

# Universal principles

## Tutors and Legal Incapacity

- **Step 1 – Person Under Legal Incapacity**
  - **Rule** – A person under ‘legal incapacity’ includes:
    - Child under 18 (*s 3 CPA*)
    - Involuntary, forensic or correctional patient – Under *Mental Health Act 2007 (s 3 CPA)*
    - Person under Guardianship – Within meaning of *Guardianship Act 1987 (s 3 CPA)*
    - Incommunicate person – A person with **mental or physical disability** – that is unable to receive communications, or express their will, with respect to his/her property or affairs (*s 3 CPA*)
    - **Incapable of managing affairs** - a person who is incapable of managing his or her affairs (*7.13*)
- **Step 2 - Requirement for Tutor**
  - **Rule – Requirement for Tutor** - A person under legal incapacity may not commence or carry on proceedings except through their tutor (*7.14(1)*)
  - **Rule – Mandatory Solicitor** – Unless otherwise ordered by the court, the tutor of a person under legal incapacity cannot carry on proceedings except by using a solicitor (*7.14(2)*)
- **Step 3 – Who can be a Tutor**
  - **Rule** – Any person is eligible to be a tutor, unless:
    - Under legal incapacity (*7.15(2)(a)*);
    - Judicial officer/registrar/anyway involved in admin. of justice (*7.15(2)(b)*)
    - Person with interest in proceedings adverse to person under legal incapacity (*7.15(2)(c)*)
- **Step 4 – Appointing a Tutor**
  - **Rule – Appointment** – A person may become a tutor without the need for any formal instrument of appointment or any order of a court (*7.15(1)*).
  - **Rule – Appointment Continued** -However, proceedings may not be commenced/carried on unless:
    - Tutor’s consent has been filed (*7.16(a)*); AND
    - Solicitor’s Certificate filed – A certificate signed by the tutor’s solicitor in the proceedings, to the effect that the tutor does not have any interest in the proceeding adverse to the interests of the person under legal incapacity (*7.16(b)*)
  - **Court Appointment of a Tutor**
    - **Rule** – In any proceedings in which a party is or becomes under legal incapacity:
      - If no tutor – The court may appoint a tutor (*7.18(1)(a)*)
      - If Tutor – the court may remove and appoint another (*7.18(1)(b)*)
    - This could be done by NOM (*7.18(4)* and *(5) implied*)
- **Step 5 – Powers of a Tutor**
  - **Rule – Powers** – The tutor can do anything authorised or required of a party under the UCPR in relation to the conduct of proceedings, on the person under legal incapacity’s behalf (*7.15(6)*)
    - Essentially acts as the person under incapacity
- **Step 6 – Requirement for Appearance before P can proceed**
  - **Rule** – A P in proceedings against a D under legal incapacity may take no further steps in the proceeding until a tutor has entered an appearance on behalf of the D (*7.17(1)*)
    - In other words – The P cannot proceed to default judgment – more leeway given here
- **Step 7 – Admissions and Traverse from Pleadings**
  - **Rule** – Ordinarily, an allegation of fact made by a party in a pleading is taken to be admitted unless traversed (*14.26(1)(a)*), however *14.26(1)* **does not** apply to an opposite party who is under a legal incapacity (*14.26(4)*)

- SOC – By leave under s 64(1)(b) if amendment after 28 days, or by right if within 28 days (19.1(1))
- **Step 4 – Effect of Summary Dismissal**
  - Rule – Fresh Proceedings after dismissal – Summary dismissal under 13.4 does not prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings (s 91(1) CPA)
    - Determination on Merits – However, if the Court has dismissed the proceedings after a determination on the merits, the Plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other court (s 91(2) CPA)
  - Rule – **Res Judicata** – However, if the P issues new proceedings, the D may raise the defence of res judicata or issue estoppel. (see estoppel summary at end if needed)
  - Statute of Limitations – An important concern for the plaintiff will be to ensure that any statute of limitation has not expired since commencing the original proceedings
  - Rule – **Staying** – Staying proceedings does not dismiss them. If you want to re-activate proceedings, have to bring application (NOM) to the court.
- **Step 5 – Continuation of Proceedings following Partial Dismissal**
  - Rule – If in any proceedings, if (1) a party applies for an order for dismissal (13.5(a)), and (2) the proceedings are not wholly disposed of by dismissal (13.5(b)), the proceedings may continue as regards any claim or part of a claim not disposed of by dismissal
  - Example – If two causes of action brought, and one is dismissed, the other remains on foot

