PARTIES:	ANNE ELIZA JESSIE WOLF v MARY PUNITHAM AND THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC AND COMMERCIAL UNION ASSURANCE CO. OF AUSTRALIA LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	47 of 1988
DELIVERED:	10 October 1997
HEARING DATES:	9 October 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Plaintiff:	J.E. Reeves
First Defendant:	M. Spargo
Second Defendant:	J. E. Hebron
Third Party:	I. Morris

Solicitors:

Plaintiff:	McBride & Stirk
First Defendant:	Clayton Utz
Second Defendant:	De Silva Hebron
Third Party:	Hunt & Hunt

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

No. 47 of 1988

BETWEEN:

ANNE ELIZA JESSIE WOLF
Plaintiff

AND:

MARY PUNITHAM
First Defendant

THE FAMILY PLANNING ASSOCIATION OF THE NORTHERN TERRITORY INC
Second Defendant

COMMERCIAL UNION ASSURANCE CO. OF AUSTRALIA LIMITED
Third Party

CORAM: KEARNEY J

INTERLOCUTORY JUDGMENT

(Delivered 10 October 1997)

The First Defendant, by summons of 8 October (document 62), and the Third Party, also by summons of 8 October (document 67), each seek to have

the trial date of 28 October vacated. The applications were argued yesterday; I rule on them today.

The general course of the proceedings

The plaintiff instituted these proceedings on 6 May 1988 against the First Defendant and the Northern Territory, seeking damages for the alleged negligent handling of her pap smear reports as a result of which, she claims, carcinoma cells disclosed by the report on 27 June 1985 were not detected until 18 August 1986; as a result she had to have a hysterectomy on 3 October 1986, with further alleged sequelae. She claims that had the report of June 1985 been processed properly, her condition would have been detected a year earlier, and could have been resolved by a less invasive process.

By a consent order of 24 May 1988 (not authenticated until 11 September 1990) the plaintiff joined the Second Defendant as a defendant (as well as joining another defendant). Because it was not authenticated until 11 September 1990 this order appears to have been overlooked until then. The action was discontinued against the Northern Territory in September 1994. The First Defendant joined the entity which is now the Second Defendant, as a Third Party, on 21 May 1990.

On 14 November 1991 the Master ordered that the Second Defendant (therein described as "the Third Party") serve its Defence within 28 days. This order was not obeyed. It is to be noted that the order was made on the application of the First Defendant from whose summons of 11 November 1991

it is clear that the Defence sought was "a Defence to the Statement of Claim endorsed on the Third Party Notice" of 14 June 1990. On 30 January 1992 the Master made a self-executing order, by consent, that unless this Defence was filed within 14 days the Second Defendant would be "deemed to have defaulted in service of its Defence pursuant to the order of 14 November 1991". This order was not obeyed. The Master proceeded in his order to provide for the consequences of default, as follows:

> "2. The Third Party shall then indemnify the First Defendant against any Judgment including costs incurred by the First Defendant.
>
> 3. The First Defendant will be at liberty to enter Judgment for the amount of the Judgment debt …"

The Plaintiff entered a default judgment on 15 June 1993 against the Second Defendant (named as such), by consent, for failing to file a Defence. Mr Hebron of counsel for the Second Defendant tells me that it never instructed its then solicitors, Messrs Halfpennys, to consent to the self-executing order of 30 January 1992, or not to file and serve a Defence in the proceedings. It instituted proceedings no.141 of 1996 against Messrs Halfpennys on 25 July 1996, claiming damages as a result of that firm's alleged "negligence and/or breach of contract and/or breach of the *Trade Practices Act* 1974" while the firm was its solicitor in proceedings no.47 of 1988.

