SUPREME COURT OF QUEENSLAND

CITATION:	*Di Carlo v Dubois & Ors* [2002] QCA 225
PARTIES:	**SALVATORE DI CARLO** **(**plaintiff / appellant) **v** **PHILIP JAMES DUBOIS** (first defendant / first respondent) **PHILIP DUBOIS (MEDICAL) PTY LIMITED** ACN 010 673 864 (second defendant / second respondent) **DENNIS RICHARD OSBORNE, PHILIP JAMES DUBOIS, STEPHEN BENNETT KELLER, PIYOOSH KOTECHA, GARY EDWARD O'ROURKE, MARK JAMES READY, PETER STOREY, CHARLES BRUCE LEIBOWITZ, PETER CHARLES LUSH, MICHAEL DAUNT, DAVID ALEXANDER NOBLE and PETER FERGUS LEIGH Trading as QUEENSLAND X-RAY SERVICES** (third defendants / third respondents) **MATER PRIVATE HOSPITAL** (fourth defendant) **MICHAEL CORONEOS** (fifth defendant / fourth respondent)
FILE NO/S:	Appeal No 9805 of 2001 SC No 1281 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2002
JUDGES:	Williams JA, White and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Allow the appeal;** **2. The orders as to costs made below be set aside and in lieu thereof order that:** **(a) the appellant pay the defendants' costs incurred in consequence of the amendment to the statement of claim, being Exhibit "K";**

(b) the costs of the four days of trial be reserved to the judge who hears the new trial of the action.

3. **The respondents pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – ADJOURNMENT AND AMENDMENT - where trial judge granted appellant leave to amend statement of claim at trial and ordered the appellant pay the costs thrown away by the amendment to be assessed on an indemnity basis – whether amended pleading set up an alternative case which raised the prospect of conflict between two of the defendants who were represented by the same counsel and solicitors and with the same professional indemnity insurer – where on the fourth day of trial the trial judge granted an adjournment of the trial, discharged the jury and ordered the appellant to pay the costs of the four days of trial thrown away to be assessed on an indemnity basis – whether trial judge erred in not reserving those costs to the judge who hears the second trial

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – COSTS ON INDEMNITY BASIS – whether trial judge erred in ordering that the costs be assessed on an indemnity basis – consideration of Rules 703 and 704 of the *Uniform Civil Procedure Rules* – consideration of the authorities including *Colgate-Palmolive Company v Cussons Pty Ltd* and *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*

Uniform Civil Procedure Rules 1999 (Qld), rules 703 & 704

Botany Municipal Council v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories (1992) 34 FCR 412, considered
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225, considered
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397, considered
Porter v Thomas Borthwick and Sons (Australia) Pty Ltd [2000] QSC 446, considered
Ragata Developments Pty Limited v Westpac Banking Corporation (unreported Federal Court 5 March 1993), considered
Rosniac v Government Insurance Office (1997) 41 NSWLR 608, considered
Sydney Markets Ltd v Sydney Flower Market Pty Ltd [2001] FCA 662, considered

COUNSEL: N M Cooke QC for the appellant
S C Williams QC, with D K Boddice SC, for the respondents

SOLICITORS: Baker Johnson for the appellant
Flower & Hart for the respondents

[1] **WILLIAMS JA:** I agree with the reasons for judgment of White J and with the orders she proposes.

[2] **WHITE J:** On 5 October 2001, the fourth day of a civil trial for damages for negligence before a jury, the trial judge discharged the jury and made orders that the appellant, who is the plaintiff, pay the defendants' costs thrown away. The appellant obtained his Honour's leave to appeal the costs order. Although he opposed the orders discharging the jury and adjourning the trial, through his counsel, Mr N.M. Cooke QC, he accepts that that is a *fait accompli*.

[3] His Honour had granted the appellant leave to amend his statement of claim over objection by the defendants with costs occasioned by the amendment to be paid by the appellant and assessed on an indemnity basis. Mr S C Williams QC, who appeared with Mr D Boddice SC for the defendants, after a brief adjournment, sought and obtained the order for the discharge of the jury and the adjournment of the trial on the basis that the amended pleading set up an alternative case which raised the prospect of conflict between the fifth defendant, Dr M Coroneos, and Dr P Dubois, the first defendant. The defendants were represented by the same solicitors and counsel and, it was understood, the same professional indemnity insurer.

