IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2010: No. 66

CARLOS MEDEIROS **Plaintiff**

-v-

ISLAND CONSTRUCTION SERVICES CO. LTD. **1st Defendant**

-and-

ANTWONE LEROY SIMONS **2nd Defendant**

-and-

THE BERMUDA HOSPITALS BOARD
3rd Defendant/3rd Party

-and-

DR STEVEN DORE
4th Defendant/1st 4th Party

-and-

AND DR. MATTHEW ARNOLD
5th Defendant/2nd 4th Party

RULING ON COSTS

(in Chambers)

Costs-unsuccessful negligence claim against hospital and doctors-whether hospital's conduct of defence impacts on its right to recover costs of successful defence-whether hospital liable to pay doctors' costs-failure to promptly notify claimants of medical expert's change of position-failure to instruct medical expert to promptly comment on other reports-consequences of claimants' failure to abandon medical negligence claim in the absence of supporting expert evidence

Date of hearing: February 20, 2018

Date of Ruling: March 9, 2018

Mr. Craig Rothwell, Cox Hallett Wilkinson Ltd., for the Plaintiff
Mr. Jeffrey Elkinson and Mr. Scott Pearman, Conyers Dill & Pearman Ltd., for the 1st and 2nd Defendants (D1-2)
Mr. Allan Doughty, Beesmont Law Limited, for the 3rd Defendant/3rd Party ("BHB")
Mr. Paul Harshaw, Canterbury Law Ltd., for the 4th and 5th Defendants/4th Parties

Introductory

1. By an Amended Generally Endorsed Writ of Summons issued on February 17, 2010, the Plaintiff claimed damages for the negligence of D1-2 in relation to a collision on or about March 10, 2006 between a vehicle owned by D1 and driven by D2 and a truck which was propelled into the vehicle being driven by the Plaintiff, thereby causing him personal injuries. Alternatively, the Plaintiff claimed additional damages for the negligence of BHB, the 4th and 5th Defendant ("D4" and "D5") during and after a hernia repair operation on December 10, 2008.

2. D1 and D2 having admitted liability, the Plaintiff relied upon the claim advanced by D1 and D2 against BHB and D4 and D5 based on the premise that the negligence of the Hospital and the doctors who treated the Plaintiff after the hernia repair surgery carried out on December 10, 2008 caused or contributed to the damage the Plaintiff complains of in the present proceedings. D1 and D2 had initially joined BHB as a Third party, and BHB in turn joined D4 and D5 as Fourth and Fifth parties. On December 6, 2017, I delivered a Judgment which concluded as follows:

> "*91. The case on liability against BHB and D4-5 is dismissed. D1-2 advanced the central thesis that the Plaintiff's December 10, 2008 hernia repair surgery was only reversed because of (a) a delayed surgical intervention, which was caused by (b) a failure to diagnose post-operative bleeding. The primary case that the Plaintiff's main post-operative complaint was bleeding was rejected and no coherent alternative case was advanced. I shall hear counsel if necessary as to costs and the terms of the final Order.*
>
> *92. It may be helpful if I set out my provisional views on the appropriate costs order. It is difficult to see why costs, as between the Original Defendants (D1-2) and the vindicated hospital and doctors, subject to one important caveat, should not follow the event. The one*

caveat is my strong provisional view that BHB acted unreasonably in failing to ensure that Dr Winters was given, in particular, Dr Arnold's Witness Statement which was apparently available in early 2013. Dr Winters provided a Supplementary Report in September 2017 because he was only given this Witness Statement and other relevant documentation in the months or weeks immediately preceding the trial.

93. If an expert has a duty to notify any change of opinion to the parties and the Court as soon as possible (reference was made at trial to the Supreme Court Practice paragraph 38/4/3), a party must be under a corresponding duty to ensure that its expert is promptly supplied with information which might cause an expert to change his opinion. On the face of it, this duty does not seem to have been met and the case against D5 was maintained by D1-2 on the assumption that it would be supported by BHB's expert Dr Winters. The logical consequence would appear to be, subject to hearing counsel if required, that BHB should not be entitled to recover its costs in relation to its successful defence of the claim based on the negligence of D5.

