THE CHANGING FACE OF PROCEDURAL LAW IN QUEENSLAND

A paper prepared by Justice Glen Williams of the Supreme Court of Queensland for presentation at the Fifth Biennial AIJA Conference held 26 - 28 April, 2000, in Auckland, New Zealand

On 1 July 1999 the Uniform Civil Procedure Rules came into force in Queensland. They dramatically changed the face of procedural law in Queensland. I think it fair to say that the changes brought about were arguably more dramatic and far reaching than the Woolf Reforms in the United Kingdom. What is often not appreciated is that such reforms do not occur overnight; there is no unexpected bolt of lightning which suddenly lights up previously darkened alleyways providing access to justice. Because of that it is worth briefly noting the evolution of the UCPR.

For almost a century civil procedure in the Supreme Court of Queensland was governed by the Rules of the Supreme Court of 1900 which were published in the Gazette of October 17, 1900. At that time Sir Samuel Griffith was Chief Justice of Queensland, and he had been largely responsible for drafting those Rules which were based on the post Judicature Act rules in England. Amendments were made from time to time but there was no significant revision until 14 December 1965 when a series of amendments were introduced following the work of a committee chaired by Sir Harry Gibbs, then a judge of the Supreme Court of Queensland. In 1983 the then Chief Justice, Sir Walter Campbell, appointed me to head a committee to conduct a major review of the Rules. The Chief Justice was influenced by the fact that Victoria was then in the process of implementing new Rules of Court, the product of a committee headed by Mr Justice Crockett; much of the hard work of research and drafting was done by Mr Neil Williams of the Victorian Bar. The Williams Committee (as it became known) embarked upon the ambitious task of rewriting the Rules of the Supreme Court, and drew heavily on the new Victorian Rules.

The Committee decided that it was preferable to complete the task and introduce a complete new set of rules rather than make piecemeal amendments from time to time. There were, however, some departures from that approach. Significantly, on the recommendation of the Williams Committee, the “Offer to Settle” procedure was introduced on 9 April 1988. That Canadian initiative first came to Australia in the Victorian Rules, but the Queensland Order 26 went further; we were the first jurisdiction to provide that the plaintiff could make an offer to settle in all matters. (The original Victorian provision only entitled a plaintiff to make such an offer in personal injury actions). In broad terms if the defendant did not do better than the plaintiff’s offer to settle, the defendant was obliged to pay costs on an indemnity basis from the date of the offer. I will deal with the “Offer to Settle” later when considering the UCPR.

By October 1991 the Williams Committee was in the process of fine tuning the drafting of a new complete set of rules. But in that month the government of the day passed the *Supreme Court of Queensland Act* 1991 which, amongst other things, constituted the Litigation Reform Commission comprised of the judges of the newly constituted Court of Appeal. That Commission was given sole jurisdiction to recommend changes to procedural rules and practices particularly on the civil side of the court's jurisdiction. The Williams Committee delivered to the then Attorney-General its draft of new rules as it then stood, and that was the end of that Committee's work.

Thereafter the Litigation Reform Commission introduced some changes to the Rules, but only a few could be classed as major alterations. Perhaps the most significant was the new disclosure Order introduced on 1 May 1994. Prior to then, Order 35 rule 10 required a party to make discovery "of the documents which are or have been in his possession or power, relating to any matters in question in the action". Numerous decisions on that rule established that discovery had to be made in accordance with the statement of Brett LJ in the *Peruvian Guano* case (1882) 11 QBD 55 at 63: "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary." The Cranston Report (*Delays and Efficiency in Civil Litigation*, AIJA 1985) identified in chapter 9 delay and the incurring of unnecessary costs as consequences of that discovery procedure. That problem was further analysed by Bernard Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (AIJA 1990); that is one of the few empirical studies relating to rules of procedure conducted in Australia. Cairns, amongst other things, recommended that documents not disclosed on discovery should not be admissible at trial without leave, and that there should be a more rigid test for relevancy applied at the disclosure stage, particularly in complex litigation. It was against that background that the new Order 35 was introduced in Queensland in 1994. Relevantly the new Order 35 rule 4 (1)(b) limited the obligation to make disclosure to documents that are "directly relevant to an allegation in issue in the cause". It was also made clear that the duty of disclosure continued until the end of the trial. Then Order 35 rule 16 provided that if a document was not disclosed, the party "may not tender the document, or produce evidence of its contents, without leave of the Court or a Judge at the trial". I will return to discovery when discussing the UCPR.