#### **Dismissal – Non-appearance of Plaintiff at Hearing**

- Rule – If the P does not appear at hearing it had notice for, the court may adjourn and direct a notice of adjournment be served on the P not less than 5 days before the new hearing date (13.6(1)). If the P does not attend at the new hearing date, the court may dismiss the proceedings (13.6(2))

#### **Dismissal for want of prosecution (AKA Progress) - Defendant & Plaintiff**

- **Step 1.1 – Plaintiff**
  - Rule – if a P does not prosecute the proceedings with due despatch, the court may order the proceedings be (1) dismissed or (2) make such other order as the court thinks fit (12.7(1));
- **Step 1.2 – Defendant**
  - Rule – If the D does not conduct the defence with due despatch, the court may strike out the defence, either in whole or in part, or make such other order as the court thinks fit (12.7(2))
    - Consequence – P can obtain default judgement, because D would be in default (*Building Insurer's Guarantee Corporation v Tagma*) – probably wouldn't need to go through the process again though, because the court has the power to do so (i.e. 'as it thinks fit')
- **Note: SC can dismiss proceedings for want of prosecution on its own accord – inherent (TB 983; *Brimson v Rocla Concrete Pipes*; *Fawcett v Cannon*)**
- **Step 2 – Considerations for P and D**
  - **Building Insurer's Guarantee Corporation v Tagma**
    - In this case, the defendant's defence was struck out – he had not attended to his side of the litigation in a timely way and disregarded his obligation to conform to directions that had been made
    - 'Delay is said to be the threshold circumstance that enlivens the power, although the significance of delay is to be considered in particular circumstances of the case involved'
      - In this sense, any explanation by the defaulting party must be taken into account so as to determine whether we can look past the prejudice or whether justice otherwise requires that proceedings be dismissed
    - 'Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs'.
      - It isn't fair to make the other party sit and wait anxiously
    - He had been changing solicitors, seeking adjournments on spurious grounds, in the hope that the inconvenience and disruption to his defence of the proceedings becomes a problem for the plaintiff
  - **Phornpisutikul v Mileto** – look at whether the relevant party 'demonstrates that s/he is not prepared to play his/her role in the expeditious advancing of the proceedings'

