

PROPORTIONALITY AND COST-SHIFTING

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The mottoes under which litigation reform has been debated over the last 20 years are creatures of fashion. It is no longer quite so compelling to urge changes simply to increase ‘access to justice’. Nor is it quite so persuasive as it once was to urge changes to the administration of justice under the banner of ‘efficiency’. The issue of costs borne by litigants in mounting or defending civil proceedings illustrates the swirl of ideals and expedients in tension. This article sketches a proposed régime for the costs paid by the losing party in ordinary civil proceedings about money or money’s-worth. It argues that the proposal’s lack of subtlety gives it merit.

Litigation ascertains the rights and obligations of the parties, an ineradicable aspect of the rule of law and the social interest in peaceful dispute resolution. Litigation means, in all but the most straightforward cases (where dispute is less common and less fraught), a reasonable need for skilled assistance from professionals and their staff. This requires the expenditure of money by way of costs. Unless the State takes on taxpayer-funded investigation and consideration of parties’ rival positions, which will happen only shortly before hell freezes over, these costs will always be incurred as part of disputation – one party against the other.

‘Disputation’ more accurately describes the process of litigation than does the more pleasant ‘dispute resolution’ which is the current cliché. ‘Dispute resolution’ more accurately describes the outcome of the process of litigation – imposed by the impartial decision of the judicial power. The obviously unattractive human qualities of all disputation lie at the base of the axiomatic suspicion in our system, held both by those in court and amongst litigation reformers, of an increase in litigation, litigiousness or the means of disputing claims and defences. ‘Let there be an end to litigation’ is not a maxim restricted to the public interest in finality in a particular case – it embraces a broader public policy about an acceptable level of the formal disputation which is litigation in a well-functioning society.

The paradox remarked on often before, and never satisfactorily resolved in terms of social policy, is that all methods proposed by reformers for rendering

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litigation less burdensome or horrible to contemplate are overtly calculated to remove discouragement to litigation. The prospect of paying one's own lawyers, and the even more unpalatable prospect of paying the other side's lawyers if one loses the case, becomes less horrible if the burden of litigation costs comes to be diminished. Yet what the Americans call the English cost rule – the gist of which is conveyed by the inaccurate statement that the loser pays – has almost universally been regarded by reformers inside and outside our court systems as an essential discipline intended to deter less deserving claims or defences from being mounted at all. This pragmatic justification for the rule has nearly always been seen as also consistent with the restorative justice rendered by requiring an unsuccessful party to contribute to the expense of proving that the party was wrong about where the parties' rights and obligations truly lay. (That high-mindedness, of course, butters no parsnips when the losing side has no money.)

The debate about litigation reform in this country was sensibly advanced by the reflexions permitted during the process which culminated in the Australian Law Reform Commission's report, *Managing Justice*.¹ Both that Report and the earlier Discussion Paper² contain useful traces of these reflexions with respect to costs. But neither this work nor the earlier work of the Commission in *Costs Shifting — Who Pays for Litigation?*³ produced much change, either directly or indirectly, in the frontline financial burdens and consequences of ordinary civil litigation. The same may be said, with equally unfeigned respect, for the Williams Report, and for the review of *Managing Justice* which is currently in its consultation phase as this is written.

Ever since the watershed procedural improvements tagged with Lord Woolf's name in England and Wales, the word 'proportionality' has played a serious rôle in considerations of litigation reform, especially in connexion with costs. Simply, we (that is those who agree with the writer, thereby being right-minded) are convinced that society can have too much of a good thing – the good thing being the peaceful quelling of disputes about rights and obligations by the process of litigation. Egregious examples (though relatively rare) and many more mediocre disappointments exist of disproportionate expenditure on litigation. They all show that disproportion provokes regret by winners and losers, both, when they compare the value of the rights and obligations at stake (usually but not always capable of monetary conversion) with the crassly monetary expense of their costs in the litigation.

There is nothing new in these truisms, which barely rate as insights at all. Courts and professional associations have, for a much longer time than outside commentators always appreciate, insisted that bad cases – admittedly, only the most extreme – of disproportionate expenditure on litigation should be prevented by some imposed reticence on procedures (for example, limited numbers of experts or time for cross-examination) or else deterred by departure from the

1 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

2 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999).

3 Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation?*, Report No 75 (1995).

usual rule that the loser pays (for example, by particularly heavy indemnity orders, or by an extravagant winner paying all its own costs).

