IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2023] NZACC 121 **ACR 124/21**
ACR 234/21
ACR 235/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACCIDENT COMPENSATION ACT
BETWEEN	NICOLA EMTAGE Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	SOUTHERN TRANSPORT COMPANY LIMITED Second Respondent

Hearing: On the papers

Appearances: Mr P O'Sullivan advocate for the Appellant
Mr I Hunt for the First Respondent
Ms N McAllister for the Second Respondent

Judgment: 26 July 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE ON COSTS

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[1] Following the substantive judgment in this matter dated 24 May 2023, detailed submissions have been filed on behalf of the parties as to costs.

[2] Rule 14.2 of the District Court Rules 2014 sets out the principles applying to the determination of costs:

> (1) The following general principles apply to the determination of costs:
>
> (a) The party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;

(b) An award of costs should reflect the complexity and significance of the proceeding;

(c) Costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application;

(d) An appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application;

(e) What is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs;

(f) An award of costs should not exceed the costs incurred by the party claiming costs;

(g) So far as possible the determination of costs should be predictable and expeditious.

[3] Keane J, in *PGG Wrightson Limited v Wai Shing Limited*[1], said:

> [4] The Court's ability to award costs is ultimately discretionary: … But far from wholly. Costs must reflect the complexity and significance of the case: … They are not at large. Normally costs are to be assessed on the basis set out in the rules: … Increased or indemnity costs may be awarded … but only for cause.

[4] Rule 14.3 categorises proceedings as follows:

> Category 1 proceedings - Proceedings of a straightforward nature able to be conducted by counsel considered junior.
>
> Category 2 proceedings - Proceedings of average complexity requiring counsel of skill and experience considered average.
>
> Category 3 proceedings - Proceedings that because of their complexity or significance require counsel to have special skill and experience.

[5] The commentary in Lexis Nexis includes the following:

> **Paragraph (b) Complexity and Significance**
>
> An award of costs should reflect the complexity and significance of the proceeding. That the award of costs should reflect the complexity and significance of the proceeding re-states the common law, but importantly omits any reference to the amount at stake in the proceeding. This is a welcome departure from the not

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1 *PGG Wrightson Limited v Wai Shing Limited*, HC Auckland CIV-2003-404-6579, 25 August 2006 at para [4].

> uncommon circumstance of simple cases involving large sums of money attracting awards of costs which are disproportionate to the complexity and significance of the case.
>
> The costs should be proportionate to what the case is about in determining what is a reasonable contribution, although a disproportionate award may be justified in some cases … the importance to the parties of the litigation, in a monetary and non-monetary sense, is a relevant factor, but losses suffered by the successful party in connection with the litigation are not relevant; *U-Bix Business Machines Limited v Astra Group Limited*[2].

[6] As to paragraph (e) of Rule 14.2, the commentary says this:

> What is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs.

[7] As to paragraph (g) of the Rule, that so far as possible the determination of costs should be predictable and expeditious, the commentary says this:

> The Rule sums up the rationale of the preceding paragraphs. They are intended to ensure as far as possible a party embarking on litigation should have a general idea of the costs which will be recovered if successful. It is equally important that a successful party should not have to spend further significant sums on arguing about amount and incidence of costs at the close of the litigation.

The Appellant's Submissions

[8] The appellant's advocate, Mr O'Sullivan, has filed detailed costs submissions running to 20 pages.

[9] Ultimately, he submits that the proceedings are Category 2 proceedings, for which, for Counsel, the appropriate daily recovery rate is $1,910 as per Schedule 5 of the Regulations.

[10] As to time allocations, he submits that Category 3 of Schedule 4 is engaged. Category C is the category that provides for the largest time allowance for the various steps in the litigation.

[11] In his submissions, he is highly critical of the appellant's employer's response to her injury, including the denial that there had been an injury as described by the appellant.

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2 *U-Bix Business Machines Limited v Astra Group Limited*, HC Wellington CP104/99, 26 July 2000.

[12] Referring to *ACC v Carey*[3], he submits that costs in this case should be awarded based on Category 2 of Schedule 5, which has a daily recovery rate of $1,910 per day.

[13] For each step in the proceeding, he seeks the highest time allocation of Schedule 4 under column C.

[14] He submits that there is justification for uplifting the *Carey* baseline from 50%:

> To significantly reflect the respondent's unjustifiably putting the appellant to the burden of having to fight through an obstacle course for over three years to gauge out a buried and camouflaged truth.

[15] In his submissions on behalf of the first respondent, Mr Hunt acknowledges that these proceedings are Category 2 proceedings for the purposes of Rule 14.3, but that there should be time allocations as listed under column B of Schedule 4.

[16] Mr Hunt also takes issue with the amount of disbursements claimed by Mr O'Sullivan. At paragraph 47 of his submissions, he notes the claim of $1,356 in relation to the preparation of bundles. He says:

> While this might ordinarily seem an appropriate disbursement to claim, the Court is asked to note that there was absolutely no attempt on behalf of the appellant and her advocate to liaise with either of the respondents in relation to the index to the bundles, or indeed the preparation of the bundles at all.

[17] This is an unusual submission for ACC's counsel to make. This ACC appellate jurisdiction runs efficiently in part because ACC's experienced counsel, in my experience, in being proactive in settling with the appellant what should be included in the bundle of documents and indeed taking charge of the production of such bundles.

[18] In the present case, it seem that this was left entirely to Mr O'Sullivan.

[19] Whilst it is plain that Mr O'Sullivan was very much in adversarial mode in his handling of Mr Emtage's appeal, bundles of documents are fundamental, and Mr O'Sullivan is entitled to reimbursement for producing them.

