributory negligence, would be subject to different determinations by different judges. The result would be a very significant risk of an overpayment which the defendant might never be able to recover.²⁸ As already noted, if general damages are paid on an interim basis, the plaintiff may be disappointed by the final damage award because he or she has already received, and probably spent, most of that money.²⁹

While we recognize that an interim payment which included general damages would more accurately reflect the full amount to which a plaintiff is entitled as of the date of the motion,³⁰ we

²⁶There are other types of damages, such as exemplary, liquidated and nominal.

²⁷The judge hears evidence on how this specific plaintiff has suffered and bases the general damage award on what was awarded in similar cases.

²⁸Even in England, where general damages are allowed to be included in the interim payment, concern has been expressed about the possibility of an overpayment. The Court of Appeal has warned lower court judges that "large interim payments in . . . cases may lead to difficulties if an order for repayment is subsequently made." *Schoit Kem Ltd. v. Bentley*, [1990] 3 All E.R. 850 at 858 (C.A.). It has also said that the judge should be concerned with "fixing the quantum . . . [so] that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered." *Stringman v. McArdle*, [1994] PIQR 230 at 233-234, as cited in *The Law Commission (Eng.)*, *supra* n. 7, at 86-87.

Even where interim payment orders are restricted to special damages, the possibility of overpayment still exists, especially when the award is for special damages which are anticipated but not yet incurred. However, if the special damages awarded in the interim payment are more than the total special damages awarded at the trial, the amount of the overpayment will probably be less than the general damages awarded at the trial. The overpayment of special damages can be subtracted from the general damages.

²⁹The Western Australia Law Reform Committee also recommended against including general damages in the interim payment. It provided these reasons:

1. the plaintiff may be disinclined to overcome his or her disabilities as he or she would be receiving interim payments for both special and general damages;
2. it would unreasonably fragment the general damages;
3. it would be difficult for the court to re-assess the general damages on subsequent motions for interim payments, which may result in overpayment; and
4. there is no reason why, in the event of the plaintiff's death, the beneficiaries of the plaintiff's estate should receive a windfall of general damages: Western Australia Law Reform Committee, *supra* n. 12, at 8.

³⁰The Western Australia Law Reform Committee noted this as a benefit of including general damages in interim payments but was not persuaded that it outweighed the disadvantages of this approach: Western Australia Law Reform Committee, *supra* n. 12, at 8.

believe that the benefits in doing so are outweighed by the risks. An interim payment is not meant to compensate the plaintiff for the total amount of damages he or she would receive if the trial were held the day of the motion. It is simply intended to ensure that the plaintiff will not suffer undue financial difficulty prior to the trial which would force him or her to settle for less than full entitlement.

RECOMMENDATION 4

The interim payment should be composed of special damages only.

CHAPTER 3

IMPLEMENTATION

In this Chapter, we consider additional issues relating to the implementation of our recommendation that courts should have the discretion to grant orders of interim damages in appropriate circumstances. We begin by considering special rules which are needed when there is more than one defendant. We then examine specific factors which courts should consider when hearing applications for interim payments and discuss the payment options which should be available. Finally, we consider when additional applications should be permitted and how interim payment orders should be reconciled with the final trial decision.

A. MULTIPLE DEFENDANTS

We have recommended that courts should have the discretion to make an order of interim damages where the defendant has admitted liability, where there has been a judicial determination of the defendant's liability or where the court is satisfied that the plaintiff will wholly succeed at trial on the issue of liability. However, when there is more than one defendant, against whom must the plaintiff prove this? Is it enough for the plaintiff to establish the likelihood of success at trial against any one of the defendants or must the plaintiff demonstrate this in respect of each of the defendants from whom an interim payment order is sought?¹

England and Scotland have answered this question in different ways. In Scotland, the plaintiff need only prove that he or she will succeed at trial against at least one of the defendants to obtain an interim payment order against all of them. ". . . [W]here there is clear liability but a dispute as to which defender is liable, an order can be made against both or either, subject to adjustment at the trial."² By contrast, in England, a plaintiff must prove that he or she will recover substantial damages from a specific defendant at trial in order to obtain an interim payment order against that defendant;³ this position was reconsidered in 1994 by the English

¹Clearly, the presence of multiple defendants should not defeat a plaintiff's application for an interim payment order. "In cases in which the plaintiff sues two or more defendants who blame each other but none of whom makes an allegation of contributory negligence against the plaintiff, it would seem desirable that the Court should have power to make an Order for interim payment to the plaintiff." England (R. Winn), *Report of the Committee on Personal Injuries Litigation* (1968) 34. It would be illogical to allow an interim payment to be ordered where there was a sole defendant but not to allow this where there was more than one defendant.

²J. Munkman, *Damages for Personal Injuries and Death* (8th ed., 1989) at 176, footnote 5, citing *Walker v. Infabco Diving Services Ltd.* Extra Div. 6/4/83 (Scots Current Law August 1983). The *Scottish Rules of Court* allow an adjustment to be made between defendants at the trial where one defendant has paid more than his or her share of the interim payment: *Rules of Court of Session 1994*, R. 43.10(b) (Scot.).

³"What the court must be satisfied of under rule 11(1)(c) is that the plaintiff will recover substantial damages from the respondent against whom the order is made, and the damages "likely to be recovered" means recovered from that respondent and not from somebody else." *Breeze v. R. McKennon & Son Ltd.* (1985), 32 Build. L.R. 4 at 49, as quoted in *Schott Kem Ltd. v. Bentley*, [1990] 3 All E.R. 850 at 857 (C.A.)

Law Commission and it "concluded that the arguments against any change are compelling."⁴

In our view, the English approach is fairer. We believe that the same test should be applied to each defendant from whom an interim payment is sought, whether he or she is the sole defendant or one of several; requiring one defendant to make an interim payment merely because liability can be clearly demonstrated against another defendant unfairly and unnecessarily exposes the first defendant to the risk of the plaintiff not being able to repay after judgment.

