Topic 1: Our civil justice system an introduction

Overview:

1. **Source of Civil Procedure Rules**
2. **How do the courts interpret the rules of Court?**
3. **Traditional Adversarial system of Adjudication of Cases**
4. **CASE MANAGEMENT**
5. **NOWADAYS / CURRENT STANCE: TRADITIONAL MODEL DOES NOT APPLY**
6. **HOWEVER, THERE IS A PROBLEM – JUSTICE V EFFICIENCY**

Civil Procedure- What are the rules that apply to the bringing of an action to a court of law?

- The ***"procedural law"*** studied in this unit is ***DISTINCT*** from ***"substantive law"*****.** The latter determines a person's rights and duties towards each other whereas the former provides the mechanism for enforcing those rights and duties where they have been transgressed.
    - Procedural law provides the **"how"** of enforcing substantive legal rights which you have been taught such as Contract Law, Tort Law and Commercial Law.
- Civil Procedure therefore is largely concerned with the pre-trial processes of bringing a dispute before the court. Expressed another way, civil procedure is:
    - "***The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right"***
        - *Poyser v Minors (1881) 7 QBD 329 at 333 per Lush J.*

1. Source of Civil Procedure Rules

- The following are two things you must look at to see how actions can be brought to court.

1st Source: Rules in Supreme Court Rules (SCR) are created by judges themselves under s25

- Orders and rules – these rules have been created by SC judges
- Supreme Court Act S25(1) Gives Supreme Court judges the power to make Supreme court rules which governs the procedures in the Supreme Court. (SCR)
    - such rules are contained in the General Procedure rules 2005
- From time to time the judges appeal and amend these rules
- These changes have force of law
- S 25 Supreme Crt Act give judges power to make the rules
- Note:
    - Each court has their own civil procedure rules
    - This subject focuses on Supreme Court rules

2nd Source: Supreme Court's (SC) Inherent Jurisdiction

- Inherent jurisdiction of the Supreme court to regulate own process so aa to prevent abuse of its own process

- Supreme Court has inherent jurisdiction which gives the supreme court power as is necessary to ensure that its procedures are capable of producing just outcomes
- So court has innate ability to regulate its own procedures in order to produce just outcomes
- The purpose of this jurisdiction is to allow the court to regulate its own process so as to prevent abuse of that process
- Examples
- Can freeze defendants assets, can allow plaintiff entry into defendants premises etc
- In *Jago v District Court of NSW (1989) 168 CLR 23*, Gaudron J said:
    - *'Subject to any limitations or restrictions to be found in statute, a court necessarily has power to control its own processes and proceedings. The power of a court to control its own processes and proceedings manifests itself in a variety of ways. It may involve no more than the grant of an adjournment. On the other hand, it is accepted it may result in the grant of a permanent stay of civil proceedings that are frivolous, vexatious or oppressive. The power of a court to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands".*

3rd Source: precedents

- decisions from previous cases

s 85:

- Indeed, s85 of the Constitution Act provides that the Supreme Court of Victoria "shall be the superior court of Victoria with unlimited jurisdiction".

2. How do the courts interpret the rules of Court?

1.14 SCR (o 1.14 / r 1.14 / SCR 1.14)

- Establishes an overriding philosophy that the court must manage litigation so as to bring cases to an early and economical end – consistently with the meaning of justice
- This rule/ order empowers the court to bring proceedings to an end; effectively, completely, promptly and economically, but they must yield to the interests of justice.
    - It entitles the court to give any direction or impose any term or condition as it thinks fit in regards to the progress of the matter
- Court can exercise these powers at its own motion or parties motion
- Has become more important in the past 10 years

> **1.14 Exercise of power**
>
> (1) In exercising any power under these Rules the Court—
>
> (a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;
>
> (b) may give any direction or impose any term or condition it thinks fit.
>
> (2) The Court may exercise any power under these Rules of its own motion or on the application of a party or of any person who has a sufficient interest.

3. Traditional Adversarial system of litigation / Adjudication of Cases

THE NEW CIVIL PROCEDURE ACT OVERTURNS ALL THIS

ONCE it is established that a person has a cause of action against another, before the matter can be heard there are a number of procedural steps that have to be taken by both parties. Only in extreme cases can that be missed. One party is not allowed to catch the other party by surprise – so there are a number of procedural steps to be taken.

Previously…

- *2016 lecture notes:*
  With regards to the traditional adversarial system, the parties and the court constituted two fundamental planks.
    - Both the judge and the parties had roles to play
    - These roles were related, but distinct from each other
        - (a) the parties themselves had to define the issues that they wanted a decision on – they had to prepare for litigation themselves
        - (b) when the parties themselves indicated to the court that their case was fully prepared, the court conducted the trial and determined the issues that the parties themselves decided had to be heard by the court.
    - THE PARTIES THEMSELVES AT THEIR OWN PACE DECIDED WHAT THEY WANTED THE COURT TO EDJUDICATE ON – once the parties had defined the issues, they would say to each other now let's go to the court for the hearing.
    - The traditional system assigned to the parties the responsibility for all pre-trial preparation – the court had no role to play
        - If the plaintiff only wanted to sue d on breach of contract, the judge wouldn't say I would now like to hear s.18 breach or is there a case based on s.18 – the judge couldn't do that.
    - The court had no role to play in what issues the parties wanted to bring up.
    - Even at the trial the judge's role was passive. The judge could not enter into the arena of dispute – the judge had to be careful in the number of questions they asked