Following another change in government the Litigation Reform Commission was abolished by the *Courts Reform Amendment Act* 1997, which came into force in July of that year. The then Attorney-General, Denver Beanland, was a long standing advocate of uniform civil procedure rules for the Supreme, District and Magistrates Courts. It is fair to say that initially that proposal was not widely supported by the legal profession. I had serious reservations as to how such a scheme would work, particularly at Magistrates Court level. There was certainly a widely held view in the legal profession that uniform rules would complicate practice in the Magistrates Courts and increase costs there.

The Attorney-General gave directions that work should commence on a set of uniform rules for Queensland Courts. A committee was set up within the Department

of Justice and Attorney-General to work on the drafting. Bernard Cairns, who had been a member of the Williams Committee and was then a Reader at the University of Queensland Law School, was co-opted as a consultant to that committee. In preparing a Consultation Draft of Uniform Civil Procedure Rules that committee drew heavily on the Williams Committee draft rules, and also on the work of the Litigation Reform Commission. That Consultation Draft was circulated in October 1997.

Then on 1 May 1998 the *Civil Justice Reform Act* 1998 was assented to. It made a number of amendments to procedural rules and practices, but more significantly for present purposes provided for the constitution of a Rules Committee. Section 118(1) provided that the Governor-in-Council may make rules of court dealing with the practices and procedures of the Supreme, District and Magistrates Courts, but only "with the consent of the Rules Committee". It also provided in Section 118(3) that the rules applying in those Courts were to be called the Uniform Civil Procedure Rules. The Rules Committee was to be comprised of Judges of the Supreme and District Courts and Magistrates. Section 118(c)(2)(a) provided that the Committee "must advise the Minister about the repeal, reform or relocation of the provisions of the *Supreme Court Act* 1995" and "may advise the Minister about any law giving jurisdiction to the Supreme Court, the District Court or the Magistrates Court". The Chief Justice is a member of the Rules Committee but he has designated that I should be the Chairman thereof.

Notwithstanding another change in government it was determined that the UCPR project should proceed. From about June 1998 to June 1999 the Rules Committee worked extensively on the Consultation Draft and ultimately the Uniform Civil Procedure Rules came into force on 1 July 1999.

Those rules have been in force for about 9 months at the time of writing. They have been discussed at a number of seminars and conferences of lawyers, and the surprising thing is that there has been little criticism of their operation. Indeed, I confess to really being taken aback by that; I had expected that there would have been many more "bad experiences" than appear to have been the case. A number of judges when speaking at seminars prior to the introduction of the new rules emphasised to the profession the importance of accepting the UCPR as a new code; one should not start off with the proposition that the new rules did not change the previous law unless it was patently obvious that such was intended. Rather one should start off with the new rules, and only have recourse to previous rules and practices if there was a gap or ambiguity. The profession have largely adopted that approach and maybe that explains why the transition has been so smooth.

The Rules Committee is currently working on the first revision. Most of the amendments will be relatively minor in nature, merely correcting or clarifying some particular without changing the general thrust of the rule. Significantly the only major area of concern was execution at Magistrates Court level. Bailiffs for those Courts quite properly submitted that the rules for execution had been drafted with the Supreme Court in mind and had not addressed the particular problems of small debt recovery. That is a matter which is being remedied.

It is against that background that I turn to discuss a number of significant new rules in the UCPR.

Disclosure

Disclosure is now dealt with in Chapter 7 of the UCPR. Generally the rules follow those adopted in 1994. The critical rule is 211(1), which provides:

> "A party to a proceeding has a duty to disclose to each other party each document –
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> (a) in the possession or under the control of the first party; and
> (b) directly relevant to an allegation in issue in the pleading; and
> (c) if there are no pleadings – directly relevant to a matter in issue in the proceeding."

The duty of disclosure continues until the proceeding is concluded. Rule 212 also clarifies what is, and is not, discoverable:

(i) there is no duty to discover a document to which there is a valid claim to privilege from disclosure;
(ii) there is no duty to disclose a document relevant only to credit;
(iii) a document consisting of a statement or report of an expert is not privileged from disclosure.

If a claim of privilege is challenged, the party claiming privilege must within 7 days after the challenge file and serve an affidavit stating the claim: rule 213.

Those rules have certainly simplified the disclosure procedure. Anecdotal evidence strongly suggests that there are now fewer applications relating to the sufficiency of discovery than there were under the old rules. There have been a few cases where a judge has had to consider whether or not particular documents were "directly relevant" to issues raised in the pleadings or the proceeding, but those cases have not resulted in any significant statement of principle; nearly all merely involved a consideration of the pleadings and a judicial finding as to whether the particular class of documents was directly relevant thereto.
There have been some applications under rule 223 which empowers the court to make an order about discovery, but again there has as yet been no significant judgment advancing the rule beyond what is expressly found therein.