RECOMMENDATION 5

Where there is more than one defendant, a plaintiff must prove one of the requirements set forth in Recommendation 3 with regard to the specific defendant against whom the interim payment order is being sought.

B. FACTORS IN DETERMINING AWARD

1. Defendant's Financial Position

At trial, the judge does not consider the defendant's financial position when deciding the amount of damages he or she must pay the plaintiff; after determining that the defendant is liable, the judge's sole consideration is the amount of the losses suffered by the plaintiff. However, in our view, the proposed discretion to make an interim payment order is an extraordinary remedy which calls for the motion judge to give regard to factors which are not usually considered at trial. The interim payment provision is meant to provide a benefit to the plaintiff by relieving his or her financial hardship without prejudicing the defendant. In our opinion, the court must have regard to the reality of the defendant's financial position in order to fulfil both aspects of this goal.⁵

An interim payment order against a defendant who does not have the means and resources to pay it will be of no benefit to a plaintiff. While there are collection procedures available to a plaintiff, such as the seizure and sale of an asset and the garnishment of a bank account or wages, they may be useless against an uninsured⁶ or impecunious defendant. In such circumstances, the plaintiff may, in fact, be in a worse financial situation after obtaining the order because the cost

⁴The Law Commission (Eng.), *Structured Settlement and Interim and Provisional Damages* (Report #224, 1994) 92. The Law Commission received a submission in support of the Scottish position from a judge, Popplewell J., who suggested that:

... where an innocent defendant is able to recover his share of the interim payment against the other defendant after judgment it seems unreasonable that the plaintiff should be deprived of the opportunity of an interim payment just because he is unable to identify the party from whom he is going to recover damages when applying for the interim payment. (at 91)

However, after consideration, the Law Commission decided that the present English position should not be changed and it adopted three arguments which were made by consultees to a paper by The Lord Chancellor's Department in 1993:

... it does not seem right that a defendant should be forced to make an interim payment just because the other defendant, who is ultimately found to be liable, was not prepared to admit liability. Consultees were also concerned that plaintiffs would be encouraged to join as many rich defendants as possible in the action not because liability can clearly be proved against them, but because they may be prepared to pay out a large sum to avoid continuing litigation.

There were also doubts about the practicalities of the changes to the Rules which would be needed in order to allow a non-liable defendant to recover the payment at the end of the day. (at 92)

⁵There are other situations where a judge is required to examine the financial stability of the defendant and calculate the monthly payment the defendant can afford to make. For example, this analysis is done in family law cases where spousal or child support is at issue, or in bankruptcy cases where the bankrupt receives a conditional discharge and must make payments to the creditors.

⁶"Uninsured defendant" can mean more than a defendant who does not have insurance. It also includes a defendant with a policy of insurance whose insurer is denying coverage for some reason (perhaps because the defendant failed to notify the insurer of the claim in a timely fashion as required by the policy or because the damages result from a risk not covered by the policy).

of the motion may exceed the amount the plaintiff is ultimately able to collect from the defendant.

Furthermore, an order requiring an uninsured or impecunious defendant to make an interim payment of damages may unfairly tilt the balance between the parties. Indeed, requiring such a defendant to make an interim payment might cause him or her financial ruin. We agree with the caution of the English Court of Appeal that

... if a defendant's resources are such that an order for interim payment would cause irremediable harm which cannot be made good by an eventual repayment, that is a very relevant factor to be taken into account in fixing the amount of any interim payment.⁷

In both England and Scotland, a defendant in a personal injury case must be "an insured, a public authority or a person of means and resources"⁸ before an interim payment order can be made against him or her. Furthermore, although the Rules do not require the court to consider the defendant's finances in other causes of action, the Court of Appeal has held that the defendant's means and resources "... are not decisive, but they are relevant"⁹ when determining the amount of the interim payment.

We would not make the distinction between personal injury cases and other cases, as have England and Scotland. However, we agree with the English Court of Appeal that the court should consider the defendant's financial position when deciding whether an interim payment order should be made and the amount of the payment though this factor may be only one of several which are taken into account and should not necessarily be determinative of the issue.

RECOMMENDATION 6

The defendant's financial means and resources should be considered by the judge when deciding whether to make an interim payment order and when determining the amount of that order but should not necessarily be determinative of the issue.

2. Set-off, Counterclaim and Mitigation

The English Rules require that the motion judge consider any relevant set-off¹⁰ and counterclaim¹¹ when determining the amount of the interim payment.¹² Since a successful set-off or counterclaim would have the effect of reducing the net amount of damages which the plaintiff would receive at trial (and a successful counterclaim can even have the net result of the plaintiff owing the defendant monies), this seems eminently sensible to us; the possibility of an overpayment to the plaintiff would be reduced.

⁷*British & Commonwealth Holdings v. Quadrex Holdings Inc.*, [1989] 3 All E.R. 492 at 511 (C.A.).

⁸Order 29, Rule 11(2) (Eng.) as cited in Sir J.I.H. Jacob, ed., *The Supreme Court Practice*, vol. 1 (1992) 542; *Rules of the Court of Session 1994*, R. 43.9(5) (Scot.).

⁹*British & Commonwealth Holdings v. Quadrex Holdings Inc.*, *supra* n. 7, at 511.

¹⁰A set-off is a claim filed in an action by the defendant against the plaintiff, arising out of a transaction which is unconnected to the plaintiff's cause of action: *Black's Law Dictionary* (6th ed., 1990) 1372. The purpose of the set-off is to reduce or cancel the amount the defendant owes the plaintiff in the main action.

¹¹A counterclaim is a "claim presented by a defendant in opposition to or deduction from the claim of the plaintiff": *Black's Law Dictionary*, *supra* n. 10, at 349. A counterclaim relates to the same transaction which is the basis of the plaintiff's action.

¹²Order 29, Rule 11(1) (Eng.) as cited in Jacob, *supra* n. 8, at 541. The English Rules also require the motion judge to consider any contributory negligence. However, this is not relevant here, given our view that an interim payment order should not be made at all where the judge believes that the plaintiff has been contributorily negligent.

