Young v Central Australian Aboriginal Congress Inc & Ors [2009] NTSC 36

PARTIES:	YOUNG, ROSARIO v CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INCORPORATED and JOHN DOMINIC BOFFA and NOEL ROBERT MORRISON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	61 of 2003 (20303381)
DELIVERED:	23 July 2009
HEARING DATES:	27 January and 13 March 2009
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	P Barr QC with A Lindsay
First Defendant:	S Gearin
Second Defendant:	M Abbott
Third Defendant:	M Abbott

Solicitors:

Plaintiff:	Povey Stirk
First Defendant:	Collier & Deane
Second Defendant:	Cridlands MB Lawyers (Morgan Buckley)
Third Defendant:	Cridlands MB Lawyers (Morgan Buckley)

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Young v Central Australian Aboriginal Congress Inc & Ors [2009] NTSC 36 No. 61/03 (20303381)

BETWEEN:

YOUNG, Rosario
Plaintiff

AND:

CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INC
First Defendant

BOFFA, John Dominic
Second Defendant

MORRISON, NOEL ROBERT
Third Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 July 2009)

[1] On 19 November 2008, I delivered written reasons with respect to the substantive issues. The parties were granted liberty to apply on the question of costs. The parties are not in agreement on the issue of costs. The question of costs was further argued.

[2] The plaintiff's amended Minute of Orders filed on 27 January 2009 seeking costs reads as follows:

"1. The first defendant is to pay the plaintiff's costs and disbursements to be taxed in default of agreement or otherwise as determined by the Court:-

1.1 of the plaintiff's proceeding against the first defendant;

1.2 of the plaintiff's proceeding against the second defendant; and

1.3 of the plaintiff's proceeding against the third defendant.

2. The plaintiff's costs are payable on the indemnity basis pursuant to SCR 26.08(2).

3. Alternatively to 2., the plaintiff's costs are payable on the standard basis until 20 March 2006, and thereafter on an indemnity basis pursuant to SCR 48.12(12)(b) and/or SCR 26.08(2).

4. The plaintiff's costs are certified as fit for Senior and Junior Counsel pursuant to SCR 63.72(9)(b).

5. The first defendant is to pay the second defendant's costs to be taxed in default of agreement or otherwise as determined by the Court.

6. There is no order as to costs of the third defendant, Dr Morrison. Alternatively the first defendant is to pay the third defendant costs to be taxed in default of agreement or otherwise as determined by the Court."

[3] The plaintiff was granted leave to discontinue her action against Dr Morrison the third defendant on 8 March 2007 which was approximately one year prior to the commencement of the hearing of her claim against the first and second defendant. On 15 March 2007, Riley J made an order that the question of the third defendant's costs of the discontinuance be reserved for the consideration of the trial judge. The terms of orders made in the judgment delivered on 19 November 2008 were as follows:

The plaintiff succeeded against the first defendant in respect of the first defendant's breach of duty of care to the deceased in that the first defendant failed to follow up the deceased's diagnosis and treatment. The first defendant's claim for contributory negligence by the plaintiff was successful. The amount awarded to the plaintiff against the first defendant was reduced by 50 percent to reflect the aspect of contributory negligence. The plaintiff's claim against the second defendant was unsuccessful and Judgment was entered in favour of the second defendant against the plaintiff.

[4] I will deal with each of the claims for costs

1.1.1 The first defendant is to pay the plaintiff's costs and disbursements to be taxed in default of agreement or otherwise as determined by the Court of the plaintiff's proceeding against the first defendant

[5] With respect to the plaintiff's claim for costs of the plaintiff's proceeding against the first defendant, the submission on behalf of the plaintiff is for an order for costs against the first defendant on an indemnity basis. I agree with the submission made by Ms Gearin, on behalf of the first defendant, that a substantial part of the hearing was taken up with respect to the plaintiff's claim against the second defendant. In addition to this the first defendant succeeded in establishing that the plaintiff's contributory negligence amounted to 50 percent.

[6] It is the position on behalf of the first defendant that there should be a 50 percent reduction made in the costs awarded in favour of the plaintiff to take account of the time spent on the issue of contributory negligence in which the first defendant was ultimately successful. Further, the submission for the first defendant is that the first defendant should not have to bear the costs of the second defendant.

[7] The primary principle is that costs follow the event and a successful party is entitled to costs against an unsuccessful party unless there are special circumstances justifying some other order.[1]

[8] During the course of argument on the issue of costs it was drawn to my attention that on 25 January 2008, which was prior to the commencement of the hearing of this matter, the plaintiff served a Notice of Offer of Compromise offering to settle the claim for $180,000. Notice of Offer to Compromise 25 January 2008 $180,000 attached to the plaintiff's submissions – costs 7 January 2009. This offer was not accepted by the first defendant. This amount was less than the amount of $236,972 which was ultimately awarded to the plaintiff, against the first defendant, after allowing for a discount in the order of 50 percent for contributory negligence by the plaintiff. At an earlier time the plaintiff had made an even more favourable offer to the defendants which was refused (Order 48 conference).