The disputed issues relating to costs

3. It was agreed that the doctors were entitled to have their costs paid by someone, the case that they had caused or contributed to the Plaintiff's current medical condition failed. The most obvious candidates were D1-2, the only parties (other than the passive Plaintiff) who had actively advanced the case of medical negligence which failed.

4. The following issues were raised for determination:

    (1) **by D1-2 against BHB**: whether the fact that BHB's expert evidence up to January 2017 (as regards D4) and August 2017 (as regards D5) supported D1-2's case that the doctors were negligent displaced the usual rule that costs should follow the event. D1-2 proposed that there should be no order as to costs as between themselves and BHB and that, most surprisingly, BHB should pay the doctors' costs;

(2) **by D1-2 against BHB**: whether, in the alternative to there being no order as to all of BHB's costs, should there be a more limited costs penalty relating to the mismanagement of the expert witnesses Dr Winters and Dr Warshaw;

(3) **by D5 against D1-2**: whether D5 should recover his costs on an indemnity basis from August 21, 2017. Because there was from that date no expert evidence supporting a case that D5 was negligent. D1-2 therefore ought to at that juncture have abandoned their case against D5;

(4) **by BHB against D1-2**: whether BHB should recover its costs on an indemnity basis because of the manner in which Mr Collin gave his evidence.

Indemnity costs claim by BHB against D1-2

5. As I indicated in the course of argument, there was nothing to the complaints Mr Doughty made about the conduct of Mr Collin. No criticism was made of this expert in the Judgment. His evidence was simply rejected. This application is summarily refused.

Indemnity costs claim by D5 against D1-2

6. On August 22, 2017 BHB disclosed that Dr Winters wished to file an amended Report which would not suggest that D5 had been negligent. This was on the basis that Dr Winters had only recently learned of crucial communications between D5 and D4 about the Plaintiff's condition. Mr Doughty informed the Court that he had learned of this change of position the previous evening, the day before Dr Winters had been scheduled to testify.

7. At the end of the hearing on August 22, 2017 I made the following directions:

(a) BHB was granted leave to file an amended Expert Report from Dr Winters within 14 days;

(b) I also granted leave to D1-2 and D5 to file and serve any responsive expert evidence against D5 not less than 28 days before the resumed hearing.

8. On September 4, 2017 Dr Winters prepared a Supplemental Report which made it clear that he did not consider that D5 had been negligent. On September 13, 2017, the parties were notified that the trial would continue on Tuesday November 14, 2017. The last date for D1-2 to file expert evidence in response to Dr Winters asserting a positive case against D5 was Tuesday October 14, 2017, 28 days before the rescheduled trial. On October 18, 2017, Canterbury Law Limited wrote D1-2's attorneys in the following crucial terms:

> "*…As matters stand there is no anaesthetic or intensivist expert giving evidence that Dr Arnold was in any way at fault for what happened to Carlos Medeiros….*

The purpose of this letter now is to invite your clients to voluntarily discontinue this action against Dr Arnold without delay on the basis that there simply is no credible evidence of wrongdoing on his part.

Please will you respond to this letter as a matter of urgency."

9. There was no response to this letter and D1-2 ploughed ahead. In the event I recorded the following pivotal finding in respect of their case against D5:

> "*79. I have little difficulty in recording a positive finding that Dr Arnold did not breach his duty of care to the Plaintiff.*"

10. Order 1A/2 obliges the Court to apply the Overriding Objective when exercising any power conferred by the Rules. Order 62/3 obliges the parties to assist the Court to achieve the Overriding Objective. Order 62 rule 12 confers a discretionary power in relation to awarding costs on either the standard or the indemnity basis. It was inconsistent with the obligations of D1-2 under Order 1A of the rules to continue the case against D5 after deciding on or about October 14, 2017 at the latest not to adduce expert evidence against D5. At that point it became obvious that Professor Aitkenhead's evidence in support of D5 would be supported by Dr Winters on behalf of BHB. The discretion as to whether or not to award indemnity costs is a flexible one. In *American Patriot Insurance Agency Inc-v-Mutual Holdings (Bermuda) Ltd.* [2012] Bda LR 23, Evans JA (delivering the judgment of the Court of Appeal) stated:

