THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 40

Production of Medical and Technical Reports in Court Proceedings

REPORT

JULY 1975

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Professor R.W. Harding, Chairman
Mr. E.G. Freeman
Mr. D.K. Malcolm

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Tel: 25 6022).

CONTENTS

	Paragraph
TERMS OF REFERENCE	1-2
WORKING PAPER	3
PRESENT LAW AND PRACTICE IN WESTERN AUSTRALIA	4-11
Present law	4-9
Present practice	10-11
THE LAW AND PRACTICE ELSEWHERE	12-30
England	12-20
Australia	21-29
New South Wales	21-24
South Australia	25-26
Tasmania	27-28
Victoria and Queensland	29
New Zealand	30
DISCUSSION	31-69
Alternatives	31-
General arguments for and against removal of privilege	32-37
Removal of privilege	32-34
Retention of privilege	35-37
A. Complete abolition of the privilege for expert reports	38-39
B. Re-establishment of the common law rules of privilege	40-42
C. Abolition of the privilege in certain circumstances	43-57
(i) *Medical reports in personal injury actions*	43-52
(ii) *Expert reports generally*	53-57
Time for production	58-66
Implementation of Commission's recommendations	67-69
Judicial bodies to which recommendations are intended to apply	67
Method of implementing recommendations	68-69
SUMMARY OF RECOMMENDATIONS	70
APPENDIX I (working paper)	
APPENDIX II (commentators on the working paper)	
APPENDIX III (English High Court Practice Direction)	
APPENDIX IV (Rules of Court (South Australia))	

TO: THE HON. N. McNEILL M.L.C.;
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. The Commission was asked to report on the extent to which the privilege attaching to medical and technical reports should be altered, and to recommend any changes it considered desirable.

2. Although the terms of reference are not specifically restricted to civil proceedings, the Commission, bearing in mind the context in which the matter arose, has confined itself to civil proceedings in the preparation of this report.

WORKING PAPER

3. The Commission issued a working paper on 28 June 1974. A copy of the paper is attached as Appendix I. The names of those who commented on the paper are listed in Appendix II.

PRESENT LAW AND PRACTICE IN WESTERN AUSTRALIA

Present law

4. As a general rule a party who possesses a document relevant to issues raised by litigation in which he is engaged cannot withhold it from other parties to that litigation, unless the document is privileged (*Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644). Privilege attaches to any medical or technical report which comes into existence after litigation is commenced or contemplated, and which is made, for the purpose of obtaining or giving legal advice relating to the litigation, or obtaining or collecting evidence to be used in the litigation (*Wheeler v. Le Marchant* (1881) 17 Ch. D. 675 at 681). To be privileged an expert report need not necessarily be prepared solely for the purpose of litigation: it is sufficient if that is a major purpose (*Seabrook v. British Transport Commission* [1959] 2 All E.R. 15; *Patch v. United Bristol Hospitals Board* [1959] 3 All E.R. 876).

5. The privilege attaching to medical and technical reports is an extension of the privilege afforded by the common law to communications between a legal practitioner and his client. The privilege is that of the litigant, not of the author of the report. It is not therefore possible for a doctor to insist that a report he has given to his patient's solicitor be withheld from production if the patient wishes to produce it.

6. Although litigation must at least be contemplated when an expert report comes into existence for privilege to attach to it, there need be no actual threat of litigation. It is sufficient if there is a high probability that litigation will ensue (*Westminster Airways Ltd. v. Kuwait Oil Co. Ltd.* [1951] 1 K.B. 134: [1950] 2 All E.R. 596). Some events very often lead to litigation, as for example an accident on the highway, and the occurrence of such an event would amount to a sufficient probability for privilege to attach to a relevant report (*Cataldi v. Commissioner or Government Transport* [1970] 1 N.S.W.R. 65: *Patch v. United Bristol Hospitals Board* [1959] 3 All E.R. 876). While the matter has not been settled in litigation, it would seem that if a doctor sends his report to a patient's solicitor without being requested to do so, as sometimes happens in Western Australia, particularly in motor vehicle injury cases, that report would be privileged.

7. In Western Australia the rules of court make provision for discovery of documents, which is a process by which parties to litigation disclose the existence of all relevant documents, and for their subsequent production for inspection (see *Rules of the Supreme Court 1971*, Order 26: *Local Court Rules 1961*, Order 17; *Married Persons and Children (Summary Relief) Rules 1966*, Rule 23). Although a litigant is entitled to refuse to produce for inspection a report to which privilege attaches, he is not entitled to refrain from disclosing its existence.

8. The common law rules which attach privilege to medical and technical reports have, in Western Australia, been varied by statute. It is provided in s.33(3) of the *Motor Vehicle (Third Party Insurance) Act 1943* that -

> "For the purposes of proceedings making a claim for damages, in respect of the death of or bodily injury to a person caused by or arising out of the use of a motor vehicle, against the owner or driver of the vehicle or against the Trust which proceedings have been entered for trial a medical report the substance of which a party intends to adduce in evidence, at some stage of the proceedings, is not a document that may be withheld on the ground of privilege by that party".

9. Further, under the *Rules of the Supreme Court 1971*, a party to litigation may require another party to be medically examined if the Court so orders (Order 28 Rule 1; cf. *Motor Vehicle (Third Party Insurance) Act*, s.30). A copy of the medical report of the examination must be given to the party examined. A similar provision exists in the *Workers' Compensation Act*, which requires a worker to submit to a medical examination by a doctor provided by his employer, and requires an employer or worker having a medical report as to the latter's condition to supply the other with a copy of it within fourteen days after the report was furnished by the doctor (*Workers' Compensation Act 1912*, First Schedule cls. 4 & 7).

Present practice

10. It has been the common practice for many years in this State for the parties in personal injury actions to exchange medical reports before trial. The practice seems to involve an exchange of all medical reports, whether favourable or unfavourable to the producing party, and whether or not the producing party intends to adduce these reports in evidence.

The Commission has been informed that the exchange of non-medical expert reports is not uncommon, and is more usual in arbitration proceedings than in court proceedings. It appears, however, that it is not the general practice to exchange them.

The Commission understands that in some cases, such as land resumption cases heard by the Supreme Court sitting as a Compensation Court in accordance with the *Public Works Act 1902*, there has been a reluctance by the parties to exchange valuations prior to the hearing. This has some times caused practical difficulties, particularly for counsel who is required to cross-examine a valuer on a report produced by his opponent at the hearing.