[1] See Order 63 Supreme Court Rules.

[9] The consequence of a failure to accept an offer of compromise are set out in Order 26.08. The relevant parts of that Rule are 26.08(1) and (2) of the Supreme Court Rules:

> **"26.08 Costs consequences of failure to accept**
>
> (1) This rule applies to an offer of compromise which has not been accepted at the time of verdict or judgment.
>
> (2) Where an offer of compromise is made by a plaintiff and not accepted by the defendant and the plaintiff obtains a judgment on the claim to which the offer relates not less favourable to him than the terms of the offer, then, unless the Court otherwise orders, the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim taxed on the indemnity basis."

[10] I accept the submission made by Mr Barr QC, for the plaintiff, that in making the offer of compromise the plaintiff had to assess her risks in the litigation and reflect that in the offer. The risk of a finding of contributory negligence was one of those factors. Accordingly, I have concluded that the fact the first defendant had refused such an offer means the first defendant cannot now succeed in the assertion that costs should be reduced, when the ultimate final award was greater than the offer of compromise made by the plaintiff before trial.

[11] I consider the plaintiff is entitled to an order for costs against the first defendant on a standard basis until 20 March 2006 when the first offer to compromise was made and thereafter on an indemnity basis pursuant to SCR 48.12(12)(b) and SCR 26.08(2).

[12] It is submitted by Mr Barr QC that the plaintiff's costs be certified as fit for two Counsel pursuant to SCR 63.72(9)(b) which states as follows:

> "63.72(9) No fee shall be allowed:
>
> .....
>
> (b) for more than one counsel, unless the Court certifies that the retainer of more than one counsel was warranted."

[13] Ms Gearin, on behalf of the first defendant, argues that the factual and legal issues in this matter were not complex and the defendants did not seek to argue the plaintiff's calculations relevant to quantum.

[14] I consider there were in fact complex factual issues particularly with respect to medical evidence and the factual basis for the opinions formed by the various experts. It was only after extensive examination in chief and cross examination by Mr Barr QC that the evidence relating to the responsibility for follow up of the deceased emerged. The subsequent submissions dealt with the principles of law to be applied to those facts. There was essentially no challenge by the defendants to the very careful and detailed calculations made by Mr Lindsay for the plaintiff with respect to the quantum of damages. The court accepted Mr Lindsay's calculations.

[15] Both liability and damages were complex matters and I would certify for two counsel for the plaintiff.

1.1.2 The first defendant is to pay the plaintiff's costs and disbursements to be taxed in default of agreement or otherwise as determined by the Court of the plaintiff's proceeding against the second defendant.

and

5. The first defendant is to pay the second defendant's costs to be taxed in default of agreement or otherwise as determined by the Court.

[16] The plaintiff did not succeed against the second defendant but seeks a Bullock/Sanderson order against the first defendant to include the costs of the plaintiff's proceedings against the second defendant and the costs of the second defendant which the plaintiff would otherwise be liable to pay. This claim is made on the basis that it was reasonable for the plaintiff to have commenced and continued proceedings against the second defendant, further that it was justified by the first defendant's conduct which was such as to make it fair to impose liability on it for costs of the successful defendant.

[17] Counsel for the plaintiff, Mr Barr QC, referred to a number of passages in the substantive judgment and the conclusion that the failure to follow up the patient's diagnosis and treatment did not rest with the second defendant but rather was a result of a systems failure for which the first defendant was liable.

[18] It was argued on behalf of the plaintiff that the matters exculpatory of the second defendant did not become apparent until the trial and the evidence given by Dr Boffa and Dr Janusic. It was further argued that these matters had not been properly raised on the pleadings by either the first or second

defendant. The first defendant had never conceded it was their duty to ensure follow up occurred but had maintained that the follow up duty (if it existed) was that of the second defendant Dr Boffa.

[19] Mr Barr QC referred to the findings in the judgment that it was the first defendant which had control and management of the Congress systems. It was the first defendant which took away the responsibility upon an individual doctor to follow up a patient.

