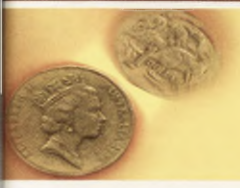

Mediation costs

By Peta Solomon

Medical negligence cases often involve mediation, the costs of which can be substantial. They will not necessarily be confined to the costs of the day, but can include the preparation of position papers, damages schedules, mediation briefs, research and conferences. Where a mediation is adjourned, there may be multiple attempts to mediate settlement such that the mediation costs extend over a lengthy period and incorporate significant work between adjourned mediation attempts.

Practitioners should be aware of s28 *Civil Procedure Act* 2005 (CPA), which provides:

> 'The costs of mediation, including the costs payable to the mediator, are payable:
> (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
> (b) in any other case, by the parties in such proportions as they may agree among themselves.'

Often in the lead-up to mediation, parties make arrangements as to the costs of the mediation, and may agree on the funding of certain components such as the mediator's fees and venue hire. If, properly interpreted, the arrangements entered into by the parties are considered to be an agreement falling within s28(b), then a general order as to costs may not include the costs of the mediation. In costs terms, mediation costs extend beyond the costs of the day, but will include preparatory work, as well as reporting conferences and correspondence thereafter. Care should be given as to whether it is in your client's interest to enter into an agreement as to the costs of the mediation, which would displace the effect of a general order as to costs at the conclusion of the proceedings. Consideration should therefore be given to whether an agreement should be made as to costs and, if so, whether it should include terms such as:

- 'The costs of the mediation are to be borne equally between the parties.' In this event, irrespective of the outcome of the proceedings, the costs of the mediation may be excised from the general costs of the proceedings. The party who succeeds and obtains a costs order, or settles the proceedings on such terms, will not be entitled to claim its costs from the party liable under the general costs order. Where this is intended, the scope of the work covered by the agreement should be carefully considered.
- 'The costs of the mediation are to be costs in the cause.'
- 'The costs of the mediator and/or room hire, etc, will be borne in specified proportions by the parties, irrespective of the outcome of the proceedings.'
- 'The costs of the mediator and/or room hire, etc, are to be funded on an interim basis by the parties on an equal basis, but the costs of the mediation are to be costs in the cause.'

Where there is evidence of an agreement or arrangement, a question may arise as to its construction. This may give rise to costly debate as to whether it was the parties' intention that the costs of the mediation be part of the costs of the proceedings, as was the case in *Mead v Allianz Australia Insurance Ltd*,[1] in which the arrangements were construed so as to exclude the costs of the mediation from the general costs of the proceedings.

Practitioners should consider whether the mediation should be conducted external to the court processes, or be court-ordered. Different positions may apply where a mediation is external to the court processes. Where a party seeks orders to exclude the costs of a mediation, and/or seeks a specific order as to the costs of a mediation, costs in mediations that are court-ordered or conducted under the auspices of the court are more likely to be regarded as part of the court proceedings and an entitling order made. In *Medulla v Abdel Hameed*,[2] in which the plaintiffs submitted that a costs order should include the costs of mediation, Austin J noted:

> 'With respect to the costs of mediation, in normal circumstances, the parties make their own arrangements for payment. The mediation did not take place as a result of any direction by the court, although I encouraged it. In all the circumstances, I think the ordinary situation should obtain. I shall, therefore, not make an order with respect to recovery of the costs of mediation.'

Since the introduction of s28 CPA, there is some question as to whether, in order to recover the costs of a mediation where there was no agreement, a specific order needed to be obtained in relation to these costs for the party generally entitled to costs to be able to claim the costs of the mediation. Some assessors would allow the costs as costs of the proceedings, while others would not unless there was a court order specifically dealing with those costs.

Recently, however, in *Newcastle City Council v Paul Wieland*,[3] the court considered whether, without sufficient evidence as to any agreement between the parties as to the costs of the mediation, an order for the 'costs of the proceedings' will include the costs of a mediation or whether s28 requires that there be a specific order as to these costs, or they will not be recoverable. In that case, where it was determined that the mediation was part of the court proceedings, and there was no evidence as to any agreement to the contrary, orders providing for the 'costs of the proceedings' included the mediation costs.