But we have not moved in any directions away from what causes hand-wringing in all concerned quarters, viz the capacity of people who can afford it to pay for highly skilled legal talent to perform all the gyrations with all the ingenuity the client fiercely desires. For good reason, not least of which is the avoidance of invidious discrimination against lawyers, we should not move to complete State control of lawyers' incomes – or not, at least, until the same is true of journalists and all other commentators, not to mention all other skilled trades and professions. What, then, can be done to reduce the expense which continues to be the largest grievance entertained at large about our system of litigation?

At the outset, we should abandon any search for a panacea. The range of civil litigation measured by the value of the rights and obligations at stake, the importance of them to the parties, the parties' resources, and the social importance of effective legal representation is far too wide to render credible the notion that one solution (assuming any can be found at all) will indifferently improve the whole variety of civil cases. Partly on the basis that the rich and powerful can look after themselves, and partly because they are an unlikely social group to deserve the most urgent attention to reform, cases which oppose the big end of town against government, or big commercial players against each other, can be put to one side. This is not to say that they are unimportant in questions relating to the improvement of a litigation system, but rather that there is greater social good to be obtained in seeking to improve litigation for the much more numerous class of so-called ordinary people. Thus, this comment does not further address the undoubted burden imposed on the whole system when large and complex litigation occupies the public resources comprising the judges and their infrastructure.

Every litigator and advocate has had (or should have had) the experience of advising their clients of the net benefit or cost the clients may expect from a win or loss in a piece of civil litigation. Whether done on the back of an envelope or more elaborately, the exercise is critical to giving proper advice to clients weighing up the merits of fighting or settling. In the contingency of a win, such advice estimates the amount of costs the losing party will be ordered to pay by way of a contribution, always only partially, towards the winner's costs of winning. Predictions about the capacity of the loser to pay some or all of its contribution, as well as the verdict monies if the case concerned money, are also part and parcel of giving this vital advice. These estimates and predictions are notoriously uncertain, especially so when the litigation is at a relatively early stage and twists and turns and nasty surprises can only be guessed at.

Quite often, especially when the parties are greatly unequal in their command of resources (as they always are in the case of private individuals against government and financial or other large commercial corporations), advice to clients about fighting or settling will explicitly take into account the relatively deep pockets of the opponent, as a threat which could turn an economically rational piece of litigation into a financial disaster after a war of attrition. This

represents a skewed influence in sensible decision-making by litigants: the poorer litigant has a much greater threat from the unpredictability of litigation than the richer litigant does; in particular, that unpredictability is affected by the capacity of the richer litigant to increase the threat of litigation costs being paid by the other party as a result of complications and elaborations of the dispute and the procedure for deciding it.

Perhaps in the great run of cases, mostly about money and often in the nature of simple debt or damages claims, and often otherwise concerning easily valued items of property such as land or legacies, we should consider a quite different approach to the availability of orders requiring the loser to pay the winner. The approach owes a deal to some German procedures, but is by no means closely modelled upon them.

The heart of the proposal is to transform the qualitative and rhetorical nature of 'proportionality' into an overtly precise matter of measurable sums of money. In what follows, the figures are more or less arbitrary, and this is really a virtue. It is often the price of predictability. Of course, being arbitrary, there is no particular magic in the precise figure chosen, although the figures used probably do bear a fair and tolerable relation to the stake (that is, the monetary value of the rights and obligations in contest in the litigation).

The object of the exercise is to permit ascertainment sooner rather than later of the amount of costs the loser will have to pay the winner. This should enhance decision-making, whether to fight or settle. It is also intended to deprive a deep-pockets litigant of some of the advantage money can buy, by denying the possibility of manoeuvres, complexity and elaboration initiated or provoked by that richer party augmenting the costs payable to that party even if it wins. It ought to tend against the currently perverse incentive by which time-based charges by lawyers reward slowness. It is also hoped that such an approach would reduce the transaction costs as between parties and their own lawyers, by eliminating to a large degree the need for detailed bills of costs to be prepared for presentation to the losing party for payment to the winner. Finally, it may be that, if the figures are appropriate and market conditions permit, the idea would provide a moderate downwards pressure on the charge-out rates for relatively straightforward litigation work. Above all, the aspects of the proposal which may conduce to some or all of these happy outcomes should also involve a general disincentive on both sides to complicate litigation more than a case really requires.

