Civil Procedure Lecture Notes

Lecture 1: Overview of a Civil Proceeding

- Civil dispute
  - Any legal dispute that is not a criminal dispute
  - Could be either a public or private law matter
  - Includes ‘relatively’ minor matters
  - Dispute is about a disagreement about specific issues or about isolated actions and/or inactions

- What is the civil justice system?
  - The institutions and services that assist people to resolve civil disputes and prevent disputes from arising
  - “…combination of institutions and individuals authorised by the state to resolve disputes and, in so doing, set and enforce standards of behaviour for those belonging to the state” – the people that are involved must be authorised by the state
  - It includes:
    - The laws and legal framework;
    - Services that provide information and advice in relation to legal problems and events that people might experience, including informing them of their legal rights;
    - Providers of legal and related services, including legal advice, assistance, advocacy, dispute resolution and representation;
    - Primary decision makers/public officials (including ministers) making decisions affecting rights. Dispute resolution services that help people negotiate their own solutions;
    - Complaint handling bodies;
    - Partially or wholly government funded dispute resolution services that help people negotiate their own solutions;
    - Tribunals; and
    - Courts.

- Purpose: “It is the method by which the state - the government - enforces the legal rights and obligations of citizens. The law, whether enacted by Parliament or declared by judges, defines those rights and obligations. Their existence raises the possibility of disputes, either between citizens, or between the government and citizens. The courts exercise the judicial power of government, which secures justice, and keeps the peace, by enforcing the civil law and imposing the will of the state on disputing parties”.

- 2 basic purposes for civil justice system:
  - System by which people may vindicate their rights; and
  - Resolve their disputes under the auspices of the state.

- Essential component is access to justice – system must be
  - Equally accessible to all; and
  - Lead to results that are individually and socially just.

- The purpose of the system is for courts to provide equal justice for all according to law impartially, fairly, without unjustifiable delay and with the minimum but necessary use of public resources.

- Civil procedure “…constitutes the mechanism of the system for the administration of civil justice”. It includes the rules, procedures and practices governing the process of the determination/adjudication and enforcement of civil disputes.

- How are civil disputes resolved?
  - Formal justice - adjudication or resolution through court or tribunal system.
  - Informal justice – resolution through bodies and institutions given power or recognition by government (e.g. industry ombudsmen) and other private bodies e.g. private dispute resolution services.
Everyday justice - resolution by the parties.

- Court/tribunal resolution of civil dispute
  - Using the coercive power of the State to resolve a dispute, for example:
    - Trial at which dispute will ultimately be adjudicated;
    - Court order.
  - State does NOT recover its actual costs in providing the court, judge, court staff etc. from the parties.

Overview of the civil court system

- Controlled by parties
- Juries principally act as finders of fact
- Role of court/judge is relatively passive and non-interventionist
- Procedural requirements subservient to determination of substantive legal dispute between the parties.
- Criticisms of the adversarial system
  - Expensive
  - Too slow in bringing cases to a conclusion
  - Lack of equality between wealthy, well-resourced litigant and under-resourced litigants
  - Too adversarial (one party against another, not reaching a resolution)
  - Rules of court are too often ignored by the parties and not enforced by the courts

Reforms

- Greater control over the conduct of litigation – case management
- Movement towards minimising the use of courts and adjudication to finalise cases
- Near removal of jury trials
- Additional professional obligations on lawyers

Case management

- Rationale is to reduce cost and delay; and ensure avenues for resolution before the trial
- Introduces court role in determining the pace of litigation
- Rules and/or practice directions are set up management scheme
- Different models in different Australian jurisdictions
- Parties still control issues and evidence
- Rule 5 of the UCPR - Philosophy — overriding obligations of parties and court
  - The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
  - Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
  - In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
  - The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
  - Example - The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court.
- Rule 5 sets out overriding objectives used to interpret other provisions in the UCPR;
- Case flow management was introduced to give practical effect to rule 5.
- Courts have made it clear that “[parties] do not have an inalienable right to a hearing on all issues on the merits”: *Ridolfi v Rigato Farms Pty Ltd*.
- All civil cases: general practices/requirements:
Directions: either party can apply for or court may make at any stage of proceedings: rules 366 and 367;
- Parties can consent to participate in ADR or court may order it;
- Rule 469 of the UCPR – proceedings set down for trial after a request for trial date signed by all parties filed (extra requirements for personal injury matters).

