CIVIL PROCEDURE AND DISPUTE RESOLUTION MLL391
HD NOTES – T2 2020

X = legislation
X = cases
X = book, citations, examples

Refer to Sam's 2019 study guide and recordings
*have referred to the 2019 assignment under pleadings, about a statement of claim for a breach of contract

SCR = Supreme *Court (General Civil Procedure) Rules 2015* (Vic)
https://content.legislation.vic.gov.au/sites/default/files/2020-07/15-103sra035%20authorised.pdf
SCA = *Supreme Court Act 1986* (Vic)
SEPA = *Service and Execution of Process Act* 1992 (Cth)
CPA = *Civil Procedure Act 2010* (Vic)

Week	Commencing	Topic	Special learning activities	Assessment activity
1	8 July 2019	1 The System of Civil Justice 2 Commencement of Proceedings	Readings and questions as specified in the Unit Guide	NA
2*	15 July 2019	3 Service of Process; 4 Appearance	Readings and questions as specified in the Unit Guide	NA
3	22 July 2019	4 Appearance (cont.) 5 Joinder of Claims and Parties	Readings and questions as specified in the Unit Guide	NA
4	29 July 2019	6 Pleadings	Readings and questions as specified in the Unit Guide	NA
5*	5 August 2019	7 Amendment	Readings and questions as specified in the Unit Guide	NA
Intra-trimester break: Monday 12 - Sunday 18 August (inclusive)				
6	19 August 2019	8 Discovery and Interrogatories 9 Costs	Readings and questions as specified in the Unit Guide	NA
7	26 August 2019Readings and questions as specified in the Unit Guide	10 The Trial; Summary Disposition	Readings and questions as specified in the Unit Guide	NA
8	2 September 2019	10 The Trial; 11 Summary Disposition	Readings and questions as specified in the Unit Guide	NA
9	9 September 2019	11 Summary Disposition 12 Enforcement	Readings and questions as specified in the Unit Guide	First Assessment (Assignment) due Friday 13 September 11.59 pm
10	16 September 2019	13 Enforcement; 14 ADR	Readings and questions as specified in the Unit Guide	NA
11#	23 September 2019	14 ADR; Revision	Revison Questions	NA

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WEEK 1 TOPIC 1: THE SYSTEM OF CIVIL JUSTICE

Sam lecture 2019 9/07 (1st video – until 1.34)

This unit is about the rules regarding pre-trial procedures for bringing before a hearing before a court; the Supreme Court

- Different from substantive rules

For the assignment:
Need to know s 18 ACL
Need to know contract law

PROCEDURAL LAW

The mode of a legal right as distinct from the law or rule that defines that right

Is a matter of process of civil disputes. The rules and practices regulating civil disputes in a court.
There is a distinction between *procedural law* and *substantive law*

S 25 Supreme Court Act 1986 (*SCA*)

- Gives power to SC judges to make rules in the conduct of proceedings before that court.
- The judges have power to make rules with regard to how cases are brought to trial
- Contained in the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) *(SCR)*

*these rules are **not** a code.

There is inherent power to commence proceedings to avoid abuse of the court process

- The Rules and judges of the court have power to make rules as well as grant remedies to avoid such abuse of their own process.
- It is an 'arm of remedies' for limitless ways to relax frustrations

ADVERSARIAL SYSTEM OF LITIGATION

Litigation is commenced with the adversarial system
→ One alleges, the other denies

The alternate is the inquisatory system.
With the inquisatory system (European), a court carries out an enquiry and the judge plays an active role in gathering the evidence, calling experts etc.

In the adversarial system there are two 'planks' it is based upon:

1. The parties and legal advisers
2. The court/ judge

The parties and their legal advisors
These parties and reps do all of the investigation and taken at their own parties.

The judge pays ***no role*** → done by the parties to determine their own track of evidence and pace
The parties themselves regard what the actual issues are and select the issues to be litigated and upon what the litigation is sought.
Only when the parties are ready, do they go to a judge to 'hear' the issues.

The judge
Plays a non-interventionalist role that is **'passive'** in the way a case is presented to the court
Makes a decision on the case based on issues the parties have presented themselves to the court.