[20] Mr Barr QC referred to the decision in *Sanderson v Blyth Theatre Co*,[2] and *Gould v Vaggelas*.[3] He submitted the true position is as stated by Blackburn CJ in Steppke v National Capital Development Commission[4] at 30-31:

> "…there is a condition for the making of a *Bullock* order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant. In *Bullock v London General Omnibus Co* [1907] 1 KB 264 at 269; [1904–7] All ER Rep 44, Collins M R said: "The common sense underlying this order is clear, because the learned judge when he made it has before him evidence that, *owing to the attitude taken up by the General Omnibus Company*, it was reasonable for the plaintiff to join the other defendants."
>
> In *Hong v A & R Brown Ltd* [1948] 1 KB 515, the court unanimously dismissed an appeal against a judge's refusal to make a *Bullock* order. Lord Greene MR said, at p 518: "The judge appears to have taken the view that it was reasonable for the plaintiffs from their point of view to make both these parties defendants to the action. He said a little lower down: 'It was reasonable from the plaintiffs' point of view, *but it was not reasonable that* (the unsuccessful) defendant *should be penalized*.'"

[2] [1903] 2 KB 533
[3] (1985) 157 CLR 215
[4] [1978] 21 ACTR 23

> In *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation* (1948) 77 CLR 544, Dixon J said at 566: "In all the circumstances of this case I think the plaintiffs took a reasonable and proper course in joining Hallows as a defendant *and they were induced to do so by the erroneous attitude adopted by the defendant shire*."
>
> In all these quotations I have emphasized the words which are material to the point I am now making. In my opinion they express a principle always applicable to the making of a *Bullock* order or a *Sanderson* order. It was agreed that in the case before me the difference between these two kinds of order was immaterial. Notwithstanding counsel's submission, I find nothing in the conduct of Citra, either before or after the writ was issued, which make it reasonable or fair that Citra should bear any liability for the costs of the successful defendants."

[21] Mr Barr QC also referred to the decision of Gibbs CJ in *Gould v Vaggelas*:[5]

> "The ground on which a Bullock order may be made is, in my opinion, more accurately stated in a passage in *Sanderson v. Blyth Theatre Co*,[6] which was cited with approval in *Bullock v London General Omnibus Co.*[7] and *Hong v. A. & R. Brown Ltd*,[8] viz., that the costs which the plaintiff has been ordered to pay to the defendant who succeeded, and which the plaintiff recovers from the defendant who has failed 'are ordered to be paid by the unsuccessful defendant, on the ground that … those costs have been reasonably and properly incurred by the plaintiff as between him and the [unsuccessful] defendant'. In *Johnsons Tyne Foundry Pty Ltd v Maffra Corporation,*[9] stated the principle in a similar way, and Starke and Dixon JJ, in giving their reasons for making a Bullock order, both relied on the circumstances that the attitude adopted by the successful defendant had induced the plaintiff to join the other defendant: see at pp 559–60, 566. In my respectful opinion the true position was clearly stated by Blackburn CJ in *Steppke v National Capital Development Commission*,[10] when he said that 'there is a condition for the making of a Bullock order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant

[5] (1985) 157 CLR 215 at 229-230.
[6] [1903] 2 KB 533 at 539.
[7] [1907] 1 KB 264 at 272.
[8] [1948] 1 KB 515 at 522.
[9] (1948) 77 CLR 544 at 556 Williams J, at pp 572–3.
[10] (1978) 21 ACTR 23 at 30-1.

has been such as to make it fair to impose some liability on it for the costs of the successful defendant'".

See also the decision of Mildren J in *Renehan v Leeuwin Ocean Adventure Foundation.*[11]

[22] It is submitted on behalf of the plaintiff that it was reasonable to sue the second defendant and the conduct of the first defendant has been such as to make it fair to impose some liability on it for the costs of the second defendant.

[23] It is the submission of Ms Gearin, on behalf of the first defendant that the plaintiff's application for Bullock/Sanderson order against the first defendant should fail.

[24] Ms Gearin argued that in these proceedings the first defendant had done nothing which could reasonably be said to be reason for the plaintiff to continue its proceedings against the second defendant. Nor had the first defendant done anything which makes it fair and reasonable that it should indemnify the plaintiff against the costs that the plaintiff must pay to the successful second defendant.

[25] Counsel for the first defendant points to the fact that the second and third defendant were brought into the litigation from the outset. It is the contention on behalf of the first defendant that the reasons for joining the

[11] (2006) 198 FLR 366 par 20-22.

second and initially the third defendant, was that the plaintiff desired to take a chance of obtaining an additional, not an alternative, party against whom it might recover. Ms Gearin argued on behalf of the first defendant that there is nothing in the pleadings which could reasonably be said to suggest that there was any conduct or act on behalf of the first defendant which was a cause of the plaintiff continuing its claim against the second defendant. It is asserted that at trial the case for the plaintiff was not pursued against the first and second defendant in the alternative but damages were sought against both defendants.

