

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
DAMAGES – COMPENSATION
SERIOUS INJURY DIVISION

Case No. CI-08-04398

STEPHEN PAUL TOMLINSON

Plaintiff

v

KILKENNY CLEANING SERVICES PTY LTD
ACN 062 013 594

Defendant

JUDGE: HER HONOUR JUDGE MORRISH
WHERE HELD: Melbourne
DATE OF HEARING: 29 March 2010
DATE OF JUDGMENT: 23 July 2010
CASE MAY BE CITED AS: Tomlinson v Kilkenny Cleaning Services Pty Ltd (No.2)
MEDIUM NEUTRAL CITATION: [2010] VCC

JUDGMENT AS TO COSTS

Catchwords: COSTS – 134AB(16) Accident Compensation Act 1985, WorkCover Legal Costs Order 2006, Calderbank Offer, high-handed conduct, jurisdiction to award indemnity costs

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr D Hore-Lacy SC with Ms F Ryan	Robinson Gill
For the Defendant	Ms H Donmez	Thomson Playford Cutlers

HER HONOUR:

Background

1 On 1 March 2010 I granted leave pursuant to section 134AB(16) of the *Accident Compensation Act 1985* (the Act) for the Plaintiff to commence proceedings for pain and suffering damages against the Defendant for injury to his lower back sustained during the course of his employment with the Defendant on 26 July 2002 and 24 August 2002.

2 On 29 March 2010 the Plaintiff applied for an award of costs to be made against the Defendant. He seeks costs on an indemnity basis as of 25 September 2009, the date upon which a *Calderbank*¹ offer was made to the Defendant. Otherwise costs are sought on a party and party basis.

Issues to be determined

3 The real question that arises concerns one of jurisdiction to make an award for costs on any other than on a party and party basis. Put simply, Mr Hore-Lacy SC who appeared with Ms F Ryan on behalf of the Plaintiff argues that there is no impediment in the Act, the Rules of Court, or in any orders made under the Regulations to making an order for solicitor and client costs or indemnity costs. If that be so, then costs are to be determined in this application by reference to established principle.

4 On the other hand, Ms Donmez on behalf of the Defendant argues that, as a matter of construction, the *WorkCover Legal Costs Order 2006* exclusively covers and governs the subject of costs in this situation, including the quantum of such costs. If that be so, she argues, then it is not open to award costs other than on a party and party basis, those being the only type of costs referred to in that Order. In other words, the Order strips from the Court the jurisdiction it would otherwise have enjoyed to award costs on a solicitor and client basis, on an indemnity basis or on any other basis that the Court might chose to direct.

5 There is no Supreme Court authority that directly resolves this specific question.

¹ *Calderbank v Calderbank* [1975] 3 All ER 333.

Counsel have referred me to two decisions of this Court. They are in apparent conflict with each other.² This judgment does not require me, or even authorise me, to decide which, if either of them is correct and ought be followed. Each are persuasive. But they are not binding. I am required to decide this case on its merits.

Questions that arise

6 Question 1: Do I have jurisdiction to award indemnity costs against the Defendant upon the successful grant of leave pursuant to section 134AB(16) of the Act?

7 Question 2: If I do have jurisdiction to make such an order, should I?

8 For reasons I shall soon set out, I answer both those questions in the affirmative.

Question 1: Do I have jurisdiction to award indemnity costs against the Defendant upon the successful grant of leave pursuant to section 134AB(16) of the Act?

Relevant Legislation, Rules of Court and WorkCover Legal Costs Order 2006

Accident Compensation Act 1985

9 S134AB (27) provides:

'Subject to the rules of the court –

in proceedings relating to an application for leave of the court under subsection (16), costs are to be awarded against a party against whom a decision is made; and

unless subsection (28) applies in proceedings for the recovery of damages in accordance with this section –

(i) if no liability to pay damages is established, costs are to be awarded against the claimant; and

(ii) if damages are assessed but cannot be awarded under the section, each party bears its own costs; and

(iii) if damages are awarded, costs are to be awarded against the Authority or self insurer.'

² See *Paul Giancos v SPC Ardmona Operations Limited* [2009] VCC 1461; and *Kim Ballantyne v Alcoa Portland Aluminium* [2010] VCC 1577.

10 Section 134AG of the Act provides:

(1) The Governor in Council may by Order in Council make a legal costs order—

(a) specifying the legal costs that may be recovered by a legal practitioner acting on behalf of a worker in respect of any claim, application or proceedings under section 134AB, 135, 135A or 135B; and

(b) prescribing or specifying any matter or thing required to give effect to the legal costs order.

(2) A legal costs order—

(a) must be published in the Government Gazette;

(b) takes effect on and from the date on which it is published or any later date of commencement as may be specified in the order;

(c) applies to legal costs incurred on or after the date of commencement of the order.

(3) A legal costs order may—

(a) apply generally or be limited in its application by reference to classes of proceedings, costs, circumstances or factors;

(b) apply differently according to different circumstances or factors of a specified kind;

(c) specify different methods of calculation whether by reference to formulas, scales, tables or other means;

(d) apply, adopt or incorporate (with or without modification) the provisions of any document, code, standard, rule, specification or method whether as formulated, issued, prescribed or published at the time the order is made;

(e) authorise any specified person or body to determine or apply a specified matter or thing.