# Amending Pleadings

## Amending Statement of Claim – w/n 28 days of filing

- **Event 1 – Amending Within 28 Days of Filing**
  - **Step 1 – Within 28 days by right and Before Date Fixed for Trial**
    - Rule - A plaintiff may, without leave, amend a SOC once within **28 days** after the date on which it was filed (**19.1(1)**), even if the amendment adds a Plaintiff or Defendant (**19.2(1)**)
    - Rule – if date has been fixed for trial – cannot amend without leave (**r 19.1(1)**)
      - Court’s power to do this comes from s 64
  - **Step 2 – Joining by Right or with Leave – Practically (If applicable)**
    - Rule - If parties are to be joined, the joinder rules under **6.19** apply, that is, the parties may be joined by right if there is **(1)** a common question of law/fact and **(2)** all rights of relief claimed arise out of the same transactions/series thereof (**6.19(1)(a)-(b)**), or otherwise with leave (**6.19(1)**)
    - Rule – Practically – However, even if there is no right to join under **6.19**, and leave has not been granted, the Defendants can be joined in the OP, subject to the D’s potentially bringing a motion for separate trials under **6.22** on the basis of potential embarrassment, inconvenience or delay in the conduct of proceedings.
  - **Step 3 – Removal of Defendants (or parties generally) (if applicable)**
    - Rule - Parties can be removed by filing an amended SOC (**19.1(1)** and **19.2(1)**), however the party being removed must consent (**19.2(3)**)
  - **Step 4 – Procedure**
    - Amended SOC – Needs to be filed (**6.2(1)**) and served (**6.2(3)**) personally on each Defendant (**10.20(2)(a)**), however provided the defendants have already been served with the original originating process, ordinary service is fine (**10.1(1)**)
    - Personal Service on Individual in NSW - If the person is an individual in NSW, personal service is effected by **(1)** leaving a copy of the SoC/summons with them (**10.21(1)**), or **(2)** if they refuse acceptance, leaving it in the person’s presence and telling them the nature of the doc (**10.21(1)**)
    - Rule – Ordinary Service - **UCPR 10.5(1): (1)** personal service, **(2)** posting, **(3)** leaving copy at person’s residential/business address with person apparently 16 years of age apparently working/living there (see **10.5(1)(a)-(d)**), **(4)** if corporation, by leaving or posting it to registered address or personal delivery to director (**10.22(b); s 109X(1)(a)-(b)**)
  - **Step 5 – If D has already filed Defence – 14 days to Amend Defence**
    - Rule - If a Plaintiff amends the SOC under **19.1(1)**, after the D has filed a defence – the D may amend his or her defence (by right) at any time within 14 days after service of the amended SOC (**19.1(2)**)
  - **Step 6 – Applying for Disallowance of Amendment**
    - Rule – Power to Disallow - If a party amends a pleading under **19.1(1)** (or **19.1(2)**) – in the case of amendment by D, the court may disallow the amendment (**19.4(1)**)
    - Rule – Procedure – Unless the court otherwise orders, a NOM for an order disallowing amended pleadings under **19.1(1)-(2)** must be filed within 14 days after the date the amended doc was served on the applicant (**19.4(2)**)
      - Affidavit – supporting the NOM should be provided (**31.2** – by way of evidence in chief), which is not to be filed (**35.9**), but must be served on each interested party not later than a reasonable time before the occasion for using it arises (**10.2(1)**), otherwise the affidavit can’t be used without leave (**10.1(2)**)

# Stale Originating Process (not served in time limit)

## Stale Service – Where Defendant nonetheless files an appearance – P can proceed

- **Step 1 – Period of Validity**
  - Rule - An originating process is valid for service in the SC for 6 months after the date it is filed (6.2(4)(a)) – following this it is 'stale'
- **Step 2 – If Defendant Files an appearance – All Errors Accepted**
  - Rule – If the D files an appearance, by filing a notice of appearance (6.9(1)) or by filing a defence (6.9(2)), that isn't a motion to set aside the originating process under 12.11 (which is not taken to be an appearance - (6.1(2)(a); 12.11(4))), the D **waives** any right to object about staleness/invalidity of service, unless the D files a notice of the objection together with the document so filed (10.19)
  - Furthermore – Affidavit of Service – Consequently – No affidavit of service will be required to prove service if an appearance is entered and the plaintiff can proceed (r 78.59(a) SCR)