[26] Ms Gearin on behalf of the first defendant submitted that her client had two policies of insurance. One in relation to the medical practitioners for medical malpractice. The findings of the Court were that there was no medical malpractice by an employed medical practitioner. Ms Gearin's point is that had there been such a finding, then it would be unjust and inequitable that the first defendant be liable for costs.

[27] The second point made by Ms Gearin is that under the policy of insurance the first defendant could not make any admissions in respect of the doctors. For this reason, it is argued on behalf of the first defendant they should not have orders made against them for indemnity costs because they were constrained by the insurance policies.

[28] Ms Gearin referred to the fact that the first defendant had never argued a case against Dr Boffa. The only contribution notice that had been filed was

in relation to s 22A of the Law Reform (Miscellaneous Provisions) Act that the employee shall not be liable to indemnify the employer in relation to vicarious liability unless the employee is otherwise indemnified in relation to his liability.

[29] I do not accept that the submissions made on this issue on behalf of the first defendant are an adequate answer to the plaintiff's claim for a Sanderson/Bullock order.

[30] I agree with the argument presented by Mr Barr QC that the plaintiff and her lawyers reasonably and properly sued the second defendant because:

1) he was a medical practitioner who saw the deceased and correctly identified a coronary (ischaemic) cause for the deceased's symptoms and history, yet

2) he did not follow up on the deceased's diagnosis and treatment.

[31] The judgment found that the second defendant did not have a duty to follow up because the system put in place by the first defendant took this responsibility away from the second defendant and the "opportunistic follow up system" put in place by the first defendant was inherently unreliable.

[32] I agree that the matters exculpatory of the second defendant did not emerge until the trial and in particular until Dr Boffa and Dr Janusic had given evidence.

[33] The first defendant did not raise anything in the pleading that would have alerted the plaintiff to the fact that it was the first defendant and not the individual doctors who had the responsibility to follow up diagnosis and treatment.

[34] At the trial the first defendant denied it had a duty to follow up beyond the advice given and appointments made by Dr Boffa on 2 March 2000. The first defendant contended if there was a duty to follow up then that fell to Dr Boffa. The findings made at the conclusion of the trial were that it was the first defendant that had the management and control of the Congress systems. It was the first defendant which took away the responsibility upon an individual doctor to follow up a patient.

[35] I prefer the argument put by Mr Barr QC that s 22A(1)(b) of the Law Reform (Miscellaneous Provisions) Act does not afford the first defendant any defence against the plaintiff's claim nor does it undo the first defendant's vicarious liability.

[36] Mr Barr QC also made the point with respect to the constraints Ms Gearin argued were imposed on the first defendant under the insurance policy. This is because the third party, the insurance company, denied liability to indemnify under the policy. I would agree that the first defendant was not bound by the terms of a policy which the insurer had declined to honour. Mr Barr QC also pointed to the pleadings in which the first defendant denied it could be vicariously liable for the actions of its doctors. This was more

than was required if the policy of insurance was binding upon the first defendant. There is no evidence that the first defendant approached their insurers to discuss the matter or seek that any such constraints be relaxed in the circumstances.

[37] Finally, I would also agree with counsel for the plaintiff that whilst the case against Dr Boffa was unsuccessful, it was necessary to elicit all of the evidence in order to establish the duty of care owed by the first defendant to the plaintiff and any breach of it. Whilst the evidence in chief of Dr Boffa and the subsequent cross examination occupied a substantial amount of Court time, there was a significant overlap of the interests of the first defendant and the second defendant in such evidence. I do not think it realistic to make any adjustment of costs because of this.

[38] I consider in these circumstances the plaintiff is entitled to the orders sought on her behalf that the first defendant pay the plaintiff's cost and disbursement to be taxed in default of agreement of the plaintiff's proceeding against the second defendant and that the first defendant should pay the second defendant's costs to be taxed in default of agreement or otherwise as determined by the Court.

1.1.3 The first defendant is to pay the plaintiff's costs and disbursements to be taxed in default of agreement or otherwise as determined by the Court of the plaintiff's proceeding against the third defendant.

6. There is no order as to costs of the third defendant Dr Morrison; alternatively, the first defendant is to pay the third defendant's costs to be taxed in default of agreement or otherwise as determined by the court.

[39] In making this particular application for costs, Mr Lindsay on behalf of the plaintiff, makes application for an "other order" pursuant to Order 63.11(9) of the Supreme Court Rules which qualifies the standard position expressed in Order 63.11(6):

> "**63.11 No order for costs required in certain cases**
>
> (6) A party who discontinues a proceeding or with-draws part of a proceeding, counterclaim or claim by third party notice shall pay the costs of the party to whom the discontinuance or withdrawal relates to the time of the discontinuance or withdrawal.
>
> …
>
> (9) This rule is subject to such other order as the Court makes."

