

TOPIC 1

An Introduction to Our Civil Justice System

Introduction

- Procedural law is law which governs the conduct of proceedings before the court. The mode of proceeding by which legal rights are enforced. A process for the resolution of civil disputes.
- Civ pro regulates the ways in which substantive rights and obligations are claimed, proved and enforced.
- Not about the law that creates legal rights or obligations (substantive rights), but law that governs how the substantive rights are enforced.

Sources of Civ pro law

- s25 supreme court act
 - o Empowers judges of supreme court to make supreme court rules. These rules are contained in the supreme court (general civil procedure 2005) thus judges have the power/authority to make rules of court which will govern the procedures of those courts.
 - o NOTE: Each court (county, HC, magistrates, federal) have their own civ pro rules.
- Courts inherent jurisdiction
 - o While supreme court rules are important source of civ pro law, not a code. The civ pro rules complement the inherent jurisdiction of the court. The inherent juris provides the court with such power as is necessary to ensure its procedures are capable of producing just outcomes.
 - o The purpose of courts inherent juris is to allow the court to regulate its own process to prevent abuse of that process.
 - o ie power in the court itself

Interpreting rules of Supreme Court

- when the court interprets its own rules, must do so with ORDER 1 RULE 14 in mind:
 - o This establishes an overriding philosophy that a court must manage litigation so as to bring cases to an early and economical disposition.
 - o In exercising its powers under to rules the court must ensure a proceeding is effectively, completely, promptly and economically determined.

Traditional Adversarial model of civil litigation

- Summary Traditional adversarial features:
 - o Parties themselves who determine track of evidence presented to court
 - o Parties themselves who select the issues to be litigated.
 - o Each party is responsible for the investigation and gathering of information to present before the court.
 - o Each party is responsible for the way this information is to be presented to the court
 - o The Judge plays comparatively passive role (non-interventionist) and court makes its decision on evidence presented before it and the issues presented to it.
 - o Evidence at hearing is elicited by parties asking questions in turn and judge forbidden to ask question except to clarify what witness said. Cannot say gap in evidence of parties, must decide the case on evidence presented before it.
 - o Where rules of court not complied with, no sanction will be imposed on delinquent party except at the request of the non-delinquent party

- Traditional adversarial system of resolving disputes meant that the parties themselves were responsible for preparation of trials and long delay occurred, costs would become substantial. Because of dissatisfaction of way litigation was traditionally conducted, Case management was introduced.
- Restriction on claims and remedies. Both had to fit a cause of action and remedy recognised by law.
- Adversarial trial system disadvantages:
 - long delays can be experienced before a matter gets to trial as left to parties themselves to prepare
 - leaving sanctions to the parties: the adversary philosophy is that the courts will not impose sanctions if the rules of 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;
 - costs of litigation will substantially increase as time increases

Jones v National Coal Board [1957] 2 QB 55

- Parties themselves that raised issues for determination. The object of the judge is to find the truth within the parameters of the adversary system. You can only find the truth on the issues before the court presented by the parties.

Hoare v Magistrates Court [2003] VSC 257

- in proceeding counsel opposed to the asking of questions, this was overruled by the magistrate who proceeded to ask several questions. It then appeared that the magistrate had predetermined the matter and was thus biased against the plaintiff. The grounds of appeal were on a miscarriage of justice.
- The question which the judge asked made it seem to a fair-minded observer to be under the impression that the defendant had committed the offence (despite the fact that he was merely clarifying the matter) → this gave impression of bias.
- Fine line between impression that defendant is guilty and clarifying of facts.
- Not the judges role to investigate and for this reasoning the questioning of the case crossed the line and is impermissible.
- Judge went beyond his power (although his intentions were honest) by placing pressure with the impression of bias which is unfair at trial and grounds for appeal.

Fookes v Slaytor [1979] 1 All ER 137 (on line).

FACTS

- P was driving his car on a dark, wet, windy night and hit a parked truck. P alleged that the truck was not well lit and P could not see it
- As a result of the collision P suffered injuries and commenced an action for personal injuries.
- D did not file a defence, nor attend the hearing.
- At the trial the judge found that P contributed to his own accident (contributory negligence) and reduced P damages accordingly.
- On appeal the decision of the judge to reduce the damages was overturned.

