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Law Reform Notes

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Law Reform Notes *is produced in the Legislative Services Branch of the Office of the Attorney General. It is distributed to the legal profession in New Brunswick and the law reform community elsewhere, and is available on the Office of the Attorney General's website. The* ***Notes*** *provide brief information on some of the law reform projects currently under way within the Office, and ask for responses to, or information about, items that are still in their formative stages. We welcome comments from any source.*

Opinions expressed in these ***Notes*** *merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Office of the Attorney General or the provincial government. Where the Office or the government has taken a position on a particular item, this will be apparent from the text.*

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. *Habeas Corpus Act*

An Act to Repeal the Habeas Corpus Act (c.51, 2011) has now been proclaimed, and came into force on June 1st, 2012. At the same time, a new Rule 69.1, *Habeas Corpus Proceedings*, also came into force. The repeal and the Rule, together, are designed to modernize the procedure for obtaining *habeas corpus* orders, bringing it into line with the ordinary procedures under the *Rules of Court* as far as practicable.

Under R.69.1 the main document is a notice of motion or preliminary motion in which the moving party identifies the substantive relief he or she seeks (which is now referred to as a *habeas corpus* "order" rather than a "writ"). In the rare cases in which, in accordance with historic tradition and the literal meaning of the Latin words, the moving party actually wants an order that a person is to be brought before the court, the moving party can request a "*habeas corpus* summons".

The procedure for obtaining a *habeas corpus* order is the ordinary procedure on a motion or preliminary motion, except that R.69.1.01(2) overrides the normal requirement that a person who brings a preliminary motion must give an undertaking to commence a proceeding.

The procedure for obtaining a *habeas corpus* summons is more flexible. It operates when the moving party requests a date for the hearing. At this stage the party can also request, with reasons, that a summons should issue. After considering the reasons the judge may hear the moving party if he or she considers it appropriate.

The idea of "hearing" the moving party is drawn from R.69.04(1)(c), under which a judge, "after hearing the applicant", can refuse to fix a date for a judicial review. Cases under R.69 suggest that there are many kinds of contact between a judge and an applicant that can satisfy this

requirement that the applicant be "heard". The same should apply under R.69.1.

Under R.69.1, furthermore, the applicant does not have to be "heard" at this stage at all. The judge may issue or decline to issue a *habeas corpus* summons based on the reasons provided alone. We anticipate that *habeas corpus* summonses will rarely be issued, since normally an ordinary motion is all it will take to resolve the real issue at stake, which is whether or not the custody or detention of a particular individual is lawful.

As to the motion itself, various provisions of the Rules of Court allow the judge flexibility in deciding how it is heard. R.37 allows motions to be heard by teleconference, for example, and makes provision for cases of extreme urgency. R.2.01 allows the judge to dispense with compliance with any rule. We mention this because of the wide variety of circumstances in which *habeas corpus* orders can potentially be sought, and because of the informality with which they are sometimes handled. The new Rule is not intended to inhibit this.

2. "Shall" and "may" in the *Interpretation Act*

In *Law Reform Notes #30* we mentioned that we were considering amending the definitions of "shall" and "may", and « doit » and « peut », in s.39 of the *Interpretation Act*. The background to this was that, in bilingual legislation nowadays, the counterpart of "shall" plus an infinitive in English is frequently not « doit » plus an infinitive in French but the present tense of the operative verb. We mentioned two ways of addressing this issue – either expanding the existing definitions in s.39 or repealing them – and said we preferred the latter.

After considering the comments received, we confirmed that repeal was indeed the better approach, and this is currently being done by *An Act to Amend the Interpretation Act* (Bill 30, 2011-12). The Bill had received third reading and was awaiting Royal Assent at the time this note was prepared.

The Bill comes into force on Royal Assent, but should not produce any substantive legal change. The provisions repealed are purely interpretative, and the reason for preferring repeal to an expanded definition was that the existing provisions are not helpful in interpreting legislation, and an expanded definition of the kind that we examined in *Law Reform Notes #30* would make them even less so. When the amendment comes into force, therefore, the words of every substantive Act will mean the same as they always did. All that will have changed is that an unhelpful interpretative provision in the *Interpretation Act* will no longer exist.

3. "Cause of action arises"

Also awaiting Royal Assent is Bill 31, the *Law Reform (Miscellaneous Amendments) Act, 2012*. The Bill gives effect to the proposal in *Law Reform Notes #29* that the *Condominium Property Act*, the *Judicature Act* and the *Private Investigators and Security Services Act* should be amended to replace the references they make to the time when a cause of action arose. Changing judicial interpretations of this expression in relation to limitation periods have made it hard to be sure what it means in the contexts of these three Acts as well.

