NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY ORDER OF THE COURT

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-2304
[2012] NZHC 3626

BETWEEN	AB Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Counsel: L McKeown for Plaintiff
J S Andrew for Defendant
G D S Taylor for Legal Services Commissioner

Judgment: 24 December 2012

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 1.00pm on the 24th December 2012.

JUDGMENT OF WILLIAMS J
(COSTS)

Solicitors:
Johnston Lawrence Ltd, Wellington
Crown Law, Wellington
G D S Taylor, Barrister, Wellington

[1] In October 2006, AB (plaintiff) filed a claim against the Attorney-General (defendant) in negligence. He sought compensatory and exemplary damages for physical and mental injury allegedly suffered while at Regular Force Cadet School in Waiouru in early 1970.

[2] AB was granted legal aid to pursue the claim. However, at one point, this was discontinued which pushed the trial date back some months. It was eventually reinstated by the Legal Aid Review Panel.

[3] In my judgment of 22 February 2011, I dismissed AB's claim. I found that it was time-barred under the Limitation Act 1950 and, in any event, relief in the form of compensatory damages was barred under s 317(1) of the Accident Compensation Act 2001. I nonetheless considered the substance of the claim and found that, while R had been subject to some physical abuse at Cadet School, it was less serious than had been alleged. I also found that, while R did subsequently develop an acute mood disorder, his treatment at Cadet School was not shown to be a substantial and operating cause of that disorder, precluding any claim in negligence. Finally, I noted that, even if causation were shown, the Cadet School's conduct would not have been sufficient to warrant the sanction of exemplary damages.

[4] The defendant[1] now seeks costs. It does not seek a costs order against AB personally. Rather, it seeks an order under s 45(5) of the Legal Services Act 2011 (the Act) for an order specifying what costs would have been ordered against AB, had s 45 not otherwise affected his personal liability for costs (s 45 limits the liability of legally aided persons for costs). Specifically, the defendant seeks an order that AB would have had to have paid increased costs, or alternatively scale costs on a 2B basis, including second counsel and actual witness costs.

[5] If the Attorney-General is successful in obtaining a s 45(5) order, this will entitle it to apply to the Legal Services Agency (LSA) pursuant to s 46 of the Act for payment or partial payment of these costs. Whether costs are ultimately awarded is a

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[1] Given that the Legal Services Agency is involved in this dispute, I have deliberately chosen not to use the term "Crown" in this judgment.

matter for the Legal Services Commissioner to determine in exercise of his/her discretion.

Governing legislation

[6] The parties accept the governing provision is s 45, in particular s 45(5), of the Act.[2] It provides:

> **45 Liability of aided person for costs**
>
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:
>
> (b) any failure to comply with the procedural rules and orders of the court:
>
> (c) any misleading or deceitful conduct:
>
> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
>
> (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> (f) any other conduct that abuses the processes of the court.
>
> (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
>
> (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

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[2] The section applies pursuant to s 132(1) of the Legal Services Act 2011.

(6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—

(a) that next friend or guardian *ad litem* has the benefit of this section; and

(b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

[7] The Legal Services Act 2011 replaced the Legal Services Act 2000. The equivalent of s 45 in the former Act was s 40. From 1 March 2007, s 40 was worded in exactly the same terms as s 45 of the 2011 Act – so the new Act did not change the law relevant to the present application. However, pre-1 March 2007, s 40 of the 2000 Act was worded slightly differently. It provided:

40 Liability of aided person for costs

(1) Subject to subsection (2), if a person (in this section, the aided person) receives legal aid for civil proceedings, the aided person's liability under an order for costs made against him or her with respect to the proceedings must not exceed the amount (if any) that is a reasonable one for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) Except in exceptional circumstances, the amount that the aided person is liable to pay under any such order for costs must not exceed the amount of the contribution that the aided person is required to make under section 15(1).

(3) Any order for costs made against the aided person may specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(4) Where, because of this section, no order for costs is made against an aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

(5) If the aided person is aged under 20 years, then for the purposes of this section that person's means include the means of any person whose disposable income or disposable capital has been included in calculating the minor's disposable income and disposable capital.

(6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—

(a) that next friend or guardian *ad litem* has the benefit of this section; and

(b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

[8] I mention this because the Legal Services Agency has appeared and filed submissions on the issue of costs. In those submissions, Mr Taylor for the Agency submitted that case law decided under the old s 40 (some of which, for example the Court of Appeal's decision in *Laverty*, I reprise below) should be put to one side as decided within a materially different statutory context.

[9] I do not accept that submission. In *A v Roman Catholic Archdiocese* of Wellington, the Court of Appeal accepted that there was no material difference between the old s 40(4) and the amended version which took effect from March 2007 (which is identical to the new s 45).[3] Gendall J came to the same conclusion in *J v Crown Health Financing Agency*.[4] I would adopt the same view as to the similarity of the sections and transferability of case law principles.