[4] His Honour included in the costs thrown away by the amendments to the statement of claim the costs of the four days of trial also to be assessed on an indemnity basis.

[5] The appellant contends that his Honour ought not to have acceded to the defendants' request to discharge the jury and adjourn the trial and make the costs order that he did because the potential for conflict was known or ought reasonably to have been known to the defendants since the receipt of a letter dated 10 August 2000 from the appellant's solicitors. In order to test that submission it is necessary to say something about the nature of the action, the pleadings and the course of the trial.

[6] On 25 May 1993 the appellant consulted Dr Coroneos, a specialist neurosurgeon, about recurring episodes of dizziness. After examination Dr Coroneos recommended that the appellant undergo a CT scan by Dr Dubois, a specialist radiologist, whose rooms were located at the Mater Private Hospital (the fourth defendant against whom the action has been discontinued). Dr Dubois carried on his business in partnership with the third defendants under the firm name of Queensand X-Ray Services.

[7] On 29 May 1993 Dr Coroneos accompanied the appellant to Dr Dubois' rooms. An employee of the partnership, one Graham Brown, at the direction of Dr Dubois performed a plain CT scan of the appellant's upper body and then injected him with contrast medium preparatory to a further scan. The appellant suffered an immediate

anaphylactic reaction which caused him breathing problems and required treatment including the injection of adrenalin and the administration of oxygen. This had allegedly serious psychiatric consequences for the appellant. These were the essential allegations of fact about the events giving rise to the claim contained in the original statement of claim delivered 20 May 1997.

[8] The duty alleged to be owed by the defendants to the appellant was to warn him of the risk of an anaphylactic reaction to the contrast medium which might cause injury to his health. The particulars of the way in which the appellant alleged that the defendants were negligent are set out in paragraph 12 of the statement of claim. As against Dr Dubois (and the second defendant company associated with him) it is alleged that he:

- failed to advise the appellant that he would require an injection of contrast medium;
- failed to warn the appellant of the risks associated with injection of the contrast medium;
- failed to warn the appellant of the risks of anaphylactic reaction to the contrast medium;
- failed to obtain a history of the appellant's health from him;
- failed to obtain a history of the appellant's health from Dr Coroneos;
- failed to instruct Graham Brown to warn the appellant of "the matters referred to above".

[9] For the purposes of this appeal the particulars of negligence against the partnership are not relevant.

[10] The particulars against Dr Coroneos are:

- a failure to warn the appellant of the risks associated with the injection of the contrast medium;
- a failure to warn the appellant of the risk of anaphylactic reaction to the contrast medium;
- a failure to ensure that Dr Dubois warned the appellant "of the matters referred to above"; and
- failure to give Dr Dubois a history of the appellant's health.

[11] By paragraph 13 the appellant alleged that had he been warned of the risks associated with the injection of the contrast medium "he would not have consented to the injection of the contrast medium". Mr Williams contended in the course of the trial and maintained on appeal that this paragraph set up a case of positive consent by the appellant to the injection of the contrast medium. Mr Cooke did not accept this construction of the pleading and contended that it was entirely

conditional in its effect. The particular of negligence that Dr Dubois failed to advise the appellant that he would require an injection of contrast medium was not discussed at the trial and might be argued to imply a failure to consent although not pleaded as a material fact.

[12] The defences delivered by the first, second and third defendants and the fifth defendant respectively were the well known, uninformative "do not admit" style of pleading permitted under the previous rules of court then in force.

[13] By letter dated 10 August 2000 the appellant's solicitors, *inter alia*, sought "any other documents concerning Dr Coroneos' examination, treatment and observations" in addition to those already disclosed and specifically requested:

> "…Dr Coroneos' requisition form for the relevant CT Scan."