> "*29. In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both 'the way the litigation has been conducted' and the 'underlying nature of the claim' (per Kawaley J in* Lisa SA v Leamington and Avicola *at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just.*"

11. I award D5 his costs against D1-2 incurred after October 14, 2017 on an indemnity basis.

BHB's costs in relation to Dr Winters

12. Mr Doughty advised the Court on August 22, 2017 that Dr Winters' change of opinion since his 2013 initial Report was based on a combination of:

    - reading the other Reports, in particular Professor Aitkenhead's Reports;

- reading the 2012 Witness Statement of D5; and
- reviewing the oral evidence given by D5 at trial in February 2017.

13. The pivotal change was apparently deciding, in light of this evidence, that a body of professional opinion existed which supported conservative treatment of ACS and that D5 had in fact reported to D4 the Plaintiff's developing condition after he entered the ICU (see Judgment, paragraph 29). Dr Winters had seemingly not reviewed anything other than Hospital records before early 2017. This was inexcusable. Having regard to Order 1A and Order 62 rule 10(1), I find that BHB acted unreasonably in failing to ensure that Dr Winters was properly briefed and reviewed his initial Opinion in light of :

    - D5's Witness Statement which described, albeit tersely, communications with D4; and
    - Professor Aitkenhead's Reports dated May 30, 2013 and November 11, 2016.

14. It is impossible to assess with any precision what impact the failure to obtain Dr Winters' comments on Mr Aitkenhead's Reports in 2013 and 2016 actually had. However it created the extremely misleading picture that BHB's expert would at trial support a finding that D5 had been negligent so that D1-2 had no need to instruct an expert of their own to have a reasonable prospect of success in relation to this part of their claim. BHB ought to have been aware of this perception and the risk that D1-2 might rely on it. I am not satisfied that it is more likely than not that D1-2 (and the Plaintiff after he joined D4-5 as Defendants in 2014)) would have abandoned their claim against D5 had Dr Winters' Supplementary Report been prepared earlier. However, the need to make that decision was postponed until late in the trial.

15. In the exercise of my discretion, I find that the appropriate costs penalty for mishandling this expert witness is for BHB's costs in relation to Dr Winters' 2017 work after the Second Winters Report dated February 19, 2013 to be disallowed in any event.

Whether BHB conducted its case in such an unreasonable manner as to require it to pay the doctors' costs and/or for its costs against D1-2 to be totally disallowed

16. The pivotal submission advanced in the Submissions of D1-2 was as follows:

> "10. *The Original Defendants fully appreciate that they have lost the action but the extraordinary unexplained changes in the Hospital's case, the sea-change (as referenced in para 70 of the Judgment) in relation to Dr. Doré*

coupled with the very last-minute change of evidence in respect of Dr. Arnold, jointly and severally bring into play RSC Order 62, rule 10 which provides: -

> *'10(1) Where it appears to the Court in any proceedings that anything has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed* ***and*** *that any costs by it to any other party shall be paid by him to that other party.'[****emphasis added****]*"

17. The "*sea change*" in BHB's case was neither "*extraordinary*" nor "*unexplained*". In paragraph 70 of the Judgment, I characterised what had happened in the following way:

> "*70. D1-2 made much in their closing submissions of the "sea-change" in BHB's case, after this Court ruled on January 21, 2014 that it did owe a non-delegable duty of care and dismissed its strike-out application on November 9, 2016*[1] *(Submissions of the First and Second Defendants (As to Liability) paragraphs 6-19). It was impossible to see how these background matters had any relevance (save, perhaps, as to costs) to the issues to be determined at the present liability trial. I summarily reject the fanciful argument that BHB has engaged in "expert shopping" which ought to be condemned. To my mind it reflected nimble footwork and clear-headed thinking for BHB to change course when it discovered that its initial 'blame the doctors' position was, on closer scrutiny (as the trial date approached and no interlocutory escape route was available) shown to be unsound…*" [Emphasis added]