On 14 May 1997 these proceedings were "tentatively" listed by the Registrar for trial in Alice Springs on 28 October, for 7 days; I note that

Mr Hebron for the Second Defendant is then recorded as intending to issue a Third Party notice "within a week or so" - in fact it issued on 8 September, almost 4 months later. That delay is the root cause of much of the trouble in which the Third Party now finds itself. The trial date was confirmed on 29 August when the Registrar noted that "matter ready for trial". Mr Hebron informs me that he neglected at that time to bring to the Registrar's attention the existence of proceedings no. 141 of 1996. The issues for trial on 28 October, as matters presently stand, are whether the First Defendant is liable to the Plaintiff (and, if so, the quantum of damages); and the assessment of the damages payable by the Second Defendant to the Plaintiff, pursuant to the default judgment of 15 June 1993.

By two summonses of 3 October the Second Defendant now seeks to set aside the Master's self-executing order of 30 January 1992 and the default judgment of 15 June 1993. This is after a lapse of time of 5 3/4 and 4 1/3 years, respectively. In both applications it has nominated 28 October as the hearing date for its applications in Alice Springs; this is the date for commencement of trial.

The Second Defendant by summons filed on 3 October and returnable yesterday also seeks to have proceedings no. 141 of 1996 consolidated with these proceedings. However, yesterday it applied to have that application adjourned until the Court had first heard and determined the applications by the First Defendant and the Third Party of 3 October, to have the trial date of 28 October vacated. Mr Berner appeared by leave for Messrs Halfpennys to

resist the mooted application for consolidation; I am told that his firm, Messrs Cridlands, are on the record for Messrs Halfpennys in proceedings no.141 of 1996 as from yesterday. Primarily, Mr Berner sought to have the application to consolidate, adjourned.

The plaintiff wishes to hold the trial date of 28 October in order that its claim against the first and second defendants, instituted over 9 years ago, may be determined. Mr Reeves of counsel for the plaintiff therefore opposed any application by any party, the practical result of which would lead to or favour the vacation of the trial date. Mr Reeves pointed out that the defendants had not complied with the time requirements in r33.08 as to the service of their respective medical reports, and the requirements of r33.11(4) as to the giving of notice of their requirement that the plaintiff's medical experts attend for cross-examination. The defendants were several weeks late in doing so, and now sought to have time abridged to the extent necessary to enable them to serve their reports and give notice of cross-examination. The plaintiff opposed this application. Mr Reeves noted that in any event the plaintiff will call one such medical expert, Dr Glenning, to testify and he will therefore be available for cross-examination. Mr Reeves said that all of the other medical reports of the plaintiff essentially went to the question of damages. He pointed out that although the proceedings had been "tentatively" set down for trial only on 14 May this year, this had been preceded by some 9 months of case-flow management of the proceedings; in fact, I note that this process commenced on 16 February 1995. Mr Reeves had given his certificate on 26 August 1996, as counsel, that the proceedings were ready for trial. He told

me that the plaintiff had no concern with the dispute between the Second Defendant and Messrs Halfpennys, or the dispute between the Second Defendant and its public liability insurer, the Third Party.

Mr Hebron informed me that the Second Defendant probably would be unable to pay damages awarded against it, if at the level sought by the plaintiff. On 8 September 1997, some 7 weeks before trial, the Second Defendant had joined its public liability insurer, as Third Party. In addition, Mr Hebron stated that he now believed that the Second Defendant may also have insurance cover against professional liability; he is presently seeking to identify that insurer. He raised the possibility that if the Second Defendant managed to identify its professional indemnity insurer, and that insurer accepted (unlike the Third Party) that it was liable to indemnify the Second Defendant, it might seek to have the trial date of 28 October vacated. I would think that highly probable. Further, he was concerned that if the Second Defendant now proceeded to trial, it might possibly be in breach of essential conditions in its (as yet unlocated) policy with its (as yet unknown) insurer. It is perhaps desirable to note that Mr Hebron's firm commenced to act for the Second Defendant only on 2 July 1996; nevertheless, that is now some 15 months ago and the Plaintiff may reasonably have expected the Second Defendant to be very much further advanced in its preparation for trial at this time (less than 3 weeks before trial) than it appears to be.