[40] Mr Lindsay raised the following issues to be determined by the Court:

> "(a) Whether the plaintiff should be awarded costs against the third defendant, Dr Morrison even though the proceedings were discontinued against him, following investigation?
>
> (b) If so, should there also be a Bullock/Sanderson order against the first defendant in respect of those costs?
>
> (c) Alternatively, should Dr Morrison be awarded costs of the discontinued action, including some portion of them on an indemnity basis, as is submitted on his behalf?

(d) If Dr Morrison should receive some costs of the proceedings against him, should they be paid by the first defendant, via a Bullock/Sanderson order?

(e) Alternatively, should the plaintiff and Dr Morrison each bear their own costs of the proceedings (with the obvious consequence that the liability of Congress for a Bullock/Sanderson order need not be considered in relation to Dr Morrison)?"

[41] Ms Gearin, on behalf of the first defendant, seeks an order:

(1) that the costs of Dr Morrison and the costs of the argument on who should pay those costs should be borne by the plaintiff.

(2) that the plaintiff's application for a Bullock/Sanderson order against the first defendant be dismissed.

[42] Mr Abbott, on behalf of Dr Morrison, submits that there is no basis for an order that:

(a) Dr Morrison pay the plaintiff's costs; or

(b) there be no order as to costs.

[43] Mr Abbott seeks an order that the plaintiff pay Dr Morrison's cost pursuant to Order 63.11(6) on an indemnity basis. The position for Dr Morrison, as outlined in Mr Abbott's written submission, is as follows:

> "If the Court should decline to make a *Sanderson* order against Congress, Dr Morrison seeks an order that the general costs of the action for which Congress is liable to the plaintiff be charged with the plaintiff's liability to Dr Morrison for costs and that Congress pay the costs for which it is liable to the plaintiff into Court until further order.

> As to the plaintiff's application for a Sanderson order against Congress, Dr Morrison takes the same stance as Dr Boffa on that issue, namely that he is content to abide the event."

Background Facts Relating to the Joinder of Dr Morrison as the Third Party

[44] I refer to the affidavit of Geoffrey John Stirk sworn 17 February 2009 and the affidavit of Alison Phillis sworn 5 March 2007.

[45] The affidavit of Mr Stirk annexes a letter from Mr Peter Barr dated 5 October 2002.

[46] In his letter dated 5 October 2002, Mr Barr discusses in some detail the role of Dr Morrison. It was Dr Morrison who saw the deceased at Congress shortly before the deceased died on 26 January 2001.

[47] Mr Barr concludes in this letter that Dr Morrison was negligent in his treatment of the deceased in that he failed to obtain a proper history and failed to carry out a proper and thorough examination. In addition to this Dr Morrison was referring to the file of the deceased's father who bore the same name as the deceased and did nothing to obtain the correct files. Mr Barr referred to the comments of the Coroner who, following an Inquest, was very critical of the actions of Dr Morrison. However, Mr Barr advised that this was not a sufficient basis to commence an action against Dr Morrison as there was an onus on the plaintiff to prove on the balance of

probabilities that the negligence of Dr Morrison caused the death of the deceased.

[48] Mr Barr recommended obtaining an expert opinion from an intensive care specialist or from an emergency medicine specialist. He suggested certain questions the specialist could be asked on the issue of causation. Mr Barr suggested that once such opinion had been obtained then a decision could be made whether or not the negligence of Dr Morrison caused the death of the deceased. The opinion from Mr Barr went into further details concerning the role of Congress and Dr Boffa.

[49] Mr Barr enclosed a draft Statement of Claim proposing the plaintiff proceed only against the first defendant. His recommendation was that the pleading not be settled until the receipt of the two suggested expert reports. He also raised other matters with respect to Dr Boffa and Dr Morrison suggesting enquiries be made about their respective medical insurance.

[50] On 28 February 2003, the plaintiff issued a Statement of Claim against three defendants, namely Congress, Dr Boffa and Dr Morrison.

[51] On 18 March 2003, solicitors for the plaintiff served the Statement of Claim on the first defendant. In letter of the same date, solicitors for the plaintiff advised they would only pursue the medical practitioners individually in the event the first defendant claimed they were not servants and agents of the

first defendant. The letter requested the first defendant not provide a copy of the claim to either the second or third defendant at this stage.