18. Despite alluding tentatively to the possibility that BHB's change of position might have costs implications, I still expressed the provisional view that BHB should have its costs. I described the case against BHB as follows in the Judgment:

> "*82. Reflecting on the evidence adduced at trial, it is difficult to readily identify what case if any was advanced against BHB which is capable of surviving the findings that (1) post-operative bleeding and consequential blood loss requiring prompt surgical intervention was not the Plaintiff's main problem, (2) the doctors themselves were not negligent, and (3) that no actionable damage was proved in any event.*
>
> *83. It is helpful to recall that it was centrally pleaded by the Plaintiff (Amended Statement of Claim, paragraph 14) that BHB breached a :*

[1] *Medeiros-v-Island Construction Company* [2014] Bda LR 3; *Medeiros-v-Island Construction Company* [2016] SC (Bda) 103 Civ .

'direct non-delegable duty of care to ensure that reasonable care was at all times taken in relation to the medical, nursing and other care with which the Plaintiff was provided by or on behalf of the Third Defendant…The Third Defendant was negligent in failing to return the Plaintiff to the operating theatre before midnight on the 10th of December 2008 for the evacuation of blood already lost and for the arrest of further haemorrhage…was negligent in failing to operate on the Plaintiff to arrest further bleeding until very late evening of the 11th December 2008…'

84. The entirety of the pleaded case against BHB not only mirrored that pleaded against D4-5, but was based on the explicit premise that blood loss was the presenting problem. D1-2 in their Amended Defence also pinned their colours to the blood loss hypothesis."

19. It was always BHB's primary pleaded case that the Plaintiff was properly cared for but that, if he was not properly cared for, then the doctors were to blame and should contribute to any damages BHB was held liable to pay. The position at trial was somewhat different as regards the surgeon (who was more clearly not an 'employee') and the intensivist (who arguably was). However, the Judgment described the BHB's pleaded case as against the doctors in the following way:

"*13. BHB alleged as against D4-5 as First and Second Fourth Parties that:*

- *at all material times its servants and/or agents met the requisite standard of care in relation to the Plaintiff; and*
- *D4-5 were granted hospital privileges on express terms that they would afford BHB absolute immunity for any potential liabilities.*"

20. On what basis can it fairly be argued, as Mr Elkinson sought to do, that BHB was on the same side as them and then, surprisingly, "switched sides" by retaining a new surgical expert on December 16, 2017? The legal test relied upon is that formulated in the following famous passage in the judgment of Nourse LJ from *In re Elgindata Ltd. (No. 2)* [1992] 1 WLR 1207 at 1214:

"*The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv)Where the successful party*

raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs." [Emphasis added]

21. The critical issue to be analysed, therefore, is whether BHB raised issues or allegations which it subsequently abandoned in an unreasonable manner. At the outset it must be acknowledged that the present complaint is difficult to grapple with because it is reflects almost the mirror image of the usual context in which this costs principle is invoked. The traditional scenario in which this rule is engaged is where the successful party has raised against the unsuccessful party arguments which the unsuccessful party incurred substantial costs in meeting and defeating at the trial or other hearing. At the core of the principle that the party that succeeded overall should not recover costs for arguments which failed is the overarching costs principle: costs follow the event. A party who pursues an argument which consumes a substantial amount of time and costs which is unmeritorious should ordinarily be visited with some form of costs penalty which benefits the party who prevailed on the relevant issue.