- The basic feature of the traditional adversarial system is that there are two 'planks'.
    - 1. there are the parties (/legal practitioners),
    - 2. on the other, the court.
- These planks play a fundamental role:

a) The 'plank' which contains the parties prepare all documentation.
    a. In other words **according to the traditional adversarial system, it is the parties themselves who prepared the documentation for court, the pre-trial steps and raised the specific issues to be heard, and the speed in which a matter would progress.**
    b. Court was Only able to decide the issues that the parties have bought before the court.
    c. Because preparation of all the steps was left up to the parries - Parties took their own time

b) The other 'plank' had a more passive role. In other words, **the court simply determined the issues that the parties themselves had raised in their documentation.**
    a. **The court played a PASSIVE role and did not intervene.**

b. The judge could not enter into the arena of dispute. In other words, the judge could not ask questions, other than to seek clarification of what the witnesses were saying. If the judge did ask questions, according to the traditional adversarial system, the judge would be seen as entering the arena of dispute
c. The judge would intrude on impartiality or have bias, or impede the parties presentation of the case.

In summary, the parties prepared the case; the courts' function was simply to resolve the issues that had been presented before it.

Examples of cases, which illustrate the courts passive role:

Jones v National Coal Board 1957 Court of Appeal (In the reader) – *judge asked too many questions at the hearing*

Facts/Issue

- Alleged that trail judged had excessively intervened – asking too many questions

Held - *Lord Justice Denning* said:

- The object of the judge is to find truth within the parameters of the adversary system
- judge must decide case on evidence that parties themselves have adduced – can't ask to adduce a witness
- judge not to be involved in conflict
- court must ignore any issue not brought before the court even where it may have an adverse effect on the courts findings
- *The interventions (that the judge asked too many questions) taken together* ***were far more than they should have been.*** *In the system of trial which we have evolved in this country,* ***the judge sits to hear and determine the issues raised by the parties NOT to conduct an investigation or examination on behalf of society at large****. The judge's objective is to find out the truth and to do justice according to law. Justice is best done by a judge who holds the balance b/w the contending parties without himself taking part in their disputations. If a judge should himself conduct the examination of witnesses, he so to speak, descends into the arena and is likely to have his vision clouded by the dusts of conflict. Yet he* ***must keep his vision unclouded.***
- *It is all very well to paint justice blind, but she does better without a bandage around her eyes. We should be blind to favour or prejudice but clear to see which way lies the truth, and the less dust that lies about, the better. Let the advocates one after the other put the weights into the scales, but the judge in the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed to call witnesses whom he thinks might throw some light****. The judge therefore, must be content with the witnesses called by the parties.***

Extra quotes discussed in the lecture recording

This case highlights all that has been said about the main features of the adversarial system

Case: Fookes v Slaytor 1979 Court of Appeal – England

Facts

- The plaintiff was driving his car on a dark wet winters night.
- The plaintiff struck a parked truck that was not lit, parked on the side of the road.
- He was injured and sued the owner of the truck in negligence seeking damages (that truck was not lit).
- The defendant (truck owner) did not bother to defend the action nor attend the trial/hearing.
- the plaintiff gave evidence.

- the judge awarded the plaintiff a sum of damages but then reduced them as the plaintiff contributed to his injuries (contributory negligence). However there was no defence raised / the issue of contributory negligence was not before the court → the trial judge had no power to discuss this issue
- The plaintiff was aggrieved that the judge had reduced the damages. P appealed.

Held

- The issue of plaintiffs contributory negligence was not before the court
    - cant find contributory negligence without it being pleaded
- That the trial judge was wrong in reducing damages, as there was no issue before the trial judge of the plaintiff's contributory negligence.
- **All the judge had to do was decide the issues brought before the court. The issue of contributory negligence was not brought before the court.** As it was not raised, the TJ had no duty / obligation to decide that issue and it wasn't before the court.

Hoare Bros v Magistrates Court [2003] VSC 257:

Agrees with Jones case!

Facts

- Mag was asking too many questions of the witnesses
- P was charged pursuant to *Section 40* of the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*.
- There was questioning of a witness from the bench during examination in chief.
- P sought order prohibiting Magistrate from further hearing and determination of the charge on the basis of apprehended bias and would constitute a denial to P of procedural fairness.

Held

- Para 17 – judge referred to Whiterhorn v The Queen – it is not an inquisitorial role in eliminating the deficiencies of either side. When parties case is deficient, it does not succeed.
- P won, there was an order in the nature of prohibition, prohibiting the Magistrate from the further hearing and determination of the charge.

How has civil procedure act impacted upon traditional rules

1. It is the parties themselves who determine the track of evidence that is presented to the court at trial and thus it is the parties themselves who "select" the issues to be fought and upon which adjudication is sought;
2. Each party is responsible for the investigation and the gathering of the information that is to be placed before the court, and the way it is to be presented;
3. The judge plays a comparatively non-interventionist role, and the court makes its decision upon the information presented to it;
4. The procedure is designed to concentrate the judicial function into one continuous hearing;
5. Evidence at the hearing is elicited by the parties asking questions in turn, the judge being forbidden to call witnesses or to examine them otherwise than for the purpose of clarifying their evidence where it is unclear;
6. Where the rules of court are not complied with, in general no sanction will be imposed on the "delinquent" party except at the request of the non-delinquent party;
    - (other than clarifying things already stated)

→ these rules have produced many criticisms:

- Leaving it to the parties themselves to enforce expeditious preparation for trial;

- As a consequence, long delays before a matter can get to trial;
- Leaving sanctions to the parties: the adversary philosophy is that the courts will not impose sanctions if the rules of court are not complied with; thus, although rules of court may impose time limits within which particular steps need to be taken, the parties are free to concede to each other extra time for the taking of these steps. The obvious consequence of this concession is that inordinate delays occur before a case finally comes to trial;
- In sum, traditionally, the adversarial model of procedure is premised on "party control"; judges assumed a passive role by not intervening in the preparation or presentation of a case;
- Above all, the costs of litigation are a major disadvantage of this system of litigation. Cost of transcripts, legal fees, witness expenses and expert fees can run into many hundreds of thousands of dollars.

