MODERN PRE-TRIAL CIVIL PROCEDURE IN THE U.S.A.

A NEW PHILOSOPHY OF LITIGATION

By THE HON. SIR STANLEY BURBURY, K.B.E.*

At the invitation of the Tasmanian Attorney-General, the Honourable R. F. Fagan, M.H.A., I made a study tour in the U.S.A. last year for the purpose of observing American pre-trial civil procedure in action and to obtain first-hand information. My study tour was arranged by the Institute of Judicial Administration, whose headquarters are at the University of New York. The Institute put me in touch with judges, court administrators, law professors and attorneys in all the places I visited. I would like to place on record in the University of Tasmania Law Review my deep appreciation of the great help given to me by members of the Institute throughout the U.S.A. and in particular to the director, Professor Delmar Karlen, and the librarian, Mrs. Fanny Klein.

In the course of my tour I visited San Francisco, Los Angeles, Little Rock, New Orleans, Chicago, Detroit, Pittsburgh, New York, Washington and Boston. The general scope of my tour may be summarised as follows:

(1) Attendances at pre-trial conferences in both State and Federal courts followed by discussions with judges and attorneys.

(2) Discussions with court administrators, officers of Bar associations and attorneys.

(3) Discussions at a number of university law schools with law professors teaching evidence and procedure.

Over the past 25 years in the United States of America a great deal of time, thought and energy has been expended by judges, Bar associations, and practising and academic lawyers in formulating new pre-trial procedures designed to make the administration of justice more efficient, more effective and more acceptable to the community.

I think it is true to say that as a result of these great endeavours a new philosophy of litigation has emerged reflected in three distinctive and basic concepts—

(1) The right of each party before trial within wide limits to take sworn depositions of the relevant testimony of any person including that of the opposing party and his witnesses;

* The Honourable the Chief Justice of the Supreme Court of Tasmania.

(2) The holding of a compulsory pre-trial conference in each case with the judge taking an active role in limiting the trial to the real and substantial issues between the parties, and (in some jurisdictions) endeavouring to obtain a settlement of the case;

(3) The active control by the court over the time-table of a case from joining of issue up to trial.

These three features of modern pre-trial procedure have been adopted by State courts in some 40 States in the United States of America and by all Federal district courts. I found that with few exceptions they are completely accepted by the judiciary and the Bar. The American Bar Association advocates their universal adoption.

We lawyers in Australia have been bred in the traditional philosophy of litigation. The idea that each party should be entitled before trial to discover within wide limits the oral testimony of his opponent and his witnesses would strike many Australian lawyers as revolutionary and as a wholly unjustifiable intrusion into a litigant's right to keep his cards up his sleeve until play has begun at the trial. Equally abhorrent to many is the idea that the judge should, by assuming at a compulsory pre-trial conference an active control over the case, abandon his traditional passive role of only speaking when his judgment is demanded. Everywhere I journeyed in the U.S.A. among judges and attorneys I was told the same story—that when first the modern pre-trial procedures were introduced to give effect to these new ideas there was a bitter opposition by the Bar but that within a few years the most vigorous critics of the new procedures became enthusiastic advocates. So we should do well to pause and consider that in the vast majority of trial courts in this great country of 180 million people the judiciary and the profession have accepted these new procedures as constituting a substantial and permanent improvement to the machinery of justice.

All this is not to say that I believe we should attempt to transplant in Australian soil these procedures in their entirety. It must be borne in mind that some features of the American procedures have evolved under the pressure of hopelessly congested lists and the necessity of getting rid of as many cases as possible by settlement. And the introduction of the revolutionary procedure of liberal oral discovery with or without modification ought not be contemplated without full consideration of both its philosophical and practical aspects by a fully representative body from the Australian judiciary, Bar and law schools. I hope that this will some day be undertaken.

I have, however, returned from my study tour with a deep conviction that there are certain features of modern pre-trial procedures that ought to be introduced immediately in the interests of efficiency in the administration of justice. I believe there are reforms that could usefully be introduced which would materially contribute to the efficiency of the profession and the courts.