## Setting Aside Stale Originating Process

- **Step 1 – Period of Validity**
  - Rule - An originating process is valid for service in the SC for 6 months after the date it is filed (6.2(4)(a)) – following this it is 'stale'
- **Step 2 – Application for Extension of Time**
  - Rule – The Court has discretion to extend or abridge any time fixed by the rules (1.12(1)), either before or after that time expires (1.12(2))
    - Case Law Guidance – Pell v Hodges
      - Not Unfettered – The discretion conferred by 1.12 is not unfettered. Proof is required of a satisfactory explanation for the delay, and a solicitor merely being busy with our clients is not a satisfactory reason
      - Delay – Delay in service is particularly serious if it occurs after the expiration of a limitation period. Potential D's should be made aware of the claims against them in reasonable time.
      - Limitation Period - However extreme prejudice could be caused to the P if the limitation period is otherwise expired and setting aside would knock out
      - Reasonable Excuse or Difficulties – If there were no reasonable difficulties preventing service in the relevant time, this will tend against the use of the discretion
- **Step 3 – No Automatic Invalidation/Nullity**
  - Rule - A failure to validly effect service of an originating process on a D within the 6 month period is treated as an irregularity (s 63(2)(a)) and is not automatically invalidated or nullified (s 63(2)(b))
- **Step 4 – Power to set Aside Stale Originating Process**
  - Rule - Upon application by the D, the Court has the power to set aside the originating process (12.11(1)(a) UCP; s 63(3)(a) CPA), and may make an order declaring the process has not been duly served on the D (12.11(1)(c)).
- **Step 5 - Grounds for Setting Aside Stale Originating Process**
  - No Satisfactory Explanation - If there are no reasons for the Court to exercise its 1.12 discretion to retrospectively extend the time for valid service (such as satisfactory explanation for delay), then the setting aside is likely to be granted (Pell v Hodges)
  - Expiration of Limitation Period – Setting aside the OP could mean the plaintiff's claim is consequently extinguished by the limitation period for bringing it. In this situation, the court will consider all the circumstances, and make a discretionary decision (Rust v Barnes):
    - Whether it was a mere oversight
    - If the D knew of the P's claim anyway,
    - Whether there had been negotiations for settlement
    - Whether there may be a claim against a solicitor for negligence
- **Step 6 – Time Limitation**
  - Rule – Time limitation and Fresh steps – Court may not set aside the process unless the NOM to apply has been filed with the time limited to enter an appearance (generally 28 days to enter appearance re SOC – 6.10(1)) (12.11(2)) and in any event, won't be set aside if the D takes any fresh step in the proceeding (10.19; s 63(4)).

# Setting Aside Joinder (of parties or cause of action)

## Applying to Set Aside Joinder - of Parties or causes of action – Embarrassment, inconvenience, delay

- **Step 1**
  - Rule - If the court considers that joinder of a **(1)** plaintiff or **(2)** defendant or **(3)** cause of action in any proceeding may embarrass, inconvenience or delay the conduct of the proceedings, the court has discretion to:
    - Order separate trials (6.22(a)) or
    - Make such other order as it thinks fit (6.22(b))
- **Step 2 – Considerations**
  - Primary Consideration - The primary consideration is whether joining the plaintiffs will cause any prejudice, unfairness or undue burden to any parties. If not, and joinder of the parties will limit overall cost and delay, and be conducive to a just resolution, then the court is likely to join the plaintiffs (*Dean Willcocks v Air Transit International*)
  - Overriding Purpose – The overriding purpose of the CPA/UCPR is to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 56(1)), and to eliminate delay (s 59), and therefore this discretion will be applied accordingly.
- **Step 3 – Procedure**
  - NOM - If a party wants proceedings between parties, or causes of actions between parties, separated, they should move the court by way of NOM (18.1), which must be **(1)** filed and **(2)** served on each person affected by the proposed order (18.2) at least 3 days prior the date fixed for motion (18.4).
  - Affidavit - The evidence supporting the NOM is to be given by affidavit (31.2), which is not to be filed (35.9), but which must be served on each interested party a reasonable time before the hearing (10.2(1)); an affidavit not served in reasonable time unable to be used without leave (10.2(2))
    - **Basis** – Will be on whether it is convenient/efficient to join etc. as above.

## Miscellaneous – Joinder

### Court Power – To join a Party During Proceedings

- Rule – Primary Rule - If the court considers that **(1)** a person ought to have been joined as a party, or **(2)** is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, THEN the court may order the person be joined as a party (6.24(1))
- Rule – Consent of Plaintiff – However, a person is not to be joined as a plaintiff in any proceedings except with his or her consent (6.25)
- Rule – This power is in addition to the power of the court to grant leave (such as under 6.19) or make orders concerning joinder of causes of action (6.18) or joinder of defendants jointly responsible (6.21(2))

### Removal of parties by order – Joinder in Error

- Rule – The court may order that a person **(1)** who has been improperly or unnecessarily joined (6.29(a)), or **(2)** who has ceased to be a proper or necessary party (6.29(b)), be removed as a party
- Process – NOM and Affidavit (as above)
- Explained – This relates to being joined in error or no case – saying you shouldn't be a party (whereas under 6.22 you are not saying shouldn't be a party – saying it should be heard separately)

