LECTURE ONE: INTRODUCTION

- Rule based unit and rationale
- Hypotheticals
- Not overly burdened by opinion and argument
- It's about understanding the rules
- Conceptual issues, social policy issues, fairness, efficiency, professional ethics, access to justice
- Get the facts, understand the facts, and then find the law.

Studying Litigation

- Civil Procedure & Evidence
- Rule-based law
- Rules in unfamiliar context
- Fact-finding
- Adversarial dispute resolution
- Not 'alternative' dispute resolution
- Best way of finding the truth is by having a contestant by two opponents. Test their arguments, recollections through a contest which involves aggressive questioning and vigorous argument and an independent umpire who makes sure the parties engage in that contest following the rules.
- 'Football game' analogy – two opponents (two adversaries) both of them wanting to score points, trying to outplay each other using the rules, tactical advantage and strategic advantage with a referee in the middle who is not telling them how to play, not telling them what players to bring on the field of or what tactics or strategies to use, but to only make sure that they observe the rules and if we do follow this system this is the best way to decide which is the better team. This is the best way to decide which side is telling us the truth.
- There is another way of resolving disputes and that is called the 'Inquisitorial method' (mostly used in Civil Law systems eg Germany, France)
- This adversarial system of ours has become very complicated and expensive. It is dependent on the involvement of professionals (lawyers) and it is full of dangers for people who represent themselves. It sets the bench mark for all those alternative dispute models.

Sources of law

- General law- which is the Common law; most of the principles and practices we have inherited have come through the courts.
- This general law is based on the inherent and implied jurisdiction of the superior courts to regulate their own court processes in order to provide for fair trials and in order to avoid abuse of process.
- Cases: *Grazby, Fellochowski*

Civil Procedure

- No national uniformity
- **Civil Procedure Act 2005 (NSW)**
- **Uniform Civil Procedure Rules 2005 (NSW) (UCPR)**
- Court Practice Notes
- Federal Court Rules
- Uniform evidence act- it is not uniform, this is a scheme which was commenced in 1995, from the common law we went into various evidence acts in AUS (all state based) until about the 1960s when people though hang on maybe we should do something about this, 1970s decision was made that they would have a proper look at this by the ALRC and they rushed it through, 17 years later they decided we should have some uniform legislation. It came about in 1995, it was initially a commonwealth and NSW initiative. Two other states jumped on; TAS and VIC.
- UCPR regulates NSW case management and pre-trial procedures

Evidence

- **Evidence Act 1995 (NSW)**

Procedural v Substantive Law

- Civil Procedure is procedural or 'adjectival' law
- "Rules which are directed to governing or regulating the mode of conduct of court proceedings" (Mason CJ)
- Law of the 'place' v Law of the 'court'
- Fundamental importance of due process, procedural fairness and access to justice
- "Justice delayed is justice denied"

Adversarial v Inquisitorial

- Civil law v Common law
- Civil codes v Case law
- Legal norms v Precedent
- Court-driven v Party-driven litigation
- Active v passive judiciary
- Written v oral evidence
- Systemic 'stereotyping'

Adversarial v Inquisitorial
Advantages and disadvantages

- Systemic v individual costs
- Individual autonomy v court control
- Search for 'approximate' truth
- Search for efficiency and justice

Limited utility of system stereotyping

- Internal diversity
- Systemic convergence

Open Justice

- "Justice must not only be done – but be seen to be done": Lord Hewitt in *R v Sussex Justices* [1924] 1 KB 256
- Court proceedings are not to be engaged in private or in secrecy
- Court cases are a matter of the public
- Courts have no inherent power to excludethe public. The publicity of proceedings is one of the great protections against the exercise of arbitrary power.
- The courts can circumvent or limit the exercise of this principle. They can make Orders for closed court, pseudonym orders, suppression or non-publication orders. They are exercised very sparingly and in exceptional cases.
- As a general rule it is not enough to get a suppression order or a closed order if publicity would cause you embarrassment or would cause you

distress of would lead you to have some financial or proprietary loss or otherwise be undesirable for the parties.

- *"Circumventing the open justice principle will only be ordered if it is really necessary to secure the proper administration of justice."* Justice McHugh in *John Fairfax Group Pty Ltd v Police Tribunal* (1986)