The solicitors added:

> "Alternatively, should you be unable to provide the relevant form, will you admit the following facts:-
>
> (1) Dr Coroneos did not ask for a CT Contrast Scan.
>
> (2) That no patient preparation consent form was ever given or shown to Mr Di Carlo.
>
> (3) That it would not be normal practice for a Radiographer to inject contrast medium in a patient in the absence of the specialist doctor."

[14] The defendants' solicitors replied that Dr Coroneos' request form "… is, in all probability, no longer in existence" and added that "our client is not prepared to make any admissions of the type that you are seeking in your correspondence".

[15] On 9 February 2001 the appellant's solicitors sent a notice to admit facts pursuant to *UCPR* 189 to the defendants' solicitors in the following terms:

> "1. That at no time prior to the injection of contrast medium into the Plaintiff on or about the 29th May, 1993 did any of the Defendants warn the Plaintiff of any risk associated with the injection of such contrast medium.
>
> 2. That at no time prior to the injection of contrast medium into the Plaintiff on or about the 29th May, 1993 did any of the Defendants obtain the consent of the Plaintiff for such a procedure."

[16] The defendants did not respond to that notice within the time limited by the Rules and, accordingly, were deemed to have admitted those facts. The defendants were relieved of that admission by order of the court made 28 March 2001. Mr P Tregenza, a lawyer employed by the appellant's solicitors, deposed in an affidavit read on the application:

> "The matter concerns an action for damages for personal injuries suffered by the Plaintiff as a result of medical negligence by the Defendants when contrast medium was injected into the Plaintiff on

> the 29th May, 1993 and the allegations are that this injection was performed without his consent **and** without warning of the risk associated with the said injection whereby he suffered an immediate anaphylactic shock." (emphasis added)

Mr Tregenza further deposed:

> "The Defendants' solicitors have produced no evidence to indicate that our client was fully informed of the risk **and** that a consent was obtained from our client prior to the injection of contrast medium." (emphasis added)

[17] The defendants filed a joint amended defence in compliance with the *UCPR* on 5 April 2001 in which they admitted that they owed the appellant a duty of care in the provision of radiology and medical services and a duty to warn him of "any material risk of undergoing radiological examination and/or medical treatment" but denied that the risk of anaphylactic reaction to the contrast medium was a material risk in respect of which they were obliged to advise him. They asserted, contrary to the allegation in the statement of claim, that the employee, Graham Brown, did obtain a relevant medical history from the appellant prior to performing the CT scan procedure, and that the appellant would have consented to the injection of the contrast medium even if warned of the risks associated with it because of his concern to have his complaints of dizziness diagnosed.

[18] As a consequence of the amended pleading which, for the first time, made positive assertions, the appellant delivered a reply on 29 June 2001 challenging some of those assertions. Of particular relevance are the allegations in paragraph 4 :

> "(a) The Plaintiff denies the Defendants or the said Graham Brown took a history from the Plaintiff at any time prior to injecting him with contrast medium or at all. Save that the said Graham Brown asked the Plaintiff "are you an asthmatic?", [t]o which the Plaintiff replied, "I had childhood asthma and there is asthma in my family".
>
> (b) The Plaintiff denies that the Defendants or the said Graham Brown warned the Plaintiff of their intention to inject him with contrast medium;
>
> (c) The Plaintiff says further that neither the Defendants nor the said Graham Brown obtained the consent of the Plaintiff to inject him with contrast medium prior to doing so;
>
> (d) Further, the Defendants by their servant or agent, Graham Brown, injected the Plaintiff with contrast medium when there was no medical indication for such procedure;
>
> (e) Further and/or in the alternative the First, Second and Third Defendants proceeded with a CT contrast scan in the absence of a request from the referring doctor for a CT contrast scan and indeed contrary to his request for a plain CT scan only.

(f) Further, and/or in the alternative, the Fifth Defendant failed to inform the First, Second and Third Defendants that a plain CT scan was all that was required and that he had advised the Plaintiff that the plain CT scan was a non invasive procedure.

(g) Further, and/or in the alternative, if the Fifth Defendant advised the First, Second and Third Defendants of the above, they failed to comply with his request and did not discuss the change with the Fifth Defendant or the Plaintiff before injecting the Contrast.