Practitioners should consider whether, where a mediation has taken place, specific orders should be obtained at the conclusion of the proceedings to ensure that mediation costs are either excluded or included or whether there is a basis for the mediation agreement to be varied. The latter situation might apply where, for example, it has been agreed that costs will be borne equally, but the proceedings are later dismissed >>

for want of prosecution, or in other circumstances where the costs of mediation were wasted, such as where a defendant attends with no instructions to make any offer.

Where it is determined to make special arrangements as to the costs of the mediation, care should be taken where a mediation is either concluded or adjourned but negotiations continue, and/or where there are multiple mediations and intervening negotiations. In the event that the costs of mediation are to be excluded from the general costs of the proceedings by arrangement, issues may arise as to the scope of the exclusion. Authorities support the position that the costs of attempts to arrive at a compromise – that is, settlement negotiations – are properly regarded as costs of 'the proceedings'.[4] If it is intended that the mediation 'process' costs are not to be costs in the cause, the agreement should be clearly stated, and also that relevant work can be readily identified for the purposes of costs claims and negotiations as to costs.

In addition to the CPA, several legislative provisions in NSW address the issue of the costs of mediation and should be considered if applicable.[5] ■

Notes: **1** [2007] NSWSC 500. **2** [2003] NSWSC 747. **3** [2009] NSWCA 113. **4** See *Higgins v Nicol (No 2)* (1972) 21 FLR 34 at pp57-8 per Joske J and *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629. **5** See, *inter alia*, s104 *Administrative Decisions Tribunal Act* 1997; reg 46 *Dust Diseases Tribunal Regulation* 2007.

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WINDMILLS OF MY MIND

SEX, LIES and HIV

By Andrew Stone

Australia has seen substantial litigation over transmission of the HIV virus. Both the Red Cross and a medical practitioner have been sued. However, as far as I am aware, there have not yet been any civil cases reported within Australia where one sexual partner has sued another in relation to the transmission of the HIV virus.

Does a cause of action exist for the transmission of the HIV virus between sexual partners? As with most tort problems, it is useful to return to the *Shirt* calculus:

1. Is there a duty of care?
2. Has the duty been breached?
3. Is the breach causative of injury?

The first question is easy. The existence of a duty to avoid sexually transmitting disease has been long recognised at law. In *Hegarty v Shine* [1878] 2 LR 1R 273, the Irish Supreme Court recognised that a duty of care was owed to avoid transmitting disease during intercourse. The unfortunate plaintiff lost only because the Irish court would not recognise the existence of the duty when the intercourse had taken place outside of marriage!

As to the second question (breach), where there is actual knowledge by one partner that they have an STD, it would be a breach of the duty owed to engage in unprotected sex, which is likely to transmit disease.

Further, it is probably also an act of battery, as the non-disclosure of the risk of transmission of disease vitiates the other party's informed consent.

More interesting is the issue of whether there can be breach on the basis of constructive knowledge. This is where the defendant does not know that they are infected, but might reasonably suspect that they are on the basis of participation in unprotected, high-risk sexual activity. A variety of US state jurisdictions have accepted that a plaintiff can sue for transmission of STDs on the basis of constructive knowledge on the part of the defendant. One of the arguments in favour of holding defendants liable for constructive knowledge is to remove any incentive for them to avoid diagnosis and treatment, and therefore avoid the liability that would flow from knowledge of infection.

The most challenging aspect of establishing liability may be causation. The plaintiff has to prove that s/he was infected by the defendant. It becomes very hard for a sexual partner who has not been monogamous to prove that it is the cheating partner rather than themselves who has brought the disease into the relationship.

There have been numerous US cases involving the negligent spread of STDs (including HIV). The cases have ranged from those involving celebrities such as Rock Hudson and Magic Johnson to Bridget B, who sued her husband John B in California for infecting her with HIV. Bridget B was awarded $12.5 million in November 2008 after her husband engaged in unprotected male/male sex outside their marriage while insisting that they not use a condom during marital sex. Before the damages trial, the Bridget B case saw a lengthy judgment from the California Supreme Court (with three dissenting opinions) holding that Bridget was entitled to discovery of John's prior sexual conduct. Not your average set of interrogatories!

Why are there no Australian cases about the spread of disease within marriage? It could be a shortage of monogamous plaintiffs who can satisfactorily establish causation. A far more likely reason is the shortage of defendants with liquid assets. The transmission of disease within a sexual relationship and especially within marriage is unlikely to be covered by any form of insurance. It is only where the relationship has ended and the defendant has sufficient assets to justify suit that litigation would be possible. ■

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