22. Here D1-2 complain that BHB acted unreasonably in making unmeritorious allegations against the doctors which, had they been proved, would have assisted D1-2's own case against the doctors. In effect, it is complained that had BHB not led the Original Defendants to believe that the doctors were negligent, they would not have independently pursued their own claim against the doctors and lost. In their Submissions, D1-2 argued that:

> "21…*The test is unreasonable or improper behaviour. Here there is both. The express failures by the Hospital:*
>
> *(1) to provide full information to its three medical experts;*
>
> *(2) to notify the parties and the Court of changes in the Hospital's position regarding Dr. Winter at the first opportunity and without delay; and/or*
>
> *(3) to formally resile from the report of Dr. Warshaw, were unreasonable omissions by the Hospital for which costs should now be ordered to be paid to the Doctors by the Hospital under Ord. 62, r.10(1). Such behaviour also amounts to an improper breach of the Court Rules in the case of Dr. Winters - see SCP 38/4/3, which failure by the Hospital was the subject of criticism by the Court itself in the Judgment (para 93).*"
>
> *22. For all these reasons the Original Defendants should not be made to pay the costs of the Doctors. These should properly fall on the Hospital owing to its initial joinder of the Doctors, its act of deploying evidence against the Doctors, and the unreasonable or improper way in which the Hospital dealt with that expert evidence both during and (in the case of Dr. Warshaw) through to the conclusion of the trial.*"

23. The position of Dr Winters has already been dealt with separately above. It was clearly unreasonable not to give full information to Dr Winters bearing in mind that it was or ought to have been apparent to BHB that D1-2 had not retained their own expert anaesthetist to support their case against D5. However, even when afforded an opportunity to abandon their claim against D5, once it became clear that BHB was not asserting D5 was negligent, D1-2 insisted on ploughing ahead, expert evidence or not. I have found above that it is not possible to infer that but for Dr Winters' initial Report the case against D5 would never have been pursued by D1-2 at all. It is accordingly impossible to accept the submission that, despite the fact that D1-2 retained their own surgical expert long before trial and relied on his evidence against D4 at trial, BHB should be responsible for these costs, in part because it initially joined the doctors. This ignores the inconvenient provisions of the relevant pleadings.

24. Firstly, the Plaintiff's Amended Statement of Claim provided as follows:

> "*11. If the First and Second Defendant are not wholly liable for damages as above, the Plaintiff claims his personal injuries, loss and damages were caused by the First and Second Defendants and caused and/or exacerbated by the negligent treatment and care of the Plaintiff by one or more of the Third Defendant (which includes its servants or agents), Fourth Defendant and Fifth Defendant during and after his hernia repair operation on or about 10th December 2008.*"

25. The Plaintiff relied entirely on the case advanced by D1-2 in these proceedings and made no submissions and called no witnesses. However, D1-2 on March 16, 2011 itself brought BHB into the proceedings by issuing a Third Party Notice (amended on May 13, 2011) which alleged negligent medical treatment on the part of BHB and its servants or agents. It is true that BHB in turn then brought the doctors into the proceedings way of a Fourth Party Notice dated August 8, 2011(it was amended and eventually re-amended on December 16, 2016). But this Notice did not advance a positive case of negligence against the doctors at all. It merely averred that the doctors were granted privileges at the Hospital on terms that they would indemnify BHB for any negligence on their part and sought to enforce that indemnity in respect of any "alleged negligence". A positive case of negligence was first advanced against the doctors (as distinct from BHB) when D1-2 on October 16, 2011 issued an Amended Notice of Contribution against D4-5. At this juncture it is wholly untenable to suggest that either:

    (a) any unreasonable conduct on the part of BHB had occurred, or

    (b) that there was any or any material causative link between the Fourth Party Notice and the decision by D1-2 to allege a positive case of negligence against the doctors in their own right.

26. On July 17, 2014, the Plaintiff pleaded his own case against D4-5 (who at this point became Defendants, not just Fourth and Fifth Parties) which the Original Defendants advanced on his behalf. The case against the doctors was advanced by parties who were separately legally represented and it is difficult to see why, when these claims have failed, BHB should be held to be responsible for the doctors' costs by reference to its decision seek its own indemnity from the doctors in the event that they were found to be negligent. In all the circumstances, it was not reasonably foreseeable by BHB that D1-2, adverse parties who had long since retained their own surgical expert, would or even might abandon their claim against D4 if they had learned sooner that Dr Warshaw's Reports would be abandoned. It is difficult to conceive of any other circumstances in which BHB could be properly held liable to pay the costs of co-Defendants incurred in successfully defending D1-2's claim.