The legislation in South Australia also requires that a failure to mitigate on the part of the plaintiff be considered and that it cause the interim payment to be reduced.¹³ The legislation states that the court will not award an amount for pain and suffering on an interim basis if the plaintiff has failed to undergo reasonable medical treatment;¹⁴ if the plaintiff has failed to make sincere and diligent efforts to rehabilitate himself or herself for employment, the loss of earnings portion of the interim payment shall not exceed 75% of the plaintiff's loss of earnings.¹⁵ Although we would not fetter the discretion of the motion judge with such formulae, we do agree that, just as a plaintiff does not benefit at trial from a failure to mitigate his or her damages, he or she should not benefit at the interim payment motion.

RECOMMENDATION 7

The motion judge should be able to reduce the interim payment award by the amount of any valid set-off, counterclaim or by an amount for the plaintiff's failure to mitigate.

C. AMOUNT AND METHOD OF PAYMENT

Subject to a consideration of the factors which we have identified, the judge hearing the motion for an interim payment order should have an unfettered discretion to order such amount as he or she thinks appropriate in the circumstances.¹⁶ We anticipate that judges will carefully balance the needs of the plaintiff with the risk of overpayment and recognize that this may on occasion mean that a judge will be reluctant to award all of the special damages which a plaintiff may be able to prove; judges may on occasion wish to leave a margin for error. We think it appropriate to leave these specific decisions to be made in the circumstances of each case.

The discretion of the motion judge should also extend to the period of time for which interim damages are awarded. England, Scotland and South Australia allow the interim payment to be based on the amount the motion judge believes will be awarded at the trial and do not limit it to damages which have been incurred up to the date of the motion.¹⁷ The Western Australia Law Reform Committee also recommended that the interim payment include special damages incurred up to the motion and loss of earnings and expenses expected to be incurred prior to the trial.¹⁸ We agree that this is in keeping with the intent of this reform and serves to reduce the number of applications which must be made to court. The motion judge should not be restricted to awarding damages which have been incurred up to the date of the motion; the judge's discretion should extend to awarding damages which are expected to be incurred between the date of the motion and the anticipated date of the trial.

¹³A plaintiff is under an obligation to take reasonable steps to mitigate or reduce his or her damages. Thus, a plaintiff complaining of wrongful dismissal may fail to mitigate his or her lost earnings if he or she refuses to take suitable alternative employment; a plaintiff may fail to mitigate his or her damages for pain and suffering if he or she refuses to undergo additional beneficial medical treatment.

¹⁴*Supreme Court Act, 1935-1975*, s. 30b(7) (S. Aust.).

¹⁵*Supreme Court Act, 1935-1975*, s. 30b(8) (S. Aust.).

¹⁶Of course, there could still be an appeal to The Manitoba Court of Appeal. However, The Court of Appeal cannot change the lower court's award simply because the appellate justices would have awarded a different amount if they had been the trial judge: S. Waddams, *The Law of Damages* (1983) 633. The Court of Appeal can vary the damage award only if it determines that the trial judge has "applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages . . .": *Nance v. B.C. Electric Ry.*, [1951] A.C. 601 at 613 (P.C.).

¹⁷Order 29, Rule 11(1) (Eng.) as cited in Jacob, *supra* n. 8, at 541; *Rules of the Court of Session 1994*, R. 43.9(3) (Scot.); *Supreme Court Act, 1935-1975*, s. 30b(2) (S. Aust.).

¹⁸Western Australia Law Reform Committee, *Interim Damages in Personal Injury Claims* (Project #5, 1969) 10.

RECOMMENDATION 8

The motion judge should have the discretion to make an interim payment order in respect of special damages which have been incurred prior to the motion and special damages anticipated to be incurred prior to the trial or any portion thereof as the judge thinks is fair and appropriate.

The courts in England, South Australia and Scotland¹⁹ have the flexibility to order that an interim payment be made by way of lump sum or by a series of payments; there are no restrictions on the judge's discretion as to when to order the different types of payments. The Western Australia Law Reform Committee has also recommended that courts have the discretion to order that interim damages be made in either a lump sum or in a series of payments.²⁰

In Manitoba, a trial judge would have this flexibility in final judgments of cases respecting personal injury and death²¹ and we believe that the motion judge should have this discretion in all cases. This would give the judge the flexibility to tailor the order to the facts of the specific case, particularly with regard to the plaintiff's present and future needs and the defendant's ability to pay. It would again reduce the need for multiple applications to court.

RECOMMENDATION 9

The motion judge should be able to order the defendant to make the interim payment in a lump sum, periodic payments or a combination thereof.

D. SUBSEQUENT MOTIONS

The decision by the motion judge to grant or refuse the plaintiff's request for an interim payment order should not preclude subsequent motions on this issue. Subsequent motions are allowed in England,²² Scotland²³ and South Australia.²⁴ We can contemplate a number of circumstances where such a subsequent motion would be appropriate.²⁵

¹⁹Order 29, Rule 11(1) (Eng.) as cited in Jacob, *supra* n. 8, at 546; *Supreme Court Act, 1935-1975*, s. 30b(2) (S. Aust.). The Scottish court is actually empowered to order the payment to be made "in one lump sum or otherwise as the court thinks fit" which would also allow for periodic payments or a combination of these payments: *Rules of the Court of Session 1994*, R. 43.9(4) (Scot.).

²⁰Western Australia Law Reform Committee, *supra* n. 18, at 10.

²¹Under the common law, a trial judge could not allow or require a defendant to pay the final damage award in a series of payments. A plaintiff was entitled to expect the full amount of the judgment to be paid in a lump sum immediately after the judgment was granted. In Manitoba, this common law principle has been legislatively altered with respect to damages awarded for personal injury or the death of a person; *The Court of Queen's Bench Act*, C.C.S.M. c. C280, Part XIV.1, allows the judge to order these damages to be paid in a lump sum, periodic payments or a combination thereof. This enactment was a result of a recommendation of the Manitoba Law Reform Commission: Manitoba Law Reform Commission, *Periodic Payment of Damages for Personal Injuries and Death* (Report #68, 1987). Damages awarded in other causes of action are still due immediately and are to be paid in a lump sum.