Mr Spargo of counsel for the First Defendant sought to have the trial date of 28 October vacated. He relied on two grounds. First, there was a

possibility raised by Mr Hebron that the Second Defendant might have professional indemnity insurance cover for the relevant period in 1985, and, if so, it was possible that the First Defendant could avail herself of that indemnity, because at the relevant time she was employed by the Second Defendant. Accordingly, Mr Spargo supported Mr Hebron's submissions relating to the possible insurer for the Second Defendant.

The second ground on which Mr Spargo relied was that the First Defendant wished to cross-examine the plaintiff's medical experts. She had failed to comply with r33.11(4), in that regard. He relied on Ms Bampton's affidavit of 8 October (document 67). This discloses that the first defendant's case is being 'run' by Ms Bampton, a solicitor in South Australia who also held a Northern Territory practising certificate. I note that nevertheless Messrs Clayton Utz are the solicitors on the record for the First Defendant and, as such, they are responsible (like the solicitors on the record for the other parties) for seeing that the case-flow management process is efficiently conducted. Ms Bampton deposed that she had received only on 12 September a report from the plaintiff's medical expert Dr Anderson; this was very late in the day, since the 42-day period prescribed in r33.08(3) expired on Monday 15 September. Ms Bampton considered that its contents were such as to require her to seek an expert opinion from Dr Sweet. She sought this opinion on 18 September and received it on 8 October. Meanwhile, on 1 October she had issued a notice, purportedly under r33.11(4), requiring the plaintiff to have 6 of her medical experts attend at trial for cross-examination; time for issuing the notice had expired on 15 September. Ms Bampton deposed that she

also hoped to secure - and, no doubt, rely on - the opinion of an oncologist whom she had consulted, "within the next few days". She sought an abridgment of time for the purposes of r33.11(4) for the following reasons:

> "12. Due to the fact that I did not consider that there was any expert evidence in the plaintiff's case on liability which directly criticised my client until 12 September 1997 [where she saw Dr Anderson's report] and due to the demands of other work, I unfortunately overlooked the time limits prescribed by the Supreme Court Rules in relation to the provision of expert reports and for the service of notices of cross-examination. I seek the indulgence of this Honourable Court and seek an order of an abridgment of time to the 1st of October for service of notices requiring cross-examination pursuant to Rule 33.11(4) of the Supreme Court Rules."

Ms Bampton also sought an order abridging the time under r33.08(3) for service of the First Defendant's medical reports, without specifying a date.

I comment in passing that the system of case-flow management tends to become ineffective if a case is in fact conducted (as here) by a legal practitioner who does not appear at the regular directions hearings, and is not directly answerable to the Court. Further, it must be a source of confusion to the other practitioners involved if they are required to correspond and deal with not only the solicitor on the record for a party, but also with that party's interstate legal agent.

Mr Spargo also relied on Ms Michael's affidavit of 8 October (document 63). Ms Michaels deposed that if the Second Defendant in fact had a professional indemnity insurer at the relevant time in 1985, the First

Defendant (as an employee of the Second Defendant at that time) might well be able to claim an indemnity from that insurer. She expressed her concern that any such indemnity could be vitiated should the policy contain the usual term that nothing be done (by the insured) in the proceedings to prejudice the insurer's position; that is a matter of critical importance, I should say, since the trial is listed to commence in less than 3 weeks. Further, Ms Michaels deposed:

> "13. In addition, now that the second defendant has joined Commercial Union Assurance Company of Australia Limited as a third party and has applied to join Halfpennys as a further third party, an adjournment of the proceedings will allow the first defendant's legal advisers time to liaise with those insurers as well as the professional indemnity insurer of the second defendant."

Mr Spargo sought to abridge the time within which to give notice of the requirement that the plaintiff's experts be available for cross-examination, to 1 October; and also the time for service of the First Defendant's medical reports, until 15 October. He said that the only report outstanding would be that yet to come from the First Defendant's oncologist. I note that Mr Hebron opposed the First Defendant's application to extend the time within which to serve Dr Sweet's report of 8 October. Mr Spargo stated that if the First Defendant could obtain the abridgments of time which she seeks, she would not seek that the trial date of 28 October be vacated.

