CIVIL PROCEDURE NOTES
LAWS5003 Semester One, 2016

★ Journal Articles ● Case Readings

CIVIL PROCEDURE

Topic One – Process, Open Justice and Fairness	**Page 1**
Substantive Law	
Stages of civil proceedings	**Page 2**
Case Management (Brief)	**Page 5**
Applications	**Page 6**
Trial and orders	
Variations	
Termination of proceedings before delivery of judgment	**Page 7**
Adversarial System	
Adversarial System v Inquisitorial System	**Page 8**
Principal function of courts	
Similarities and differences between civil and criminal proceedings	**Page 9**
Sources of the Law of Civil Procedure in NSW	
Themes of the purposes served by civil procedure	
Open Justice	**Page 10**
Exceptions to open justice: common law **(●Hogan v Hinch (2011) 243 CLR)**	
Exceptions to open justice: Statute	**Page 11**
Court Suppression and Non-Publication Orders Act 2010	
● "X" v Sydney Children's Hospital Specialty Network *Grant of suppression order*	
●Rinehart v Welker [2011] NSWCA 345 (Tobias AJA) *Order should be made where it is "really necessary to secure the proper administration of justice*	**Page 12**
Case Management	
Factors affecting time and cost of legal action	
Foundations of case management	**Page 13**
Overriding purpose (s56 of CPA)	

Reasons for Case Management (CM) **Page 14**

Aspects of Case Management

●Jackamara v Krakouer (1998) 195 CLR 516
Justice may not be served as time may erode the evidence

Case Management in Legislation (Civil Procedure Act 2005 ss 56-60, 86(3)

●Metropolitan Petar v Mitreski [2008] NSWSC 293 **Page 15**
The principle goal of civil procedure, namely the doing of substantive justice, is now overlaid with an overriding objective that establishes a procedural discipline so that the court reaches a substantially correct outcome by means of proportionate resources and in a reasonable time.

The Uniform Civil Procedure Rule 2005 - 2.1 Directions and orders **Page 16**

Case Management in Common Law

●High Court in Queensland v J L Holdings (1997) 189 CLR 146
Case management should not be allowed to prevail over the pursuit of justice

●Aon Risk Services Australia Ltd v Australian National University **Page 17**
It cannot be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs

UCPR r51.53 Circumstances in which Court may order new trial **Page 18**

●Stead v State Government Insurance Commission (1986) 161 CLR 141
An appellate court will not order a new trial if the denial of natural justice does not have a material effect on the outcome of the trial.

Judicial Discretion

●Chandra v Perpetual Trustee Victoria Ltd [2006] NSWSC 1046 **Page 19**
The power to dismiss proceedings for failure to comply with directions is one which will be used in appropriate cases.

●A & N Holding NSW Pty Ltd v Andell Pty Ltd [2006] NSWSC 55
Striking out a case is pretty much only used as a last resort. There are a range of other powers which the court can use to punish the offending party.

Adjournments

●City of Sydney Council v Satar [2007] NSWCA 148
Section 66 is a "wide and ample" power to adjourn the hearing of a matter, the principal consideration being what's necessary to do justice between the parties.

Legal practitioner behaviour

●Firth v Latham [2007] NSWCA 40
A claim will have "reasonable prospect of success" if the legal practitioner reasonably believes there are "provable facts" and a "reasonably arguable view"

LEGAL PROFESSION ACT 2004 - SECT 347 Restrictions on commencing proceedings without reasonable prospects of success **Page 20**

Law Society of NSW Revised Professional Conduct and Practice Rule 1995 **Page 21**

★Tension between efficiency and justice **Page 22**

Alternative dispute resolution	**Page 22**
ADR and Indigenous communities	
Reasons for Growth of ADR	
Advantages of ADR	
Disadvantages of ADR	**Page 23**
Types of ADR (classified by NADRAC)	
Terms of Settlement	**Page 24**
Enforcement of resolved disputes	
Types of dispute resolution processes	
Negotiation	**Page 25**
Mediation	
Arbitration	**Page 27**
Expert determinations	**Page 28**
●Higgins v Higgins [2002] NSWSC 455 *Due to the age and health of the plaintiff, matter was referred to mediation in the hope it will induce the spirit of compromise.* **●Waterhouse v Perkins [2001] NSWSC 13** *Mediation looks beyond mere "rights"; it looks at "interests and needs".* **●Oasis Fund Management v ABN Amro [2009] NSWSC 967** *Being in a position to have a realistic assessment of a person's position in the litigation is relevant to determining whether to refer matter to mediation.*	**Page 29**
Enforcement of dispute resolution agreements	**Page 30**
★Alternative Dispute Resolution impact on Civil Procedure themes	
★The Costs of Litigation	**Page 31**
How courts seek to control costs	**Page 32**
Cost Disputes	
Proportionality of Costs	**Page 33**
Topic Two – Matters Preceding Litigation and Commencing Proceedings	**Page 34**
Summary of matters preceding litigation	
Limitation periods	**Page 35**

