

**LOW  
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY

AP18/97

**IN THE MATTER** of an appeal by way of case stated  
on a question of law from a  
determination of the District Court  
at Palmerston North

**BETWEEN** **ROGER JAMES WOODGATE**

**Appellant**

**AND** **DAVID HENRY PARKER**

**Respondent**

Hearing: 15 October 1997

Counsel: M B Ryan for Appellant  
G A Paine for Respondent

Decision: 16 October 1997

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**RESERVED DECISION OF GENDALL J**

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Solicitors:

**M B Ryan, Palmerston North for Appellant**  
**Fitzherbert Rowe, Palmerston North for Respondent**

The appellant was the informant in respect of two charges brought in the District Court at Palmerston North against the defendant. Those charges were careless use of a motor vehicle in breach of s60 of the Transport Act 1962 and causing bodily injury to the appellant by careless use of a motor vehicle in breach of s56 of the Transport Act 1962. Those Informations were dismissed after a defended hearing on 5 February 1997. The appellant appealed pursuant to s107 of the Summary Proceedings Act 1957 on questions of law by way of case stated. The case as stated by the learned District Court Judge is recorded as follows:

- “1 On the 8th day of October 1995 the informant lived near the end of Kaihinu Road which leads off SH 57 between Shannon and Levin. Kaihinu Road is a distance of approximately 25 kilometres from Palmerston North.
- 2 Kaihinu Road is a no exit road approximately 5 kilometres long which leads from SH 57 towards the hills to the east and services farm properties.
- 3 The informant had lived near the eastern end of Kaihinu Road for 10 years. The informant was the organiser of a neighbourhood support group.
- 4 The informant lived rent free in a house on a farm property in return for looking after the property for the owners. The informant was also looking after a neighbour's farm, house and animals for a few days while the neighbours (Mr & Mrs Cudby) were away on holiday.”
- 5 The defendant who then lived in Palmerston North drove his motor vehicle to the end of Kaihinu Road looking for a quiet place to read his Sunday newspaper and catch up on study and stopped near the driveway to the Cudby house.
- 6 The informant noted that the defendant had driven up the road towards the Cudby house but had not returned and the informant rode his small motorcycle up to where the defendant sat seated in his car.
- 7 Following a brief conversation the defendant drove his motor vehicle back along Kaihinu Road to the junction with SH 57 and drove off in the direction of Palmerston North. The informant followed the defendant on his motorcycle to the junction of Kaihinu Road with SH 57.
- 8 The informant drove back along Kaihinu Road to the first house (occupied by Mr & Mrs Christensen) which is 180 metres from the junction with SH 57.

- 9 The defendant returned to Kaihinu Road to obtain the name of the road from a road sign at the junction with SH 57 and then drove along Kaihinu Road intending to turn around and resume his journey to Palmerston North.
- 10 The defendant entered the driveway of the Christensen house in his motor vehicle as the informant was leaving that driveway on his motorcycle.
- 11 The informant quickly alighted from his motorcycle and ran and stood in front of and close to the defendant's motor vehicle thereby restricting the forward movement of the defendant's motor vehicle.
- 12 The informant sought an explanation from the defendant as to the defendant's presence in that place and punched his fist on to the bonnet of the defendant's car.
- 13 The defendant slowly drove his car forward in such a manner that the informant was pushed to one side by the forward movement of the car and then drove off.
- 14 As the defendant drove past the informant the informant struck the window of the driver's door of the defendant's car with his fist.
- 15 Gentle force was used by the defendant when he drove his motor vehicle forward thereby displacing the informant from in front of the defendant's motor vehicle.
- 16 When examined by a doctor on 25 October 1995 (17 days after the incident) the informant complained of a lower back injury for which he was anti-inflammatory tablets but there was no obvious bruising.

I DETERMINED THAT:

- 17 The defence of self defence was available to the defendant.
- 18 There was evidence upon which a defence of self defence could be founded.
- 19 The form of driving adopted by the defendant in this case was in the nature of self defence being driving that was consistent with that of a reasonably prudent driver in the circumstances.
- 20 The informant's injuries may not have amounted to injury for the purposes of s56 of the Transport Act 1962.

