PARTIES:	JULIE NAMALA v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	377 of 1987
DELIVERED:	6 March 1998
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JUDGMENT OF:	Kearney J

CATCHWORDS:

Costs – General rule – Costs follow the event – Departing from the general rule – Amendment of pleadings at trial to raise new basis for claim – Offer to compromise before amendment of pleadings – Whether costs should be taxed on an indemnity basis –

Supreme Court Rules (NT), rr26.08(2), 30, 31, 63.03(1), 63.11(7)(b) and (9), 63.28.

Donald Campbell and Co v Pollak [1927] AC 732, followed.
R v Racing Gaming and Liquor Commission; ex p. Tangentyere Council Inc. (unreported, Supreme Court (NT) (Kearney J), 24 May 1988), followed.
Archard v Ellerker (1888) 10 ALT 196, approved.
Keddie v Foxall [1955] VLR 320, approved.
Marks v GIO Australia Holdings Ltd (1996) 137 ALR 579, not followed.
Fischer v City Hotels Pty Ltd (1970) 92 WN (NSW) 322, approved.
Multicon Engineering Pty Ltd v Federal Airports Corporation (1996) 138 ALR 425, followed.

Evidence – Witnesses – Expert evidence – Witness both as to facts and as expert – Whether statement of substance of evidence must be served –

Supreme Court Rules (NT), r44.03(2)

Practice – Northern Territory – Practice under Rules of Supreme Court – Purpose of rules as to pleading – Purpose of interrogatory process

Supreme Court Rules (NT), rr13.13(2), 30 and 31

REPRESENTATION:

Counsel:

Plaintiff:	J.E. Reeves, K.P.Philp
Defendant:	P. M. Barr

Solicitors:

Plaintiff:	Cridlands
Defendant:	Solicitor for the Northern Territory

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

No. 377 of 1987

BETWEEN:

JULIE NAMALA
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 6 March 1998)

The applications

The plaintiff sued the defendant, alleging that a medical practitioner who had attended her during the birth of her child at the Royal Darwin Hospital in 1984, had been negligent. Complications had ensued during the course of birth. The attending practitioner, Dr Mellor, then effected delivery by caesarean section; his decision to do so was not attacked, but the way in which he carried out the operation gave rise to this litigation . A tearing of the uterus was noted after the operation; this resulted in the attendance of a

specialist obstetrician, Dr Anderson, who immediately carried out a hysterectomy.

On the first day of trial, 25 March 1996, the plaintiff sought and obtained leave to amend her Statement of Claim. Next day the defendant conceded that it was liable in negligence to the plaintiff. The plaintiff recovered damages in May 1996. Subsequently, written submissions were made on the award of costs, turning on the fact that the pleadings had been amended during trial and the alleged reasons therefor. I rule today on the question of costs.

The amendments to the pleadings during the trial

Mr Reeves of counsel for the plaintiff, in opening her case, applied to amend the Statement of Claim by alleging 4 further particulars of negligence. He submitted that the need to do so at such a late stage arose from what had been disclosed to the plaintiff in 3 documents: an expert medical report of 1988 by Dr Anderson which had not been discovered by the defendant when it made discovery in July 1991, and statements by 2 expert witnesses, Dr Anderson and Dr Mellor. All 3 documents had been served on the plaintiff on 19 March 1996, only 6 days before trial. Rule 44.03(1)(b)(i) requires that the statement of an expert's evidence be served "6 weeks before the day fixed for trial". Mr Reeves submitted that the defendant was in breach of that provision.

The application to amend was opposed by Mr Barr of counsel for the defendant, on the basis that the proposed amendments did *not* arise from these

recently-served documents. Rather, the existing particulars in the Statement of Claim of April 1991 showed that the plaintiff's claim in negligence had always been pleaded on the basis that the incision made by the surgeon Dr Mellor had been made in the wrong anatomical site for a caesarean section. He submitted that this 'site' basis for negligence had been relied on by the plaintiff up to trial in March 1996 despite the fact that her own medical expert Dr Sweet in a report in February 1993 had noted that the situation which gave rise to the need for a caesarean section was one in which there was a "deep transverse arrest" of the baby's head in the course of childbirth. Further, a report in May 1990 by the defendant's medical expert, Professor Beischer, served on the plaintiff in June 1990, had also referred to this situation, which was a significant fact in the defendant's case when it came to determining how the tearing occurred. I note that Professor Beischer said in that report:

> "… it is difficult to understand how the tear occurred in the posterior vaginal wall and presumably the incision made in the lower uterine segment extended [in layman's language, tore], which it can easily do when the tissues have become weakened by obstructed labour, *especially when a hand has to be pushed down to pull back the head which is jammed in the pelvis, as I think it was in this patient.* In other words *I am not sure that the incision was made too low [as alleged by the plaintiff], but rather that it extended due to the difficulty in delivering the head".* (emphasis added)

It can be seen that Dr Sweet and Professor Beischer had differing views as to the reason for the tearing. Professor Beischer had opined in 1990 that the cause of the tearing was "the difficulty in delivering the head", the immediate cause being the need to push "a hand down to pull back the [jammed] head". Dr Sweet opined in February 1993 that tearing due to the then "quite oedematous" nature of the lower uterine segment was the "less

likely" of the two possibilities he considered open, the only other possibility (which he favoured) being that the caesarean incision was made in the wrong place, lower than normal, and in the course of it the posterior wall was probably damaged. Later, in his report of 9 February 1996, Professor Beischer accepted that Dr Sweet's favoured view was a possibility.

The hospital notes of the operation of 1984, discovered by the defendant in 1991, referred to the need to extract the head from the vagina "prior to delivery abdominally"; they did not bear on the question whether any *difficulty* was encountered in doing so, as Dr Sweet pointed out on 26 March 1996 (p12). It seems clear enough that what the plaintiff alleged on 25 March 1996 as an omission by Dr Mellor (see (f) on p7) when extracting the baby's head from deep in the plaintiff's pelvis in order to effect the caesarean delivery, led the defendant to concede on 26 March that that process had been carried out negligently, causing damage to the plaintiff's uterus such as to necessitate a hysterectomy, and to the concession by the defendant that thereby it was liable in damages to the plaintiff.

Mr Barr informed me that the plaintiff's proposed new particular (e) alleged negligence in that the defendant had failed to recognise that there was a "deep transverse arrest", before commencing the caesarean operation. Mr Barr submitted that, if that allegation were to be relied on, the plaintiff should have pleaded it before trial, because clearly the plaintiff's knowledge of that fact did *not* arise from the recently-served materials. That is correct,

and indeed it was conceded by Mr Reeves (p17) to be so, but it is particular (f) at p7, and not particular (e), which is important for present purposes.

I note that it is clear that the plaintiff's case until trial, clearly based on the opinion of her expert Dr Sweet, had been that the need for the hysterectomy (resulting from the alleged negligent damaging of the uterus, and founding the claim for damages) had probably been occasioned by Dr Mellor's scalpel perforating the rear wall of the uterus during the course of his caesarean incision, because of the low and "anatomically incorrect" site of that incision. The negligence alleged lay in the site of the caesarean incision.

I also note that at no time prior to trial, until receipt on 16 March of the 3 documents, had the plaintiff become aware that difficulty had *in fact* been experienced by Dr Mellor in the course of the caesarean operation, in extracting the baby's head. It had of course been clear to the plaintiff since 1990 that that was Professor Beischer's *opinion*. On the question of costs, I consider it important to determine whether the plaintiff *should have* become aware of that fact, before she became aware of it on 19 March 1996. In that connection, I note that though she had known since June 1990 of Professor Beischer's opinion, she never sought to explore with the defendant the ramifications of the difficulty to which he referred, or, more importantly, the ramifications of par7 of the defendant's Defence of June 1991 along the same lines (p11).

Mr Barr submitted that the 4 particulars of negligence now sought to be added raised a different basis for the plaintiff's case, on which he would have to obtain further instructions. He noted that the defendant's contention since June 1991 had been that the damage to the uterus in the form of the extension tearing of the caesarean incision, was caused as the surgeon extracted the baby's head 'which was wedged tightly in the pelvic cavity'; I observe that that is correct – see par7(ii) of the Defence of 7 June 1991 (p11). He submitted that it now appeared that the plaintiff had come to share that view of the cause of the tearing, since she now sought to allege in the new particulars that the negligence lay in the *means* adopted by the surgeon to extract the head, rather than the site of the caesarean incision; I consider that the plaintiff now relied on that as one of two possible causes, the other being the site of the incision.