●Baker-Morrison v New South Wales [2009] NSWCA 35 **Page 37**
The date of discoverability in negligence is referrable to knowledge of facts indicating the availability of steps or procedures or systems which the defendant could reasonably have adopted which would have prevented the injury.

●Frizelle v Bauer [2009] NSWCA 239
No argument that the plaintiff did not know or ought to have known of a causal link between injury and fault of defendant where there's clear evidence.

Interim preservation orders

●ABC v O'Neil (2006) 227 CLR 57 **Page 38**
Principles upon which an interlocutory injunction should be granted:

The effect of expiration of limitation periods **Page 39**

Freezing orders

●Deputy Commissioner of Taxation v Hua Wang Bank Berhad [2010] **Page 41**
Requirements for the granting of a freezing order. A freezing order may be granted even though there is no evidence of the respondent's positive intention to frustrate a Judgment

●Cardile v LED Builders (1999) 198 CLR 380 **Page 42**
Freezing orders can be made against third parties.

Search orders or Preservation orders

Preliminary Discovery **Page 44**

●RTA v Australian National Car Parks [2007] NSWCA 114 **Page 46**
Must be sufficient evidence that information will help identify the persons and reasonable enquiries must be made to find the information through other means.

Discovery of documents from prospective defendant **Page 47**

●Panasonic v Ngage [2006] **Page 48**
Whether discretion should be exercised to make the order to discover documents from a prospective defendant.

Jurisdiction **Page 49**

Original Jurisdiction - NSW State Civil Limits

Original Jurisdiction - Federal Civil Jurisdiction **Page 50**

Cross-vesting legislation

●BHP Billington v Shultz (2004) 221 CLR 400
Choosing an appropriate court usually involves looking at considerations of cost, expense and convenience

Commencing proceedings (summary) **Page 51**

General principles of originating process

Which originating process to use? **Page 52**

When Statement of Claim should be used

When Summons should be used

Originating Process and Pleadings **Page 58**

Service

★Why is service important? **Page 59**

●**Agar v Hyde [2000]**
A party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes.

Service of Documents Generally **Page 60**

Methods of Service

●**Bulldogs Rugby League Club Ltd v Williams [2008]** **Page 62**
The steps proposed to be taken must address the purpose of serving, i.e., evidence that the substitute service will be likely to bring the service to the attention of the defendant.

●**Flo Rida v Mothership Music Pty Ltd [2013] NSWCA** **Page 63**
Order for substituted service was made authorising service by email and by Flo Rida's facebook, but order for substituted service cannot be used to serve a person who is not in Australia.

Service of Originating Process **Page 64**

(Impersonal) Personal Service **Page 67**

Options for person served with originating process **Page 69**

Appearance and types of appearance

Topic Three – Pleadings and Particulars, Gathering Evidence in Civil Cases **Page 72**

Procedure of gathering evidence

Discovery

Electronic Discovery of documents **Page 76**

Destruction of Documents **Page 77**

●**McCabe v British American Tobacco Australia Services Limited [2002]**
Court preferred an 'innocent' explanation of the policy and the destruction of documents under the policy.

Discovery Abuse

Reducing Discovery Burden **Page 78**

Subpoena

Notice to Produce **Page 84**

Notice to Admit **Page 86**

Interrogatories **Page 87**

Pleadings **Page 90**

The purpose of pleadings (summary of cases)

●**Banque Commercialle v Akhil Holdings (1990) 169 CLR 279** **Page 91**
The plaintiff was entitled only to such relief as was available on the pleadings.

Matters to be pleaded

Rules of pleadings

Drafting a Statement of Claim **Page 93**

Drafting a Defence

Verification of pleadings **Page 96**

Particulars **Page 98**

●**Bailey v Federal Commissioner of Taxation [1977]**
On the one hand [particulars] prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds.

