IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-092-001291

NEW ZEALAND POLICE
Informant

v

GRAHAM HOHEPA ANDERSON
Defendant

Hearing:	23 October 2014
Appearances:	Sergeant B Ingram for the Informant F Hogan for the Defendant
Judgment:	28 October 2014

DECISION OF JUDGE G T WINTER

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[1] As a result of an incident that happened at Sandstone Road, Whitford, on the morning of Thursday, 10 October 2013, the defendant Graham Hoepa Anderson is charged with operating his vehicle on that road carelessly and thereby causing injury to Mark Hansen.

The Facts

[2] Mr Anderson an experienced truck driver had been carting material to and from a work site at 73 Sandstone Road. He would travel West on Sandstone Road, then turn across the East bound lane into a turning bay on the opposite side of the road known as Caldwell Road. This would allow him to safely turn his truck around and return East to access the work site.

[3] Sandstone Road is a sloped two way road. The Western side of the road is divided into two lanes providing what is commonly known as a slow lane and an adjacent passing lane. There is one East bound lane. There is a solid yellow line dividing the East and West bound lanes. The posted speed limit on Sandstone Road is 100 km an hour. However, at the time of this incident a temporary speed limit of 50 km an hour was imposed along a stretch of Sandstone Road, West of the Whitford Maraetai Road.

[4] Around 11:00 am Mr Anderson was driving West on this road in the single lane temporarily provided for traffic because of the road works. I find there was a truck and trailer unit ahead of him. I find that behind him there was a black Hilux driven by Mr Levas and behind that a Toyota Caldina car driven by Ms Mead.

[5] I find this line of traffic was travelling sedately. I am satisfied that Mr Anderson's speed was no more than 37 km an hour. The weather was fine, visibility was good, the road was dry and traffic flow was moderate. As the road works ended the speed limit changed from 50 km an hour to 100 km an hour and the single West bound lane opened up to two lanes. The defendant continued travelling at his sedate pace in the left lane.

[6] Around this time, the complainant Mark Hansen was driving his large Ford Falcon motor vehicle West on Sandstone Road. He too passed through the coned area. He was behind the line of traffic I have just described. I accept his evidence that as he approached the cars ahead, he was travelling slightly above the 50 km an hour speed limit. As such, I find Mr Hansen quickly came up behind the line of traffic. I accept the evidence of Ms Mead and her passenger that Mr Hansen quickly came up behind them. I accept the evidence of Ms Mead that she became concerned at this tailgating which she colourfully described as Mr Hansen travelling "right up her arse"[1].

[7] I accept the statement Mr Anderson made to the police[2]. As part of his routine that morning I find he travelled up the hill near to Caldwell Road then

[1] NOE P 58/4.
[2] NOE read of Nicholas David Cartwright's brief of evidence.

indicated to move right out of the slow lane. Having safely negotiated that first part of his turn, I accept by way of inference that he checked the way ahead in the East bound lane was clear, continued his indication and completed his right hand turn into Caldwell Road.

[8] Most incidents of this kind happen in a few seconds. They flash by. Any witness's evidence about the facts leading up to a collision are routinely coloured by a reconstruction of events they are not expecting to see. Taking those matters into consideration, I found the civilian witnesses in part corroborated the events that subsequently happened.

[9] In particular, I accept the evidence of Mr Rihea[3]. He was travelling East bound on Sandstone Road and as he got to the crown of the hill sitting in his elevated seat, this experienced truck driver had a panoramic view of the events as they unfolded very close to him. He corroborates the defendant's statement to the police. I find as a fact then that Mr Anderson having checked the way was clear, turned his indicator on to warn traffic behind him that he was moving from the slow lane into the passing lane of the West bound Sandstone Road. I accept that he checked his rear vision mirrors to ensure the way was clear, continued his indication and then continued his right hand turn. I accept Mr Rihea's evidence that at this time while he could see Mr Leavs' black Hilux and Ms Mead's car travelling behind that in the slow lane, he could not see Mr Hansen's Ford Falcon motor vehicle. So where was Mr Hansen?

[10] I find after tailgating Ms Mead, Mr Hansen moved to his right and into the passing lane. Ms Pitu was a passenger in Ms Mead's car. I accept Ms Pitu's evidence that Mr Hansen zoomed past her car[4]. Mr Hansen was driving a large powerful Ford Falcon motor vehicle travelling uphill I find at that time he was clearly under heavy acceleration. I accept his evidence that he was travelling over the speed limit. I find about that time he accelerated to at least 110 kms an hour if not slightly faster. In that regard, I accept the defence expert's calculation of Mr Hansen's approaching speed.