The statements by the 2 doctors who had attended to the plaintiff in 1984, Dr Anderson and Dr Mellor, delivered to the plaintiff on 19 March 6 days before trial, both showed that in their view the extension of the caesarean incision most likely occurred when the baby's head was being extracted from the vagina. It can be seen that this view was in accord with Professor Beischer's opinion of May 1990, and with par7(ii) of the Defence of 1991 (p11). Dr Anderson, the specialist obstetrician, in his "statement of evidence" said he attended the operating theatre after Dr Mellor's caesarean operation and carried out the hysterectomy, and that "the tear I observed was consistent with having occurred during the delivery of the head from deep in the pelvis". Dr Mellor, who was attending to the plaintiff throughout the childbirth, in his

"Statement of expert evidence proposed to be adduced from Dr. P. Mellor" describes the course of the labour, the obstruction, the baby's head being "in the left transverse position with caput (swelling) of scalp", his inability to apply forceps to the head, his consequent decision to effect delivery by caesarean section, and the carrying out of that operation. As to the caesarean incision, he said that "it is necessary to make the incision in the lower uterine segment to enable you to reach the baby's head". He did not spell out how he went about extracting the baby's head from the pelvis, and effecting delivery. In his view the tearing of the uterine incision occurred during that operation; he said:

> "After the baby had been delivered, I noted a tear extending from the [caesarean] incision into the vagina. *I think it most likely* that the tear occurred at the time of delivery of the baby's head, because *the baby's head was low and it was difficult to extract it from the vagina. There is a vacuum effect in these situations; the baby's head being sucked into the pelvis and so being very difficult to remove. If it had been easier to deliver the baby's head, it would have been less likely that the uterus/vagina would have torn.*
>
> After I noted the tear, Dr Anderson was called in to decide whether the tear should be repaired or a hysterectomy performed." (emphasis added)

Having heard the submissions, I granted the plaintiff leave to amend, as sought. Amongst the 4 additional particulars was -

> "(f) In the alternative, if the medical staff did recognise that the foetal head was jammed deep in the plaintiff's pelvis, *they did not dislodge the foetal head upwards before the caesarean operation;"* (emphasis added)

The foundation for the allegation emphasized does not appear anywhere in the Court papers, except that in commenting in his report of 9 February 1996 on

the possibility that the tearing may have occurred "when the hand was pushed down into the vagina in order to deliver the head", Professor Beischer observed:

> "Indeed we are not even told whether somebody helped push the head up vaginally at the time of the Caesarean section".

The second day of the trial commenced late, to enable the defendant to consider the effect of the amendments. On resuming, Mr Barr stated that the defendant no longer disputed liability. The evidence was treated as complete; in due course judgment was entered for the plaintiff and submissions on the quantum of damages were made. Following an award of damages, there were 3 written submissions on costs; to these I now turn.

The submissions on costs

(1) Ms Philp for the plaintiff submitted that it was common ground that in January 1996, prior to trial and pursuant to r26.02(1), the plaintiff served on the defendant an offer to compromise her claim, on the basis that she was paid $75,000 plus costs. The defendant did not accept that offer. On 14 May 1996 the plaintiff was awarded damages of $80,000, and accrued interest of $32,119.67. Ms Philp submitted that in terms of r26.08(2), the plaintiff had thereby recovered a judgment "not less favourable … than the terms of the offer" of January 1996, and was therefore "entitled to an order against the defendant for the plaintiff's costs in respect of the claim, taxed on an indemnity basis", unless the Court otherwise ordered. I consider that the effect of r26.08(2) cannot be considered, until the question of costs is resolved.

Ms Philp submitted that despite the provisions of r63.11(7)(b) (see p15), the plaintiff should not be required to pay any costs which the defendant had thrown away as a result of the plaintiff's amendments at trial, because (as Mr Reeves had submitted (p2)) the need for those amendments became apparent to the plaintiff *only* when the reports of the 2 surgeons Dr Anderson and Dr Mellor were served on the plaintiff *6 days* before trial. Those reports are properly classified as expert reports and therefore should have been served on the plaintiff *6 weeks* before trial; see r44.03(1)(b)(i). In other words, the plaintiff's lateness in seeking the amendments was the direct result of the late service of those reports on her by the defendant, in breach of the Rules. Consequently r63.11(9) (see p15) should be applied, and the defendant should bear any costs it had thrown away, as a result of those amendments.