→ over past 15-20 years – some changes have been made – SET OUT BELOW

- To overcome these perceived faults and disadvantages, judges have assumed, in recent times, a greater role in the supervision of case preparation by the parties; indeed relating to the Supreme Court Rules: *Order 14, Rule 1* (Refer above: pg 4)

THE NEW CIVIL PROCEDURE ACT OVERTURNS ALL THIS^^

Evolution of the law and resolution to this problem

Mid 1990s

- Courts adopted **case management**
- That is, the courts said there was a practice direction given by the SC that judges should take a more **active role in the preparation of cases.**
- **Judges agreed due to order 1, rule 14 – that cases must be dealt with economically, promptly, and completely.**
- Thus, judges took a more active role.

Problems with old traditional system:

- Parties decided how quick the process would be
- Long delays could be experienced before matters went to trial
- Judges plain and passive role
- Costs were going to run away
- **THE PROVISIONS OF ORDER 1 RULE 14 WOULD NOT BE MET** – resolving matters quickly and economically.

4. CASE MANAGEMENT

- In the mid 90's, the judges decided to take a more active role in the way in which a case was prepared. **Took a more active role in deciding the dates which some procedural steps had to be taken. This was known as CASE MANAGEMENT.**

CASE MANAGEMENT-

- Is an approach that the judges have adopted themselves to the control of litigation, in other words, the court or the judge supervises or controls the progress of the case through its interlocutory phase.

- Now, case management by judges and quasi judicial registrars, manage the time cases are heard in. in other words, in order to overcome the obstacles with traditional adversarial procedure (time etc), the judges themselves took a more active approach in the way cases are prepared (through O1R14)

Cairns – makes a number of points about case management:

- The traditional mode of the adversary system no longer applies under case management
- The court manages the progress of cases
- Delay which was being experienced under the traditional system is now been brought under control of judges who set and enforce timetables for which certain steps have to be completed
    - The judge takes a more active role and sets a timetable for steps to be completed, and if steps not completed a party could be liable for costs or their case chucked out
- Courts have a responsibility to prevent waste of time and public money
- The court retains control of the proceedings brought before it

Case management system required – and now in place

- An approach to the control of litigation in which the judge supervises or controls the progress of a case through its interlocutory process – in other words, judges take a more active role as to which a case is prepared and the speed of its preparation
- Judge more active
    - Sets out the timetable for pre-trial processes / when they have to be met

Specialist lists

- In Victoria judges have developed specialist list of cases and judge will be in charge of each list and guide as to how and when each step should be taken 8 to 9 of them. For example major tort, commercial list, intellectual property, building and construction.
- If a case does not come within a specialist list it is manage according to the directions which are in place. From time to time judges release practice notes in regards to civil litigation.
    - must also go to judge for directions hearing where steps are laid out – if not taken then judge would want to know why

5. NOWADAYS / CURRENT STANCE: TRADITIONAL MODEL DOES NOT APPLY

The traditional model of the adversarial system does not apply, the court is no longer passive-

- The court manages the progress of cases and assures that the parties are aware of ADR mechanisms.
- Greater control by the court to some extent control taken away by the parties.
- The delays and the costs traditionally associated with civil procedure are sought to be overcome. The court sets and enforces timetables for the progress of cases. The court supervises the management and refinement of the issues.
- Courts have a responsibility to prevent the waste of public time and money.
- The private convenience of litigation must give way to the courts to see that their facilities are bring litigation to an end at the earliest possible moment.
- Case management is based on the premise that the conduct of litigation is not a mere private matter for the parties.

- There is important public interest in the functioning of the civil justice system. *The whole point of case management, is to overcome the traditional obstacles associated with the traditional adversarial system of justice.*

- The whole point of case management is that judges set a timetable which procedural steps must be taken to get a case ready for trial.

6. JUSTICE V EFFICIENCY

- Relevant when determining whether court should allow:
    - ALLOW ADJOURNMENT or,
    - ALLOW change/add of defendant, etc

- In a space of 10 years, this is where the HC got itself tangled.
- If at Directions hearing, parties agree and paperwork is organized as such.
- However, if extra ground comes up and now want to sue on another cause of action (i.e. s18 ACL), that means further disclosures need to be made and thus, wont be heard at the hearing date as a new claim is raised.
- Must go to court and change this, and new timetable as last one is irrelevant due to the new claim, which postpones the hearing date.
- Issue: efficiency v justice.
    - What comes first – the justice of the case or the importance of running an efficient system?
    - This was confused at the HC….. see cases below….

The HC in SALI says efficiency prevails, however, a few years later the HC says justice prevails (JL Holdings). Now, the case of AON enunciates the current stance, where it held that efficiency prevails.

My lecture notes:

TENSION BETWEEN: JUSTICE v EFFICIENCY (CASE MANAGEMENT)

If the parties are bound by a timetable, what happens if a party wants to amend their documents and the steps they were supposed to have taken by a certain date?

