In all matters in which I am involved, I am making applications to the court for directions that were previously not necessary. This involves additional cost, which will ultimately be borne by the client.

A further problem that I have encountered in conducting medical negligence claims is the protracted time that it is taking to negotiate with defendants' solicitors as to whether there is an expert in a particular field whom we can agree is an appropriate expert in the case. This process is delaying, in a number of complex cases, the resolution of the matter for many months. It also involves additional costs, due to the plethora of correspondence that is exchanged in trying to reach agreement, and then the further correspondence involved in trying to reach agreement on the content of the joint instructions to the expert.

Whether the single expert rule has resulted in impartiality on the part of the experts is a matter of conjecture. Gary Edmond, in his 2009 article, comments that there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to civil practice. 'Even if not conspicuously or predictably allied, experts (including court appointed experts) do not enter disputes without professional, institutional, and ideological "baggage".'[10]

Regardless of whether we consider that the rules have met their stated goal, it is clear that if we ignore the rules, then the consequence may be that the evidence of the experts may be rejected. This will impact both on the client and the lawyer, with potential liability for the resulting adverse outcome. ■

Notes: **1** The rules came into effect on 2 July 2004. **2** *Access to Justice* final report by the Right Honourable the Lord Woolf, Master of the Rolls, July 1996. **3** *Ibid*, chapter 13. **4** Part 35 of *Civil Procedure Rules* 1998 (UK). **5** Unreported, Supreme Court, Mackay 30 October 2006. **6** [2008] QSC 203. **7** Unreported – Supreme Court, Rockhampton, number 467/208. **8** [2009] QSC 192. **9** The Hon Justice McMeekin Keynote Address: 'Expert Evidence and the Expert Evidence Rules. Why, What and Where To from Here?' ALA Qld State Conference 2010. **10** Gary Edmond, 'Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure', *Law and Contemporary Problems*, Vol. 73, (Winter 2009): 159.

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COSTS UPDATE

Retainer and disclosure issues

By Peta Solomon

The decision of the Court of Appeal in *Boyce v McIntyre*[1] is of substantial significance in relation to the proper compliance with disclosure provisions relevant to personal injury matters.

The court considered the definition of 'costs' in s302(1) and held that a costs assessor *does not have power* to determine the amount of GST payable on legal costs.[2] The court held:

> '[51] The costs assessor, the Panel and Harrison AsJ all held that the assessor had that power. I disagree. By the Act, a costs assessor is empowered to assess costs that are defined by s302(1) as including "fees, charges, disbursements, expenses and remuneration". GST does not fall under any of these categories and does not come within the ambit of legal costs. GST is an issue in respect of taxation, not legal costs.'

This decision has important implications, including in relation to the importance of compliance with the disclosure provisions.[3] While a practitioner would retain a contractual right to recover GST under a costs agreement which so provides, that right would now presumably have to be enforced in another forum. Difficulties may arise where there has been some defect in disclosure. In such circumstances, where a costs agreement is set aside and the practitioner is entitled only to claim their fees on a *quantum meruit* basis, and is limited to the assessment system to do so,[4] a practitioner may not have another avenue to recoup GST that the practice is liable to remit on those fees. Until the case is overruled or legislative amendments requested by the Law Society are introduced, it is even more critical that practitioners be vigilant in respect of compliance with disclosure provisions.

The case also has implications for disclosure and estimates in litigious matters. Section 309(1)(f) *Legal Profession Act* 2004 (LPA) provides that additional disclosure is required in a litigious matter of an estimate of:

> '(i) the range of costs that may be recovered if the client is successful in the litigation, and

(ii) the range of costs the client may be ordered to pay if the client is unsuccessful'.

And, upon settlement, the law practice is required under s313(1) LPA to disclose:

'(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay), and

(b) a reasonable estimate of any contributions towards those costs likely to be received from another party.'

As GST can form a substantial component of the costs payable and, importantly, recoverable, the client's net result 'in hand' may be significantly affected by a failure to provide properly based estimates with regard to the impact of *Boyce*. Many practitioners provide only a general statement, to the effect that the full costs will not be recoverable and, in some instances, provide a statement as to the likely percentage recovery of costs by the client if successful. Section 309(2)(f)(ii) is frequently not adequately complied with.

