WHAT HAPPENS WHEN YOU DISCOVER PARTIES HAVE BEEN LYING?

HOW TO HANDLE THE SITUATION - ON BOTH SIDES OF THE FENCE

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1.0 Background

1.1 The Macquarie Dictionary defines a "lie" as

- A false statement deliberately presented as being true; a falsehood
- Something meant to deceive or give a wrong impression

1.2 As Jim Carrey poignantly demonstrated in the 1997 film *Liar Liar*, some lies are in fact useful - and probably even unavoidable - as we go about our daily lives. And a lie told often enough can become the truth. [2]

1.3 This paper addresses the legal and practical issues that may arise in family law litigation when a party has been caught out lying – be it your client, or your opponent's client.

2.0 Your client lies and tells you - the ethical position

2.1 The ethical rule for solicitors [3] is in these terms:

> *15. Delinquent or guilty clients*
>
> *15.1 A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in a material particular to the court or has procured*

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[2] Lenin

[3] Solicitors Rule 2007

another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:

15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;

15.1.2 must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification:

15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; but

15.1.4 must not otherwise inform the court of the lie or falsification.

2.2 For barristers the rule is virtually identical. [4]

78. A barrister who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

(a) has lied in a material particular to the court or has procured another person to lie to the court; or

(b) has falsified or procured another person to falsify in any way a document which has been tendered; or

(c) has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the barrister to do so but otherwise may not inform the court of the lie, falsification or suppression.

2.3 Note that the Barristers Rule has the more extended concept of "lie, falsification or <u>suppression.</u>"

2.4 These rules are self-explanatory. In practice, the client will either instruct the legal practitioner(s) to make the necessary admission; if not then the practitioner(s) will immediately cease to represent her or him. The reasons for withdrawal remain protected by legal professional privilege. Note that these

[4] Barristers Rule 2011 – for simplicity's sake we refer to the revised rules that will commence 1/7/11

professional rules are reflected in the "Best Practice Guidelines" issued by the Family Law Section of the Law Council of Australia. [5] Solicitors Rule 15 was referred to by Justice Atkinson in *Perpetual Trustees v Cowley* [6] where Her Honour made an indemnity cost orders against a solicitor who had become aware that mortgage documentation had been falsely altered, expressing her opinion this way:

Mr McClelland had robustly represented his clients as was his duty to them. However, a solicitor is not merely a passionate and gullible mouthpiece for his or her client. A solicitor's primary duty is to the court. If the solicitor discovers that his or her client has lied to the court or falsified a document which has been made an exhibit then the solicitor must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court. The solicitor must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification, and must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so.

Her Honour described the solicitor's conduct as an

Obstinate and egregious refusal to comply with his duties to the court.

3.0 The case in family law – the client refuses to tell the truth or whole truth

3.1 The *Family Law Rules* [7] extend the obligation beyond 'correcting' a lie to one of positively volunteering relevant facts and documents. The Rules provide, in both financial and children's matters that:

If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, to cease to act for the client.

And so far as clients are concerned, their obligation is

[a] duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute. [8]

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[5] See "Best Practice Guidelines for lawyers doing family law work" 2nd Edition, October 2010 at Part 1 sections 12.1 and 13.4

[6] [2010] QSC 65. Her Honour's decision was overturned on appeal it being shown that the solicitors breach of duty had not, at the relevant time, caused any relevant loss. See [2010] QCA 281

[7] see *Family Law Rules, Schedule 1 Part 1, clause 6(4)* and *Part 2, clause 6(4)*

[8] *Family Law Rules, Schedule 1 Part 1, clause 1(5)(i)* and *Part 2 clause 1(6)(i)*

3.2 At least so far as disclosure of document is concerned, the rule simply reflects the old common law rule exemplified by cases such as *Myers v Elman* [9] but clearly now extends significantly wider. As will be appreciated the family law rule comes, in property cases, from the requirement for absolute financial disclosure; and in children's case from the policy that a child's best or paramount interest supersedes the parents' interests.

