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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