(4) Section 134AB(29), 135A(13B) or 135B(7) does not apply in proceedings to which a legal costs order applies.

(5) This section and any legal costs order made under this section has full force and effect notwithstanding anything to the contrary in the **Legal Profession Act 2004**, the **Supreme Court Act 1986** or the **County Court Act 1958** or in any regulation, rules, order or other document made under any of those Acts.'

Note: sub-section (5) does not claim precedence over any contrary provision in the Accident Compensation Act, notably 134AB(27)

11 The Objects of the Act are set out in section 3:

“ The objects of this Act are –

.....

- (d) to provide adequate and just compensation to injured workers;
- (e) to ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses;
- (f) to establish incentives that are conducive to efficiency and discourage abuse;
- ...
- (h) to establish and maintain a fully-funded scheme;
- (i) in this context, to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation.”

Rules of Court

12 Section 134AB(27) of the Act is consistent with and gives precedence to the Rules of Court made under the *County Court Act 1958*, including the *County Court Civil Procedure Rules 2008* and their predecessors the *County Court Rules in Civil Proceedings 1999*.³ Those Rules spell out the circumstances in which the Court may, in the exercise of discretion, award costs and the basis upon which those costs are to be awarded⁴. The Rules also include certain scales of costs⁵. It is perhaps an oversimplification to say that ordinarily under the Rules a successful party to proceedings is to be awarded costs, taxed, on a party and party basis⁶. The Rules further provide however that the Court has discretion to order that costs be taxed and paid on a more generous basis, namely, on the basis of solicitor and client⁷ or on an indemnity basis⁸. Further, the Court has power to

³ The powers of the Court in relation to costs are identical as between the 1999 and 2008 Rules. An amendment to the 2008 Rules provides for taxation of costs in the Costs Court rather than by the Registrar. On a taxation the Costs Court will apply the scale that was applicable when “business” was done: R63A.34A(1).

⁴ Rule 63A.02; 63A.27.

⁵ Rule 63A.34A, Appendix A.

⁶ Rule 63A.28, 63A.29 and 63A.31.

⁷ Rule 63A28(b), 63A.30.

⁸ Rule 63A.28(c), 63A.30.1.

award costs "on such other basis as the Court may direct"⁹.

WorkCover Legal Costs Order 2006¹⁰

13 Pursuant to s134AG, an Order in Council was made on 10 October 2006. It was gazetted 12 October 2006. That Order is known as the 'WorkCover Legal Costs Order 2006'.

14 The relevant clauses of the WorkCover Legal Costs Order 2006 provide:

'2. Application

This Order specifies the legal costs that may be recovered on a party and party basis by a legal practitioner acting on behalf of a worker in respect of any claim, application or proceedings under section 134AB of the [Act]. This Order applies to all applications brought or made on or after the date of commencement of the Order pursuant to section 134AG(2).

3. Definitions

...

"*application*" means an application in the form referred to in section 134AB(5)(a) of the Act;

.....

"*certificate*" means a certificate in writing as set out in section 134AB(16)(a)(ii) of the Act;

"*claim*" means the proposed claim at common law, in respect of each cause of action which the worker seeks to maintain;

....

"*County Court Rules*" means the County Court Rules of Procedure in Civil Proceedings 1999 made under the County Court Act 1958;

.....

"*offer*" means an offer in settlement or compromise of a claim and includes an offer of a nil amount;

"*Scales of Costs*" means the Scale of contained in Appendix A of the County Court Rules

⁹ Rule 63A.28(d).

¹⁰ I note that the WorkCover Legal Costs Order 2010 applies only to 'applications brought or made after the date of commencement of this order' ie the publication date of 27 May 2010 and is therefore not applicable to this matter.

4 *Legal Costs*

A. [sets out the worker's entitlement to recover costs on a party and party basis following compromise and recovery of damages following application under section 134AB(12) prior to commencing proceedings]

B. [sets out the worker's entitlement to recover costs on a party and party basis following compromise and recovery of damages following application under section 134AB(12) prior to commencing proceedings]

C. [provides an additional amount allowed when either A. or B. apply]

D. [sets out the worker's entitlement to recover costs on a party and party basis following compromise and recovery of damages following application under section 134AB(12) after proceedings instituted]

E. In addition to the sums specified at Parts A and B above (as the case may be), where proceedings instituted by a worker pursuant to section 134AB(16)(b) of the Act, and costs are awarded to the worker, the worker's legal practitioner shall be entitled to legal practitioner's professional costs on a party and party basis of the preceding (including counsel's fees), calculated in accordance with the Scale of Costs that would in the absence of this Order have applied (but as if the amounts in the scale were reduced by 20 per cent) plus disbursements, but excluding any amount in respect of attendances and disbursements incurred prior to the delivery of the advice by the Authority or self-insurer.

F. [sets out the worker's entitlement to costs where the matter is settled in defined circumstances prior to making application]

.....

Footnote

The entitlement to costs and disbursements under this Order replaces any other entitlement of a worker to be awarded legal practitioners' professional costs and disbursements for or incidental to an application, ... or proceedings commenced in accordance with ... section 134AB(16) of the Act, and has full force and effect notwithstanding anything to the contrary in the Legal Profession Act 2004 ... or the County Court Act 1958 or in any regulation, rules, order or other document made under any of those Acts.'