3.3 Obviously enough, in some cases the point of confrontation between lawyer and client will not arise at some point during the trial when a lie emerges but will emerge at the very start of the case when the client demonstrates an unwillingness to make proper disclosure of "a fact or document that is relevant to the case."

4.0 **Consequences for lawyer**

4.1 It hardly needs stating that, in our view a practitioner who fails to comply with the various rules set out above, for instance by continuing to act in the matter and knowingly allowing the Court to be misled, would be guilty of professional misconduct. So, for example, in *Guss v Law Institute of Victoria*, [10] a solicitor who failed to ensure discovery of a survey plan relevant to a question of valuation had his practicing certificate cancelled.

4.2 Aside from the professional consequences for the practitioner(s), a costs order could potentially be made against him/her. *Family Law Rules* 19.10 relevantly provides:

> *(1) A person may apply for an order … against a lawyer for costs thrown away during a case, for a reason including:*
>
> *(a) the lawyer's failure to comply with these Rules …*
> *(b) the lawyer's failure to comply with a pre-action procedure;*
> *(c) the lawyer's improper or unreasonable conduct; and*
> *(d) undue delay or default by the lawyer.*

[9] [1940] AC 282

[10] [2006[VSCA 88

4.3 The current form of the Rules reflects a codification of what has always been regarded as an inherent jurisdiction of the courts to supervise the conduct of the practitioners appearing before them; and on our research was first applied in the Family Court as early as 1985; [11] in a serious case the order can be for indemnity costs. [12] There are numerous decisions in the civil arena where such consequences have occurred.

4.4 The sequence of decisions of O'Sullivan FM in *Parker & Jacks* [13] requires careful examination. The case commenced as a child support and child maintenance dispute. An interim hearing had occurred in November 2008 with the decision reserved. The evidence included the fact of a child support agreement between the parties. Within a few days an application was made for the hearing to be re-opened and the wife recalled and cross-examined on the basis of non-disclosure of relevant financial matters. It appeared that the wife had made a professional negligence claim against former legal advisers concerning the child support agreement and had received a financial settlement. Her current solicitors knew of those matters, because they had acted for her in the negligence claim. O'Sullivan FM allowed the case to be re-opened [14] and at the subsequent hearing it emerged that the wife (and her solicitor) had withheld information showing that the wife had received a damages settlement, which, net of costs exceeded $34,000.00. The learned magistrate concluded that the non-disclosure was deliberate. [15]

4.5 Subsequent to those events an application for costs was made against both the wife and her solicitor. [16] The formal orders made the wife and her solicitor jointly and severally liable for costs; and as well there was an order that:

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[11] *Marriage of Collins* (1985) FLC 91- 603

[12] *Cassidy and Murray* (1995) 19 Fam LR 492

[13] There are 3 decision reported at [2009] FMCAfam 290, 743 and 993 respectively

[14] *Parker v Jacks (No 1)* [2009] FMCAfam 290

[15] *Parker v Jacks (No 2)* [2009] FMCAfam 743 at paragraphs [35] – [38]

[16] *Parker v Jacks (No 3)* [2009] FMCA 993

The Registrar of the Federal Magistrates Court of Australia be requested to provide the Legal Services Commissioner with a copy of these reasons to pursue such investigation into the conduct of Ms Curtis as that organisation believes is appropriate.

4.6 In coming to that conclusion O'Sullivan FM referred to the decision of the Full Court in *Cassidy & Murray* [17] where the Court said:

1. *Pursuant to s.117(2) Family Law Act, the Court has jurisdiction to make an order for costs against a solicitor or a non-party.*

2. *The court should not make such an order without giving the person to be affected by the order an opportunity to be heard.*

3. *The Court may make an order for costs against a solicitor without the necessity to establish that the solicitor has been guilty of serious professional misconduct.*

4. *The solicitor has a duty to the Court to promote the interests of justice whilst at the same time attending to the needs of the solicitor's client.*

5. *A mistake or error of judgment would not justify an order for costs against a solicitor. However, misconduct, default or negligence, any of which are found by a Court to be of a serious nature, may be sufficient to justify an order.*

6. *The jurisdiction is compensatory.*

4.7 The factual finding by His Honour was:

On what is before the Court the conclusion the Court comes to is that it is possible to find that Ms Curtis prepared affidavits in these proceedings "which she knew contained falsehoods" (albeit by omitting relevant financial information and thus not creating an accurate picture of the parties financial circumstances) and she failed to ensure her client "properly explain[ed] to the Court (and Husband) the true sources of moneys used by the wife to pay the children's private school fees" and prepared "an affidavit of documents on behalf of the Wife knowing that that document did not disclose details of the negligence actions and subsequent settlement."