²²Subsequent interim payment orders can be granted "upon cause shown": Order 29, Rule 10(5) (Eng.) as cited in Jacob, *supra* n. 8, at 540; the interim payment order may also be varied if it is "just" to do so: Order 29, Rule 17(6) (at 547).

²³A subsequent motion may be made where there has been "a change of circumstances": *Rules of the Court of Session 1994*, R. 43.9(6) (Scot.).

²⁴The Supreme Court can grant multiple interim payment orders or a variation of any periodic payment order: *Supreme Court Act, 1935-1975*, s. 30b(2) and s. 30b(6)(b).

²⁵This will not result in an indirect appeal of the original decision of the motion judge as, generally, motion judges are "seized" of all pre-trial motions; this means that the judge who heard the first motion will hear the subsequent motions.

As indicated, we propose that the motion judge have the discretion to determine the amount of the interim payment to be awarded and the time period which that order will reflect. Although the judge will have the discretion to make an award in respect of all damages incurred or to be incurred up to the anticipated date of the trial, judges may on occasion choose to make an award only for the damages actually incurred up to the date of the motion. In such cases, plaintiffs should be free to seek further orders as they continue to incur damages.

Either the plaintiff or the defendant may also wish to make a further application because of a change in circumstances. For example, the motion judge may have initially refused to grant the order because the issue of liability had not been settled or because he or she was concerned about the possibility of contributory negligence; subsequently, the defendant may have admitted liability or more convincing evidence as to the absence of contributory negligence may have been found. The damages actually incurred by the plaintiff after the motion may turn out to be greater than those which were anticipated at the time of the motion. Similarly, those damages might prove to be lower than anticipated, in which case the defendant should be able to make a subsequent application.

RECOMMENDATION 10

A party should be able to make a subsequent motion for an order or variation of an order upon any ground which seems just, including a change of circumstances.

E. RECONCILIATION WITH TRIAL JUDGMENT

In England, the court Rules contain an explicit requirement that information regarding any interim payments be kept from the trial judge until after the judgment is given.²⁶ We believe that this is an important safeguard.

Disclosure of this information clearly has the potential to prejudice the defendant while having no probative value; the trial judge does not need this information in order to decide the issues before him or her. If the payment were made voluntarily, the impression may be created that the defendant was implicitly admitting liability; if the payment were made pursuant to a court order, the trial judge would become aware that one of his or her fellow judges believed the plaintiff's case to be strong enough to warrant an interim payment order.

Keeping such information from the trial judge is not unusual. Currently, parties and counsel are prohibited from disclosing to the trial judge information regarding negotiations and settlement offers prior to judgment.²⁷ Again, the reason is a concern that disclosure may influence the trial judge or prejudice him or her against a party who the judge believes took an unreasonable position during negotiations. This prohibition requires formal Offers to Settle and other documents which discuss negotiations²⁸ to be separated from the main file which contains the pleadings. The same procedure could be used by the court to ensure that the information regarding interim payments is not provided to the trial judge.

²⁶Order 29, Rule 15 (Eng.) as cited in Jacob, *supra* n. 8, at 546.

²⁷*Queen's Bench Rules*, R. 49.06.

²⁸For example, the pre-trial conference briefs which usually include lengthy discussion about the negotiations.

RECOMMENDATION 11

There should not be any disclosure to the trial judge of any interim payment motion held or of interim payments made by a defendant, whether voluntary or pursuant to a court order, until after the judgment has been granted.

Once the trial judge has made his or her final award of damages, he or she must be informed of any interim payments which have been made by a defendant so that any necessary adjustments can be made. Just as in England, Scotland and South Australia, the trial judge should be empowered to credit the amount of any interim payment against the gross amount of the final damages and reduce the net amount to be paid by the defendant; where the defendant has already paid more than the final amount ordered by the trial judge, he or she should order the plaintiff to repay the excess amount.²⁹

It is also necessary to allow for a defendant who has paid more than his or her share of the interim payment to receive compensation from a defendant who has underpaid.³⁰ This can be addressed through *The Tortfeasors and Contributory Negligence Act*. Under that Act, a defendant who has paid the damage award to an injured plaintiff can recover contribution from any other person who is liable in respect of the same damage.³¹ The amount of the contribution is determined by the judge and is to be "just and equitable having regard to the extent of that person's responsibility for the damage. . . ."³²

RECOMMENDATION 12

The trial judge should credit the amount of any interim payments against the final damage award and make any necessary adjustments among the parties, including ordering the plaintiff to repay the defendant.

²⁹Order 29, Rule 17(a) (Eng.) as cited in Jacob, *supra* n. 8, at 547; *Rules of the Court of Session 1994*, R. 43.10(a) (Scot.); *Supreme Court Act, 1935-1975*, s. 30b(5) (S. Aust.).

³⁰England and Scotland have a specific rule to deal with this situation: Order 29, Rule 17(c) (Eng.) as cited in Jacob, *supra* n. 8, at 547; *Rules of the Court of Session 1994*, R. 43.10(b) (Scot.).

³¹*The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90, s. 2(1)(c). This provision would also allow a defendant to claim contribution from a plaintiff who was found contributorily negligent, if the defendant had overpaid the plaintiff.

³²*The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90, s. 2(2).

CHAPTER 4

THE COURT OF QUEEN'S BENCH AMENDMENT ACT (ANNOTATED)

Implementation of our recommendations would require changes to *The Court of Queen's Bench Act* and we have accordingly prepared draft amendments. They are set out in this Chapter, together with annotations explaining the intent and effect of each section. The Act is restated, without annotations, in Appendix A.