I have conducted seminars for members of the Bar both in Hobart and Launceston and I have been encouraged by the response to my proposals to introduce in Tasmania some features of the American pre-trial procedure. But as Lord Macmillan has said, 'Reform of procedure is always a ticklish business, for we have grown accustomed to paths we have long trodden, however tortuous. But the task must be undertaken from time to time if the vehicle of the law is to keep pace with the changing requirements of the age'.[1]

The foundation of modern American pre-trial civil procedure is to be found in the Federal Rules of Civil Procedure which were promulgated in 1938.[2] The American Bar Association has characterised these Rules as 'the greatest single accomplishment in modern judicial reform' and 'the most enlightened procedural system yet devised'.

Many encomiums have been heaped on the Rules. I quote from Shafroth[3]:

> The important thing about the new rules was their basic philosophy and their adoption of new concepts of procedure, including wide use of discovery, the introduction of the pre-trial conference and the outdating of the 'sporting theory of justice' by which the outcome of litigation was often determined by the procedural skill of counsel rather than the merits of the case. The primary purpose of these rules is expressed in Rule 1 which states that 'they shall be construed to secure the just, speedy and inexpensive determination of every action'. The rules call for the complete exposition of the facts of the case before trial to eliminate surprise and to outlaw the old technique of lying in ambush until the trial with a surprise witness or previously unrevealed testimony.
>
> Judge E. Barrett Prettyman, formerly Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, in a speech at a judicial seminar at Boulder in 1960, commented on the spirit of the rules as follows:
>
> > 'Many older lawyers lament the destruction by the Rules of what they describe as the courtroom skills of their early days. And it is true that many of those skills have passed with gaslight, and sulphur and molasses, and leeches. But the new Rules require other and greater skills in trial. Instead of the flash of drama, they require the more demanding skills of preparation, of clear analysis, of clarity in presentation, of fighting known material with known material. The modern trial is even more than its ancient counterpart a matter of skill.'
> >
> > . . . . . .
> >
> > '. . . I must mention two more objectives of the Rules, at least of their Spirit. These objectives are Expedition and Economy. Justice delayed is justice denied. And the costs of litigation are a reflection upon the judicial process. To eradicate delay and expense is a major purpose in our modern federal procedure. (Prettyman, "The Spirit of the Rules", 28 *F.R.D.* 51, 60 (1960)').
>
> The importance of the changes made by the Rules was stressed at the same seminar by Justice William J. Brennan, Jr., in the following language:
>
> > 'It is now about 21 years, I think, since the Federal Rules of Civil Procedure became effective. They represent one of the great advances in the history of our striving for the best process for administering justice.

---

[1] *Law and Other Things*, pp. 34-35.

[2] For an account of the origin of these Rules, see Shafroth, 'Modern Developments in Judicial Administration', *The American University Law Review*, Vol. 12, No. 2, June 1963.

[3] *Supra*, n. 2.

> Their greatest contribution was not in simplifying pleading and eliminating old technical forms. Their greatest contribution was the revolution they accomplished in converting a law suit from a game of maneuver of surprise into a rational, orderly search for truth and right. Through discovery and pretrial conference procedures they promised that all the cards would be face up on the table before the day of decision. And this made virtually obsolete all of the old habits of trial practice. (Brennan, "The Continuing Education of the Judiciary in Improved Procedures", 28 *F.D.R.* 42, 43 (1960).)'
>
> As these judges have stated, the rules have made a basic change in the theory of trial practice. Under them, a lawsuit is a search for the truth and the machinery provided gives each lawyer the right and the power to search out and to profit by a knowledge of all testimony which his adversary will bring to the trial. Any lawyer practising in the federal courts who does not know the full facts of his opponent's case when the trial begins has failed to use the rights given to him by the new rules under which the element of surprise can be completely eliminated.

In a nutshell liberal oral discovery gives every litigant a right to examine on oath the other party to the action and his witnesses before trial and thus to discover the whole of his opponent's case and evidence. He goes to trial with full knowledge of the other side's case and surprise is virtually eliminated. The pre-trial conference is a compulsory conference between the parties and the judge, at which the judge takes a vigorous initiative and endeavours in an informal atmosphere to obtain agreement as to facts over a wide field and a clear definition of the contested issues. The judge settles the issues for the trial. He may also attempt to guide the parties to a settlement. If the case is not settled the court takes charge of its time table and itself fixes the date of trial.