11. It is the practice of some doctors in Western Australia, who have been consulted by a person injured in a motor vehicle accident, to send a copy of the report they make to the Motor Vehicle Insurance Trust, without obtaining permission of the patient, or his solicitor, to do so. The Commission considers that this practice is undesirable. The report is a privileged document, and while the Commission is in favour of the general practice of freely exchanging reports (see paragraph 47 below), it considers that the decision to exchange should be that of a party or his solicitor, not his doctor. In any event, in some circumstances it may be

appropriate not to produce a medical report to the other party (see paragraphs 50 and 51 below), and the doctor's practice pre-empts the possibility of such a decision being made.

THE LAW AND PRACTICE ELSEWHERE

England

12. The common law relating to privilege for expert reports was significantly altered in England by the *Civil Evidence Act 1972*. That Act empowers rules of court to be made providing for the pre-trial production of expert reports the substance of which a party intends to rely on at the trial pursuant to this Act, amendments to the Rules of the English Supreme Court were made which came into operation in June 1974.

13. The relevant parts of these amendments are contained in Appendix II to the working paper. The effect of Order 38 Rule 36 is that, except with the leave of the Court or where all parties agree, a party cannot adduce expert evidence at the hearing unless he has applied to the Court for a direction under Rule 37, 38 or 41 (whichever is appropriate) as to whether the substance of that evidence should be disclosed beforehand to other parties.

14. These amendments to Order 38 do not affect the normal process of discovery and inspection of documents, under which each party must send a list of documents within fourteen days after the pleadings are closed, and must permit the other party to inspect those documents within seven days of serving the list. This process is, however, subject to the right of a party to object to inspection on the grounds of privilege, but inspection may be required by the operation of the amendment to Rule 38.

15. Order 38 Rule 37 covers the case of an action for personal injuries where a party seeks to adduce oral expert evidence relating to medical matters. Unless the Court considers there is sufficient reason for not doing so, it is required to direct that the substance of that evidence be disclosed in the form of a written report to such other parties and within such period as it specifies. The Court may, if it thinks fit, treat any of the following circumstances as a sufficient reason for not giving such a direction -

> "(a) that the pleadings contain an allegation of a negligent act or omission in the course of medical treatment; or

(b) that the expert evidence may contain an expression of opinion

(i) as to the manner in which the personal injuries were sustained; or

(ii) as to the genuineness of the symptoms of which complaint is made".

16. All other cases where a party seeks to adduce oral expert evidence are covered by Order 38 Rule 38. Under that rule the Court may direct the prior disclosure of the substance of such evidence only if it is satisfied that it is desirable to do so. In deciding whether to give such a direction the Court is to have regard to all the circumstances and may, to such extent as it thinks fit, treat any of the following circumstances as affording a sufficient reason for not giving such a direction -

" (a) that the expert evidence is or will be based to any material extent upon a version of the facts in dispute between the parties; or

(b) that the expert evidence is or will be based to any material extent upon facts which are neither -

(i) ascertainable by the expert by the exercise of his own powers of observation, nor

(ii) within his general professional knowledge and experience".

17. Order 38 Rule 41 applies where the expert evidence is contained in a statement which a party wishes to use without calling the maker of the statement to give oral evidence at the trial. Except with leave of the Court, the statement cannot be admitted unless its contents have been disclosed to the other parties beforehand.

18. Although application for an order under Order 38 Rule 36 may be made at any stage of the proceedings, where practicable, it must be made at the hearing of the summons for directions, which plaintiffs must in any case take out within one month after the pleadings are closed (Order 25). According to the *Practice Direction (Evidence: Expert)* [1974] 1 W.L.R. 904; [1974] 2 All E.R. 966, exchange of medical reports will normally be ordered within a specified period. If further medical examination is necessary, the period asked for should allow for this, and should not materially extend beyond setting down. In the case of non-medical reports, any order for production will normally be by way of exchange, but the direction does not specify any period within which exchange must take place. Appendix III to this report reproduces the Practice Direction.

19. Similar rules of court have been made with respect to the County Court. Under the *County Court (Amendment No. 3) Rules 1974* (s.1 1974/1138), a party seeking to adduce expert evidence must apply to the Court to determine whether there should be prior disclosure of that evidence, but this requirement does not apply if no defence or answer has been filed or the sum claimed does not exceed two hundred pounds.

20. The *Civil Evidence Act 1972* and the rules made thereunder follow in general the recommendations of the English Law Reform Committee in its 17th Report (*Evidence of Opinion and Expert Evidence* Cmnd. 4489 (1970)).

Australia

New South Wales

21. Provision exists for the pre-trial production of medical reports in Supreme Court actions for personal injuries. Rule 13A of Part 36 of the *Supreme Court Rules 1970*, introduced in 1972, provides as follows -

> "(1) This rule applies to proceedings in the Court in which damages are claimed in respect of personal injuries.
>
> (2) Unless the Court otherwise orders, this rule does not apply to proceedings against a medical expert in which damages are claimed in respect of personal injuries alleged to have been sustained as a result of the professional negligence of that medical expert.
>
> (3) In this rule, "evidential medical report" means a report by a medical expert in writing which contains the substance of medical matters which are intended by the party disclosing it to be adduced in evidence in chief at the trial.
>
> (4) Unless the Court otherwise orders, in proceedings to which this rule applies each party in the proceedings shall, not later than fourteen days before the date for which the proceedings are set down for trial, disclose evidential medical reports.

(5) An evidential medical report shall be disclosed by delivering a copy of it to each other party who has an address for service in the proceedings.

(6) In proceedings to which this rule applies, except with the leave of the Court or by the consent of the parties, the evidence in chief of any medical expert on medical matters is not admissible unless that evidence is covered by a report disclosed in accordance with this rule.

(7) For the purposes of subrule (6), evidence is covered by a report if the report contains the substance of the matters sought to be adduced in evidence.

(8) An application to the Court for an order under subrule (4) may be made without serving notice of the motion".

22. The Chief Justice of New South Wales has issued a Practice Note to the effect that, as from 3 March 1975, all common law cases set down for trial in the Supreme Court are to be listed for a hearing for directions under Part 26 of the *Supreme Court Rules 1970*. Pursuant to the Note the disclosure of medical evidence (i.e. production of evidential medical reports) as required by Part 36 Rule 13A must be completed not less than three days before the directions hearing.

23. The circumstances of the directions hearing in New South Wales are thus not the same as in England. In England the hearing takes place before the action is set down for trial and the decision whether or not to order pre-trial production of expert reports will normally be made by the Court at the directions hearing. By contrast in New South Wales the hearing takes place after the action is set down for trial, so that if an order exempting a party from producing medical reports is to be obtained it must be obtained before the directions hearing.