Submissions

[10] The Attorney-General argued that this was an appropriate case in which to exercise my discretion to make a costs order under s 45(5). Counsel submitted:

(a) the focus when applying the section should be solely on the parties' conduct in pursuing the litigation and the merits of the case, and what an appropriate costs order would have been. The consequence of making the order (that is, that the Legal Services Commissioner *might* grant costs in fact) is "entirely separate" and irrelevant;

(b) costs would have been ordered personally against the plaintiff on at least a 2B basis, had he not been legally aided. Allowance for second counsel and witness expenses should also be made. This is because:

(i) costs generally follow the event;

[3] *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 57 at [2].
[4] *J v Crown Health Financing Agency* HC Wellington CIV-2000-485-876, 2 April 2008 at [4].

(ii) the plaintiff failed on all causes of action;

(iii) the plaintiff failed for several independent reasons (limitation, the Accident Compensation Act bar, lack of causation and the breaches being insufficiently serious to warrant exemplary damages);

(iv) the plaintiff fell significantly short of the mark (the claim being based on events long ago, on allegations said to be "vague", in pursuit of an award of damages that is said to have been disproportionately high); and

(v) both parties spent extensive sums pursuing and defending the litigation.

(c) Counsel also submitted that this is a case where increased costs of 50 per cent would have been justified. This is for the same reasons, but also:

(i) the extent of the weaknesses of the causes of action should have been obvious to counsel for the plaintiff from the get-go; and

(ii) the "stop-start" way in which the plaintiff proceeded greatly increased the defendant's costs. While this was, to an extent, caused by difficulties in obtaining legal aid funding, the plaintiff should nonetheless be regarded as personally responsible for continuing to seek legal aid rather than discontinuing the claim.

[11] Scale 2B costs plus disbursements work out at $115,457.09. Increased costs at 50 per cent plus disbursements lift that figure to $151,053.09.

[12] Mr Taylor for the LSA submitted that, when exercising its discretion under s 45(5), the court can take into account the factors enumerated in s 45(3) relating to

whether "exceptional circumstances" exist for the purpose of making a costs order against the applicant personally. In that sense the test for the exercise of discretion under s 45(5) is an holistic inquiry. In this case, Mr Taylor says, none of the s 45(3) factors apply and, accordingly, an order for costs in respect of the whole proceeding is inappropriate.

[13] The plaintiff also appeared and has filed submissions, notwithstanding no order for costs against him personally is sought. Counsel took no issue with the Attorney-General seeking a s 45(5) order for scale 2B costs, but strongly rejected the notion that increased costs would have been appropriate, arguing that any delay by the plaintiff was caused by the Legal Services Agency withdrawing legal aid, for which the plaintiff should not be held personally responsible. Counsel also points to delays caused by the defendant's own conduct.

Discussion

Discretion to make order under s 45(5)

[14] The decision to make a costs order under s 45(5) is discretionary. I accept, contrary to the submissions of Mr Taylor, that the Court of Appeal's guidance in *Laverty v Para Franchising Ltd*[5] given in relation to the former s 40(4) of the 2000 Act is relevant to that discretion. In *Laverty*, the Court of Appeal said:[6]

> If s 40 has impacted on the amount of costs awarded, the Court *will generally go on* to specify the figure, or the higher figure, that the costs against the aided person would have been had the party concerned not been legally aided (s 40(3) and (4)). In that case the way is open for an application to the Legal Services Agency under s 41. (emphasis added)

[15] This passage suggests that, in situations like the present, the usual course is for the Court to go on to make a s 45(5) order. However, this will not always be the case. This is shown by the Court's use of the word "generally".

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5 *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA).
6 At [32].

[16] In what circumstances, then, will a Judge refuse to exercise that discretion? Certainly there must be some wriggle room. In *P v Attorney-General*, Mallon J accepted that:[7]

> … s 40(4) [the former equivalent of s 45(5)] is phrased as something the Court "may" do and that therefore there will be circumstances where it is not appropriate for it to do so.

[17] In light of the view I ultimately take in this case, it is unnecessary for me to decide whether the potential consequences on the Legal Services Agency of making an order under s 45(5) are relevant to the exercise of that discretion. It is unnecessary for me to decide whether to apply the approach taken by Miller J in *W v Attorney-General*[8] to the new section. I would prefer to wait until confronted with a case in which is necessary to resolve the point in order to decide the case.

[18] In this case, it is appropriate to exercise my discretion to make an order under s 45(5). Neither the LSA nor the plaintiff has provided any evidence as to why making an order would be inappropriate in the present case. Given the general directive in Laverty, there is no reason that costs should not follow the event. I therefore conclude as Mallon J did in *P*:[9]

> I see no reason not to make the order and the matters referred to by the Legal Services Agency do not persuade me that the order should not be made.