- Justice vs efficiency *(where someone say wants to bring another claim later for say s.18 but the other party argues compliance with timetables)*
- *If for instance a judge says to the plaintiff I am not going to allow this cause of action because to do so would upset the timetable set – justice won't be achieved/done*

Sali v SPC – case management & efficiency

- the high court held that, depending on the circumstances, the principles of case management take precedence – i.e. if timetable has been fixed, the parties have to stick to it

QLD v JL Holdings – justice

- the High court said justice is actually more important (dawson, wardon and McHugh) said that it is the most important consideration for adjournment
- Case management, involving the efficiency of the court, was considered important BUT not so important to override the needs of justice

AON v Australian National Univeristy 2009 HCA – must know this case!!!!! ←

- FACTS:
    -
- Went back to the original decision that case management is important
- We must also consider the justice of all other litigants who are awaiting justice for their trial
- What may be just when an amendment ay be sought, requires an account of what is just for other litigants not just those in the proceedings
- The HC said that this statement is consistent with Sali v SPC
- Even though you will depreived of adding to your claim or defence, in consideration of justice we will consider all other people

Cases in depth next page…

Sali v SPC Ltd 1993 HCA – current stance as per AON

Facts

A case was set for hearing but one of the parties wanted to change the date because they wanted to add a new defence.

Issue:

- Efficiency v Justice
- Should court grant adjournment – to allow additional defence to be pleaded?

Held -

- No - Efficiency prevails
- Have to follow case management – otherwise unfair for other cases with set dates.
- In determining whether to grant an adjournment, the judge is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases.
- *What might be perceived as an injustice to a party when considered only in the context of an action between those parties may not be so when considered in a context of claims of other exhibinats and the public interest in … court resources.*
- The court is saying that when we have to decide whether or not to claim and adjournment when a new claim is to be added, we must consider the rights of the parties and the rights of others whose cases will also need to be postponed.
- Must consider what effect an adjournment will have on other parties' cases and interests which are to be heard!!

Qld v JL Holdings 1997 HCA – not current stance

Facts

- Wanted adjournment to be able to raise another defence

Held

- Justice prevails
- Dawson, Gaudron, Mchugh – WENT THE OTHER WAY THAN SALI CASE
- *"Justice is a paramount consideration in determining an application for adjournment. The courts aren't there ti punish a party simply because they have made a mistake. Case management principles are a relevant consideration, but, case management principles, should not be allowed to prevail over the injustice that might occur, by shutting out a party from arguing or raising a new claim or defence."*

- The HC is saying that despite the timetable, justice demands that the pl be allowed to amend his documents. Case management timetable must take second place.
- Overruled Sali case!!

AON Risk Services Pty Ltd v ANU 2009 HCA – KNOW THIS CASE

- *This case is relied on almost every day in Court!*

Facts

- ANU owned properties
- Due to bushfires – sued AON
- Case begun
- Then also wanted to sue their insurance agents

Held

- Efficiency prevailed
- High court reversed again AND HELD IN FAVOUR OF SALI CASE!
- When we consider the need for justice as a factor in deciding justice for the parties before us, we have to consider the issue of justice for other parties waiting for their case to be heard. We are not here simply for the interests of private individuals, we are here to serve the community at large.
- Court has to do justice – however they have to ensure to do justice to everyone (all other litigants)
    - *"The rules that govern civil litigation are no longer to be considered as directed only to the resolution of the dispute to the parties to the proceeding. The achievement to a just but timely and cost effective resolution of the dispute has an effect on court and other litigants. What might be just when an amenity is sought requires count to be taken to other litigants not just to the parties in question. The statement is consistent to what was said in the case in Sali, which reflect a proper understanding of case management. The statement in JL Holdings do not reflect such an understanding and are not consistent with what was said in Sali to say that case management principles should only be applied in extreme circumstances to refuse an amendment implies a consideration such as delay and cost can ever be important as an arguable case and it denies the wider effect of a delay on others."*

The approach of the HC in AON case has been confirmed in the Civil Procedure Act 2010 (Vic)

- Order 1 rule 14 has been given much more force and life

Read paragraph 1.90 of Boozi textbook which summaries all important things that have been said.

- Case management represents a shift
- It was the intention of parliament to impose strict limitation on the conduction of proceedings
- CM involves the following:
    - The identification of the issues between the parties at an early stage
    - CM enables the laying down of strict timetables for the parties to abide by
    - CM imposes party discipline and inter-party co-operation so as to avoid tactical litigation

The High Court has indeed confused itself in the efficiency v justice debate.

Current stance

- AON CASE IS THE LAW – 2009 CASE!!!
- BUT, LOOK AT s 47 of Civil Procedure Act.. and how court has an active role :) s 47 PLACES GREAT EMPHASIS ON CASE MANAGEMENT PRINCIPLES!

- This section accepts Aon and puts Aon in a legislative structure
- Effectively, efficiency wins out in that game between efficiency and justice.

*** In Summary

1. *Traditional form of adversarial system- everything left up to the parties courts playing passive role.*
2. *Courts and litigants realized the delay and expense therefore involved.*
3. *The judge themselves created the case management principles, meaning that judges played a more active role in*
    a. *In deciding what issues parties could bring before a court*
    b. *How quickly proceedings progressed*
4. *The issue was created, what comes first? Case management principles or justice.*
5. *The court on that issue has been confused.*
6. The new civil procedure act 2010 clearly states the case management principles are important. They take precedence over the need to do justice; AON case. Order1 Rule 14
    - The scope to do justice includes all other litigants: AON Case

Aon's case is applicable. S47-53 CPA (judge actively getting involved IN THE PRESENTAION AND PREPARATION OF CASES!!!!)