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[3] NOE P 106 P 116
[4] NOE P 85/9 to P 86/20.

[11] At the same time Mr Anderson in his truck maintained his 37 km per hour speed. This was confirmed from an analysis of his GPS system in his truck. I find Mr Hansen swiftly approached the rear of the truck which by then I find was momentarily positioned in the passing lane directly ahead of Mr Hansen. I find Mr Anderson had not yet commenced his right hand turn.

[12] I mean no criticism of Mr Hansen. I found him a credible witness. However, his recall of events was greatly affected by his memory loss as a result of his injuries. In many instances throughout his careful testimony he conceded he could not 'recall' events. An example of this is his evidence of not recalling any indicator lights signalling Mr Anderson's intention to make this right hand lane change and turn. Having accepted Mr Rihea's evidence that he clearly saw the truck indicate then change lanes before executing a turn, I find Mr Anderson signalled his intention in a timely fashion by use of his indicator lights. I find Mr Hansen failed to see the indicator lights flashing at the rear of Mr Anderson's truck.

[13] I find as a fact that Mr Anderson an experienced truck driver would not have made a continuous movement across the East bound lane of Sandstone Road but did so in a two step approach. The first step was to move from the West bound slow lane into the passing lane. I find he paused there momentarily to check the way ahead[5]. I take it by inference that he could see Mr Rihea's truck at a distance and decided that as his way was sufficiently clear he could safely turn across the East bound lane.

[14] The critical error of judgment Mr Hansen made is that by then he had committed to a passing manoeuvre. He pressed on. I find he had no car following behind him in the passing lane[6]. I accept Mr Marks' evidence that Mr Hansen at that stage had options. If he had seen the indicator lights he could have applied his brakes sharply and come to a stop. Rather than stop he took a risk and crossed the solid yellow line dividing the East and West bound lanes.

[15] This manoeuvre crossing a solid yellow dividing line was not only careless, it was unlawful. A driver is not entitled to pass a motor vehicle unless he keeps left of

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[5] See note 2.
[6] NOE Pitu P 85 – P 87.

the no passing line[7]. I find he assumed the risk of moving into the East bound lane and completing a passing manoeuvre of Mr Anderson's truck. He had not seen or had misinterpreted the trucks flashing indicator lights. He assumed he could safely pass the truck, but clearly he could not do so.

[16] I also find on this day that Mr Hansen was in an impatient mood. I make this finding because he travelled at excess speed in the 50 km coned area. He then tailgated Ms Mead's car. He then pulled out and "zoomed" past her vehicle under heavy acceleration at or over 110 km an hour. In his impatience he made an error of judgment. He was familiar with the road. He decided he could safely cross the solid yellow line dividing the East and West bound lanes and pulled out to do so.

[17] Mr Rihea, meanwhile had a panoramic view of these events[8]. He did not see the last fractions of a second before the impact and engagement of the truck and Ford Falcon car. He had at that critical time glanced down to check his load sheet. When he looked up it was at or just after the point of impact. Importantly, Mr Rihea confirms that Mr Hansen's silver car was by then fully in the East bound lane. That evidence is consistent with the defence expert's evidence.

[18] At the conclusion of the prosecution case I found as a reasonable possibility that Mr Hansen came up sharply behind Mr Anderson's truck and then committed to overtake him. He then moved into the East bound lane, accelerated even more. He then attempted to cut sharply back into his correct side of the road thereby returning to the relative safety of the West bound two lane Sandstone Road ahead of Mr Anderson's truck. At that moment in the East bound lane his car glanced off the truck. All of this evidence is corroborated in part by the defence expert Mr Marks' careful and measured analysis.

The Issues

[19] I keep in mind the burden and onus of proof required in a criminal trial. The defence and prosecution accept that identity, time, place and circumstance are not in issue. It is also conceded that Mr Anderson's truck and Mr Hansen's car came into

[7] See Land Transport Regulations.
[8] NOE P115/25-3 .

collision at about the time described by the witnesses on Sandstone Road. It is not denied that as a result of the collision, Mr Hansen suffered serious injury as a result of his car spinning, cart wheeling and crunching against a lamp post at the side of the road.

[20] All the prosecution are required to prove beyond reasonable doubt is that Mr Anderson drove carelessly and thereby caused those injuries. However, at the close of the prosecution case encouraged by the skilled cross-examination of Mr Hogan, the prosecution witnesses had established the reasonable possibility that Mr Hansen may have caused the incident and his injury.