Should some of BHB's costs be disallowed because Dr Warshaw's expert evidence was improperly managed?

27. It remains to consider whether BHB should be deprived of any portion of its costs as against D1-2 in spite of its comprehensive victory, because of the way in which it dealt with its expert evidence before December 2016. As already noted above, it beggars belief to suggest that D1-2 would not have pressed ahead with the eminent and enthusiastic Mr Collin in their case against D4 had Dr Warshaw not intimated that he would support the case against D4. This broad-brush view is supported by a review of the timing of the Reports:

- **February 9, 2012**: Dr Warshaw opines (in 3 pages) that D4 should have operated earlier to deal with abdominal compartment syndrome (ACS);
- **June 5, 2012**: Mr Collin opines (in 16 pages) that D4 was negligent for failing to diagnose post-operative bleeding;
- **July 8, 2012**: Mr Collin (in 5 pages) comments on Dr Warshaw's first Report, seeks further information and reiterates his post-operative bleeding diagnosis;
- **August 29, 2012**: Mr Collin (in 4 pages) provides a Supplementary Report considering additional data and confirming his initial opinion;
- **September 24, 2012**: Mr Collin (in 11 pages) further supports his initial opinion;
- **January 1, 2013**: Dr Warshaw elaborates (in 5 pages) on his initial opinion that ACS was the problem;
- **August 6, 2013**: Mr Collins's Fifth Report (in 25 pages) considers various reports including Dr Warshaw's two Reports and reiterates his blood-loss diagnosis;

- **June 8 2014**: Mr McDonald (D4's expert, in 10 pages) opines that D4 was not negligent in diagnosing ACS when he did and in delaying surgery until less intrusive measures had been applied;

- **June 19, 2016**: Mr McDonald's Second Report (in 3 pages) considers Mr Collin's Reports and confirms his initial opinion;

- **December 29, 2016**: Mr Meleagros (BHB's new surgical expert, in 33 pages) concurred with Mr McDonald.

28. Mr Elkinson complained in his Submissions that BHB had failed to provide "*full information to its three medical experts*". Putting aside Dr Winters, who has been dealt with above, and Mr Meleagros, whose evidence was accepted, it was at first blush somewhat difficult to see what adverse costs consequence should flow from any failure to properly brief Dr Warshaw. D1-2 advanced a different case on negligence altogether, and Dr Warshaw's somewhat concise ACS diagnosis partially supported D4's defence, the only difference turning on how soon surgery should have occurred. Mr Collin's thesis was advanced with such conviction from the outset that it seems fanciful to suggest that D1-2 placed any material reliance on Dr Warshaw's opinion.

29. However, on closer scrutiny, Dr Warshaw did support the Plaintiff and D1-2's case on negligence to some extent and Mr Collin's broader hypothesis that D4 should have operated sooner than he did. The fact that his Reports appeared to reflect BHB's position would have influenced, to an extent which is difficult to precisely evaluate, the way in which the strength of the case against D4 was evaluated by the 'claimants'. Was there an unreasonable failure to properly instruct him which should be visited with costs consequences? I have already found as regards Dr Winters that BHB failed to properly instruct him because they only focused on full trial preparations having lost the interlocutory "non-delegable duty of care" strike-out application in November 2016 only months before the trial.

30. It is easy to understand that the public body might have been keen to limit the amount it invested in trial preparations before it was clear that a trial was inevitable. It is a notorious fact that BHB has faced financial challenges in recent years. However the Overriding Objective dictates cost-savings which benefit all parties involved in a case, not any single litigant. The almost silent exit of Dr Warshaw from the stage was only explained by reference to the discovery of an undisclosed conflict of interest. That was very convenient because it avoided the need for Dr Warshaw, like Dr Winters, to change an important part of his opinion (breach of duty) based on the discovery that a reasonable body of medical opinion now exists which supports a conservative approach to ACS.