Oral discovery and the pre-trial conference are very closely linked. To introduce all the features of American pre-trial conference practice without also adopting a system of liberal oral discovery would be impracticable. As a high academic authority on the subject, Professor Louisell of the University of California, Berkely, strikingly put it to me:

'Discovery and pre-trial go together like ham and eggs'.[4]

A pre-trial conference can only be fully effective if both counsel and the judge are familiar with the issues and the main lines of the evidence on both sides. This of course is apt to be a counsel of perfection. I am bound to say that upon the many pre-trial conferences I attended there were few where all parties to the conference had done sufficient 'homework' to make the conference fully effective.

Oral Discovery

Written interrogatories are of course no innovation in the law. Professor Chapin claims to be able to trace their use to the Romans who he says received the practice from the Greeks.[5] In the United States from the mid-nineteenth century onwards rudimentary forms

---

[4] And see Louisell, *Modern California Discovery* (1963) p. 22.

[5] (1954) 28 Connecticut Bar Journal P. 13.

of oral discovery were in use. But only the parties themselves could be interrogated and there were severe limitations upon the extent to which examination could probe an adversary's case as distinct from assisting the interrogator's case.

Oral discovery in its modern form came with the 1938 Federal Rules and the subsequent adoption of similar rules by State trial courts over the last 25 years.

The provisions of the Federal Discovery Rules (Rules 26-28) of the Federal Rules of Civil Procedure) have been summarised as follows:

A. You may take the deposition of any one, a party, or otherwise.

B. It may be upon oral examination or written interrogatories.

C. It may be taken to discover evidence or it may itself be used as evidence.

D. No leave of court is necessary to take the deposition unless you are a plaintiff and wish to serve notice of a deposition taking within twenty days after the commencement of an action. This so-called 'twenty-day' rule does not apply to a defendant. He needs no leave of court, but may serve notice of deposition taking any time. (The purpose of this 'twenty-day' rule, of course, is to allow a defendant time to obtain counsel).

E. The examination itself may relate to your own claim or defence, or that of any other party.

F. You can inquire into the existence, custody, condition, or location of books, documents, or tangible things. You may inquire as to the names and addresses of persons having knowledge of relevant facts. You may inquire as to the names and addresses of your opponent's witnesses.

G. You may inquire into any matter which is relevant to the subject matter of the suit so long as it is not privileged.

H. It is not ground for objection that the information you seek would not be admissible as evidence at the trial—you may have the testimony *'if it appears reasonably calculated to lead to the discovery of admissible evidence'*. This is the only evidentiary test.[6]

The American law and practice of oral discovery involves a fundamental change in traditional methods of conducting litigation between parties. I found that in most places when it was first introduced it was bitterly opposed by most members of the Bar. Now nearly all of them accept it and applaud it.

The effect of the new discovery procedure in the States which have adopted it has been said to have been to 'expedite the disposition of cases, to encourage settlements, to narrow issues, to eliminate surprise, to preserve testimony, to discourage perjury and generally to enhance the judicial processes'.[7]

---

[6] (1964) Mass. L.J. p. 42.
[7] (1964) Mass. L.J. p. 43.

The fundamental basis upon which the justification of the new procedure is commonly placed is that the time has come to abandon the antiquated concept of a trial shrouded in secrecy, mystery, surprise and clever manoeuvre and to adopt rules which conduce to an open and rational consideration of the matters in issue so as to assist the court in determining the truth. The rules go beyond providing machinery merely to freeze the testimony before trial. Their main end is full discovery, that is to enable parties fully and intelligently to assess the strengths and weaknesses of the claim and defence before committing themselves to the expense and inconvenience of a formal judicial hearing. In effect a party is thus able to go to trial sure of his position and of the specific assaults which will be made on it. No longer can key witnesses be kept a dark secret until trial thus preventing intelligent pre-trial evaluation.

An important side effect of the requirement of disclosure of evidence before trial has been the settlement of many more cases. Under our traditional procedure counsel has little knowledge of the evidence on the other side until the trial itself. Oral discovery gives time for evaluation of the whole case before trial and encourages settlement at a stage before the real battle has commenced.