4.8 One of the difficulties created by using anonymous names in the this jurisdiction is that we have been unable to find any reference in published decisions as to what may or may not have happened when the solicitor was referred to the (Victorian) Legal Services Commissioner.

[17] (1995) FLC 92-633

4.9 We have, so far, discussed the situation concerning the preparation for and conduct of trials. Lest we forget, similar considerations apply even in the context of negotiation. So for example *Barristers Rule 2011* provides:

> *48. A barrister must not knowingly make a false statement to an opponent in relation to the case (including its compromise).*
>
> *49. A barrister must take all necessary steps to correct any false statement in relation to the case made by the barrister to an opponent as soon as possible after the barrister becomes aware that the statement was false.*

4.10 As was stated by Justice Byrne, barristers cannot approach negotiation as if it were an 'honesty-free zone' [18] and the same will also apply to solicitors. [19]

5.0 **A party lies on oath or affirmation - the criminal law position**

5.1 A witness swears an affidavit or affirms its truth. The attestation clause is included at the foot of the document to show that one or other process has been followed.

5.2 As solicitors tend to both draw and witness affidavits, it is obviously essential to make very clear the serious nature of the oath or affirmation taken by the client, and the need for the document to be truthful.

5.3 Making wilfully false statements either in affidavits or on oath, constitutes perjury, which is a criminal offence.

5.4 It would be open to Judges/Magistrates to refer the matter to the Federal Police for prosecution. However, we suspect that most Judges/Magistrates would probably not refer the matter unless the lie was particularly heinous. (For example, making a wilfully false allegation of child abuse which resulted in police interviews, supervised time for the falsely-accused parent, Magellan orders etc.)[20] Neither of us has experienced a referral occurring.

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[18] *LSC v Mullins* [2006] LPT 012

[19] there is an identical rule in *Solicitors Rule 2007* clauses 18.1 and 18.2. The instructing solicitor to Mr. Mullins was also prosecuted – see *LSC v Garrett* [2009] LPT 12

[20] In any event it is a separate offence to make a wilfully false complaint of criminal conduct to the police

5.5 Note also that a certificate against the use of evidence to incriminate a person, which is available under section 128 of the *Evidence Act (Cwlth)*, may 'protect' a witness from being prosecuted for a substantive criminal offence the subject of the certificate – but cannot save that witness from being prosecuted for perjury in respect of any false evidence given pursuant to that certificate.[21]

6.0 **Lying - the costs position**

6.1 The Courts have always had power to punish and discourage perjury by way of costs orders. Giving wilfully false evidence would be a relevant consideration under:

s. 117(2A)(c) – conduct of the parties in the litigation; and

s. 117(2A)(g) – other relevant matters.

6.2 The costs position was made explicit in the 2006 amendments, introducing s. 117AB in these terms:

> *(1) This section applies if:*
>
> *(a) proceedings under this Act are brought before a Court; and*
>
> *(b) the Court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.*
>
> *(2) The Court must order that party to pay some or all of the costs of another party or other parties, to the proceedings."*

6.3 The words "knowingly" and "must" in s. 117AB(1)(b) and s. 117(2) require careful consideration and have been the subject of discussion in several cases.