### Joinder of a third Party - On application of third party

- Rule – A person who is not a party to proceedings (already commenced) may apply to the court to be joined as a party, either as a P or D (6.27), the applicant necessarily consenting by virtue of their application (6.25)
- Rule - The basis upon which the application is made - The court having power - If the court considers that **(1)** a person ought to have been joined as a party, or **(2)** is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, THEN the court may order the person be joined as a party (6.24(1))
- Process – If a third party seeks to be joined, they should move the court by way of NOM (18.1), which must be **(1)** filed and **(2)** served on each person affected by the proposed order (18.2) at least 3 days prior the date fixed for motion (18.4). The evidence supporting the NOM is to be given by affidavit (31.2), which is not to be filed (35.9), but which must be served on each interested party a reasonable time before the hearing (10.2(1)); an affidavit not served in reasonable time unable to be used without leave (10.2(2))

## Preliminary Discovery - Considering Proceedings against Prospective D - Documents

### • Step 1 – Discovery Against Prospective D

- Under r 5.3(1), the court has discretion to order the Prospective D to give discovery of all documents that (1) are or (2) have been in the D's possession that relate to whether or not the Applicant is entitled to make a claim, if the following are met: (see r 5.3(1))
  - **Applicant may have a case** – the applicant may be entitled to make a claim for relief against the person (r 5.3(1)(a)) – Need not show prima facie case, just a reasonable cause to believe the applicant may have an action (something above mere suspicion or conjecture) (*Hatfield v TCN Channel 9*)
  - **Reasonable Inquiries** – have been made by the P, and P is unable to obtain sufficient information to decide whether or not to proceed against the prospective D (r 5.3(1)(a)) – a question of fact, considered in all the circumstances of the case, such as any relationship between the Applicant and the D (*Hatfield v TCN Channel 9*)
  - **Prospective D may have info** – Prospective D may have or have had possession of a document or thing that can assist in determining whether the applicant is entitled to make a claim for relief (r 5.3(1)(b))
  - **Inspection would assist applicant** – to make the decision concerned (r 5.3(1)(c))

The court may order preliminary discovery against a prospective defendant of all documents in the person's possession with regards to the question as to whether or not the applicant is entitled to make a claim for relief where firstly it appears to the court that the applicant may be entitled to a claim for relief (r 5.3(1)). Secondly, the applicant must have made reasonable inquiries (r 5.3(1)(a)). Thirdly, the applicant must have been unable to ascertain sufficient information to determine whether or not to commence proceedings against the prospective defendant (r 5.3(1)(a)). Fourthly, it must be shown that the prospective defendant may have or have had possession of a document or thing that can assist in determining whether the applicant is entitled to a claim for relief (r 5.3(1)(b)). Finally, the applicant is required to prove that inspection of the document or thing would assist the applicant to decide whether or not to commence proceedings (r 5.3(1)(c)).

### • Step 2 – If Discovery sought for Cross-Claim Decision (If Applicable)

- **Cross-claim or normal claim** – This rule applies whether or not the applicant wishes to decide whether to claim or cross-claim (r 5.3(4)).

### • Step 3 – Procedure

- **Summons** – Application is by way of summons (r 6.4(c)), which must be filed (r 6.2(1)) and served personally on the Prospective D (r 5.3(3)(b)), on or before the return date stated in the summons (r 6.10(1)(b)(i))
- **Affidavit** – A supporting affidavit must accompany the summons, (1) stating the facts on which the P relies and (2) specifying the kinds of documents sought (r 5.3(3)(a)), which must not be filed (r 35.9), but is to be served personally with the summons (r 5.3(3)(b))
  - **Personal Service** – If the person is an individual in NSW, personal service is effected by (1) leaving a copy of the summons with them (r 10.21(1)), or (2) if they refuse acceptance, leaving it in the person's presence and telling them the nature of the doc (r 10.21(1))
  - **If Prospective D is a Corporation** – If the prospective D is a corporation - an order may be addressed to any officer or former officer of the corporation (r 5.3(2))

### • Step 4 – Discretion and Policy (Probably not Applicable)

- **Rule** – Discovery under r 5.3 is not a right, but is in the discretionary hands of the court (*Hatfield v TCN Channel 9*). Even if the requirements are met, policy concerns may tend against the order. E.g. in *Hatfield* – Policy concerns about leaving free speech unfettered (as the discovery was sought for injunctive relief), saw discretion refuse the Order.