[19] I add that, contrary to the submissions of Mr Taylor, I do not consider s 45(3) to be relevant to the s 45(5) discretion. It deals with a completely different circumstance, namely whether "exceptional circumstances" exist to justify an award of costs against a legally aided person personally.

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7 *P v Attorney-General* HC Wellington CIV-2006-485-874, 14 December 2010 at [11].

8 *W v Attorney-General* HC Wellington CIV 1999-495-85, 25 September 2008 at [11]. In *W v Attorney-General*, Miller J determined that the existence of s 46 was "irrelevant" to the s 45(5) discretion, finding:

> There is nothing in the legislation, or in the way in which the legislation has been interpreted in the authorities, to suggest a broader approach is appropriate.

9 At [12].

What costs would the plaintiff have had to have paid personally if he had not been legally aided?

[20] Once it is determined an order under s 45(5) will be made, the assessment of the amount of the award the unsuccessful party would have had to have paid must be a very narrow inquiry. It governed by ordinary costs principles and must focus on the conduct of the parties to the litigation only.

[21] In my view, R would have been personally liable to pay scale 2B costs plus disbursements if he had not been legally aided. I would also have certified for second counsel and made allowance for the Crown's witness expenses. This is for the reasons submitted by the defendant, summarised at [ ] above.

[22] I do not accept that this is a case where increased costs would have been justified. High Court Rule 14.3 applies, and provides:

> **14.6 Increased costs and indemnity costs**
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> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules (increased costs); or
>
> ...
>
> (2) The court may make the order at any stage of a proceeding and in relation to any step in it.
>
> (3) The court may order a party to pay increased costs if—
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> (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> (i) failing to comply with these rules or with a direction of the court; or
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[23] In *Bradbury v Westpac Banking Corporation*, the Court of Appeal confirmed that, for an order for increased costs to be made, the respondent must have acted unreasonably.[10]

[24] Again, I do not find it helpful to refer to the factors listed in s 45(3) of the Legal Services Act 2011 at this stage of the inquiry either. That section provides examples of factors the court may take into account when deciding whether "exceptional circumstances" exist to justify making an award of costs against a legally aided person personally. While they are very similar in nature to the r 14.6(3) factors, "exceptional circumstances" and the jurisdiction to award increased costs are different concepts, and I prefer to keep them clearly delineated.

[25] The defendant essentially leans on rr 14.6(3)(b)(i) and (ii). Counsel accepts that delays of some months in hearing the proceeding may have been the direct result of the Agency's decision to withdraw legal aid, but submits that the plaintiff must bear ultimate responsibility for this, given he would not (so the defendant says) have pursued the claim if he were spending his own money. The plaintiff had applied for extensions of time on 29 October 2008 (granted 16 December 2008) and again on 27 January 2009 (granted 23 March 2009) after the Legal Services Agency had denied his application dated 17 June 2008 for additional legal aid funding.

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[10] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 (CA) at [27].

[26] The defendant also submitted that the weaknesses of the plaintiff's courses of action, summarised above, should have been apparent from the outset and that this, too, justifies an increased costs award.

[27] I do not accept the plaintiff acted unreasonably and in contravention of rr 14.6(3)(b)(i) and (ii). To the extent the plaintiff delayed proceedings by requesting new timetabling orders, this was indeed the direct result of the Legal Services Agency initially denying him aid. It is wrong to blame the plaintiff personally for these delays – even indirectly as here under s 45(5). The proper place for the consequences of the Legal Services Agency's conduct on costs to be taken into account is when the Commissioner is exercising his or her discretion to enforce the s 45(5) award under s 46 of the Act.

[28] Equally, I do not accept that the plaintiff's claim was as hopeless as the defendant submits, or that this should have been apparent to the plaintiff's counsel in the early stages of the litigation. The plaintiff was in fact successful in obtaining important factual findings against the defendant in relation to abuses at Cadet School. In *J v Crown Health Financing Agency*[11] Gendall J dealt with a costs application where although the plaintiff had been comprehensively unsuccessful, the defendant had been responsible for some wrongful acts against J. On this basis, the Judge reduced costs by 10 per cent. In my view, a similar deduction is similar in this case to recognise that the defendant, though successful, cannot be said to have been entirely without blame.

Conclusion

[29] I therefore make an order under s 45(5) of the Legal Services Act 2011 that, had he not been legally aided, the plaintiff would have been liable for costs on a 2B basis (less 10 per cent), plus disbursements. The costs sought were $71,192.00 less 10 per cent which comes to $64,072.80. Disbursements are $44,265.09. This makes a grand total of $108,337.89.

Williams J

[11] *J v Crown Health Financing Agency* HC Wellington CIV-2000-485-876, 2 April 2008.