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Topic flowchart summaries

Foundational principles

- Fair trial (p. 2)
- Open justice (p. 2)
- Adversarial system of litigation (p. 4)

Determine jurisdiction

- matters arising under treaty, affecting consuls, where party is the Commonwealth, matters between states, appeals from lower court: High Court
- all civil matters originating under federal law, including matters arising under the Constitution, industrial disputes, corporations, trade practices, native title, judicial review and federal tax matters: Federal Court of Australia (FCA Act 1976)
- divorce and children-associated matters: Family Court of Australia (Family Law Act 1975)
- family law and child support transferred from Family Court, admiralty, administrative law, bankruptcy, intellectual property, human rights, industrial law, consumer law, privacy law, and migration: Federal Circuit Court
- Appeals from District, Land and Environment Court and some tribunals: Supreme Court of NSW Court of Appeal
- claims involving the general law, including common law actions, intentional torts and commercial disputes up to \$750,000: District Court (s 4(1) of the *District Court Act 1973*)
- appeals from Local Court and Children's Court, motor accident personal injury cases irrespective of amount: District Court
- claims up to \$100,000 except for personal injury or death: General Division of Local Court (s29 of Local Court Act 2007)
- claims up to \$10,000: Small Claims Division of Local Court (s29 Local Court Act 2007)
- claims for damages arising from personal injury or death up to \$60,000: General Division Local Court
- matters concerning mental health issues, some family law matters, children's criminal proceedings, coronial matters: Local Court

Case management

1. Interpret rules according to overriding purpose in s56 of CPA (p. 14)
2. Have regard to the objects of case management in s57 (p. 15)
3. In deciding according to dictates of justice (s58) have regard to the extent to which parties have complied with their duty to further the overriding purpose and assist the court (*Triple Take v Clark Rubber*) -- see examples of specific circumstances (p. 15)
4. Balance case management and individual justice - court 'must seek' to further overriding purpose (*Dennis v ABC*) and therefore have to consider interests of other litigants in system (*Sali v SPC Ltd*) (p. 18)

Lawyer Ethics

- Primary duty to the court (s56 CPA, Legal Professional Uniform Australian Solicitors' Rules 2015 and Legal Profession Uniform Conduct (Barristers) Rules 2015) (p. 19)
- Legal Profession Uniform Law Application Act 2014 (p. 21)
- Model Litigant Policy (p. 22)

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W1 L1 - Process, Open Justice and Fairness Adversarial System of Civil Litigation

General

Formal and informal systems that process justice

Formal

- In determining the merits in individual disputes, the judiciary are publicly stating the law, reinforcing norms of social and economic behaviour, identifying the limits of executive power and publicising the values of the society
- The public value of civil justice is in reinforcing values and practices. It comes from authoritative statements of what the law is, who has rights and how those rights are to be vindicated.
- What arrives at the court is to some extent a reflection of access to justice or the resources of the parties to proceed as far as adjudication and, indeed, appeal. Those cases that reach appeal reflect patterns of access to the courts
- The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait

Differences between civil and criminal processes

- the civil justice 'system' is arguably more varied and complex than the criminal justice system; criminal = set of processes leading to prosecution by State vs individual; civil = wide range of potential claimants and defendants with many different party configurations, utilised as a matter of choice, last resort
- Different penalties - criminal = incarceration/imprisonment, fines and forfeitures, probation, community services, and sometimes restitution to the individual victim, civil = monetary compensation or other agreement
- Burden of proof - beyond reasonable doubt vs on the balance of probabilities
- Parties - citizen vs citizen, state v citizen

- policies for reducing the number of cases issued in court in certain categories may impact work in other areas and inevitably lead to a loss of income for the civil justice system as a whole
- civil justice system = substantive law, machinery and procedures for vindicating and defending civil claims – in effect, the entire system of the administration of justice in civil matters

Procedural law and its sources

Definition: "*rules which are directed to governing or regulating the mode or conduct of court proceedings*"

McKain v RW Miller & Co (1991), Mason CJ

- Governed by lex fori (laws of the court) as opposed to *lex loci delicti* (applicable law in places where misconduct took place); therefore procedural rules are rules of state where case litigated, not where misfeasance committed
- Litigants must take the court as they find it (**John Pfeiffer Pty Ltd v Rogerson**)
- without an effective civil justice system, substantive civil laws are no more than words and that the rule of law becomes an 'aspiration' rather than a reality
- **Purposes:** facilitate dispute resolution, provide due process, promote access to justice, ensure processes are in place through which substantive justice can be achieved, giving the judicial system legitimate authority
- **Challenges:** balance between efficiency and substantive justice, balancing competing demands

