

## Cost and Fee Allocation in Civil Procedure: A Comparative Study

Edited by Mathias Reimann

United States: Springer, 2012, pp 328 (Hardback), ISBN 978-94-0072262-0, \$150.99.

The allocation of costs in civil litigation has a large impact on access to justice in the civil context and is a continuing concern in Australia<sup>1</sup> and across the globe.<sup>2</sup> *Cost and Fee Allocation in Civil Procedure* is a collection of articles from around the world, representing volume 11 of the *Ius Gentium: Comparative Perspectives on Law and Justice* series. The utility of such an expansive survey of the ‘almost ubiquitous struggle with the high costs of civil litigation and ... problems with access to justice’ cannot be understated. For what seems to be such a universal concern, it is surprising that such an expansive comparative assessment has not been prepared before.<sup>3</sup> *Cost and Fee Allocation in Civil Procedure* considers how the costs of civil litigation are allocated in key (and largely Western) countries, dealing with three principle questions: who foots the bill for civil litigation costs, the overall costs of litigation in different jurisdictions and how civil litigation costs are distributed among actors such as legal aid and insurance companies.

*Cost and Fee Allocation in Civil Procedure* is divided into two main parts. First is a synthesis of ‘Cost and Fee Allocation in Civil Procedure’, prepared by Reimann and based on the General Report commissioned by the International Academy of Comparative Law and written for the

---

<sup>1</sup> See generally, Andrew Cannon, ‘Alternatives to activity-based costing’ (2008) 17 *Journal of Judicial Administration* 20; MCNAMARA, Lindy McNamara, ‘Civil litigation costs are cause for concern’ (2012) 34(5) *Bulletin (Law Society of South Australia)* 16; Justice James Spigelman, ‘Opening of the Law Term 2009’ (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2009); Gino Dal Pont, *Lawyers Professional Responsibility* (Thompson Reuters Lawbook Co, 5<sup>th</sup> ed, 2013); Justice Susan Kiefel, ‘Ethics and the Profession of the Lawyer’ (Speech delivered at the Vincents 48<sup>th</sup> Annual Symposium, Queensland, 26 March 2010), 4-6 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2010-03-26.pdf>>. See also *ASIC v Richards* [2013] FCAFC 89.

<sup>2</sup> See generally Erik Knutsen, ‘The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada’ (2011) 36 *Queen’s Law Journal* 113; Martin Gramatikov, ‘A Framework for Measuring the Costs of Paths to Justice’ (2009) 2 *Journal of Jurisprudence* 111; Stefan Vogenauer and Christopher Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law (Studies of the Oxford Institute of European and Comparative Law)* (Hart Publishing, 2011).

<sup>3</sup> Some limited comparative studies do exist, however. See for example, David Root, ‘Attorney Fee-shifting in America: Comparing, Contrasting, and Combining the “American Rule” and the “English Rule”’ (2005) 15 *Indiana International & Comparative Law Review* 583; Andrew Cannon, ‘Designing Cost Policies to Provide Sufficient Access to Lower Courts’ (2002) 23 *Civil Justice Quarterly* 198.

XVIII<sup>th</sup> World Congress of Comparative Law in Washington, DC in 2010. This is followed by 25 chapters, written by various authors, canvassing the impact of costs and fee allocation on access to justice across 25 jurisdictions around the world, written specifically for the book.<sup>4</sup> The benefit of taking such a far-reaching analysis is that it enables the book to deliver a full picture of current issues in civil costs allocation. However, it is unfortunate that the focus is almost entirely on highly developed countries, with developing countries poorly represented.<sup>5</sup> Additionally,

The chapters generally flow well from one to the next, forming a coherent narrative written in a reasonably consistent style, a notable achievement given the number of chapters. Given the large number of chapters, the use of an opening synthesis is a useful addition, providing a detailed analysis of the issues raised throughout the book as well as serving as a signpost for the rest of the book. Cross-referencing is employed throughout the book, similarly adding to the accessibility of the book. It is however, odd that the chapter on costs in France is written in French and has not been translated for the benefit of non-French speakers, especially given that all of the other chapters have been written in English or at least translated into English.<sup>6</sup> This is nonetheless overcome, to an extent, by the discussion in the synthesis, which highlights the key findings of the chapter.<sup>7</sup>

