

## **A response from the Clinical Negligence and Serious Personal Injury Committee, September 2004**

### **Interim Payments**

1. We consider that to alter Rule 25.7(2) to allow for interim payments to be made where a Defendant (who is neither a public body nor insured in respect of the claim) has (or has access to) sufficient resources to make such a payment would be not only sensible but desirable. We know of cases not only of mesothelioma, but relating to occupiers and to some sports claims where this would permit interims to be ordered where the present rule prevents it.
2. Early payment on account of damages is particularly important if the injured person is to be able to access rehabilitation, and to minimise the prospects of the worst aspects of his injuries becoming chronic. Even if the claim should subsequently be dismissed, where the interim payment has secured an improvement in the claimant's condition (as it should have done) then the effect of the interim will be to lessen ongoing costs of medical treatment, and the social costs – not just for the claimant but for others – of his injury. There is thus a clear public benefit in money being available to a claimant early in the progress of his claim. The suggested revision of Rule 25.7(2) is a modest contribution to this.
3. We consider that rule 25.7(3) should apply, even where the order would be made against an uninsured defendant before liability has been determined. However, we would emphasise the importance in this case of the Practice Direction directing a court to the need to check the means and resources of the uninsured defendant before doing so, to consider the prejudice that might be suffered where those resources immediately available do not substantially exceed the amount of the payment sought (thereby protecting small businesses and individuals), and to caution against making an award against an unrepresented Defendant, at least at an initial hearing of an application.
4. It will be necessary for the court to have information before it on which to base its determination. Thought will have to be given as to the procedure for achieving this: to require evidence to be furnished by the claimant will often be to ask him to provide what he does not have; to require evidence of means will too easily enable a Defendant to avoid payment, simply by failing to supply sufficient evidence. Perhaps the answer is to require a court, in any case in which it appears that there may be a case for exercising its powers under this rule to order an uninsured Defendant to pay, to order that Defendant to file evidence of means and available resources if he seeks to argue that the court should not make such an order. If the defendant does, the evidence may be considered. If he does not, the Court should not then feel inhibited in making an otherwise appropriate order.
5. The rule might usefully add that in any case in which liability against the paying Defendant has not been determined nor accepted, that defendant will make the interim payment from its own resources as agent for itself and the other defendants (thereby making it clear that the paying defendant has a right of recourse against the other Defendant(s) irrespective of any claim for contribution or indemnity made on the pleadings in the particular case). At present rule 25.8(3) prevents such a repayment unless a claim for contribution, indemnity or other remedy has been

made by the paying Defendant against the co-Defendant ultimately found liable: the rules should not be such as to require that a Defendant makes a claim, with the attendant expense of doing so, simply to ensure recovery of an interim payment he has made.

### **Provisional and Further Damages**

6. We can see no reason to retain the link between Parts 25 and 41. Removing it would resolve the problems identified by the Consultation Paper, whether or not Rule 25.7(2) is retained or amended.

### **Answers, in Summary**

7. In summary, therefore, we would answer questions 1 and 2 affirmatively; in answer to Q3 we would urge that any disproportionate and adverse affect be taken into account; the means and resources of the uninsured defendant be considered; that there be additional caution where the Defendant is unrepresented; and in a case to which 25.7(3) would apply, that the paying defendant does so as agent for itself and all the Defendants; and in answer to Q4 and 5 we suggest that the link between Parts 41 and 25 should simply be removed.

8. We are grateful for the slight extension of time in which to respond: the consultation period otherwise coincided with the summer holidays of many of us.

Brian Langstaff QC,  
Chairman, Clinical Negligence and Serious Injury Committee, CJC,  
For and on behalf of the Committee.  
14th September 2004