I note that the plaintiff has consented to the Second Defendant's arrangements for the examination of the plaintiff on 15 October by one Dr Cotton. The question of the admissibility in evidence of any resulting report to the Second Defendant by Dr Cotton remains to be dealt with at a later date.

Mr Morris of counsel for the Third Party also sought to have the trial date vacated. He submitted that the Third Party simply could not have its case fairly tried, if the trial were to commence on 28 October. The Third Party was the public liability insurer of the Second Defendant. The Second Defendant had joined it in these proceedings as recently as 8 September, less than 5 weeks ago (despite the fact that it should have been done nearly 5 months ago) on the basis that the Third Party was liable to indemnify it for any liability it was found at trial to have to the plaintiff. Mr Morris relied on his application of 8 October and his supporting affidavit of 9 October. He submitted that the very late joinder of the Third Party, only 7 weeks before trial, had deprived it of the benefit of the usual pre-trial procedures. It had now been informed by the plaintiff that since it had not given notice within the 42 days allowed by the Rules (the time-limit having expired 7 days after it was joined), it could not cross-examine the plaintiff's medical experts. Mr Morris observed that the Second Defendant had not applied for leave to file the Third Party Notice; see r11.06. There is nothing on file to indicate that the alternative course of obtaining the consent of the other parties to the Third Party Notice, had been

adopted; see r11.05(2)(b). However, it became clear that they had in fact consented; eventually the plaintiff's written consent of 10 July 1997 was produced. The Third Party entered its Appearance on 24 September.
Mr Morris explained why, as a matter of practicalities, the Third Party had not applied to have this joinder set aside. He stated that some time ago the Third Party had indicated to the Second Defendant that it declined to indemnify the Second Defendant.

Mr Morris noted, as matters on which the Third Party would wish to be heard, the Second Defendant's two applications of 3 October to set aside the Master's self-executing order of 30 January 1992, and the default judgment against the Second Defendant of 15 June 1993. I note that those summonses of 3 October were made returnable by the Second Defendant on the morning of the trial, 28 October. That is not conducive to an orderly process of litigation, to say the least; however, since no party has sought to have those applications brought on for hearing and determination earlier than 28 October, it appears that the issues involved will be left for resolution by the trial judge.

Mr Reeves took issue with certain parts of Ms Bampton's affidavit of 8 October. In particular, he submitted that the First Defendant had had Dr Glenning's report of 9 March 1990 since 15 October 1996, and that that report raised the very issue which Ms Bampton asserted had first been raised by Dr Anderson in his report of 9 September 1997. That is not quite accurate.

Mr Reeves stated that the plaintiff intended to call Dr Glenning and he would therefore be available for cross-examination. He submitted that this course of action met most of the concerns of the First Defendant and the Third Party as regards cross-examination of the plaintiff's medical experts, since Dr Glenning was the specialist who dealt with the question of the respective responsibilities of the First and Second Defendants. He submitted that the other parties would suffer no prejudice, or very little prejudice, any of which could be adjusted quite simply.

Mr Reeves explained the delay in obtaining and serving Dr Anderson's report: the plaintiff's solicitors had requested Dr Anderson in 1996 to provide a report by 28 August 1996, but in fact he had not done so until 9 September 1997; it was served on the other parties on 12 September 1997.

Mr Reeves took me through the history of the case-flow management of these proceedings. He submitted that the plaintiff had prepared for trial on the basis that she would not have to call her doctors, as the First Defendant now sought.

Conclusions

It is clear that the Third Party has been given totally inadequate time to prepare for trial by 28 October. The sole responsibility for that state of affairs lies with the Second Defendant. I raised with the parties yesterday whether an

order should be made along the general lines indicated by r11.07(7), mentioned by Mr Reeves, whereby the issues between the plaintiff and the other parties could be tried first, with any issues between the defendants and the Third Party being tried thereafter.

