Civil Procedure Notes

Week 1 - Introduction
- Focus of this course on court rules as applied in the Supreme, District and Magistrate Courts of Queensland.
- Key source of rules are the Uniform Civil Procedure Rules (UCPR).
- We will also, to a limited extent, consider the civil procedure in the Federal Court of Australia.
- Civil procedure is concerned with the rules governing the way in which civil (non-criminal) cases before courts are conducted.

Civil procedure and evidence law: both provide ‘adjectival’ rules, that is rules of process rather than rules about substantive rights and obligations. Civil procedure concerned with commencing, maintaining and enforcing civil claims. Law of evidence provides the rules and principles which govern the proof of facts in issue at a trial.
See diagram text p 3

Law of civil procedure found in:
- common law
- statute
- delegated legislation (court rules).

Uniform Civil Procedure Rules
- UCPR delegated legislation, made under Supreme Court of Queensland Act 1991.
- UCPR in effect since 1 July 1999.
- UCPR apply generally across the Supreme Court (Trial Division and Court of Appeal), District Court and Magistrates Courts.
- UCPR introduced with a number of aims, including:
  - increase access to justice and reduce costs;
  - improve relationship between solicitors and their clients; and
  - give courts better powers to manage cases before them.

Reform in Queensland, expressed through the introduction of the UCPR, part of a trend which has swept the UK and Australia (and before them the US). Why has this occurred?
A substantial reason has been dissatisfaction with the past manifestations of the traditional adversarial system of litigation.
Adversarial System
- The ultimate philosophy of dispute resolution in the UCPR is Adversarialism.
- In the Western legal tradition there are two approaches to dispute resolution
  - common law/adversarial; and
  - civil law/inquisitorial.
- What traditionally have been some of the features of a common law/adversarial system?
  - application of judge-made case law, but note modern reliance on detailed statutory law;
  - inductive legal reasoning;
  - parties control dispute, judge relatively passive; and
  - expense falls mostly on parties.

What are some of the features of the civil law/inquisitorial system?:
- source of law is code, glossed by legal scholars;
- role of judiciary is proactive and inquisitive; and
- less formal court room procedures.
Adversarial System
- Traditional model of adversarial system assumed that parties’ self-interest and sanctions such as adverse cost awards enough to prevent delay and high costs.
- Question whether assumption valid
- True costs of litigation (financial, personal)
- Repeat players vs one-shotter
- Criticisms of adversarialism has lead to significant reform of common law jurisdiction procedure.
- Attempts to supplement party control with court supervision (for some commentators a movement towards an inquisitorial model).
- In Australia the reform focus has been in greater court control through case management.
- The UCPR and practice directions reflect this.

Case Management
Case management is a system under which the court actively manages the conduct of cases, from commencement to disposition.
Case management varies between jurisdiction from aggressive control of proceedings (Federal Court) to looser control (Queensland).

Important features of case management:
- management of litigation not to be left to the parties, instead the court plays an active role;
- reflects public interest in the efficient functioning of the civil justice system; and
- use of standards and goals to measure case progress.

Case management systems actively encourage early resolution of disputes, through court-annexed alternative dispute resolution (ADR) procedures (such as mediation and case appraisal). ADR has probably reduced the volume of matters going to trial (see court statistics on Qld Courts home page, and anecdotal reports of an 'under-worked' Supreme Court Trial Division).

Systems may vary:
- matter list – case controlled by court registry and may be assigned to different judges at different stages of the proceeding. Supreme Court of Queensland uses this system, although also uses elements of docket system; and
- individual list/docket system – case assigned to single judge, who manages that case from filing to disposition. Federal Court has adopted this system.

Ethos of case management reflected in UCPR r 5:
- ‘facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense’; and
- ‘objective of avoiding undue delay, expense and technicality’.
- Rule 5 elevates this underlying ethos to an implied undertaking from the parties to the court and to each other to proceed as expeditiously as possible.

The Supreme Court of Queensland (Trial Division and Court of Appeal) has taken a robust approach to the application of r 5:

_Aon Risk Services Australia Limited v Australian National University_ 83 ALJR 951.
- Late amendment of pleadings (3 days before trial scheduled)
- High Court basically said interest in public in resolving dispute means case management override parties freedom. What is just applies to other litigates wanting court not just parties.
WEEK 2 – PRIOR PROCEEDINGS 1

Ethics and the adversarial system
Duties to the client; and

• Loyalty
• Confidentiality;
• Competence; and
• To inform, advise and obey

Duties to the court (public administration) include:

• Acting honestly (not misleading court or breaching undertaking to the court); and
• Acting fairly (not pursuing hopeless cases, not making unsupported allegations, not causing unreasonable expense or delay)
• Formally, duties to the court take precedence over duties to a client

Ethics and the adversarial system

• Duties clients may seem to overwhelm duties to the court
• Adversary system ethos winning at all costs
• Commercial pressures, including the need to satisfy the client to ensure repeat business; and
• Well-resourced clients able to exploit court processes to obtain their objectives.
• Issue of professional conduct arose in White Industries (Qld) v Flower & Hart (Goldberg J):
  o Solicitors in the proceedings knowingly obstructed the course of justice
  o Counsel advised that arguable, but weak case existed and not to wait for further evidence,
    so as to institute proceedings before other side did.

Cause of action
Not a formal legal term. Short hand term used by litigators to say that it is the litigator’s opinion that sufficient evidence exists or is likely to exist for all the elements of a substantive area of law to be made out. Substantive law gives the elements of a cause of action, for example breach of contract needs a contract, interpretation of the terms of the contract, breach of a term and damage.