When the number of cases which are settled during trial, after the evidence of a party or key witness, is considered along with the heavy cost per day incurred by a judicial hearing in respect of legal costs, judges' salaries, court administrative costs and time lost from industry and business by parties, witnesses and jurors, the utility of pre-trial discovery becomes apparent. Pre-trial examinations are conducted at minimal expense in the privacy of an office at the convenience of the parties.

Another side effect of this new procedure has been to stimulate many attorneys to deal with each other on an 'open file' basis thus greatly reducing the occasions for resort to the courts for the solution of clients' disputes.

Advocates of liberal oral discovery claim that it has resulted in litigation becoming less of a game of skill between advocates of varying ability and more an orderly process for the discovery of truth.

I questioned many attorneys about the merits and demerits of oral discovery, and in several courts I attended the presiding judge at the conclusion of formal proceedings invited the members of the Bar present to engage in a discussion with us on the subject.

I was looking for opponents of oral discovery in the U.S.A. and was amazed to find so few.

Most attorneys agreed that oral discovery adds to the total overall cost of an action. Some, however, disagreed with this on the ground that if you know in advance your opponent's evidence, the time spent in cross-examination in court is greatly reduced and fewer witnesses are called (*i.e.*, at the pre-trial conference following discovery a number of witnesses will be eliminated after the depositions are

scrutinised). Those who asserted that the total overall cost was increased did not consider this factor of great importance. Many attorneys told me that the practice is worth retaining if only for the reason that it enables complete pre-trial evaluation of a client's case and leads to more settlements and to better settlements. In other words there are many cases in which the attorneys without going to court may be completely satisfied that their client's claims are justly settled. I was told by a number of plaintiffs' attorneys that the system is a great advantage to plaintiffs in ordinary personal injury claims. The defendant's insurance company is put in the position of being able to make a quick and proper assessment of the plaintiff's claim. A very experienced attorney in Chicago told me that since the introduction of oral discovery he had unquestionably obtained quicker and better settlements from insurance companies.

It is not the practice in America to order the losing party to pay the costs of both sides. In Tasmania an overall increase in the costs of an action may be a more serious objection where the losing party has to pay the costs of both sides.

I found no opposition to discovery among attorneys and judges who have grown up with it. They accept it and cannot conceive practice without it. I did however find some opposition to it among a number of older attorneys and judges. No doubt much of this opposition springs from their years of practice under the traditional procedure which permits surprise as a legitimate tactic at a trial. But a more rational and serious objection was put to me by some. This is that the practice puts a premium on perjury. If a party or his witness knows in advance exactly what his opponent and his witnesses are going to say he will know how far he can go in giving false evidence if he is so minded. Akin to this objection is the claim that the weapon of surprise by confronting a witness at the trial with a piece of evidence of which he was unaware may be effectively used to expose the dishonest witness and is often the means of eliciting the truth. The most formidable opponent of discovery (who bases his objections on these grounds) is Mr. Justice Harlan of the U.S. Supreme Court.

A practical way of meeting the first objection is to have contemporaneous taking of depositions of the plaintiff and the defendant and their respective witnesses. This procedure in fact is adopted in Chicago and probably elsewhere.

There remains the possible disadvantage that the dishonest witness may not be effectively exposed before the tribunal which has the task of assessing the credibility of witnesses.

The Pre-trial Conference

The pre-trial conference was introduced informally in Detroit by Judge Monahan in 1929 and this is said to be its genesis in the States. When in Detroit I had a long discussion with a son of Judge Monahan,

who is himself a judge of the same court, and he showed me a number of interesting letters and memoranda written by his father on the pre-trial practice which he had inaugurated.

In 1929 the civil trial lists in Detroit had become very congested. They were 45 months in arrears. To remedy this, Judge Monahan began the practice of inviting the attorneys engaged in a case to discuss with him informally in chambers ways and means of shortening the time of trial of the case by limiting the contest to the real issues and obtaining agreement over as large an area of fact as possible. He also, in appropriate cases, discussed settlement and it is said that many cases were in fact settled because the attorneys were brought face to face and encouraged to a mutual exchange of frank views upon the merits of their respective cases. The pre-trial conference became a regular feature of civil practice in Detroit and has long since been given formal expression in rules of court.