Submissions on behalf of the Plaintiff

15 Mr. Hore-Lacy S.C argues that the claim for indemnity costs falls to be determined under the County Court Civil Procedure Rules, whereas his application for costs on a party and party basis is to be determined by reference to the WorkCover Legal Costs Order 2006. He argues that there is no incompatibility between the Rules and the WorkCover Legal Costs Order, and that they each cover different subject matter. Therefore the WorkCover Legal Costs Order 2006 does not oust the Court's jurisdiction to award costs on a basis other than on party and party.

16 Further, Mr Hore-Lacy argues that s134AB(27) concerns the question of a party's liability to pay costs, not the quantum of such costs. Since the present claim involves no question of liability to pay costs (the Defendant will have to pay since it was the unsuccessful party), the only live issue concerns quantum. He argues that there is no clear provision, under the Act or the WorkCover Legal Costs Order that limits the Court's discretionary power to award costs on an indemnity basis in accordance with the Rules.

Submissions on behalf of the Defendant

17 Ms. Donmez argues that the WorkCover Legal Costs Order 2006 effectively codifies the nature and quantum of costs orders than can be made in favour of a successful applicant worker. Clause E, which specifically applies to the present case (proceedings under s 134AB(16)(b) of the Act), refers to only party and party costs. Since indemnity costs are not referred to in that clause they are simply not recoverable. By necessary implication, there is no power to award costs on any other basis.

18 Accordingly, Ms Donmez submits, the only costs recoverable by a successful worker are to be fixed on party and party scale as modified by the Order (a reduction of the applicable scale of costs reduced by 20% and other limitations). She submitted this conclusion is inevitable because the Order states that it 'specifies the legal costs that may be recovered on a party and party basis by a legal practitioner acting on behalf of a worker in respect of any claim, application or proceedings under s134AB [of the Act]. This Order applies to all

applications brought or made on or after the date of commencement of the Order pursuant to s134AG(2).'

19 The Order goes on to specify at clause 4 the quantum of costs by which the Plaintiff is constrained.

20 When asked if this interpretation would have the consequence that there would be inequality between the parties on the question of costs – so that a successful Plaintiff can never recover indemnity costs but a successful Defendant always can, Ms Donmez agreed that this result must follow.

Applicable principles in statutory interpretation

21 In resolving the construction point, I have resorted to basic rules of statutory interpretation. I have come to the conclusion that the WorkCover Legal Costs Order 2006 does not "cover the field" on the question of all types of costs. It is not in conflict with the Rules of Court except to the extent that it modifies party and party costs. It does not oust the Court's jurisdiction to award costs on an indemnity or any other basis.

1. Application of The Golden /Cardinal Rule

22 A classic statement explaining the cardinal rule of statutory construction was made by Tindal CJ in *Warburton v Loveland* (1832) 2 D. &Cl. (HL) 480 at 489:

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."¹¹

23 This rule also applies to subordinate legislation¹². The rule requires me to examine the actual words used and give them their natural and ordinary meaning.

24 Examining the words of 134AG of the Act, subsection (3) indicates that a legal costs order may be made to cover the entire spectrum of legal costs orders or some of them only.

"(3) A legal costs order may—

(a) apply generally or be limited in its application by

¹¹ S.G.G Edgar (ed), *Craies on Legislation*, (9th ed. 1971), Sweet & Maxwell, 611.
¹² *Ibid*, 623.

reference to classes of costs"

25 I repeat, this provision makes it clear that a legal costs order may be confined in application, if the Governor in Council so determines.

26 In this instance, the WorkCover Legal Costs Order 2006 in its application provision at clause 2 only seeks to specify the costs that may be awarded in a limited class of costs, namely party and party costs. So much is clear from the use of the words "this Order specifies the legal costs that may be recovered on a party and party basis." It does not purport to cover all types of costs that might be awarded in all situations. In other words, if the interpretation contended for Ms. Donmez is correct, the Order could have said "this Order specifies and limits all types of legal costs that may be recovered by a legal practitioner acting on behalf of a worker in respect of any claim" etc.

27 As to the submission that the "footnote" ousts the Court's jurisdiction to award indemnity costs, I do not consider that is a fair construction in context of the entire Order.¹³ In any event, section 36 of Interpretation of Legislation Act 1984 provides:

"(3) No ... footnote ... in an Act or subordinate instrument ... shall be taken to form part of the Act or subordinate instrument".

28 Although sub-section (4) provides:

(4) Nothing in subsection (3) shall be construed as preventing in the interpretation of a provision of an Act or subordinate instrument, the consideration pursuant to section 35(b) of any ... footnote ... not forming part of that Act or subordinate instrument."

29 I consider that the footnote does not purport to, and could not do more work on the applicability of the Order than the text of the "Application" clause of the Order. If the application clause seeks to do no more than govern the narrow field of party and party costs, then the footnote clause cannot enlarge the scope of application to cover the entire spectrum of all types of costs.

2. Interpretation that promotes the purpose or objects underlying the Act

30 This rule is also reflected in section 35 of the *Interpretation of Legislation Act 1985*,

¹³ Ibid, 124.

which provides

“In the interpretation of a provision of an Act or subordinate instrument –

- (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and
- (b) consideration may be given to any matter or document that is relevant ...”.

