**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2016-404-001149**
**[2019] NZHC 16**

| | |
|---|---|
| IN THE MATTER OF | a claim of historic sexual abuse |
| BETWEEN | MARIYA TAYLOR<br>Plaintiff |
| AND | ROBERT ROPER<br>First Defendant |
| | ATTORNEY-GENERAL<br>Second Defendant |

Hearing: [On the Papers]

Counsel: G F Little and G E Whiteford for the Plaintiff
J F Mather and L M Herbke for the First Defendant
A C M Fisher QC, J K Gorman and
E Lay for the Second Defendant

Judgment: 21 January 2019

---

**JUDGMENT OF EDWARDS J**
**[re Costs]**

---

This judgment was delivered by Justice Edwards
on 21 January 2019 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: A C M Fisher QC, Auckland
G F Little, Auckland
J F Mather, Auckland

Solicitors: Davenports City Law, Auckland
Barter Law, Auckland
Crown Law, Wellington

[1] In my judgment dated 5 September 2018, I dismissed Ms Taylor's civil claim against Mr Roper and against the Attorney-General on behalf of the Royal New Zealand Air Force (RNZAF).[1]

[2] Ms Taylor sought damages (including exemplary damages) against both Mr Roper and the RNZAF for the mental harm she alleged was caused by Mr Roper's actions between 1985 and 1987. Sixteen witnesses, including two experts, gave evidence at trial over one and a half weeks. The briefs of evidence of other witnesses were taken as read.

[3] I found it likely that Mr Roper had acted as Ms Taylor alleged, and that these acts were a material and substantial cause of Ms Taylor's mental injury, namely, her post-traumatic stress disorder.[2] However, Ms Taylor's claim did not succeed because it had not been brought within the time limits prescribed by the Limitation Act 1950, and there was insufficient evidence that she was suffering from a disability that would have prevented her from bringing her claim within time.[3]

[4] Both the RNZAF and Mr Roper sought an award of costs. The RNZAF subsequently withdrew its application. Mr Roper claims costs of $55,638.50 plus disbursements of $220.[4] Costs have been calculated according to the scale set out in the High Court Rules 2016. The total sum claimed is substantially less than the actual costs and disbursements incurred by Mr Roper which total $100,213.21. Mr Roper was in receipt of legal aid for part of the proceeding. The sum of $75,888.35 has been paid out under that grant for both costs and disbursements.

[5] Ms Taylor opposes costs and submits that no order should be made in favour of Mr Roper. Although she was unsuccessful in establishing her claim, she says that Mr Roper failed on the issue of whether the alleged acts of assault and false

---

1 *M v Roper* [2018] NZHC 2330.
2 At [125].
3 At [155].
4 This figure is slightly less than that calculated in Mr Roper's schedule. The difference lies in the allowance for case management conferences. There were three case management conferences. An allowance of 0.3 days is made for the first case management conference on 1 November 2016, with 0.2 days allowed for the remaining two conferences.

imprisonment occurred, and that this issue significantly increased Ms Taylor's costs at trial.[5]

**What is the purpose of a costs award?**

[6] The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognised and enforced in a court of law.[6] Costs are not ordered as punishment against the losing party, nor as a reward for the winner.[7] An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.[8]

[7] An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.[9]

[8] The costs regime set out in part 14 of the High Court Rules aims to strike a balance between these competing policy objectives. The Rules set out a method of calculating costs by taking prescribed time allocations for steps taken in a proceeding and multiplying those time allocations by a prescribed daily rate. The allocations and daily rates are aimed at delivering a successful party two-thirds of the costs deemed to be reasonable litigation costs.

---

5 Ms Taylor also opposed costs on the basis that both defendants could have joined in their defence and so the award of only one set of costs was appropriate. That submission is no longer relevant given the RNZAF's withdrawal of its application for costs.

6 *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [8]–[17]; *Morton v Douglas Homes Ltd (No 2)* [1984] 2 NZLR 620 (HC) at 625.

7 *See Kazar v Kargarian* (2011) 197 FCR 113, [2011] FCAFC 136 at [9]; *Ahmadi v Fairfax Media Publications Pty Ltd (No 2)* [2010] NSWSC 1191 at [7].

8 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160].

9 *Hamilton City Council v Waikato Electricity Authority* HC Hamilton CP21/93, 29 September 1993 at 10–13.

[9] A Judge has a discretion in awarding costs, but that discretion is not unfettered.[10] It is to be exercised in accordance with part 14 of the Rules. Rule 14.2 sets out the principles that apply to a determination of costs. Those which are particularly relevant to this case are:

> **14.2 Principles applying to 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:
>
> …
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

[10] The principle in r 14.2(1)(a), that costs follow the event, is fundamental to the costs regime. In *Shirley v Wairarapa District Health Board*, the Supreme Court paraphrased the principle as "the loser, and only the loser, pays" unless there are exceptional circumstances.[11]

[11] The Rules also govern the circumstances in which costs may be either increased or reduced from scale. Rule 14.7 governs the latter. The circumstances listed in that rule that are particularly relevant to this case are:

> **14.7 Refusal of, or reduction in, costs**
>
> Despite rules 14.2 to 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if—
>
> …
>
> (d) although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs; or
>
> …
>
> (g) some other reason exists which justifies the court refusing costs or reducing costs despite the principle

---

10 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [9].