Certainly the rule requiring disclosure of the statements and reports of experts has greatly facilitated the use of other rules, for example those relating to offers to settle and alternative dispute resolution. Parties can now, at an early stage in the proceeding, make a full and accurate assessment of the relative strengths and weaknesses of the cases of all parties.

There is still no evidence as to the cost effectiveness of the new disclosure rules. It is unfortunate that we have not been able to undertake a study along the same lines as the Cairns review in 1990. Certainly the number of documents appearing in the list of disclosed documents is substantially less than under the old rules. That means, of course, that there is a reduction in the time spent on, and cost of, inspection. There is also a reduction in the number of documents which have to be copied for counsel's briefs and the like. But I am reliably informed by solicitors that the initial costs relating to discovery have not been reduced; the reason is fairly obvious. A client cannot determine what is "directly relevant" to an allegation in

issue in the pleadings or the proceeding. That question can only properly be answered by a trained lawyer. That means that a solicitor must advise the client to bring in all documents which are in the client's assessment in any way relevant to the litigation. The solicitor must then go through that large bundle of documents and determine which are "directly relevant" for purposes of the rule. In other words the initial time spent by the solicitor is much the same as that which would have been spent under the old rules. But even making allowance for that it is obvious that there is a considerable saving in time and cost brought about by the new rules.

Rule 225 of the UCPR also provides that if a party does not disclose a document that party may neither tender the document at trial nor adduce evidence of its contents at trial, without the court's leave. In many ways that is a more significant sanction than the provision, also found in that rule, that a party is liable to contempt for not disclosing a document.

Finally on the issue of disclosure rule 226 should be noted; it provides:

> "(1) The solicitor having conduct of a proceeding for a party must give to the court at the trial, a certificate addressed to the court and signed by the solicitor –
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> (a) stating the duty of disclosure has been explained fully to the party; and
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> (b) if the party is a corporation – identifying the individual to whom the duty was explained.
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> (2) The certificate must be prepared and signed at or immediately before the trial."

Interrogatories

Rule 229 effectively provides that interrogatories may only be delivered with the court's leave. The application must be accompanied by a draft of the interrogatories and the order granting leave will identify the specific interrogatories which can be delivered. The number of interrogatories may be more than 30 only if the court directs that a greater number may be delivered; for purposes of that rule each distinct question is counted as one interrogatory. The application for leave to deliver interrogatories may be made without notice. Rule 230 provides that the court may give leave "only if the court is satisfied there is not likely to be available to the applicant at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by the interrogatory."

Rule 233 has also limited the grounds for objection to answering interrogatories. The only grounds available are the following:

(a) the interrogatory does not relate to a matter in question, or likely to be in question, between the person and the interrogating party;

(b) the interrogatory is not reasonably necessary to enable the court to decide the matters in question between the parties;

(c) there is likely to be available to the interrogating party at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory;

(d) the interrogatory is vexatious or oppressive;

(e) privilege.

Again the new interrogatory rules have had a significant impact on the use of that procedure as part of preparation for trial. There are now fewer cases in which interrogatories are delivered, and the old scenario of hundreds of interrogatories being delivered is a relic of a bygone era. There are very few applications for leave to deliver interrogatories, and even fewer cases in which an answer to an interrogatory is admitted into evidence at trial.

Statement of Loss and Damage

The procedure of discovery and interrogatories is now virtually a thing of the past so far as personal injury actions are concerned. That is because the rules impose specific obligations on all parties to such actions. A plaintiff to a proceeding for damages for personal injury or death must serve on the defendant a signed written statement of loss and damage within 28 days after the close of pleadings, and a defendant in such an action must serve on the plaintiff a signed written statement of expert and economic evidence within 28 days after the defendant is served with the plaintiff's statement of loss and damage (rules 545, 547 and 550). Such statements must be delivered before a request for trial date is filed.

The plaintiff's statement of loss and damage must contain the following information:

(a) details of any amount claimed for out-of-pocket expenses and documents in the possession or under the control of the plaintiff about the expenses;

(b) if there is a claim for economic loss –

  (i) the name and address of each of the plaintiff's employers in the 3 years immediately before the injury and since the injury, the period of employment by each employer, the capacity in which the plaintiff was employed by each employer and the plaintiff's net earnings for each period of employment; and

  (ii) if the plaintiff is self-employed – details of the plaintiff's net income in the 3 years immediately before the injury and since the injury; and

  (iii) details of the amount the plaintiff claims (if any) for loss of income to the date of the statement; and

  (iv) details of any disability resulting in loss of earning capacity and of the amount the plaintiff claims for future economic loss; and

  (v) if the plaintiff is self-employed – additional details substantiating the plaintiff's claim for economic loss;

(c) details of the pain and suffering experienced by the plaintiff and the loss of amenities caused by the injuries (including the physical, social and recreational consequences of the injuries sustained);

(d) details of any other amount sought as damages;

(e) the name and addresses of all hospitals, doctors and experts who have examined the plaintiff or who have given reports on the plaintiff's injury, loss (including economic loss) or treatment;

(f) the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment.