Pre-trial conference practice rapidly gained ground in the U.S.A. in State jurisdictions, but it was not until the introduction of Federal Rule 16 in 1938 that Federal judges were given power to introduce the pre-trial conference in their respective jurisdictions and to impose appropriate sanctions, that pre-trial practice became really effective. In its mandatory form it was introduced almost everywhere in the teeth of strong opposition from the Bar — the chief objection being that the court was taking the business of litigation out of the hands of the attorneys by telling them what to do.

The Federal judges became quickly convinced that it was not in the best interests of litigants and the public that the courts should adhere to their traditional aloofness from the business of litigation. They took the view that the courts have a duty to see to it that cases are brought quickly to trial; that cases that ought to be settled should be settled; that cases that have to be tried should be limited to the real issues—and that all reasonable admissions of fact should be made.

Most, if not all, Federal judges pursuant to their powers conferred by Federal Rule 16 have introduced the pre-trial conference in one form or another in their courts.

Federal Rule 16, in simple and direct terms, provides:

> 'PRE-TRIAL PROCEDURE: FORMULATING ISSUES
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.'

The Federal judges have not hesitated to impose severe sanctions for non-compliance with pre-trial procedural rules (*e.g.* the preparation and delivery within a time appointed by the court of mutual pre-trial notices). Dismissal of a plaintiff's claim or the striking out of a defence are not uncommon sanctions. It is, I think, true to say from my discussions with some of the older judges that the Bar having perforce accepted the pre-trial conference in the Federal courts welcomed its introduction in the State courts. The story in most parts has been that the State courts have introduced it after the Bar has become accustomed to it in the Federal courts. Generally speaking the pre-trial conference is not as effectively conducted in the State trial courts as in the Federal courts. This, I believe, is due to the greater pressure of work in most of the State trial courts and in some measure to the fact that the judges of the State trial courts are elected and not appointed and are not independent of popularity. Several of them told me frankly that they were not prepared to court unpopularity by imposing effective sanctions for non-compliance with pre-trial procedural rules.

Some variations in practice between the courts where I attended pre-trial conferences may be noted:

(1) In some courts the emphasis in pre-trial conferences is on simplification of the issues, the elimination of issues which are unreal, the elimination of unnecessary witnesses, and persuasion of the parties to agree upon as wide an area of facts as possible.

(2) In some courts the judge conducts the pre-trial conference for the purpose of simplifying the issues, etc., and also discusses possibilities of settlement with the attorneys. In other courts there is a separate pre-trial settlement calendar presided over by a different judge, and the judge taking pre-trial conference has nothing to do with settlement, although he may refer the case to the settlement judge if he sees fit.

(3) In some courts (particularly Federal district courts) pre-trial conferences are held only by the judge who is to try the case. In other courts pre-trial conferences are conducted by a judge other than the judge who will try the case.

(4) In some courts pre-trial conferences are conducted by a commissioner or master, as distinct from a judge.

(5) In some courts pre-trial conferences are mandatory and are held in every case. In others there are exemptions and provisions for 'opting out'.

(6) Detailed procedure varies greatly from court to court and from judge to judge, and in particular, sanctions for enforcement of pre-trial orders differ greatly. Almost every judge I sat with had a different approach. It is freely conceded that the success or failure of pre-trial conferences depends a great deal on the personality and ability of the particular judge in this field.

The basic features of effective pre-trial procedure may be summarised as follows:

(i) Once a case is set down (*i.e.*, after pleadings are closed) the case becomes the court's business and not exclusively the business of the parties. The court of its own motion notifies the parties of an appointed date for the pre-trial conference and specifies the time for exchange of pre-trial notices and the lodging of the pleadings, depositions, pre-trial notices and other documents with the pre-trial judge's clerk, to enable the judge to do his 'homework'. At the pre-trial conference the judge, after discussing the case fully (having previously read the pleadings and depositions), himself formulates the issues and states them in the pre-trial order which supplants the pleadings. In the course of the pre-trial conference spurious issues may have been eliminated, the judge may have given his views on the merits of a suggested defence and the attorney may have dropped it. The judge will have discussed with counsel the area of disputed fact, he will have inquired what evidence there is to support the allegations in the pleadings and will often have persuaded the attorneys to agree upon a number of facts; he will often have eliminated unnecessary witnesses—*e.g.* where the plaintiff proposes to call more than one witness on a question of fact on which the defendant announces he has no contradictory evidence to call.