Purpose of the Act was to overcome these limitations in the system.

- s47s3B CPA;
    - a court may actively case manage civil proceeding by identifying at an early stage the issues involved of the civil proceeding including any issues that have not been resolved including any mandatory or pre litigation processes
- s47s3E;
    - the court may control the progress of the proceeding including but not limited to fixing timetables, dealing with as many aspects of a civil pro as it can in the same occasion.
- S47s3F;
    - the court may limit the time of a hearing to a civil pro, it can limit the witnesses, limit the time for the examination or cross examination, limit the issues or matters. – CAN CASE MANAGE AND LIMIT THE ISSUE TO HEAR
- S48s2E;
    - the court may define issues by pleadings or otherwise
- S51

POSSIBLE EXAM QST: See how the civil procedure Act has impacted on the traditional adversarial principles – i.e. see the provisions and how many – ONES LISTED IN PREV PARA.

Principle of open justice:

- Refers to the ability for the public to attend proceedings
- Benefits:
    - It acts as a bastion, preventing arbitrary power of judges
    - It improves judicial performance

- Allows parties to publically vindicate their rights
- It ensures public confidence in the administration of justice
- "It is the best security for the pure, impartial and efficient adminsitartion of justice": Scott v Scott (1913)

- Exceptions to principle of open justice:
  - parties are children
  - hearing of sensitive nature
  - if parties are wards of the state
  - if proceeding concerns secret matters

    → justice may not be able to be done in an open court

Topic 2: The Victorian Court Hierarchy

Overview:
1. **Original Jurisdiction of the Supreme Court**
2. **Hierarchy of Courts**

Jurisdiction of the courts

- Before a court can hear a case, it must have jurisdiction or power to hear a dispute. A court must have jurisdiction in both the subject matter and jurisdiction over the defendant.

1. Original Jurisdiction of the Supreme Court – the power to hear and determine a case

SC must have:

A. *Subject matter jurisdiction*
B. *Territorial jurisdiction over the defendant*

= jurisdiction over the subject matter, and over the defendant

A. *Jurisdiction over Subject Matter – s85*

- This is over what things can the Supreme Court have jurisdiction – what causes of action?
- Under **s85 of the Constitution Act 1975 (Vic)**, has been **construed very widely** and gives the court wide power to hear any case under any subject matter (Unlimited jurisdiction!)
  - The court shall have jurisdiction in all cases whatsoever with unlimited jurisdiction
  - However, the wide jurisdiction can be curtailed by specific legislation (by Parliament) – it may enlarge it, restrict it, or modify it.

B. *Territorial Jurisdiction over the defendant (LAURRIE V CARROLL)*

- The SC must also have jurisdiction over the defendant.
  - This is known as territorial or impersonam jurisdiction.

Summary:

- **At CL, at the time of service of the writ, the D must be within the boundary of the State of Victoria.**
  - HC principal that jurisdiction of the SC over a defendant only extended as far as the state boundary comes from ***LAURRIE V CARROLL*** 1968 HCA→ Dickson CJ, Willlaims and Webb said:
  - **At common law, the power over the SC over the defendant depended on the defendant being within the state boundaries of Vic at the time the writ is served**. Does not run beyond the state.
    - *"The jurisdiction of the SC depends not in the least on subject matter, but on the amenability of the D to the writ. The CL doctrine is that the writ does not run beyond the limits of the state. The D must be amendable or answerable to the command of the write. His amenability depends upon nothing but presence within the J."*
    - *"Where a writ cannot be legally served on a D, the Court can exercise no jurisdiction"*

- THUS, presence within the state boundaries **at the TIME OF SERVICE**, is vital for the SC to have jurisdiction.

The jurisdiction of the Supreme Court to hear a case against the defendant at common law depends on the defendant being served within the state of Victoria.

- At common law, the SC did not have jurisdiction over a defendant in a state outside Victoria.
- If you serve the writ when they are in the state of Victoria, then it is all good

At common law the jurisdiction of Supreme Court extends only as far as the state boundaries confirmed in *Laurie v Carroll*

Service = giving the notice of the case to the D → i.e. serving the writ/summons

- Service is good even if the defendant is in the state of Victoria **fleetingly**.
- However, if the defendant is fraudulently enticed within the state boundaries for the purpose of the being served, service is not good and the SC will NOT have jurisdiction.
  - E.g. if Sam says to Grace let's play a game of golf in Victoria and takes her to a café where the server is, she was fraudulently enticed and service is bad.
- Def can be compelled by law to enter jurisdiction – then that is good service.

HRH Maharanee of Baroda v Wildenstein: Denning reaffirmed this point.

HOWEVER, THERE ARE EXCEPTIONS THAT YOU HAVE TO KNOW.

Cross-Vesting Legislation – The Cross Vesting Jurisdiction of the Courts

Which court is the appropriate court?

Background:

Because we have a federal system, we have federal courts and State courts:

- *Federal Courts = Fam Court of Aus, Federal Court, and FCC*
- *State Courts = County Courts, SC of State etc.*

(1) Because Australia has a system of Federal Courts and State Courts, there was a clear division of subject matter jurisdiction between the Federal Courts and State Courts.
(2) Apart from the Service and Execution of Process Act (SEPA), there was also a clear divide of territorial jurisdiction between the States.