Rule 548 then provides that a plaintiff's statement of loss and damage must identify the following documents:

(a) hospital and medical reports;
(b) hospital, medical and similar accounts;
(c) documents about the refund of workers' compensation payments, social security benefits or similar payments;
(d) if there is a claim for economic loss –
    (i) documents about the amount of wages paid to the plaintiff –
        (A) in the 3 years immediately before the injury; and
        (B) since the injury; and
    (ii) if the plaintiff is self-employed – documents about the plaintiff's net income –
        (A) in the 3 years immediately before the injury; and
        (B) since the injury'
    (iii) documents about the tax paid by the plaintiff and the taxable income of the plaintiff –
        (A) in the 3 years immediately before the injury; and
        (B) since the injury;
(e) any other documents about the plaintiff's claim for damages.

As with the disclosure procedure if the defendant asks for a copy of a document identified in the statement of loss and damage then the plaintiff must give the defendant a copy thereof but may charge a reasonable amount therefore.

A plaintiff cannot avoid making that disclosure by not obtaining the proposed evidence in written form. Rule 548 (3) provides:

> "If the plaintiff intends to rely at the trial on evidence of the plaintiff's injury, loss (including economic loss) or treatment (including future treatment) not in a report that, if it were in a report, would be required to be identified under subrule (1), the plaintiff must, before the request for trial date is filed, serve on the defendant the evidence in the form of a report, or a proof of the evidence."

Finally it should be noted that rule 548(4) then provides that the plaintiff may call or tender evidence not identified in the statement of loss and damage only if the evidence is called or tendered by consent, or the "court for special reason gives leave".

One important consequence of those rules is that a plaintiff gains nothing by shopping around the medical profession for a favourable report. If there has been a consultation that must be disclosed. Most litigation for damages for personal injury involves recourse to publicity funded insurance funds (motor vehicle and master and servant) and it was considered proper that a person claiming on such a fund should be obliged to make full disclosure. Once the principle was accepted in those cases it was only natural that it be extended to all. Probably partly due to those rules less time is now taken up with the cross-examination of medical witnesses at trial.

The defendant's statement must include "the names and addresses of all hospitals, doctors and experts who have given the defendant reports on the plaintiff's injury, loss (including economic loss) or treatment". (Rule 550). Again that statement must identify the following documents:

(a) hospital and medical reports;
(b) hospital, medical and similar accounts;
(c) documents about the refund of workers' compensation payments, social security benefits or similar payments;
(d) if there is a claim for economic loss and the defendant was an employer of the plaintiff –
    (i) documents about the amount of wages paid to the plaintiff by the defendant in the 3 years immediately before the plaintiff's injury; and
    (ii) documents about the tax paid by the plaintiff and the taxable income of the plaintiff in the 3 years immediately before the plaintiff's injury.

There then follow similar provisions to those applying to plaintiffs. A defendant cannot avoid making disclosure by not having the evidence reduced to writing, and evidence not disclosed may only be tendered by consent or if the court, "for special reason gives leave".

Those rules have been in force in Queensland effectively for more than 20 years and practitioners in the personal injury jurisdiction are very familiar with the obligations imposed by the rules. Those rules have greatly simplified pre-trial preparation in those cases, and compliance with them means that all parties are able to make a full assessment of the risks of proceeding with the litigation. The rules enable meaningful offers to settle to be exchanged and ensure that mediation proceedings can be properly conducted.

The only contentious area is in relation to video evidence obtained by defendants of plaintiffs acting contrary to allegations contained in the pleadings. There is a strong argument that such videos are not caught by the rules relating to the defendant's obligation to disclose. Generally defendants wish to keep that material from the plaintiff prior to trial so that any fraud or exaggeration can be established during cross-examination. However, there is a growing body of opinion amongst judges that little point is served by holding back such information. It will be interesting to see how the law develops in that regard in the future.

Pleadings

The UCPR introduced a number of changes to the rules relating to pleadings, and those changes have resulted in the real issues between the parties being identified much earlier in the course of the litigation. It is worth noting some of the relevant changes. It is no longer permissible to make a claim for general damages merely by saying: "and the plaintiff claims $100,000 general damages". Rule 155 provides that a party claiming general damages must include the following particulars in that party's pleading:

(a) The nature of the loss or damage suffered;
(b) The exact circumstances in which the loss or damage was suffered;
(c) The basis on which the amount claimed has been worked out or estimated.