Fookes v Slaytor **(1979) English Court of Appeal** [1979] 1 All ER 137
Facts: P was driving his car on a very wet rainy night in England.
- P hit a truck that was parked. P suffers injury by smashing to the parked truck and P sued D, who was the owner of the parked truck. Complaint didn't have the truck sufficiently lit for others to be able to see it.
- D (owner of truck) didn't file a defence. Did not even bother to turn up in court
- Award P damages but reduced them because P guilty of contributory negligence. Must have been part of the blame and should have seen the truck and had been paying more attention, would see the truck

Issue: P argued about the reduction because of negligence
Held: P went to the court of appeal and won because **the issue of contributory negligence was not before the court. D never raised the defence of contributory negligence**
- If D wanted to argue about the contributory negligence, it should have been raised
- The court plays a *passive* role and the parties *determine the issues and evidence to be adduced*

A judge may be prohibited to asking too many questions of parties and witnesses during a trial
- *Has to be an impartial observer*. There to decide only the issues the aprties bring before the court

Jones v National Coal Board **[1957] 2 QB 55** (Justice Denning)
Facts/Issue: Judge asked too many questions. Court said the judge should NOT ENTER into arena for dispute. To do so creates bias and partiality and impedes presentation of a case
- Judge does not intervene in the presentation of a case
- Parties plans and steps to take and judge's function is to decide the issues the parties brought themselves through the witnesses
- The only focus of the judge is that the due process is observed in the trial

The adversarial system summary:

1. Parties conduct proceedings as they see fit and in accordance with own timetable
2. The parties and judge have 2 distinctive roles
3. When the parties indicate a case as prepared, the court conduct a trial. The adversarial system assigns to the parties/ legal representatives' responsibility for **all** pre-trial procedures and the court is **passive. Including the speed at which the pre-trial steps happened and issues they wanted the Court to adjudicate upon**

Because of this system, there was high cost and massive delays that deterred the pursuance of claims.
There was a problem → litigation controlled by the parties accompanied by the fact courts attempted to do justice on the merits (deciding the case on true facts and correct law and not the procedural grounds)

- Justice on the merits overrode procedure. Where there was non-compliance on procedure by the parties, the court *forgave* the non-compliance and defect to decide the case on the merits
- Justice was ***paramount*** → justice > procedure

CASE MANAGEMENT SYSTEM

Introduced in the 1980s
The court supervises or controls the process of the case

- Reduces costs and delays
- Judges became more involved in pretrial steps. Involved in the moment after the writ was served

If a trial is necessary (because settlement couldn't be agreed), the judge sets a time table by which certain steps had to be taken

One party serves the writ on another
Upon service of the writ, the parties are called to a directions hearing.
There, the judge sets down a timetable by which certain steps must be done
→ judge has assumed more of an active role. Case management is to prevent a waste of time

Here, the court assumes supervision of the case through conferences and *direction hearings*. *Case management systems directly reverse the previous passive role of the courts*

S 29 Supreme Court Act *1986* (Vic) *('SCA')* – Law and equity to be concurrently administered
… the SC must exercise its jurisdiction in every proceeding so as to ensure as far as possible, that all matters in dispute between the parties are completely and finally determined and all multiplicity proceedings are to be determined

Order 1 Rule 14 *SCR*

- The court shall endeavour to ensure all questions in the proceeding are effectively completely promptly and economically determined

Section 7 *Civil Procedure Act*

- The overarching purpose of the Act and the rules of court is to facilitate the just, efficient and timely and cost-effective resolution of the real issues in dispute

^ These ***two authorities*** are of the court's adoption of case management. It stresses

1. The matter has to be resolves economically and promptly
2. All questions between the parties has to be resolves to the same extent

BUT THERE IS A DILEMMA

Hypothetical example:

- The court at a directions hearing tells a party to perform these particular pre-trial acts, the parties comply, and the judge sets a date for the hearing, setting down a timetable
- HOWEVER, what is the provision where one party wants an adjournment before that date, because of realisation of new claims or new defences?
- *So, **what comes first?** The issue in dispute OR the timetable*

This issue of efficiency vs. justice:

- Case management = efficiency. Certain steps by a certain date
- ALL the issues relevant to the case agreed by the parties = justice

