SOUTH AUSTRALIA

TWENTY-NINTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE AWARD OF COSTS TO A LITIGANT APPEARING IN PERSON

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON, Q.C.

J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

TWENTY-NINTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE AWARD OF COSTS TO A LITIGANT APPEARING IN PERSON

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us on a request from a Mr. Willing, the consideration of the question of the reform of the law relating to the award of costs to a successful litigant who appears in person. At present that litigant is entitled only to a witness fee on the ordinary scale for his attendance at Court together with his travelling expenses. Mr. Willing's request arises out of the decision of the Full Court, which was adverse to him, in *Willing v. Hollobone* (1972) 3 *S.A.S.R.* 532.

It has been held in England in *The London Scottish Benefit Society v. Chorley* 13 *Q.B.D.* 872, that a solicitor appearing in person is entitled to the same costs as if he had employed a solicitor except in respect to items which the fact of his acting directly renders unnecessary. The most helpful judgment in that decision of the Court of Appeal was that of Lord Justice Bowen who stated:

> "A great principle, which underlies the administration of the English law, is that the courts are open to everyone, and that no complaint can be entertained of trouble and anxiety caused by an action begun maliciously and without reasonable or probable cause; but as a guard and protection against unjust litigation costs are rendered recoverable from an unsuccessful opponent. Costs are the creation of statute. The first enactment is the Statute of Gloucester, 6 Edw. 1, c.1, which gave the costs of the 'writ purchased'. There is a passage in Lork Coke's Commentary, 2 Inst. 288, which it is worth while to examine, as it affords a key to the true view of the law of costs. That passage is as follows:
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> "Here is express mention made but of the costs of his writ, but it extendeth to all the legal costs of the suit, but not to the costs and expenses of his travel and loss of time, and therefore 'costages' cometh of the verb 'conster', and that again of the verb 'constare', for these 'costages' must 'constare' to the court to be legal costs and expenses". What does Lork Coke mean by these words? His meaning seems to be that only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognized and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk."

This case was followed in the case of *Tolputt & Co. Ltd. v. Mole*, 1911 1 *K.B.* 87 and on appeal at 836.

Similar questions to those raised by Mr. Willing were argued in the case of *Buckland v. Watts* 1970 1 *K.B.* 27 by a lay litigant. Mr. Justice Donaldson in his judgment in that case at page 30 quoted from the judgment of Mr. Justice Manisty in *Chorley's case* (referred to above) where that Judge said:—

> "The reason why costs are allowed to a solicitor being a party and not to another person who is not a solicitor is simply this: that the one is a solicitor and the other is not. For instance what a strange thing it would be if a person who is not a solicitor should be allowed solicitors' charges . . . time is money to a solicitor".

Mr. Justice Donaldson said at page 31:—

> "This reasoning seems to me, with respect, to be perfectly sound in so far as it justifies the claims of a solicitor litigant, but it also applies, subject to slight modification, to lay litigants. Time is also money to them, and they are entitled to be compensated for having their time wasted. The modification is that their time, being unskilled vis-a-vis the law, is not, in relation to solicitors' work, worth as much as that of a solicitor, and, accordingly, should be charged at a lower rate. In addition, or alternatively, they should not be allowed to charge actual time spent if and in so far as it took them longer to do the work than it would have done had they been skilled. In any event, the unsuccessful party's liability in costs should not be increased by virtue of the fact that the successful party failed to employ solicitors."

He went on to hold that he was bound by previous decisions of the Court of Appeal to decide against the appellant. The appeal to the Court of Appeal was also dismissed.

At page 37 Sir Gordon Willmer in the Court of Appeal said:—

> "It is because there has been an exercise of professional legal skill that a solicitor conducting his own case successfully is treated differently from any other litigant in person conducting his own case. We are not concerned with the exercise of other professional skills."