- ➢ It became difficult to know which Court a case could be heard, if the defendant was interstate. Because many transactions are conduct across borders (e.g. online orders) and transcend State boundaries, there is an issue of which court to go to?
- ➢ Another problem, let's say I want to sue you for a breach of contract. Breach of contract is a State matter. It is heard by a State Court. In return, you want to sue me for a breach of s.18 of ACL – that is a federal matter. So what do we do?
    a. There is specific legislation, for instance s.138B of the Australian Competition and Consumer Act provides that State Courts can hear federal court matters, or matters based on the ACL.

The problem was that Fed courts would hear matter involving Cth laws, and state courts would hear matters from State laws. ***But where would the plaintiff start his case?!***

- *E.g. breach of contract = state law matter but D wants to counter sue for misleading and D conduct = Fed court matter?! This made it difficult, hence…* →

HISTORY

- *Prior to the commencement of the Service and Execution of Process Act 1992 (Cth), there was quite a clear division of "territorial jurisdiction" between the State Courts.*
- *As a result, jurisdictional problems frequently arose when commercial transactions in particular, transcended the borders of one or more States.*
- *This cased inefficiencies, uncertainties, delays and unnecessary expense.*
- *Difficulties occasioned by lack of State court jurisdiction in trade practices matters were to some extent overcome by s138B of the Competition and Consumer Act 2010 (Cth) which invests State Courts with federal jurisdiction to hear and determine such matters.*

The Cross Vesting Laws:

In 1987, both the Commonwealth and State Parliaments passed the Jurisdiction of Courts (Cross Vesting Actions) Acts.

SO (but note the court changed this in **Re Wakim 1999** below), in the later 1980s the States passed similar legislation, as did the Cth, titled the "**Jurisdiction of Courts (Cross Vesting Actions) Acts"**

- **Jurisdiction of Courts (Cross-Vesting) Act 1997, s 5 → compels transfer to another States SC per s 5 if in the interest of justice.**

- The **Cth Act established cross-vesting (x-vesting) courts** → thus, State courts, according to the Act, could hear Fed Court matters and vice versa.
- **AND, the parties were free to select the forum** (i.e. which court to go to)
- This overcame the hassle of choosing which court to state the action in.

Aims/components/features:

1) The first purpose was it conferred jurisdiction of one court to another (in simple terms) – between federal courts and state courts.
    - *The state courts were vested with Federal jurisdiction and the Federal Courts were vested with State jurisdiction.*
    - The act applied to the federal courts, the family courts, and the supreme courts of each state. But it did not apply to the magistrates' court or county courts of each state.
    - The broad purpose of the legislation was that the Federal Court could hear state matters, and State Courts could hear federal matters, which would avoid the need to argue which court does this case belong to.
2) The second aim is this, a case can be transferred in the interests of justice to another court.
    - Because a party could start a case anywhere, the parliament was concerned that there would be an unequal distribution of court business. One party might be cheeky and say I will start my case in NSW even though it was in Victoria, because I know courts in NSW are more generous/or our main office is in NSW etc.
    - Because we have all this cross vesting of jurisdiction, we need some mechanism of control for the distribution of court business
    - S.5 of the Act says that a case can be transferred in the interests of justice

Bank Invest v Seabroke 1988 Court said →

- The crossvesting legislation brings together the SC, Fed Court and Family Court into an organizational relationship.
- The legislation achieves 2 purposes:
    1. It **enables any of these courts to exercise the J of**, and to apply the law which would be applied by, any one of the other courts; and
    2. **Enables any one of these courts to transfer** these cases to any one of the other courts.

BUT THEN - The HC in 1999 said this was not constitutional!!

In consideration of this **first component** – the conferral of jurisdiction between one court and another.

- In 1999, case ***Re Wakim*** **HC** (as seen below) the court declared part of that cross vesting of legislation invalid.

FEDERAL COURTS = NO STATE COURTS = YES

- The HC held very basically, for constitutional reasons, that a federal court could not be invested with State jurisdiction – constitutionally invalid.
- Fortunately, every other part of the legislation was declared to be valid – SO State Courts could have federal jurisdiction, and it also meant that State Courts from other jurisdictions had power of courts in other jurisdictions.

Re Wakim 1999 HC said:

- Federal courts cannot exercise State powers. This was unconstitutional.
- However, State courts could exercise Federal powers.
- That is, the HC held that the x-vesting legislation was constitutional and valid in every respect expect for the provisions of the Act which conferred State powers on Federal Courts.

The 2nd component / aspect of this finding is important.

- S.5(2) provides that at the instance of a judge or one of the parties, a case can be transferred in the interests of justice to a **more appropriate court**.
    - At the instance of the judge acting on his or her own motion, at the instance of a party, at the instance of the state or the Commonwealth, a case can be transferred etc…
- The criteria for a case to be transferred to a **"more appropriate court":**
    - A case shall be transferred to a more appropriate court **in the interests of justice**

The x-vesting legislation empowered one court to transfer to another court (**valid**)

- The x-vesting said this (HC decelerated valid) → "**On the motion of the court itself, or the party to a proceeding, one case could be transferred from one court to a *more appropriate* court.**"
- Thus, a case can be transferred to a more appropriate court if 1 requirement was fulfilled → **that requirement is** → "If it was in the ***interests of justice*** that it be so transferred."