24. The Commission has been informed that Rule 13A of Part 36 was introduced to facilitate pre-trial settlements. The Commission has attempted to ascertain from legal practitioners in New South Wales whether the Rule is having its intended effect, but it appears that the Rule has not been in operation for a sufficient time for any firm conclusion to be drawn. There is some evidence, however, that the Rule has shortened the average duration of

trials, reduced the average number of expert witnesses called at the trial and increased the number of occasions where agreed medical reports are submitted.

South Australia

25. Amendments made to the *Rules of the Supreme Court* of South Australia on 21 March 1975 contain provisions for the pre-trial production of expert reports. Their broad effect is as follows -

(a) Order 30 (under which any party may take out a summons for directions), has been amended to empower the Court at the directions hearing to make an order for the production of medical reports (whether in personal injury or other actions) on any matters raised by the pleadings and for production of reports from other experts as to any opinion given by them on any matters raised by the pleadings.

However a report need not be produced if it has been superseded by another report, unless the Court orders, or where the party does not intend to call the author of the report at the trial.

(b) Order 31 (which deals with discovery and inspection) has been amended to provide that, unless an order of exemption is obtained, parties in a personal injury action must produce to the other parties all relevant medical reports the authors of which it is intended to call as witnesses at the trial. A party may apply *ex parte* at any time for an order exempting him from compliance on the ground that production of the report would be unduly prejudicial to him.

26. The full text of the amendments referred to in the previous paragraph is set out in Appendix IV to this report. The following features should be noted -

(a) a directions hearing is not compulsory, but may be applied for by any party;

(b) in the case of medical reports (whether in personal injury or other actions), reports on fact as well as opinion are subject to production, whereas in the case of other reports, those as to opinion only are so subject;

(c) the amendments do not contain guidelines as to whether a report should be ordered to be produced under Order 30, or whether a medical report should be exempted from production under Order 31;

(d) the amendments appear to cover written reports only, and there seems no requirement to disclose the substance of any medical report which was given to a party orally (cf. paragraph 49 below).

Tasmania

27. Provision exists for the pre-trial production of expert reports in Supreme Court actions. Order 40 Rule 5 of the *Supreme Court Rules 1965* provides as follows;

> "In an action of whatever nature, except in a case in which, at or before the trial, the Court or a judge otherwise orders or directs, the oral evidence of an expert witness sought to be called on account of his skill and knowledge as respects facts in issue involving expert opinion (including evidence of comparable sales by a valuer) is not receivable in evidence at the trial unless at such time before the trial as is fixed by order of a judge on the summons for directions, or, if no time is so fixed, within a reasonable time before the commencement of the trial, a copy of a proof containing the substance of his evidence has been made available to each of the parties for inspection".

It is noted that the Rule, which has been in force since 1958, is not confined to medical matters, but applies to expert evidence generally, and that unless the Court otherwise orders no expert evidence can be given unless a proof of that evidence is made available to the other parties before the trial.

.

28. Under Order 32A an action cannot be set down for trial unless the parties have exchanged proofs of expert evidence, or agreed on a date for exchange which is satisfactory to the Court. If a party delays in producing proofs of his expert witnesses or will not agree on a satisfactory exchange date, then the other party may apply to a judge for directions. What is a reasonable time for the purposes of Order 40 Rule 5 depends on the circumstances of each

case, but it appears that proofs must be exchanged at least in sufficient time for parties not to be taken by surprise at the trial.

The Commission has been informed that the intention behind the Rule is that proofs of expert evidence be exchanged on a voluntary basis, and that this is in fact normally done.

Victoria and Queensland

29. Neither of these States makes provision for the compulsory pre-trial production of expert reports. The Commission has some evidence that in practice in Queensland there is some degree of exchange of expert reports. In Victoria, where personal injury actions are generally tried before a jury, it appears that medical reports are seldom exchanged; however, there appears to be some degree of exchange of expert reports in civil actions other than personal injury actions.

New Zealand

30. There is no provision by statute or by rule of court in New Zealand requiring the pre-trial production of expert reports. The Commission has been informed that in practice there is some degree of exchange of reports to facilitate settlements.

DISCUSSION

Alternatives

31. In paragraph 8 of the working paper the Commission outlined the three main alternatives which it thought should be considered in examining what changes, if any, should be made to the law of privilege as it applies to medical and technical reports. These were -

(a) to abolish the privilege attaching to medical and/or technical reports regardless of whether their substance is to be relied upon in litigation;

(b) to re-establish fully the common law rules of privilege;

(c) to abolish the privilege attaching to medical and/or technical reports the substance of which is to be relied upon in litigation, either -

(i) with regard to actions generally; or ,

(ii) with regard to specified types of actions, e.g. personal injury actions.

Paragraphs 32 to 37 below discuss the general arguments for and against removal of privilege and paragraphs 38 to 57 discuss each of the above alternatives.

General arguments for and against removal of privilege

Removal of privilege

32. The first and third alternatives in paragraph 31 would involve removal of the privilege which presently attaches to medical and technical reports. The arguments usually advanced in favour of removing the privilege are that the duration of trials is likely to be shortened and legal costs reduced, litigants are more likely to be encouraged to settle actions without the need for a hearing in Court, and an opportunity is given courts to arrive at a just verdict more easily. In the case of medical reports in personal injury actions, there is the additional argument that it is already common practice to exchange them (see paragraph 10 above).

33. The Commission considers that the arguments mentioned in paragraph 32 above are persuasive. Pre-trial production of medical and technical reports often helps define the limits of the dispute between the parties. This is likely to reduce the length of cross-examination and shorten the hearing. The need for adjournments may be reduced, since a party is unlikely to be able to argue successfully that he was taken by surprise by evidence given by the author of a report. In many instances pre-trial production of expert reports results in the parties submitting agreed reports to the Court and not calling the authors. This practice is common in running down cases in this State. In some cases, however, it could be desirable to call the author, since a medical witness may be able to assist a court on a particular issue arising out of a report expressed in general terms (see *Jones v. Griffith* [1969] 2 All E.R. 1015; see also *Rose v. Motor Vehicle Insurance Trust* (unreported decision of Burt J., delivered on 17 July 1973)). Shortening the duration of a trial or dispensing with the need to call experts could reduce the costs of litigation.

34. Experience in this State with actions in the Third Party Claims Tribunal (this Tribunal was established in 1966 with exclusive jurisdiction to determine running down cases and was abolished in 1972) suggests that removal of privilege from medical reports in personal injury cases encourages pre-trial settlements. In claims before the Tribunal it was compulsory to exchange medical reports the substance of which parties intended to rely on at the hearing. A consent judgment was entered in 1,738 of the first 2,074 cases commenced in that Tribunal, 601 cases being settled prior to the action being set down for trial. It seems reasonable to infer that this high rate of settlement was in part due to the pre-trial production of medical reports. It is probable that the production of expert reports in other kinds of actions would also, as a general rule, encourage pre-trial settlements.