HELD

- Court should play a passive role
- Judge had no right to reduce the damages for contributory negligence.
- The issue of P contributory negligence was not before the court. Judge could not make an order as it was never brought up by the D in the court.
- Obvious that P was guilty of contributory negligence but as it wasn't brought before the court, the issue could not be raised.
- Not open to trial judge to find contributory negligence as was not pleaded before the court.
- Objective is to find the truth but that truth is to be found within the restrictive parameters of the adversarial system. Only find the truth on the issues before you. If any fact should

emerge during trial that does not concern issue for the court, court must ignore the fact even if it knows that by ignoring the fact the credibility of the courts findings will be affected.

Case management

- Judges become more active
- NOW case management by judges, registrars manage the time and events involved in the management of cases from management to disposition. New system contemplates greater control exercised by the court on the progress of cases.
- Caines:
 - o Traditional model no longer applies in aus today.
 - o Court is no longer passive
 - o Court manages the progress of cases and ensures parties are aware of avenues of alternative dispute resolution
 - o Delays under old system are brought under control by court setting a timetable for progress of cases. Courts have responsibility to prevent waste of time and public money.
 - o Court retains control of proceedings before it and can give directions to properly manage the cases in its list.
- **Case management schemes are based on premise that the conduct of litigation is not mere private matter for the parties there is an important public interest in the functioning of the civil justice system.**

Who should be the winner in efficiency vs justice?

- in today's legal world there has been a shift towards efficiency over justice as is evident by the *Civil Procedure Act 2010 (Vic)* and the cases below

Sali v SPC Ltd (1993) 116 ALR 625

FACTS

- situation where **new facts/defence** has been brought to the attention of either the P or D **after the hearing date has been set**

HELD

- brennan, Deanne, mchugh:
 - o in determining whether to grant an adjournment (so one party can amend their documents) **MUST** consider the **effect of an adjournment on:**
 - **court resources** and
 - In public interest in achieving the most efficient use of court resources.
 - **the competing claims of litigates in other cases which are awaiting a hearing.**
 - What might be perceived to be an injustice to one party on its own circumstances may not be so when considered with claims of other litigants.
 - o Look at the explanation of why the new evidence should be allowed in
- **APPLIED HERE:**
 - o In this case the court followed the timetable that had been set.
 - o Court gave importance to case management timetables
 - o **EFFICIENCY WON**

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

FACTS

- federal court at directions hearing set down particular timetable and trial date.

- Soon after the date was set (all procedural requirements had been prepared) D wanted to make amendments and wanted to adjourn the case.
- Trial judge refused and that original date was to be kept (applying *Sali*)

HELD

- HC:
 - o Justice was a paramount consideration
 - o Its true case management is a relevant consideration whether to grant adjournments BUT is not so important so as to prevent justice from being done
 - o Justice is the ultimate aim of the court.
 - o **JUSTICE WON**

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

FACTS

- ANU had property damaged in bushfires. Made a claim to insurance companies. Insurance companies rejected their claim. ANU sued the insurance companies. Three days into the trial ANU asked the court for an adjournment so they could add a new cause of action against insurance company

HELD

- ANU request for an adjournment was rejected.
- HC rejects *JL* holdings and **reaffirmed the decision in *Sali***
- The rules governing civil litigation no longer are to be considered only to the resolution of the dispute b/w parties to a hearing. The achievement of a just, timely and cost effective resolution has an effect upon the court and other litigants.
- When doing justice not only considering justice on parties before the court but all other litigants.
- **EFFICIENCY WON**

LOOK AT CIVIL PROCEDURE ACT FOR ALL SECTIONS IN WHICH THE CASE MANAGEMENT NOW TAKES PRECEDENCE OVER JUSTICE.

Topic 2

The Victorian Court Hierarchy

Jurisdiction of the Supreme Court of Victoria

- Jurisdiction of court means the power of a court to hear a case
- Before the court has jurisdiction to hear a case it MUST have:
 1. Subject matter jurisdiction AND
 2. Territorial jurisdiction

1 subject matter jurisdiction

- supreme court must have power to hear a particular dispute.
- section 85 of the *Constitution Act* (Vic) provides for the jurisdiction of the Supreme Court:
 - Court has whatever jurisdiction is necessary to do justice.
 - Jurisdiction is unlimited.
- Subject to:
 - legislation may reduce or modify the jurisdiction (eg property law act dispute about property referred to VCAT) therefore necessary in determining jurisdiction of supreme court to look at legislation that may effect its power.