- Supreme Court:
  - Practice Direction 4 of 2002 “Case Flow Management – Civil Jurisdiction”
  - Practice Direction 6 of 2000 “Supervised Case List” – for longer trials – only relates to the pre-trial management of cases. This may include regular review hearings
  - Practice Direction 3 of 2002 – “Commercial List” (as amended by Practice Direction 2 of 2008 – changed the rule in relation to which rules can end up on the commercial list – commercial cases need to be of 10 days or less)

- District Court:
  - Practice Direction 3 of 2010 “Commercial List: District Court” (assigns the case to a specific judge – this judge hears the applications for the matter and the final matter)

- Failure to comply with the rules or case management?
  - Raises potential conflict between justice (including giving parties adequate opportunity to fully investigate and present their claims) and efficiency, cost and timeliness.

  - **State of Qld v JL Holdings Pty Ltd**
    - Minister refusing to approve a lease over some property that they were holding to take out on Kangaroo Point. JL Holdings took action on a number of grounds.
    - The matter was set down for trial, 6 months before the trial they sought leave to amend the pleadings. Initially leave was refused at the first instance – as not refusing it would jeopardise the trial dates.
    - HC held, overturned this decision, cases need to be determined on merits and only in exceptional circumstances should case management procedures outweigh this.
    - In our view, the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion.

  - **Aon Risk v ANU**
    - Unanimous judgement –
    - Canberra bushfires – ANU had property that was destroyed by the bushfires. There was an issue with insurance and them taking issue against their insurer and their insurance broker.
    - ANU managed to settle the claim against the insurer in the first few days, however the claim against the insurance broker continued.
    - ANU then sought to amend the claim to plead a new cause of action against the insurance broker and attempted to plead a different contractual issue.
    - The judge allowed the issue to be debated during the course of the 4 weeks. The matter was then appealed.
    - HC, could these procedural issues effect the parties ability to substantiate their claims?
    - “Justice” is not just the needs of parties but public at large;
    - Court will weigh interests of parties against interests of the civil justice system as a whole.
- ANU should not have been allowed to amend its pleadings.
- Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a "just resolution" is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore 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.

- How effective is case management?
  - Some evidence effective in reducing time to conclusion.

Minimising the use of courts and adjudication to finalise cases

- Diversion of some cases away from the courts to other bodies or mechanisms such as:
  - Industry ombudsman;
  - Quasi-administrative schemes e.g. personal injuries or workers compensation which essentially provide “barriers and hurdles to litigation” designed to maximise the prospects of mediated resolutions (de Jersey CJ);
  - Specialist tribunals designed to produce less expensive, less formal, more expeditious outcomes e.g. QCAT.

Limitations or removal of use of juries in civil matters

- Jury trials barred by statute in personal injury proceedings arising out of motor vehicle accidents, accidents at work and medical negligence.
- Judges now have role of finders of fact.

Change in the role of a lawyer

- In the traditional adversarial model of civil litigation, the role of the lawyer was partisan even though duties to client (i.e. representation, to act on instructions and a duty to continue to act) always been subject to overriding duties to court and administration of justice.
- However, there have now been attempts to make less partisan (i.e. more co-operative problem solver):
  - 1. Impose duty to advise clients and potential litigants about alternatives to litigation: rule 12.3 of Solicitor’s Rule 1997 (Qld)/rule 17.1 of the Australian Solicitor’s Conduct Rules;
  - 2. Impose obligation to maintain independence: rule 13 of Solicitor’s Rule 1997 (Qld)/rule 17 of the Australian Solicitor’s Conduct Rules; and
- Changes to the law and rules that lawyers must advise clients of have also (arguably) pushed lawyers to be less partisan:
  - rule 5(3) of UCPR – implied undertaking upon parties to proceeding to proceed in an expeditious way;
  - introducing formal offers to settle that may have costs consequences: r 360 and 361 UCPR;
  - introducing rules that attempt to limit expert evidence to a single expert: r423 UCPR; and
  - over time, seemingly greater willingness of courts to strike out proceedings for failure to comply with the rules.