Mr Hebron submitted that if the plaintiff wanted to pursue this course, she should apply by summons supported by affidavit, in order that the question of any resulting prejudice could be argued. Mr Hebron clearly preferred to have the proceedings heard as a whole. He submitted that the case was simply not ready for trial on 28 October; it appears to me that the Second Defendant may not be ready, and certainly the Third Party is not ready.

Mr Morris stated that the Third Party preferred to take part in a trial. His preference was that any such trial take place later than 28 October. He submitted that it would be inappropriate to hive off the Third Party proceedings completely.

Mr Reeves submitted that the plaintiff was prepared not to rely on certain words in Dr Anderson's report in which he expressed an opinion that the First Defendant (as well as the Second Defendant) was "responsible" for the plaintiff's problems.

I am somewhat puzzled by the expressions of opinion by various medical experts as to what the law requires of the medical practitioner vis-a-vis the employer. Possibly this has something to do with the application of the "Bolam" principle, and proof of what a responsible body of medical opinion accepts as proper practice in that regard. It is for the Courts to adjudicate on what is the appropriate standard of care, a question in the resolution of which responsible medical opinion will have an influential role. However, this is not a matter of concern for present purposes.

In *State of Queensland v J L Holdings Pty Ltd* (1996-97) 141 ALR 353 the High Court stressed that the ultimate aim of a court is the attainment of justice, and no principle of case-flow management can be allowed to supplant it. The present case is not a commercial case as *J L Holdings Pty Ltd* (supra) was. Here the plaintiff is seeking a remedy for a wrong which she alleges occurred in 1985, by way of proceedings which she instituted in 1988. It the trial date of 28 October is vacated it is highly improbable, in my opinion, that her case will come on for trial within 12 months thereafter. That delay would be an injustice to her. On the other hand there is nothing much to be said in favour of the First and Second Defendants, in the present application. They have failed to move with all due speed and their problems which now exist as regards readiness for trial on 28 October are largely of their causing. The unfortunate position of the Third Party is almost wholly attributable to the action or inaction of the Second Defendant. The fact that the Second

Defendant has only come to believe in very recent times that it may have a professional indemnity insurance cover to which it may have recourse, appears to point to the case-flow management process as failing to achieve in this case what it is intended to achieve.

I consider that the applications to vacate the trial date of 28 October should be refused. Subject to the conditions noted below, time under r33.08 should be extended to 15 October, for the First Defendant; likewise, time under r33.11(4) should be extended until 1 October 1997 for the First Defendant. The conditions upon this abridgment of time is granted are twofold. First, the First Defendant must bear all reasonable costs of arranging the attendance at trial of such medical experts of the plaintiff as it wishes to cross-examine at trial. To the greatest extent practicable I would expect that expert witnesses give their evidence by way of a video link. Second, as regards the provision of a further medical report or reports by the First Defendant: if the result of this report or reports is that the plaintiff reasonably requires to engage further expert medical opinion to respond to them, the plaintiff should do so within a reasonable time and the First Defendant is to bear the reasonable cost of the plaintiff obtaining such expert reports.

Finally, to meet the legitimate requirements of the Third Party in preparing for trial, I order pursuant to r11.13(1)(b) that the issues between the plaintiff and the other parties be tried prior to the trial of issues between the

Third Party and the other parties. To that extent, r11.12(b)(ii) is varied. The Third Party may attend and take part in the trial of the issues between the plaintiff and the defendants; to the extent necessary to enable it to do so the time in r33.08(3) is abridged. The Third Party is at liberty to apply for directions at 2 hours notice, until trial on 28 October. It is desirable that proceedings between the Third Party and the other parties be case-flow managed after the conclusion of the trial commencing on 28 October.

I should make it clear that these orders are necessarily subject to any orders made by the learned trial Judge, at trial.

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