[21] I refer to Becroft's Transport Law commentary. In order to convict under this section, a Court must be satisfied beyond reasonable doubt that the prosecution has not only established that the defendant has not exercised the degree of care and attention which an ordinary and prudent driver would exercise in the circumstances but also that the driving, having been characterised as careless, was causative of the injuries to or the death of the victim: see eg *Wan v Police* HC Auckland AP78/03, 1 August 2003.

[22] The English Court of Appeal in *R v Hennigan* [1971] 3 All ER 133 (CA), 55 Cr App R 262, held that it is only necessary for the prosecution to show that the accused's culpable driving was a cause of the accident and was something more than de minimis. It is not necessary to show that this was a "substantial" cause in the sense that on an apportionment of liability in a civil action the accused would, for example, be held at least a fifth to blame for the accident. In this context if the word "substantial" is used it must be taken as indicating no more than that the culpable driving is one cause of the accident.

[23] This decision has been followed and applied in New Zealand. See *Howell v Police* (HC, Hamilton M 382/84, 6 November 1984, Bisson J); [1985] BCL 23, where the driver drove at night at a speed beyond the range of his vision; and *Police v Keen* (HC, Masterton M 33/72, 26 June 1973), where Cooke J stated:

> It may be that the question can equally well be expressed as being whether the defendant's careless use of his motor vehicle was a material cause of the

> death or a significant cause or a substantial cause. Another expression used in *Hennigan's* case is real cause as opposed to minimal cause. Those are alternative modes of conveying the same idea.

[24] Mr Anderson was lawfully entitled to change between the West bound slow traffic and passing lanes. As he was executing a right hand turn into another road, he was also entitled to cross the solid yellow no passing line that divided the West and East bound road. Mr Hansen was not lawfully able to move his vehicle across that solid yellow no passing line.

[25] The issues then distil in this way:

(a) Have the police made me sure that in making a continuous turn across the West bound lanes and into the East bound lane of Sandstone Road, Mr Anderson cut across Mr Hansen's path, was therefore careless and caused the injury suffered by Mr Hansen; and

(b) Have the police excluded the reasonable possibility that Mr Hansen breached Regulation 2.9 of the Transport Rules by attempting to pass Mr Anderson's truck on a length of road marked with a no passing line and in doing so caused the incident and his injury.

[26] Apart from the civilian witnesses whose evidence I have distilled into the findings of fact earlier in this judgment there were two expert witnesses called.

Expert Witnesses

[27] Expert evidence is often used to reconstruct the dynamics of a crash and thereby analyse the cause of it. It is now well established that the code of conduct for expert witnesses that commenced its life in the High Court Rules in civil cases, is nevertheless applicable to expert witnesses in a criminal case. The Court found in the early case of *R v Carter*[9] that the obligations of expert witnesses in a criminal case do not differ from those of an expert witness in a civil case in the sense that in both contexts the witness must not be an advocate for any party, but must assist the

[9] *R v Carter* (2005) 22 CRNZ. More recently reaffirmed in *R v Hutton* [2008] NZCA 126 at [169].

Court impartially on matters within his or her area of expertise. The uncontroversial principles established by the case law guide expert evidence in this way:

(a) An expert must state his or her qualifications when giving evidence;

(b) The facts, matters and assumptions on which opinions are expressed must be stated explicitly;

(c) The reasons for opinions must be stated explicitly;

(d) Any literature or other material used or relied upon to support opinions must be referred to by the expert;

(e) The expert must not give opinion evidence outside his or her area of expertise;

(f) If an expert witness believes that his or her evidence might be incomplete or inaccurate without some qualification, that qualification must be stated;

(g) An expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise; and

(h) An expert is not an advocate for any party.

[28] In *R v Carter* it was held that these propositions merely reflect the truism that expert evidence must be based on reason as opposed to conclusions incapable of being tested in any meaningful manner. It is for that reason, that underlying assumptions and reasons for opinions reached must be stated explicitly. *Carter* supports the desirable proposition that experts called in criminal cases should be referred to the statement of principles and should state at the outset of their evidence that they understand and accept them.

[29] The police called an expert, Sergeant Mile Tusevljak[10]. The Sergeant is an experienced crash analyst with 22 years service to the New Zealand Police. He is well recognised as someone that has attended and investigated many serious crashes. He is qualified in basic and advanced crash investigation as well as heavy motor vehicle crash investigations.