Retention of privilege

35. Proponents of the retention of privilege would argue that any limitation on the scope of the privilege which attaches to expert reports would involve a further inroad into the adversary system. It would lead to a change in the tactical position of the parties. Pre-trial disclosure of evidence to be relied upon at the hearing removes in part the element of surprise which is often advantageous to a litigant. It may result in a party having evidence led against his case that would not otherwise have been led. However, the committee which enquired into the practice and procedure of the Supreme Court in England (the Evershed Committee) observed that, though this element of surprise was "no doubt good tactics" on the principles generally adopted in contesting cases, it did not "conduce to decisions in accordance with the true facts" (see *Final Report of the Committee on Supreme Court Practice and Procedure* Cmd. 8878, (1953) paragraph 289).

36. Both the English Law Reform Committee (see paragraph 20 above) and the Committee on Personal Injuries Litigation in England (the Winn Committee) (Report, Cmnd. 3691 (1968)) were generally concerned to maintain the basic concept of the adversary system. There seems wide agreement that any changes made to the laws attaching privilege to medical and technical reports should be designed to make no more inroads into the adversary system than are reasonably necessary and clearly beneficial.

37. There may well be a connection between the existence of jury trials and the desire to retain the common law privilege from pre-trial production in full. In Victoria most personal

injury actions are tried with a jury and, from enquiries made by the Commission, it appears that in that State medical reports are seldom exchanged before trial (see paragraph 29 above). In New South Wales the rule requiring pre-trial production of medical reports in personal injury cases (see paragraph 21 above) was not introduced until 1972, which was about two years after the cessation of jury trials in running down cases.

Where jury trials exist it is perhaps natural that counsel would wish to preserve the secrecy of an expert report until such time as he regards it as appropriate to disclose its substance to the jury. However, such tactics should not necessarily be regarded as appropriate where, as in this State, trials are heard before a judge alone.

A. Complete abolition of the privilege for expert reports

38. The Western Australian Chapter of the Royal Australian Institute of Architects agreed with the submission of one of its members, Mr. F. McCardell, that the first alternative in paragraph 31 above be adopted, which would require the pre-trial production of all expert reports received by the parties, whether or not it is intended to rely on them at the hearing. They contended this largely because in their view the adversary system is not the "best way to find the truth in technical matters".

Judge O'Connor of the Western Australian District Court in his comments on the working paper expressed the view that all medical reports containing material relevant to the questions at issue should be produced to the opposing side, whether or not the reports favoured the party producing them. He was not, however, in favour of this course for non-medical reports. Similarly, no other commentator suggested that the obligation to produce medical or technical reports should be absolute, and the Commission is unaware of any general support for such a proposition.

39. If parties were required to produce any expert reports they had obtained, whether or not they intended to rely on their substance at the trial, the present adversary system would be radically altered. The obligation would require the production of reports obtained merely to assist counsel get a case up for trial, including preliminary statements and reports containing a number of differing opinions based on differing factual hypotheses. Considerable inconvenience and difficulty would result if parties were obliged to produce preliminary

drafts of reports, incomplete, misleading or incorrect reports or reports which appeared biased or based upon incorrect factual assumptions. Such a requirement might inhibit those contemplating litigation in seeking expert opinion about their case and certainly would restrict them as to the manner in which they presented their case in court. It would lengthen and complicate the preparation of the trial and the trial itself. Far from reducing the costs of litigation, such a rule would appear likely to increase them.

The Commission does not recommend its adoption.

B. Re-establishment of the common law rules of privilege

40. None of the commentators on the working paper supported the second alternative referred to in paragraph 31 above, namely that the common law privilege be fully re-established. Under this alternative there would be no obligation at any stage on a party to an action to make pre-trial production of an expert report obtained in circumstances giving rise to privilege. All commentators agreed that in certain circumstances the advantages of pre-trial production of some expert reports out-weighed any disadvantages. A return to the common law position would require the repeal of s.33(3) of the *Motor Vehicle (Third Party Insurance) Act* (see paragraph 8 above), and would conflict with the present practice in personal injury actions.

41. The Evershed Committee (Report Cmd. 8878 (1953), paragraphs 289 and 290) and the English Law Reform Committee (17th Report Cmnd. 4489 (1970)) agreed that there were grounds for removing the privilege attaching to medical and technical reports in some circumstances (see paragraphs 28 to 32 of the working paper). A similar conclusion was arrived at by the English Winn Committee in relation to medical reports (Report, Cmnd. 3691 (1968) paragraph 280).

42. The Commission is of the opinion that the practice of pre-trial production of certain expert reports is too well established in the law and practice of this State (see paragraph 10 above) for it to recommend that privilege should at all times attach to all expert reports, even if it had wished to do so.

C. Abolition of the privilege in certain circumstances

(i) Medical reports in personal injury actions

43. As was mentioned in paragraph 10 above, it has been the practice in this State for parties to actions for personal injuries to produce to opposing parties copies of medical reports the substance of which they intend to rely on at the trial. A similar practice, although perhaps not as widespread, appeared to have existed in England for at least thirty years before the passing of the 1972 *Civil Evidence Act* (see the 17th Report of the Law Reform Committee, Cmnd. 4489 (1970) paragraph 32). In running down cases in this State there has been since 1967 a statutory requirement to produce such medical reports (s.33(3) *Motor Vehicle third Party Insurance) Act* (see paragraph 8 above); *Rules of the Third Party Claims Tribunal 1967*, Rule 170 (repealed)).

44. Although the English courts did not, until the enactment of the *Civil Evidence Act 1972*, have express power to order the exchange of medical reports, the judges had before then made it clear that they expected those reports the substance of which a party intended to rely on at the trial to be produced to opposing parties before the trial (see *Edmeades v. Thames Board Mills Ltd.* [1969] 2 Q.B. 67; [1969] 2 All E.R. 127; *McGinley v. Burke* [1973] 2 All E.R. 1010; cf. *Causton v. Mann Egerton (Johnsons) Ltd.* [1974] 1 All E.R. 453). In *Lane v. Willis* [1972] 1 All E.R. 430 Sachs L.J. commented -

> "There is far too much reluctance in this matter of exchanging - far too much manoeuvring behind the scenes - far too much (especially on the part of defendants) trying to hold back a report until the moment of the trial" (p.437).

