Practice Updates

Costs - Offers to settle

Davies v. Fay, Writ No 782 of 1990 QLD Sup CT 25-3-94

Greg Sowden, Barrister, QLD

After delivery of Judgment the Plaintiff made an application under 0.26 r.9 for costs of a solicitor and client basis.

The Plaintiff offered to settle quantum in the sum of $635,000.00 on or about 24th February, 1994. A separate offer bearing the same date was made by the Plaintiff to settle the issue of liability by offering 5% contributory negligence.

On 4th March, 1994 the parties settled quantum as a separate issue at $620,000.00 inclusive of all heads of damages and any refunds. The trial proceeded on the issue of liability alone. No contributory negligence was found on the part of the Plaintiff.

0.26 r.2 provides that a party may serve on any other party an "offer to settle on any one or more of the claims in a cause or matter" on the terms specified in the offer to settle. MacKenzie J held it is a natural reading of this provision that a claim that the Plaintiff was guilty of contributory negligence is a claim in the cause. The onus lies on the Defendant to establish that there should be some other order than for solicitor and client costs. As the offers to settle quantum and liability were made on the same day, to that point both aspects of the action were in issue. It was only after settlement of the issue of quantum on 4th March, 1994 that the question of contributory negligence became the sole live issue.

The final resolution of the action depended heavily upon the acceptance of one view of the evidence over the other. Accordingly, the order for costs was that the Defendant was to pay the Plaintiff's costs of the action including any reserved costs, to be taxed. Further, such costs on the issue of liability were to be taxed on a solicitor and client basis after 25th February, 1994.

Potting Mix Danger

Roland Everingham, Cashman & Partners, NSW

A number of plaintiff lawyers have been asked to advise in cases involving serious injuries following the use of gardening potting mix. Bagged potting mix has, in some instances, been found to contain the Legionella bacteria which, it is alleged, caused the user to contract the Legionella Pneumonia.

The Legionella Pneumonia can be a life threatening condition. One case commenced in the Queensland Supreme Court arose from the death of the user whose widow is now suing the retailer, K-Mart Australia and Arthur Yates & Co Limited.

Concern about potting mix first arose in October 1991 when the Queensland Government began a study of potting mix following concern in the community about the potential dangers. On 24 January, 1992 the Queensland Minister for Health issued a press release announcing that potting mix in Queensland would carry a label alerting consumers to potential health risk. The Minister noted that "Legionella Pneumonia is a very serious illness...".

On 29 January, 1992 Arthur Yates & Co published a prominent advertisement in the Sydney press concerning the association between illness in humans and presence of environmental organisms in bagged potting mix.

In March 1992 the Nursery Industry Association of Australia adopted the recommendations of the National Health and Medical Research Council concerning warnings to be displayed on bags of potting mix.

Plaintiff lawyers advising clients in these cases who wish further information are invited to contact the following lawyers who are able to provide assistance:

Linda Phelps of Linda Phelps & Co - (075) 764 611; Neil Francey, Barrister (02) - 233 5892; and Roland Everingham of Cashman & Partners (02) 261.1488.