COUNTY COURT OF VICTORIA

CIVIL TRIAL PROCESS

This fact sheet explains the trial process in the civil jurisdiction of the County Court. It includes discussion of some recent County Court cases and law reform to illustrate aspects of these processes.

Civil law deals with disputes between private parties where a **remedy** or **relief** may be awarded to the plaintiff to recognise that the defendant's wrongful actions resulted in loss or damage to the plaintiff. A plaintiff is the person or organisation who is bringing the case to court, while the defendant is the person or organisation who is disputing the claims made by the plaintiff. A remedy or relief is how the court recognises and enforces a legal right. In the civil jurisdiction, this can include a financial remedy (such as money paid in damages or compensation) or some other form of relief (such as returning property or enforcing a contract). In Victoria, the *Civil Procedure Act 2010* (Vic) is the key statute that sets out the procedure for civil trials in the County Court.

COMMENCING CIVIL PROCEEDINGS

A person who lodges a civil claim (the **plaintiff**) and the person against whom the claim is lodged (the **defendant**) are required to comply with a set of obligations in the way that they behave and conduct their civil claim. The *Civil Procedure Act 2010* (Vic) sets out these 'overarching obligations'. Some examples are:

- to act honestly at all times;
- not to lie or be misleading;
- to try and narrow the issues that are in dispute, and to try to resolve the dispute;
- to minimise delay; and
- to cooperate with the other party and the Court during the proceedings.

The plaintiff commences civil proceedings in the County Court by filing a document with the Court, which is a request for the matter to be considered and listed. Depending on the nature of the dispute and the remedy sought, the matter will be listed in the Commercial Division or Common Law Division, which each have separate lists for specific areas of the law (see Fact Sheet 13). A common law claim means the remedy is being sought on the basis of law that has developed from previous judicial decisions, rather than a remedy based in statute law.

The document to commence proceedings is called either a **writ** or an **originating motion**, depending on the nature of the matter. The plaintiff must also file a **statement of claim**, which sets out what the plaintiff wants to rely on in support of their claim as well as the relief he or she is seeking from the court. The defendant must file a notice of appearance and a **defence** with the Court, which sets out his or her response to each of the points in the plaintiff's statement of claim. Both parties must also complete other procedural requirements called **certification**. If the defendant does not file a defence or appear in response to the statement of claim, the plaintiff may request that judgment be entered in their favour **by default** (called a **default judgment**) and orders be made for their claim as set out in the statement of claim.

CASE MANAGEMENT

The *Civil Procedure Act 2010* (Vic) has a strong focus on case management, which means that judges can make orders or give directions to the parties with the aim of resolving the issues in dispute as efficiently, quickly and cheaply as possible. However, the judge must balance this with the need for disputes to be resolved justly, and he or she must also ensure that proceedings are conducted fairly. By way of examples of case management, he or she can identify at an early stage in proceedings the real issues in dispute; fix a timetable according to which parties must take certain steps; or limit the number of witnesses that may be called to give evidence.

An example of a case management technique is in *Kamasaee v Commonwealth (No 9) (Live Streaming Ruling)* [2017] VSC 171 (7 April 2017). This is a Supreme Court case (not a County Court case), where the judge ordered that proceedings be live streamed because many members of the group, who were involved in the case as a party to the case, lived overseas so they could not physically attend the court proceedings. Live streaming of the proceedings allowed them to be part of the proceedings remotely. The judge applied the **open justice principle** and decided that live streaming of the evidence was appropriate to ensure that the evidence was heard by all parties and that justice was done in the proceedings.

In the County Court, the **administrative mention procedure** is an important part of the case management approach to civil matters prior to a trial. After a defendant has filed a **defence**, **consent orders** are filed by both parties setting out the agreed conduct of the trial and other **interlocutory** steps. Interlocutory relates to any issues or matters that occur before the commencement of the trial. Consent orders could include matters such as the trial date, the timetable for key milestones, when documents are to be filed, and dispute resolution processes such as mediation (see Fact Sheet 10). A judge or judicial registrar (see Fact Sheet 11) will then consider the consent orders, make a decision, and may make the orders sought by the parties **on the papers** (meaning that the parties do not need to come to court to make oral submissions).

DIRECTIONS HEARING

If the parties are not able to agree on the consent orders or after the administrative mention procedure has occurred, the matter may be listed for a directions hearing. Similar to the criminal process, a directions hearing in the civil process is a preliminary hearing before the trial where the judge can check on and make orders to ensure the case is progressing. A judge can use case management powers in a directions hearing to set time frames for things to done or can give direction on how to proceed to try and resolve certain issues. The judge can also make orders in relation to interlocutory matters, or make any orders necessary to ensure that the trial runs fairly and efficiently. For example, the judge could make orders about when documents need to be shared between the parties, when fees need to be paid, and he or she can order the parties to attend mediation. The judge can also make an order to set the date for trial. Once the trial date is set, parties must be ready to start on that date. This can only be delayed (adjourned) if the parties can show to the judge that there is good reason to adjourn the trial.

DISCLOSURE AND DISCOVERY

Disclosure and discovery are about the obligations and requirements for both parties in proceedings to share or provide to each other documents and information that are relevant to the issues in the case. The rules are also set out in the *Civil Procedure Act 2010* (Vic) and the aim is for information that will assist in resolving the matter to be shared.

SETTLEMENT

If the parties manage to resolve the dispute and come to an agreement before or during the trial, this is called **settlement**. The emphasis on case management means parties are encouraged to try and do this as early as possible and this could happen at any stage after a case is commenced in the court, including during the trial. If a case settles, the parties must provide the court with consent orders, which are signed by the parties and become an order of the Court.