6.4 In *Charles v Charles* [22] the dispute concerned children and property. In several places during his reasons for judgment, Cronin J gave preference to the mother's version of events compared to the fathers. In response to an application to apply s. 117AB His Honour said the following:

[21] Evidence Act s.128(7). Coker FM usually makes this observation from the bench when issuing certificates

[22] [2007] FamCA 276 – the passages quoted are at paragraphs [24], [26] [31] and [32] of the reasons

"Knowingly" imports a serious subjective element into the question. In respect of many findings of fact as in this case, a trial judge determines which of two versions, sometimes diametrically opposed to one another, he or she believes on the balance of probabilities. Such a finding is not necessarily a statement that one version is patently untrue or that a person is lying; it may simply be that one version is more probable than another. For a court to be satisfied that a person knowingly made a false allegation or statement in the proceedings must mean that a court can be comfortable in finding that the person lied. It would not simply then be a balancing act between two versions. To be satisfied that a lie has been told and to so find requires a careful analysis of two things. The first is that the proffered version of fact is untrue but the second is that it is put knowing it to be untrue. A court must then be cautious about such a finding because of the mandatory consequence. The finding must be elevated above the "probable" level set out in s 140(1) of the Evidence Act 1995 to consider the matters contemplated in s 140(2) of that Act. That is, the Briginshaw test applies.

Knowingly" is unequivocal. There can be no room for misunderstanding or doubt; objectively, the person making the statement cannot believe the statement to be true.

A court must be very careful in making a judgment in an application for costs subsequent to the determination of proceedings that the person who made the false statement did it knowingly. In my case, I do not think that I can go outside the findings that I made in my judgment and draw any other conclusion than that which I set out in my reasons for judgment. In each case, I have found on the balance of probabilities that I preferred the wife's version of events. Those matters related to issues of domestic violence. I am conscious of the fact that s 117AB is far wider than the domestic violence question but in this case, I have not made any finding other than on the balance of probabilities about all those matters.

Accordingly, for the purposes of s 117AB, I am not prepared to find that the statements made by the husband were done so knowingly.

6.5 In *Sharma & Sharma (No. 2)* [23] Ryan J dealt with a case where she had found that the mother had lied by falsely creating abuse allegations. Her Honour said:

My finding that some of the wife's allegations are fabrications introduces the mental element, which turns a wrong statement into a deliberate falsehood. This means I am satisfied she knowingly made a false allegation or statement.

6.6 Her Honour observed that there was no guideline as to how the Court determines the quantum of costs payable pursuant to s.117AB and went on to apply various aspects of s. 117(2A), noting:

The factors which would ordinarily influence the Court's discretion about whether an order would be made at all (s. 117(2A)) purport to relate only to the exercise of that discretion and not to the separate issue of the quantum of a costs order which s. 117AB mandates. Nonetheless, s. 117(2A) contains a useful structure of relevant considerations when determining the quantum of a s.117AB order.

[23] [2007] FamCA 425

6.7 *Child Support Registrar v Kanavos* [24] was an appeal to the Full Court from a decision of Altobelli FM where His Honour, though finding that the husband's evidence was 'patently false' and 'fictional and engineered' had refused to make an order pursuant to s. 117AB. Justice Boland, sitting as the Full Court, approved the reasoning in *Charles* and *Sharma (No 2)* and found that the making of a costs order was mandatory once the necessary facts had been found. Only the quantum of the costs order is discretionary.

6.8 A good example of the distinction between "knowingly" and other forms of (mis)conduct can be found in *Polito and Polito (No 2)* [25] where there was a factual debate concerning the extent of gambling losses incurred by the husband. In one respect the husband was clearly and knowingly dishonest; but in all other cases the finding of Baker FM was that the husband had been careless and reckless in giving his evidence. In concluding that an order for costs must be made, Her Honour, exercising the discretion by reference to factors under s. 117(2A) made a comprehensive examination of the behaviour, successes and failures of each party to the litigation. The result was an order for costs of $4,030.00 as against an initial claim for costs of $90,000.00. A similar distinction arose in *Eleninovska & Patronis (No 2)* [26] where the finding was of 'cavalier' and 'irresponsible' evidence rather than 'knowing' dishonesty.