(ii) At the pre-trial conference the judge will call upon the plaintiff's attorney to make a frank evaluation of his case and will then seek the same frank evaluation from the defendant's attorney. The judge will often express his own opinion on these evaluations and will encourage (and in some cases brow-beat) the attorneys to a settlement. In some courts, however, as noted above, pre-trial settlement conferences are divorced from regular pre-trial conferences and if the judge conducting the regular pre-trial conference sees that there is a possibility of settlement he will refer it to the pre-trial settlement conference judge.

(iii) If the case is not settled, the judge at the pre-trial conference dictates the pre-trial order. This determines the issues and supplants the pleadings. It particularises all stipulations (*i.e.* admissions of fact). He then, after discussion with the attorneys, appoints the date of trial. The pre-trial order (except in rare cases) precludes each party from raising any further issues or seeking any further discovery, further medical examination of the plaintiff or other interlocutory matter. The pre-trial rules and their appropriate sanctions are designed to ensure that before the pre-trial conference all the evidence has been briefed and discovery completed. Once the judge has appointed a date for hearing, the parties must be ready at the appointed time and continuances (*i.e.* adjournments) are only granted for really good cause, *e.g.* illness of a material witness.

I was very impressed in San Francisco and Los Angeles with the business efficiency of the courts. The clerk of the lists is a highly paid and most efficient administrator. The practice is for the judge at the pre-trial conference, after discussion with the attorneys and the clerk of the lists or his deputy, to fix a 'day certain' for the case. This is normally one to three months ahead (the business of the court is so organised that the day appointed for the pre-trial conference will be within three months of an available date for its hearing).

In practice the 'day certain' is a Monday in a given week. The parties and their witnesses must be ready on that Monday. They appear at 9 a.m. on the Monday before the judge in charge of the master calendar. In the majority of cases the judge will there and then assign the case for hearing that day at 10 a.m., before a judge (and jury) available for civil causes. Sometimes it happens that because of part heard cases the case cannot be fitted in on the Monday, and a time later in the week will then be fixed if practicable. or the parties will be directed to come back to the master calendar judge on the next day or the day after. I was told that it is very rare indeed for a case listed for the 'day certain' not to begin during the course of the week.

This system involves some waste of judicial time but is a great convenience to the litigants.

U.S. Supreme Court Justice William J. Brennan (with whom I had the advantage of having a discussion in Washington) concisely summed up the new approach to litigation and the objections of pre-trial conference practice:

> The main objective of a court trial is a search for truth . . . a lawsuit is not a game of wits; nor should the one with the most wealth or guile have an undue advantage over another. . . .

> In pre-trial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and manoeuvre as twin allies of the sporting system of justice. The essential features are—
>
> (1) By broad discovery practice to probe into the case of the other side both to strengthen his own and learn the strength and weakness of the other's case
>
> (2) *After discovery* by the pre-trial conference to synthesise the case in a tailor made document suited only for the particular case to which it relates. Pre-trial is used 'as a scalpel to lay bare the true factual controversy'.

Justice Brennan also expressed the view that pre-trial 'should never be perverted into a device for forcing settlement, but as each side knows the strength and weakness of the other side, it is conducive to settlement'.

As a result of bringing the parties together at a pre-trial conference and holding a 'stock-taking' of the case, many more cases are undoubtedly settled. It is possible that if the pre-trial conference is introduced in Tasmania individual judges may in the course of the 'stock-taking' in chambers assist the parties to a settlement in appropriate cases. But I am entirely opposed to any coercive procedure for settlements. It is no part of the judicial function, and after observing it in practice in the U.S.A. I am bound to say that it ought to be regarded as an unfortunate but probably necessary evil which has resulted from the enormously congested court lists.

The immediate procedural reforms which I have recommended to the Tasmanian Rule Committee are designed to introduce a modified form of the American pre-trial conference and to condition the Bar to the new philosophy of litigation and to its ultimate acceptance.

I do not propose any changes in the present procedure until the parties are at issue. From that stage I propose that the procedural steps up to trial would be as follows:

1. Application to Fix Date for Pre-trial Conference

With congested lists the traditional procedure of entry of a case for trial and its inclusion in a long general list has become unreal and inefficient. No case ought to appear in the court's list until it is really ready for trial and has had an individual stock-taking by the court. To this end I propose that instead of entering a case for trial the plaintiff should, after the parties are at issue and discovery completed, file a simple application for a pre-trial conference stock-taking.