RECOMMENDATION 13

The recommendations contained in this Report should be implemented by enactment of amendments to The Court of Queen's Bench Act similar to those set out in the draft Act in Appendix A.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

C.C.S.M. c. C280 amended

1 *The Court of Queen's Bench Act is amended by this Act.*

2 *The following is added after section 63 as part of Part X:*

Interim order of special damages

63.1(1) Upon motion made in any civil proceeding, a judge may order a defendant to pay to a plaintiff an interim payment of special damages in such amount as seems just, where

(a) that defendant admits liability to that plaintiff;

(b) that plaintiff has obtained judgment against that defendant on the issue of liability; or

(c) the judge is satisfied that, at trial, that plaintiff will prove the liability of that defendant and will not be found contributorily negligent.

Part X of *The Court of Queen's Bench Act* sets out the power of the Court to deal with interlocutory or interim proceedings, both generally and with reference to specific actions. It is appropriate that the interim payment provisions be included in this Part.

This subsection gives judges of the Court of Queen's Bench the power to order interim payments and sets out the main criteria for the exercise of this power.

The motion should be made before a judge, rather than a master of the Court, as the issues raised in the motion (liability and quantum of damages) are identical to those which the trial judge will have to consider.

The liability of the parties is the key factor which the motion judge must consider when determining whether to grant an interim payment order. The motion judge may not make an order for the interim payment of damages if he or she is not satisfied that the defendant will be found liable for the plaintiff's loss or injury or if he or she

believes that the plaintiff may be found contributorily negligent, that is, partially responsible for his or her own loss or injury. The difficulty in accurately predicting the amount of contributory negligence which will be attributed to the plaintiff and by which the final damage award will be reduced means that the motion judge may underestimate the reduction and the interim payment may be too large; the existence of contributory negligence significantly increases the likelihood of overpayment to the plaintiff, with the corresponding risk that the plaintiff will be unable to make repayment after judgment.

If there are multiple defendants, the motion judge must be satisfied of the liability of a specific defendant before ordering that defendant to make an interim payment. This does not mean that the plaintiff will have to prove that one defendant will be fully liable for the action which caused the loss or injury, just that the action of that defendant was one of the causes. The other defendants may also be liable.

The interim order may only be composed of the plaintiff's special damages, which include the plaintiff's out-of-pocket expenses and loss of income. It is fairly easy to provide evidence of special damages: receipts for expenses paid and either affidavit evidence from the plaintiff's employer regarding the plaintiff's lost income or copies of the plaintiff's previous income tax return or pay stubs. The more subjective general damages are not included in the interim payment, as doing so would increase the risk of the plaintiff receiving an overpayment.

The amount of the interim payment order is left to the judge's discretion and will be based on the judge's consideration of the facts of the particular case before him or her.

Calculation of special damages

63.1(2) In calculating the amount of an order under subsection (1), a judge may take into account

(a) the amount of special damages incurred at the date of the motion;

(b) the amount of special damages that will likely be incurred by the plaintiff after the motion for any period prior to the anticipated date of the trial;

(c) the amount of any set-off or counterclaim in which the judge is satisfied that that defendant will succeed against that plaintiff at trial;

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

Defendant's resources relevant

63.1(3) A judge who acts under subsections (1) or (2) may take into account the defendant's means and resources to pay.

Method of payment

63.1(4) A judge may order that payment under subsection (1) be made by lump sum, installment or a combination of both.

In exercising the discretion conferred upon him or her in calculating the amount of the interim payment, the motion judge can consider the plaintiff's out-of-pocket expenses and loss of income which have been incurred prior to the motion as well as those which are anticipated to be incurred before the trial (or any portion thereof). In order to prevent overpayment, the judge should also consider any valid set-off or counterclaim of the defendant as well as the plaintiff's failure to mitigate his or her damages (just as these factors would be considered in determining the amount of the final judgment).

If he or she considers it appropriate, the motion judge may consider the defendant's means and resources when deciding whether an interim payment should be ordered and, if ordered, when deciding the amount of the order. Neither party would benefit from the motion judge granting an interim payment order which the defendant cannot pay. Furthermore, in such a case, care must be taken to ensure that an interim payment order is not made which unfairly tips the balance between the parties against the defendant; the amendment's intent is to benefit the plaintiff in appropriate cases without undue detriment to the defendant.

The motion judge should be given the flexibility to determine which method of payment would be most appropriate in the circumstances of the specific case. This would allow the payment to be tailored to the needs of the plaintiff and the financial resources of the defendant. In many cases, either a lump sum payment or periodic payments would be acceptable; however, in some circumstances, one method would be preferable to the other. For example, an immediate infusion of money, in the form of a lump sum payment, may be preferred where the plaintiff has incurred debts or depleted his or her savings to meet

expenses. Periodic payments may be more appropriate where the defendant does not have the means and resources to make a lump sum payment but earns a wage from which to make periodic payments or where the plaintiff will have regular predictable expenses between the time of the motion and the time of the trial.

Further motion

63.1(5) Notwithstanding any grant or refusal of a motion under subsection (1), a party may make a subsequent motion for an order or variation of an order where there is a change of circumstances or any other ground which to a judge seems just.

The parties should be able to apply to court for a subsequent order with respect to the interim payment, whether the initial motion was refused or granted. Facts change over time and the circumstances which resulted in the earlier decision will not have remained stagnant. In order to meet the continuing needs of the parties, the court must be able to re-examine the issue when appropriate.

The *Queen's Bench Rules* currently allow subsequent orders to be sought in civil proceedings on "the ground of fraud or of facts arising or discovered after . . . [the interim order] was made." We believe this Rule is too restrictive for subsequent interim payment motions; it does not allow a subsequent motion to be commenced in all the situations we envisage. For example, it would not cover the situation where a motion judge chose not to include any amount for special damages anticipated to be incurred between the motion and the trial, preferring to deal with those amounts when they were actually incurred. Arguably, such future special damages would have been known at the time of the initial motion.

Non-disclosure to trial judge

63.1(6) No person shall plead or communicate to the trial judge that an order has been sought, made or refused under subsection (1) or that an interim payment of special damages has been made voluntarily or under order, unless the plaintiff and defendant consent to disclosure of that information or until the court gives judgment on all issues of liability and amount of damages.