[30] The evidence he gave of his observations at the scene on the day of the accident were unremarkable. His statement was read to the Court augmented by some supplementary material that he wished to explain. Having described his observations, he then described experiments he undertook about positioning the truck and car together to determine the position and angulations of the maximum point of engagement. He also provided evidence detailing the precise movements and speeds of the truck extracted from the vehicle's GPS system. As a result of this body of information, he then provided the Court with an analysis of the incident. He supported the prosecution case that Mr Anderson suddenly and without care cut across Mr Hansen's travel in the West bound lane therefore causing a collision.

[31] The Sergeant confirmed to me that he had never heard of a Code of Conduct for Expert Witnesses[11]. He confirmed that he was unaware of his obligation to disclose to the Court any incomplete or inaccurate evidence that might require qualification of his analysis. Under cross-examination it was established that in preparation of his evidence and analysis[12]:

(a) He had not read or referenced any of the defendant's statements;

(b) He had not prepared scale plans;

(c) He had incorrect calculations of the distance travelled by vehicles from the end of the coned area to the point of impact. This led the Sergeant to assume a distance of some 100 metres between the end of the cones and the point of impact, when in fact the distance was 3½ times that. The significance of this bears upon a longer period for the

[10] Brief read. P 118 ff
[11] NOE P 165-166
[12] NOE P 133-164

occurrence of events relating particularly to Mr Hansen as he first tailgated Ms Mead's vehicle and then determined to overtake her car and the black Toyota Hilux. It also confirms Mr Hansen's clear view of Mr Anderson's truck well ahead of him, crawling up Sandstone Road.

(d) The Sergeant conceded he had not measured the width of the tyre marks across the yellow lines painted on the road in Exhibit 1, photograph 78. Nor was there any measurement of the angulations of the tyres to the angles of the tyre marks on that yellow line. The Sergeant conceded the very clear possibility that those tyre marks might have absolutely nothing to do with the incident under consideration. However, they formed a pivot point in his analysis.

(e) The Sergeant conceded he did not discern a point of impact merely an area that he assumed to be a point of maximum impact engagement and he then reverse engineered from that point to an assumed point of impact.

(f) Importantly, the Sergeant conceded that his initial report was significantly altered for the purposes of evidential brief. His report records gauge marks in the road surface. This changed to findings of tyre marks on the roadway. The significance of this concession being as the defence contends that the gauge marks might indicate a point of impact proving that Mr Hansen's vehicle was well into the East bound lane at that time as the gauge marks could have been made. This when the tyre collapsed on impact and tyre rims scrapped out the asphalt surface of the road.

[32] These reasonable criticisms of the Sergeant's evidence and his complete lack of knowledge of the Code of Conduct for Expert Witnesses and the applicable principles for expert evidence mean I must completely lay to one side the crash analysis described at page 7 of his brief. That analysis at best draws conclusions incapable of being tested in any meaningful manner. At worst, the underlying

assumptions for the opinion described in the analysis were flawed, misconstrued or not stated explicitly. In particular, I reject the prosecution evidence that this expert evidence proves Mr Hansen in an attempt to avoid a collision caused by Mr Anderson's truck took evasive action and veered into the East bound lane.

[33] My rejection of the prosecution expert evidence when taken in combination with the findings of fact I have made from the prosecution witnesses inevitably lead me to the conclusion that the prosecution had not excluded the reasonable possibility that Mr Anderson was not careless, but rather Mr Hansen's carelessness caused the incident and his injuries.

[34] However, rather than dismiss the charge at the conclusion of the prosecution case I found there was a case to answer. The defence then called their expert witness Mr Marks. Unlike the police expert witness, Mr Marks was familiar with the Code of Conduct for Expert Witnesses and well understood the *Carter* principles.

[35] Mr Marks in well over two hours of examination carefully explained his scientific, well reasoned and concise opinions. I mean no disrespect to his expert testimony, however, I need only refer to that body of evidence in a summary way[13].

[36] Much of the prosecution expert's analysis rested upon the Sergeant's observation of side-by-side tyre marks clearly indicating Mr Anderson's truck had turned at a sharp 45 degree angle from the left lane across the right lane into the East bound lane of Sandstone Road. My earlier rejection of this evidence was fortified from the analysis of Mr Marks.

[37] I find the tyre marks depicted in photo 78[14] are of poor match in thread pattern and width by comparison with the actual truck tyres shown in Exhibit 4, photo 6. I find the tyre marks in photo 78 are irrelevant and in all probability these marks were not left on the road services as a result of this incident. In the absence of these marks, a conclusion that the truck while turning across the Western lanes into the East bound lane locked its wheels and skidded at that point is unsustainable.

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[13] NOE Ps 167-202 Mr Marks' evidence.
[14] Ex 1/78.

