$385,000. Justice Dowd awarded indemnity costs from that date. Even the adjusted verdict was far in excess of what the plaintiffs were prepared to accept.

The plaintiffs have taken the position that they are entitled to indemnity costs of the appeal as well, notwithstanding that the appeal was allowed, in part. Reliance is placed on the decision of *Ettingshousen v Australian Consolidated Press Limited* (1995) 38 NSWLR 404. The hospital is resisting an indemnity costs order relying on *Fotheringham v Fotheringham* (No 2) [1999] NSWCA 21. This is an important legal issue, especially from the point of view of plaintiff lawyers who seek to avoid prolonged and costly litigation by making reasonable settlement offers early. I will report once again with the outcome of the ruling on costs. PL

NSWCA declines to follow Victorian decision

Tiufino v Warland (2000) NSWCA 110

DAVID HARPER, CANBERRA

The NSW Court of Appeal has declined to follow a 1996 decision of the Victorian Court of Appeal on an issue which arises from time to time and can be highly significant in motor vehicle personal injury litigation.

There had been a collision between motor vehicles driven by Mrs Tiufino and Miss Warland at an intersection at Belrose in 1993. Proceedings were brought in the Local Court by Miss Warland for property damage. The action was defended. After a full hearing, the Magistrate found that the accident was entirely the fault of Mrs Tiufino and that Miss Warland had not been guilty of contributory negligence.

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Mrs Tiufino subsequently brought proceedings in the Supreme Court against Miss Warland for damages for personal injury. Prior to the hearing of the proceedings in the Local Court, Mrs Tiufino applied to the Supreme Court to have the actions transferred to the Supreme Court or stayed until judgment was given in the Supreme Court. Dowd J refused this application. After the decision in the Local Court, Dowd J dismissed her action on the basis of issue estoppel.

The decision of Dowd J was upheld by the Court of Appeal (Mason P, Handley and Powell JJA). Handley JS, in the principal judgment, concluded that the Court should not follow the Victorian decision of *Linsley v Petrie* [1998] 1 VR 427, notwithstanding that the Court would ordinarily follow a decision of the Court of Appeal of Victoria.

A strong Victorian bench, including Hayne JA as he then was, had held that a prior finding in property damage proceedings was not binding in a subsequent personal injury action between the same parties. The NSW Court of Appeal found that this decision ran counter to many earlier authorities and dicta in the High Court of considerable persuasive weight.

Since *Linsley*, it had been assumed that an earlier decision in property damage proceedings on liability was not binding for the purposes of a subsequent personal injury action between the same parties.

Following the decision in *Tiufino v Warland*, it must be accepted that a property damage decision does give rise to an issue estoppel for later personal injury proceedings in New South Wales. The reverse is the case in Victoria.

There is no recent authority in the Australian Capital Territory and the issue is now one which will probably have to be ultimately resolved by the High Court to achieve uniformity in the common law in Australia. PL