(2) Mr Barr submitted that where a person is to be called as an expert witness at trial, r44.03(2) requires only that the substance of "such of the evidence as it is proposed to adduce from him *as an expert*" be served 6 weeks before trial. Where a person is to give evidence *both* as an expert and as a witness of fact – and Dr Anderson and Dr Mellor were in that category – there is *no* requirement that a statement of the person's evidence as to the facts (as opposed to his expert opinion) be served prior to trial. I accept both propositions. I note that obtaining evidence of material facts from an opponent is achieved by the interrogatory process in Order 30, or the oral examination process in Order 31; a party may thereby obtain from the opponent particular information as to facts material to the issues in dispute

between them raised in the pleadings, and possibly secure admissions about those facts. Surprise at trial is thereby reduced.

Mr Barr submitted that the statements of Dr Anderson and Dr Mellor should be approached on that basis, their evidence which it was said had led the plaintiff into seeking to amend was evidence *of fact,* and accordingly there had been no breach of the Rules (particularly, of Order 44) on which the plaintiff could rely to found her submissions on costs. I do not accept that submission. Dr Anderson deposed as to what he saw by way of tearing when he arrived at the operating theatre, and stated his *opinion* that it "was consistent with having occurred during the delivery of the head from deep in the pelvis". That was expert opinion, not evidence of fact. The relevant part of Dr Mellor's statement is at p7; the relevant part for present purposes consists of expert opinion. I consider that *if* the plaintiff had reformulated her claim on the basis of these statements, as she alleges, the reformulation was based in part on both doctors' factual observations and in part on their expert opinion evidence as to the cause of the tearing they each saw. I note that no basis for the factual allegation in new particular (f) on p7 can be found in these statements, though it resonates in Professor Beischer's observation in his statement of 9 February 1996 (p8). Further, the opinions expressed by Dr Anderson and Dr Mellor accord with Professor Beischer's opinion of May 1990 and the defendant's Defence of June 1991 (p11).

Par9 of the Statement of Claim of April 1991 set out what the plaintiff alleged to be the negligence of the defendant. It was particularised (until

25 March 1996) principally as a failure "to make an incision for the caesarean section at the normal anatomical site", in that the incision was in fact made "several centimetres lower" than that site. I note that this allegation was clearly based on Dr Sweet's opinion of 5 December 1988 as to the cause of the tearing, and took no account of Professor Beischer's opinion on causation of May 1990 (see pp3 and 13). In par7 of the Defence of June 1991 the plaintiff's allegation was denied, the defendant contending that -

> "… the [caesarean] incision was made at an appropriate anatomical site but became extended during the course of extraction of the head of the foetus which was wedged tightly in the pelvic cavity."

It can be seen that this denies the plaintiff's major allegation of negligence and assigns a quite different reason for the tearing. It states the material facts on which the defendant relied for its defence. It raises by way of an affirmative case issues of fact which do not arise out of the Statement of Claim, as well as traversing the factual basis alleged by the plaintiff. This pleading was proper, as otherwise at trial the plaintiff could legitimately claim that she had been taken by surprise. The plaintiff was informed thereby of the case she had to meet. This case of the defendant was never sought to be explored by the plaintiff, by interrogatories or under Order 31.

Mr Barr submitted that the plaintiff's solicitors had apparently never informed their expert Dr Sweet of the contention in par7 of the Defence of June 1991 as to how the tear had occurred, or shown him Professor Beischer's report of May 1990. I reject this submission; Dr Sweet said in his report of

February 1993 (served on the defendant early in February 1996) that he had read Professor Beischer's report of May 1990 and agreed with the Professor that "in all probability the situation was one of deep transverse arrest [of the baby's head] at that time". By the time of the hearing in March 1996 it appears that Dr Sweet had been aware for over 3 years of Professor Beischer's opinion as to the cause of the tearing, and of the Defence; according to Ms Philp, they were both forwarded to him on 27 November 1992.