Material Facts compared to Particulars **Page 99**

Particulars required for personal injury cases **Page 101**

Particulars required for proceedings under Compensation to Relatives Act 1897 **Page 102**

Reasonable Prospects of success **Page 104**

Defective Pleadings

Abuse of process **Page 105**

Amendments of pleadings

Legislation in relation to amendments **Page 106**

Case summaries relating to amendments

★Application of Civil Procedure Themes to Pleadings and Particulars **Page 108**

●**Markisic v Cth of Australia [2010] NSWSC 24**
Leave to replead

●**Aon v ANU (2009)**
An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.

Topic Four – Opposing Disclosure (Privilege) **Page 109**

Types of privilege

Context of a claim for privilege

Related Legislation **Page 110**

★Limitations of s131A **Page 111**

Client Legal Privilege **Page 112**

Rationale of Client Legal Privilege

Purpose of Legal Privilege

Client Legal Privilege for third party documents **Page 113**

●**Esso Australia Resources v Commissioner of Taxation (1999 CLR)** **Page 115**
If a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose, the existence of that subsidiary purpose will not result in the loss of the privilege. But if a document would have been prepared irrespective of the intention to obtain professional legal services, it will not satisfy the test.

●**Mitsubishi Electric Australia v Victorian Workcover Authority (2002)**
The test to determine what is "dominant purpose" was an objective test

Loss of the Client Legal Privilege

●**Waugh v Merrill Lynch** **Page 118**
Case considers whether there was waiver of client legal privilege.

Public Interest Immunity

Balancing test for Public Interest Immunity

●**State of NSW v Public Transport Ticketing Corporation** **Page 121**
Information where its disclosure could prejudice the functioning of government, for example, cabinet documents, should be privileged. A special counsel may be appointed to look at the documents that are the subject of the claim (s 56 CPA).

Negotiations Privilege (Evidence Act s 131)

How is Negotiation Privilege lost?

●**Field v Commissioner for Railways (1957 CLR)** **Page 123**
The court made a distinction between what formed part of the negotiations for settlement and what was reasonably incidental to the negotiations.

●**Azzi & Ors v Volvo Car Australia Pty Ltd (2007 NSWLR)** **Page 125**
Civil Procedure Act s 30(4) is a more specific provision directed specifically to negotiations in a mediation session, excluding evidence of such negotiations, without any corresponding exception

Topic Five – Trial or No Trial **Page 126**

Deferral of Trial

Adjournment

●**Bank of Western Australia Ltd v Callipari [2011]**
Considerations against adjournment:
- *need for public confidence in judicial system*
- *public money wasted in adjournments*
- *prejudice caused by delay*
- *costs cannot always compensate for delay so "justice" does not always mean allowing adjournments with costs.*

Summary Disposition (Disposition without Trial) **Page 126**

●General Steel Industries Inc v Commissioner for Railways (NSW) (1964)
Jurisdiction of summary disposition to be employed sparingly

●Ashby v Commonwealth of Australia (No. 4) [2012] **Page 127**
The Courts are cautious about exercising their power and will only do so in a clear case ...

●Hepburn v McLaughlins Nominee Mortgage & Aerogala Pty Ltd [1997]
Requirements for summary disposition

- *Must be clear that there is no real question to be tried*
- *This must be clear on the whole of the evidence; and*
- *Defendant does not need to show a complete defence.*

Default Judgment

●National Australia Bank Ltd v McCann (No.2) [2010] **Page 130**
Abuse of process: "unjustifiably oppressive on the other party" given "no real effort" to deal with deficiencies in defence and evidence "clearly pointed out in the earlier judgment."

Summary Judgment **Page 131**

●E-C Commerce v Bidwell [2005]
Though the defence was very badly drafted --- internal inconsistencies. But there were triable issues, summary judgment ordered.

Summary Dismissal

Common basis for dismissal

Civil Procedure Themes in dismissal

★Summary Disposition --- Balancing "just, cheap and quick" **Page 132**

Role of judicial discretion

Frivolous and vexatious proceedings

Abuse of Process **Page 134**

●Ashby v Commonwealth of Australia (No. 4) [2012]
Proceedings dismissed as an abuse of process. Commenced for the predominant purpose of a political attack on Mr Slipper to advance the interests of Mr Ashby and included allegations which were irrelevant, scandalous and calculated to injury Mr Slipper.