6.9 Three considerations arise from this discussion:

[a] If, prior to trial, you suspect your client has been less than candid and there is a significant risk of an adverse finding then greater effort needs to be put into settlement (and generous settlement) negotiations. An early – and very reasonable - settlement offer may provide a partial shield to a

[24] (2010) 44 Fam LR 422

[25] [2009] FMCAfam 923

[26] [2007] FMCAfam 906

later costs order as well as putting pressure on the other side not to over-press their advantage.

[b] If acting for the 'innocent' party it is not enough to secure an admission in cross-examination that a particular passage of evidence by the other party is 'wrong' or 'misleading' – such answers need to be followed up in a fashion such as this:

Q. You have agreed, Mr. Smith that paragraph 67 of your affidavit is wrong.

A. Yes.

Q. Indeed, you will agree that paragraph 67 positively misleads His Honour as to the facts, doesn't it?

A. Yes.

Q. You knew the importance of telling the truth when your affidavit was sworn?

A. Yes.

Q. Indeed, at the time you swore to the truth of paragraph 67 you were concerned that, to tell the real truth, it would have damaged your case.

A. Yes.

Q. And you knew, when swearing to paragraph 67, that it was a lie.

A. Yes.

As will be appreciated, only in the rarer of case will cross-examination be this productive and that simple – but we include it as an example to stress the importance of achieving an appropriate admission that the lie was "knowingly" made, or as so conducting the case as will enable the judge/magistrate to make the necessary finding even if the witness will not make the necessary admission.

[c] However, the law of diminishing returns applies. To 'win' a case you just need a judicial officer to prefer your client's version of events or to find that the opponent was 'cavalier' or 'reckless' or 'irresponsible' in giving evidence. Such findings may enable a costs order to be made anyway. If significant extra effort is required to achieve a finding of 'knowing falsity' is the effort justified? See for example *Vincent & Vincent* [27] where Coker FM declined to consider the application of s. 117AB as there was already a sufficient basis to make an 'ordinary' costs order.

7.0 Salvaging the case after an admission of lying made before trial.

7.1 If the lie is about a minor or peripheral matter that will not really impact on the result of the case, then the harm is contained to some extent.

7.2 If the lie is of real significance then it becomes a case of damage control but timing will be a significant factor. There is, obviously enough, a world of difference between correspondence which arguably misstates the position and a sworn affidavit that has been filed in court.

7.3 On a practical level it would be prudent for the solicitor (and counsel if engaged by that stage) to prepare a statement (if there no proceedings on foot) or an affidavit (if proceedings have been commenced) for the lying party. The affidavit should address what the 'true' facts are; and the reason for the lie needs to be set out clearly and as fully as is necessary to put the lie into its proper context. There would be nothing worse than an explanation containing further half-truths or lies. The motto is – if the client is going to admit it, then admit it and give the true reasons for the lie.

7.4 If the reasons for the lie make it worse for the client, then the case probably is close to unsalvageable. In that event, keep the affidavit short and factual. Just admit the lie and set out the truth. Then – as firmly as you can – tell the client to settle the case on whatever reasonable terms can be negotiated.

[27] [2009] FMCAfam 308

7.5 From a practical perspective, the time when a client admits to lying is usually a good time for that party to enter into serious settlement negotiations – though for ethical reasons a prior admission of the lie (at least to the opponent, if not the Court at that stage) is crucial beforehand. Otherwise the solicitor/barrister is potentially misleading the opponent and again faces an ethical problem as discussed in earlier paragraphs of this paper.

7.6 Obviously, if you are for the 'innocent' party you are at a great advantage at this stage. But a word of caution – do not try to 'over-press' that advantage. For example, threatening the lying party with criminal or costs consequences if they don't capitulate to your client's demands could potentially constitute blackmail under the Criminal Code. While it is permissible to refer to the lie and to the probable consequences at trial, the other lawyers already know these things anyway so don't over-press the point. Do not make threats, however much you or the client feels 'vindicated' by the admission.

