COSTS ISSUES IN MEDICAL NEGLIGENCE CLAIMS

By Phillipa Alexander

ACTING FOR MORE THAN ONE PARTY IN THE PROCEEDINGS

It is not unusual in a medical negligence action to act for more than one claimant, such as a child who has been injured during birth and a parent who has suffered nervous shock as a result of the child's injury. In such cases, before settling the parent's claim on a costs-inclusive basis as often occurs, or discontinuing the claim of one party, it is important to consider the effect that this will have on the recoverable party:party costs of the remaining party.

Where a solicitor acts for more than one party and there is no special arrangement, each client is liable for his or her proportion of the general or common costs incurred on behalf of all, plus the costs, if any, incurred exclusively on his or her behalf.[1] This principle applies not only to cases where clients are severally liable to their solicitor, but also to cases where the liability is a joint one.[2] Although each client may be liable to the solicitor for the whole of the common costs, as between the clients, each is liable to contribute only their share. It follows, therefore, that each client can recover party:party costs only to the extent of their liability, which may be one-half or less of the total common costs.

Particularly in a matter where the majority of work on the case was primarily undertaken for the physically injured client, settling on a costs-inclusive basis or discontinuing a parent's claim may prove a costly decision for the continuing client. Defendants are often aware of the effect that such a decision will have on the ultimate costs recovery. It is therefore preferable to settle on a 'plus-costs' basis.

OBTAINING EXPERT EVIDENCE

The overriding purpose of the *Civil Procedure Act* 2005 (NSW) is to facilitate the 'just, quick and cheap resolution of the real issues in the proceedings'.[3] A party is under a duty to assist the court in this regard and a solicitor or barrister must not, by his or her conduct, cause his or her client to be in breach of that duty.

Medical evidence can be particularly expensive to obtain in relation to medical negligence proceedings and, where overseas experts are required, the cost of such evidence is substantial. In order to comply with the overriding purpose, practitioners should carefully consider the cost of obtaining such evidence; whether there is a cheaper local alternative; and the scope of the brief that is given to the expert.

The court can exclude specific costs that it regards as extravagant from the amount payable by the defendant, and may order the solicitor to pay the costs of their client if it considers there has been an unnecessary waste of the client's money. Such orders were made by Hulme J in *Blake v Norris*,[4] when the solicitor was ordered to pay, inter alia, the costs of obtaining an expert's report in relation to the costs of altering the plaintiff's home, as the court regarded the extent to which the report went as unreasonable. As held by Hulme J:

> 'Firstly, given the nature of adversarial litigation it is appropriate and indeed necessary for solicitors engaging in such an exercise to ensure that any claim made and the evidence obtained in support do not sell their clients short by reason of being too little. In this regard I do not intend by anything I say to suggest that any nice judgment is

required, error in which lays a solicitor open to the risks of an order for costs being made against him. Nevertheless, it is incumbent on solicitors to ensure that any claim bears a reasonable relationship to the facts of a case as those facts are known to the solicitor…

To the extent to which costs were incurred as a result of what may be described in the extravagance in the claim they should in my view be laid at the solicitor's door.'[5]

On the solicitor's application for leave to appeal, the court confirmed 'the principle that practitioners must carry out litigation in accordance with the overriding requirement of the Rules, to be "just, quick and cheap", with its corollary that charges are not to be incurred which are unnecessary and unjustified, remains of fundamental importance.'[6]

While there was some criticism of the orders made by Hulme J, the appeal was dismissed by a 2:1 majority on grounds that the amount involved was too small to justify granting leave.

RECOVERING THE COSTS OF MEDICAL EVIDENCE

Where medical reports are unserved, recovering the costs of the reports from the defendant can be difficult. Historically, the costs of obtaining reports from treating doctors where the reports were not served has usually been allowed, provided that an excessive number of such reports were not obtained.

However, where reports from examining specialists remain unserved, the costs of obtaining such evidence may be regarded as unreasonable unless the solicitor can justify his or her decision to obtain them. The test is not one of hindsight; the reasonableness of the work is to be determined 'by the state of things known or which ought reasonably to have been known to a diligent solicitor at the time when the expenditure was made'.[7] For example, it may be necessary to poll the profession to see if there was any consistency of opinion at the time of the negligence as to the standard of care applicable.

COUNSEL'S CANCELLATION FEES

When briefing counsel in a matter where an extended trial is likely, it is important to protect the client against excessive cancellation fees that may be claimable by counsel, even where a matter settles many months before hearing. Such fees are often very substantial and solicitors may not be aware of the liability to which they are exposing their clients. A solicitor's failure to protect a client from these fees could result in the client not having to reimburse the solicitor for them. While discussing general overcharging by counsel, Basten JA recently acknowledged the role of the solicitor when he held that 'the failure of the solicitor to protect his client rather identifies a weakness in the supposed protection which might be expected in a divided profession'.[8]

Counsel's fee disclosure should be analysed to ascertain exactly what cancellation fees may apply and the client should be informed accordingly. It may also be prudent to inform the client that such fees, or most of them, will not be recoverable from the defendant, particularly if settlement occurs well before trial. Where counsel is prepared to negotiate his or her fee agreement, consider including a sliding scale and/or credit to be given for work obtained in lieu, so that reduced cancellation fees are payable the earlier a matter is settled.

In relation to recovering cancellation fees from another party by way of party:party costs, there is a fairly strong presumption that such fees are generally not regarded as reasonable.[9] However, some amount may be allowed where a matter settles immediately before the trial and, where a matter settles at trial, some allowance is likely to be made for cancellation fees incurred by a successful party. When formulating terms of settlement, consider including a specific provision that provides for the defendant to pay the plaintiff's costs (including incurred cancellation fees), if the defendant can be persuaded to settle on this basis. ■

Notes: **1** *Korner v Korner & Co Ltd* (1951) Ch 10. **2** *Keen v Towler* (1924) 41 TLR 86 at 87. **3** Section 56. **4** *Blake v Norris [Solicitor Costs]* [2003] NSWSC 199 (28 March 2003). **5** *Kelly v Norris & 1 Ors* [2004] NSWCA 260 at 21, in reference to judgment of Hulme J. **6** *Ibid* at 14. **7** *W & A Gilbey Limited v Continental Liqueurs Pty Limited* (1963) 81 WN (NSW) 1. **8** *NSW Bar Association v Meakes* [2006] NSWCA 340 (6 December 2006) per Basten JA at 115. **9** *Commissioner of Australian Federal Police v Razzi and Others* (1991) 101 ALR 425.

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