Definitions (from Encyclopedic Australian Legal Dictionary)

- **Substantive law:** "The branch of the law which creates, defines, and regulates people's rights, duties, powers, and liabilities; the actual rules and principles administered by the courts, including legislative and common law principles. Substantive law is to be contrasted with 'adjectival' or 'procedural' law, concerned with the method of enforcing rights and duties, in particular the rules of procedure and evidence."
- **Procedural law** "A body of rules prescribing the manner, form, and order in which matters may be dealt with and enforced in a judicial forum. Procedural law includes the formal steps to be taken in an action, such as pleading, process, evidence, and practice. In conflict of laws, the procedural law to be applied is that of the *lex fori*. It is to be contrasted with the *lex causae* or governing law, which is the law that is applied to determine all substantive questions."

Sources of civil procedural law

- Civil Procedure Act 2005 (NSW)
- Uniform Civil Procedure Rules 2005 (NSW)
- Court rules: Supreme Court, District Court, Local Court
- Practice notes delivered by the court
- Evidence Act 1995 (NSW)

Jurisdiction

- **Superior courts** of record = inherent jurisdiction to regulate their processes; District and Local Courts have limited jurisdiction (arises from statute or implication from statute)
- Superior courts have inherent power because they are responsible for administration of justice not only in their court, but in the courts below them; stems from supervisory function of King's Bench
- **Magistrate's courts** have no responsibility for administration of justice beyond their constitution; whatever power they have to dictate procedural rules stems from statute (**Grassby v R**, Dawson CJ) and from the implication that a grant of power carries with it everything necessary for its exercise (**TKWJ v R** (2002), Gaudron J);

i. "necessary" means "subject to the touchstone of reasonableness", not "essential" (must be "reasonably required or legally ancillary to the accomplishment of specific remedies") (**Pelechowski v Registrar**, Court of Appeal NSW (1999))

The principles of open justice and fairness

Open Justice

- *"one of the great protections against the exercise of arbitrary power and an assurance that justice is administered fairly and impartially"* (**R v Richards & Bijkerk**)

Power to close justice

Authority

- S71 of CPA
- Court Suppression and Non-publication Orders Act 2010
- Court's implied jurisdiction (inherent power of superior court to close justice)

Principles

- Must be *"really necessary to secure the administration of justice"* (**John Fairfax & Sons v Police Tribunal of NSW**)
- *"wholly exceptional circumstances"* (**John Fairfax**), not just useful or desirable; purpose is to prevent unacceptable circumstances (John Fairfax, Mahoney JA) because these would be detrimental to proper function of the court, justified by reference to the *"necessity of such orders in the administration of justice"* (**Hogan v Hinch, JJ**), can be closed where observance *"would frustrate the administration of justice or some other public interest"* for whose protection Parliament has modified the open justice rule: (**Rinehart v Rinehart**)
- e.g. vindicating the activities of a blackmailer, police informant, police officer, secret technical processes, exceptional circumstances relating to national security, proceedings involving the mentally ill (parental jurisdiction), where disclosure of the information would seriously affect the commercial value of the subject matter by revealing secret processes or confidential business information to competitor, proceedings not in ordinary course of litigation (e.g. leave for appeal) (**Hogan v Hinch**), privacy, delicacy, confidentiality (**Russell v Russell (1976)**)
- Statutory provisions must be construed in such a way as to *minimize intrusion upon the principle of open justice* (**Hogan v Hinch**)
- in general parties have to *accept the embarrassment and damage to their reputation* (**Rinehart v Rinehart**)

CIVIL PROCEDURE ACT 2005 - SECT 71

Business in the absence of the public

71 Business in the absence of the public

(cf Act No 52 1970, section 80)

Subject to any Act, the business of a [court](#) in relation to any [proceedings](#) may be conducted in the absence of the public in any of the following circumstances:

- (a) on the [hearing](#) of an interlocutory application, except while a witness is giving oral evidence,
- (b) if the presence of the public would defeat the ends of justice,
- (c) if the business concerns the guardianship, custody or maintenance of a [minor](#),
- (d) if the [proceedings](#) are not before a jury and are formal or non-contentious,

- (e) if the business does not involve the appearance before the court of any person,
- (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
- (g) if the uniform rules so provide.