31 I have already referred to section 3 of the Act. In my judgment the Act intends to ensure that injured workers are fairly and adequately compensated, that legal costs are contained, but that there is incentive given to encourage efficiency in the system.

32 Costs are an effective tool to ensure parties think carefully about the way litigation will be run, if it is to be run at all. It requires sharp focus on the issues and the strength or weakness of the evidence and the case to be presented. The real threat that indemnity costs might be ordered compels attention to this question. The principle applies not only to Plaintiffs, but also to Defendants. Why should the Plaintiff have the threat of indemnity costs held against him/her, but not the Defendant? What incentive is there for the Defendant to seriously consider offers of compromise if the failure to do so has no adverse consequence? Such inequality would bring the administration of justice into disrepute and undermine the policy purpose of equality and efficiency.

33 In *Murphy v Harney [2001] VSC 386*, the Court was concerned with the effect of an offer of compromise and the power of the Supreme Court to award certain claimed costs in view of section 93(12) of the Transport Accident Act 1986 and Order 26.08 of the Rules of the Supreme Court. Eames J (as His Honour then was) observed that the application raises “what appears to be a novel question as to the effect of s. 93(12)(b)(ii) and its relationship to Order 26.08”. At paragraph 15 His Honour stated:

“It seems to me that Parliament did not intend that the terms of s. 93(12) should have reduced the effectiveness of the weapon available to a litigant of a well judged offer of compromise. The public interest in the compromise of litigation and the discouragement of inappropriate claims, suggests to me that a party making an offer of compromise should gain the fruits of its tactical victory unless good

reason is shown for the contrary result. Whilst I am sympathetic to the Plaintiff's position, and to the fact that he will gain no benefit of the \$15,000 assessment made for pain and suffering damages, it does not seem to me that that fact is sufficient in itself to deny to the Defendant the benefit of the offer of compromise".

34 The circumstances in which an award of indemnity costs might be justified are not confined to cases of unreasonable rejection of offers of compromise: Where there has been impropriety or other misconduct such an order might also be justified as a mark of the Court's disapproval and to ensure the out of pocket party is properly compensated.

35 If there was no power to award costs against a party who has engaged in an unethical or capricious manner, then this would severely undermine the integrity of the administration justice. But implicit in Ms Donmez's submission is the consequence that all defendants, **except the Workcover Authority**, are exposed to the risk of an award of indemnity costs in circumstances of professional impropriety. Accordingly, the WorkCover Authority, or those acting on its behalf could simply chose to arbitrarily reject certificates and contest cases even where a plaintiff's case is overwhelming, they could take unmeritorious points, cause deliberate delay and additional cost, all without exposure to adverse cost consequences. On the other hand, if a plaintiff engaged in such conduct, her or she would be so exposed. I do not think the Statute or the Order In Council intended such an absurd result. As is discussed below, those representing the Workcover Authority are subject to the Model Litigant principles. It would be doubly ironic if the Model Litigant was not accountable by way of costs when other litigants are so accountable.

3. Canons of statutory construction

36 There are other canons of interpretation that support the conclusion that the Court's jurisdiction to award costs other than on a party and party basis is not ousted by the WorkCover Legal Costs Order 2006. These include:

- *The presumption against creating or removing judicial jurisdiction*¹⁴
- *The presumption against altering legal principle*¹⁵

¹⁴ *Craies*, above n 11, 657; *Goldsack v Shore* [1950] 1 All ER 276, 277; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C 147, 170; *Boddington v British Transport Police* [1995] 2 A.C 143, 161; *R v Monopolies & Mergers Commission, Ex parte South Yorkshire Transport Ltd.* [1993] 1 WLR 23. See also Pearce and Geddes, *Statutory Interpretation in Australia*, (6th ed), LexisNexis, 191.

- *The presumption that in the absence of express language there is no implied repeal by subsequent or subordinate legislation*¹⁶

Although there is power to repeal or amend statutes by Orders in Council, the language must be clear and unambiguous¹⁷.

- *The presumption against unfairness*¹⁸
- *The presumption for fairness and convenience*¹⁹
- *The presumption against interference with rights in the absence of express or implied intent to do so*²⁰
- *Expressio Unius*²¹ and *casus omissus*²²

An express reference to party and party costs in the WorkCover Legal Costs Order 2006 indicates that the Order does not apply to other sorts of costs. The Order should not be extended to meet a case for which provision has clearly and undoubtedly not been made.²³

Question 2: Should I award Indemnity costs in this case?

37 Mr Hore-Lacy submits that indemnity costs should be ordered for two reasons:

- First, the Defendant's rejection of a "*Calderbank*" offer was unreasonable; and
- Second, the Defendant's solicitors acted in an unconscionable, high handed and unethical way in their dealings with the Plaintiff's solicitors, without regard to the obvious merits of the Plaintiff's claim. This resulted in the defence of litigation that was unnecessary.

The "*Calderbank*" Offer

38 The Plaintiff was successful on the pain and suffering aspect of his claim. He did not

¹⁵ *Craies*, above n 11, Ch. 14, sections 1 and 2.

¹⁶ *Craies*, above n 11, 422.

¹⁷ See *Miller v Boothman* [1944] K.B. 337. An example where statutory costs were modified by subordinate order is to be found in *Garnett v Bradley* (1878) 3 App. Cas. 944 at 964 – 965.