[38] I also accept Mr Marks' evidence that there is no congruence between the angle of those tyre marks and the truck's right hand turn. The angle of the tyre marks is, I accept too great to reflect a proper calculation on the probable turning angle of the truck as it crossed the lane. Tyre marks shown in Exhibit 1, photo 78 indicate a moderately severe 45 degree turn, whereas the likely angle of turn at the speed Mr Anderson's truck was travelling on that position on the road was more likely to be a shallow 15 to 20 degrees. Indeed if the turn was made from the right hand lane, 10 to 12 degrees, not the 45 degree angle depicted. Accordingly, for that reason I find the tyre marks left on the road depicted in photo 78 as irrelevant for any crash analysis.

[39] I was impressed too by Mr Marks' comparison of the damage suffered by the Falcon motor vehicle when it came into contact with the right hand front truck tyre. While there was a reconstruction of this point of engagement carried out by the prosecution's expert, there were no precise measurements taken of the relatively shallow path the Falcon travelled after impact.

[40] I accept Mr Marks' view that taking into account the speed, angle, distance and motor vehicle damage the Falcon only had a glancing impact with the truck. This is corroborated by both the damage to the Falcon vehicle and the remains of the side panel left on the truck's right hand front wheel.

[41] Most importantly, I accept Mr Marks' deductions concerning the probable point of impact by reference to the three orange triangulated cones found in photo 79. I accept that point of impact was a glancing contact, that information taken together with the undisputed relative speed of the vehicles must mean the point of impact was some short distance back towards the camera from the triangulated orange cones in photo 79.

[42] Accordingly, I find as a fact that rather than the point of impact taking place during Mr Anderson's sharp and sudden turn from the West bound right hand lane, the incident happened somewhere over half the distance of that East bound lane slightly back from the orange cones.

[43] I accept, as well, Mr Marks' calculations concerning the rate of closure of his vehicle on Mr Anderson's truck. Given the speed and distance coefficient, that incorporates an assessment for reaction time, I find that Mr Hansen had sufficient time and an option to apply his brakes and stop in his lane. He did not do so[15].

[44] I have found the prosecution's expert analysis does not assist their case. That finding is fortified by Mr Marks' assessment of the physical evidence and criticism of the prosecution analysis[16]. I accept that criticism and find the conclusions drawn in that analysis exceedingly unlikely. I accept it was impossible for the Ford motor vehicle to be beside the truck at the commencement of its right hand turn.

[45] Finally, in answer to a question from me, Mr Marks confirmed that nothing he had heard in evidence, no photograph nor measurement provided, nor any part of the careful and considered calculations he had undertaken could exclude the simple and reasonable possibility that Mr Hansen having tailgated Ms Mead's car quickly came up behind Mr Anderson's truck. Further, that Mr Hansen either did not see or ignored the indicating lights warning of a right hand turn and that Mr Hansen then travelling at or over a 110 kms an hour made a poor decision to overtake. I am satisfied that Mr Hansen could have stopped prior to impact, but he did not do so[17].

[46] I am satisfied that the police have not excluded that reasonable possibility.

[47] I am satisfied that Mr Anderson took a careful and lawful approach to his right hand turn. I find that he did not suddenly, unreasonably and carelessly cut across Mr Hansen's path causing the injuries he suffered. I make it clear that this is not an account of Mr Hansen's contribution to the cause of his injury. I find that as Mr Anderson did not use his truck carelessly his actions were not a materially significant or substantial cause of Mr Anderson's injury.

[48] Accordingly, for all of these reasons the charge against Mr Anderson has not been proved beyond reasonable doubt and the case against him is dismissed.

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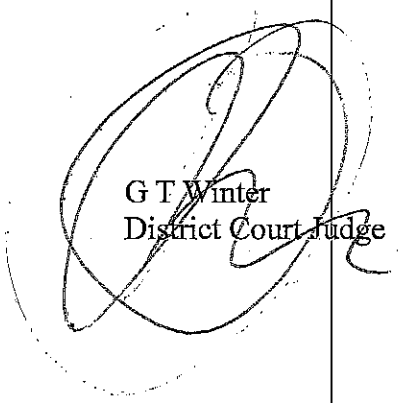
[15] NoE P181-185
[16] NoE P179
[17] NoE p206



G T Winter
District Court Judge

IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-092-001291
[2015] NZDC 4548

NEW ZEALAND POLICE
Informant

v

GRAHAM HOHEPA ANDERSON
Defendant

Hearing:	2 March 2015
Appearances:	Sergeant Ingram for the Informant Mr Hogan for the Defendant
Judgment:	23 March 2015

DECISION OF JUDGE G T WINTER AS TO COSTS

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[1] As a result of an incident that happened at Sandstone Road, Whitford on the morning of Thursday, 10 October 2013, the defendant Graham Hohepa Anderson was charged with operating his vehicle on that road carelessly and thereby causing injury to Mark Hansen, an off duty police officer travelling to work. The charge against the defendant was dismissed.