The trial judge should not be told about any interim payment motions or interim payments, made either voluntarily or under court order, until the issues of liability and quantum of damages have been decided. If the judge were provided with this information earlier, there is a concern that the judge would be, or would appear to be, influenced by that information.

Final adjustment

63.1(7) Subject to subsection (8), a judge may make any order which may be just with respect to any interim payment of special damages ordered under subsection (1), when

(a) judgment is given at trial on all issues of liability and amount of damages;

(b) the plaintiff discontinues the proceeding; or

(c) the plaintiff withdraws the claim in respect of which the interim payment was made.

Types of adjustment

63.1(8) Without limiting the generality of subsection (7), a judge shall order that

(a) the amount of the interim payment be credited against the judgment for damages which the defendant who made the payment is liable to pay to the plaintiff; and

(b) the plaintiff repay any sum by which the interim payment exceeds the judgment for damages which the defendant who made the payment is liable to pay to the plaintiff.

Transitional

63.1(9) This section applies to all proceedings, whether commenced before or after the day this section comes into force.

Coming into force

3 *This Act comes into force on the day it receives royal assent.*

At the end of the proceedings, the judge is to consider the amount of any interim payment which was ordered and make any adjustments which are appropriate. In particular, a defendant must only be required to pay a plaintiff the amount of the damages awarded in the final judgment. This means that the amount of the interim payment must be credited against the final damage award and the amount of the award must be reduced accordingly; if the plaintiff received too much on the interim payment, the plaintiff must be ordered to repay the excess. *The Tortfeasors and Contributory Negligence Act* deals with adjustments between a defendant who has overpaid and one who has underpaid.

There is no reason to exclude the new interim payment power from court actions which were commenced prior to its enactment. In light of the safeguards attending this power, no defendant would be prejudiced by applying the power to existing cases, while clearly many plaintiffs would be benefited.

CHAPTER 5

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. The judges of the Court of Queen's Bench should have the discretionary power to order a defendant to make an interim payment of damages to a plaintiff. (p. 6)
2. The discretion to order an interim payment should be available in all civil proceedings. (p. 8)
3. The Court of Queen's Bench should be able to order interim payments in the following situations:
 - (a) where the defendant has admitted liability;
 - (b) where the liability of the defendant has been judicially determined; or
 - (c) where the Court believes that the plaintiff will wholly succeed against the defendant at trial on the issue of liability. (p. 9)
4. The interim payment should be composed of special damages only. (p. 11)
5. Where there is more than one defendant, a plaintiff must prove one of the requirements set forth in Recommendation 3 with regard to the specific defendant against whom the interim payment order is being sought. (p. 13)
6. The defendant's financial means and resources should be considered by the judge when deciding whether to make an interim payment order and when determining the amount of that order but should not necessarily be determinative of the issue. (p. 14)
7. The motion judge should be able to reduce the interim payment award by the amount of any valid set-off, counterclaim or by an amount for the plaintiff's failure to mitigate. (p. 15)
8. The motion judge should have the discretion to make an interim payment order in respect of special damages which have been incurred prior to the motion and special damages anticipated to be incurred prior to the trial or any portion thereof as the judge thinks is fair and appropriate. (p. 16)
9. The motion judge should be able to order the defendant to make the interim payment in a lump sum, periodic payments or a combination thereof. (p. 16)
10. A party should be able to make a subsequent motion for an order or variation of an order upon any ground which seems just, including a change of circumstances. (p. 17)
11. There should not be any disclosure to the trial judge of any interim payment motion held or of interim payments made by a defendant, whether voluntary or pursuant to a court order, until after the judgment has been granted. (p. 18)

12. The trial judge should credit the amount of any interim payments against the final damage award and make any necessary adjustments among the parties, including ordering the plaintiff to repay the defendant. (p. 18)
13. The recommendations contained in this Report should be implemented by enactment of amendments to *The Court of Queen's Bench Act* similar to those set out in the draft Act in Appendix A. (p. 19)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 6th day of June 1995.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE COURT OF QUEEN'S BENCH AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

C.C.S.M. c. C280 amended

1 *The Court of Queen's Bench Act is amended by this Act.*

2 *The following is added after section 63 as part of Part X:*

Interim order of special damages

63.1(1) Upon motion made in any civil proceeding, a judge may order a defendant to pay to a plaintiff an interim payment of special damages in such amount as seems just, where

- (a) that defendant admits liability to that plaintiff;
- (b) that plaintiff has obtained judgment against that defendant on the issue of liability; or
- (c) the judge is satisfied that, at trial, that plaintiff will prove the liability of that defendant and will not be found contributorily negligent.

Calculation of special damages

63.1(2) In calculating the amount of an order under subsection (1), a judge may take into account

- (a) the amount of special damages incurred at the date of the motion;
- (b) the amount of special damages that will likely be incurred by the plaintiff after the motion for any period prior to the anticipated date of the trial;
- (c) the amount of any set-off or counterclaim in which the judge is satisfied that that defendant will succeed against that plaintiff at trial;
- (d) any failure by the plaintiff to mitigate the amount of special damages.

Defendant's resources relevant

63.1(3) A judge who acts under subsections (1) or (2) may take into account the defendant's means and resources to pay.

Method of payment

63.1(4) A judge may order that payment under subsection (1) be made by lump sum, installment or a combination of both.

Further motion

63.1(5) Notwithstanding any grant or refusal of a motion under subsection (1), a party may make a subsequent motion for an order or variation of an order where there is a change of circumstances or any other ground which to a judge seems just.

Nondisclosure to trial judge

63.1(6) No person shall plead or communicate to the trial judge that an order has been sought, made or refused under subsection (1) or that an interim payment of special damages has been made voluntarily or under order, unless the plaintiff and defendant consent to disclosure of that information or until the court gives judgment on all issues of liability and amount of damages.

Final adjustment

63.1(7) Subject to subsection (8), a judge may make any order which may be just with respect to any interim payment of special damages ordered under subsection (1), when

- (a) judgment is given at trial on all issues of liability and amount of damages;
- (b) the plaintiff discontinues the proceeding; or
- (c) the plaintiff withdraws the claim in respect of which the interim payment was made.