¹⁸ *Craies*, above n 11, 650.

¹⁹ See *Craies*, above n 11, pp.650, 657; *Inland Revenue Commissioners v Henchy* [1960] AC 748, 768; ²⁰ *Ibid*, 501.

²¹ See *Craies*, above n 11, 657; Pearce and Geddes, *Statutory Interpretation in Australia*, (6th ed), LexisNexis, 139.

²² *Craies*, above n 11, p673.

²³ *Mersey Docks v Henderson* (1888) 13 App.Cas 502.

press his claim for loss of earnings.

39 On 25 September 2009 his solicitors wrote to the Defendant's solicitors "without prejudice save as to costs". That letter included the following offer:

"I consider the Plaintiff's Application to be likely to succeed, at the very least in relation to pain and suffering. Given the delay this matter is taking, the Plaintiff offers to settle this claim on the basis that he withdraw the loss of earnings component from his Serious Injury Application and that he be granted a Serious Injury Certificate with respect to pain and suffering only.

This offer remains open for a acceptance by you for a period of fourteen days from the date of this letter. If this offer [is] rejected and this matter proceeds to hearing, and our client is subsequently granted a certificate for pain and suffering, we will rely on the contents of this letter in an application that your client pay the Plaintiff's costs on an indemnity basis pursuant to the principles enunciated in *Calderbank v Calderbank* and in *MT Associates Pty Ltd v Aqua-Max Pty Ltd & Anor.*"

40 As it turns out not much was given away in the letter since as I said before the Plaintiff abandoned the loss of earnings component on the first day of the hearing in any event. Even so, Mr Hore-Lacy argues the timely offer was pitched in such a way to give the Defendant something worth considering.

41 The Plaintiff relies on *Hazeldene Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435. In that case the Court of Appeal reviewed the relevant authorities and observed that a presumption in favour of awarding indemnity costs may arise when there has been "an imprudent refusal of an offer of compromise".²⁴

42 Mr Hore-Lacy submits that the offer made here was reasonable and gave up part of the claim which, at the time, had a prospect of success given the extent of the Plaintiff's injury and the limited expert evidence then at hand.

43 Unfortunately, the Plaintiff did not have all relevant financial materials at that time, and so they were not passed on to the Defendant's solicitors in order that they could make an informed decision as to the reasonableness of the offer.

44 As was said in *Hazeldene*:

²⁴ At paragraph 18, citing with approval the judgment of Sheppard J in *Colgate Palmolive Co v Cussons Pty Ltd.* (1993) 46 FCR 225.

"[25] The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations.²⁵ It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:

- (a) the stage of the proceeding at which the offer was received;
- (b) the time allowed to the offeree to consider the offer;
- (c) the extent of the compromise offered;
- (d) the offeree's prospects of success, assessed as at the date of the offer;
- (e) the clarity with which the terms of the offer were expressed;
- (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it."

45 Because the Plaintiff failed to furnish the Defendant with sufficient materials as to the Plaintiff's financial circumstances at the time the offer was made, the Defendant was unable to realistically assess the extent of the compromise offered or the Plaintiff's prospects of success as at that date.

46 It might be said that it is more difficult to give weight to a Calderbank offer when determining whether it is appropriate to grant indemnity costs where the relief sought is non-financial. In the proceedings before me, the Plaintiff sought leave to bring further proceedings. I do not see that as posing an insurmountable hurdle: In this case, the plaintiff initially sought leave on two grounds. The offer to abandon one of those grounds in order to settle the proceedings meant he was prepared to forego a right. Further, the statutory scheme enables the Authority to issue a certificate to the worker if the Authority is satisfied that the injury is a serious one. The Authority could have saved enormous cost by issuing its own certificate in this case under either section 134AB(16)(a), or by giving consent to the grant of the Court's leave at any time in the proceedings, including at any directions hearing or other mention. In any event, there are other sorts of proceedings where the relief sought is not expressed in dollars – for example injunctive or declaratory relief. An unreasonable rejection of a Calderbank offer may well justify costs on a more generous than on a party and party basis in such cases.

²⁵ See *House v R* (1936) 55 CLR 499 at 505.

47 I need not finally decide that question, since I would not award indemnity costs on the basis of the Calderbank letter in this case for the reasons already stated.

The conduct of the Defendant's solicitors

48 Two affidavits were tendered on the question of the Defendant's solicitor's alleged misconduct; Exhibit A - Affidavit of the Plaintiff's solicitor dated 5 March 2010 and Exhibit One – Affidavit of the Defendant's solicitor dated 26 March 2010.

49 In his Affidavit, the Plaintiff's solicitor deposed that on or about 3 March 2009 the Defendant's solicitor telephoned him. In that conversation the Defendant's solicitor said that the Defendant was in possession of video surveillance of the Plaintiff. The Plaintiff's solicitor deposed:

"I was advised that unless the Plaintiff withdrew from the current proceeding, the Defendant intended to defend the Serious Injury Application which at the time was listed for 11 June 2009. I was also advised that the Defendant would seek an Order for costs and would enforce such an order in the event that the Plaintiff was unsuccessful in his application.²⁶"

50 The Plaintiff's solicitor then went on to explain that on or about 4 March 2009 he received a letter from the Defendant's solicitor dated 3 March 2009. The letter contained an offer for the Plaintiff to withdraw the application and that each party bear their own costs. A copy of the letter was attached to the affidavit and, omitting formal parts is in the following terms.