What Dr Sweet was *not* aware of, until he saw Dr Mellor's statement (p7) served 6 days before trial, was that in that situation of "deep transverse arrest" about which he had been aware, difficulty had *in fact* been encountered by Dr Mellor in extracting the baby's head "wedged tightly in the pelvic cavity". Though Professor Beischer had been of *opinion* in 1990 that in that situation it "would have been difficult to deliver" (p13), the difficulties *actually* encountered by Dr Mellor 'only came to light', as Dr Sweet put it in his letter of 26 March 1996, when he saw Dr Mellor's statement on 19 March. I accept that it 'only came to light' to Dr Sweet, in March 1996; a relevant question is, should it have been brought to light earlier by the plaintiff, by use of Order 30 or Order 31 procedures? Dr Sweet also observed on 26 March, correctly in my view, that the hospital case-notes "in no way reflect any difficulty in [extracting the head]"; he said he still considered that the "issue of the anatomically incorrect incision was always and still is an important factor". No doubt that is why the plaintiff added particular (f) on p7 to the 'site' basis

for negligence. Dr Sweet did not refer in his letter of 26 March 1996 to Professor Beischer's differing opinion of 1990 (pp3 and 13). Until then, as Mr Barr rightly submitted, Dr Sweet's opinion, reflected in par9 of the Statement of Claim (p11), had been that the damage to the posterior wall of the vagina was done in the course of the actual incision for the caesarean section – that is, *prior to* any difficulty encountered in extracting the baby's head.

As opposed to Dr Sweet's opinion of December 1988 and February 1993 as to the cause of the tearing, the plaintiff's amendments to the Statement of Claim of 25 March 1996 reflected the cause suggested by Professor Beischer in his report of May 1990 passed to the plaintiff in June that year, viz:

> "Certainly *the head was deep in the pelvis and would have been difficult to deliver* and the dislodgment of it may have resulted in extension of the incision in the lower uterine segment.
>
> …
>
> …presumably the incision made in the lower uterine segment extended, which it can easily do when the tissues have become weakened by obstructed labour, *especially when a hand has to be pushed down to pull back the head which is jammed in the pelvis, as I think it was in this patient.*" (emphasis added)

Mr Barr submitted that by trial the plaintiff had shifted her focus, because Dr Sweet had now abandoned his previous view as to the cause of the tearing (that is, cutting during the course of an incision made too low), and the plaintiff now accepted the defendant's view that the tearing was caused in the course of extracting the baby's head from the pelvis. I note that it is not

correct that Dr Sweet had abandoned his earlier opinion as to causation; see p12.

Mr Barr submitted in effect that Mr Reeves had opened the plaintiff's case on negligence on the 'incision made too low' basis, *and* also on the new basis of the way in which the difficulty caused by the baby's head being deep in the pelvis was dealt with – specifically, that dislodging of the head was not assisted by pressure upwards by hand from below, through the vagina. That is correct; in doing so Mr Reeves was in accord with what became the amended Statement of Claim.

In summary, Mr Barr submitted that there was no reason why the allegation of negligence relied on by the plaintiff, as manifested in the new particulars, and ultimately accepted by the defendant, could not have been pleaded by the plaintiff long before trial. The plaintiff could have interrogated as to relevant factual issues arising from the Defence (p11), long before trial. I have sufficiently indicated already that I accept these submissions.

On this basis, he submitted that the plaintiff should not have her costs on the issue of liability after 13 February 1995, when the defendant had provided further and better answers to her interrogatories; and further, she should pay the costs incurred by the defendant after February 1995 on the issue of liability, or, alternatively, her taxed costs should be reduced by 50%.

(3) In reply, Mr Reeves for the plaintiff noted that the plaintiff had been successful in her claim, and submitted that costs usually follow the event; I accept that that is the settled practice - see r63.03(1), *Donald Campbell and Co v Pollak* [1927] AC 732 at 809, 811-2 per Viscount Cave LC., and *R v Racing Gaming and Liquor Commission; ex p. Tangentyere Council Inc.* (unreported, Supreme Court (NT) (Kearney J), 24 May 1988). However, the costs issue arises here because of the plaintiff's amendments to her Statement of Claim, at trial; in that situation r63.11(7) (b) and (9) are relevant, viz:

> "(7) A party who amends –
>
> …
>
> (b) a pleading … by leave
>
> shall pay the costs of and occasioned by the amendment and the costs thrown away because of the amendment.
>
> …
>
> (9) This rule is subject to such other order as the Court makes."

