Following a lengthy discussion of the case law, Justice Bennett also rejected the submission that the couple's decision not to try to abort one of the embryos, or not to adopt out one of the twins, amounted to a failure to mitigate their loss or to a break in the chain of causation.[10]

Justice Bennett accepted that the birth of twins negatively impacted on Ms G, who endured the pregnancy, and on the couple's relationship thereafter. General damages were assessed at $55,000.

On the costs of raising a second child, her Honour allowed private school costs but refused to allow the costs of university education after the age of 18. She said that while the parents should be '*applauded*' for intending to support their children at that stage of life, it was more than would be considered reasonable and that this should not be visited on Dr Armellin.[11]

In the end, the costs of raising the child, with a 15 per cent discount for vicissitudes, was assessed at $234,600.

CONCLUSION

This case represents an important addition to the case law in birth tort claims. It gives guidance on some legal and practical issues that is important to lawyers representing clients in such claims. As it should have, the case ignored the media spectacle of '*ungrateful lesbians with twins*' and focused on the rights of individuals to bring to account health professionals whose management is alleged to have been inadequate, and to seek lawful compensation for the consequences. ■

Notes: **1** This was the headline in the *Sydney Morning Herald*, 24 July 2008. http://news.smh.com.au/national/twins-lesbian-mothers-lose-compo-case-20080724-3kd0.html **2** *G and M v Armellin* [2008] ACTS 68 (24 July 2008). **3** The High Court permitted wrongful birth claims in *Cattanach v Melchior* (2003) 215 CLR 1 but claims for the economic consequences of the birth of normal, healthy child have since been outlawed in Qld, NSW and SA. **4** Judgment [32]. **5** One possible reason might be that it would have highlighted the couple's own contributory negligence in failing to inform the clinic of their last-minute decision to have only one embryo implanted. Had negligence been established, Justice Bennett would have assessed the plaintiffs' own negligence at 35% – the amount argued for by Dr Armellin. Interestingly, her Honour said, '*This represents, in my view, the minimum percentage that should apply.*' Judgment [125]. **6** (2003) 215 CLR 1. **7** Judgment [139]. **8** (1998) 195 CLR 232 [11]-[13]. **9** Judgment [140]. This same, spurious argument is sometimes raised in failed sterilisation cases. It is put that the plaintiff knew that there was some risk of failure, a failure occurred, and so they could not complain. But the risk of failure accepted was the risk inherent in a properly performed procedure, not a negligently performed one. **10** Judgment [160]-[195]. **11** Judgment [224]-[225].

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Costs issues in m

By Phillipa Alexander

Medical negligence proceedings give rise to a number of specific costing issues that practitioners may need to consider when acting for a plaintiff.

COUNSEL'S CANCELLATION FEES

Medical negligence matters may involve a lengthy hearing for which counsel may have been briefed at an early stage. Counsel's cost agreements often incorporate cancellation fees that are claimable if the matter settles prior to the trial, or if the estimated number of hearing days are not required. Cancellation fees are often disallowed or substantially reduced on a party:party assessment so that the client is left to fund the shortfall. In any settlement negotiations, it is essential to consider the amount of cancellation fees that may be claimable by counsel or expert witnesses and factor these fees into the negotiations, and into the advice to the client as to the net settlement amount s/he is likely to receive after party:party costs have been agreed or assessed.

It is not uncommon for clients to seek an assessment of their solicitor's costs and disbursements (including counsel's fees) some time after the matter has concluded.

A client, or third-party payer, has 12 months to apply for assessment of the solicitor's costs (which usually include counsel's fees as a disbursement) after:

(a) the solicitor's bill was given or the request for payment was made to the client or third-party payer; or
(b) the costs were paid if neither a bill was given nor a request was made.

In addition, the client, if not a 'sophisticated client' within the meaning of the Act, has the further right to apply to the Supreme Court for an assessment to be made out of time.

However, under s351 of the *Legal Profession Act* 2004 (NSW) (the Act), where counsel has been retained by a solicitor on behalf of a client (rather than directly by the client), the solicitor has only 60 days to apply for assessment after:

(a) counsel's bill was given or the request for payment was made; or
(b) the costs were paid if neither a bill was given nor a request was made.