- 21 Even if either of the charges of careless driving causing injury or careless driving had been established then the “de minimis” principle would apply so that no conviction would have been entered.
- 22 That an award of costs pursuant to s5 of the Costs in Criminal Cases Act 1967 was justified.
- 23 That this was a case of special difficulty, complexity or importance as defined in s13 of the Costs in Criminal Cases Act 1967 justifying an award of costs in excess of the scale by the Costs in Criminal Cases Regulations 1967.
- 24 That an award of costs in favour of the defendant of \$1,750.00 plus GST was a fair and reasonable amount having regard to total legal costs of \$3,500.00 plus GST expected to be incurred by the defendant.

The question for the opinion of the Court is whether my decision was erroneous in point of law.”

When the matter came on for hearing the appellant abandoned any challenge to the determinations to the District Court Judge contained in paragraph 17, 18, 19, 20, 21 and 22 of the case. By implication he accepts that the learned District Court Judge’s decision in respect of those matters was not erroneous in point of law.

However the appellant proceeded with the appeal by way of case stated insofar as it related to determinations 23 and 24 of the District Court Judge. Whilst the appellant, through his counsel did not challenge an award of costs pursuant to s5 of the Costs in Criminal Cases Act 1967 was justified he submitted:

- (1) This was not a case of special difficulty, complexity or importance so as to justify an award of costs in excess of scale prescribed by the Costs in Criminal Cases Regulations 1987 and,
- (2) In any event if an award in excess of scale was justified an award of costs in the sum of \$1,750 plus GST was excessive.

The Costs in Criminal Cases Act 1967 provides:

“s5. Costs of successful defendant - (1) Where any defendant is acquitted of an offence or where the Information charging him with an offence is dismissed or withdrawn ... the Court may, subject to any Regulations made under this Act, order that he paid such sum as it thinks just and reasonable towards the costs of his defence.

(2) Without limiting or affecting the Courts discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to -

- (a) whether the prosecution acted in good faith in bringing and continuing the proceedings:
- (b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:
- (c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested the defendant might not be guilty:
- (d) whether generally the investigation into the offence was conducted in a reasonable and proper manner:
- (e) whether the evidence as a whole would support a finding of guilt but the Information was dismissed on a technical point:
- (f) whether the Information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
- (g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation of a proceedings was such that a sum should be paid towards the cost of his defence.”

Pursuant to s13 Regulations were made in 1987 prescribing levels of costs and fees which, by a 1988 amendment, provide for a maximum fee of \$226.00 for each day or part half day occupied in Court by a barrister or solicitor for conducting a prosecution

or defence before a Judge or Justices. Regulation 3 of the Costs and Criminal Cases Regulations 1987 provides:

“Subject to s13(3) of the Act, the heads of costs and the maximum scales of costs that may be ordered to be paid under the Act shall be those set out in the schedule to these Regulations”.

Section 13(3) of the Act provides:

“Where any maximum scale of costs is prescribed by Regulation, the Court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable”.

The appellant submitted that the learned District Court Judge gave no reasons for his decision to make an award in excess of the scale; that the factual situation was neither difficult, nor complex, nor important; that hearing occupied only a little more than half a day with the Judge’s decision being delivered thereafter in the early afternoon; no difficult, complex or legal issues of special importance arose, the charge was relatively minor and no case existed for an award to be made in excess of scale. Alternatively the appellant submitted that an award at a level of \$1,750.00 plus GST was excessive having regard to the minor nature of the charge, the factual evidence was not largely in dispute, the length of hearing, the nature of the defence being a straight forward application of the legal principles involved in self-defence and the time taken to resolve the case, namely a little over four months.

For the respondent Mr Paine submitted the appeal did not concern a point of law but rather was an appeal against the exercise of a discretion by the District Court Judge and the provisions of s13(3) envisages a situation where the discretion of the hearing Judge may be exercised so as to award costs in excess of scale.

In terms of the case stated the District Court Judge records that it was determined that this was a case of special difficulty, complexity or importance so as to justify an award of costs in excess of scale. Mr Ryan on behalf of the appellant submits that the Judge's reference, in his decision, to having regard "to all relevant circumstances" including whether the prosecution acted in good faith, that the informant had been given a warning by two Police Officers as to his actions, that the appellant knew the risk that he might face if an award of costs is unsuccessful may all have been matters or reasons given why an award of costs was justified in the first place, but are not reasons which fall into the category of "the special difficulty, complexity or importance of the case" so as to justify an award of costs in excess of scale as provided in s13.