- In the case of the *Condominium Property Act*, the amendment relates to the time at which a person must be an owner of a condominium unit in order to be liable for a judgment awarded against the condominium corporation. In future this will be the date of the judgment rather than the date the cause of action arose.

- In the case of the *Judicature Act*, the amendment relates to the period of time over which a court can award pre-judgment interest to a successful litigant. At present, under s.45(1), this period starts on the date when the cause of action arose. The amendment replaces this with a reference to "the date the debt was due or the amount subsequently awarded as damages ought reasonably to have been paid". A consequential amendment is made in s.46(2), and some old transitional provisions in s.45(2) and s.46(3) and (4) are repealed.

  Despite the change of words, the amendment is not intended to alter the existing state of the law. The new wording is based on the Court of Appeal's decision in *Cyr v Roman Catholic Bishop of Edmundston*, [1982] NBJ No.159, recently

affirmed by the Court of Appeal in *Jean v Pêcheries Roger L. Ltée*., 2010 NBCA 10 (CanLII), para.69. Those cases have established that the key to applying s.45(1), as worded before the amendment, is the expression that the amendment has now written into the section. The cases explain how this concept should be applied in relation to things like debts, special damages in tort actions, damages for pain, suffering and loss of amenities, and future economic loss. The operation of s.45(1) should therefore remain the same, even though its wording is being changed to remove the now-problematic reference to the date when the cause of action arose.

- In the case of the *Private Investigators and Security Services Act*, the amendment relates to the time at which an agency must hold a licence in order to be able to bring legal proceedings to recover its fees for services rendered. In future this will be the time the services were rendered, rather than the time the cause of action arose.

The Act will come into force on Royal Assent, but for each of these amendments there is a transitional provision which ensures that the amendment will not affect legal proceedings that have already begun.

Not affected by this Bill are the limitation periods under the *Insurance Act*, some of which also depend on the time when a cause of action arose. As mentioned in *Law Reform Notes #29*, if there are to be changes to these provisions they will come from the Superintendent of Insurance.

Also unaffected by the Bill are the two Rules of Court those *Notes* identify as raising the same issue of terminology that the Bill addresses, R8.04 and R.61.14. In their case amendments are being developed, but they are proceeding separately as self-contained amendments to the Rules of Court.

4. Privity of contract and the *Law Reform Act*

In *Law Reform Notes #30* we presented a brief summary of an extensive review of the case-law under s.4 of the *Law Reform Act* and under the "principled exception" to the law of privity of contract established by *Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.*, [1999] SCJ No.48. We suggested that s.4 should be amended to change the effect of *Mandervillle v Goodfellow's Trucking, Ltd.*, [1999] NBJ No.75, and make it clear that "conditional beneficiaries" – third parties who would come within the scope of a contract *if* they did something that the contract contemplated *might* be done – were included in the section. We also asked more generally whether there were other issues relating to s.4 that deserved consideration.

We received no suggestions for other issues to consider, and no comment on the specific amendment we had suggested was required. We are therefore now limiting our attention to the specific amendment, and plan to present our legislative recommendation to the government during the summer months.

5. The definition of "parent" in the *Guardianship of Children Act*

Another item in *Law Reform Notes #30* that received no comment – at least, not on the specific point we had raised – was the definition of "parent" in s.1 of the *Guardianship of Children Act.* This definition, combined with the interconnected definition "child", excludes the unmarried father of a child from the scope of the Act. We believe that this should be changed, and on this item, too, we plan to submit our legislative recommendation during the summer months.

Exactly how the Act should be amended, however, is a more complicated question which took up much of the discussion in *Law Reform Notes #30*. This will be finalized before we submit our recommendation, but at present we still favour the second option discussed there: repealing the definitions of "parent" and "child" and not replacing them with anything else.

6. Enforcement of money judgments

Law Reform Notes #29 mentioned that we were taking up again a major project to reform New Brunswick's legislation on enforcement of money judgments. *Law Reform Notes #30* added that our renewed attention to this had coincided with a project being undertaken by Professor Micheline Gleixner, of the Université de Moncton, and that we hoped to have the benefit

of her report before finalizing our own recommendations.

We understand that her report is to be released very soon, and a companion article by a member of professor Gleixner's working group, will be published in the University of New Brunswick Law Journal. We expect that this will be an active file for us in the coming months, and we hope that it will be possible to introduce legislation during the 2012-13 session of the Legislative Assembly.

B. NEW ITEMS

7. Advance payments of special damages

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

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

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

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

(a) Background to s.265.6

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

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

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

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

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

(b) Application of s.265.6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The case for expansion

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

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

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

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

(d) The nature of the claim

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

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

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

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

(e) The characteristics of the plaintiff

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

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

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

(f) The characteristics of the defendant

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

rather than directly borne by the specific defendant.

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

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

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

(g) All kinds of damages?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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