I note also that where a plaintiff has so framed her case that the defendant is misled and thereby prevented from admitting liability, or is caused unnecessary expense, the plaintiff may be deprived of all or part of her costs; see *Archard v Ellerker* (1888) 10 ALT 196 per Williams J, and *Keddie v Foxall* [1955] VLR 320 at 323-4.

Mr Reeves drew attention to the decision in *Marks v GIO Australia Holdings Ltd* (1996) 137 ALR 579, but I do not consider that the approach to the award of costs on an indemnity basis favoured by Einfeld J obtains in this jurisdiction, in light of r63.28; see also now *Re Wilcox; ex p. Venture Industries Pty Ltd* (1996) 141 ALR 727 at 729.

Mr Reeves submitted that there was nothing to support Mr Barr's suggestion that had the plaintiff made her amendments earlier, the defendant would in all probability have admitted liability earlier. It had never offered to do so and it was not probable that it would have done so; consequently, the defendant had not thrown away any costs and there was no basis for depriving the plaintiff of any part of her costs. As to this submission, I consider that the course of events shows clearly enough that an earlier amendment of the Statement of Claim along the lines of those made on 29 March 1996, would have led to the defendant conceding the issue of liability within a reasonable time thereafter.

Mr Reeves submitted, alternatively, that the question of what had caused the need for the late amendments and partial reformulation of the plaintiff's claim, fell to be considered. I accept that. He submitted that that need arose from two facts which emerged for the first time in the late-served statements: first, that Dr Mellor had encountered difficulty in extracting the baby's head; and second, that he had not been assisted at that time by Dr Anderson. The

first fact indicated that Dr Mellor probably did not dislodge the baby's head from the pelvis before trying to extract it, and thereby caused damage; learning that fact led to 3 of the plaintiff's new particulars, including (f) on p7. The second fact indicated that the damage could have been caused by Dr Mellor's lack of experience; learning that fact led to the plaintiff's fourth amendment. I note that clearly the plaintiff came to know of the first fact from the statements received on 19 March 1996; however, the submission does not address the question whether the plaintiff should have come to know of this fact earlier, by administering interrogatories. As to the second fact, I note that by answers to interrogatories on 1 September 1994 the defendant disclosed that Dr Mellor carried out the caesarean section assisted by Dr Evans, with Dr Anderson on call at the time of delivery. This seems a clear enough answer; any lack of clarity as to Dr Anderson's role could have been cleared up by a supplementary interrogatory or by obtaining an order under r30.09 that the defendant make further answer, but the plaintiff did not seek to do so.

Mr Reeves submitted that the plaintiff had never abandoned its contention as to the significance of the site of the incision; I accept that. He submitted that the reformulation of the plaintiff's case during the trial was *not* based on the admittedly long-known fact that the baby's head was "lodged deep in the plaintiff's pelvis", but on the difficulties in extracting the head, as stated by Dr Mellor only 6 days before trial. This submission is correct as far as it goes,

but it does not address the question whether the plaintiff should have ascertained at an earlier time the difficulties now alleged by Dr Mellor, and how he dealt with them.

Mr Reeves submitted that these facts - the difficulties encountered in extracting the head, and the fact that Dr Anderson was not present at the caesarean section - had never been disclosed by the defendant prior to 19 March, and were not reasonably capable of being ascertained earlier by the plaintiff's legal advisers. I consider that the latter submission raises the crucial issue. In seeking to establish this submission, Mr Reeves discussed at length the pleadings, the discovery of July 1991 made by the defendant including the hospital notes, the defendant's answers to interrogatories of September 1994 and February 1995, and the medical experts' reports. He submitted that the defendant was able to maintain its denial of negligence only because it was in complete control of the facts; I note the lack of interrogatories directed to the issue raised by the defendant in its Defence of June 1991. He submitted that the existence of Dr Anderson's report of 25 August 1988 was not disclosed in the defendant's list of documents of July 1991, and was only disclosed to the plaintiff on 19 March 1996; it stated that "at the time of the delivery of the child a tear occurred during the delivery of the head as it was deep in the pelvis", a statement of fact which would have opened a chain of enquiry to the plaintiff had it known of it. I accept the last point; the defendant treated this letter as expert opinion, and possibly also as

falling within the generalized documents in Part 2 of Schedule 1 of the list, for which legal professional privilege was claimed. As an expert opinion it should have been disclosed 6 weeks before trial. In any event, the "chain of enquiry" in question was opened by the Defence of June 1991 (p11).

