A triumph of decency

By David Hirsch

I was recently involved in the settlement of a medical negligence claim that highlighted the importance of openness in achieving a good outcome for all parties.

The case involved the stillbirth of a child and a claim for nervous shock by the mother. The death was caused by uterine rupture after Syntocinon had been given to augment labour. The mother had had a previous caesarean delivery and her uterus tore along the scar line of the previous caesarean.

The plaintiff had a solid expert report on liability, and psychiatric evidence supported a diagnosis of severe depression with poor prospects of recovery.

The defendant hospital did not serve any report on liability at this stage, although it reserved its right to do so. The woman had been assessed by a psychiatrist for the defence but no report had been served.

The parties agreed to an early, informal settlement conference. The hospital was represented by a solicitor and an experienced barrister. There was no mediator and no representative from the hospital or its insurer, either.

The conference was delayed because the woman was inconsolable and bitter. She insisted that the hospital had ruined her life, that she would never recover and she wanted, in effect, 'to bring the hospital down'. It was not the first time I had heard this from her, or from other parents in a similar situation.

I did what I could to explain what the law could and could not deliver. I offered a realistic assessment of what a judge could award by way of damages. I emphasised the benefits of an early settlement over protracted litigation.

The plaintiff's solicitors, meanwhile, had prepared what can best be described as an 'ambit' damages claim. This included a past and future economic loss claim based on average weekly earnings – despite the fact that the mother was ill-educated and had virtually no work history. A large gratuitous care claim was also advanced, on the basis that the woman's mother had to help care for her and her own young daughter for at least 15 hours per week because she 'was not up to it'.

I decided to open the conference by going through the damages material and advising that the claim would be scaled back, especially in the areas of economic loss and gratuitous care. This clearly took the defence by surprise. Rather than begin with aggression, I began with concession.

After conceding what I thought was appropriate, I maintained that there should be no discount for liability since the defence had not yet served an expert report.

Then the defence took us by surprise. The barrister explained that she and the solicitor had been to the hospital and interviewed everyone involved with the delivery. She said that they had formed a strong view based on what they had been told. She continued, 'And our view is that this should never have happened.'

My client was dumbstruck. She had steeled herself for a half-hearted 'expression of regret' along the lines of: 'With hindsight, things might have been done differently, but on the basis of the information available at the time, the hospital's actions were defensible. Still, we would like to avoid the expense of litigation.' Thankfully, the hospital's apology was not couched in legal doublespeak. It was honest and clear. And it was sincere.

At this point the parties went to separate rooms and negotiations began. Within an hour we had moved to making offers inclusive of costs and, after one quick round of discussion, the parties were $40,000 apart.

I knew that 'splitting the difference' would yield a very good result and suspected that the hospital's barrister knew this, too. I told my client that this would be a very good outcome and hoped that she would take my advice and head directly for the middle ground. She left the room to think about it. I was worried that she would want to bargain in smaller lots just to get a settlement that fell on her side of the centre line.

To my surprise, she agreed to split the difference if the hospital would agree to pay that amount. I advised the barrister, without making a formal offer, that if the hospital would split the difference then we would accept this.

This time we waited. And waited. Eventually the barrister announced that the hospital had agreed. She added that she had the benefit of a sensible solicitor who, unlike some, did not want to bargain in small lots to see if the plaintiff would accept a sum on the hospital's side of the centre line.

In the end, the case settled for a suitable sum. I have no doubt that my client ended up with much more in her hand than she would have, had the matter gone to trial. She felt both relieved and vindicated, and I believe that she will be able to 'move on'.

This good result was a triumph of decency. We did not press an ambit claim. The hospital offered a fulsome and genuine apology. And with this foundation, neither party saw the need to 'chisel' the other in an effort to salvage some sense of victory by getting the other to 'give in'. ■

David Hirsch *is a barrister at 3 Selborne Chambers, Sydney.*
PHONE *(02) 9233 2206* **EMAIL** *dhirsch@selbornechambers.com.au*