Future directions
“Trials, civil and criminal, continue to grow in length, especially in Brisbane. This expansion in the number of days committed to trials inhibits the court’s capacity to dispose of its workload as quickly as the judges would wish. It also adds to expense, both public and private. Earlier, more intensive judicial case management is needed to try to address some of the causes of this ongoing inflation.”

Better Resolution Group in Qld

3 main areas of work:
  - ADR
  - Disclosure
  - Case management – looking at ways to reduce issues at trial

Pre-litigation exchange of information

Requirements to attempt settlement pre-litigation

Extending case-management to the trial stage

User-pays in commercial trials??

Ongoing problems with litigation
  - Remains an expensive option
  - Unpredictable in terms of outcome
  - Difficult
    - Time consuming
    - Adversarial – not a way of resolving the dispute – more so a clash between parties
    - Physically and emotionally distressing
  - Only provides adjudication to legal issues

Reasons to advise clients about ADR pre-litigation
  - Duty to advise clients about alternatives to litigation
  - Good client care (achieve the outcomes that the client wants to achieve)
  - Future stator obligation that effectively requires parties to make reasonable attempts to settle before commencing proceedings? (Introduced in NSW and Federal courts)

Alternative/additional dispute resolution procedures
  - The choice of ADR may be dependent on the type of dispute, the complexity of the claim
  - Mediation
    - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
    - Third party has purely facilitative role i.e. no advisory role.
  - Conciliation
    - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
    - Conciliator has an advisory (not an adjudicative) as well as a facilitative role.
  - Arbitration
    - Parties present arguments and evidence to an independent expert who makes a determination; and
    - Most commonly used in commercial, construction, labour and international trade disputes.
  - Factors to consider when advising a client regarding ADR:
    - What is in dispute;
    - Conflict management history between the parties;
    - The client’s priorities and the reason for those priorities; and
    - Attitudes and capacity of the parties.
In a civil proceeding the plaintiff’s first consideration is to choose the proper forum for litigating the dispute. In Queensland, there are three courts of civil jurisdiction:

- **Supreme Court of Queensland** – unlimited jurisdiction in law and in equity. It has whatever jurisdiction is necessary for the administration of justice.
- **District Court of Queensland** – civil jurisdiction up to a monetary value of $750,000 over those causes of action listed in s 68 of the District Court Act.
- **Magistrates Court** – civil jurisdiction over the causes of action and heads of relief mentioned in the Magistrates Court Act 1921 up to a monetary limit of $150,000.

Irrespective of the court in which a civil proceeding is pending the same rules of procedure apply, namely the Uniform Civil Procedure Rules 1999. Essentially, the courts function is to determine the facts and arrive at a judgment.

### Commencing proceedings

- The plaintiff commences a proceeding involving a dispute by filing a claim, in the prescribed form, in the court in which the plaintiff intends to sue. The claim is the formal document giving basic details about the names of the parties and a brief description of the plaintiff’s cause of action.
- The plaintiff’s statement of claim, a statement setting out the facts the plaintiff intends to prove by evidence at the trial must be attached to the claim.
- The court registry accepts the claim form and gives the plaintiff an official stamped copy.

### Service

- Once the plaintiff has an official stamped copy of the claim, they must deliver it to the defendant, usually by handing it to the defendant personally. This constitutes personal service on the defendant.
- Beyond notifying the defendant of the existence of a proceeding, service on the defendant creates the courts personal jurisdiction over the defendant. The defendant is liable to be served with a claim only if there is a rule of law pursuant to which service can be effected. Presence within the territorial jurisdiction of the court is sufficient.
- A defendant who is outside of the court’s territorial jurisdiction is liable to be served only if there is a rule of law permitting service. This a defendant who is in a another State is served pursuant to the Service and Execution of Process Act and a defendant who is in a foreign country is served pursuant to r 124 of the UCPR.