Types of adjustment

63.1(8) Without limiting the generality of subsection (7), a judge shall order that

- (a) the amount of the interim payment be credited against the judgment for damages which the defendant who made the payment is liable to pay to the plaintiff; and
- (b) the plaintiff repay any sum by which the interim payment exceeds the judgment for damages which the defendant who made the payment is liable to pay to the plaintiff.

Transitional

63.1(9) This section applies to all proceedings, whether commenced before or after the day this section comes into force.

Coming into force

3 *This Act comes into force on the day it receives royal assent.*

**EXECUTIVE SUMMARY OF
REPORT ON INTERIM PAYMENT OF DAMAGES**

EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Interim Payment of Damages* recommends empowering the Court of Queen's Bench to order a defendant in a civil proceeding to make interim payments of damages to a plaintiff in advance of the trial.

BACKGROUND

The traditional "once-and-for-all" method of quantifying and paying damages owing to a plaintiff does not allow the plaintiff to receive any portion of the damage award until a final judgment has been granted; the total amount of the award is then due and owing immediately. However, there can be a delay of months or years between the injurious act which caused the loss or injury suffered by the plaintiff and the trial and, on occasion, a delay between trial and judgment. The plaintiff may suffer financially during this period of time, as his or her earning capacity may have been affected by the injurious act while additional expenses may have been incurred. Even where liability has been admitted and the only matter at issue is the amount of damages, neither the plaintiff nor the court can compel the defendant to pay a part of the damages in advance of the final judgment. This can have the important consequence of tilting the balance between the parties in favour of the defendant, putting pressure on the plaintiff to settle the action prematurely for an inadequate amount and giving the defendant an incentive to drag out the proceedings.

Procedural delays can be shortened by court intervention; the *Queen's Bench Rules* allow the court to set deadlines by which the various pre-trial procedures must be performed or to waive the requirement for performing some of the procedures. However, there is no way to shorten or avoid an evidentiary delay. For example, it may be years before experts can determine the long-term prognosis of a personal injury plaintiff or the effect of a chemical spill on the future yield of farmland. A trial can only occur when the parties are ready to present all of the evidence which is necessary to prove their case, both as to liability and damages.

REFORM

The Manitoba Law Reform Commission believes that the adverse and unjust effects of a delay can be reduced or eliminated by allowing a plaintiff to receive some financial compensation from the defendant prior to the trial and judgment. Such a reform should have the effect of benefiting plaintiffs without causing harm or prejudice to defendants.

In order to ensure that the potential benefits to plaintiffs are maximized, the Commission recommends that judges of the Court of Queen's Bench be allowed to order a defendant to make an interim payment of damages to a plaintiff in any civil proceeding. Courts should be able to make these orders in three circumstances:

- a. where the defendant has admitted liability;
- b. where the defendant's liability has been judicially determined (this might occur where the judge has granted summary judgment or held an expedited trial solely on the liability issue or where a default judgment has been granted upon the defendant's failure to file a statement of defence); or
- c. where the judge believes that the defendant will be found liable at trial.

Where there is more than one defendant, the plaintiff must prove one of these circumstances against the particular defendant being asked to make an interim payment. In all cases, the decision whether to make an interim payment order and the amount of the order would be in the discretion of the judge hearing the motion.

While the primary purpose of the interim payment power is to aid the plaintiff pending the trial, the Commission also believes that the defendant must not be unjustifiably prejudiced. The greatest risk to the defendant is that the amount of the interim payment will exceed the amount of the final judgment with the attendant risk that the plaintiff will not be able to repay the excess to the defendant. To lessen the likelihood that this will occur, the Commission has recommended that the interim payment be limited to special damages; when determining the amount of the interim payment, the judge hearing the motion should be able to consider any valid set-off or counterclaim of the defendant and any failure of the plaintiff to mitigate his or her damages. Furthermore, an interim payment order should not be made where the motion judge believes that the plaintiff has been contributorily negligent; the subjectivity inherent in determining the degree of contributory negligence introduces a high potential for error. Finally, the judge hearing the motion should consider the financial resources of the defendant when deciding whether an interim payment should be made and, if so, in what amount.

The judge should be able to order that the interim payment can be made in a lump sum payment or through periodic payments, depending on the circumstances of the specific case; the order should be tailored to the particular losses or injuries of the plaintiff and the financial resources of the defendant. Either party should be able to make subsequent motions whenever circumstances change or when a judge decides that it would be just.

The fact that a motion for an interim payment has been made, that such a motion has been granted or refused or that such a payment has been made voluntarily or pursuant to a court order may be seen to influence or prejudice the judge hearing the trial of the matter. Accordingly, the Commission recommends that such information not be disclosed to the trial judge until after his or her judgment has been rendered. Upon granting the final judgment, the trial judge should be informed of any interim payments so that they can be credited against the amount of the judgment. Any necessary adjustments would then be made between the parties (for example, an interim payment may have the effect of reducing the amount of the judgment the defendant still must pay; where the amount of the interim payment exceeds the amount of the judgment, the plaintiff would be required to repay the excess).

Draft amendments to *The Court of Queen's Bench Act* incorporating the recommendations of the Commission are set out in an Appendix to the Report.

**SOMMAIRE DU RAPPORT SUR
PAIEMENTS DE DOMMAGES-INTÉRÊTS PROVISOIRES**

SOMMAIRE

Dans son rapport intitulé *Interim Payment of Damages*, la Commission de réforme du droit du Manitoba recommande que la Cour du Banc de la Reine ait pleins pouvoirs pour ordonner à un défendeur dans une instance civile de verser à un demandeur des dommages-intérêts provisoires, avant le procès.