11 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].

> that the determination of costs should be predictable and expeditious.

**Should Mr Roper be awarded costs?**

[12] The starting point is that Mr Roper successfully defended the claim against him, and is therefore entitled to an award of costs. That is consistent with the principle that a party who fails with respect to a proceeding should pay costs to the party who succeeds (r 14.2(1)(a)), and the principle that so far as possible the determination of costs should be predictable and expeditious (r 14.2(1)(g)).

[13] As to quantum, Mr Roper seeks scale costs calculated on a schedule 2B basis. That calculation includes a claim for both his counsel. Ms Taylor had two counsel acting on her behalf, and the RNZAF had three. The historic nature of the evidence, the claim for exemplary damages, and the novel nature of some of the claims advanced makes the engagement of two counsel reasonable in all the circumstances. I allow for second counsel accordingly.

[14] The next step is to consider whether there are any grounds to reduce the costs otherwise payable to Mr Roper. I consider there are grounds under r 14.7(1)(d). That is because Mr Roper's defence failed in relation to an issue which significantly increased Ms Taylor's costs. Mr Roper denied assaulting or falsely imprisoning Ms Taylor. He lost on that issue. I made factual findings that he likely committed the acts alleged. That issue absorbed some time at trial. All but one of the plaintiff's 10 witnesses gave evidence that was, at least in part, directed towards that issue. Mr Roper also gave evidence denying he had acted in the way alleged.

[15] Mr Mather submits that, even if Mr Roper had admitted the acts complained of, Ms Taylor's claim for exemplary damages meant that evidence directed at the nature and extent of the acts complained of would still have been required. He submits that teasing out the extent of the conduct for the purposes of assessing an exemplary damages claim would have probably taken just as much, if not more, trial time.

[16] I accept that Ms Taylor would still have had to call evidence directed at the nature and extent of Mr Roper's actions even if he had admitted them. But, she would

not have had to adduce as much evidence directed to that issue as she did. For example, evidence which simply corroborated Ms Taylor's account that the acts had occurred would not have been required. In addition, although Ms Taylor would still have needed to give evidence at trial, admissions by Mr Roper that he had acted in the way she alleged may have relieved her of some of the distress in describing traumatic events from the witness box. In any respect, the saving of time extends beyond just the trial time, and relates to all steps taken in the proceeding.

[17] Estimating the time and cost that Ms Taylor was put to as a result of Mr Roper contesting this issue is not a precise science. Considered in the round, a reduction of 50 per cent of the costs that would otherwise be awarded reflects the additional time and cost incurred by Ms Taylor on an issue on which Mr Roper ultimately lost.

[18] The next issue is to consider whether there is any basis to reduce costs further, or decline to make any award of costs at all. Mr Little, for Ms Taylor, urges me to apply the exception in r 14.7(g) to refuse to award costs to Mr Roper. Mr Little says that Mr Roper's conduct was outrageous, disgraceful and deplorable, and yet he has not suffered any penalty for his treatment of Ms Taylor. Further, he says that Mr Roper's defence to the claim was unmeritorious, and technical, and accordingly should not carry any order for costs.

[19] There can be no dispute that Mr Roper's conduct towards Ms Taylor was heinous. But Mr Little's submission confuses the proper function of an award of costs. An award of costs is not an occasion on which to penalise the conduct forming the subject matter of the claim. That is the function of the law governing the substantive claim. Ms Taylor was unsuccessful in her substantive claim. Costs should not be used as a backdoor means of granting relief to a plaintiff who failed to get their claim past the front door.

[20] Refusing costs in this case would also run counter to the policies underpinning the costs regime. It would cut across the primary purpose of an award of costs, which is to compensate a successful party for the costs they have expended in either bringing or defending a claim in court. And, it would be at odds with the policy of encouraging litigants to carefully weigh their prospects of success before embarking on litigation

that would put other parties to time and cost. Litigants might commence and continue a proceeding knowing that they face significant Limitation Act hurdles, but nevertheless confident that, even if they lose, they will be immunised from any adverse costs consequences of that decision.

[21] Finally, refusing to award costs would undermine the integrity of the costs regime. That regime is built on the principle that costs should be predictable and expeditious. The courts have cautioned against a broad interpretation of the exception in r 14.7(g) lest the exception swallow the rule.[12] Reducing or refusing costs due to the nature of the conduct that formed the basis of the claim would introduce a new category of exemption from the general rule that would risk doing just that.

[22] Overall, I consider a reduction of 50 per cent on the basis that Mr Roper lost on an issue which caused Ms Taylor to incur significant costs maintains the integrity of the costs regime and is consistent with the principles in r 14.2 which underpin it. The practical effect of that reduction is that Mr Roper will be left with a significant cost burden, despite successfully defending the claim at trial. But that is the ordinary consequence of an orthodox application of the cost rules in this case. Accordingly, I award Mr Roper 50 per cent of costs calculated on a schedule 2B basis (being $27,819.25) plus disbursements of $220.

_____

Edwards J

[12] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2014] NZCA 141, (2014) 21 PRNZ 753 at [24]–[25].