### • Step 5 – Privilege: An order under r 5.3 does not operate to require production of privileged documents (r 5.7)

## Preliminary Discovery - Non-Party (not prospective D) – Any Question in proceedings - Documents

### • Step 1 – Discovery from 3rd Party / Non-Party

- The Court may order that a person who is not a party to proceedings, but who it appears may have or have had possession of a document that relates to any question in the proceedings, must give discovery to the applicant of all documents that are in their possession relating to that question (r 5.4(1))

### • Step 2 – Procedure

- **Summons** – Application is by way of summons (6.4(c)), which must be filed (6.2(1)) and served personally on the person on the non-party (5.4(2)(b)), on or before the return date stated in the summons (6.10(1)(b)(i))
- **Affidavit of Support** – A supporting affidavit must accompany the summons, (1) stating the facts on which the P relies and (2) specifying the kinds of documents sought (5.4(2)(a)), which must not be filed (r 35.9), but is to be served personally with the summons (5.4(2)(b))
  - **Personal Service** – Application/affidavit must be personally served (r 5.4(2)(b)) - (1) leaving a copy of the summons with them (r 10.21(1)), or (2) if they refuse acceptance, leaving it in the person's presence and telling them the nature of the doc (r 10.21(1))

### • Step 3 – Privilege: An order under r 5.4 does not operate to require production of privileged documents (r 5.7)

## Before Commencing Action:

### Jurisdiction:

Before commencing any action, we will need to ascertain whether the court has the proper jurisdiction.

- **INHERENT JURISDICTION**

- There is an inherent jurisdiction (inherent power) in Superior Courts of record to regulate their processes and prevent an abuse of process (*Jago v District Court of NSW; Batsistatos v Roads & Traffic Authority of NSW*)
- The District and Local Courts have a limited jurisdiction which arises expressly under statute or is derived by implication from statutory provisions conferring particular jurisdiction (*Grassby v R*)
- It is undoubtedly the general responsibility of a Superior Court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power (*Grassby v R*)

- **IMPLIED JURISDICTION**

- An implied power may be found where a court has jurisdiction under its status, but no provision is made in the statute for the making of an order which is necessary to carry out the court's statutory powers (*R v Mosley*)
- In the case of a court whose powers are defined by statute, such as the District and Local Courts, "there is an implied power to do that which is required for the effective exercise of its jurisdiction" (*TKWJ v The Queen*)
  - It is not necessary for the effective exercise of jurisdiction for a trial judge to give an "advanced ruling" on evidence (*TKWJ v The Queen*)
- A statutory court has the power to that which is "really necessary to secure the proper administration of justice in the proceedings before it" (*John Fairfax v Police Tribunal*)
  - The term 'necessary' does not mean 'essential' but rather is to be 'subjected to the touchstone of reasonableness' (*Pelechowski v Registrar*)

- **LIMITATION PERIODS**

- Q: Has the claim been brought within the limitation period?
- Rationale: Oppressive, loss of evidence, Efficient utility of resources without the threat of litigation or public interest (*Brisbane South Regional Health Authority v Taylor*)
- They are rules of substantive law (*John Pfeiffer v Rogerson*)
- Proceedings must be initiated to fall within limitation period and a preliminary discovery may be insufficient.
  - Where multiple cases of action, shorter limitation period applies (*s13 Limitation Act 1969 (NSW)*)
- Limits: **LA 1969**
  - Contracts = 6 Years (*s14(1)(a) LA*)
  - Torts = 6 Years (*s14(1)(b) LA*)
  - Breach of Trust = 6 Years (*s48 LA*)
  - Recovery of Land = 12 Years (*s27(2) LA*)
  - Defamation = 1 Years (*s14B LA*)
  - Motor Accident = 3 Years (*s109 Motor Accidents Compensation Act*)
  - Work Injury = 3 Years (*s151D Workers Compensation Act 1987 (NSW)*)
  - Personal Injury:
    - prior to 5 Dec 2002: 3 years (*s18A(2) LA*)
    - after 5 Dec 2002: (*s50C(1)(b) LA*) Whichever is shorter:
      - 3y from date COA discoverable by P (*s50C(1)(A)*)
        - 'discoverable' (*s 50D*) when know or ought to have known the fact that injury / death has occurred, caused by defendant and injury was sufficiently serious to justify bringing an action.
      - 12 y from time of act or omission.
    - Section 50E: limitations for minors injured by relatives
    - Section 50F: effect of a disability on limitation period