RENSEIGNEMENTS GÉNÉRAUX

La méthode habituelle qui consiste à évaluer quantitativement et à payer «une fois pour toutes» ne permet pas à un demandeur de recevoir une partie du montant des dommages-intérêts qui lui sont dus tant qu'un jugement définitif n'a pas été rendu. Une fois ce jugement rendu, le montant total devient immédiatement exigible. Cependant, des mois ou des années peuvent s'écouler à compter de l'acte préjudiciable qui a causé la perte ou la blessure subie par le demandeur jusqu'au procès. Il peut y avoir aussi à l'occasion un délai entre le procès et le jugement. Le demandeur peut avoir des problèmes financiers pendant cette période. En effet, l'acte préjudiciable peut avoir causé des changements dans la capacité du demandeur à gagner sa vie et lui avoir occasionné des dépenses supplémentaires. Ni le demandeur ni le tribunal ne peuvent obliger le défendeur à verser une partie des dommages-intérêts avant que le jugement définitif soit rendu, même si le défendeur a reconnu sa responsabilité et que le seul point litigieux est le montant des dommages-intérêts. Cette situation risque fortement de favoriser le défendeur. En effet, le demandeur peut être contraint à conclure un règlement prématuré et ainsi à accepter un montant inapproprié. Le défendeur, quant à lui, peut être tenté de faire traîner les procédures.

Le tribunal peut diminuer les délais dans les procédures. Les *Règles de la Cour du Banc de la Reine* permettent au tribunal de fixer les délais d'exécution des mesures préparatoires au procès ou de soustraire une partie à l'obligation d'exécuter certaines procédures. Un délai visant l'obtention d'une preuve ne peut toutefois être diminué ou supprimé. Par exemple, un délai de plusieurs années peut être nécessaire pour que les experts établissent le pronostic à long terme d'une blessure subie par le demandeur ou les conséquences d'un déversement de produits chimiques sur le rendement futur de terres agricoles. Un procès n'a lieu que lorsque les parties sont en mesure de présenter toute la preuve nécessaire à l'exposé de leur cause, laquelle preuve porte à la fois sur la responsabilité et les dommages-intérêts.

RÉFORME

Selon la Commission de réforme du droit du Manitoba, il suffirait d'accorder au demandeur le droit de recevoir du défendeur une indemnité avant le procès et le jugement pour réduire ou éliminer les conséquences négatives qu'entraîne un délai. Une telle réforme aiderait les demandeurs et ne causerait pas de préjudice aux défendeurs.

Afin que les demandeurs tirent le maximum de l'aide financière envisagée, la Commission recommande de permettre aux juges de la Cour du Banc de la Reine d'ordonner à un défendeur de verser à un demandeur des dommages-intérêts provisoires dans une instance civile. Les tribunaux devraient pouvoir rendre ces ordonnances dans les trois cas suivants:

- a) le défendeur a reconnu sa responsabilité;
- b) la responsabilité du défendeur a été établie judiciairement (par exemple, le juge a rendu un jugement sommaire, a présidé un procès accéléré portant

seulement sur la question de la responsabilité ou un jugement par défaut a été rendu à la suite du défaut du défendeur de déposer une défense);

- c) le juge est convaincu que le défendeur sera déclaré coupable au procès.

S'il y a plusieurs défendeurs, le demandeur doit prouver qu'un des cas susindiqués existe à l'égard du défendeur à qui l'on demande de faire un paiement provisoire. Dans tous les cas, la décision de rendre une ordonnance de paiement provisoire et le montant accordé en vertu de cette ordonnance seraient à la discrétion du juge saisi de la motion.

Même si les paiements provisoires visent principalement à aider le demandeur jusqu'au procès, la Commission est aussi d'avis que le défendeur ne doit pas subir de préjudice déraisonnable. Pour le défendeur, le plus grand risque est que le montant des paiements provisoires soit supérieur à celui accordé dans le jugement définitif et que le demandeur ne puisse lui rembourser le trop-versé. Afin que cette situation se produise le moins souvent possible, la Commission a recommandé que les paiements provisoires visent seulement les dommages-intérêts spéciaux. Lorsqu'il détermine le montant du paiement provisoire, le juge saisi de la motion devrait pouvoir examiner toute compensation ou demande reconventionnelle valable du défendeur et tenir compte du défaut du demandeur de réduire ses dommages-intérêts. De plus, une ordonnance de paiement provisoire ne devrait pas être rendue si le juge conclut que le demandeur a fait preuve de négligence, l'aspect subjectif lié à la détermination du degré de négligence contributive créant un risque d'erreur élevé. Enfin, lorsqu'il statue sur la question de savoir si des paiements provisoires devraient être faits et, dans l'affirmative, sur leur montant, le juge devrait tenir compte des ressources financières du défendeur.

Le juge devrait avoir la possibilité d'ordonner que les paiements provisoires puissent être faits sous forme de somme forfaitaire ou de versements périodiques, compte tenu des circonstances de la cause dont il est saisi. L'ordonnance devrait tenir compte des pertes ou des blessures particulières du demandeur et des ressources financières du défendeur. Chaque partie devrait pouvoir présenter des motions subséquentes, si les circonstances changent ou qu'un juge décide que cela serait juste.

Le fait qu'une motion visant l'obtention d'un paiement provisoire ait été présentée, qu'elle ait été accordée ou rejetée ou que le paiement provisoire ait été fait volontairement ou conformément à une ordonnance judiciaire pourrait être perçu comme pouvant influencer l'opinion du juge qui préside le procès. Par conséquent, la Commission recommande que ces renseignements soient communiqués au juge seulement après qu'il a rendu son jugement. Une fois qu'il a rendu un jugement définitif, le juge devrait être informé des paiements provisoires qui ont été faits afin qu'ils soient déduits du montant du jugement. Les parties feraient ensuite les rajustements nécessaires (par exemple, un paiement provisoire peut entraîner la réduction du montant du jugement que le défendeur doit payer; un rajustement est aussi nécessaire lorsque le montant du paiement provisoire est supérieur à celui du jugement, le demandeur étant tenu dans ce cas de rembourser le trop-versé).

L'avant-projet de modification de la Loi sur la Cour du Banc de la Reine contenant les recommandations du comité est annexé au rapport.