*Cost and Fee Allocation in Civil Procedure* reveals a general trend towards the deregulation of the legal profession globally and exposes a strong correlation between high civil litigation costs and common law legal systems. A key theme of the book is the ‘access to justice’ implications of cost shifting. Reimann categorises countries as falling into one of three categories of cost shifters. Firstly, ‘major shifters’, where the loser will largely make the winner whole – in the sense that the winner is indemnified, shifting court costs, lawyer fees and evidence expenses. These ‘major shifting’ countries are largely from the Germanic/Civil legal systems.<sup>8</sup>

The second group are the partial shifters, which still ostensibly support the loser pays principle, however the amount of costs recovered is the subject of judicial discretion and may not extend to all categories of costs.

---

<sup>4</sup> Covering: Australia; Austria; Belgium; Brazil; Canada; the Czech Republic; England and Wales; Finland; France; Germany; Greece; India; Israel; Italy; Japan; Korea; Macau; the Netherlands; Russia; Scotland; Slovenia; Spain; Sweden; Switzerland and the US.

<sup>5</sup> Indeed, the African continent is not represented at all and Brazil is the only country representing South America. It is also noted that Islamic countries are not represented.

<sup>6</sup> The reason for this disparity is not given in the book.

<sup>7</sup> See footnote 136.

<sup>8</sup> Such as Germany, the Czech Republic and the Netherlands, but also include countries such as Italy, Spain, Greece, Hong Kong and Mexico.

These countries are largely Commonwealth countries with Common Law legal systems, such as Canada, Scotland, Australia and England. The final group, of which the US is the only member identified, is the ‘minor shifters’, which reject the loser pays principle; though cost shifting may still occur in limited circumstances.

This is a helpful prism through which to consider the subject, as the category a country falls into will impact the way that country acts to increase access to justice. The book also highlights some of the issues relating to how costs are calculated. Particularly interesting is the worldwide shift towards the US market-based model for costing as opposed to scales of costs, which tend to have increased the costs of litigation. This has implications for access to justice especially in jurisdictions that do not embrace cost shifting, but also where there is only partial shifting because it may make small and medium sized litigation uneconomic. However, it may be that cost shifting acts as a disincentive to risky litigation, as parties are aware that a loss will result in a costs order.<sup>9</sup>

Two noteworthy chapters are the Australian and US chapters. Australian readers will be particularly interested in Cameron’s chapter, which considers the access to justice implications of litigation funding and the ad hoc way in which litigation funding has developed in Australia.<sup>10</sup> Maxeiner’s US chapter presents an interesting counterpoint to the rest of the book. Punctuated with charming illustrations the chapter gives an interesting historical overview of costs in the US as well as explaining some of the consequences of being the only jurisdiction that does not shift costs from the loser to the winner.

There is a lack of expansive comparative analyses of the law of cost shifting and fee allocation across the world; *Cost and Fee Allocation in Civil Procedure* fills this gap. It is therefore compulsory reading for anyone studying the access to justice implications of cost allocation regimes. Despite the focus on developed countries, the book provides a broad overview of what is a ubiquitous issue. The extensive referencing also makes the book an excellent starting point for those engaging in in-depth research in the area. Finally, the book is a pleasure to read and flows surprising smoothly for a book written by over 30 authors.

---

<sup>9</sup> An issue which is considered in the US chapter.

<sup>10</sup> This chapter considers the acceptance of litigation funding as part of the legal landscape in the important case of *Campbells Cash and Carry v Fostif* (2006) 229 CLR 386, emphasising the problems arising from a lack of statutory intervention in the area, highlighted by *Brookfields Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2)* [2009] FCAFC 147. This remains an important issue in Australia, which is underlined by the recent case of *ASIC v Richards* [2013] FCAFC 89, where the court highlighted some of the issues with funders’ premiums (see especially, [46]-[55]).

Reimann should be commended for seamlessly stitching articles together in such a way as to retain a coherent narrative throughout the book.

*Peter Dominick Scott\**

---

\* Final-year BBus-LLB(Hons I) student at the University of Tasmania, and Co-editor of the *University of Tasmania Law Review* in 2013.