From this point the case will become the court's business and not merely the parties' business.

2. Notification by the Court of its Own Motion of Date for Pre-trial Conference: *Compulsory conference between the solicitors for the parties.*

The Registrar will fix a time for the pre-trial conference which will enable him upon the hearing to give a date for the trial of the action within a fortnight or three weeks of the conference. It is

important to realise that under this new procedure the action will become the court's business from the moment the application is made to fix the date for the pre-trial conference. The court will no longer wait passively until the parties announce they are ready for trial. The court will tell them what to do and when to do it. I am entirely convinced after my observations in the U.S. courts that this is an essential condition of the efficient organisation of the court's lists. The Notice in effect tells the parties that they must now begin their final preparations for trial. I have in mind that the Registrar will give fourteen days notice of the date for the pre-trial conference. In this period the parties must do all the things necessary for them to prepare the certificate of readiness and be thoroughly seised of the issues and evidence in the case when they attend the conference. During this fourteen-day period the parties will be required to confer in order—

(a) to reach agreement upon as many matters as possible;

(b) to discuss the possibility of settlement of the case;

(c) to discuss a mutually convenient week for the hearing of the case (after the expiration of two weeks from the hearing of the summons for directions);

(d) to prepare a joint certificate of readiness.

They will be required after their conference to prepare a joint certificate of readiness and file it at least twenty-four hours before the conference.

3. Preparation of Joint Certificate of Readiness

The certicate of readiness should not be required until about a fortnight or three weeks before the available date for trial of the case. The certificate of readiness should be sufficiently comprehensive to ensure that

(1) It will serve as a complete 'check list' for the solicitors, covering pleadings, admissions of fact, mode of proof, documents, expert witnesses, availability of witnesses, and the necessity for any further discovery or interlocutory applications.

(2) The court by looking at the detailed certificate can be really assured that all proper steps have been taken to have the case ready for trial.

4. The Pre-trial Conference

This will take place about a fortnight or three weeks before the available date of trial. I envisage that at the conference the judge or master will—

(a) Ask each counsel to give an outline of his case referring to the material facts he expects to prove.

(b) Discuss the pleadings and particulars and ensure that they are in order for the trial.

(c) Question the parties about the real issues with a view to eliminating spurious and uncontested issues, thus simplifying the issues and reducing the area of conflict.

(d) Discuss the admissions made and endeavour (where appropriate) to get the parties to agree to further admissions.

(e) List requests for admissions refused and if appropriate report to the trial judge that a party has unreasonably refused to make admissions.

(f) Deal with applications specified in the certificate of readiness and fix specific times for compliance.

(g) Limit (if appropriate) the number of expert witnesses.

(h) Fix the time for exchange of proofs of expert witnesses.

(i) Fix the date of trial.

It will be seen that the pre-trial conference I recommend will involve several new concepts:

(1) It will give a robust initiative to the judge or master.

(2) It will impose a duty on counsel to disclose information as to their cases.

(3) It will provide for a discussion between the judge or master and counsel as to a convenient date for the trial and the fixing of a date which can be taken as firm within a week.

Sanctions

I imagine the most effective sanction for non-compliance will be to mulct the defaulting party in costs. Sanctions frequently imposed in U.S. courts are—

(1) dismissing the action in the case of a defaulting plaintiff;

(2) striking out the defence of a defaulting defendant;

(3) fining attorneys for contempt.

Note: On the 17th September 1965 the Rule Committee gave final approval to Pre-Trial Rules which will give effect to the procedural reforms outlined in this article. To give the profession a full opportunity to study the Rules and to enable a smooth change-over to the new procedure to be made they will not come into force until the 1st January 1966. The only substantial variation made in the Rules as finally approved is a provision that a full pre-trial conference before a Judge or the Master shall not be mandatory in every case but may be directed at the discretion of a Judge or the Master upon perusal of the Certificate of Readiness. The intendment of this provision is that a pre-trial conference will not be directed where the Certificate of Readiness is adequate and it appears that nothing further could be achieved at a formal pre-trial conference beyond what the parties have themselves already achieved at their compulsory conference.