45. The Law Society of Western Australia in its comments submitted that medical reports, the substance of which parties intend to rely on in personal injury actions, should be liable to pre-trial production. The Australian Medical Association (W.A. Branch) and the Australian Dental Association (W.A. Branch) made similar submissions. All agreed that there should be some exceptions to the proposal.

46. The Commission considers that the legal distinction now existing in this State between medical reports in running down cases and in other personal injury litigation is difficult to justify.

The Commission accordingly recommends that, subject to certain exceptions (see paragraphs 51 and 52 below), privilege should be removed in all personal injury actions from medical reports the substance of which is to be relied on at the trial.

47. The enactment of such a provision, while intended to facilitate the trial of personal injury actions, would in fact not go so far as the present practice, which is not confined to the production of favourable reports or those intended to be relied on at the trial (see paragraph 10 above). The Commission wishes to make clear that its limited recommendation, if implemented, is not intended to inhibit the wider practice which now exists of including in an exchange of medical reports in personal injury actions, a report unfavourable to the adducing party. It is thought that this practice encourages the settlement of such actions.

48. The Australian Dental Association (W.A. Branch) suggested that medical reports should include dental reports. The Commission agrees. The Commission considers that the requirement to produce should not be confined to any narrow class of medical report, and accordingly recommends the adoption of a broad definition similar to that in the South Australian Rules. This covers a report from a medical practitioner, dentist, psychologist, psychiatrist, physiotherapist, chiropodist or any person in connection with any injury or illness the subject of the action, but excludes one in which the person giving it was not then acting in his professional capacity (see Appendix IV). The Commission understands that the present practice in this State of exchanging reports covers those referred to in the South Australian definition.

49. The English Rules require that, unless the Court otherwise directs, at the hearing of an action for personal injuries no witness may give expert evidence relating to "medical matters" unless the substance of the evidence has been reduced to writing and given to the other side beforehand (see paragraph 15 above and Appendix II of the working paper). The New South Wales Rules have a similar provision (see paragraph 21 above), as do the Tasmanian Rules which apply to expert reports generally (see paragraph 27 above). These provisions are in contrast to the South Australian Rules (see paragraph 25 above and Appendix IV of this report) under which the requirement is confined to producing any written reports and associated documents.

The Commission recommends the adoption in this State of provisions similar to those in England and New South Wales to ensure that the intended effect of the Commission's proposal in paragraph 46 could not be avoided by obtaining oral instead of written medical reports.

50. In paragraph 30 of its 17th Report, the English Law Reform Committee laid down a principle which it thought should be used to distinguish between those expert reports which should be produced prior to trial and those which need not. The Committee said that compulsory production -

> "(a) is appropriate in cases where the expert's report may be expected to be based upon facts which are either agreed or can be ascertained with reasonable certainty by the expert himself by the exercise of his own powers of observation or are within his general professional knowledge or experience; but
>
> (b) is *not* appropriate in cases where the expert's report may be expected to be based to any material extent upon a version of facts in dispute between the parties which has been supplied to him by the party on whose behalf he has been instructed".

A reason the Committee gave for the distinction was that expert reports in category (b) -

> "...involve disclosing alleged facts which the party instructing the expert will seek to prove at the trial by witnesses other than the expert himself and to this extent involve disclosing material which will be included in the proofs of those witnesses. If the opinion of the expert based upon the alleged facts so disclosed is unfavourable to another party to the action, there might be a temptation to that other party to trim the version of the facts presented by him and his witnesses at the trial so as to weaken or destroy the factual basis of the unfavourable expert opinion" (paragraph 29).

51. Applying this principle to medical reports in personal injury actions, the Committee considered that, in the majority of such cases reports would fall into category (a) above, and that accordingly they should, as a general rule, be subject to compulsory pre-trial production. The Committee also recognised that there would be exceptional circumstances in which compulsory pre-trial production could be inappropriate. It specified these as follows -

> (a) where the action was one for medical negligence;
>
> (b) where a report contained an opinion on the cause of the injury; or

(c) where it contained an opinion on the genuineness of the symptoms.

The Committee recommended that the court should be empowered, if it thought fit, to regard any of these circumstances as sufficient for not giving a direction to produce a medical report. This approach was adopted in the 1974 amendments to the English *Supreme Court Rules* (see paragraph 15 above).

52. The Commission recommends that a similar approach be adopted in this State.

(ii) Expert reports generally

53. The reports dealt with under this heading are non-medical expert reports in all actions (whether personal injury or other actions) and medical reports in non personal injury actions (see paragraph 57 below).

54. The Law Society of Western Australia expressed its opposition to the removal of privilege from reports other than medical reports in personal injury actions. Judge O'Connor was also of the opinion that medical reports in personal injury actions were in a separate category (see paragraph 38 above). The Commission, however, can see no essential difference in the nature of medical reports in personal injury actions and expert reports in other cases which would justify removing privilege from the former but not from the latter. The distinctions which have been made in practice appear to be merely the result of experience in the use of particular kinds of reports.

55. The question is whether expert reports other than medical reports in personal injury actions should be produced unless the Court thinks there is sufficient reason for not doing so (which is the position recommended by the Commission in regard to medical reports in personal injury actions) or whether they must be produced only if the Court is satisfied that it is desirable to do so.

There is in this State no general practice of exchanging expert reports (other than medical reports in personal injury actions - see paragraph 10 above), and the Commission considers that their pre-trial production should be required only if the Court is satisfied that it is desirable to do so. A similar distinction between medical reports in personal injury actions

and other expert reports is made in the English Rules (see paragraph 16 above). The need for distinguishing in this way between the two categories of reports is based on practical experience rather than on principle; the position could accordingly be reassessed in the light of additional experience.

56. In paragraph 51 above, the Commission set out three reasons which the Court could regard as sufficient for not ordering the production of a medical report in a personal injury action. The English *Supreme Court Rules* (see paragraph 16 above) set out parallel, but necessarily more general, reasons for exempting other classes of expert reports from compulsory production. The Commission recommends these reasons should, if the Court thinks fit, be regarded as sufficient for exemption in this State.

The Commission recommends the adoption of a rule to the effect that, if the Court directs a party to produce a report, then, unless the direction is complied with, no expert evidence on matters contained in that report may be adduced by that party at the trial without the leave of the Court. This recommendation is analogous to that for medical reports in personal injury actions (see paragraph 52 above).