(h) Further, and/or in the alternative, by failing to warn the Plaintiff of their intention to inject the Plaintiff with contrast medium and the risk of anaphylactic reaction attendant thereto, the Defendants deprived the Plaintiff of the opportunity of declining to undergo that procedure."

[19] The trial commenced on 2 October 2001. Mr Cooke in the course of his opening address to the jury said:

> "In this case, the defendants have admitted that they gave no warning of any risk to the plaintiff at any stage that there was a risk of serious reaction to the contrast dye. It is the plaintiff's case as well that no one asked for his consent to administer a contrast dye in fact."

[20] When outlining the evidence to be given by the appellant Mr Cooke, referring to the consultation with Dr Coroneos, said:

> "He was told, Mr Di Carlo will tell you, that it was like having an X-ray, there was nothing intrusive about it. The question of contrast was raised. Mr Di Carlo said, "What's that?" He was told, "We will inject a dye into your vein".
>
> Mr Di Carlo said to Dr Coroneos, "No, I don't want any of that. I don't want any intrusive procedure". It was then arranged that Dr Coroneos would issue a request form (sic) a plain CT scan, that is, one without contrast …".

[21] No objection was taken by defence counsel that the appellant's positive assertion to Dr Coroneos that there was to be no invasive procedure of the kind involved in injecting contrast medium did not appear in the pleadings and/or might be the subject of a claim for damages for assault.

[22] The appellant gave his evidence on this matter consistently with his counsel's opening. He said that he read the request form filled in by Dr Coroneos which sought "a plain CT". There were, it seems, Medicare documents (not in evidence) which suggested that Dr Coroneos requested both plain and enhanced procedures, but in any event, Mr Williams explained to the court subsequently when he was objecting to amendments to the statement of claim, no objection to this evidence by the appellant had been made because it was seen only as a credit issue.

[23] During argument in the course of the trial concerning questions proposed to be put to Dr Middleton, a psychiatrist, going to the materiality of the risk and the evidence

of the appellant that he had told Dr Coroneos of his aversion to an invasive procedure, the defendants made plain that they regarded the action against them as confined to a failure to warn of the risks associated with the procedure. Mr Williams asserted that paragraph 13 indicated that the appellant consented to such a procedure. Mr Cooke drew attention to the reply but it did not go as far as the appellant's evidence. His Honour accepted the defendants' understanding of the pleadings.

[24] The following day Mr Cooke sought leave to amend the statement of claim. In paragraph 9 it was proposed to delete the allegation that Dr Coroneos recommended that the appellant "undergo radiological examination" and in substitution that he "undergo unenhanced CT scan". This was argued by Mr Williams to be contrary to paragraph 13 of the statement of claim. Proposed amendments in paragraphs 13B – 13I incorporated, in essence, paragraph 4 of the reply. What was new and what Mr Williams maintained gave rise to the potential for conflict for the first time was the allegation made in paragraph 13A that:

> "The Plaintiff told the Fifth Defendant [Dr Coroneos] on 25 May 1993 that he did not wish to be injected with contrast medium."

Paragraph 13F was said, in the light of the amendment in paragraph 13A, to raise concerns about conflict between the doctors. It provided:

> "13F. Further and/or in the alternative the First, Second and Third Defendants proceeded with a CT contrast scan in the absence of a request from the referring doctor for a CT contrast scan and indeed contrary to his request for a plain CT scan only."

But it was only paragraph 13A which contained any new allegation – paragraph 13F was the same as paragraph 4(e) of the reply.

[25] Mr Williams contended that the allegations in the reply set up a case inconsistent with that pleaded in the statement of claim, namely, that paragraph 13 contained a clear assertion that the appellant consented to the injection of the contrast dye and that the only issue was one of informed consent, whilst paragraph 4 of the reply raised the want of consent to the procedure, and that this was even more objectionable when relocated into the statement of claim. The particulars of negligence remained unchanged and were only directed to an informed consent case.

[26] This was a managed case which had been extensively reviewed. There had been no application to strike out the offending allegations from the reply. After some further complaint about lack of identity between the proposed amendments to the statement of claim and the reply a further document was produced which pleaded a case of want of consent to the injection of contrast medium procedure and in the alternative that had the appellant been warned he would not have consented to undergo the procedure.