Effect of discontinuance **Page 135**

Stay of Proceedings **Page 135**

●Aon v ANU (2009)
Abuse of process principles may be invoked to prevent attempts to litigate that which should have been litigated in earlier proceedings as well as attempts to re-litigate that which has already been determined.

Security for Costs **Page 136**

Wide discretion; Principles from case-law: **(Idaport Pty Ltd v NAB Ltd [2001])**

Settlement **Page 136**

Settlement Correspondence

Two types of settlement: Offer of compromise and or Calderbank letters

Process of settlement

Offer of Settlement and Costs **Page 137**

For indemnity costs

Calderbank Offers

Principles relating to Calderbank offers **Page 138**

Trial - UCPR Part 29 **Page 139**

Conclusion of trial **Page 140**

Appeal

CIVIL PROCEDURE
Topic One – Process, Open Justice and Fairness

Adversarial System of Justice of Civil Litigation, Case Management, Alternative Dispute Resolution, Costs and Ethics

Substantive Law: defines rights and duties, such as crimes and punishments in the criminal law and civil rights and responsibilities in civil law. It is codified in legislated statutes, can be enacted through the initiative process, and in common law systems it may be created or modified through precedent.

<u>Examples of substantive law</u>

- Contracts
    - A party who fails to perform his contractual obligations:
        - Remains under an obligation to perform her obligations under the contract; or
        - Comes under an obligation to pay damages to the person not in breach to compensate that person for loss arising from the breach
- Torts
    - A person (A) who negligently causes harm to another person (B) to whom A owes a duty of care must compensate B for the harm A caused.
- Real Property
- Company Law
- Administrative law

If everyone agreed about what their rights and obligations are; and every person under an obligation was willing and able to perform his or her obligations, the only law we would need would be substantive law – that is, rules which define rights and obligations.

However: some people who are under a legal obligation simply choose not to perform their obligations: this is relatively rare. Other people who are under an obligation do not have the financial or other capacity to perform their obligations; then there are cases where there is disagreement or a

dispute about whether a person had incurred an obligation or, if she has, the extent of the obligation she has incurred.

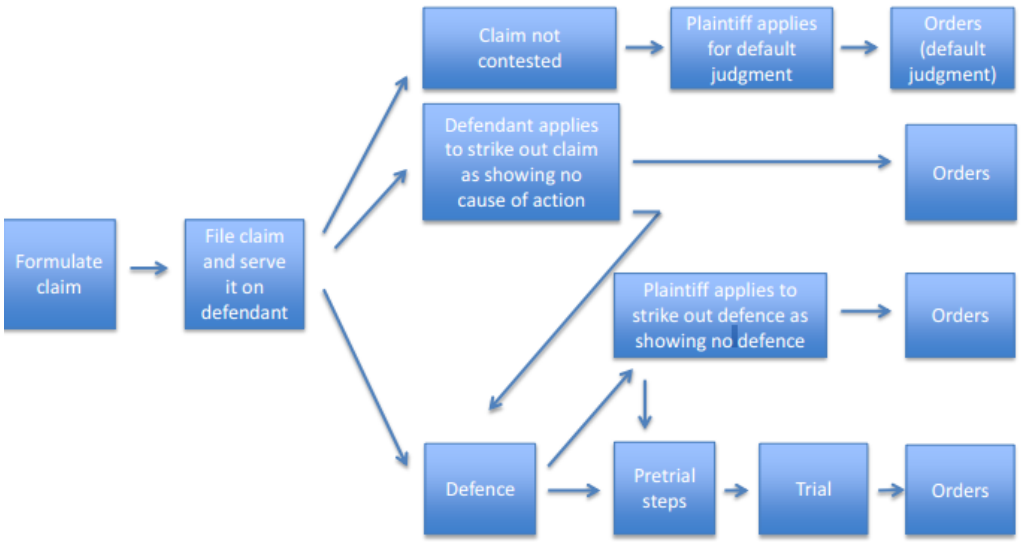
Unless the person who is owed the obligation is willing to forego or compromise what they believe to be their rights, they will go to court, because:

- First it is only the courts that can conclusively determine whether the claimant has the rights she claims she has.
    - A claimant will therefore go to court with the aim of transforming what is a contested claim into an incontestable right.
- Second, if the respondent continues to refuse, or is unable, to perform the obligations which the court conclusively determines he owes the claimant, the claimant can utilise various coercive powers at the disposal of courts to enforce the obligation.
    - Examples: sale of property by sheriff; charge on land; bankruptcy.
- Even if the respondent does not dispute he is under the obligation claimed by the claimant, but is unable or unwilling to perform it, the claimant will still desire to go to court.
    - That is so because, although not disputed, a claimant cannot enforce the obligation unless a court recognises that the claimant has the right she claims she has.
    -

The law of civil procedure is a set of rules which deals with:

- The form and manner in which a claimant must bring her claim before a court.
- Where a claim is disputed, how that dispute is to be identified and determined by the court.
- The means by which parties can compel production of potential evidence from each other or from persons who are not parties.
- Where a claim is not disputed, how the court is to recognise the claimed rights. • How rights which a court determines or recognises exist may be enforced. What this course will cover
- It is also important to consider:
    - The policies underlying the rules and the system of procedure they underpin; – some of the problems with the system, and in particular, costs, and efficiency.
    - Alternative procedures for resolving disputes.

<u>Stages of civil proceedings</u>



Step 1A: Formulation of the claim

In most cases, a claim must or may be formulated in a document called a "statement of claim". A statement of claim sets out:

- The **orders** to which the plaintiff claims she is entitled.
- The **"material facts**" which the plaintiff alleges exist and which entitle her to the orders she claims. Such facts are called a "cause of action".
    - *"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."*
      Letang v Cooper [1965] 1 QB 322

In other cases a claim must or may be formulated in a document called (in NSW) a "summons".

- Like a statement of claim, a summons sets out the orders the plaintiff claims she is entitled.
- A summons does not, however, set out the material facts on which she relies.
    - Instead, the plaintiff must give evidence of the facts in an affidavit which accompanies the summons. Example: summons seeking orders for specific performance.

Step 1B: Filing of the claim and jurisdiction

A proceeding is commenced when the plaintiff files the statement of claim (or summons) with a court. The **claim must be filed with a court that has jurisdiction (i.e., authority)** to entertain the claim. Some courts are restricted in the types of orders they can made, and, where the claim is a claim for a money judgment, the amount of the claim they can entertain. For example: the District Court cannot entertain a claim for debt that exceeds $750,000. And it cannot entertain claims for specific performance.

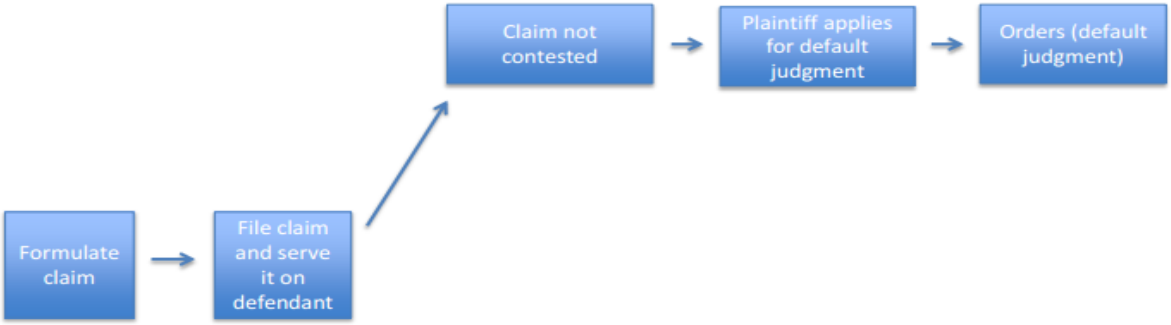
Step 2: Service of claim

A fundamental principle of our procedural law is that the person against whom a claim is made must be given notice of the claim. In most cases, the rules require that the **notice must be given by delivering to the person a sealed copy of the claim**. The delivery of the claim on the defendant is known as "service".

Service is the foundation of a court's jurisdiction (authority) to determine the claim and rule adversely to the defendant. Service would be effective if the defendant resides in New South Wales or anywhere else in Australia. A defendant who resides overseas can also be validly served there, but only in particular circumstances. (This will be dealt with in conflict of laws.)