SUMMARY JUDGMENT

Summary judgment means that a decision about the claim is made by a judge prior to any trial commencing. A plaintiff or a defendant can apply to the judge to consider this. A judge can give summary judgment if he or she is satisfied that a claim or a defence has no real prospect of success.

MODE OF TRIAL: JUDGE OR JURY

A trial is where the main hearing of the issues in dispute occurs. In Victoria, a civil trial may be held before a judge or a jury as the decision maker in relation to findings of fault and remedies in civil matters. The availability of a jury trial depends on how the parties commenced the proceedings and the type of remedy or relief sought. In Victoria, plaintiffs and defendants have a right to a jury in civil proceedings where a remedy under common law is sought. If one party wants to have a jury trial, but the other does not, the party who does not want a jury trial must try and persuade the court to allow the trial to be heard by a judge only, not by a jury.

EMPANELLING A JURY

The procedure for the selection of the jury is set out in Victorian statute in the Juries Act 2000 (Vic). When a person is selected for jury service, through a legal document called a **summons**, they must attend the Jury Commissioner's Office. This group of prospective jurors is called the **jury pool**, and for each case where a jury is needed, prospective jurors are randomly selected from the jury pool to form a **jury panel**. Jurors for a trial are selected randomly from the jury panel.

In the County Court, the judge's associate randomly selects people from the panel and calls out that person's number or name. Each panel member stands up and walks to his or her seat in the jury box. This process continues until the required number of jurors is selected. In civil trials, there are 6 jurors.

Similar to criminal proceedings, in civil proceedings, prospective jurors can be challenged. Both the plaintiff and the defendant have a right to challenge prospective jurors. In 2014, the Victorian Law Reform Commission completed a review of the law in relation to jury empanelment and published a report with recommendations on how to improve the law in relation to civil and criminal trials.

THE TRIAL – OPENING ADDRESSES, PLAINTIFF AND DEFENDANT CASES AND CLOSING ADDRESSES

Similar to a criminal trial, a civil trial involving a jury commences with the judge making some opening remarks to the jury. He or she will address the jury to explain the trial process and the jury's role in that process. The judge may also explain the separate roles of the judge and jury and other people in the courtroom and set out the approaches that they should take in assessing the evidence, for example the credibility of witnesses. The jury may also be asked to select a foreperson, who will be the spokesperson if the jury has any questions during the trial and when the jury delivers its verdict.

The next stage is the opening addresses to the jury by both the plaintiff and the defendant. If there is no jury, the trial will commence with the plaintiff's and defendant's opening addresses to the judge.

The prosecution presents its case by calling witnesses to give evidence. This occurs by the witnesses each giving responses to questions by the prosecution. This is called **evidence in chief**. The defendant has the opportunity to test the evidence of each witness by cross-examining the witness by asking questions about the evidence that he or she has given and putting the defence case to the witness. The defendant may also present its case and call evidence. The plaintiff has the opportunity to cross-examine the defendant's witnesses.

Once the plaintiff and defendant cases are complete, both parties may each make a closing address to the jury (or judge if there is no jury). In a jury trial, the judge also addresses the jury, summing up the evidence that was presented in the case, and giving any directions under the law as to how the jury should assess the evidence.

The conduct of a civil trial and order of proceedings may depend on the issues in dispute and the particular approach the judge has taken to case managing the proceeding. For example, in a case heard in the Supreme Court of ***Ying Mui & Ors v Frank Kiang Ngan Hoh & Ors (Ruling No 1)*** [2016] VSC 519 (31 August 2016), the judge ordered that the trial be conducted in a particular order – **a sequential trial** – based on the particular issues in dispute. The judge relied on the case management laws in the *Civil Procedure Act 2010* (Vic) to order that:

1. all of the evidence be heard first:
2. at the right time during the trial, if appropriate, the judge may identify the issues to be addressed in closing addresses in groups;
3. the judge then hears the first group of closing addresses on the first issues;
4. the judge delivers judgment on the first group of issues, before moving on to the next group, until the case is complete.

This sequence was followed instead of all the more common sequence of a civil trial where all of the evidence is heard all at once, and then closing addresses are delivered on all of the issues in the trial at the same time, and then judge makes a decision and delivers judgement on all of the issues in the trial all at once. In this case, the judge considered that a different approach – under a sequential trial – was appropriate because it was a very complex trial involving many parties and many issues. There were questions of crucial importance that needed to be determined first before determination of the main issues in the case. The judge decided that the sequential trial had many advantages in complex commercial trials.

DELIBERATIONS AND DECISION

Once all of the evidence has been heard and the plaintiff and defendant have made their final addresses, the jury or judge will make a decision (or judgment) about the claim.

If the trial is before a jury, it will retire to consider its decision (deliberate). The jury may come back to court during its deliberations to ask questions, seek further directions, or be reminded of certain evidence that was presented. The jury will generally make a decision about fault (the defendant's wrongdoing or otherwise) and remedy (damages, compensation or other relief). In some cases, the jury may only make a decision about fault, and not the remedy. For example, in defamation cases, the jury is responsible for the decision in relation to fault and the judge is responsible for the decision in relation to remedy.

If the trial is before a judge, the judge may make a decision on the day of the trial or may adjourn the case to deliberate and make a decision on another day. The judge will make a decision about fault and remedy. The judge will usually also make an order for costs, which is an order directing that one party (usually the party that the jury or judge finds to be at fault) must pay the other party's legal costs.

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