

1.11. Civil Procedure Themes and Case Management

- 🗣️ **Civil procedure** is the body of law governing the process of litigation undertaken by private parties (mostly individuals or corporation).
- 🗣️ **Criminal procedure** governs cases where the State prosecutes an individual or corporation for offences or breaches of legislation.
- 🗣️ **Substantial law** is concerned with the establishment of a right.

Criminal Procedure	Civil Procedure
State vs Defendant	Private vs Private (include government)
State more powerful	Party power can be uneven
Outcome is punishment or nothing (if defendant wins)	Many possible outcomes usually involving money
Police and courts have major role in enforcement	Courts and individuals enforce (bailiff, sheriffs)
Higher profile in media	Affects more people
Small body of law applies	Huge body of law applies
State bears most costs	Individuals bears most costs

- The decision maker in the inquisitorial system takes a more **ACTIVE** role
- Witness called for by the judge therefore hopefully less biased
- Heavier reliance on written documents
- Less reliance on legal representation
- Cost of the inquisitorial is relatively cheaper than the Adversary system

Adversarial System v Inquisitorial System

Adversarial System	Inquisitorial System
Court decisions form precedent, binding on future decisions.	Mainly codified law. Prior cases are merely persuasive.
Trials are lengthy and involve extensive evidence.	No rigid separation between trial & pre-trial phases, as a consequence, cases are much shorter generally.
Judge as umpire --- impartial; role is reactive . Given the parties' opportunity and responsibility for mounting their own case the system is more participatory.	Judge's role is proactive and inquisitive . The greater directorial role of the judiciary allows less room for the parties to direct their own case. In this sense the system is more hierarchical than participatory.
Emphasis on oral argument and evidence especially cross-examination.	Strong emphasis on documentary proof. Virtually no cross-examination and often no physical hearing. (i.e., entire matter heard "on the papers").
The judiciary possesses an inherent and separate power to adjudicate.	An officers of the state the judiciary possesses no separate and inherent power to adjudicate.
Court-room practice may be subject to rigid and technical rules.	Rules relating to court-room practice are intended to be minimal and uncomplicated.
Parties bear the costs.	A great proportion of the effort and expense of dispute determination through litigation falls on the state.

1.11. Civil Procedure Themes and Case Management

Perceived problems with civil procedure:

- cost
- delay
- lack of access (usually due to cost and delay)
- uncertainty
- unfairness
- excessive complexity

Overriding purpose (s56 of CPA)

The overriding purpose of civil procedure can be summarised as 'efficiency'.

- Section 56 of the Civil Procedure Act 2005 (NSW) prescribes the "just, quick and cheap" resolution of civil proceedings to be the 'overriding purpose' of civil litigation.
- The provision is overriding in the sense that when the court exercises procedural powers, it must always have regard to this purpose: [s56\(2\)](#).
- Furthermore, any parties or legal practitioners which are part of the proceedings must also assist the court in achieving this objective: [s56 \(3\)\(4\)](#).

Civil procedure themes -- Balancing competing objectives

Principle of Open Justice

General Principle:

In support of the 'overriding purpose' of civil proceeding, the public is free to observe all court proceedings. This acts as a safeguard to ensure that court proceedings are just as it allows the public to scrutinise the legal process and moreover creates the perception that justice is delivered which instils public confidence into the legal system: [Enfield v R \(No 2\) \[2008\] NSWCCA 243](#).

Exceptions:

- closed court orders (family law)
- non publication orders (defamation)
- pseudonym orders (migration/children)
- orders for anonymous witness, eg. use of screens, CCTV, pseudonym orders: [Witness v Marsden \(2000\) 49 NSWLR 429](#)
- confidentiality of documents: [NAK Australia Pty Ltd v Starkey Consulting Pty Ltd \[2008\] NSWSC 1136](#); [Seven Network \(Operations\) v James Warburton \(No1\)](#)
- **section 71 of the CPA** provides a broad range of categories in which proceedings can be conducted **in the absence of** the public.
 - (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.
- **Court Suppression and Non-Publication Orders Act 2010** empowers Court to make a suppression or non-publication order

1.11. Civil Procedure Themes and Case Management

- Is in addition to inherent power (s4)
 - s6 provides the court "must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice."
 - s7 set out the power to grant orders
 - s8 Grounds for making an order
- (1) A court may make a suppression order or non-publication order on one or more of the following grounds:
- (a) the order is necessary to prevent prejudice to the proper [administration of justice](#),
 - (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
 - (c) the order is necessary to [protect the safety of any person](#),
 - (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a [sexual nature](#) (including an act of indecency),
 - (e) it is otherwise necessary in the public interest for the order to be made and that [public interest significantly outweighs the public interest in open justice](#).
- (2) A suppression order or non-publication order **must specify the ground** or grounds on which the order is made.

Principle of a Fair Trial

General Principle:

The elementary right of every accused person to a fair and impartial trial.

However, due to the courts' inherent ability to control its own processes, there is a duty on the courts to **prevent the abuse of process**. This helps to **maintain public confidence** in the justice system because **justice delayed is justice denied**, i.e., delay and cost prevent justice.

Conflicts between: the right to a fair hearing and procedural equality.

UCPR r51.53 Circumstances in which Court may **order new trial**

- (1) The Court **must not** order a new trial on any of the following grounds:
- (a) misdirection, non-direction or other error of law,
 - (b) improper admission or rejection of evidence,
 - (c) that the verdict of the jury below was not taken on a question that the trial judge was not asked to leave to the jury,
 - (d) on any other ground,
- unless** it appears to the Court that some [substantial wrong or miscarriage has been thereby occasioned](#).
- (2) The Court may order a new trial on any question [without interfering with the decision on any other question](#).
- (3) If it appears to the Court that some ground for a new trial affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that part only, or as to that party or those parties only....