In New Zealand differing views have been expressed by the Courts. However, the differences would seem to be based on the fact that in New Zealand costs are generally given on a fixed lump sum scale and not on an item by item taxation according to the nature of the litigation, as in this country. The whole position there is carefully dealt with by the New Zealand Court of Appeal in *Lynsar v. The National Bank of New Zealand Limited* (No. 2) 1935 *N.Z.L.R.* 557 where the successful appellant in question was a solicitor who appeared on his own behalf but who had not held a practising certificate for a number of years.

As far as Canada is concerned, there is a reference to a case in the *Canadian Abridgement* Second Edition under the heading "Practice. VI Costs and Discovery" at page 48 where a litigant appearing in person was allowed to set off against a judgment debt his disbursements and a moderate allowance for his time and trouble and a reference is given to *Millar v. MacDonald* (1892) 14 *P.R.* 499. This report does not appear to be available in any of the libraries accessible to us.

The American position is as set out in 20 *American Jurist 2nd Edn. 'Costs' Section 77*:—

> "If a party to a suit, who is not an attorney-at-law prosecutes or defends the suit in person he is not entitled to costs for his services under a statute allowing an attorney's fees to be taxed as costs (*Gorse v. Parker* 36 F. 840). Where the party appearing for himself is an attorney or counsellor-at-law the cases are not clear whether he is entitled to tax attorney's fees as costs. Some decisions hold that he is not entitled to a fee against his adversary whereas others hold that he is entitled to the same attorney's fees which could be taxed in the cause if he appeared for another.
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> O'Connell v. Zimmerman 157 Cal. App. 2d. 330, 321 P 2d. 161.
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> Ealer v. McAllister 19 La. Ann. 21.
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> State v. Connolly 75 N.J. Eq. 521; 72 A. 363 (recognizing principle as a general rule but not applicable in this particular case)."

The Committee agrees with and accepts the statement of the law cited by Bowen L. J. on page 2 of this report that allowable costs are those necessarily arising from litigation. Consistently with this principle it seems reasonable that a litigant appearing in person who has lost money in having to take time off from work to obtain statements from witnesses, subpoena witnesses and otherwise get up his case should be entitled to reimbursement for the money actually lost, on satisfactory proof of that matter to a taxing officer. The Committee however subject to the proviso which appears at the end of this paragraph does not agree that it is not practicable to ascertain such reimbursement in the case of a lay litigant. Beyond that we do not think the present rules should be disturbed. The recommendation therefore is that where a successful lay litigant, appearing in person, has lost money in taking time off from work in the necessary preparation of his case, he should be entitled to reimbursement for that loss so far as it is proved to the satisfaction of a taxing officer, provided however that the total cost involved does not exceed the alternative expense of employing a solicitor to act in the matter.

If the law is to be amended the following references are in point:—

Supreme Court Act, Section 40 which provides—

> ". . . Subject to the express provisions of this Act, and to the rules of Court, and to the express provisions of any other Act whenever passed, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

See also Section 72 (v);

Supreme Court Rules Order 65 Rule 5;

Industrial Conciliation and Arbitration Act 1972 Sections 17 (6) and 18 (2) (*b*), (5) and (6);

Local and District Criminal Courts Act Sections 293 and 295;

Justices Act, Sections 77 and 177.

The Committee communicated with the Honourable Mr. Justice Bleby, His Honour Senior Judge Ligertwood, Q.C., and Mr. V. C. Matison, C.S.M., in regard to their respective Courts or series of Courts as the case may be. Mr. Justice Bleby has replied approving the report but drawing attention to the special position of agents who practice in the Industrial Court and consideration will have to be given to their position in drafting legislation. The Committee has had approval from Mr. V. C. Matison, C.S.M., and no expression of disapproval from Senior Judge Ligertwood.

The Committee expresses its indebtedness to Miss Deborah Horton, the Associate to the Chairman, for her research into the state of the law on this point in New Zealand, Canada and the United States.

We have the honour to be

HOWARD ZELLING

B. R. COX

R. G. MATHESON

JOHN KEELER

The Law Reform Committee of South Australia