The last requirement forces the plaintiff to set out in the pleading the basis on which the court will be asked to assess damages, and that has the consequence that from the outset it is easy to identify an outlandish claim. Forcing the plaintiff to be specific at that stage enables the defendant to make a realistic assessment of quantum, and makes it more likely that any offer to settle will be realistic.

The same rule also says that a party must "plead each type of general damages and state the nature of the damages claimed for each type". Finally there is an obligation to specifically plead any matter relating to the assessment of damages that, if not pleaded, may take the opposite party by surprise.

Rule 158 deals with a claim for exemplary or aggravated damages and requires the pleading to contain "particulars of all matters relied on in support of the claim".

In Queensland where a claim for damages would ultimately lead to recourse to compulsory third party insurance funds or workers' compensation funds there must be compliance with statutory procedures before commencing action. Those statutory provisions, and rules just mentioned, have greatly facilitated the early settlement of personal injury claims. Recent experience has shown a marked increase in early settlement of such claims. Any such action which goes to trial generally now involves serious dispute as to either or both liability and quantum. Anecdotally judges report an increase in the number personal injury actions being dismissed after trial, and that reflects the fact that the great majority of genuine claims are being compromised at an early stage.

There are two further pleading rules which have worked wonders in identifying issues more clearly at the pleading stage. Rule 165 is in these terms:

"(1) A party may in response to a pleading, plead a denial, a non-admission, an admission or another matter.
(2) A party who pleads a non-admission may not give or call evidence in relation to a fact not admitted, unless the evidence relates to another part of the party's pleading."

More effect is given to that rule by rule 166(3) which provides that a party may plead a non-admission only if:

(a) the party has made inquiries to find out whether the allegation is true or untrue; and
(b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in

which the denial or non-admission of the allegation is contained; and

(c) the party remains uncertain as to the truth or falsity of the allegation.

Then paragraph (4) provides that a "party's denial or non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted". If there is non-compliance with paragraph (4) then by virtue of paragraph (5) the "party is taken to have admitted the allegation". Also a party making a non-admission is under a continuing obligation to make further inquiries that may become reasonable and if those inquiries make possible the admission or denial of an allegation the pleading must be amended appropriately.

The consequence of all that is that a defendant can no longer merely generally deny allegations with a view to putting the plaintiff to proof. It has taken some time for the profession to become comfortable using the new rules, but indications are that the new rules are not causing any real hardship; to the contrary, as noted, they are leading to earlier and clearer definition of the real dispute between the parties. There have not yet been any cases where under the new rules the court has had recourse to rule 167 to order a party to pay "additional costs caused by the denial or non-admission".

Notice to Admit

Those pleading rules have been taken further by rule 189 which relates to Notices to Admit Facts or Documents. As was traditionally the case a party may by notice served on another party seek to obtain from that other party an admission for purposes of the proceeding only. However, paragraph 2 makes a dramatic change; if the other party does not, within 14 days, serve a notice on the first party disputing the fact or the authenticity of the document, that party is taken to admit for purposes of the proceeding the fact or document. In other words there is a reversal of onus. The party receiving the Notice to Admit must respond in 14 days, otherwise the fact or document is deemed to have been admitted. Such a deemed admission can be withdrawn by leave of the court, but that is not likely to be granted lightly.

As one can readily imagine, when that rule came into force there was quite a flurry amongst the ranks of solicitors. Some even went so far as to suggest it was unethical for a solicitor to give a notice having those consequences to a fellow practitioner. But now it seems that all is quiet, and there is a general recognition that the rule is a good one and merely compliments the pleading provisions noted above.

Expediting Hearing of Trials and Interlocutory Applications

The UCPR contain some rules which are specifically designed to expedite the hearing of trials and applications. Mention should be made of some of the provisions which have been found to be useful.

Rule 366(2) provides that the court "may give directions about the conduct of a proceeding at any time". That may be done on the application of a party or by the court acting on its own motion. That rule, and those associated with it, empower the court to utilise such case management provisions and techniques as are considered appropriate. Pursuant to rule 367(3) the court may, amongst other things, give directions along the following lines:

(i) Limit the time to be taken by the trial or hearing;
(ii) Limit the time to be taken by a party in presenting its case;
(iii) Require evidence to be given by affidavit, orally or in some other form;
(iv) Limit the number of witnesses (including expert witnesses) a party may call on a particular issue;
(v) Limit the time to be taken in examining, cross-examining or re-examining a witness;
(vi) Require submissions to be made in the way the court directs, for example, in writing, orally, or by a combination of written and oral submissions;
(vii) Limit the time to be taken in making an oral submission;
(viii) Require the parties, before the trial or hearing, to provide statements of witnesses the parties intend to call.