"We refer to our recent discussion and confirm our view that the denial of serious injury will be maintained and that we are instructed to offer the worker the opportunity to withdraw the case on the basis that each party bear their own costs. We enclose a copy of the WorkSafe's Guidelines for costs orders and costs recovery and refer you to paragraph 4.4 and the definition of "exceptionally good reasons" as to why WorkSafe will recover costs against an unsuccessful worker.

This offer is open for [a] period of 21 days from the date of this letter.

Should the offer not be accepted and the worker fails to obtain a Serious Injury Certificate, an order for costs will be sought."

51 That letter enclosed a copy of the guidelines referred to. Paragraph 4.4 provides

²⁶ Exhibit A, paragraph 3.

"If a Panel Member considers there is an "exceptionally good reason" as to why WorkSafe should recover costs in a matter in which a Plaintiff's credit has not been impugned and where WorkSafe has been successful, the Panel Member should contact WorkSafe and the circumstances will be considered."

52 The Guidelines include a non-exhaustive definition of "exceptionally good reason" at footnote 1 in the following terms:

"without limiting the scope of the definition of "exceptionally good reason" WorkSafe prescribes that "exceptionally good reason" includes Serious Injury Originating Motion cases where WorkSafe has put the worker's legal representative/worker on notice that the worker's application for serious injury is unlikely to succeed and should the worker fail to obtain a serious injury certificate, WorkSafe will seek an order for costs, and subject to satisfying the approval process outlined in the governance structure, WorkSafe will seek to execute on the orders obtained."

53 The Defendant's solicitor sent a further letter to the Plaintiff's solicitor dated 29 April 2009 seeking advice as to whether the Defendant's offer would be accepted. That letter contained the following paragraph:

"We reiterate that should your client fail to obtain a Serious Injury Certificate then an order for costs may be sought."

54 On 6 May 2009 the Plaintiff's solicitor responded to this letter indicating that the Plaintiff had no intention of withdrawing the proceedings.

55 In paragraph 7 of Exhibit A, the Plaintiff's solicitor referred to his extensive experience in WorkCover statutory benefits and common law claims. He said:

"In my years of practice, this is the first time that a threat to pursue and enforce against a Plaintiff in a Serious Injury Application has been communicated to me. It has always been my understanding that WorkSafe only seeks to pursue and enforce a costs order against an unsuccessful Plaintiff in a Serious Injury Application in the event of fraud or very significant credibility issues."

56 The Plaintiff's solicitor then went on to describe the level of diligence with which he investigated, prepared and pursued the Plaintiff's claim. This included viewing video footage of surveillance of the Plaintiff and providing that footage to the Plaintiff's medical experts to examine. The purpose of this was to ascertain whether that surveillance evidence undermined the Plaintiff's claim.

57 In my reasons for judgment for the Plaintiff on the Serious Injury Application at

paragraph 73 I referred to further surveillance footage that was taken of the Plaintiff but not disclosed until privilege was waived when the Plaintiff was under cross examination. Surveillance was filmed of the Plaintiff's activities on 16, 17 and 31 May 2009 and tendered as Exhibit D5 in those proceedings. As I said in that judgment:

"[73] Further surveillance footage was taken of the plaintiff on 16, 17 and 31 May 2009.²⁷ Privilege was claimed over this footage, it was not disclosed to the plaintiff until he was under cross-examination. Initially objection was taken to the admission of that evidence, but the objection was ultimately withdrawn. The plaintiff was denied any opportunity of presenting that footage to any of his experts for opinion. Significantly, the defendant has never subjected any of its surveillance evidence to its own experts. All of the surveillance evidence was played in open court and defendant's counsel was given the opportunity to point out any part of that footage that supported the defendant's case or undermined the plaintiff's evidence or credibility. At no stage was any passage identified. This was not a case where the video footage proved a demonstrable lie. There was no evidence showing the plaintiff to be doing anything that he claimed to be unable to do. Rather, the plaintiff was depicted doing things he said he could do.

[74] In addition, there are four affidavits included in the PCB that shed light on the plaintiff's go-karting activities. In his affidavit sworn 31 March 2009, Peter Colosimo deposes that the plaintiff's back problems are well-known in his go-karting club. It is for that reason that the plaintiff obtains assistance with lifting his go-kart on and off its trolley. He further deposes as to the protective measures taken by all go-kart riders to support their necks and backs.²⁸

[75] The plaintiff's father, George Tomlinson, in his affidavit sworn 15 April 2009,²⁹ refers to the plaintiff's interests in go-karting, the protective measures he takes when pursuing that hobby and the assistance he receives from others.

[76] In his affidavit sworn 5 May 2009, Frank Falla also deposes to the protective measures taken by riders in go-karting events.³⁰

[77] In his affidavit sworn 18 May 2009, John Skinner deposes that the plaintiff has withdrawn from races due to back pain. He recalls seeing the plaintiff lying flat on his back in his trailer after qualifying heats.³¹

[78] These four affidavits were admitted into evidence without objection. The evidence answers the suggestion made by Mr. Middleton that the surveillance footage shows a man apparently unaffected by injury. Although it is not obvious from the surveillance footage, I accept that the plaintiff most likely wears rib and kidney protection that supports his body and prevents occasional bumps affecting him. I also accept his seat in the go-kart is designed to keep his body tight and prevent movement while riding. I also accept that the plaintiff pursues his hobby despite the pain it causes him and that he does this in an attempt to lead as normal a life as possible."