In relation to this issue^

***Sali v SPC Ltd* (1993) HCA 47**

Issue: one party wants to make application to the court to adjourn the case to make certain documents amended to raise a new claim or new defence

Held:

- In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing as well as the interests of the other parties.
- What might be perceived as an injustice to a party when considering only in the context of an action between the parties may not be so when considered in context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources
- **Case management/ efficiency wins out** against justice. Justice is important, but more important for the justice of all parties.
- Efficiency > justice

***Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146**

Issue: HC reversed the judgement in *Sali* above^

Held: justice is the paramount consideration in determining an application such as the one in question

- Case management and efficiency is important. **BUT** case management should not have been allowed to prevail over injustice if shutting the applicant out from raising an arguable defence. Thus, precluding the determination of an issue between the parties
- Justice > efficiency

Note: *It used to be general practice to allow an adjournment so long as the party seeking the adjournment would pay the costs of the other party that had been thrown away*

This is a very important case

^

Aon Risk Services v Australian National University (2009) 239 CLR 175

Facts:

- As a result of the Canberra bushfires in 2003, a number of properties owned by the Uni were destroyed or damaged. The Uni made claims against its insurers against losses sustained as a result of damages to the property
- The insurance company denied liability. The insurers had the view that the properties for which compensation was sought was either not insured or at aa very low value
- As a result of that defence, the university decided to sue insurance agent → Aon. That it undervalued the properties and some properties were not insured because of Aon's negligence
- The actions / case started into its 3rd day. During that day, the Uni settled the claim against the insurance company for a figure much lower than expected. As soon as settled, the Uni applied for an adjournment to amend the claims against Aon → wanted new claims added against Aon. Adjournment would be against case management principles
- Trial judge took 9 months to decide between efficiency or justice. After said justice should prevail. Followed *JL Holdings*
- **Aon appealed to court of appeal** in a split decision, dismissing the appeal. While case management is important, shouldn't prevail over the interest of justice which is the paramount duty of the court
- **Aon appealed to the High Court**

Issue: HC reversed itself again. Back to *Sali* above^

Held: That *Queensland v JL Holdings* should not be followed

- Efficiency > justice. Case management should always win out
- French: *The history of proceedings, reveals an unduly permissive approach to an application which is made late in the day [3 days into a trial] was inadequately explained – the Uni offered no explanation. The necessity of a vacation of an adjourn of the date and raising new claims not previously agitated was a deliberate tactical decision not to do so.*

1. *The person seeking the adjournment has a very heavy burden to show why leave to adjourn should be granted. It should not be decided by reference to whether prejudice on Aon could be compensated by costs. The costs awarded in the court below when application granted, should be taking into consideration the unduly prejudice of delaying proceedings*
2. *The time of the court is a public ally funded resource and inefficiency of such must be taken into account to keep public confidence in the judicial system.*

- The majority: *case management is now an accepted aspect of the system of civil justice administered by the courts*

1. *What might be just when an amendment is sought requires taking into account other litigants, not just those party to the particular proceedings.* **Sali** ***reflects the proper understanding of case management and*** **JL Holdings** **does not**. *The HC in* JL Holings *based its opinion on the ground that it was assumed a party had a right to have an amendment subject only to the payment of costs*
2. *Speed and efficiency is minimum delay and expense is essential to a just resolution of the proceedings.* ***A party has a right to bring proceedings. A party has a right to ask for an amendment, NOT entitled to gain one on the basis they can raise an arguable claim.*** *Whether the court will grant is dependent on*

the court's discretionary power. Limits may be imposed if costs are taken into account, especially when litigation has advanced.