[2] In reaching that conclusion there were three findings that now underpin Mr Anderson's application for his costs of a successful defence. First at paragraph 31 concerning the role of an expert witness in a criminal trial:

> [31] The Sergeant confirmed to me that he had never heard of a Code of Conduct for Expert Witnesses. He confirmed that he was unaware of his obligation to disclose to the Court any incomplete or inaccurate evidence that might require qualification of his analysis. Under cross-examination it was established that in preparation of his evidence and analysis:

(a) He had not read or referenced any of the defendant's statements;

(b) He had not prepared scale plans;

(c) He had incorrect calculations of the distance travelled by vehicles from the end of the coned area to the point of impact. This led the Sergeant to assume a distance of some 100 metres between the end of the cones and the point of impact, when in fact the distance was 3½ times that. The significance of this bears upon a longer period for the occurrence of events relating particularly to Mr Hansen as he first tailgated Ms Mead's vehicle and then determined to overtake her car and the black Toyota Hilux. It also confirms Mr Hansen's clear view of Mr Anderson's truck well ahead of him, crawling up Sandstone Road.

(d) The Sergeant conceded he had not measured the width of the tyre marks across the yellow lines painted on the road in Exhibit 1, photograph 78. Nor was there any measurement of the angulations of the tyres to the angles of the tyre marks on that yellow line. The Sergeant conceded the very clear possibility that those tyre marks might have absolutely nothing to do with the incident under consideration. However, they formed a pivot point in his analysis.

(e) The Sergeant conceded he did not discern a point of impact merely an area that he assumed to be a point of maximum impact engagement and he then reverse engineered from that point to an assumed point of impact.

(f) Importantly, the Sergeant conceded that his initial report was significantly altered for the purposes of evidential brief. His report records gauge marks in the road surface. This changed to findings of tyre marks on the roadway. The significance of this concession being as the defence contends that the gauge marks might indicate a point of impact proving that Mr Hansen's vehicle was well into the East bound lane at that time as the gauge marks could have been made. This when the tyre collapsed on impact and tyre rims scrapped out the asphalt surface of the road.

[32] These reasonable criticisms of the Sergeant's evidence and his complete lack of knowledge of the Code of Conduct for Expert Witnesses and the applicable principles for expert evidence mean I must completely lay to one side the crash analysis described at page 7 of his brief. That analysis at best draws conclusions incapable of being tested in any meaningful manner. At worst, the underlying assumptions for the opinion described in the analysis were flawed, misconstrued or not stated explicitly. In particular, I reject the prosecution evidence that this expert evidence proves Mr Hansen in an attempt to avoid a collision caused by Mr Anderson's truck took evasive action and veered into the East bound lane.

[3] As to the facts, importantly at paragraphs 9 and 10 I found:

> [9] In particular, I accept the evidence of Mr Rihea[1]. He was travelling East bound on Sandstone Road and as he got to the crown of the hill sitting in his elevated seat, this experienced truck driver had a panoramic view of the events as they unfolded very close to him. He corroborates the defendant's statement to the police. I find as a fact then that Mr Anderson having checked the way was clear, turned his indicator on to warn traffic behind him that he was moving from the slow lane into the passing lane of the West bound Sandstone Road. I accept that he checked his rear vision mirrors to ensure the way was clear, continued his indication and then continued his right hand turn. I accept Mr Rihea's evidence that at this time while he could see Mr Leavs' black Hilux and Ms Mead's car travelling behind that in the slow lane, he could not see Mr Hansen's Ford Falcon motor vehicle. So where was Mr Hansen?
>
> [10] I find after tailgating Ms Mead, Mr Hansen moved to his right and into the passing lane. Ms Pitu was a passenger in Ms Mead's car. I accept Ms Pitu's evidence that Mr Hansen zoomed past her car[2]. Mr Hansen was driving a large powerful Ford Falcon motor vehicle travelling uphill I find at that time he was clearly under heavy acceleration. I accept his evidence that he was travelling over the speed limit. I find about that time he accelerated to at least 110 kms an hour if not slightly faster. In that regard, I accept the defence expert's calculation of Mr Hansen's approaching speed.