Principle of a fair trial

- There are numerous jurisdictions in which a right to a fair trial is enshrined, in those terms, either in a Constitution or in a statute of general, and often overriding, application. That is not the case in Australia
- In Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes: "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice and unfairness. " (**Walton v Gardiner** (1993))
- The court cannot turn a blind eye to vexatious and oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible
- "The question is ... whether the court, whose function is to dispense justice with impartiality both to the parties and to the community which it serves, should permit its processes to be employed in a manner which give rises to unfairness." (**Jago v District Court (NSW)** (1989))
- "second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice" (Richardson J in the New Zealand Court of Appeal in a passage cited with approval in the High Court in **Jago**)

Right to legal representation, right to a fair trial

In **Dietrich v The Queen** (criminal matter; Dietrich charged with drug importation, question was whether Dietrich had a right to legal representation), Mason CJ and McHugh J said:

- Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial
- The justices also concluded that when an accused, through no fault of their own, does not have legal representation when charged with a serious offence, a judge may order the trial be delayed (stayed) until legal representation is available
- The court held that the seriousness of the crime is an important consideration: 'the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only', where custodial sentence and real chance of acquittal present then legal representation is likely required

Constitutional protection

- As Brennan, Deane and Dawson JJ pointed out in **Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs** (1992) 176 CLR 1 at 27,20 "the legislative power of the Commonwealth does not extend, to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power"
- The dominant view now appears to be that some form of protection of procedural rights is inherent in Ch III, although there is no clear majority decision to that effect.
- Principle of a fair trial so fundamental and unlikely to be modified by legislation that it is essentially part of constitutional law

Miscarriage of justice

- "All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result." **Stead v State Government Insurance Commission** (1986)
- Adapting the remarks of Gleeson CJ in **Re Refugee Review Tribunal; Ex parte Aala** (2000) 204 CLR 82 at [4], albeit in a case where the Tribunal had taken into account material of which the prosecutor was not aware, it is possible that, even if the trial judge had given careful and accurate attention to all of the evidence, he would ultimately have come to the same conclusion. Gleeson CJ continued:

"But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive."
- Because the Appellant did not have a trial untainted by material factual errors, he can properly complain that he has not had his case considered according to law. That in itself constitutes a substantial miscarriage of justice, a phrase which cannot be limited to an assessment of the ultimate outcome, particularly where it is not in the power of this Court to make that assessment for itself.

Adversarial system of litigation

Main features

	Adversarial	Inquisitorial
Judge's role	A reactive, impartial judge who acts as an umpire	Judge's role is proactive and inquisitive
Who directs	Party controlled dispute	Judge-controlled dispute
Sources of law	Use of precedent, procedural rules and laws of evidence	Main sources of law are codes with commentary from legal scholars
Courtroom practice	Rigid courtroom practice	There are minimal rules of courtroom practice
Type of evidence	A reliance on oral testimony which is adduced from witnesses and is subject to cross examination, use of oral arguments	Emphasis on documentary proof not cross examination

Trial vs pre-trial	The trial is the climactic end of the litigation process (distinct from pre-trial stage)	No rigid separation between pre-trial and trial phases
Use of transcript	Use of the trial transcript for an appeal	No use of transcript to record court proceedings

Issues and reforms

- Restricts access to justice
- Approaching litigation like a card game in which the opponent doesn't see the other's cards until the last moment
- Delivers more procedural justice than substantive justice due to imbalances stemming from representation (reliance on orality means best lawyer more likely to win case), hand-picking of juries and expert witnesses

Lord Woolf's enquiry recommendation

- Early settlement of disputes
- Greater use of ADR
- Single expert witnesses
- Encouraging cooperation amongst lawyers
- Reduction of issues as basis for case preparation
- Moving to trial as quickly as possible if settlement not viable
- Use of overriding objectives in court rules

Impact of Lord Woolf's enquiry in Australia

- ALRC inquiry (Review of Adversarial System of Litigation)
- There is now a clear statutory duty to assist the court (CPA s56), requirement to be clear and precise in the illumination of issues for trial (**Baulderston Hornibrook Engineering v Gordian Runoff**)

Level of reform regulated by funding

- All that the community can demand is that a public service's funding is commensurate with available public resources and with the importance of the benefits that it has to deliver
- Adequate - efficient (not wasteful), effective (time, accuracy, proportionate resources) and fair (resources justly distributed)

The adversarial system and orality

- Relies on oral arguments that can be cross-examined in order to convince an impartial, uninvolved judge
- A reactive, impartial judge who acts as an umpire
- A reliance on oral testimony which is adduced from witnesses and is subject to cross examination, use of oral arguments
- The trial is the climactic end of the litigation process (distinct from pre-trial stage)
- Use of the trial transcript for an appeal (oral arguments key to appeal)