The rules recognise that in giving such a direction the court must bear in mind that each party is entitled to a fair trial or hearing, that the time allowed must be reasonable, and that regard must be had to the complexity or simplicity of the case.

At a recent seminar mainly attended by plaintiffs' lawyers it was agreed by most that rule 444 was one of the greatest innovations made by the UCPR. That was particularly pleasing to Moynihan SJA who had initially drafted a similar provision as part of the practice direction regulating the conduct of building disputes. That was taken up by the Rules Committee and incorporated generally into the rules. It has been such a success that steps may well be taken to widen the scope of its operation.

The rule applies generally to applications for further and better particulars of the opposite party's pleading, applications for directions under rule 367, and applications relating to a failure by a party to comply with an order or direction of the court. Before such an application is made rule 444 requires the applicant to write to the respondent specifying the following matters:

(a) The applicant's complaint;
(b) A brief statement of the relevant facts;
(c) The relief sought by the applicant;
(d) Why the applicant should have the relief;
(e) A time (at least 3 business days after the date of the letter) within which the respondent must reply to the letter;
(f) That the letter is written pursuant to the rule.

It is expressly provided that the letter must list the persons to whom a copy of it is being sent, and it is also expressly provided that it may be sent by fax.

Then rule 445 deals with the respondent's reply to that letter. A party receiving such a letter must write to the applicant specifying the following:

(a) That the letter is a reply to the applicant's letter under the rule;
(b) What, if anything, the respondent proposes to do in response to that complaint;
(c) If applicable, why the applicant should not have the relief sought.

The respondent must send a copy of the letter to all those persons to whom the applicant sent a copy of the letter under rule 444.

Rule 447 provides that an application of the type specified may only be made to the court after the applicant has received a reply from the respondent or the time for making such a reply has passed. Rule 447(2) provides that the following document must be filed with the application:

(a) The applicant's letter to the respondent;
(b) The respondent's reply (if any);
(c) Other relevant correspondence between the applicant and the respondent exchanged after the applicant received the respondent's reply or the time for replying had passed;
(d) Relevant responses from any other person notified.

Finally rule 448(2) provides that the court may decide the application on the basis of the contents of the letters exchanged between the parties without the necessity of receiving affidavit evidence; though in appropriate cases the court may receive additional affidavit evidence.

Anecdotal evidence from legal practitioners suggests that there are fewer applications for further and better particulars getting to the court because of the use of this procedure. It forces the applicant to be specific in defining the complaint, and that more often than not results in a satisfactory response being received from the other party.

It is interesting that legal practitioners of their own volition are using a similar procedure in situations where the rules do not strictly apply. For that reason there is no urgency for the rules to be amended to give them wider operation with respect to interlocutory applications, but that is something which will probably happen in the near future.

Offer to Settle

I have already discussed the introduction of the "Offer to Settle" procedure into Queensland. It has proved much more successful than the older payment into court procedure, and has been extensively utilised by both plaintiffs and defendants in a variety of actions.

Rule 353 of the UCPR simply provides that a "party to a proceeding may serve on another party to the proceeding an offer to settle one or more of the claims in the proceedings on the conditions specified in the offer to settle". The wording is wide enough to make the procedure applicable to all causes of action. The costs sanctions if an offer to settle is not bettered by the judgment are dealt with in rule 360 (Offer to Settle by Plaintiff) and rule 361 (Offer to Settle by Defendant). The costs sanction where the plaintiff does better than the offer made by the plaintiff is that the defendant must pay costs on the indemnity basis "unless the defendant shows another order for costs is appropriate in the circumstances". Also, in that situation the court must be satisfied that the "plaintiff was at all material times willing and able to carry out what was proposed in the offer". There is an increasing tendency for plaintiffs to make an offer to settle at a relatively early stage in the course of the litigation so as to set up a basis for recovery of indemnity costs. As already noted the stricter pleading rules which are now in force enable the making of a realistic offer well before the matter is set down for hearing.

Rule 361 effectively mirrors rule 360. If the defendant does better than the offer to settle made by the defendant, then the plaintiff must pay costs on the standard basis from the date of the defendant's offer. Again the court must be satisfied that the "defendant was at all material times willing and able to carry out what was proposed in the offer", and the order will be made unless the plaintiff "shows another order for costs is appropriate in the circumstances".

In the vast majority of cases the order for costs has been made in accordance with the rules. There have been few, if any, cases where the court has been persuaded that some other order for costs should be made.