²⁷ Exhibit D5.
²⁸ See PCB 31-34.
²⁹ PCB 35-36.
³⁰ PCB 38-39.
³¹ PCB 43-44.

58 The Plaintiff's solicitor's affidavit goes on to explain the economic loss aspect of the claim.

59 In his affidavit, Exhibit One The Defendant's solicitor denied the suggestion of any impropriety. At paragraph 5 he gave his version of the telephone conversation of 3 March 2009. He said:

"(a) I did indicate that the Defendant had surveillance of the Plaintiff (and this is in fact what instigated my telephone call to The Plaintiff's solicitor);

(b) I told The Plaintiff's solicitor that our denial of the Application would be maintained;

(c) I told The Plaintiff's solicitor that I had instructions to allow his client an opportunity to withdraw his Application on the basis that each party would bear their own costs. That this offer would be open for acceptance for 21 days;

(d) I said that if his client wished to pursue his Application but was ultimately unsuccessful then costs may be sought against him (the Plaintiff);

(e) The Plaintiff's solicitor rejected my offer on this spot;

(f) I did not say "**unless** (my emphasis) the Plaintiff withdrew from the current proceeding the Defendant intended to defend the Serious Injury Application;

(g) I did not say that the Defendant would "enforce" an order for costs as that would depend on (among other things) the result of the hearing and obtaining further instructions from my client at that point."

60 There is obviously an unseemly dispute between the solicitors (neither of whom were cross-examined) as to what was actually said in the conversation of 3 March 2009. The correspondence referred to above speaks for itself, and is consistent with the Plaintiff's solicitors' version. Contrary to sub-paragraphs (d), (f) and (g) of the Defendant's solicitors' affidavit paragraph 5, the letter of 3 March 2009 (written the same day as the conversation) made it plain that an order for costs "**will be sought**". If paragraph (g) of the Defendant's solicitor's affidavit is to be accepted, then this advice was without instructions from WorkSafe.³² Yet the letter conveys the impression that it was on instructions. In any event, solicitors are entitled to assume that correspondence from other legal practitioners is on instructions. Further the Defendant's solicitor agrees that he sent a copy of the WorkSafe Guidelines to the Plaintiff's solicitors on 3 March 2009. The reason for doing that was not

³² See also Exhibit One, paragraphs 7-10.

satisfactorily explained. Whatever the Defendant's solicitors' intention, a fair reading of his letter as a whole, including the reference to and enclosure of the Guidelines, and its timing is consistent with the Plaintiff's solicitors' interpretation.

61 On the question of non-disclosure of the additional video surveillance, the Defendant's solicitor denied that the purpose of this stance was to ambush the Plaintiff.³³ The Defendant was legally entitled to maintain privilege over that footage. The reason for that was explained during the trial by the Defendant's counsel. The Defendant was entitled to waive the privilege at the last moment to achieve the tactical advantage of surprise. Whether described as "ambush" or "element of surprise" the purpose of the late waiver is patent. The tactic did not, however, achieve the purpose designed.

62 By the date of the Plaintiff's Calderbank offer in September, the Defendant was well aware of the evidence in its own possession including the undisclosed surveillance footage. The Plaintiff had made full disclosure of his own experts' opinions and lay evidence explaining the activities seen in the disclosed surveillance footage. Only the Defendant had the opportunity to consider the impact of the May 2009 surveillance footage on the strength of the Plaintiff's case. As I said in the substantive judgment not one question was asked of the Plaintiff in cross-examination about that surveillance footage. The only inference to be drawn is that the evidence did not in any way undermine the Plaintiff's case, and the Defendant knew it.

63 Mr. Hore-Lacy submits that regardless of the Defendant's solicitor's intention when sending the critical letters referred to above, objectively the correspondence is tantamount to an improper threat and the Defendant's solicitor's conduct more generally fell short of the standard expected.

64 In discussion with Counsel, I raised the ethical obligations of the 'Model Litigant'. Clearly the Defendant's solicitors are bound by Model Litigant Guidelines, and this is not disputed.³⁴

65 The Victorian Government Solicitors' Office publishes clear guidelines for those legal

³³ See Exhibit One, paragraph 15.

³⁴ See Trial Transcript, pp.90, 93, 129 and 140.

practitioners whom it engages to represent the State in litigation. The guidelines reflect the important policy that those who act on behalf of the State set an example to the private legal profession as to conscientious compliance with the procedures designed to minimise cost and delay.³⁵ Adherence to model litigant principles ensures public confidence in the administration of justice is maintained, particularly where litigation affects the rights of citizens.

66 The model litigant principles are contained in the Standard Legal Services to Government Panel Contract. Clause 2 of Schedule 4 provides “in providing Project Services, the Firm shall ensure that the status of the State and any client as a model litigant is not compromised.”