(Possible) Step 3A: Applying for default judgment

Once served, the defendant can either defend the claim or not defend the claim. If he does not defend the claim, he will incur a **default judgment.**



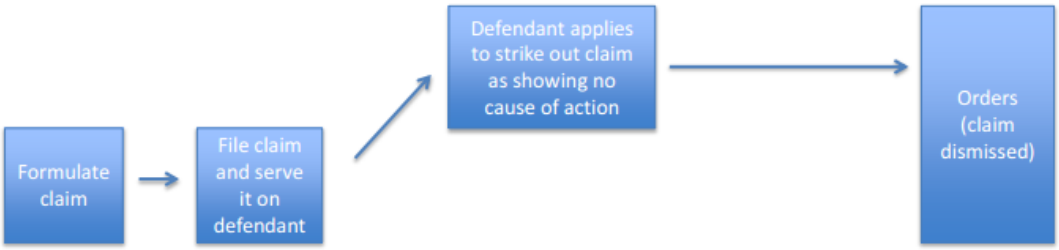
(Possible) Step 3B: Defendant files notice of appearance

If the defendant accepts the court has jurisdiction, and he chooses to defend the claim, he must formally submit to the jurisdiction of the court. He does this by filing a "notice of appearance".

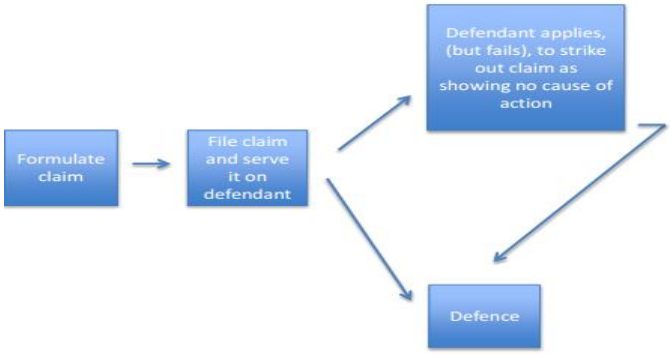
(Possible) Step 4: Defendant options

The defendant then has a number of options:

- One is to apply to **strike out the claim** as disclosing no reasonable cause of action.
    - This is rarely done, and it is not encouraged unless the claim is clearly bad.



- If the defendant does not apply to strike out the claim, or he does, but fails to obtain an order striking out the claim, the next step is for the defendant to give notice of the grounds on which he will defend the claim.
    - Assuming the proceeding was commenced by statement of claim, the defendant does this by **filing a document called a "defence".**

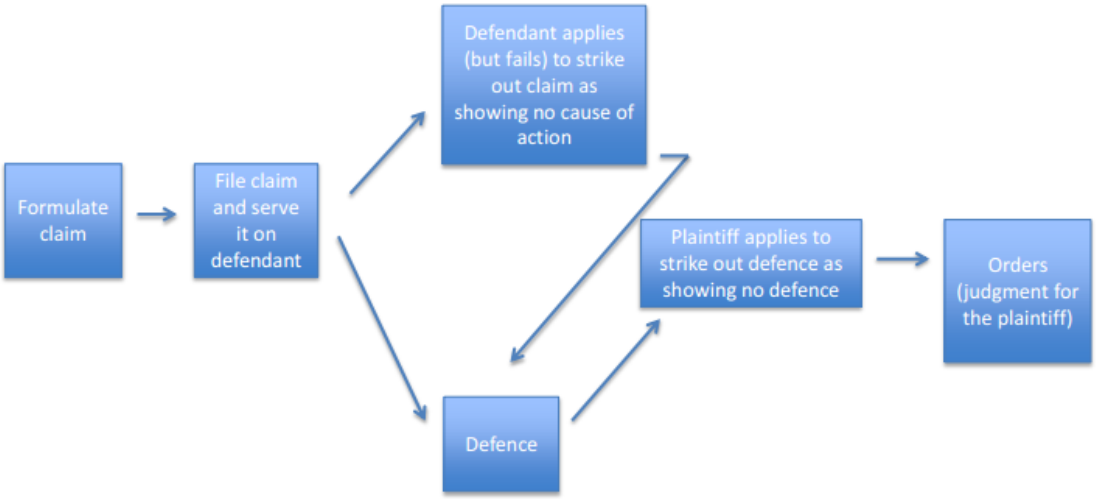


The defence must respond to each allegation made in the statement of claim. This may be done by adopting any one of the following:

- Admitting the allegation.
- Denying or not admitting the allegation.
- Admitting the allegation, but alleging additional facts which negatives liability ("confession and avoidance").
    - Example: defence denying liability to pay price.