57. The Commission has considered whether medical reports in non personal injury actions should be treated in the same way as those in personal injury actions so as to require their pre-trial production unless the Court was satisfied that there was sufficient reason for not doing so. However, it decided against recommending such a step. There is insufficient experience in relation to the exchange of such reports. Further, medical reports in personal injury actions are in general obtained to help assess the amount of damages, but no such generalisation can be made about medical reports in other actions. For example, a medical report may be obtained in connection with a petition for divorce on the grounds of cruelty, in affiliation proceedings to determine paternity, or in proceedings to determine a person's contractual capacity.

Time for production

58. Most commentators, including those who commented on the working paper, agreed that expert reports which are to be produced before trial should be exchanged by parties simultaneously to avoid one party obtaining an unfair advantage over the other. This was

recommended by the English Law Reform Committee in its 17th Report, (Cmnd. 4489 (1970) paragraphs 40, 41, 58 and 59). The same principle seems implicit in the provisions of s.33(3) of the *Motor Vehicle (Third Party Insurance) Act*, and is supported by the Law Society of Western Australia.

59. It is necessary to fix a date for exchange late enough for a party to decide on what expert evidence he intends to rely. Under the English Supreme Court Rules it is compulsory for plaintiffs to take out a summons for directions within one month after the pleadings are deemed to be closed (R.S.C. Order 25). A party intending to adduce expert evidence can make application to the Court for a direction under Order 38 at that stage.

60. A summons for directions must now be taken out in common law cases in the New South Wales Supreme Court (see paragraph 22 above). However, in contrast to the English position, the directions hearing takes place after the action has been set down for trial, and the production of medical reports must be completed before the hearing.

61. In South Australia, a summons for directions may be taken out at any time before judgement, except that where the defendant is required to appear, it cannot be taken out before appearance (see Appendix IV). However, an order cannot be made for the production of an expert report before twenty-one days after the close of pleadings (see Appendix IV). In relation to medical reports in personal injury actions, production must be made not later than the hearing of the application for leave to set the action down for trial (see Appendix IV).

62. In Tasmania, if a party wishes to proceed and considers that the other party is frustrating him by delay, he may apply under Order 32A Rule 8 for a summons for directions, and the Judge may thereupon impose a timetable on the parties. A certificate of readiness for trial must state either that proofs of expert witnesses have been exchanged or state a date on which they will be exchanged (see paragraph 28 above). If a party will not agree to an exchange date the other party can apply for a summons for directions.

63. There is no general requirement in the Supreme Court of this State that a summons for directions be taken out, although there is a provision for it to be done, should a party wish to do so (see R.S.C. Order 29 (W.A.)). However, in an action on a building or engineering contract where the estimated hearing time exceeds one day, a party desiring to enter an action

for trial must apply to a judge for directions (Practice Direction, 27 November 1974). Included in the matters on which a direction must be sought is discovery and inspection of documents. The Direction provides that an order for directions shall not require any information or documents that are privileged to be given or produced by a party, other than with his consent.

64. In paragraph 33(c) of its working paper the Commission suggested as one method of providing for the exchange of reports that -

> "..the Supreme Court Rules should be amended to require a party, upon filing a request to set a matter down for hearing, to take out a summons for directions. On the return of that summons, the reports to be exchanged could be determined and an exchange date fixed. Use could also be made of Order 36 Rule 3 of the *Supreme Court Rules* to fix the number of expert witnesses to be called, although in most cases this would be determined by the reports ordered to be exchanged".

At the hearing of the summons, the Court could also determine whether a court expert should be appointed: if such an appointment were made, any party may call one other expert witness on that question (R.S.C. Order 40 Rule 6).

65. It is not within the Commission's terms of reference to consider whether or not there should be a compulsory summons for directions in the Supreme Court. However, should such a procedure be instituted, the Commission recommends that the question of what reports should be exchanged, and the timing of the exchange, should be determined at that hearing.

66. In the absence of a compulsory summons for directions, the Commission considers that, for proceedings in the Supreme Court and District Court, expert reports should be exchanged by the parties after the expiration of a period of twenty-one days after pleadings are deemed to be closed, but before, and as a condition precedent to, the entry of the action for trial (see R.S.C. Order 20 Rule 20 and Order 33). Appropriate notices would be required to be served to facilitate the fixing of an exchange date. In the case of medical reports in personal injury actions, the onus should be on a party who does not wish to produce a medical report to apply to the Court for exemption. In all other cases, the onus should be on the party desiring production to apply to the Court for an order directing production. Appropriate provision would also be required for reports which come into existence after the action has been set down for trial.

Implementation of Commission's recommendations

Judicial bodies to which recommendations are intended to apply

67. In the preceding paragraphs, the Commission has been concerned primarily with proceedings in the Supreme Court and District Court. However, it considers that appropriate provision should also be made for pre-trial production of expert reports in -

(a) the Local Court and the Summary Relief Court;
(b) the Workers' Compensation Board;
(c) arbitration proceedings under the *Arbitration Act*;
(d) all other tribunals to which the strict rules of evidence apply.

There is no entry for trial procedure in the bodies referred to in (a) and (b). The Commission suggests that the date for exchange of expert reports be fixed by reference to the date of the trial. In regard to arbitration, the most appropriate method may be to empower the arbitrator to fix an appropriate exchange date.

Method of implementing recommendations

68. It has been suggested that the promulgation of a rule of court requiring the pre-trial production of expert reports, would be a change in the substantive law, as being an abrogation of the common law privilege against inspection attaching to those documents, and that accordingly power to make rules of court relating to procedure would not extend to the making of rules requiring pre-trial production of expert reports (*Cicosta v. Lilly* (1967) 61 D.L.R. (2d.) 12). The Commission considers that it is doubtful whether the present rule-making power of the Supreme Court (the *Supreme Court Act 1935*, s.167) the District Court (the *District Court of Western Australia Act 1969*, s.88) the Local Court (the *Local Courts Act 1904*, s.158) the Summary Relief Court (the *Married Persons and Children (Summary Relief) Act 1965*) or the Workers' Compensation Board (the *Workers' Compensation Act 1912*) extends beyond procedural matters. In New South Wales the *Supreme Court Act 1970* was expressly amended to enable rules to be made concerning the production of expert reports (s.124(l) (ma)).

69. The Commission is accordingly of the view that, except in the case of arbitration proceedings under the *Arbitration Act 1895*, the most appropriate way to give effect to its recommendations would be by way of amendment to the *Evidence Act*, and to empower the making of appropriate rules. For administrative convenience of the Courts, it would be desirable to supplement the amendment of the *Evidence Act* by specific amendments to the *Supreme Court Act* and the other Acts mentioned in paragraph 68 so as to add to the rule-making power. The amendments should be wide enough to cover all matters in respect of which the Court or tribunal in question has jurisdiction.