This discrepancy in the time-limits to apply for assessment means that, once the 60-day period has expired, the solicitor is no longer entitled to challenge the fairness and reasonableness of counsel's fees. However, the client retains the right to challenge these fees as a disbursement in the solicitor's bill of costs for an additional 10 months or more. Should counsel's fees then be reduced on the

ical negligence proceedings

client:practitioner assessment, the solicitor can recover only the assessed amount from the client, notwithstanding that the solicitor's own liability to counsel for the full amount of the fees remains. The same principle applies in relation to agency fees charged by another law practice.

In some cases, it may not be immediately clear whether counsel has contracted with the solicitor or the client, particularly where arrangements are in place for the client to pay counsel's fees directly. In the recent case of *Ofria v Cameron*,[1] the NSW Court of Appeal set aside the District Court judgment of Hungerford ADCJ, in which his Honour found that a former barrister was entitled to recover his fees directly from a lay client. On appeal by the client, the Court of Appeal held that a letter and schedule of fees sent by counsel to the solicitor, which appeared to have been passed on to the client by the solicitor, did not constitute a contract with the client. Counsel accepted this finding but argued that the arrangement for the client to pay counsel's fees directly without the involvement of the solicitor still had contractual force. This submission was rejected by the Court of Appeal on the basis that such an arrangement did not necessarily give rise to a contract. In addition, the letter forwarded by counsel to the solicitor referred to s176 of the former *Legal Profession Act* 1987 (now s310 of the Act), which related to disclosure to an instructing practitioner, rather than to a client. If it is intended that the retainer be made between counsel and the client, practitioners should ensure that it is clearly described as such.

The recent decision of the NSW Supreme Court in *Levy v Bergseng*[2] concerned the recoverability of cancellation fees. In this matter, counsel had charged 20 days' cancellation fees. The costs assessor allowed 15 days' cancellation fees and required the law practice to pay the remainder of the fees. The law practice sought a review of the assessor's determination by the Review Panel, which determined that the cancellation fee provisions of the costs agreement were unjust and it disallowed the fees.

On appeal to the Supreme Court, Rothman J held that:

> '[110] To the extent available in these proceedings, and to the extent that the Court is entitled to deal with this issue, the charging of cancellation fees was reasonable, was part of the agreed costs arrangements and is not rendered unjust by any factor adumbrated by the Appeal Panel.'

His Honour reinstated cancellation fees for 15 days and found that an amount of $6,000 per day was appropriate, thus allowing $90,000 for cancellation fees.

The court did, however, sound a word of caution:

> '[111] Nothing in this judgment should be taken as a general proposition that all counsel in all cases can reasonably and justly charge cancellation fees. In most cases, and for most counsel, cancellation fees would be unjustifiable. This judgment deals only with this appeal, relating as it does to senior counsel engaged "on spec" in particularly specialised work for which the lead time is lengthy and during which he has, in fact, foregone other paid court work.'

EXPERT EVIDENCE

Obtaining expert evidence in medical negligence proceedings is often a substantial component of the costs of conducting the proceedings. In order to ensure that these disbursements are recoverable as party:party costs, practitioners should consider the reasonableness of the expenditure. For example, in order to establish the reasonableness of additional costs usually incurred when relying on an overseas expert, enquiries should be made, and documented, to evidence that there was no suitable equivalent local expert. The cost of travel by counsel and/or a solicitor to confer with an overseas witness should also be justifiable to overcome a defendant's objection that telephone or video conferencing could have been held at a far lower cost.

In some cases, it may be necessary to consult multiple experts in the same specialty where a consensus view of the profession is required. While *Uniform Civil Procedure Rules*, r31.19, which requires parties to seek directions before calling expert evidence, does not apply to a professional negligence claim, objection to the costs of obtaining more than one expert in the same specialty is routinely made by defendants when the party:party costs are being negotiated or assessed. Written advice on evidence from counsel directing that the specific evidence be obtained may assist in recovering the costs on a party:party assessment. Where appropriate, include a specific reference to the costs of the multiple experts when negotiating the terms of settlement or consider requesting the court to direct that the party:party costs include the costs of the multiple experts. ■

Notes: **1** *Ofria v Cameron* [2008] NSWCA 159 (1 July 2008).
2 *Levy v Bergseng* [2008] NSWSC 294 (4 April 2008).

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