In light of the scope of contracts and property dealings or interests of the kind in which ordinary people are likely to be in dispute, and the rather circumscribed nature of personal injuries claims (at least in NSW from now on), the range of civil litigation for which this costs device might be useful should comprise cases where the stake does not exceed, say, the value of a rather good Sydney residence. That order of magnitude will comprehend many ordinary commercial transactions as well, which would be an advantage. Roughly, and in round figures, one could propose a maximum stake of \$1 million.

There is, in the nature of professional work, a minimum fee below which it is implausible that clients (or indeed courts) could reasonably expect lawyers to

provide their assistance. On the other hand, a robust ‘swings and roundabouts’ approach ought to permit that minimum to be set fairly low. This is especially so if, at the upper end, shifted costs (that is, what the loser pays the winner) as a fraction of the stake are a reasonable approximation of actual profit costs and normal disbursements.

Next, if we wish to ration precious hearing time as we should, then there should be a balance of encouragement and discouragement for early concessions or late surrender. A ratchet as litigation approaches the final courtroom is easily devised. The result might appear thus:

Stage of litigation when result reached		Fraction of stake (or minimum) payable by loser
Before 1 week after	Date for defence (P wins)	2% or \$2,000
	Service of defence (D wins)	
Before 1 week after	Service of P’s evidence (P wins)	5% or \$5,000
	Service of D’s evidence (D wins)	
1 month before date fixed for hearing		10% or \$10,000
Thereafter		15% or \$15,000

The ‘stake’ should be understood as the amount that justifies the expenditure of costs. For a plaintiff’s win, that should never be other than the net (that is, after cross-claim or set-offs) judgement sum actually awarded. Inflated claims must not carry inflated costs, in the interests of discipline. For a defendant’s win, the stake needs to be the largest sum actually claimed by the plaintiff, say, at the beginning of the hearing. In this way, defendants are given costs to reflect the threat against them, and plaintiffs are deterred from inflated claims.

The making of offers should continue to be a means of avoiding costs. Thus, a plaintiff does not win – indeed, loses – if judgement is less than a defendant’s offer made, say, at least one month before the date fixed for hearing. In that event, the defendant should get the costs. If a defendant is adjudged liable to pay more than the plaintiff offered to accept at least one month before the hearing, the fraction should be increased to 20 per cent.

Summary or virtually automatic imposition of this costs contribution is of the essence: fine-grained examination of actual bills, expenses and forensic conduct would defeat the aim of predictability. The costs order must be part and parcel of the judgement, with no further argument. Thus, if a special indemnity is to be sought because of extravagant or unreasonable delays or expenses attributable to the losing party, that must be claimed before judgement and only if notification of such a claim had been made as soon as the expensive conduct became apparent. An opportunity for repentance and retrenchment is appropriate. Then

and only then should a court, with a broad brush, augment the winner's costs by, say, a daily rate supplement. But the fraction-of-stake lump entitlement should remain inscrutable.

It would follow that courts should reconsider the expenses that are a concomitant of sophisticated case-management. Litigants are admonished to be reticent in litigious behaviour: so too should judges take serious care not to require parties to spend money (let alone lawyers to donate work) on non-essential pre-trial procedures.

Some may see resemblance between this approach and the elements found in Part 11 Division 3A of the *Legal Profession Act 1987* (NSW). There is no substantive similarity: the statute is (ironically) limited to personal injuries litigation, it imposes a limit on what lawyers may charge clients, and it still requires actual assessment of costs. The essence of the present proposal is to abandon the traditional concept of costs to be paid by the loser as in any way individually calculated in every case, or separated from the judgement on liability.

Courts are probably better off confining their interest in what lawyers actually charge their clients to cases of alleged professional misconduct: generally, courts are rotten market arbiters. We should never again invite judges to value items of legal work, from which they are remote. And there could well be a real market effect, beneficial to clients at the lower end of the scale, if some lawyers offer their services for just the stipulated fraction-of-stake amount – a sort of bulk-billing selling point. The trade-off has to include dispensing such lawyers from obligations to provide detailed bills.

This kind of proportionate cost-shifting may lend itself to experiment, by way of a pilot scheme. Perhaps voluntary participation could be enticed by a waiver or discount of court filing and hearing fees, for a pilot period. A properly designed empirical study might then compare cases run under the present relatively complex and custom-made costs orders with cases run on the fraction-of-stake approach – including levels of satisfaction by litigators as well as litigants, along with measurement of relative costs, including transaction costs usually ignored by judges.

In short, unless we experiment with radically different ways of considering loser-pays costs in our litigation system, we should not be puzzled, let alone resentful, at the continued chorus of protest against the uneconomic burden of 'going to law', that is, of asserting rights in court.