Should courts be given a broad statutory power to make security for costs orders?

Sure - particularly if there is a widening of those to whom the power can be exercised against.

Provided always that security for costs is not used by deep pocket defendants to effectively deny the plaintiff's claim. This is applicable across the board and underlies the reasons why security for costs does not apply to natural persons.

I believe that the practical factors identified by White J in *April Fine Paper v Moore Business Systems* [2009] NSWSC 867 75 NSWLR 619 (particularly in pars [23]-[26] but the whole judgment ought be read) ought be provided for in either practice notes or the rules. Quite often, the amounts said to be needed for security are used in terrorem and there ought be encouragement of any security for costs to be given in tranches.

Should courts have the power to order costs and security for costs against litigation funders?

Sure for both - Rules would need updating in my view to better allow costs against non-parties - perhaps by requiring those plaintiffs funded by litigation funders to specify that fact at the commencement of the funding and be treated as the plaintiff in terms of costs orders, which is different to how the rules apply to non-parties now.

Should courts have express legislative power to order security for costs against representative plaintiffs?

Sure - there should be a discretionary power for the lower courts to do so.

Should the statutory provisions allowing costs orders to be made against legal practitioners should be amended to provide an exemption to those who are acting pro bono?

No - costs orders against legal practitioners are rare and are used in quite extreme circumstances, circumstances equally applicable regardless of the basis of the representation.

Does the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by legal aid?

This is so rare as to be illusory and would require numerous changes to the grants of legal aid etc.

However, to the extent relevant, I do agree with the NSW Bar Association submissions allowing conditional and speculative arrangements with private lawyers.

Of course lawyers acting pro-bono ought be able to obtain costs orders in their favour if successful in the usual way - to not allow it would allow unmeritorious claims and defences. There is no warrant to allow security for costs against a natural person who happens to be represented by someone acting pro-bono. Indeed it is almost certain such an order would stifle the claim in most circumstances warranting pro-bono work.

Is there a need for new legislation to give courts the power to make public interest costs orders?

I would have no objection that there should be a discretionary power for the lower courts to do so. The courts invariably get these matters right if given room to allow it.

Should there be greater use of protective costs orders, that is, orders that place a cap on the costs that may be recovered by one party from another?

There ought be allowed the discretion where it does not exist.

However, very often there are legal and factual issues of real complexity in matters involving small sums of money or where damages are small. A good example is defamation.

I regularly advise potential plaintiffs not bring cases and defendants to settle - just preparing the matter to the point of obtaining a Reply (which might set out many particulars of Malice) is prohibitive but often required to give a full advice. The costs consequences of getting it wrong are so serious and out of all proportion to the potential damages they invariably are not worth running. Yet, a cap on the costs means they won't be brought at all except by the very rich.

Furthermore, arbitrary thresholds such as the $100,000 in the Civil Liability Act are productive of injustice. The courts invariably get these matters right if given room to allow it.

If I can be of any assistance or you need clarification please let me know.

kind regards

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