The offer to settle procedure has had a marked effect on procuring settlements at an earlier stage in the proceedings than the morning of trial. Though the court door is still an inducement of last resort to settle, realistic offers to settle made by each of the opposing parties have resulted in earlier settlements thus avoiding the wastage of judge time occasioned by last minute settlements.

Rule 364 provides that a defendant may make an "offer to contribute" where there are contribution proceedings between defendants to an action. The court may then take account of the offer to contribute in deciding the appropriate order for costs.

Finally, it should be noted, that there is an offer to settle procedure in relation to the assessment of costs. Rule 721 provides that a party liable to pay costs may serve on the party entitled to the costs a written offer to settle the costs. Then rule 722 provides that if that offer is not accepted and the amount of the costs assessed is less than the amount of the offer, the party entitled to the costs may not recover the costs of the assessment but must pay the costs of the assessment unless the registrar orders otherwise.

Again, it is sufficient to note that extensive use has been made of that rule over recent years.

Summary Judgment

Some significant changes to the summary judgment procedure have been introduced by the UCPR. The rules as introduced were a refinement of recommendations initially made by the Williams Committee. Rule 292 deals with summary judgment for the plaintiff; the most significant change is that the procedure is not limited to a cause of action for a liquidated sum or recovery of specific property as was the traditional rule. Further, such an application may be made "at any time" and more than one application may be made "with the court's leave". The plaintiff's entitlement to judgment is conditional upon a finding that the "defendant has no defence" and "there is no need for a trial of the proceeding".

It is too early yet to assess the impact of the new rule. Most applications are still limited to actions for recovery of a liquidated sum.

The significance of the new rule is that after the close of pleadings and after disclosure the plaintiff may apply for summary judgment if, on the material then available including admissions by the defendant, it can be demonstrated that the defendant has no defence.

It must be remembered that the rules have abolished the concept of a specially endorsed writ; all proceedings are now commenced by a claim (rule 9) which must have a statement of claim attached to it (rule 22). Further, the response of the defendant is a notice of intention to defend to which is attached the defence (rule 139). The notice of intention to defend replaces the old entry of appearance. As any application by the plaintiff for summary judgment must now be made after the defence has been served the old authorities dealing with the necessity of making the application promptly are no longer apposite.

Rule 293 has been more contentious, and as yet there have not been many instances of a defendant successfully applying for summary judgment. That may well be due to some deficiencies in the drafting of the rule; this is a matter which the Rules Committee will be addressing later this year.

The rule currently provides that the defendant may apply at any time for judgment which may be granted if the court is satisfied:

(a) no reasonable cause of action is disclosed; or
(b) the proceeding is frivolous, vexatious or an abuse of the process of the court; or
(c) the defendant has a defence to the proceeding.

Even under the old rules it would have been permissible for the defendant to apply to have the claim struck out on either grounds (a) or (b). So far as those grounds are concerned the only change is that rather than an application to strike out, the application is for summary judgment. It is paragraph (c) which has proved most contentious. Undoubtedly the philosophy behind the new rule was that if the defendant could demonstrate at an early stage an unanswerable defence the proceeding should then and there be terminated by entering

judgment for the defendant. But whilst there is a body of law establishing what a plaintiff must prove in order to get summary judgment, there is as yet no case law indicating what a defendant must establish in order to get judgment by relying on paragraph (c). To overcome that difficulty it may be necessary for the rule to provide some guidelines.

It has been held by a single judge that a defendant must verify the assertions involved in the defence, and summary judgment should be refused if any fact is not adequately verified by the material. It is obvious, however, that if the rule is to have reasonably wide scope of operation some further guidelines for its use will have to be provided.

Another significant departure from the traditional summary judgment rule is that on such an application pursuant to the UCPR, whether by plaintiff or defendant, the court may order that evidence be taken on oath. In other words in theory at least there could be something in the nature of a mini-trial before the court arrived at its decision.

In the light of all the changes made by the UCPR to the summary judgment procedure it is arguable that the often quoted observations of Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129 are, at least, less relevant. However, one will probably have to await a decision by an appellate court on the new rules before the ghosts created by those older decisions will finally be exorcised.

Default Judgment

One rule worth mentioning under this head is rule 280. It provides that if a plaintiff is required to take a step by the rules or comply with an order of the court within a stated time and does not do what is required the defendant "may apply to the court for an order dismissing the proceeding for want of prosecution". Difficulties were often encountered in the past where such an application was based on the inherent jurisdiction of the court. The new rule should facilitate the obtaining of judgment in such circumstances.

