THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 81

Privilege for Technical and Medical Reports in Legal Proceedings

WORKING PAPER

JUNE 1974

INTRODUCTION

The Law Reform Commission has been asked "to investigate and report on the extent to which the privilege attaching to technical and medical reports should be altered and to recommend any changes considered desirable."

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspects coming within the terms of reference, are invited. The Commission requests that they be submitted by 13 September 1974.

Copies of the paper are being sent to the

Chief Justice and Judges of the Supreme Court
Judges of the District Court
Law Society of W.A. (Inc.)
Magistrates' Institute
Law School of the University of W.A.
Solicitor General
Under Secretary for Law
Association of Consulting Engineers, Australia (W.A. Chapter)
Australian Dental Association (W.A. Branch)
Institution of Surveyors Australia (Western Australian Division)
Royal Australian Institute of Architects
Australian Medical Association
Law Reform Commissions and Committees with which this commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

TABLE OF CONTENTS

TERMS OF REFERENCE

1. "To investigate and report on the extent to which the privilege attaching to technical and medical reports should be altered and to recommend any changes considered desirable. "

THE PRESENT LAW IN WESTERN AUSTRALIA

2. The privilege referred to in the terms of reference is the right of a party to legal proceedings to withhold from other parties to those proceedings and from the court, information which might be relevant to any issue between the parties. Any expert report obtained by or on behalf of a party, or potential party, is privileged if obtained for the purpose of being laid before his legal adviser for advice relating to, or for the purpose of litigation either existing or in contemplation at the time the report was obtained (*Anderson v. Bank of British Columbia* (1876) 2 Ch. D, 644; *Re Saxton (dec'd) Johnson v. Saxton* [1962] 2 All E.R. 618; *Causton v. Mann Egerton (Johnsons) Ltd.* [1974] 1 All E.R. 453).

3. The privilege is that of the party to the proceedings, not that of the person who makes the communication to the party or his legal adviser (*Sahneider v. Leigh* [1955] 2 Q.B. 195). It is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the party and his legal adviser.

4. The rules governing the conduct of court proceedings usually provide for the disclosure ("discovery") by any party to those proceedings of all documents which relate to the matter in question and which are or have been in the possession of that party or of his agent. Provision is also usually made for the subsequent production for inspection by other parties of any document so disclosed, unless it falls within the class for which privilege may properly be claimed.

5. The fact that a document is privileged is no reason for not disclosing its existence upon discovery (*Swanston v. Lishman* (1881) 45 L.T. (N.S.) 360, 361). It is common practice in this state for legal practitioners, when making discovery of documents, to refer collectively to expert reports for which privilege is claimed, rather than to identify each report. This practice appears to accord with the requirement that such reports should be identifiable (*Rules*

of the Supreme Court 1971 Order 26 Rule 4(1) *Gardner v. Irvin* (1878) 4 Ex. D. 49 but cf. *Hill v. Hart-Davis* (1884) 26 Ch. D. 470; and see paragraph 13 below).

6. The privilege attaching to medical reports has been partially removed in actions "caused by or arising out of the use of a motor vehicle" by s.33(3) of the *Motor Vehicle (Third Party Insurance) Act 1943* as amended by the *Motor Vehicle (Third Party Insurance) Act Amendment Act 1972*. It has only been removed from those reports the substance of which a party intends to adduce in evidence, and then only after the proceedings have been entered for trial.

7. Another example of a provision which derogates from a party's exclusive control over information relating to his own medical condition is found in s.30 of the *Motor Vehicle (Third Party Insurance) Act* and in Order 28 Rule 1 of the *Rules of the Supreme Court*. Each of these provisions permits a party to have the other party medically examined, where it is relevant to the action. In the former case no statutory right exists for the examined party to receive a copy of the report, though the commission understands that in such cases the Motor Vehicle Insurance Trust invariably makes a copy of such report available; in the latter case there is a statutory obligation to do so.

DISCUSSION

(i) Alternatives

8. In considering what changes, if any, should be made to the law attaching privilege to reports, the following are the major alternatives -

(1) To abolish completely the privilege so that any medical or technical report obtained with litigation in mind would be liable to pre-trial production.

(2) To abolish the privilege only in respect of any medical or technical report the substance of which a party intends to adduce in evidence. Alternatively, to abolish the privilege in these circumstances for medical reports only, and either

(a) in all actions; or

(b) in actions arising out of the use of a motor vehicle (this represents the existing law).

(3) To re-establish the total privilege which the common law accords to expert reports. This would involve repealing s.33(3) of the *Motor Vehicle (Third Party Insurance) Act*.