[52] A letter dated 7 June 2006 from Mr Barr QC, is annexure "D" to the affidavit of Mr Stirk sworn 17 February 2009. In this letter, Mr Barr QC refers to two expert reports, one from Dr Sangster dated 28 October 2003 and one from Dr Adjani dated 25 February 2003 the latter had been received by solicitors for the plaintiff on 3 March 2003. The plaintiffs had in fact served the Statement of Claim on Dr Morrison in May 2003 irrespective of the report from Dr Adjani dated 25 February 2003 in which Dr Adjani concluded that whatever may have been the failings of Dr Morrison, they did not alter the fatal outcome. At paragraph 10 of his affidavit, Mr Stirk deposes as follows:

> "On 16 May 2003 Mr Anderson of my firm had a telephone conversation with Mr. Ted Sinoch of Collier & Deane. Mr Sinoch advised Mr Anderson he was acting for Congress and that Ms Short of De Silva Hebron was acting for the insurer. He advised that there was an argument between Congress and its insurer as to insurance coverage. Mr Sinoch indicate that his client wished us to serve the two doctors but that they would accept vicarious liability because the doctor were employees of Congress. He also advised that Congress did not have sufficient funds or assets to satisfy a judgement. Annexed and marked with the letter "C" is a copy of Mr Anderson's file note of that conversation."

[53] All parties attended an unsuccessful settlement conference in June 2006.

[54] In his letter dated 7 June 2006 to solicitors for the plaintiff, Mr Barr QC referred to the failed settlement conference. Mr Barr QC advised the need

to discontinue against Dr Morrison. The letter goes into considerable detail as to the reasons for this, including a review of the expert evidence on the issue of causation. Mr Barr QC concluded that the claim against Dr Morrison would fail because the plaintiff would not be able to satisfy the Court on the balance of probabilities that the negligent actions of Dr Morrison caused the death of Clive Impu.

[55] Mr Barr QC advised negotiating a discontinuance on the basis that no costs are sought by the third defendant's lawyers. Mr Barr QC advised solicitors for the plaintiff that if they could not obtain that result then he would wish to be involved in arguing the issue of costs, since there is a strong argument that:

> "2.1 Mr Morrison was negligent;
>
> 2.2 Dr Morrison brought the litigation on himself by his unethical conduct in re-writing medical records and attempting to pass them off as his contemporaneous notes;
>
> 2.3 it was otherwise reasonable for the plaintiff to join him."

[56] On 14 August 2006, Morgan Buckley solicitors for Dr Morrison, forwarded a letter to solicitors for the plaintiff dated 14 August 2006, advising their client was not prepared to agree to the plaintiff's discontinuance against Dr Morrison on the basis of each party pay their own costs. They sought an order pursuant to Rule 63.11 (6) which provides:

> "A party who discontinues a proceeding or with-draws part of a proceeding, counterclaim or claim by third party notice shall pay the

costs of the party to whom the discontinuance or withdrawal relates to the time of the discontinuance or withdrawal."

[57] A Notice of Discontinuance with respect to the third defendant was filed on 28 March 2007. The application came before Justice Riley on 8 March 2007. On that date the orders made were as follows:

> "- Third Party (CGU Insurance Ltd) will not be appearing in the matter. They neither consent to nor oppose any applications
> - **Plaintiff has leave to discontinue their action against 3rd Defendant**
> - Plaintiff has leave to amend her Statement of Claim to that appearing annexed to the summons
> - Plaintiff pay the costs of the 1st and 2nd Defendant's in relation to the pleadings and consequential amendments to their defences
> - **Issue of 3rd Defendant's costs yet to be resolved and to be argued on Fri 16 March 2007 at 10am before Riley J unless orders can be made by consent.**

[58] As stated in paragraph 3 of these reasons for decision, Riley J made an order on 15 March 2007 that the question of the defendants' costs of the discontinuance be reserved for the consideration of the trial judge.

[59] The matter subsequently proceeded to trial during 2008 against the first and second defendant and CGU Insurance Limited as the third party. Judgment in the matter was delivered on 19 November 2008.

[60] On 29 January 2009, the matter came back before the Court for argument on the issues of costs. This was the first occasion on which the plaintiff gave notice of an application to seek an order against the first defendant to pay

the costs with respect to Dr Morrison. The argument relating to costs was part heard and adjourned to 13 March to enable the parties to prepare further submissions with respect to the issue of costs relating to Dr Morrison.

[61] On 13 March 2009, Mr Lindsay, on behalf of the plaintiff, presented the argument for costs against the third defendant. Mr Lindsay referred to the various acts of negligence by Dr Morrison, that Dr Morrison had destroyed relevant evidence and substituted a non-contemporaneous record, which was false to the extent that one of the symptoms complained of by the deceased on the day he died was deleted.