Summary:

- ***The guiding principal as to whether a case is transferred to a more appropriate court, is what the interests of justice dictate.***
- Thus, the court has an unfettered power to determine what the interests of justice are. **These interests are considered case-by-case and not controlled by judges comments in other cases**!!!! (i.e. unencumbered by prior decisions)

DG v Commonwealth Serum Laboratories – Vic SC 1991

Facts:

- P was infected with HIV, and he or she alleged that they were infected with HIV through the negligence of the CSL and or the negligence of Brisbane North Regional Health Authority, and or through the negligence of the Australian Red Cross.
- P sued the three defendants from the SC of Victoria.
- The three defendants applied for the case to be transferred to a "more appropriate Court" – the SC of Queensland.
- Decision for the Court was, can the case be transferred to the more appropriate court – SC of QLD?
    - Was it in the interests of justice that the case be transferred?
- P started the case in Victoria, but was infected whilst in QLD. Ds were saying that they should start their case in QLD as the more appropriate court.
- SC of Victoria did in fact hold that the SC of QLD was the more appropriate court.
    - Because:
        - The P resided in QLD
        - All of the P's treatment took place in QLD
        - The cause of action probably arose in QLD
        - The hospital where P received treatment was in QLD
        - Doctors who treated P were in QLD
        - There would have been a high degree of inconvenience, expense and hardship if all of these people were required to come down to Victoria.
    - In the interests of justice, the case should be transferred to the more appropriate court, that being the SC of QLD.

Must know:

BHP Billiton Ltd v Schultz (2004) 221 CLR 400 – Leading case

The facts of this case highlights why there was such a need for the legislation to provide for the transfer from one court to another.

Facts

- Shultz got asbestosis and claimed it was from working for BHP in Wialla
- Shultz lived in SA
- Shultz brought a claim in the Dust Diseases tribunal of NSW and alleged against BHP and others, negligence, Breach of contract, and a breach of statutory duty. He also sued 4 other corporations, alleging similar things.
- BHP applied under the x-vesting legislation to have the matter removed from the tribunal to the NSW SC, and then from the SCNSW to the SC of SA.
    - This is b/c the x-vesting legislation only applies to State Courts (fed courts and family courts – not the Dust Diseases Tribunal).
- So consider this → Shultz lived in SA, but started his case in NSW, but BHP was incorporated and registered in Victoria, but carried on its business in SA and NSW. The other companies had similar issues and some were incorporated overseas (England – registered as foreign corporation in NSW), another D incorporated in Canberra, another in NSW.
- SO WHICH COURT HAS JURISDICTION?
- Also can see the need for this legislation. If Shultz started this case in NSW SC, BHP could have said wrong Court let Shultz start his case in SA.

Held

- HC said they take a 'nuts and bolts approach'
- The **only criteria** for a case being transferred is **'in the interests of justice'** cf the interests of one of the parties.

Points that arise from this case:

- The party that wants to move a case to the more appropriate court does not have to show that the court from where the proceedings started was inappropriate.
- The question is a simple one, either the case is transferred or not transferred in the interest of justice.
- To decide what is in the interest of justice the courts adopt a 'nuts and bolts' management decision as to which court in the pursuit of the interest of justice is the more appropriate court.
- The court is told by parliament that a case shall be transferred in the interest of justice. There is a statutory requirement for the transfer of a case in the interest of justice.
- What has to be shown is that another court is the more appropriate court.
- Usually the court asks this: which is the more natural forum/court to hear this case? Which court has a closer connection with the cause of action?
- FACTORS which are useful in deciding the question of which court has the most natural forum/closer connection**:**
- ***He is not giving us these factors, we have to find them.*** *BUT he is providing cases:*
- Best on Parks (below) AUSTLII VIC SC 2008 & **Irwin v State of Queensland 2011 SCV – sets out all the principles you need to know**

Best On Parks Management v Sexton VSC 2008 para 5-6

This cases summarized the principles of Shutlz:

- *"In deciding the application, the court must consider whether it is in the interests of justice that the proceeding be heard in the Supreme Court of another state.*
- *This involves the court undertaking a "nuts and bolts management decision",[2] to decide which court is the "more appropriate" forum,[3] in the sense that it has the most real and substantial connection with the subject matter of the proceeding. It is not necessary to conclude that the proceeding has been issued in a "clearly inappropriate" forum.[4]*

- *The possible factors have been described as "legion" → factors which may be relevant include:*
  - The connection b/w the parties
  - The alleged conduct and jurisdiction
  - The governing law of the dispute
  - Any choice of jurisdiction clause
  - Issues of cost and convenience to parties, including where parties live and carry on businesses,"
- If it appears that it is in the interests of justice for the case to be transferred, s 5 obliged the court to do so.

Mutch v BHP Billiton Ltd [2015] VSC 253

Facts

- Application to transfer proceeding to Supreme Court of South Australia — Claim in tort for personal injury through exposure to asbestos in South Australia from 1969–1979 — Plaintiff long since residing in Victoria.

Issue

- Whether proposed transfer in the interests of justice — Jurisdiction of Courts (Cross-Vesting) Act 1997, s 5(2)

Reasoning

- Both sides in Schultz proceeded on the basis that the task for the court was simply a "balancing exercise" in relation to a long list of possibly relevant "connecting factors". Neither side had submitted that the relevant principles required that the place of the alleged wrong be treated as the starting point, or that it be given any particular weight among relevant factors.
- In the present case … counsel for BHP … submits that the place of the wrong should indeed be taken as the starting point and should indeed be given particular weight in every case. I accept that submission.
  - *Generally speaking, the place of the wrong will be the "natural" forum or the forum which will give effect to the "reasonable expectation of the parties", especially if the parties are resident there: O'Donnell [2013] VSC 115.*

Finding and Rule:

- *"Although **the place of the wrong should be taken as the starting point** and should be given particular weight in every case, **nevertheless in a particular case there may be countervailing factors** or other circumstances of such a kind that, **considering the matter overall, it will not appear** to the original court **that it is in the "interests of justice"** that the relevant proceeding be determined by the courts of the place of the alleged wrong. As will appear, that is the situation here."*

Summary

- Diff between Mutch and Schutlz is that Mutch 2015 determined that the place of the wrong should be taken as the starting point as to what is in the 'interest of justice' cf a mere 'balancing exercise'.