It would also be necessary to amend s.33 of the *Motor Vehicle (Third Party Insurance) Act 1943* (see paragraph 8 above) to enable the time for production of medical reports to be specified by the *Supreme Court Rules* and the rules applicable in the District Court and the Local Court.

In the case of arbitration proceedings it would probably be preferable to amend the *Arbitration Act*. In its report on Project No. 18 the Commission recommended that the *Arbitration Act* be revised. If this recommendation is adopted, a suitable provision as to pre-trial production of expert reports could be included in the course of that review.

SUMMARY OF RECOMMENDATIONS

70. The Commission recommends that -

(a) unless the Court otherwise directs, medical reports in personal injury actions, the substance of which are to be relied on at the trial, must be produced to the other party before the trial;

(paragraph 46)

(b) unless the leave of the Court is obtained, at the hearing of a personal injury action no witness may gave evidence relating to medical matters unless the substance of that evidence is produced in the form of a written report to the other party before the trial;

(paragraph 49)

(c) the Court may, if it thinks fit, treat any of the following matters as sufficient for directing that a medical report need not be produced -

(i) the action is one for medical negligence;

(ii) the report may contain evidence -

(a) as to the manner in which the injuries were sustained; or

(b) as to the genuineness of the symptoms;

(paragraphs 51 and 52)

(d) "medical reports" be defined along the lines of the definition in Order 30 Rule 6 of the South Australian *Rules of the Supreme Court* so as to include reports on medical matters other than reports by doctors;

(paragraph 48)

(e) in the case of expert reports intended to be relied on at the trial to which (a) above does not apply, the Court may, if it thinks it desirable to do so, order their pre-trial production;

(paragraph 55)

(f) unless the leave of the Court is obtained, in a case where the Court has directed that a report to which paragraph (e) applies is to be produced before trial no expert evidence containing the substance of that report may be adduced at the trial unless the direction of the Court has been complied with;

(paragraph 56)

(g) the Court may, if it thinks fit, treat any of the following matters as sufficient for directing that a report to which (e) applies need not be produced -

(i) the expert evidence is based on a version of facts in dispute; or

(ii) the expert evidence is based on facts which are neither -

(a) ascertainable by the expert himself, nor

(b) within his professional knowledge;

(paragraph 56)

(h) if a compulsory summons for directions is instituted in the Supreme Court and District Court the Court should be empowered to consider when the exchange of reports should take place and whether any direction should be given under (c) or (g) above at that hearing;

(paragraph 65)

(i) in the absence of compulsory summons for directions, expert reports be exchanged in the Supreme Court and District Court after a period of twenty-one days following the close of pleadings and before the action is entered for trial;

(paragraph 66)

(j) in addition to the Supreme Court and District court provision should be made for the pre-trial production of expert reports in the Local Court, the summary Relief Court and the Workers' compensation Board, in arbitration proceedings and all other tribunals to which the strict laws of evidence apply;

(paragraph 67)

(k) the *Evidence Act* be amended to empower the making of appropriate rules of court which would lay down the procedure for the exchange of expert reports, and that consequential amendments be made to the rule-making powers contained in the *Supreme Court Act, District Court Act, Married Persons and Children (Summary Relief) Act* and the *Workers' Compensation Act*; and in the case of arbitration proceedings, the *Arbitration Act* be amended to provide a procedure for the exchange of expert reports.

(paragraph 69)

(Signed) R. W. HARDING
Chairman

E. G. FREEMAN
Member

D. K. MALCOLM
Member

15 July 1975

APPENDIX I

THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 81

Privilege for Technical and Medical Reports in Legal Proceedings

WORKING PAPER

JUNE 1974

APPENDIX II

List of those who commented on the working paper

Australian Dental Association (Inc.) W.A. Branch

Australian Medical Association (Western Australian Branch)

Burton, R.H., S.M.

Consumer Protection Bureau

Law Reform Committee of South Australia

Law Society of Western Australia

McCardell, F.

Miller Robinson, F.

Northmore, Hale, Davy & Leake

His Honour Judge O'Connor

Royal Australian Institute of Architects

APPENDIX III
ENGLISH HIGH COURT PRACTICE DIRECTION

QUEEN'S BENCH DIVISION

1. RSC Ord 38, rr 35-44, came into force on 1st June 1974 and apply to all actions set down since that date.

2. It is provided by Ord 25, as now amended, that consideration must be given at the hearing of the summons for directions to whether orders under these rules should be made and that all parties must, where practicable, make any application for leave to call expert evidence and as to the disclosure of reports, at that hearing.

3. For the guidance of the profession and to provide uniformity, it is notified that the practice at the hearing of the summons for directions, with such variations as the circumstances may require, will be as follows:

(a) *Agreement of the parties*. If the parties have agreed as to adducing expert evidence or disclosure of reports this fact will be recorded.

Otherwise

(b) *Medical reports.* Mutual disclosure (i.e. exchange of reports) will normally be ordered within a specified period; if any further medical examination is necessary, the period asked for should allow for this, but should not materially extend beyond setting down. Reciprocity will be the normal practice, but in exceptional circumstances, and to save costs, disclosure by one party only may be ordered and the other party permitted to defer disclosure of any report, e.g. where a defendant has not had a medical examination and it is likely that the plaintiff's report will be agreed.

(c) *Non-medical experts.* If both parties have instructed, or are likely to instruct, experts the question of disclosure of reports will be dealt with at the hearing of the summons for directions; any order for disclosure will normally be by way of exchange. In other cases, disclosure of one party's report only may be ordered in exceptional circumstances (see (b), foregoing), or the parties may be

given leave to call expert witnesses without disclosure of reports; liberty to apply subsequently for disclosure may be given.

(d) *Engineers' reports in collision cases.* If any party wishes to call an expert in a case of collision on land and has not yet disclosed his report, that party must ask for an extension of time for so doing.

4. Practice form PF 51A, replacing paras 23 and 24 of PF 51 (summons for directions), will be used for short forms of order in straightforward cases. Extended forms of order may be used wherever necessary.

W. RUSSELL LAWRENCE
Senior Master

18 June 1974

APPENDIX IV
RULES OF COURT, 1975 (SOUTH AUSTRALIA)
Order 30 - Summons for Directions

1. (1) A summons for directions may be taken out by any party in any cause or matter at any time before judgment …..

6. (1) Upon the hearing of the summons, or at any later time before judgment, the Court or a Judge shall have power to give any such directions as to the proceedings to be taken and as to the costs thereof as the Court or Judge thinks proper. (Form 97).