7.7 In serious cases consideration needs to be given to the application of s. 128 *Evidence Act* as the admission of the lie may expose the client to a penalty, prosecution etc. In a recent trial before Monteith J [28] it appeared relatively clear that the mother had, unbeknown to the father, committed Centrelink fraud exceeding $100,000 in value over many years, but her trial material was silent about those matters. It was inevitable that she would be cross-examined about this (alleged) dishonesty. The very sensible approach taken by our colleagues Tony Collins of counsel and John Hopes (his instructing solicitor) was to prepare the client's affidavit but before filing or serving it make an application at the commencement of trial for the issue of a certificate under s. 128. Upon the certificate being granted the affidavit was filed and served and the mother cross-examined about those matters in the usual way.

8.0 **Salvaging the case during trial**

8.1 An admission of lying occurs, in our experience, in three circumstances:

[28] matter of *R v R* (2010)

[a] The client, confronted by difficult questions, documents or subpoenaed material makes an admission during a break in proceedings - this will be usually a rare event because of the rule that a witness ought not be spoken to during the course of his/her evidence, and will only arise where for some reason you have been given permission to speak to your client; or

[b] An admission is made in the witness box; or

[c] The client makes an admission after he/she has given evidence.

8.2 Obviously enough, situations [a] and [c] above involve the necessity to advise that client that the lie must be corrected and if such instructions are not given then the solicitor/counsel must withdraw. As already discussed, consideration may have to be given to the application of s. 128 *Evidence Act.*

8.3 If the lie is admitted by the client under cross-examination, then the advocate is in an awkward position. Apart from suffering in silence, it is important to observe the client's evidence, with careful consideration as to re-examination. Depending on the nature of the lie, the demeanour of the witness and the trial Judge's reaction, a forensic decision has to be made whether or not to re-examine the client as to the lie to try to get the client's "explanation" for lying before the Court. Importantly, do not panic as the lie is generally not the end of the case. [29] It is a time for calm reflection. (This highlights the advantage of explaining the lie by a carefully drawn affidavit but such luxury is only available where the client has admitted to the lie before entering the witness box.)

8.4 There will be some cases, admittedly rare, where consideration must be given to withdrawing from the case and you will have to seek an adjournment from the trial judge/magistrate so as to consider your ethical position and – if necessary and only with leave – advise the client in this respect.

8.5 In the unfortunate event that the case cannot be settled and the trial has to continue, then the lawyers for the lying party may be wise to invest carefully in

[29] More 'the beginning of the end' ☺

trying to find a lie somewhere in the opponent's material. An obvious lie that a party will not admit can be more damaging to their case than an obvious lie that is admitted. But for costs purposes bear in mind what Cronin J said about "knowingly" and that the test is a high one.

8.6 It is also worth remembering that, even if a judicial officer is unimpressed by a lie, all the evidence still needs to be considered and the lie will rarely – of itself – determine the case. The flipside of that coin however is that judges/magistrates will sometimes find that, because of the lie, the evidence of the other party is preferred wherever there is conflict. This would be the 'angle' used by the innocent party in closing submissions. Of course such a finding can be the real 'killer' for the liar's case, rather than the one lie of itself.

9.0 Summary:

[a] The requirement for truthful evidence is at the cornerstone of the judicial process;

[b] A lawyer is bound to advise and should emphasize to the client the need for truthful evidence throughout;

[c] A client who gives knowingly false evidence commits a criminal offence;

[d] A solicitor who becomes aware that their client will not tell the truth or has given knowingly false evidence must urgently advise the client in accordance with the ethical rules. Basically, the truth is told, the lie is corrected or the lawyer(s) must withdraw;

[e] Correcting the lie is best done by a controlled process - an affidavit explaining the lie and giving the reasons for telling it. A correcting affidavit needs to be carefully drafted and scrutinized so that it does not make the case worse;

[f] A lying party faces the certainty of a costs order – the quantum of the costs order is the only live issue;

[g] The lawyer for a lying party is at risk of a cost order where he/she has not given proper advice or behaved properly;

[i] After a lie is admitted is usually a good time for the lying party, and his/her opponent, to enter into serious settlement negotiations. It is particularly advantageous for the lying party to make their 'best offer' for costs purposes – s. 117(2A)(f);

[j] But in the end, the lie is just a part of the evidence and, while very unhelpful for the lying party, it is not necessarily the end of the case.

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