2 territorial jurisdiction

- **at CL at the time of service of the writ**, the defendant **must have been within the state of Victoria** (even if for a brief moment) → *Lorrie v Carroll*
 - also known as *impersonam* jurisdiction
- If the defendant was served in another state, at common law, the supreme court had no jurisdiction over them
- NOTE: the **offence does not have to been committed in Victoria**

Summary CL position:

1. at CL the basis of the courts jurisdiction is valid service on the defendant in Vic
2. power of the court does not run beyond territorial borders of the state. The court power in an action depends on the defendants presence inside the jurisdiction at the time of the service of the writ
3. Relevant date: at the time of service
4. Temporary presence inside the jurisdiction is all that is required to attract the jurisdiction. Presence for whatever reason creates a foundation for the courts jurisdiction.
5. However, if the defendant is **fraudulently enticed** into the state boundaries and then served. **Service is bad** and the Supreme Court does not gain jurisdiction over that person. Not valid service.

Lorrie v Carroll

- the jurisdiction of the supreme court depends upon the amenability of the defendant to the writ.
- The defendant has to be answerable to the writ which is only possible if served in Victoria
- **CL doctrine is that the writ does not run beyond the boundaries of the state.**
- Defendant must be answerable to the writ. Depends upon nothing but presence in the jurisdiction.
- The power of the supreme court depends upon people being in the state of Victoria at the time of the service of the writ.

Cross-vesting jurisdiction of the courts

In cases which involve a mixture of state laws and federal laws which is the appropriate court?

The Jurisdiction of Courts (Cross Vesting) Act

- Act established a cross vesting courts, state courts according to this act could hear federal court matters and federal courts could hear state matters.
 - Parties were free to select which court they wanted to go to.
- the cross vesting legislation had two broad purposes (*Bankinvest v seabrook 1988 NSW court of appeal*) :
 1. The cross vesting leg in effect brings together the supreme courts, federal court and the family court into an organisational relationship.
 - a. It enables any of these courts to exercise the jurisdiction of and apply the law that would be applied by any one of the courts
 2. courts have the power to transfer a case from one court to another in the interests of justice.
 - a. This ensures court proceedings will not fail because of the lack of jurisdiction of a particular court.

EXCEPTION:

Re wakim 1999 HCA

- Constitutionally invalid that provision of the act, which gave federal court the power to hear state matters.
- All other aspects valid
- **Federal courts CAN NOT hear state matters.**
- **State** courts CAN hear **federal** matters

Transfer of proceedings

- s 5 cross vesting legislation act:
 - On the motion of the court itself, on the motion of any party to a proceeding one case could be transferred from one court to a more appropriate court if:
 1. **related case** being heard in another court OR
 2. **interests of justice** to transfer a case.
 - Whether or not its transferred in the interests of justice depends upon the facts of each case.
 - Look at each case independently. Not guided by previous judgements.
 - The court has an unfettered discretion in deciding what the interest of justice are in transferring a case to a more appropriate court
 - If the court is **satisfied that in the interest of justice another court should hear the case, that case SHALL be transferred.**

Factors for interests of justice:

- court takes nuts and bolts approach to determine which is the more appropriate court
 1. **which court has the most REAL and SUBSTANTIAL connection with the subject matter of the proceeding?**
 2. Forum non-covience → clearly inappropriate
- In deciding where the interests of justice lie, **courts should NOT adopt the forum non-covience rule** (this is the test for international law and has no application here)
- Other factors include:
 1. The connection b/w parties and jurisdiction (where the parties live)
 2. The connection b/w alleged incident and jurisdiction of the court (assignment incident was in Queensland → what does this have to do with vic?)
 3. Governing law of the dispute (ordinarily it is the law of the place where the incident occurred) (if happened in QLD the QLD law should apply)
 4. Has there been any agreement b/w parties as to which law should apply (maybe stated in the CT signed by parties)
 5. Cost, convenience/ inconvenient to parties (where do they carry on business? (FOR ASSIGN) where do witnesses live?)
 6. Which Court is more likely to hear the case quickly if party is one deathbed?
 7. Location of solicitors