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I fought the law and the lawyers won

Winston Peters' big bill for losing his controversial privacy case shows one thing clearly: lawyers fees are so high most people can't afford to risk a court trial, writes Bridgette Toy-Cronin

If you lose a case in court, will you be ordered to pay hundreds of thousands of dollars to the opposing party? That was the outcome of Winston Peters' failed claim over the public leaking of his superannuation information before the 2017 general election. The High Court has now ordered Peters to pay nearly \$320,000 in costs – the equivalent of half the value of an average New Zealand home. So how does this work? Why did this case cost so much?

The short answer is that this amount reflects the very high cost of lawyers' fees. In New Zealand, we have a rule that the unsuccessful party should normally pay the costs of the successful party (a loser pays rule). The loser doesn't pay all of the winners' actual costs, but a portion of what was reasonable for them to spend. The actual cost is much more.

In Peters' case, there were two teams of defence lawyers – one team for the Ministers Tolley and Bennett (Ministers' team) and another for the Chief Executive of the Ministry of Social Development (MSD), the State Services Commissioner and MSD (Government team). The Ministers' team asked for just over \$130,000 but the Government Team asked for \$645,000, which they said was "partial indemnity"; otherwise known as "almost what the case actually cost".

Not all of this is lawyers' fees. It also includes expert witness fees and things like photocopying and the court fees, adding up to several thousand. The lion's share, however, is what the lawyers charged for working on the case. I would guesstimate somewhere north of \$700,000 for both teams – more than an average house is worth.

So, given the actual costs are so high how did the court arrive at \$320,000? It used a schedule from its rules, which is meant to calculate about two-thirds of what it was

reasonable for the winner to spend on legal fees. The idea is that anyone going to court can see how much it will cost them if they lose, so they can make a calculated decision about whether or not proceed to court.

If they then receive a settlement offer (as Peters did), they can include their risk of costs when deciding whether or not to accept it. It also means that there is no incentive for lawyers on the winning team to drive up their costs; they'll only be reimbursed for what was reasonable to spend, not their actual fees. This might be cold comfort for the winner, though, who has to pay their lawyer the difference between what the loser is ordered to pay and what the actual fees are.

What is a reasonable fee under the schedule, however, is pegged against what lawyers are charging clients in the private market. As lawyers' fees increase, so does the amount you may receive as costs. And lawyers' fees are going up faster than general incomes. While the median weekly income increased 4.3 percent from 2015 to 2016, an employed lawyers' average charge-out hourly rate went from \$270 per hour to \$292.70 per hour; an 8.4 percent increase. Employed lawyers usually are the cheapest kind of lawyer. We do not have good data on what partners and barristers (including QCs, two of whom appeared in this case) charge, but we know it is more than this and is likely to be going up by at least the same rate.

So, the story behind Peters' costs decision is that lawyers' fees are very high. So high that paying a lawyer (or team of lawyers) to run a two-week trial is out of reach of all but the very wealthiest New Zealanders.

If you lose the case, the loser pays rule doesn't mean you have to pay all the winner's costs, but you have to pay a good chunk of them. If you behave badly in the litigation (like making unsubstantiated claims, like Peters did) you have to pay a bigger chunk. You will also have to pay your own lawyers' costs.

And even if you win, the loser pays rule still won't cover all the cost of your lawyer's fees. You will have to cover the difference between what is awarded by the court and what actually is charged to you.

In some ways this is good as we don't want people thoughtlessly suing each other – those defending proceedings suffer very significant cost and stress. But this case highlights the very substantial problem facing our justice system and our democracy as a whole. We rely on litigation as the decisions that judges issue are part of our law. Even more importantly, we rely on people being able to challenge the actions of the state in court. It is a vital part of our democracy that people who consider they've been wronged by the state, can go and challenge that and have it tested in court.

The risk of a huge costs decisions like this one, might put people off taking a case. For most people though, this is not the biggest hurdle, it is fact that lawyers' fees are so high, most people won't even be able to hire one in the first place. People are forced to walk away from cases that might develop our law, right a wrong, test a principle – and that means we all lose.