67 In 2001, the Attorney-General issued ‘Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant.’ The guidelines provide:

“Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant

1. In order to maintain proper standards in litigation, the State of Victoria, its Departments and agencies behave as a model litigant in the conduct of litigation.
2. The obligation requires that the State of Victoria, its Departments and agencies:
 - (a) act fairly in handling claims and litigation brought by or against the State or an agency,
 - (b) act consistently in the handling of claims and litigation,
 - (c) avoid litigation, wherever possible,
 - (d) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid,
 - (e) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by:
 - (i) not requiring the other party to prove a matter which the State or the agency knows to be true, and
 - (ii) not contesting liability if the State or the agency knows that the dispute is really about quantum,
 - (f) do not rely on technical defences unless the State’s or the agency’s

³⁵ *Kenny v South Australia* (1987) 46 SASR 268 per King CJ.

interests would be prejudiced by the failure to comply with a particular requirement,

(g) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim, and

(h) do not undertake and pursue appeals unless the State or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

NOTES:

1. The State of Victoria acknowledges the assistance of the Commonwealth in developing these Guidelines. The Guidelines are based on the Directions on the Commonwealth's Obligation to Act as a Model Litigant, which were issued by the Commonwealth Attorney-General pursuant to section 55ZF of the Judiciary Act 1903.

2. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving State

Departments and agencies, as well as Ministers and officers where the State provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Victorian Government Solicitor, in-house or private, will need to act in accordance with the obligation to assist their client agency to do so.

3. In essence, being a model litigant requires that the State and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.

The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

4. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

5. The obligation does not prevent the State and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the State and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.

The obligation does not prevent the State from enforcing costs orders or seeking to recover its costs.(Government policies as referred to in Schedule 4 of the Legal Services to Government Panel contract).”

68 If the Defendant’s solicitors breached the standards expected of a model litigant to the detriment of the Plaintiff, I consider this would be good reason to award indemnity costs. Costs are never intended to be punitive in their nature, rather they are intended to compensate for the loss suffered.

69 It must be remembered that those entrusted with the privilege of representing the State must act consistently with the purposes of any applicable legislation. Those acting for the WorkCover Authority are not briefed to deny compensation to injured workers when those workers are legitimately entitled. One of the Act’s purposes is to ensure that injured workers are properly compensated. The model litigant should not act as a bully. The “threat” made in this case was not particularly veiled; unless the Plaintiff withdrew the proceeding he was in serious jeopardy of the Authority taking the unusual step of enforcing any costs order. This may have resulted in the loss of his home.

70 It is trite to say that the award of costs other than on a party and party basis is the exception and is generally reserved for cases “where the losing party has engaged in unmeritorious or deliberate or high-handed or other improper conduct such as to warrant the Court to show its disapproval, and at the same time preventing the successful party being left out of pocket.”³⁶

71 I am satisfied that the conduct of the Defendant’s solicitor falls within the exception described above. He may not have intended to be deliberately menacing, however, objectively assessed his correspondence, actions and omissions in the circumstances of this case must be regarded as high-handed at the very least, and in any event were apt to be misconstrued. Having said that, I do not consider that Defendant’s solicitor approached his task with any malice. I think he formed a judgment about the merits of the case and pursued a legitimate and robust defence. Nor can it be said that given the information as

³⁶ *Australian Guarantee Corp Ltd. v De Jager* [1984] VR 483 at 502; *Glaxosmithkline Australia Pty Ltd v Ritchie & Anor.(No 2)* (2009) 22 VR 482.

he understood it to be, the defence was utterly hopeless. I appreciate that when the 3 March letter was written, the solicitor for the Defendant did not yet have the surveillance footage later obtained in May. However, the letter was inflammatory and factually inaccurate (i.e. no actual instructions to press for recovery of costs) and the obligation of propriety was on-going. A detached examination of the surveillance footage would have demonstrated its neutrality on the critical trial issue. It appears to me that a hostile view was taken of the Plaintiff's case, and even as at the commencement of the trial I was told that everything was in issue, including causation. Fortunately, by the end of the trial, common sense prevailed and the only live issue was whether the Plaintiff had suffered a serious injury.

72 The question is whether the solicitor's lapse on 3 March is serious enough to justify an award for indemnity costs. His was not actuated by malice, it was not consonant with the Model Litigant Principles, and I consider it created the appearance that the Defendant had "an axe to grind".

73 Although the Defendant's solicitor's conduct was not that grave, I consider that a higher principle must be respected. The Model Litigant Guidelines were designed to set a high standard of professionalism in practice. They must be paid more than mere lip service. Unless the Courts are prepared to hold to account those who are bound by them, those Guidelines are at real risk of being discarded as hollow rhetoric. Both in terms of jurisdiction and exercise of discretion, the law would be an ass if higher professional standards were expected of those not bound by the model litigant guidelines than those who are – that improper conduct of a non-model litigant could sound in indemnity costs but that improper conduct of a model litigant could not.

74 On this occasion I consider the Court should mark its disapproval of the type of conduct exhibited on behalf of the Defendant.

75 I therefore propose to award indemnity costs from the date of the Plaintiff's Calderbank offer. The Plaintiff has not pressed indemnity costs prior to that date. The Plaintiff's offer presented the Defendant's solicitor with cause to calmly reflect on the merits of the case

and assess whether moderation of past attitudes was required.