Links with ethics – it is your professional opinion that sufficient evidence exists or is likely to exist to substantiate the cause of action – White Industries v Flower & Hart
Need to plead all the elements, for most common law actions this involves the need to plead damage, most proceedings involve the joinder of multiple causes of action.

Limitations of actions
The time period in which an action must be brought after cause of action accrues. Reasons for having? Gives certainty, liabilities and to avoid prejudice in defending proceedings. Generally does not destroy an action, but allows the defence to raise a complete defence. D can choose not to raise a defence.

Limitations of Actions Act (Qld)

• Contract – 6 years (s10)
• Tort – 6 years (s10)
• Personal injury – 3 years (s11)
• Action on judgement – 12 years from date judgment becomes enforceable (s10)
• Series of conversion/wrongful detention chattel – 6 years from 1st conversion (s12)
• Recovery of land – 12 years from date right of action accrued to plaintiff (s13)
• Action v deceased – 12 years from date right to receive share accrued (s28)
• Beneficiary v trustee to recover property or breach of trust action – no limit (s27)
• Equity – doctrine of laches – LAA generally applies to common law proceedings

Savings clause
Section 7 LAA is a savings provision acknowledging that time limits do occur in other legislation (for example Civil Aviation (Carrier’s liability) Act Cth s 34 in Proctor v Jetway Aviation [1982] 2 NSWLR 264

Beginning of limitation period?
• From date cause of action arises. Eg for contract, the time of the breach.

Expiry of limitation period
See s 38 of Acts Interpretation Act 1958 (Qld)
• If a cause of action accrues on 12 February, 3 years will not expire at the end of 11 of February, but the end of 12 February
• If expired on a non-business day, P has until next business day to file.
• Generally does not extinguish action, but only bars relief if raised by defendant UPCR r 150 (1) (c)
• D MUST PLEAD LAA
• Exception – s 24 LAA provides person’s title in land extinguished if action for recovery not brought within limitation period.

Contracting out
Possible for parties to agree not to plead limitation period. Correspondence from defendant saying liability is not an issue has been held to amount to contract that precluded defendant from contesting liability, including defence that claim is statute barred – Newton, Bellamy & Wolfe v SGIO (1986)

Extensions of limitations period
LAA part 3. Remedial in nature and designed to assist plaintiffs who have not, for some genuine reason, taken action and whose case would otherwise statute barred, or will become so in the near future. NOT designed to assist sloth, tardiness, laziness.

4 situations where part 3 allows extension
1. Where persons are under a disability – s 29
2. In cases of personal injury – s 31
3. Where there have been acknowledgements or part payments – ss 35 – 37
4. In cases of mistake or fraud – s 38
1 & 2 most common – will focus on these

Person under disability s 29
• Definition s 5 (2) under a disability infant or unsound mind
• Unsound mind defined 5 (3) includes but not limited too, a person under the Mental Health Act 2000 (Qld) or the Forensic Disability Act 2011 (Qld)
• Infants: extra 6 years begins to run on obtaining majority
• Persons of unsound mind – 6 years commences once person capable of handling their own affairs or they die.
• PI 3 years after person ceased to be under a disability
Personal injuries extension – s 31
Applies to actions for damages for negligence, trespass, nuisance or breach of duty (eg contract, statute) where the damages in respect of personal injury or death. Applies in ANY cause of action where the damage claimed is for personal injuries.

Triggering s 31
Must establish (s31) (2):
Section 30:
   a) a material fact
   b) of a decisive character relating to right of action (not cause of action)
   c) not within means of knowledge of applicant
      until date following commencement of last year of limitation period.

There is evidence to establish a right of action. Court may order extension for 1 year from that date.

Brisbane South Regional Health Authority v Taylor

Personal injuries process
Personal Injuries Proceedings Act 2002 (Qld) (PIPA)
Introduced in response to perceived insurance/negligence crisis – hot coffee. Aims to reduce litigation and the damage amounts by forcing parties to negotiate prior to any formal litigation (s 4). Covers personal injuries, excluding motor vehicle or work related injuries (s 6).

Pre-claim process under PIPA
A claimant must give the respondent notice of claim within a narrow time period after injury. This triggers a process of negotiation and compulsory conferencing that must be completed before litigation can commence. Slightly different process for medical related injuries.

Claimant responsibility:
   • Give notice on approved form (s 9 (1) )
   • Time limits – within 9 months of injury or 9 months of symptoms, or 1 month after instructing lawyers to seek damages for injury (s 9 (3) )
   • Failure to comply prevents claimant from commencing proceedings (s 18)

Respondent responsibility
   • Respondent within 1 month to form
   • That the respondent is the proper respondent or not (s 10 (1) )
   • Indicate whether the claimant has complied with their responsibilities
   • Obligation to provide information (s 27)
   • Failure of respondent – claimant conclusively has satisfied PIPA requirements, can commence litigation
   • There is a mechanism for identification of other respondents (ss 14-18)

Compulsory conferencing
   • Usually 6 months after notice of claim (s 36)
   • Parties can dispense with compulsory conference by agreement (s 36 (4) )
   • 7 days prior parties must exchange all outstanding documentation (s 37)
   • lawyers must sign certification of readiness indicating that all preparation has been done by the lawyer in anticipation of trial (that is, that all witness statements, reports and evidence that would