[62] It was argued that it was reasonable to join the third defendant and maintain action against him until such time as the effect of the likely negligence and other conduct had been properly assessed by the plaintiff's lawyers. Further, Mr Lindsay submits that in the time between establishing the gap in causation evidence and negotiating on a discontinuance the plaintiff concentrated on the other defendants and did not put the third defendant under any particular burden.

[63] The alternative position argued for the plaintiff is that if costs are to be awarded in favour of Dr Morrison then those costs should be the subject of a Bullock/Sanderson order against the first defendant.

[64] I am not able to accept the arguments advanced on behalf of the plaintiff with respect to the costs of the proceedings against Dr Morrison.

[65] Ms Gearin, on behalf of the first defendant, refers to the advice provided by Mr Barr QC in an opinion dated 5 October 2002. This was well before the Statement of Claim issued and identified the fact that at that time there was no reliable evidence the negligence of Dr Morrison caused the death of Mr Clive Impu. Ms Gearin referred to the fact that Mr Barr QC had recommended seeking an expert opinion as to whether the actions of Dr Morrison were causative of the death of Clive Impu.

[66] I also refer to the following written submissions dated 22 January 2009 made by Mr Abbott on behalf of Dr Morrison:

> "It was not 'reasonable' for the plaintiff to have sued Dr Morrison in the absence of supportive expert evidence on the issue of causation[3] in circumstances where the report of Dr Heard dated 6 May 2001 tendered at the inquest (exhibit D 41 in this action) concluded that '*It was **very unlikely** that Mr Impu would have survived no matter what action was taken by* [Dr Morrison] *at this late stage'* and the findings of the Coroner were to like effect: '*Given how he presented to Congress on 26 January 2001 even with a thorough and comprehensive medical examination* [by Dr Morrison] *it is **highly possible** that the deceased would have been allowed to go home first before being urged to make his way to the hospital. Given the results of Dr Zillman's autopsy I accept that the deceased was living, to a large extent, on borrowed time in the event that his illness was not diagnosed.*' [paragraph 124].
>
> _____
> [3] It is conceded that Dr Heard gave the plaintiff some hope on the issue of diagnosis: see the second paragraph on page 6 of his report to the inquest."

[67] On the evidence before this Court, it is clear that despite the advice provided by Mr Barr QC the plaintiff issued a Statement of Claim against

the three defendants which included Dr Morrison alleging negligence that caused the death of Clive Impu.

[68] A few days later, ie. on 3 March 2003, solicitors for the plaintiff received an opinion from Dr Adjani in which he opined that the actions of Dr Morrison would not have altered the fatal outcome. However, despite having received this opinion the plaintiffs went ahead and served the Statement of Claim on Dr Morrison in May 2003.

[69] Essentially, Dr Morrison had been consulted by Clive Impu on 26 January 2001 a short time before he died. Dr Morrison had before him the wrong file, he did not carry out a thorough examination and did not obtain a thorough history. Dr Morrison prescribed some medication. However, the expert medical evidence both from Dr Adjani, and subsequently Dr Sangster in his report dated 28 October 2003, was that at the time he consulted Dr Morrison, the heart condition suffered by Clive Impu, was so advanced, that the conduct of Dr Morrison made no difference to the inevitable result, which was death.

[70] I agree with the submission made by Ms Gearin, that professional negligence on the part of a doctor causing or contributing to the death of one of his patients, is a very serious allegation. An allegation that Dr Morrison was bound to defend. It was an allegation made without proper basis and made against the advice of counsel.

[71] I agree there was no pressing urgency upon the plaintiff to comply with a limitation period as this did not expire until 24 January 2004.

[72] By November 2003, the plaintiff had received an opinion from a second expert, namely Dr Sangster, to the effect that they were unable to substantiate that the actions of Dr Morrison caused the death of Clive Impu.

[73] There is no reasonable explanation as to why an application to discontinue was not made at that time. I agree with the submission made by Mr Abbott on behalf of Dr Morrison that it is not to the point as Mr Lindsay argues, that by the end of 2003 the plaintiff's focus was on the other two defendants. Dr Morrison was put in the position of having to take all necessary steps to defend the claim against him. Neither is it to the point that the first defendant may not have been insured and able to satisfy any order for damages. This was not a reason to make a claim that could not be substantiated against another party.

[74] I consider the third defendant is entitled to an order for costs in respect of the proceedings that were discontinued against him.

[75] The normal order would be costs on a party and party basis.

[76] Mr Abbott, on behalf of Dr Morrison, submits costs should be awarded in favour of Dr Morrison on an indemnity basis.

[77] Mr Abbott argues the plaintiff's claim falls within the category of "hopeless case" referred to in Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd and Others (1988) 81 ALR 397 at 401:

> "… I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. …"

See also *Colgate-Palmolive v Cussons Co Pty Ltd* [1993] 46 FCR 225 at 233.

