

Adversarial System of Civil Litigation

1.1 Procedural law

- The link between evidence and correct decisions (rectitude) **Jeremy Bentham**

What is procedural law

- Rules which are directed to governing or regulating the mode or conduct of court proceedings (McKain v R W Miller & co)
- Substantive law defines the legal right e.g with Torts
- Uniform Civil Procedure Rules 2005 (NSW) (UCPR) in every court but not used in the Federal Court or the Family Court
- The function of a civil court is to resolve a dispute and/or enforce a right
- Most of these rights are enforced through 'due process' which involves a right to be heard, openness, no bias and notice
- Rules have to guarantee procedural fairness and achieve an accurate decision
- Rules can be modified to address the problems of cost/delay/complexity
- The procedural rules are critical to the perceptions of fairness
- The trade off between cost and delay- something may be an accurate decision because it takes a long time but that will cost a lot
- There will always be delay and justice can not always be free of cost and constraints (s56 Civil procedure Act) the overriding purpose of the court is to facilitate just, quick and cheap decisions

Sources of Procedural Law

- Civil Procedure Act 2005 (NSW)
- Uniform Civil Procedure Rules 2005 (NSW)
- Inherent and implied jurisdiction, a superior court has the inherent power and jurisdiction has the power to prevent an abused process of justice
- In the case of a court whose powers are defined by statute such as the District Court, there is an implied power to do what is required for the effective exercise of its jurisdiction (**Pelechowski v Registrar**)
- **For example, the court has the power to close its doors to the public - national security matters, for children etc**

Civil Procedure Act 2005 (NSW)

- **s56** 'overriding purpose of the act and the rules of court... is to facilitate the just, quick and cheap resolution of the real issues in the proceedings', party to civil proceedings is under a duty to assist the court to further the overriding purpose and participate in the processes and directions of the court
- **s58** the court is to act in accordance with justice in deciding whether or not to make any order or direction for the management of proceedings
- **ss56** and **57** must have regard to the overriding purpose and objects of case management
 - a. Just determination
 - b. Efficient disposal of business
 - c. Effective use of resources
 - d. Cost affordable and timely disposal
- **s58** and must take into consideration
 - a. The degree of difficulty or complexity to which the issues of the proceedings give rise to
 - b. The degree of expedition with the respective parties and how timely they have been
 - c. The degree of injustice that would be suffered by the respective parties as a consequence of an order/direction

- s59 the CPA requires that the court try to eliminate any delay or time lapse between commencement of proceedings
- s60 must implement procedures where cost is proportionate to the complexity and importance of the matter

1.2 Open justice

Rinehart v Welker [2011] NSWCA 403 (at page 34);

Open Justice

- Both criminal and civil cases
- Most fundamental aspects of the system of justice in Australia (**John Fairfax Publications Pty Ltd v District Court of NSW 2006**)
- Anyone can walk into a courtroom and watch proceedings (this also allows for the writing of court reports/media reports)
- We know the names of the parties/witnesses
- Publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially (**R v Richards & Bijkerek 1999**)
- Anyone can publish a fair and accurate report of the proceedings (**Hogan v Hinch 2011**)
- There is power in both inherent and implied jurisdiction to depart from open justice
- Judge can determine that its closed, that there's a non-publication order, suppression order of certain evidence, pseudonym orders, the witness may be hidden etc
- Access restricted to confidential info (**Seven Network (operations) Limited & Ors v James Warburton (No1) 2011**)
- Pseudonym Orders (**Witness v Marsden & Anor 2000**) and also (**Sydney Children's Hospitals Speciality Network**) or (**A v Bird, C v Bird**)
- There's a public interest in informers coming forward therefore closing this in the court is beneficial
- 'Justice may not have been done at all if it is to be done in public' **Scott v Scott [1913]**

Power to make close court order

- Test in common law to see if it is reasonable to ensure the proper administration of justice (**John Fairfax Publications Pty Ltd v District Court of NSW 2006**)
- Test of necessity - not one of necessity (**Hogan v Australian Crime Commission**)
- Open justice is generally departed from with mentally ill, victims of extortion and blackmail etc
- **s71 Civil Procedure Act 2005** Business in the absence of the public
- **Court Suppression and Non-Publication Act 2010 (NSW)**
- In NSW and Federal Courts
- Primary objective is open justice
- But the power is found in **s71** power to make the order/**s73** Grounds for making an order
- May make a suppression order or non- publication order based on the protection of justice, the safety of a person, avoid causing undue stress or embarrassment or in public interest
- Gina Rinehart litigation - breach of trust/powers as a trustee
- Gina applied to suppress all proceedings and confidentiality of proceedings
- **Welker & Ors v Rinehart [2011]**
- Suppression order over the whole case- no publications to be made
- Media rejected this order and appealed to the court of appeal
- Public interest in open justice was considered to be higher
- Administration of justice did not require the suppression order

1.3 Adversarial system of litigation

Adversarial System (Common Law)

- Parties commence the proceedings
- Judge as the umpire
- Emphasis on oral argument/evidence especially cross-examination
- Parties bear the costs
- Criticised due to issues of costs and delays as the parties control the dispute
- Public cost to pay the courts and the private costs of lawyers

Inquisitorial System (Civil Law) e.g Royal Commissions/ Inquests

- Predetermined legal principles
- Mainly codifies law
- The judge's role is inquisitorial
- Emphasis on documentary proof

1.4 Fairness

Principal of Fair Trial

- Reasonable notice of the case has to be met
- Reasonable opportunity to present a case
- A right of cross-examination

1.5 Case management and reform

AON Risk Services Australia Ltd v ANU (2009) 239 CLR 175; [2009] HCA 27 (KLV 107)

- Third day of the four week trial, ANU sought to adjourn to amend the statement of claim
- AON appealed and it was ruled that this would be a waste of resources

Civil Procedure Act 2005 (NSW), ss 56–59 (KLV 87-89)

Chief Justice Bathurst, “After the Civil Procedure Act”, chapter 2 in Ten Years of CPA.

Justice Basten, “Civil Procedure Act 2005 (NSW) – The Overriding Purpose”, chapter 5 in Ten Years of CPA.

- 1996 Lord Woolf reform the problem is where the litigants control the process
- Therefore the courts should control the process to move as quickly as possible

Australian Law Reform Commission Report 2000

VLRC Civil Justice Review 2008

- Both argue that the civil system works best when judicial officers take an active role in managing proceedings from an early stage

Jackson Report 2010

- Costs actually went up after the Woolf reforms, enforcement of case management was costly
- Jackson found that the court tolerated delays and non compliance with orders and therefore measures should be put in place to prevent non compliance
- Case management - courts began to impose timetables on parties and disciplinary measures for breaches
- Case management seen in s56 CPA

Queensland v J Holdings (1997)

- J L Holdings sued QLD for \$60 mill
- 6 months before the 4 month trial, QLD sought leave to amend the defence and this was denied as it would result in a one year delay in proceedings
- QLD appealed to the Full bench of the Federal Court and then the HC
- Speedy disposition of cases v individual justice