(2) Without prejudice to the generality of the last preceding paragraph, the Court or a Judge may -

...(f) subject to the provisions of Order 31 Rule 27A, at any time after the expiration of 21 days after the close of pleadings, make an order for the delivery, upon receiving payment for the same, of

(i) a full and true copy of all or any medical reports as to any matters raised by the pleadings, and

(ii) a full and true copy of all or any reports from any experts in any field as to any opinion given by such experts on any of the matters raised by the pleadings,

the originals or copies whereof are in the possession or power of a party at the date of the making of the order, provided that a copy of any report to which this sub-rule would otherwise apply need not be delivered to another party where the report has been wholly superseded by a subsequent report from the same, or from some other person unless the Court or a Judge otherwise orders, or where, at the date on which the order is sought, the party in whose possession or power the report is does not intend to call at the trial the author thereof.

In this subrule:

"Report" means written report and shall include -

(i) any document prepared by, or under the direction of, the person giving the report and received by, or on behalf of, the party or his solicitor as a report, and

(ii) any other document referred to in any part of any report.

"Medical report" means a written medical report and for the purposes of this rule -

(i) shall include a report from a medical practitioner, dentist, psychologist, psychiatrist, physiotherapist, chiropodist or any person in connection with any injury or illness referred to in the pleadings but shall not include any report or statement on any matter in which the person giving the report is not acting in his professional capacity in giving the statement or report. Where it is necessary for the proper understanding of any such report there shall be delivered with the copy of the same a full and true copy of any communication to or of other documents in the possession of the person furnishing such copy report;

(ii) shall not include any report arising out of a medical examination conducted pursuant to the provisions of section 127 of the *Motor Vehicles Act, 1959*, as amended, or section 28 of the *Workmen's Compensation Act, 1971*, as amended, or Order 31 Rule 27 of these Rules or any report relating solely to a report or film of the kind referred to in subparagraph (g) of this rule provided that nothing in this Rule, or in any order made under this Rule, shall alter or affect the obligation, if any, of any party to disclose any such report to any other party other than pursuant to this Rule.

"Payment for the same" shall mean the amount prescribed by the Rules for engrossing a copy of the document where the report supplied is an engrossment, or the amount of 20 cents per sheet where a photostat copy is supplied, or such other amount as the Court or the Judge making the order shall fix.

(g) The provisions of subparagraph (f) of this sub-rule shall not apply:

(i) to any report or statement given by an Inquiry Agent licensed under the *Commercial and Private Agents Act, 1972*, as amended, or by any other like person (including an insurance assessor) who has made inquiries or observations in respect of the claim of a party,

(ii) to films, excluding X-rays, or

(iii) to any oral statement or comment subsequently recorded in a proof or recorded in a document intended to be used as a proof or from which a proof is or is intended to be drawn.

Order 31 - Discovery and Inspection

...27A. (a) In the case of any action for or including a claim for damages for or in respect of personal injury, every party shall deliver to every other party a full and true copy of every medical report received by him or his solicitor relating to such personal injury, provided that no report to which this rule would otherwise apply need be delivered where the party in receipt of such report does not intend to adduce evidence from the author of such report or tender such report or any part thereof at the trial of the action.

(b) The copy of such report shall be delivered in accordance with this rule within the following times, namely:-

(i) when such report is received by a party or his solicitor prior to an application being made for leave to set the action down for hearing, not later than the day upon which such application comes on for determination;

(ii) when such report is received by a party or his solicitor after leave to set the action down for trial has been given; upon receipt of such report.

(c) In any cause or matter to which this rule relates any party may apply at any time, and from time to time, ex parte on affidavit, for an order that he be exempt from the requirements of this rule with respect to a specified medical

report on the ground that the disclosure of the same would be unduly prejudicial to him. On the hearing of any such application the Court or a Judge may -

(i) exempt the party from the requirements of this rule with respect to the report the subject of such application for such period, and on such terms and conditions, as to the Court or a Judge may seem fit,

(ii) order the disclosure in part of the report the subject of the application.

On any application pursuant to this sub-rule, such medical report shall be exhibited to the affidavit upon which the application is made in a sealed envelope and the Court or a Judge shall be at liberty to peruse the report for the purposes of such application.

(d) Any order made pursuant to the preceding sub-rule of this rule may be revoked or varied either wholly or in part, and on such terms and conditions, as to the Court or a Judge may seem fit on application at any time by any party to the action.

(e) "Medical report" for the purposes of this rule means a written medical report and -

(i) shall include a report from a medical practitioner, dentist, psychologist, psychiatrist, physiotherapist, chiropodist or any other person in connection with any injury or illness referred to in the pleadings, but shall not include any statement or report on any matter in which the person giving the report is not acting in his professional capacity in giving the statement or report. Where it is necessary for the proper understanding of any such report there shall be delivered with the copy of the same a full and true copy of any communication to or of other documents in the possession of the person furnishing such report;

(ii) shall not include any report arising out of a medical examination conducted pursuant to the provisions of section 127 of the *Motor Vehicles Act, 1959,* as amended or section 28 of the *Workmen's Compensation Act, 1971*, as amended or Order 31 Rule 27 of these Rules, or any report relating solely to a report or film of the kind referred to in Order 30 Rule 6(2)(g) of these Rules provided that nothing in this Rule, or in any order made under this Rule, shall alter or affect the obligation, if any, of any party to disclose any such report to any other party other than pursuant to this Rule;

(iii) shall not include any oral statement or comment subsequently recorded in a proof or recorded in a document intended to be used as a proof or from which a proof is or is intended to be drawn.

(f) Any party may apply at any time on summons for an order that a copy of such communication or other documents be furnished to him by any other party as may be necessary to comply with sub-paragraph (i) of the last preceding sub-rule.

(g) In any cause or matter, where a party fails to deliver a copy of a report in accordance with this rule, the trial Judge may in his discretion -

(i) make such order as to an adjournment of the trial, or as to costs, or as to both, as to the Judge may seem fit, and, in addition thereto,

(ii) if the party in default is the plaintiff, reduce the amount of the judgment to which the plaintiff might otherwise be entitled by such amount as to the Judge may seem fit.

(h) No medical practitioner, dentist, psychologist, psychiatrist, physiotherapist, chiropodist, or other person referred to in sub-rule (e) of this rule, shall, if objection be taken when such evidence is tendered, be competent to give evidence on behalf of a party at the trial of any action to which this rule applies unless a copy of all reports which have been furnished by such medical practitioner, dentist, psychologist, psychiatrist, physiotherapist, chiropodist, or any other person to that party have been delivered to the other party or parties to the action in accordance with this rule except where an order made pursuant to sub-rule (c) of this rule is still in force or by consent or by leave of the Court.