[4] These two findings drew me to an inevitable conclusion where at paragraph 33 of my judgment I said:

> [33] My rejection of the prosecution expert evidence when taken in combination with the findings of fact I have made from the prosecution witnesses inevitably lead me to the conclusion that the prosecution had not excluded the reasonable possibility that Mr Anderson was not careless, but rather Mr Hansen's carelessness caused the incident and his injuries.

[5] The defence called their expert witness Mr Marks. I accepted that recognised expert's testimony in full. I observed at paragraphs 44 and 45:

> [44] I have found the prosecution's expert analysis does not assist their case. That finding is fortified by Mr Marks' assessment of the physical evidence and criticism of the prosecution analysis. I accept that criticism and find the conclusions drawn in the analysis exceedingly unlikely. I accept it was an impossibility for the Ford motor vehicle to be beside the truck at the commencement of its right hand turn.
>
> [45] Finally, in answer to a question from me, Mr Marks confirmed that nothing he had heard in evidence, no photograph nor measurement provided, nor any part of the careful and considered calculations he had undertaken could exclude the simple and reasonable possibility that Mr Hansen having tailgated Ms Mead's car quickly came up behind Mr Anderson's truck. Further, that Mr Hansen either did not see or ignored the indicating lights warning of a right hand turn and that Mr Hansen then travelling at or over a

[1] NOE P 106 – P 116. A prosecution witness.
[2] NOE P 85/9 to P 86/20.

> 110 kms an hour made a poor decision to overtake. I am satisfied that Mr Hansen could have stopped prior to impact, but he did not do so.

[6] These findings led me to the conclusion that Mr Anderson on this day took a careful and lawful approach to a right hand turn he made out of a crawler lane into an overtaking lane. I found that he did not suddenly, unreasonably and carelessly cut across Mr Hansen's path. When making that determination I found that Mr Anderson's actions were not a materially significant or substantial cause of the injuries suffered by Mr Hansen.

[7] In the light of these findings the police prosecutor accepted in good faith, a prima facie liability for costs. However, the police do not accept that the defendant is entitled to indemnity for his legal expenses.

The Law

[8] The costs in Criminal Cases Act 1967 sets out the criteria for these applications. The applicant must justify the Court's exercise of the discretion to grant costs having regard to those non-exclusive matters listed in the enabling section.

[9] Where a charge is dismissed and the discretion available then the Court may order a payment of such sum as the Court thinks just and reasonable towards the costs of the defence. The *Margaritis*[3] approach is the accepted norm and so generally the Court is empowered to do what it thinks right in the particular case.

[10] There is one other general principal that requires my determination in this application. The Chief Executive of the Ministry of Justice is usually required to pay costs awarded to a successful defendant. However, if the Court is satisfied that the prosecutor acted negligently or in bad faith in bringing continuing or conducting the prosecution it may, but not must, order the costs be paid by the prosecutor. In this case the New Zealand Police.

[3] *R v Margaritis* HC Christchurch T66-88, 14 July 1989.

[11] I read the submissions of counsel and the police. I heard from counsel then reserved this decision. In doing so, I gave a preliminary indication of my assessment of the prosecution's liability for costs. I invited the parties to enter into discussions to settle costs. I indicated that in the event they were able to do so, I would make an order in terms of their agreement. If they were unable to reach a compromise, then I advised this decision would issue. No such agreement was reached.

[12] When argued before me, the application distilled into an inquiry about three inter-related issues:

- Whether the prosecution failed to take proper steps to investigate the charge prior to laying the information.
- Whether the investigation and prosecution was conducted in a reasonable and proper manner.
- Whether Mr Anderson established that he was not guilty and in doing so whether his behaviour throughout could be characterised as exemplary and cooperative.

[13] I commence this Judgment by referring to the last and simplest point first.

Did the defendant establish that he was not guilty

[14] The defendant positively established his innocence. In particular, the police did not exclude the reasonable possibility that the speed and tailgating of the off-duty policeman Mr Hansen created the accident and caused the injury he suffered.

[15] I find that Mr Anderson and his lawyer throughout these entire proceedings very simply, carefully and in a forthright manner laid out the defence. I accept that counsel telephoned, wrote and met with police to highlight the inadequacies of the prosecution case. I find counsel's appeal for reconsideration of the charge was unreasonably ignored. I find the defence behaviour exemplary and cooperative.

Whether the prosecution failed to take proper steps to investigate the charge prior to laying the information and was the investigation and prosecution conducted in a reasonable manner

[16] This issue in part concerned the use of internal experts in a disciplined force. In such a vertical organisation when an expert of rank or seniority poorly prepares an opinion it is difficult for sub-ordinates or peers to criticise that expert's view.

