

## Civil justice

Consistent

Unbiased and unprejudiced

2 approaches

- Peacefully reaching an agreement
- Enforce rights based on the rule of law
  - Not just about the parties before the Court – goes beyond
    - Ie. precedent
  - The function of the Courts is to enforce rights as a **public resource**

## Adversarial System

### Features

Party autonomy

- Where, when, how to litigate
- Whether or not the claimant bring legal proceedings in the first place
- Sometimes defendant discouraged from submitting a defence because the plaintiff is right
  - The plaintiff's claim succeeds by **default**

Responsibility for outcomes

- The parties responsible for bringing and presenting evidence in Court
- Judges have limited responsibility to the outcome
- Parties believed to have the best chance of bringing the best evidence and bringing the truth into the light

Party control

- Party controls the pace and intensity of the process
- *Birkett* Case (p142) – decision since reversed
  - As long as we are within the Statute of limitation the Court should not dismiss the case unless there are special circumstances
    - Problematic because waste Court time and resources

## Case Management

Intended to limit parties' control of the pace of proceedings

Done in Victoria through the *Civil Procedure Act 2010* (Vic)

Rationale is that justice is not just for the parties but also for others who are waiting

## Managing the Procedural Side of Litigation

Setting up time frames esp. For pre-trial procedures

give /deny extensions

Sanctions for not complying with process requirements

- Sometimes (in extreme circumstances) this might result in the dismissal of the claim
  - Dismissal in the case of the claimant not complying
  - Default judgment in favour of the claimant when defendant doesn't comply
- Controversial because the case is being dismissed without the merits of it being heard

## **Litigation**

### Advantages

Legitimacy and authority – People want an authority to say that they are right

Confirmation of one's rights – cannot be obtained through ADR

Protection of less powerful parties – in theory everyone is equal under the law

- In ADR, the process doesn't matter only the outcome

Public record – litigation a public process

Precedent – legal system a public resource which is not just for the parties involved in a dispute

Society's values – role of the Court not just to resolve disputes but to declare social/societal values

- Function of Courts to give force to societal values and bring reality into accord with them

Familiarity – people are more familiar with litigation than ADR

### Disadvantages

Costs – creates barriers

- Contingency fees to lawyers lowering the remedies that the plaintiff receives

Duration

Painful process – the public nature of litigation can exacerbate the trauma already experienced by parties

- Being cross-examined can be painful and litigation may not provide victims with the voice they were hoping for

adversarial/Binary

- Doesn't allow parties to identify their mutual interest

## **ADR**

Settlement – primary goal

- Aim – for parties to agree

Adversarial character

- Less adversarial than litigation but still two parties against each other

Private process

- No protocol/process
- No public decision
- Problematic when victims want recognition

Costs

- Costs associated with lawyers (sometimes)
- The parties bear their own costs (no cost orders)

Litigation beyond the settlement

- If more than one party (ie. class action) might have to resort to litigation anyway if one party doesn't settle

Justice

- Does justice look like settlement?
  - Settlement sacrifice justice in return for agreement between parties

## **Restorative Justice**

Ideal for healing and restoring relationships

Ideal for situations where the true nature of harm in cases involve broader relationships within the community – mechanism to voice the harm

### Advantages

Virtually no costs for the victims

- The Government pays the costs and there are no need for lawyers
- Usually a compensation scheme included in these schemes/legislation without having to go through long litigation
- Mechanism is not just about (material) compensation but about education, recognition, etc

Not adversarial

Allows for the victims' side of the story to be told **holistically** – not just points that come up in trial

Focus on restoring and preserving rights for the future

Addresses social justice as well as legal justice

National process – not just an individual process centered on individual abuse

- Creates a space where stories come together and create a full picture

Public process – documents released to the public

Allows wide community participation – helps with the healing process

### **Trevorrow Case**

State argued the *Limitation Act*

- Court ruled that Trevorrow could bring a claim under s42(b)(2) a person can bring a claim if a claim wasn't brought because of the actions of the defendant

Court's argument

- Wrongful imprisonment
- Breach of fiduciary duty
- The State acted in *ultra vires* – beyond powers
- Negligence
  - Breached duty to care a Trevorrow's guardian
  - State didn't check upon Trevorrow's foster care situation
- Misfeasance in public office
  - Knew what they were doing was unlawful and it was reasonably expected that removing a child from his family would be harmful

Compensation – Damages for harm

- Loss of earning capacity
  - Hard to evaluate because harm occurred from his childhood
  - Discretionary calculation
- Cultural loss
  - Compensation for the loss of his Aboriginal identity and culture
- Punitive/Exemplary damages
  - Unusual because civil law usually not aimed at punishing the defendant
  - The judge wanted to 'mark his disapproval of the defendant's conduct'

Decision given in 2007 – Apology given in 2008

Little precedential value – Trevorrow's siblings not taken

- Many times the State's argument was that the child was taken for their own good but Trevorrow's siblings were thriving while he was not
  - Very easy to prove causation
- The State agents received clear legal advice that they don't have the power to take Trevorrow from his family

#### Limitations of litigation

- State argued for statutory limitation periods
- Problems with bringing evidence due to passage of time
  - One of the rationales for the statute of limitations is that it is harder to find the truth when times goes on
- Expensive and long
- Standard of the time – the State argues that at the time the practice was thought to be justified