I cannot agree. The case had unusual and difficult features. It involved a private prosecution brought by an informant who, according to the learned District Court Judge, envisaged that he had "possessory, type rights which he seems to exercise in relation to the road and the jealousy that he has of it and its users". It involved the right of a citizen to travel on a public roadway unrestricted or undeterred from interference or impediment by others. Yet it involved a consideration as to the extent to which a citizen might go to overcome such impediment. It had some minor procedural difficulties in that the proceedings were originally filed in the Levin District Court. It involved a novel issue of some difficulty or complexity - namely the availability of the defence of self-defence to a charge of careless use of a motor vehicle and injuring another by careless use. Whilst that defence had been by inference recognised in the District Court in *Ministry of Transport v Rhodes* [1990] DCR 461, where a District Court Judge held that a defendant was entitled to escape from a form of trap, in the guise of another stationary motor vehicle, through the use of such force as in the circumstances he believed them to be, it was reasonable to use, nevertheless the issue does not appear to have been specifically determined by higher authority. The case had its difficult and unusual elements to it. The application of the comments of the Court of Appeal in *Police v Vialle* [1989] 1 NZLR 521 had to be considered. There the Court of Appeal said that carelessness must be judged objectively and that it was relevant to consider any or all parts of the history or events leading up to the

driving event or episode but in the end, whether there had been negligence or carelessness was a question of fact in each case. The difficult issue that the Court had to confront seems to me to be whether the objective assessment of the respondent's driving provided a different test for that referred to in the *Ministry of Transport v Rhodes*, namely whether he was entitled to use such force as in the circumstances "as he believed them to be" it was reasonable to use. In the end the learned District Court Judge in this case came to the view that the form of driving adopted by the defendant was that of a reasonable prudent driver in the circumstances (the objective test) and further that it was in the nature of self-defence. That has not been challenged now as a question of law. Nevertheless it was a matter of some importance and special difficulty. In my view it cannot be said, as a point of law, the learned District Court Judge's decision to exercise in his discretion and award of costs in excess of scale in terms of s13(3), was erroneous as a matter of law.

Turning to the issue of the quantum of costs. That was a matter entirely within the discretion of the District Court Judge. Such cannot be exercised capriciously. An award which represented 50% of the actual legal costs incurred was awarded. The case stated records that such an award was regarded by the District Court Judge as "a fair and reasonable amount having regard to the total legal costs". It simply cannot be said that a District Court Judge could not in law have come to the decision, in the exercise of his discretion, that he did on the evidence and factual material before him. The duty of this Court on appeal by way of case stated is to intervene only where there is only one conclusion to be drawn from the case stated and the circumstances, namely that the District Court Judge erred in law and could not but for such error have awarded costs in excess of scale and at such a level. If the award was such that no Judge acting judicially and properly instructed as to the relevant law could have reached such a determination then this Court will intervene. However that is not the case here. The District Court Judge referred substantially to the reasons and considerations that he took into account in the exercise of the discretion that he had, and properly came to the view that the respondent was entitled to a substantial



contribution from the informant in respect of costs which contribution of necessity exceeded that provided in the scale, it nevertheless presented one half of the actual costs incurred.

There being no error of law on the part of the District Court Judge the appeal must be dismissed. I answer the questions posed in the case stated as follows:

“Was the District Court Judge’s decision erroneous in point of law in respect of:

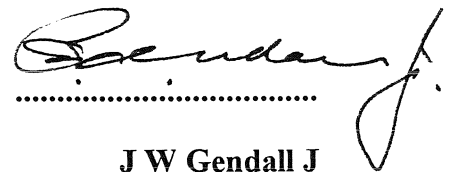
- (a) that this was a case of special difficulty, complexity or importance as defined in s13 of the Costs in Criminal Cases Act 1967 justifying an award of costs in excess of the scale proscribed by the Costs in Criminal Cases Regulations?

Answer: No.

- (b) That the award of costs in favour of the defendant of \$1,750.00 plus GST was a fair and reasonable amount having regard to total legal costs of \$3,500.00 plus GST expected to be incurred by the defendant?

Answer: No.

The appeal is dismissed.

  
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**J W Gendall J**