Rule 371 provides that a failure to comply with the rules is an irregularity and does not render the proceeding a nullity. If there has been a failure to comply the court is given wide powers; it may:

(a) set aside all or part of the proceeding; or
(b) set aside a step taken in the proceeding or order made in the proceeding; or
(c) declare a document or step taken to be ineffectual; or
(d) declare a document or step taken to be effectual; or
(e) make another order that could be made under these rules (including an order dealing with the proceeding generally if the court considers appropriate); or
(f) make such other order dealing with the proceeding generally as the court considers appropriate.

Rule 374 then provides that if a party does not comply with an order to take a step in the proceeding the party who is entitled to the benefit of the order may, by application, require the party who has not complied to show cause why an order should not be made against it. On the hearing of such an application the court may give judgment against the party in default, extend time for compliance, or give such other direction as it thinks appropriate.

These rules provide another illustration of the width of the power given to the court to end proceedings early if that is the most appropriate step to take.

Decision on Papers

Another innovation in the UCPR is the procedure whereby a court may give a decision on the papers without the necessity of an oral hearing. It applies only to applications brought in the Supreme and District Courts.

A party may, pursuant to rule 489, propose that an application be decided without an oral hearing. The application and supporting material must be accompanied by a draft order and written submissions in support of the application (rule 490). The registrar sets a date for deciding the application which is at least 10 days after it is expected to be served on the respondent. If the respondent wishes to present a written submission or evidence, other than oral evidence, that party must file and serve that material in accordance with rule 492. There is then an opportunity for the applicant to reply (rule 493). The respondent may require an oral hearing (rule 494) and if there is compliance with that rule the application will be heard in the ordinary way. The court may at any time decide that the application is an inappropriate one for decision without hearing (rule 491) and in that case the application proceeds by way of an ordinary hearing. If the matter proceeds on the papers the judge must give reasons and make an order which the registrar will then send to the parties to the application (rule 498).

Reasonably extensive use of the procedure has been made in the District Court, and there have been some applications in the Supreme Court. The procedure has been regularly used where the party's solicitors are distant from a place where a judge is regularly sitting. To save costs of travelling to appear before the court, or appointing an agent, there is often agreement that the application be dealt with on the papers.

The procedure is, however, also used in major centres such as Brisbane. Provided the application is largely non-contentious the procedure is a good one and saves a lot of time and money from the client's point of view. It will be interesting to monitor the situation to see whether or not extensive use of the rule would impose an undue burden on the judges.

I should also mention that applications are often dealt with by telephone link. I have dealt with a number of applications sitting on the Bench in Brisbane with only a speaker telephone in front of me; the legal representatives have been at the Courthouse in Cairns some 2000 kilometres away. Such procedures have

been regularly adopted in matters of urgency where it was appropriate to have the local legal representatives who were more familiar with the application as the ones to present the argument. It would be preferable if such hearings were conducted by videolink, and undoubtedly they will in the future. But in the meantime a telephone hook-up has proved more than adequate.

Decision without Pleadings

Rules 479-481 provide for a proceeding to be decided without pleadings. The court may give a direction to the parties to prepare a statement of facts and issues for determination, and then give such other directions as it considers appropriate. The rule introduces flexibility into the proceedings and has been used occasionally. Again, it will be interesting to monitor the situation in the future and assess the impact of the new rule.

Alternative Dispute Resolution

Rules 313-351 deal with Alternative Dispute Resolution and make provision for mediation and case appraisal. Particularly with managed cases the court has been regularly referring proceedings to a form of ADR, and in addition to that in many instances the parties themselves initiate the ADR procedure. Again experience has shown that with the new rules relating to pleading and disclosure the matters in issue between the parties are more clearly defined and that enhances the prospects of successful resolution at the ADR stage. It is not appropriate to expand on the relevant rules here; they conform with rules which are now commonly found in all jurisdictions.

General

The philosophy underlying the UCPR is set out in rule 5:

> "(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceeding at a minimum of expense.
>
> (2) 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.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."

Experience over the last 9 months has shown that both judges and practitioners have sought to apply that philosophy. It is interesting to note that a number of litigants in person often commence submissions to the court by referring to that philosophy. Generally the UCPR have been well received by the profession

and most agree that the language of the rules is readily comprehensible by the average litigant.

Because there are so many dramatic changes occurring almost daily in our modern society it is unlikely that any set of rules will remain in force virtually unamended for a century as happened with the 1900 rules. If nothing else, changes in technology will demand regular overhaul of the rules of procedure if the courts are to make use of that technology in the course of dispute resolution. The gestation period of approximately 16 years for the UCPR will have to be significantly abridged when it comes to future changes. However, I have no doubt that courts and the legal profession will meet the challenge. The UCPR has taken the Queensland Courts into the 21st Century, but it will be interesting to see how long it is before they become outdated.