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1 INTRODUCTION TO LITIGATION

Topic	Issue	Case/Legislation
1.1 Procedural Law	What is procedural law and why is procedural law important?	<i>Basic rules about procedural law</i> – Definition: rules which are directed to governing or regulating the mode or conduct of court proceedings – The way in which substantive rights and obligations are claimed and enforced – It is not substantive law – The basis of procedural law could be procedural fairness or due process: the rule ensures that the parties are aware of the case (subpoena) they have to meet and allow the parties to be heard. – Promoting access to justice.
	Judging civil justice	– A ritual of extreme social significance – The power of procedure was in the link between evidence and correct decisions and the role of procedure in achieving accuracy in decision making. – Procedural rules reflect a sense of justice – Fair procedures make losing more acceptable (the legitimacy of decision) – A reasonable balance between cost/efficiency and accuracy/justice. (e.g. 28 days default judgement)
1.2 Source of procedural law	Where do you find procedural law in NSW?	<i>Sources of procedural law</i> – CPA – UCPR – Various court Acts and rules – Practice Notes – Evidence Act

1.3 Inherent and implied jurisdiction		– Supreme Court has inherent and unlimited jurisdiction for the administration of justice – Inferior courts such as District Court and Local court have implied and limited jurisdiction, no general responsibility for the administration of justice beyond the confines of its constitution (based on the principle that a grant of powers carries with it everything necessary for its exercise). (<i>inferior courts cannot act beyond their powers</i>) <i>Pelechowski v Registrar, Court of Appeal (district court exceeds its power)</i> – Facts: P appeals against conviction on a charge of contempt in respect of an order in the District Court; A wide restraining order against a property of the debtors was given by the District Court – HC held: ✓ The District Court order was too wide; the order said: “the order shall continue until further order or payment of the verdict” ✓ Exceeded the implied jurisdiction of District Court: Grassby v The Queen test not satisfied, because <u>DC went beyond what was ‘necessary’ for the effective exercise of the jurisdiction of DC in the enforcement of judgment.</u> – The DC order should have been: ✓ <u>Limited by an undertaking</u> by the judgement creditor <u>to pursue expeditiously the remedies provided by the DC Act or the Bankruptcy Act;</u> and ✓ Expressed to operate in aid of recovery of so much of the judgement debt as might be recouped upon a sale under a writ of execution; or ✓ Expressed as subjected to rights of creditors under an insolvent administration of the affairs of the judgement debtors.
1.4 Guiding principles for procedure	What are the guiding principles for	<i>CPA s 56 Overriding principle</i> – Just, quick and cheap <i>CPA s 56(4) (cannot breach the overriding purpose)</i>

	procedure in NSW?	– A party is under a duty to assist the court to further the overriding purpose and a solicitor/barrister must not, by his or her conduct cause his or her client to be put in breach of this duty.
		<i>CPA s 57</i> – Objects of Case Management
		<i>CPA s 58</i> – Dictates of justice
		<i>CPA s 59</i> – Delay
		<i>CPA s 60</i> – Proportionality
1.5 Adversarial system of civil litigation		<i>Adversarial v. inquisitorial systems</i> – Court room practice subject to rigid and technical rules v. Rules relating to court room practice intended to be minimal and un complicated <i>Reforms of the adversarial system</i> – Encouraging early settlement of disputes – Greater use of ADR – Single expert witnesses; – Encouraging cooperation among lawyers; – Identification and reduction of issues – Move to trial quickly if settlement not possible – Use of overriding objectives in court rules
1.6 Cards on the table approach	What is 'card on the table' approach to	<i>'Card on the table' approach to litigation</i> – The conduct of litigation as if it were a card game (opponents never see your cards until the last moment) is out of line with modern trends;

	litigation? Why is this approach the modern trend?	– The expense of courts to the public is great – Civil litigation is too important an activity to be left solely in the hands of those who conduct it. <i>S 56 of CPA</i> – Duties of parties and lawyers to cooperate with clarity, precision and openness in the conduct of litigation (as opposed to surprise and ambush). Parties need to delineate the real issues in dispute. – Extend beyond pleadings to all aspects of the engagement in the court's processes
1.7 The principle of Open justice and exceptions		– Protection against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially. – Justice must not only be done but be seen to be done <i>Exceptions:</i> – Pseudonym orders to protect the true identity of a witness – Close the court to the public (the proceedings are held in camera) – Witnesses to give evidence behind a screen or via CCTV – Suppression and non-publication orders
1.8 Common law power to depart from the open justice principle		<i>Pros to depart from open justice</i> – Sometimes, justice could not be done if it had to be done in public. (business secrets) – The power to make orders to 'close' justice is an <u>inherent power of a superior court</u> and can be implied as necessary to the proper function of the statutory/inferior courts. – The order have to be '<u>really necessary to secure the proper administration of justice</u>', which means that if the orders were not made, particular consequences will flow, which are unacceptable and therefore the prevention of such consequences is necessary to the proper function of the court. <i>Cons to depart from open justice</i>

		– The consequences may be the hardship on the informer or the security officer or the blackmail victim; – The future supply of information from such persons will end or be impeded, it will be more difficult to obtain from such persons the evidence necessary to bring offenders before the courts and deal with them. For example, a magistrate hearing committal had the implied power to make pseudonym orders protecting the identity of a victim. – Only in “wholly exceptional circumstances” not merely where such measures would be useful or desirable, and would save embarrassment, distress or financial loss.
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