The majority held that in spite of the principle of fair trial, not every departure from the rule of natural justice will entitle the aggrieved party to a new trial. An appellate court will not order a new trial if the denial of natural justice does not have a material effect on the outcome of the trial.

Stead v State Government Insurance Commission (1986) 161 CLR 141

The tension/conflicts between efficiency and justice

All three have the power to cost money, waste time and cause negative emotions but the latter two can also cause injustice and unfairness.

- **the dispute between parties.**
- **procedural justice vs substantive justice.**
 - The best procedure is the fastest and cheapest but this risks substantive injustice.

1.11. Civil Procedure Themes and Case Management

- The closest thing to the "right answer" (substantive justice) may be procedurally unfair because it is likely to be expensive and slow.
- If process takes too long it becomes procedurally unjust that it is also substantively unjust (eg. dead witnesses, parties giving up)
- **lawyers' conflicts of interest.**
 - It is commonly acknowledged that procedural efficiency means procedural justice.
 - However, courts often fail to deliver efficient judgments.
 - One likely reason is that procedural efficiency is not often in lawyers' best interests.
 - In large litigations, lawyers have a conflict between the best interest of their clients and the court and their own best interest.
 - Lawyers need to earn a living (efficiency reduced fees).
 - Lawyers become emotionally entangled (they want to win to prove they are right).
 - Lawyers fail to see the conflict between personal interest and client best interest.
 - Lawyers are trained in self delusion (we learn to objectify real life into legal principles).
- **Legal Profession Act 2004 (NSW)** s 347 provides that legal practitioner's must not may a claim unless there is reasonable prospects for success.

The Cost of Litigation -- Litigation Deterrents

The litigation process is inherently stressful for any party, in particular an individual. Ms Richards embarked upon a time-consuming, stressful and potentially very expensive process. ...

That stress includes the uncertainty and concern as to the effects of legal costs that can lead to bankruptcy and financial ruin. The reality of the personal strain of litigation is now clearly recognised by the Courts...

- Case concerned events in 1990's
- The proceedings ran for 13 years prior to trial
- There were 404 hearing days between 2003–2006.

Sackville J: "This case is an example of ..mega-litigation."

- 120 hearing days
- Discovery electronic database containing 85,653 documents, comprising 589,392 pages
- Seven produced 1,556 pages of written Closing Submissions in Chief and 812 pages of Reply Submissions.

Emotional Cost

Litigation is stressful for everyone involved.

Richard v Cornford (No 3) [2010] NSWCA 134

Time Cost

The Bell Group Limited (In liq) v Westpac Banking Corporation No 9 [2008] WASC 239

Financial Cost

Seven Network Ltd v News Ltd [2007] FCA 1062

It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.

Types of Financial Cost

Cost are often used as the inducement for parties to settle rather than an instrument of punishment. Cost orders are a significant aspect of most civil litigation and are not intended to indemnify a party against every expense it has incurred. Usually, costs only cover legal expense incurred and payments necessarily made in prosecuting or defending the claim: ***Cachia v Hanes (1994) 179 CLR 403.***

Cost Disputes

- Litigation funding is a growing industry, particularly for class action.
- There might be no order as to costs, that is to say, **each party bears its own costs.**
- Two types: party-party and solicitor-client:
 - **solicitor-client costs**: all costs incurred according to contract with solicitor
 - **party-party costs**: costs that court usually orders one party to pay another party
 - can be ordered on an ordinary basis or an indemnity basis: **s98 (1)(c) of CPA**
 - indemnity basis = all costs incurred except those unreasonably incurred.
- Party-party costs generally follow the cause, i.e., the loser pays.

1.11. Civil Procedure Themes and Case Management

- A defendant may obtain security for costs to ensure another can pay an adverse order.
- Settlement offers can alter the allocation of costs between parties.
- Courts use costs as a remedy and deterrent, including for interlocutory skirmishes.
- Lawyers have significant obligations and rights regarding costs.
- **Section 56(5) of CPA** provides the litigants with the responsibility of ensuring that the overriding provisions are satisfied. Otherwise costs may be awarded against them.

Calculating Financial Costs

- The power to award costs is in the discretion of the court: **s98 of Civil Procedure Act 2005 (NSW)**.
 - Costs awards are compensatory.
 - **Costs generally follow the event: UPCR r 42.1**. Such an order acknowledges that a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party and that fairness dictates that the unsuccessful party typically bears the liability of costs.
 - Can be calculated on different bases
 - Disciplinary element : who is to pay, and on which basis
 - Indemnity costs is an exceptional order

Civil Procedure Act 2005 (NSW)

98 Courts powers as to costs

(1) Subject to rules of court and to this or any other Act:

- (a) costs are in the **discretion** of the court, and
- (b) the court has **full power to determine by whom, to whom and to what extent** costs are to be paid, and
- (c) the court may order that costs are to be awarded on the **ordinary basis** or on an **indemnity basis**.

....

(3) An order as to costs may be made by the court **at any stage of the proceedings** or **after the conclusion of the proceedings**.

.....

Proportionality of Costs

Cost awards reflect the size of award (proportion) and parties' efforts in disclosure, confining issues, etc. The legal costs should not exceed or take up a significant portion of the amount expected to be recovered: **s 60 of CPA**. In doing so, the courts may sometimes only need to achieve adequate justice, not perfect justice: *Zanella v Madden [2007] NSWSC 559*; For example, a request for documents, which have little value and will cause great delays (which will cost thousands of dollars per hour) will be denied in the interest of proportionality of costs: *Vella v Australia & New Zealand Banking Group Ltd [2008] NSWSC 209*.

60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is **proportionate to the importance and complexity of the subject-matter in dispute**.