[17] This difficulty is compounded, as in this case, where the expert is completely ignorant of their obligation's as an expert witness. When called in criminal cases, an expert's duty does not lie in securing a conviction, but rather in providing the Court with clear and impartial opinion evidence within his or her area of expertise.

[18] I do not accept the police submission that Sergeant Tusevljak was merely a witness and that the police prosecution may be divorced or separated from the inadequacy of their experts investigation and flawed opinion. When the police call any expert from among their ranks, then they vicariously assume responsibility for both the good and bad aspects of the opinion evidence the policeman tenders.

[19] It is my duty to observe that the expert Sergeant Mile Tusevljak, an experienced crash analyst with 22 years of service to the New Zealand Police poorly performed his professional duties. I find he was negligent in preparing his reconstruction of the crash dynamic and thereby produced a completely flawed analysis of the accident's cause. Beyond this negligence the fact that the "victim" was an off-duty police officer provides a regrettable but available perception that the investigation about the incident and prosecution of Mr Anderson was tarnished with bias. That perception of bias finds support in two aspects of the police preparation of the case for prosecution.

[20] The first matter concerns the development of the police expert's brief of evidence. The content of the earlier expert statements when compared with the final trial brief is of concern. A short while before the substantive fixture, the only expert statement disclosed to the defence was based on Sergeant Tusevljak's report of 4 December 2013. In actual fact, the police had failed to disclose a further statement

prepared in April 2014 that enhanced the December report. The comprehensive but deeply flawed trial brief was not disclosed until 10 days before trial.

[21] The December and April briefs contain no discussion of witnesses evidence; did not seek to place before the Court any scaled plan or photographs as exhibits and contained no reference to the available GPS data from the defendant's truck describing the course of that truck's travel at moderate speed. Further, these briefs contain no analysis of the physical evidence and most importantly expressed no opinion as to causation.

[22] In the absence of such important evidence the defence while initially instructing Dr Marks then dispensed with his services. In the absence of scientific data to support a clear and impartial opinion on the cause of the accident there was nothing for Dr Marks to peer review. Dr Marks was re-engaged just before the trial started.

[23] The second matter concerns the content of civilian witness briefs. Before the police expert's October brief, the prosecution had very little expert evidence upon which to support a case against Mr Anderson. What the prosecution had before October was a range of inconsistent witness statements. Defence counsel made these inconsistencies known to the prosecution. Mr Rihea's brief is a good example.

[24] Mr Rihea's evidence, available to the police shortly after the incident, provided a grand stand view of the accident as it unfolded. Mr Rihea's brief did not support the expert opinion or the prosecution theory of the case. In any sense of it Mr Rihea's evidence exculpated the defendant or at the very least raised reasonable doubt about Mr Anderson's guilt. I find Mr Rihea's brief, let alone his evidence, would give any reasonable prosecutor a clear indication of the need to review the strength of the expert opinion and the prosecution case against Mr Anderson.

[25] I find Mr Rihea's brief was unreasonably discounted by the prosecution. Further I find that until pressed by the defence, the police were not proposing to call Mr Rihea as a witness.

[28] I find the police were responsible for the negligence of their expert witness. I find that the expert's unfounded improvement of his original report by further statements prepared but not disclosed in April and then expanded and disclosed in October to be particularly poor and unreasonable conduct.

[29] Although there is a perception that out of sympathy for a badly injured fellow policeman the police unreasonably pressed on to prosecute Mr Anderson there is insufficient evidence for me to draw that logical inference. I cannot find the prosecution was biased or conducted in bad faith. However, I am satisfied that Mr Anderson should never have been put to a defence of this charge.

Award

[30] As the police acted negligently in bringing and continuing this prosecution, I am satisfied that partial indemnity costs pursuant to s 7 of the Costs in Criminal Cases Act 1967 is deserved. I refuse to order the consequential costs and losses to Tebo Services Limited, Mr Anderson's employer. I am satisfied that the company must pursue the New Zealand Police in a civil action to recover their consequential costs and losses. They are however entitled to be reimbursed for any fees and expenses paid to Mr Hogan.

[31] I am satisfied that counsel's costs of $4,344.53, $8,418 and $32,691.28 together with Mr Mark's preliminary accounts of $3,450 and $8,541.28 together with the investigators costs of $664.53 should be paid as to 75% by the New Zealand Police. In addition, I also allow a further order for costs again as to 75% for Mr Hogan and Mr Mark's final accounts for all attendances up to the date of this judgment. Payment shall be made to counsel by the New Zealand Police within 21 days of the date of this judgment.

G T Winter
District Court Judge