Urgent and retrospective amendments have been sought in relation to the power to include GST in the assessment of costs. However, if retrospective, there may be significant consequences for assessments, certificates issued and judgments previously entered. It may be complex and costly to overturn these determinations, having regard to the fact that rights of appeal in relation to determinations issued since the judgment in *Boyce* may have expired.

For parties liable to pay costs and practitioners negotiating costs at this time, regard should be had to the excluding of GST from costs offers and costs negotiations.

EFFICIENT RESOLUTION OF COSTS CLAIMS

Gross sum order applications

Large medical negligence matters can take many months, and sometimes longer to resolve the question of costs, giving rise to substantial costs and delay. Consideration should be given, in appropriate cases, to an application for a gross sum order. The court has power to make such an order under s98(4)(c) CPA.

Consider an application for gross sum orders in circumstances where:

- the costs of assessment relative to the overall costs are likely to be substantial;
- the costs and delays involved in a full assessment of costs would be substantial;
- there is some urgency with respect to recovery of costs; in particular, in circumstances where the party liable is a corporation or individual who may deal with assets in the interim in a manner that undermines recovery; and
- circumstances where the costs involved are substantial and the party liable is uninsured or impecunious, such that there is unlikely to be recovery of all or a proportion of the costs, and where incurring the costs of assessment would be 'throwing good money after bad'.[5]

The relevant principles are set out in *Idoport Pty Limited v National Australia Bank Limited*[6] by Einstein J at [9]. Applications for gross sum orders must be carefully prepared, preferably supported by an affidavit by the solicitor with conduct and an expert report relating to the likely party:party recovery of the costs claimed. This must be sufficient to meet the following principles referred to by Einstein J:

'ii. the touchstone requires that the Court be confident that the approach taken to estimate costs is logical, fair and reasonable: *Beach Petroleum* at [16];

iii. the fairness parameter includes the Court having sufficient confidence in arriving at an appropriate sum on the materials available: *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738 per Giles JA at para [22]; [following (*Wentworth v Wentworth* (CA, 21 February 1996, unreported, per Clarke JA) and adopted in *Sony Entertainment v Smith* (2005) 215 ALR 788; [2005] FCA 228 ... at para [199]]'

Recovery of costs by way of a deed

In a number of instances, practitioners have attempted to enter into a deed to secure payment of their costs in a variety of circumstances and in an attempt to reach finality as to their costs. Such a deed may, in certain circumstances, be regarded as a costs agreement and may need, in order to be enforceable, to comply with all the disclosure provisions of the LPA. In *Amirbeaggi v Business in Focus (Australia) Pty Ltd*[7] a deed was entered into by clients and their legal practitioners to acknowledge a debt for legal costs. Brereton J held that such a deed, which also provided for how the costs were to be paid was a costs agreement. However, as such, the agreement was void as barring the right to costs assessment, in breach of s327 of the LPA. The proceedings to recover under the deed were also an abuse of process under s355(b) of the LPA, which prevents a law practice from commencing or maintaining proceedings until a pending costs assessment has been completed.

Brereton J did, however, indicate that certain factors could enable proceedings based on a practitioner's entitlement to costs, to be characterised as other than proceedings for recovery of costs. These factors included a compromise of previous legal proceedings; a compromise involving other matters as well as costs; a compromise accepting in respect of costs a substantially lesser sum; and legal advice to the client at the time of the compromise. Practitioners considering this course should also have regard to *Koutsourias v Metledge*[8] in relation to the matters to which a court may have regard when determining these questions. ■

Notes: **1** [2009] NSWCA 185. **2** *Ibid,* at [50]-[51]. **3** See ss309-16 *Legal Profession Act* 2004 (LPA). **4** See s317 LPA. **5** See *Hamod v State of New South Wales* (No. 13) [2009] NSWSC 756. **6** [2007] NSWSC 23. **7** [2008] NSWSC 421. **8** [2004] NSWCA 313.

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