

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 116/2024
[2025] NZSC 5

BETWEEN	RICHARD LINCOLN Applicant
AND	ATTORNEY-GENERAL Respondent
Court:	Ellen France, Williams and Kós JJ
Counsel:	Applicant in person Z R Hamill and O Kiel for Respondent
Judgment:	28 February 2025

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B There is no order as to costs.**
-

REASONS

Introduction

[1] Mr Lincoln made two complaints to the police in 2020 and 2022. The complaints related to a Mr Cavell who Mr Lincoln said had assaulted him and breached a restraining order. The police did not prosecute Mr Cavell but instead issued formal warnings. Mr Lincoln subsequently successfully brought private prosecutions against Mr Cavell for two breaches of the restraining order.¹

[2] Mr Lincoln applied for judicial review of the formal warnings. The warnings were in fact withdrawn at an early stage in the light of Police instructions on the issuing

¹ *Lincoln v Cavell* [2022] NZDC 6362.

of formal written warnings, and the decision of the High Court in another case, *S v Commissioner of Police*.² That decision dealt with the legal requirements for formal warnings. Relevantly, the High Court said that a warning had to be supported by a clear admission of the offending.³ The Police instructions on formal warnings, released in July 2022, are recorded in the Police Manual and require, among other things, that the offender must provide informed consent to participate in the warning process.

[3] Despite withdrawal, Mr Lincoln pursued the judicial review proceedings. He was unsuccessful in the High Court.⁴ The High Court subsequently awarded costs against Mr Lincoln.⁵ Mr Lincoln appealed unsuccessfully to the Court of Appeal from the decision declining judicial review and from the award of costs against him.⁶ Mr Lincoln now seeks leave to appeal from that decision. He says that the issue is one of public importance and a miscarriage of justice will otherwise occur.⁷

The proposed appeal

[4] The proposed appeal would reprise arguments made in the Court of Appeal. Mr Lincoln maintains his argument that the warnings were an extra-judicial punishment and were an unlawful bargain to stifle prosecution.

[5] In dismissing the appeal, the Court of Appeal discussed the guidance relating to formal warnings. The Court said that in December 2021, following *S v Commissioner of Police*, Te Tari Ture o te Karauna | the Crown Law Office had released a supplement to the Solicitor-General's Prosecution Guidelines dealing with the use of warnings.⁸ The supplementary material in the Guidelines discusses, amongst other matters, the purpose of a warning, the process to be followed and

² *S v Commissioner of Police* [2021] NZHC 743, [2021] 3 NZLR 392.

³ See at [96].

⁴ *Lincoln v Attorney-General* [2023] NZHC 3822 (McQueen J).

⁵ *Lincoln v Attorney-General* [2024] NZHC 326. (McQueen J)

⁶ *Lincoln v Attorney-General* [2024] NZCA 515 (Collins, Whata and Grice JJ) [CA judgment].

⁷ Senior Courts Act 2016, s 74(2)(a) and (b).

⁸ Te Tari Ture o te Karauna | Crown Law *Solicitor-General's Guidelines for the Use of Warnings* (23 December 2021).

permissible content. The Court of Appeal set out the requirements for making a formal warning as recorded in the Manual.⁹

[6] The Court of Appeal noted that from the point in time the warnings were withdrawn in this case, Mr Lincoln’s rights and interests were put back to the position they would have been in but for the warnings. In addition, the form of warnings used in this case were no longer used by the police. Accordingly, the Court of Appeal considered that “whatever punitive effect they may have [wa]s a matter of historical and theoretical interest only”.¹⁰

[7] The Court then addressed Mr Lincoln’s argument that formal warnings are inherently unlawful. The Court rejected that argument. The Court made the following points.

[8] The first of these was to note that the current police policy in the Manual in relation to warnings illustrates the lawful exercise of the warnings process.¹¹ Second, the Court observed that formal warnings “do not absolve the warned person of criminal liability for their alleged offending”.¹² The warning does not have the effect of an acquittal or provide immunity from prosecution to the warned person as, the Court noted, Mr Lincoln’s successful private prosecution of Mr Cavell illustrated. Third, the Court said that “the prosecutorial discretion to commence (or not) a public prosecution has long been recognised by the law”.¹³ The Court also placed some weight on the fact that the exercise of the discretion, including the use of formal warnings, is guided by the Solicitor-General’s Prosecution Guidelines. The Court pointed out that those Guidelines are recognised by statute and referred in this respect to this Court’s judgment in *Osborne v Worksafe New Zealand*.¹⁴ On this basis, the Court of Appeal said, formal warnings had “the imprimatur of both the common law and statute”.¹⁵

⁹ CA judgment, above n 6, at [20].

¹⁰ At [30].

¹¹ This is a reference to the requirements for an admission and informed consent.

¹² CA judgment, above n 6, at [33].

¹³ At [34] citing *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) at 59 and *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [30]–[31].

¹⁴ CA judgment, above n 6, at [34] citing *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [27].

¹⁵ CA judgment, above n 6, at [36].

[9] The Court noted that none of this meant that formal warnings were immune from challenge. The exercise of prosecutorial discretion must be lawful and formal warnings that purported to interfere with the rights and interests of the warned person without their consent “may well be amenable to challenge on legality grounds”.¹⁶

[10] On costs, the Court was not persuaded that costs should lie where they fall. While there were public interest considerations in the appeal, the Court took the view that it was “clear” that Mr Lincoln pursued the matter for personal reasons as exemplified by his commencement of a private prosecution against Mr Cavell.¹⁷

[11] The legality of formal warnings could give rise to a question of general or public importance.¹⁸ However, we do not consider this case would provide an appropriate vehicle in which to address this question. That is primarily because the issue here is no longer a live one and the way in which warnings are now given has since changed. In these circumstances we see no appearance of a miscarriage of justice in the way the Court of Appeal has approached the issue.¹⁹

[12] As to the question of costs, there is no challenge of principle here but rather disagreement with the outcome in costs terms of the application of principle to this specific case. No question of general or public importance accordingly arises. Nothing raised by Mr Lincoln calls into question the assessment of the Court of Appeal on this issue. There is no appearance of a miscarriage of justice as that term is used in the context of civil proceedings.²⁰

Result

[13] The application for leave to appeal is dismissed.

[14] There is no order as to costs.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

¹⁶ At [37].

¹⁷ At [42].

¹⁸ Senior Courts Act, s 74(2)(a).

¹⁹ Section 74(2)(b).

²⁰ See *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].