### Notice of intention to defend

- If the defendant intends to contest the plaintiff’s claim, the defendant has to file a notice of intention to defend in the court registry and serve a copy on the plaintiff. The defendant’s notice of defence must be attached to the notice of intention to defend. The notice of defence sets out the defence the defendant intends to prove at trial.
- If the defendant fails to file the notice of intention to defence within 28 days of being served with the claim, the plaintiff may request the court to give a default judgment against the defendant if the plaintiff’s claim is for non-discretionary relief.
- The plaintiff has to apply to the court for judgment if the defendant fails to file a notice of intention to defend in a claim for discretionary relief, such as equitable relief or an order requiring the exercise of a statutory discretion.

### Pleadings

- Pleadings are the documents where the parties set out what they intend to prove at trial. In a personal injury proceeding the plaintiff must also file and serve a statement of loss and damage.
- Pleadings:
  - Define the issues for determination at trial
  - Govern the range of admissible evidence to be given at trial
  - Indicate whether a trial by judge and jury or judge sitting alone is appropriate
  - Govern the scope of disclosure of documents
  - Influence the sequence of events at the trial
  - Define the scope of any estoppels resulting from the judgment
Plaintiff’s statement of claim (1st pleading)
- Sets out the material facts on which the plaintiff will call evidence at the trial.
- For it to be valid, the facts alleged have to show a cause of action known to law. If it fails in this regard the court may strike out the plaintiff’s claim and give judgment for the defendant.
- It must give sufficient particulars so that the defendant will not be taken by surprise at the trial.
- It must also set out the orders the plaintiff proposes to ask the court to make at trial.

Defendants notice of defence (2nd pleading)
- The defendant must specifically answer each allegation of fact in the plaintiff’s statement of claim. In addition, the defendant must set out each fact the defendant intends to prove at the trial. The defendant is not permitted to merely deny the plaintiff’s allegations.
- If the defendant denies an allegation, the defendant has to set out in the defence the reasons for the denial and state why the plaintiff’s allegation cannot be admitted. The defendant cannot plead a denial unless the defendant has first carried out a reasonable inquiry about the truth of the plaintiff’s allegation and after that inquiry is uncertain of the truth or falsity of the allegation.

Plaintiff’s reply to defence
- Where the defence raises matters to which the plaintiff has an answer, the plaintiff may deliver a reply to the defence.
- There can be no pleadings after the reply.

Disclosure of documents
- The parties must advise each other of all documents in their possession or control that are directly relevant to an issue on the pleadings. A party is entitled to inspect any relevant document in the opposite party’s possession. A document that is subject to a recognised privilege may be withheld from inspection. The main heads of privilege are:
  - Legal professional privilege
  - Self-incrimination
  - Forfeitures and penalties
  - Oppression
  - Public interest
  - With prejudice communications

Interrogatories
- With the court’s permission a party may submit written questions to the opposite party asking for the admission of facts the party seeking the admission must prove at trial.

Summary judgment
- Either the plaintiff or the defendant may apply for summary judgment. The court may give judgment summarily if the plaintiff or the defendant has not reasonable prospect of succeeding at the trial and there is no need for a trial of the proceeding. Any application for summary judgment is normally made shortly after the pleadings close to bring an early conclusion to a case that does not merit a full trial.

Default judgment
- If the plaintiff’s claim is for non-discretionary relief the court may give judgment by default if the defendant fails to file a notice of intention to defend within 28 days of being served with the claim.
- The plaintiff may request a default judgment where the claim is for a debt or liquidated demand, unliquidated damages to be assessed or the recovery of land or goods.

Alternative dispute resolution
- Settlement processes are important in all civil proceedings.
- ADR usually a form of mediation is where the parties themselves submit their dispute to mediation or case appraisal. The court may also order alternative dispute resolution.

Settlement negotiations