matters falling short of or outside of sexual intercourse.

Ms O'Connell's summary of the decision in *Daniels v Burfield* also fails to do justice to the decision in that case.

Firstly, it is to be noted that no damages were actually awarded in the case because the Trial Judge found that liability had not been proved. However, Bollen J went on to indicate what would be his assessment if his finding on liability was subsequently overturned on appeal. It is quite wrong to allege that "there was no consequences from the injury at all".

On the contrary, Bollen J indicated that he would have allowed an assessment for the "severe pain and discomfort" suffered in the past. In respect to the (theoretical) future award, Bollen J said that he would have made an allowance for the possibility of the consequences which would follow in the event that the plaintiff lost his second testicle. Such consequences included the loss of testosterone and the physical changes to the plaintiff's body which would follow and the cost of testosterone replacement. Bollen J was, of course, obliged *as a matter of law* to make allowance for that possibility.

I have not read the other decisions cited by Ms O'Connell in her article. One hopes that her research in respect to those other cases was somewhat more thorough than her reading of the above cases.

The basic thesis espoused by her, ie that "personal injury law needs to recognise the ... diversity of human sexual behaviour ... and to value male and female sexuality equally" is one deserving of support. However, failure to get the basic facts right will not assist that cause.

# Notice

***APLA membership is individual.***

***Benefits of membership do not attach to a member's colleagues within the same firm. Accordingly, seminar discounts and assistance requests will only be granted to the particluar individual who is an APLA member.***

***We ask for your respect and cooperation on this fundamental issue.***

# Exceeding the Maximum for Items 24 and 27 on the Dictrict Court Scale - What are Special Circumstances?

**Gemma McGrath, QLD**

One of the most common problems confronting practitioners in relation to party and party costs is where the value of work performed exceeds the maximum allowable for such work under items 24 or 27 of the District Court Scale. As a general rule the amounts specified in the items cannot be exceeded but there is a specific provision for execeptions.

Both items 24 and 27 make allowance for the fact that if *because of special circumstances*, a party considers that the maximum allowance prescribed in the schedule is not enough for the work actually done, then the party may apply to a Judge to certify to the registrar or taxing officer to allow a higher amount if they consider such to be proper in the circumstances. The grant of such a certificate does not assure the applicant of receiving an allowance of an amount higher than that prescribed by the scale. It merely allows the registrar or taxing officer to consider allowing a higher amount if appropriate.

*Special circumstances* means that the circumstances of the case must be different from the ordinary or the usual[1].

In defining what is meant by the term *special circumstances* explanations such as "of more than usual difficulty"[2], " out of the ordinary"[3] and " a very complex matter"[4] have all been held to constitute special circumstances giving rise to judicial certification. In considering what constituted special circumstances in *Kane v State of Queensland & Anor*[5], His Honour Judge Shanahan, made mention of the number of professional witnesses called and the many witnesses from out of town and interstate. In *Vogler v Dunn & Anor*[6] regard was had to the issues of liability and contributory negligence.

In *Hughes v Alward*[7] His Honour Judge Nase accepted the opinion evidence of the solicitor for the plaintiff that the allowance in the District Court Scale of Fees and Costs was inadequate due to the work required in the action. His Honour considered that the "inherent complexity" of the case gave rise to the special circumstances required for judicial certification to be given.

In *Antney v Smith*[8] His Honour Judge Wylie QC stated that the word "special", as used in both items

24 and 27 of the Scale of Fees and Costs, must be given effect[9]. He considered that an applicant seeking judicial certification allowing the registrar or taxing officer to allow an amount greater than that permitted in the schedule, must show to the Court that the work required to be done on that action was different from the work ordinarily or usually done in a similar type of action. This would, of course, depend on the circumstances of the particular action.

In this case the plaintiff had sustained a whiplash injury as a result of a motor vehicle accident. The plaintiff suffered what is described by His Honour as a disproportionate psychological response to a whiplash injury[10], necessitating more medical reports to be collected than might otherwise have been required. Liability remained in issue and investigations in this regard had been conducted. The matter settled one week prior to trial. An affidavit of the solicitor having the conduct of the matter deposed to the steps which had been taken in the matter and exhibited an assessment of the plaintiff's party and party professional costs, prepared by a legal costs assessor, indicating that the costs relating to 24/27 items exceeded that allowed by the schedule. His Honour however, based on the material before him, did not accept that this particular action demonstrated anything unusual in its history or in the issues raised by it. He found that the steps taken where no more than what one would ordinarily expect[11].

His Honour considered that as the amounts prescribed in the Scale had been arrived at through discussions with associations representing legal practitioners and who are presumed to be familiar with the work usually done under any item in the scale, that the Scale of Fees and Costs was appropriate remuneration in relation to the work required. Therefore, unless the applicant could show that it would be unfair to categorise their action as ordinary or usual, a certificate would not be granted.

Such an approach was also adopted in *Pears v Perkins & Anor*[12] where His Honour Judge Robertson refused to grant the necessary certification. In doing so however His Honour did recognise that the Scale, in its present form, is unnecessarily complex and can lead to significant extra costs[13].

To establish the special circumstances required for judicial certification pursuant to items 24 or 27 of the District Court Scale of Fees and Costs, the applicant must show more than just the number of witnesses and the distance that they must travel to attend at trial. Issues of liability and contributory negligence, by themselves, may also not be considered as giving rise to special circumstances. When exercising their discretion to grant a certificate, the Judge will assess the nature of the action itself and it is for the applicant to show that the action was sufficiently different from the ordinary to warrant the extra work performed.

## Footnotes:

1. *Antney v Smith*, number 1837 of 1994, unreported decision of His Honour Judge Wylie QC, Brisbane District Court, February 1996.
2. *Vogler v Dunn & Anor*, number 389 of 1991, unreported decision of His Honour Judge Robin QC, Brisbane District Court, 31 March 1994.
3. *Kane v State of Queensland & Anor*, number 53 of 1990, unreported decision of His Honour Judge Shanahan, Brisbane District Court, 28 September 1990.
4. *Kane v State of Queensland & Anor*, number 53 of 1990, unreported decision of His Honour Judge Shanahan, Brisbane District Court, 28 September 1990.
5. Ibid.
6. Supra at 2.
7. Unreported decision of His Honour Judge Nase, Rockhampton District Court, 31 January 1996.
8. *Antney v Smith*, number 1837 of 1994, unreported decision of His Honour Judge Wylie QC, Brisbane District Court, February 1996.
9. Ibid., at 4.
10. Ibid., at 10.
11. Ibid., at 9.
12. *Pean v Perkins & Anor*, number 114 of 1991, unreported decision of His Honour Judge Robertson, Ipswich District Court, 22 May 1996.
13. Ibid., at 8.