(Possible) Step 5A - Striking out the defence

After the defence is filed, the plaintiff may apply for an order to strike out the defence on the ground it discloses no arguable defence. This does not happen often, and is discouraged by the court except in very clear cases.



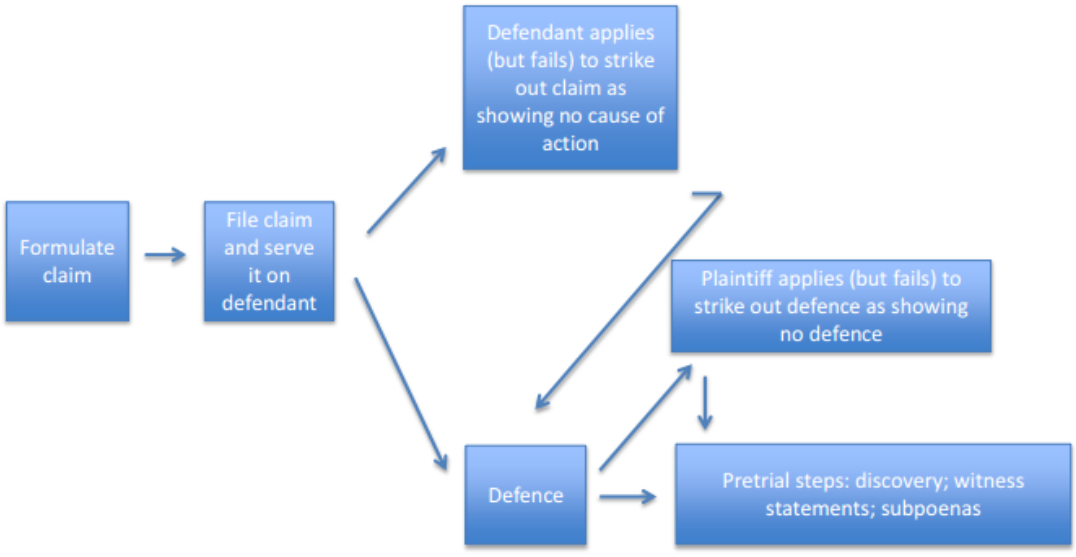
Pleadings: The statement of claim and the defence are called "pleadings".

"Pleading" also refers to a process, that is, the process in which a plaintiff serves a statement of claim, and the defendant answers each allegation in the statement of claim. The **pleadings** define the issues of fact that the court is required to determine, and, more generally, marks the boundary of the dispute between the parties. Usually, pleading stops with the defence. But in certain cases, a further pleading, called a reply, is filed.

(Possible) Step 5B Pre-trial

If there is no move to strike out the defence, or if the plaintiff moves but fails to strike out the defence, steps are then taken to have the matter ready for trial. **Pre-trial** includes the following steps:

- "**Discovery**". This requires parties to make available for each other's inspection documents they hold that are relevant to any issue.
- Preparing and **serving affidavits or witness statements**. In most civil cases, parties are required to reduce to writing the evidence of witnesses the parties are going to call at the trial, and to provide those statements to each other in advance of the hearing.
- **Subpoenas for production**. These are orders directed to persons who are not parties to produce documents described in the subpoenas to the court usually on a date in advance of the hearing date. Once produced, they may be inspected by the parties, subject to claims of privilege.



Case Management

These pre-trial activities, and often pleadings, are regulated by judicial officers, sometimes judges, but in state courts, more often by registrars. This regulation is generally known as “case management”

The basic technique is that matters come before the court for directions. At these hearings (“directions hearings”) the court, usually by consent, directs the steps that the parties should take, and the time by which the steps should be taken. Usually, the legal representatives agree before the directions hearing of the directions that should be made, and the court usually makes directions in line with that agreement. The agreement is usually recorded in a document called “short minutes of order”.

Applications

Often in the course of a proceeding, the court is called to make orders about such matters as:

- a party’s non-compliance with directions and other procedural requirements;
- the inspection of documents;
- the amendment of pleadings;
- joining additional parties;
- preservation of assets;
- security for costs.

These orders are called “interlocutory” orders as opposed to the final orders the court makes after the hearing. The court **makes interlocutory orders usually by a party applying for such orders**. The application is made by filing and serving on the other parties a document known as a “notice of motion”.