[27] His Honour accepted Mr Williams' submission that this now raised a situation of conflict between the first, second and third defendants and the fifth defendant which would require separate representation and adjournment.

[28] Mr Cooke contended that the allegations contained in paragraph 4 of the reply were in response to the assertions in the amended defence that the risk of harm arising out of the injection of contrast medium was not a material risk in respect of which advice need be given to the appellant. That is, the appellant had expressed aversion to such a procedure to Dr Coroneos on 25 May 1993 and to allege this in the reply was consistent with the approach of the court in *Rogers v Whitaker* (1992) 175 CLR 479 at 490:

> "The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it."

[29] The difficulty with Mr Cooke's submission is that the pleading does not immediately convey that purpose. It does not, it is true, have any other apparent role nor, when relocated to the statement of claim, is there any further consequence pleaded to the allegation of want of consent, that is, the appellant does not seek damages for assault. Mr Cooke does not accept the suggestion that such a consequence is inherent, pointing to the observations of the court in *Rogers v Whitaker* at 490 that the phrase

> "[i]nformed consent is apt to mislead as it suggests a test of the validity of a patient's consent. Moreover, consent is relevant to actions framed in trespass, not in negligence. Anglo-Australian law has rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass; the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed."

Nonetheless, a positive assertion of want of any consent to the injection procedure seems outside the ambit of those remarks.

[30] There seems to have been a *bona fide* misunderstanding between the parties about the case that was being run and met. If, as Mr Cooke contends, the allegations in the reply were only to meet the defence of the non-materiality of the risk it is unfortunate that there was no clearer expression of it. However, the letter of 10 August, paragraph 2 of the notice to admit facts, the affidavit of Mr Tregenza and the reply reveal issues of potential conflict which were exposed well before the trial. Mr Williams contended, both before the learned trial judge and this court, that those matters could safely be ignored because there was no conflict of interests until they were crystallised into a pleading. That seems, with respect, a rather sanguine approach. The separate responsibility of each group of defendants for the appellant's injury was always an issue and the potential conflict between Dr Coroneos and Dr Dubois plain enough even when confined to informed consent.

[31] His Honour was faced with an intimation that defence counsel and solicitors may have felt constrained to withdraw altogether from the trial. He had already ruled that the defendants were not surprised by the amendments which incorporated the reply. But given the position taken by defence counsel on instructions it is not

surprising that he discharged the jury and adjourned the trial. His discretion to do so cannot be said to have miscarried. However the appropriate course, in my view, was to have reserved the question of the costs lost as a consequence of the adjournment until the issues giving rise to the adjournment had been the subject of evidence or, at least, more fully ventilated.

[32] The appellant also appeals against his Honour's order that the costs be assessed on the indemnity basis. If the costs are to be reserved to the judge who hears the second trial then it would follow that the basis upon which those costs are to be assessed ought properly to be left to that judge. However, I will make some comment on what seems to be a growing practice of seeking costs on an indemnity basis.

[33] Rule 703 of the *UCPR* provides:

> "(1) Unless these rules or an order of the court otherwise provide, the registrar must assess costs on the standard basis.
>
> (2) When assessing costs on the standard basis the registrar must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed."

Rule 704(1) permits the court to order costs to be assessed on the indemnity basis. By r 743(a) and (b) standard and indemnity bases for awarding costs are said to equate to the former taxation of costs on a party and party basis or solicitor and client basis. By r 704(3):

> "When assessing costs on the indemnity basis, the registrar must allow all costs reasonably incurred and of a reasonable amount, having regard to –
>
> (a) the scale of fees prescribed for the court;
>
> (b) any costs agreement between the party to whom the costs are payable and the party's solicitor; and
>
> (c) charges ordinarily payable by a client to a solicitor for the work."

[34] When making his order for indemnity costs his Honour said:

> "… amendments will be allowed if the other side can be sufficiently protected by an order for costs. Well, no one these days can be sufficiently protected by an order for costs unless it is on an indemnity basis because the difference between party and party and solicitor and own client costs is so very considerable. Otherwise I would be paying lip service to the notion that parties can be sufficiently protected by orders for costs…." R321.