[78] I summarise the important aspects of the application as including the fact the plaintiff ignored the advice of her counsel to obtain expert medical advice on the issue of causation before issuing a claim against Dr Morrison. In addition to this, the plaintiff maintained her action against Dr Morrison for approximately four years after first receiving the opinion of an expert that causation could not be established with respect to Dr Morrison. There was a further expert's report received during the intervening period which confirmed the plaintiff could not sustain an action against Dr Morrison. By letter dated 8 August 2006, solicitors for the plaintiff had advised solicitors for the third defendant of the plaintiff's decision to discontinue her action against Dr Morrison. However, this did not formally occur until March 2007.

[79] In these circumstances, I consider Dr Morrison is entitled to an order for costs on an indemnity basis.

[80] The next issue for consideration is whether it is appropriate to make an order that the first defendant pay the costs of Dr Morrison or as it is referred to a Bullock/Sanderson order.

[81] Mr Lindsay submits that the relevant law concerning the discretion to make a Bullock/Sanderson order is as follows:

1) The costs have been reasonably and properly incurred by the plaintiff as between him and the successful defendant.

2) The conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for costs of the successful defendant – see *Gould v Vaggelas*.[12]

[82] I do not consider the plaintiff has satisfied either of these conditions. Whilst it was reasonable to investigate the role Dr Morrison played in the matter it was not reasonable to commence proceedings in the knowledge that to succeed in a claim against Dr Morrison the plaintiff needed evidence to substantiate causation. The plaintiff was aware through her lawyers that the action against Dr Morrison was maintained for some four years after receipt of expert opinions that causation could not be established.

[12] [1983-1985] 157 CLR 215 at 229.9.

[83] The conduct of the first defendant was dealt with in the substantive judgment delivered in this matter. The first defendant was found to be negligent and to have contributed to the cause of death in failing to follow up the deceased for a condition that could have been treated. The first defendant was negligent in again having the wrong file produced when Dr Morrison attended upon the deceased. However, the expert opinion obtained by the plaintiff is that by this time it was too late for Dr Morrison to have made any difference to the end result. The plaintiff either was or should have been made aware from the advice given by her counsel prior to any proceedings being commenced that evidence was required to establish causation with respect to Dr Morrison.

[84] Mr Lindsay argued that another unsatisfactory aspect of the first defendant's conduct was that when proceedings were issued the first defendant requested that the Statement of Claim be served on the third defendant. However, the plaintiff was not obliged to comply with such requests and should not have done so knowing that the expert evidence was such that causation with respect to Dr Morrison could not be established on the balance of probabilities. Whether or not the first defendant was insured did not affect the causation issue between the plaintiff and the third defendant. There is no satisfactory explanation for why the plaintiff having received both expert reports relating to Dr Morrison on the issue of causation by the end of October 2003 did not actually seek leave to discontinue against Dr Morrison

until March 2007. I accept as set out in the affidavit of Mr Stirk sworn 17 February 2009, that on 8 August solicitors for the plaintiff wrote to solicitors for the third defendant offering to discontinue against the third defendant on the basis that each party pay their own costs. Annexure E to the affidavit of Mr Stirk is copy of a letter from solicitors for the third defendant to solicitors for the plaintiff advising the third defendant did not agree to the plaintiff discontinuing on the basis each party bear their own cost and referring to the Supreme Court Rule which provides that the party discontinuing shall pay the costs of the party to whom the discontinuance relates at the time of the discontinuance.

[85] I do not consider it appropriate to make a Bullock/Sanderson order that the first defendant pay the third defendant's costs.

[86] The order I make is that the plaintiff pay the costs of Dr Morrison on an indemnity basis as agreed or taxed.

Summary of Costs Orders

(1) The first defendant to pay the plaintiff's costs and disbursements to be taxed in default of agreement of the plaintiff's proceeding against the first defendant.

(2) The first defendant to pay the plaintiff's costs and disbursements as taxed in default of agreement of the plaintiff's proceeding against the second defendant.

(3) The first defendant to pay the second defendant's costs to be taxed in default of agreement.

(4) The above costs are payable on a standard basis until 20 March 2006 and thereafter on an indemnity basis.

(5) I certify the matter as fit for two counsel.

(6) The plaintiff to pay the costs of the third defendant on an indemnity basis as taxed or agreed.

(7) I am not satisfied it is appropriate to go further and make the order sought by Mr Abbott that the general costs of the action for which Congress is liable to the plaintiff be charged with the plaintiff's liability to Dr Morrison for costs and that Congress pay the costs for which it is liable to the plaintiff into Court until further order. That application is refused.

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