Mr Reeves submitted that Dr Mellor should have ensured that the hospital notes recorded the difficulties he had encountered in extracting the head, and that the defendant had been vague and evasive in pleading to the general allegation of negligence; I do not consider that the first point has merit, and the defendant's pleading was in accordance with the Rules.

Mr Reeves submitted that Professor Beischer's opinion of 1990 was "mere speculation" and clearly, since he eschewed further speculation in February 1996, he had not, as late as that date, been supplied with Dr Mellor's statement. I consider that the latter point may well be correct, but Professor Beischer's opinion of 1990 was not mere speculation, but an expert opinion.

Conclusions

I have already dealt with various matters in the course of discussing these submissions, so I will express my conclusions briefly.

A Statement of Claim should allege the facts on which the plaintiff relies to establish her cause of action. Pleadings are intended to define the issues between the parties.

The defendant raised an issue as to the cause of the injuries, in its Defence of June 1991 (p11). The plaintiff joined issue on the defendant's allegation by implication; see r13.13(2). The plaintiff never sought to explore that issue joined by interrogatories, or under Order 31. She could have done so; in *Fischer v City Hotels Pty Ltd* (1970) 92 WN (NSW) 322 at 326 it was pointed out that interrogatories involve –

> "… questions fairly seeking, in truth and substance, information so as to enable appreciation of the opponent's case, or so as to throw up and confine the real issues and matters that must be proved by evidence …".

The 3 statements delivered by the defendant on 19 March, insofar as they constituted expert opinion evidence, were delivered far too late, but raised no matter that the defendant had not already raised in June 1991. The essential reason the plaintiff sought amendments at trial, instead of well before, was because she had failed to utilise Order 30 or Order 31 as they should have been used, in relation to the plaintiff's defence of June 1991, when she administered interrogatories in June 1994. However, had the defendant's expert reports been disclosed at least 6 weeks before trial, as they should have been, the plaintiff would have had an opportunity to amend her Statement of Claim sooner than she did, despite her previous lack of action under Order 30

or Order 31; the proceeding would then probably have settled before the trial date, with some consequent saving of expense.

Against that background, as regards the amendments of 25 March 1996, I consider that both r63.11(7)(b) and (9) should apply; the plaintiff must pay the defendant's costs of and occasioned by those amendments as regards the issue of liability, and the costs thrown away by the defendant on that issue because of those amendments since 13 February 1995 (when the defendant gave further and better answers to the plaintiff's interrogatories), other than such costs that were incurred or thrown away by the defendant from and after a date 6 weeks before trial – that is, from and after 12 February 1996. The amount of such costs, if not agreed, may be determined on taxation. It can be seen that they are the costs incurred or thrown away by the defendant on the issue of liability, over a period of precisely 12 months, 13 February 1995 – 12 February 1996.

Subject to that, the successful plaintiff should have her costs of the action, other than her costs on the issue of liability incurred after 13 February 1995. In light of the plaintiff's offer of compromise in January 1996 and its non-acceptance (p8), the question arises whether her costs should be taxed on an indemnity basis, pursuant to r26.08(2). Payment of costs on that basis is a prima facie, though not an automatic, consequence. An important consideration is that at the time the plaintiff made her offer of compromise,

her Statement of Claim still alleged a sole basis of negligence which the defendant denied – and I consider, clearly enough, never did accept. Bearing in mind that factual situation in January 1996 in the light of the factors referred to at p15, I consider that in this case it was reasonable for the defendant not to accept the offer of compromise, the prima face consequence in r26.08(2) is displaced, and the plaintiff's costs should be taxed on the standard basis, and not on the indemnity basis, although I am satisfied that the preconditions in r26.08(2) were met. In arriving at this conclusion I have applied the approach outlined by Rolfe J in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425 at 448 and 451-2, while bearing in mind the authorities discussed by his Honour.

The issue of costs was addressed separately; on that issue the defendant has largely succeeded, and the plaintiff should pay 75% of its costs.

Orders accordingly.

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