[35] The standard basis of assessment in r 703(2) is not materially different from the words used to describe party and party costs in RSC O 91 r 82A but without importing the strictures of r 81. Rule 704(1) imposes a different standard of assessment than previously applied in respect of solicitor and client costs notwithstanding r 743(b) of the *UCPR*. Whether it is more generous I cannot say.

What r 704 does not do is to give guidance as to when an order for costs to be assessed on the indemnity basis might be made. The particular instances mentioned in r 704(2) are of no or little assistance in this regard.

[36] As Sheppard J noted in *Colgate-Palmolive Company v Cussons Pty Limited* (1993) 46 FCR 225, there is perceived a growing divergence between what taxing officers consider necessary or proper and the refusal of barristers, solicitors and professional witnesses to accept that guide for their fees and charges. But that does not mean that it is open to an individual judge to award costs having regard to his or her own view as to the adequacy of party and party costs so fixed, see Davies J's comments to that effect in *Ragata Developments Pty Limited v Westpac Banking Corporation* (unreported Federal Court 5 March 1993) quoted in *Colgate-Palmolive* at 231-2.

[37] There are numerous authorities which discuss the circumstances in which a court will be justified in making an order for indemnity costs. Two are regularly cited – *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, a decision of Woodward J, and *Colgate-Palmolive*. From his review of the cases Sheppard J was able to derive a number of principles or guidelines. At pp 232-4 his Honour recognised that the categories in which the discretion may be exercised are not closed. Woodward J at 637 in *Fountain* said that there needs to be some special or unusual feature in the case to justify a court departing from the ordinary practice. Sheppard J instanced the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud; misconduct that causes loss of time to the court and the other parties; the fact that the proceedings were commenced at or continued for some ulterior motive; or in wilful disregard of known facts; or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions; the imprudent refusal of an offer to compromise; and costs against a contemnor.

[38] The New South Wales Court of Appeal in *Rosniac v Government Insurance Office* (1997) 41 NSWLR 608 noted at 616 that the discretion to depart from the usual party and party basis for costs is not confined to the situation "of what Gummow J described as the "ethically or morally delinquent party" in *Botany Municipal Council v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412 at 415. Their Honours observed however, that:

> "…the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule maker."

[39] Mr Williams referred the court to two single judge decisions – *Sydney Markets Ltd v Sydney Flower Market Pty Ltd* BC 200102863, a decision of Hely J of 23 April 2001 and *Porter v Thomas Borthwick and Sons (Australia) Pty Ltd* BC 200008123, unreported decision of Dutney J of 9 November 2000. In the first case a late amendment to a statement of claim was sought. An adjournment of the imminent trial would cure any prejudice that might be suffered by the defendant and order was made that the costs thrown away as a consequence of the adjournment and the amendment were to be paid on an indemnity basis. There was no discussion

of the circumstances in which such an order for indemnity costs might be made. *Porter* had special facts but in the course of his reasons for judgment Dutney J indicated that had he been minded to grant the adjournment sought by the defendant that would have been with indemnity costs. Again there is no discussion of the basis upon which such costs might be awarded.

[40] It is important that applications for the award of costs on the indemnity basis not be seen as too readily available when a particular party against whom the order is sought is seen to carry responsibility for the state of affairs calling for a costs order without some further facts analogous to those mentioned in *Colgate* and other considered decisions.

[41] As I have indicated, since the question of the costs lost by the adjournment ought to be, in my view, adjourned for the decision of the judge who hears the second trial, so too, should the basis upon which those costs are to be assessed be adjourned to that judge.

[42] I would allow the appeal and order that the orders as to costs made below be set aside and in lieu thereof order that the appellant pay the defendants' costs incurred in consequence of the amendment to the statement of claim, being Exhibit "K", and the costs of the four days of trial be reserved to the judge who hears the new trial of this action.

[43] I would further order that the respondents pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.

[44] **WILSON J:** I agree with the reasons of White J, and with the orders she proposes.