Irwin v State of Queensland [2011] VSC 291 – Summarises all the principles

- FACTS: Mrs Irwin's son, Brett Andrew Irwin, was murdered in Brisbane whilst on police duties. Mrs Irwin was residing in the Northern Territory at the time. She now lives in Melbourne. Mrs Irwin claims to have suffered psychological and psychiatric injuries as a result of her learning of the death of her son. She has issued proceedings in the Supreme Court of Victoria claiming negligence on the part of the Queensland Police in dispatching her son to the home of the man who murdered him.
- **[8]** The preamble to the Act relevantly provides: Whereas inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable — … if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceedings will be transferred to the appropriate court.
- **[10]** The High Court of Australia held that provisions of the federal cross vesting statute were invalid that authorised the Federal Court to exercise jurisdiction (whether original or appellate) conferred on it by State law relating to cross-vesting of jurisdiction. This did not affect the validity of the scheme for cross-vesting between the Supreme Courts of the States.

- *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See discussion by Gummow J in *Schultz* at [47].

- **[12]** A court may transfer a proceeding on its own motion as well as on the application of a party or on the application of the Attorney-General of Cwth or of a State or territory (s5(7))

[14] The relevant principles may be summarised as:

(a) The Act requires that the [first] court should exercise the power of transfer whenever "it appears" that it is in the interests of justice that it should be exercised.[9]

(b) It is not necessary that it should appear that the first court is a "clearly inappropriate" forum.[10] It is both necessary and sufficient that it appears that, in the interests of justice, **the second court is more appropriate** than the first court.[11]

(c) The court is not concerned with the problem of a court, with a prima facie duty to exercise a jurisdiction that has been regularly invoked, asking whether it is justified in refusing to perform that duty. Rather, the court is required by statute to ensure that cases are heard in the forum dictated by the interests of justice.[12]

(d) The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so the interests of the respective parties, which might in some respects be common (as for example cost and efficiency) and in other respects conflicting, arise for consideration.[13]

(e) The power to exercise the jurisdiction is not a discretionary power but a mandatory obligation. No question of discretion arises.[14]

(f) It is inapt to speak of an applicant for an order for transfer as bearing a burden of persuasion analogous to an onus of proof.[15] Rather the jurisdiction must be exercised when "it appears" to the court that "it is in the interests of justice" that the proceeding be determined in the Supreme Court of another State or Territory rather than the court of where the proceeding has been issued.[16]Unless it so appears, the court does not have power under the Act to transfer the proceedings. To that extent it may be said that an applicant assumes some onus of persuasion.

(g) The court should adopt what has been described as a "nuts and bolts" management decision as to which court, in the pursuit of the interests of justice, is more appropriate to hear and determine the substantive dispute.[17]

(h) The appropriate court is the natural forum as determined by connecting factors to that forum.[18]

(i) Relevant connecting factors include matters of convenience and expense[19] such as availability of witnesses, the places where the parties respectively reside or carry on business, and the law covering the relevant transaction.[20]

(j) In many cases there will be a preponderance of connecting factors with one forum so that it can readily be identified as the most appropriate of natural forum. In other cases, there might be significant connecting factors with each of the two different forums. Some of the factors might cancel each other out.[21]

(k) If the action is between two individuals, and the plaintiff resides in one area and the defendant in another, there may be no reason to treat the residence of either party as determinative, although it would ordinarily be the residence of the defendant that is important to establish jurisdiction.[22]

(l) **Factors** which may be relevant to a tortious action are:[23]

(i) The place where the wrong occurred.

(ii) Residence of the parties and where it is an individual, the place where he or she resides, and in the case of a corporation where it carries on business. The latter is not necessarily its place of registration, although of course the latter is important to ensure jurisdiction.

(iii) The convenience of the parties and witnesses. However in this day and age this factor may not carry substantial weight because of the ability to move witnesses around Australia at small expense and little inconvenience, and also because the provision of evidence by audio visual link.

(iv) The law governing the proceeding.

(v) The experience of a particular court and its ability to provide an efficient and speedy trial, for example a court with a particular evidentiary and procedural rules hearing particular types of cases.

(vi) The condition of a party, for example, in a personal injury case where life expectancy of the plaintiff is limited requiring a speedy outcome.[24]

(m) As a general rule significant weight is to be attached to the place of the tortious wrong and the residence of the parties in a personal injury claim arising out of a claim in tort.[25] Where the place of the tort and the residence of the parties coincides, this will generally be determinative of the issue of the appropriate court although other factors may need to be assessed in the process of determining where the interests of justice lie.[26]

(n) A relevant factor is whether the coincidence of the lex fori[27] and the lex loci delicti[28] will avoid debates concerning substantive and procedural law.[29]

(o) The plaintiff's choice of forum by itself is not a relevant connecting factor.[30]

(p) Each case depends on its own particular facts.[31]

(q) The list of connecting factors is impossible to state exhaustively. Equally the weight to be given to each factor must vary from case to case.[32]