3. *This discretion depends on the 'good faith' of parties. In this case an explanation was not given.*

***Expense Reduction Analyst Group Pty Ltd v Armstrong Strategic Management* (2013) HCA**

- Confirmed the proposition of *Aon*

Sections 47-53 of the *Civil Procedure Act 2010* (Vic) embodies the decision of *Aon*

Order 1 Rule 14 *SCR*
→ these two provisions say that all questions in the proceedings are to be effectively completely, promptly and economically determined
S 29 *SCA*
→ … the SC must exercise its jurisdiction in every proceeding so as to ensure as far as possible, that all matters in dispute between the parties are completely and finally determined and all multiplicity proceedings are to be determined

Refer to page 4 of these notes for explanation of these provisions

Supreme Court (General Civil Procedure) Rules 2015 (Vic)
Civil Procedure Act 2010 (Vic)
'Bozzi' Chapter 1 'The New Proceduralism'
Sections 47-53 of the *Civil Procedure Act 2010* (Vic)

Civil Procedure is "*[t]he 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*) and is largely concerned with the pre-trial processes of bringing a dispute before the court.
Substantive law = determines parties' rights and duties towards each other
Procedural law = provides the mechanism for enforcing those rights and duties where transgressed. Procedural law determines how substantive law is pursued

MECHANISMS OF CIVIL PROCEDURE

Embodied in rules of respective courts. Supreme Court has inherent jurisdiction to control its own process to avoid abuse of power
Inferior courts = Magistrates Court* and County court
Superior courts = Supreme Court* and Court of Appeal
** = have Court has own procedural rules*
***NOTE:** primarily will refer to SCR, but specific rules needs to be applied to the specific court*

HOW DO COURTS INTERPRET THE RULES OF COURT?

Order 1 rule 14 SCR

THE ADVERSARIAL TRIAL SYSTEM: 'THE TRADITIONAL ADVERSARY SYSTEM'

'Adversarial trial system' = system of adjudicating the rights and obligations of parties to each other

BUT enactment of *Civil Procedure Act 2010* (Vic) – altered form and substance of the conduct of proceedings

These cases inform the features, scope, problem and controversies of the adversarial system

***Jones v National Coal Board* [1957] 2 QB 55**
***Hoare v Magistrates Court* [2003] VSC 257 (4th of July 2003)**
***Fookes v Slaytor* [1979] 1 All ER 137**

Features of the adversarial system

Deeply embedded historically in the adversarial system, therefore a disadvantage

THE IMPACT OF CASE MANAGEMENT PRINCIPLES

These concerns raised on the abuse of the adversarial system triggered reform over the 20th Century

Case management

Cases management by judges and quasi-judicial officials such as Registrars

- Most incisive instruments of reform
- Sets down a timetable by which steps taken by parties → BUT, situation may arise requiring documents to be amended
    - Therefore, may prevent timetabling being followed and causes hearing postponement

***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**

Sections 47-53 of the *Civil Procedure Act 2010* (Vic).

THE PRINCIPLES OF OPEN JUSTICE

Rinehart v Welker [2011] NSWCA 403

WEEK 1 TOPIC 2: COMMENCEMENT OF PROCEEDINGS

Sam lecture 2019 9/07 (1st video – 1.34 → 2.10 (end))

The Supreme Court Rules

Note: The *Supreme Court Rules* are made by Supreme Court judges under s 25 of the *Supreme Court Act*

These rules have the force of law and designed to regulate conduct of proceedings

We will focus on the rules of the Supreme Court Rules

COURT HIERARCHY IN VICTORIA

Court by hierarchy	*Description of the court*
High Court of Australia	Has ***some*** originating jurisdiction i.e. can start some cases there, very limited in number. However, for most purposes, the HCA is a court of appeal. Must have special leave to appeal. Public interests in the subject matter in the appeal.
↑	
Court of appeal	Cannot start an action at the court of appeal.
↑	Is only an appeal of the Magistrates, County or Supreme Court
Supreme court	Has unlimited jurisdiction
↑	More complex cases that the County court (County is less complex
This Unit is relevant to the Supreme Court and its Rules	
County court	Has unlimited jurisdiction.
↑	Can hear cases involving any amount of money above $100,000
Magistrates court	Has a jurisdictional limit of $100,000. If you have a claim exceeding that amount, cannot start at the Mag. Court.