31. It seems more likely than not that Dr Warshaw was not fully instructed and given an opportunity to change an important part of his initial opinions because his last Report was prepared in January 2013 and he was seemingly never asked to comment on Mr McDonald's contrary June 2014 (and June 2016) Reports. His diagnosis of ACS was confirmed at trial and supported by his replacement, Mr Meleagros, but BHB abandoned its evidential position that D4 had been negligent.

32. In "*The Ikarian Reefer*" [1993] 2 Lloyd's Rep 69 at 81 cited in Supreme Court Practice 1999 at paragraph 38/4/3, Creswell J described the "*duties and functions of an expert witness in civil proceedings*" as follows:

> "*1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 W.L.R. 246 at p 256 per Lord Wilberforce).*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polliviitte Ltd v Commercial Union Assurance Co Plc [1987] 1 Lloyds Rep 279 at p.386 per Mr Justice Garland and Re J [1990] F.C.R. 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J supra)*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J supra). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co Ltd and Others v Weldon and Others, The Times, Nov9, 1990 per Lord Justice Staughton).*
>
> *6. <u>If, after exchange of reports an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court</u>*...." [Emphasis added]

33. If an expert has a duty to communicate a change of view "*having read the other side's expert report or for any other reason*", parties instructing expert witnesses must be subject to an ancillary obligation to ask their experts to review and comment on the other, relevant reports. This obligation was generally discharged in relation to most expert witnesses. It was not discharged, most obviously in relation to Dr Winters, who admitted that he only reviewed the later reports on the eve of the trial. Inferentially, I am bound to find (based on the fact that he never commented on the most relevant subsequent McDonald Reports) that this duty was not discharged in relation to Dr Warshaw either.

34. The final result is not too different from the case of Dr Winters. An expert witness filed initial short reports, was not invited to comment on crucial contrary reports which have been served to facilitate such comments and the critical part of the opinion (dealing with breach of duty) was abandoned on the eve of the trial. This was not an appropriate way to manage the preparations for trial in relation to an expert witness. The position is less serious than in the case of Dr Winters in that D1-2 were from an early stage always relying upon their own expert who was advancing an entirely distinct theory of negligence. The significance of D1-2 being misled as to the true nature of BHB's case at trial was not as great. In my judgment the appropriate costs penalty is to disallow all costs relating to Dr Warshaw, because those costs were effectively thrown away when a decision was made not only that he would he not be called, but that an important part of his intended evidence would be abandoned as well.

Summary

35. To summarize, the following Order is made as to the costs of the action, without prejudice to any Orders previously made herein:

(a) the costs of D4-5 shall be paid entirely by D1-2 on the standard basis, subject to (b);

(b) the costs of D5 shall be paid on the indemnity basis to the extent that they were incurred after October 14, 2017;

(c) the costs of BHB shall be paid by D1-2 on the standard basis, save that:

(i) the costs in relation to Dr Warshaw are disallowed, and

(ii) the costs in relation to Dr Winters incurred after his Second Report was prepared in 2013 are disallowed.

36. As far as the costs of the costs hearing are concerned, the most significant issues (whether BHB should be deprived of all of its costs and should be required to pay the doctors' costs) were decided in favour of BHB and against D1-2. D1-2 achieved only partial success to the extent that most of BHB's costs relating to two experts were disallowed, and BHB's application for indemnity costs was summarily dismissed. D5 succeeded as against D1-2 on the one narrow issue which he raised. Unless any party applies by letter to the Registrar to be heard as to the costs of the costs hearing, the following Order shall be made. D1-2 shall pay D4-5's costs and D1-2 shall pay 90% of BHB's costs of the costs hearing.

Dated this 9th day of March 2018 _____

IAN RC KAWALEY CJ