

Table of Contents

Topic 1: Introduction to Our Civil Justice System	2
Topic 2: The Victorian Court Hierarchy	5
Topic 3: Commencement of Proceedings	11
Topic 4: Service of Process	14
Topic 5: Appearance	19
Topic 6: Joinder of Claims and Parties	22
Topic 7: Pleadings	26
Topic 8: Summary Disposition	30
Topic 9: Amendment	34
Topic 10: Discovery	36
Topic 11: Costs	40
Topic 12: The Trial	43
Topic 13: Enforcement	45
Topic 14: Alternative Dispute Resolution	49
Case Law	52

Topic 1: Introduction to Our Civil Justice System

Introduction

- This topic will look at the procedures of bringing a civil action to court and will examine the rules and practices that form the control mechanisms and methodology through which our society litigates and resolves its disputes.
- Substantive law determines a person's rights and duties towards each other.
- Procedural law provides the mechanism for enforcing those rights and duties where they have been transgressed. It provides the 'how'.
- Civil procedure is concerned with the pre-trial processes of bringing a dispute before the court. It 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

Mechanisms of civil procedure

- Each Court within our Court hierarchy has developed rules by which procedures are governed.
 - The Magistrates Court Rules;
 - The County Court Rules; and
 - The Supreme Court Rules.
 - *The Supreme Court Rules 2005 (Vic)*
- The Supreme Court of Victoria is the superior court of Victoria with unlimited jurisdiction: *s85 Constitutional Act 1975 (Vic)*
- The source of the Supreme Court Rules is held in the *Supreme Court Act 1986 (Vic): s25*
- The Supreme Court has inherent jurisdiction so it can regulate its own procedures.
 - The purpose of the inherent jurisdiction is to allow the courts to regulate their process and to prevent abuse of process: *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264
 - The main five purposes are to:
 - Ensure convenience and fairness in legal proceedings;
 - Prevent steps being taken that would render judicial proceedings ineffective;
 - Prevent abuse of process;
 - Act in aid of superior courts; and
 - Aiding or controlling inferior courts and tribunals.

How Courts interpret the Rules of Court

- ◻ *Order 1 rule 14 of the Supreme Court Rules* – contains definitions

The adversarial trial system

- In Australia, the traditional adversarial trial system applies.
- This system has been impacted as a result of the enactment of the *Civil Procedure Act 2010 (Vic)*.
- The adversarial model of litigation is premised upon party control.
 - *Jones v National Coal Board* [1957] 2 QB 55
 - *Hoare v Magistrates Court* [2003] VSC 257
 - *Fookes v Slaytor* [1979] 1 All ER 137
- The traditional adversarial trial system has a number of particular features which can be readily identified:

- It is the parties themselves who determine the track of evidence that is presented to the court and thus it is the parties themselves who select the issues to be litigated and upon which adjudication is sought;
- 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;
- The judge plays a comparatively non-interventionist role, and the court makes its decision based on the evidence and issues presented to it;
- The procedure is designed to concentrate the judicial function into one continuous hearing;
- 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; and
- Where the rules of court are not complied with, in general no sanction will be imposed in the delinquent party except at the request of the non-delinquent party.
- The biggest disadvantages to the adversarial trial system is:
 - Leaving it to the parties themselves to enforce the expeditious preparation for trial;
 - As a consequence, long delays can be experienced before a matter gets to trial;
 - Leaving sanctions to the parties: the adversary philosophy is that the courts will not impose sanctions if the rules of the court are not complied with; thus, although the 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 is that inordinate delays occur before a case finally comes to trial;
 - Traditionally, the adversarial model of procedure is premised on party control: judges played a passive role by not intervening in the preparation or presentation of a case; and
 - Costs of litigation will substantially increase.
- Section 7 Civil Procedure Act 2010 (Vic)
- Case management shifts the control of the process of litigation from the parties to the court.

The impact of case management principles

- Case management by judges and quasi-judicial officers such as Registrars remove the progress of cases from the control of the parties (or their legal representatives).
- The judges and Registrar of each court are now able to set down timetables by which particular steps have to be taken by the parties.
 - Sali v SPC Ltd (1993) 116 ALR 625
 - Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146
 - Aon Risk Services v Australian National University (2009) 239 CLR 175
 - There is substantial public interest in reducing cost and delay so as to facilitate access to the system for other litigants.
 - Cement Australia Pty Ltd v ACCC (2010) 273 ALR 147
 - Sections 47-53 Civil Procedure Act 2010 (Vic)
- The Supreme Court of Victoria has introduced a number of judge-controlled specialist lists operating in its civil jurisdiction.
- The individual docket system has been adopted in all Federal Court registries.
- The individual docket system involves each case being allocated to a particular judge who will ordinarily be responsible for that case from commencement to disposition.

The principles of open justice

- The principle of open justice confers particular benefits on the administration of justice.

- E.g. by acting as a bastion against the exercise of arbitrary power by judges, improving judicial performance, acting as a check on the veracity of witnesses, and allowing parties to litigation to publicly vindicate their rights.
- The phrase open court refers to a place where the public has a right of free access to the matter being heard there.
- There are many common law and statutory exceptions to the principle of open justice that allow courts to make suppression orders or non-publication orders or to close the court if the pre-conditions to the exercise of the power are satisfied.

– Rinehart v Welker [2011] NSWCA 403