VCAT

- Specialised tribunal in disputes, taxation, complaints against legal profession, tenancy disputes, retail disputes etc.
- This jurisdiction is increasing as lawyers include their relevance in VCAT

Commencement of proceedings in the Supreme Court

The Supreme Court must have jurisdiction to hear a matter → the *power* to hear a matter.
Before a Supreme court can hear a matter, it must have;

A. Subject matter jurisdiction; and
B. Jurisdiction over the Defendant
   → territorial jurisdiction / *in personam* jurisdiction over the defendant

Jurisdiction can mean a power or the power of the SC to hear a matter which depends on subject matter of the dispute or power over the D;

A) Subject matter jurisdiction

The Supreme have jurisdiction to hear a dispute that the parties have brought before it

S 85 *Constitution Act* (Vic)

- The SC of Vic shall have jurisdiction in **all cases (over any matter)** whatsoever (unlimited jurisdiction). Can listen to disputes of any type. Its jurisdiction extends to anything that is necessary to administer justice
- This section has been widely construed so that SC have a very wide general jurisdiction
- However, this may be enlarged, reduced or even excluded by legislation. Therefore, if a matter is out of the ordinary, must check legislation to see that the SC has power to hear it

B) Jurisdiction over the Defendant

Must have territorial jurisdiction / *inpersonam* jurisdiction over the defendant

- This means that at common law, before the jurisdiction of the SC to hear a case the **D had to be within the state boundaries of Vic at the time D was served with the writ**

At **common law**, the jurisdiction or power of the Supreme Court only extended/ is only invoked as far as the state boundaries.
Other states were considered 'foreign' jurisdiction.

***Laurie v Carroll* (1958) 98 CLR 310 [322-324]** for judgement
Held: the CL doctrine is that the writ doesn't run past the state boundaries. A writ filed in C Vic does run outside of that state

- The D must be amenable or answerable to the command of the writ
- Even if the D is within the jurisdiction of Vic ***fleetingly*** (even if there for minutes) and is served, the jurisdiction of the SC is invoked **AT COMMON LAW.** It is good service

LIMITATION PERIODS **– THIS IS RELEVANT FOR THE ASSIGNMENT**

If you have a client instructing you that you are involved in a 'crash and bash'. Once your client gives you instruction to sue, you MUST commence proceedings in the time stipulated by the *Limitations of Actions Act* (Vic). (Sam will reveal what the limitation period if for the circumstance)
It provides you MUST start the action in a particular time period. If you fail to do this within the time, you give D a good defence.
→ Prepare the writ;
→ The statement of claim;
→ Then have to file or issue that in court (the date of filing) within the limitation period
**must note when the event occurred

- A writ being issued or filed in court within the limitation period means when P's clerk or the lawyer for P prepares the writ and takes it to the SC and SC puts a date, number and signature on it. This is called issuing or filing the writ

If you have *filed* the writ within the limitation period, you have deprived the D of a defence based on limitation, but must *serve* the writ within 12 months of being filed

- Order 5 rule 12 *SCR*

1. Must **issue/ file** the action (just writs or both types of originating processes?) within the limitation period imposed by *Limitations of Actions Act* (Vic).
2. Pursuant to Order 5 rule 12 *SCR* (R 5.12), that writ has to be **served** within 12 months from the date filing

Ruzeu v Massey-Ferguson [1983] 1 VR 733

Facts: P was injured at work. The limitation period was 3 years

- The writ was issued one day before the limitation period expired
- And the writ was served 1 day before the 12-month expiry
- If the writ is served after 12 months, it is said to be stale

Sam lecture 2019 16/07 (2nd video 0.00 – 1.18.30)

Important to note – THIS IS RELEVANT FOR THE ASSIGNMENT

1. Must issue/ file the action within the limitation period imposed by *Limitations of Actions Act* (Vic). Which is usually 6 years
2. Pursuant to Order 5 rule 12 *SCR* (R 5.12), that writ has to be served on the D within 12 months from the date filing.
3. Failure to file the writ within the limitation period gives the D a rock-solid defence (unless P can make application to the court for extension of that limitation period)
4. Failure to serve the writ within the 12-months from the date of filing, makes the writ stale. Service of a stale writ makes the proceedings irregular. It is not void, but irregular (still valid).

The purpose of filing and serving, known as the originating process, is two-fold

A. To inform D that he or she is being sued
B. To inform D of the allegations made

It is only natural justice and procedural fairness that D is informed of these 2 matters

How an action is commenced

→ Once the writ has been prepared and statement of claim, must be taken to SC for filing.
→ The SC will file the writ and sign the document and given a date
These acts constitute the commencement of the proceedings. This MUST happen before limitation period expires