- **ISSUES TO BE SORTED OUT BEFORE COMMENCING PROCEEDINGS**

- Preliminary Discovery:
  - If the plaintiff can't identify the person who they want to sue.
  - The plaintiff needs more information to decide whether to sue.
- Working out who can be parties/joinder
- Working out the causes of action/joinder

## Introduction:

- **Substantive law:** defines legal rights, duties and liabilities
- **Procedural law:** rules governing or regulating the mode of conduct of court proceedings

### What is procedural law?

- Procedural law is the law that governs the conduct of proceedings before the court. Procedural law is “rules which are directed to governing or regulating the mode or conduct of court proceedings” (*McKain v RW Miller*)
- It is conceived as adjectival, as opposed to substantive

### Purposes & Roles of Procedural Law:

- The rules of procedural law guarantee procedural fairness, and procedural fairness is important both in its own right and through its link with substantive justice.
- Some of the derivative roles & purposes of procedural fairness:
  - 1. Tells us more about a system, of justice than the substantive law.
  - 2. Encourages parties to accept the legitimacy of the process, even if it results in a negative outcome.
  - 3. Helps establish a nexus between fairness, efficiency and cost.

### Main Authority (Instruments):

- Civil Procedure Act 2005 (NSW) – (CPA)
- Uniform Civil Procedure Rules 2005 (NSW) – UCPR
- Supreme Court Rules 1970 (NSW)
  - Given the focus on the NSW Supreme Courts, this legislation will be relevant.

### Regulation of abuse of process:

- **Superior Courts** have an inherent power to regulate their processes to prevent abuse of process (*Jago*)
  - *Ashby v Commonwealth* [4]: Processes that are seriously unfair or burdensome, prejudicial or damaging, resulting in unjustified harassment or where proceedings are carried out for an ulterior purpose.
- **Lower Courts** have implied power to do everything that is ‘necessary’ to regulate itself (*Grassby v R*)
  - For example, things that are ‘reasonably required’ (*Pelechowski*)
- **Overriding purpose: s 56 CPA**
  - The overriding purpose of this Act and the rules of the Court is the ‘just, quick and cheap resolution of the real issue in the proceedings’. (*s 56(1) CPA*)
    - Court must give weight to all three considerations (*Dennis v ABC*)
    - Involves a balancing process – ultimately court may make orders as it sees fit (*Halpin v Lumley*)
    - Balance justice versus consideration of cost and delay (*Aon Risk Services*)
  - Effect by the court (*s 56(2)*), parties (*s 56(3)*), and practitioners (*s 56(4)*).
  - Non-compliance may result in a costs order (*s 56(5)*).
- **Open Justice:**
  - Prevents arbitrary exercise of power (*Richards and Bikerk*)
  - Courts can ‘close’ proceedings under special circumstances: (*s 71 CPA; Hogan v Hinch*)
    - (1) Where really necessary, not merely useful (*John Fairfax Group*), (2) protect identity of informants, (3) protect identity of victims of blackmail, (4) matters of national security.
- **Principal of a fair trial:**
  - For a re-trial, appellant must establish:
    - there was a denial of natural justice, which deprived him of the possibility of a successful outcome (*Stead v State Government Insurance Commission*)
    - ‘some substantial wrong or miscarriage’ has been occasioned (*UCPR r 51.53; Mastronardi*)



# Civil Procedure – Exam Notes

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