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[3] *Accident Compensation Corporation v Carey* [2021] NZHC 748.

[20] In her submissions, on behalf of the second respondent, Ms McAllister helpfully refers to the Court of Appeal's decision in *Holdfast NZ Limited v Selleys Pty Limited*[4], which sets out what the party applying for costs must do to categorise proceedings;- work out the time band; apply extra time for a particular step if required under Rule 14.6.3(a); and finally step back and look at the total costs that would be recovered at this point and argue that additional costs should be awarded.

[21] Ms McAllister rejects the proposition that the respondents have unnecessarily protracted the matter and added complexity and have unreasonably mishandled facts. She notes that the appellant's advocate carried out the case in an unusual manner and in a way which incurred additional costs to the second respondent.

[22] Ms McAllister also says that the appellant's advocate failed to file evidence in a timely fashion as required by the Court; that he failed to comply with timetabling requirements; and that the second respondent was consistently having to file submissions in response to ongoing evidence filed.

[23] She also says that the appellant's advocate's insistence on attendance of particular witnesses prolonged the hearing.

[24] She also points to other actions on the part of the appellant's advocate that contributed unnecessarily to time or expense of the proceeding.

[25] She says that the volume of information submitted by the appellant was extreme and additionally increased the costs of the second respondent. She points to nine memoranda or applications during the course of the proceeding filed by the appellant's advocate.

[26] She submits that this is a Category 2B proceeding, being a proceeding of average complexity requiring Counsel of average skill and experience, where a normal amount of time is considered reasonable.

[27] She submits that the appellant's submissions failed to meet the threshold necessary to justify a categorisation uplift from that applied in *Carey*.

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4 *Holdfast NZ Limited v Selleys Pty Limited*, CA200/04, 6 December 2005

[28] She further submits that a large portion of the appellant's memorandum of costs was an opportunity for re-litigation of the matter. She says this is unproductive.

[29] She concludes by saying that for the reasons in her submission, the costs sought by the appellant should lie where they fall and that the Court should refuse the application.

Decision

[30] I concluded the substantive Judgment with the words "this saga must be brought to an end". It assuredly does. The question of costs has given Counsel and the advocate, Mr O'Sullivan, further opportunity to make comments on how the appeal was conducted. However, in order to conclude what I fervently hope will be the last step in this "saga", namely the settlement of the costs issue, I do not propose to drill once again into the behaviour of the parties and their representatives, except to say that from the outset, from Ms Emtage's standpoint, there was a substantial power imbalance against her and in making her injury claim, she was not believed.

[31] From a raft of perspectives of each of the parties, things could and should have been done better.

[32] The fact of the matter is that she has succeeded on her appeal, and is prima facie entitled to costs.

[33] Ultimately in this case, there is, remarkably, something close to a consensus that for the purposes of Schedule 5, this is a Category 2 proceeding which carries with it an appropriate daily recovery rate of $1,910 per day.

[34] In his table at paragraph 31 of his submissions, Mr Hunt applies Band B of Schedule 4. However, I consider Band C is appropriate in this case. As the commentary to Rule 14.5 says:

> The Court is only concerned with fixing a reasonable time for taking a step. This is done either by enquiring if the step in question is referred to in that Schedule, or if not, by analogy. If there is no analogy, then the Court must determine what is reasonable, having regard to all of the relevant circumstances. It is enjoined to do this by considering whether the amount of time considered reasonable is small, normal or comparatively large.

…

> The categorisation process involves the exercise of discretion by the Judge in fixing what is a reasonable time. Like any discretion, it must be exercised judicially, taking into account all relevant considerations and disregarding the irrelevant considerations. No doubt where there is controversy, the process is open to submission and debate.

[35] In this case, notwithstanding some justified criticism of some of the appellant's advocate's actions that in essence ran counter to the most efficient prosecution of this appeal, this case had more than its fair share of complexities, from the challenges faced by the appellant in having her claim accepted through to the inaccurate diagnoses of her particular condition. Accordingly, in this case, Band C is appropriate because a larger amount of time for each of the steps is in this case reasonable.

[36] Costs therefore are calculated as follows:

Step	**Time Allocation**	**Daily Rate of $1,910**
Item 9.13 – Preparation of bundle for hearing	1 day	$1,910.00
Item 21 – Commencement of appeal	2 days	$3,820.00
Item 23 – Case management (x2)	0.8 day	$1,528.00
Item 24 – Preparation of case on appeal	1 day	$1,910.00
Item 24A – Preparation of written submissions	3 days	$5,730.00
Item 25 – Appearance at hearing as principal counsel	2.5 days	$4,775.00
TOTAL		**$19,673.00**

[37] In terms of the judgment of *ACC v Carey*, the amount of costs to be awarded to the advocate, Mr O'Sullivan, in this case is 50 per cent, being $9,836.50.

[38] Mr O'Sullivan also seeks disbursements of $2,527.93.

[39] He has provided a detailed schedule of these disbursements, which total $2,527.93. It is noted that the largest item is the printing and binding of the bundles involved in the hearing, totalling $1,356.13.

[40] Mr Hunt objects to the claim of $1,356.13 in relation to the preparation of bundles. I refer to my earlier comments relating to the usual proactive involvement of ACC's counsel in the preparation of bundles being absent in this case. The claim for disbursements of $2,527.93 is allowed.

[41] Accordingly, the Court awards judgment in favour of the appellant against the respondents for costs of $9,836.50, together with disbursements of $2,527.93.

CJ McGuire
District Court Judge

Solicitors: Young Hunter, Solicitors, Christchurch
Copeland Ashcroft, Solicitors, Queenstown