The Commission has been unable to find any commentaries which advocate the first alternative. Its implementation would completely disregard one of the pillars of the adversary system of fact finding that the parties should be free, within the existing rules of procedure, to have their disputes settled within the terms set by them. The Commission is of the view that such an extreme change would not be justified.

Each of the alternatives in (2) above is also in some way, inconsistent with the adversary system, and it is therefore necessary to consider the extent of that inconsistency.

(ii) Effects on adversary system

9. The Adversary system has grown up with English law and is the basis of civil litigation in this State. The English Law Reform Committee in its 16th Report (Privilege in Civil Proceedings: 1967 Cmnd. 3472) in considering privilege in aid of litigation said of the adversary system -

> "So long as civil litigation in England is based upon the "adversary" system and its procedure includes provision for discovery and for the compulsory attendance of witnesses to give oral testimony and to produce documents, it is, we think, essential to the proper preparation of each party's case that he should be entitled to insist upon there being withheld from the court any material which came into existence, and any oral communication which was made, wholly or mainly for the purpose of preparing his case in litigation then pending or contemplated by him." (see paragraph 17).

10. Not only does the pre-trial production of an expert's report modify the doctrine of privilege, but it makes fundamental inroads into the adversary system of establishing fact, and for this reason compulsory pre-trial production has not met with wide support. Indeed, it is presumably because the first alternative involves such a radical departure from the adversary system that the Commission has been unable to find any commentaries which favour it. Those who advocate the retention of the existing common law rules attaching privilege to expert

reports contend that, despite attempts to do so, no other system of fact finding has been found to be as effective as the adversary one.

(a) Change in tactical position

11. In this State the defendant has the right, except, in running down cases (see paragraph 6 above), to call expert evidence after having heard the plaintiff's evidence, without forewarning the plaintiff that he intends to call such evidence. Apart from the pleadings, the practical effect of which in this regard is often ambivalent, only by implication in his cross-examination need the defendant disclose his line of attack to the plaintiff before presenting his case. To insist upon pre-trial production would take away the defendant's advantage in this respect.

On the other hand, it could be suggested that one of the more important premises on which the adversary system is based is that each party should be able thoroughly to challenge his opponent's case. The element of surprise might be said to weaken this aspect of the system. This is particularly so where expert evidence is involved, for it is not easy to probe effectively for weaknesses in such evidence without advance notice of its substance.

12. A more radical change in the tactical position of the parties may arise where a party, having produced a report, decides not to rely on it at the trial. If another party could compel the producing party to tender in evidence any report produced by him, as recommended by the 17th Report of the English Law Reform Committee (*Evidence of Opinion and Expert Evidence: 1970* cmnd. 4489), it would involve a significant departure from the present system.

13. It should be noted that even where privilege is claimed, it is at present possible for an opposing party to call the author of any other party's report which is discovered in that party's list of documents. Obviously, the more detailed the discovery the more advantageous it would be for opposing parties in this respect (see paragraph 5 above). However, to call the author of another party's report is a hazardous course, and is not often taken because the calling party would be bound by whatever evidence the author gives. In any case, it would be possible to minimise the risk of the opposing party calling the other's expert by persuading him not to make out a written report.

(b) Disclosure of Evidence

14. The inroads into the adversary system which would occur as a result of compulsory pre-trial production of expert reports, upon which a party intends to rely and which are based on agreed fact, are minimal. All that is disclosed is an opinion which, at worst, from the disclosing party's point of view, could be disputed.

15. On the other hand, where a report is based on or discloses facts in dispute between the parties the situation is very different. The pre-trial production of a report based on or containing disputed fact is tantamount to giving the opposing party advance knowledge of fact which the disclosing party will have to prove in order to use the opinion. It would in effect involve the disclosure of at least part of the proof of evidence of some of his witnesses. Any advantage the disclosing party might have gained from the element of surprise provided by the adversary system is lost. The English Report of the Committee on Personal Injuries Litigation (the Winn Report), after considering the exchange of proofs of evidence prior to trial, agreed that the time had not yet come, if ever it would, when this fundamental change should be recommended (1968 Cmnd. 3691 paragraph 369).

16. It may be considered desirable to enact rules of court which require more detailed pleading as to damages than appears currently to be required (see for example the *Rules of Third Party Claims Tribunal 1967* (W.A.) Rule 50). This would result in fewer facts being unknown to the opposing party prior to the trial, and thus more expert reports could be produced without disclosing any additional facts to that party. Although to widen the scope of pleadings would to some extent reduce the advantage arising out of the element of surprise, it would by no means remove it, nor would it render all expert reports liable to pre-trial production.

17. The *Rules of the Supreme Court (Amendment) 1974* made under the English *Civil Evidence Act 1972*, Order 38 Rule 38 (see appendix II) expressly provide that the court may refrain from ordering the production of a non-medical expert report if the opinion contained therein is based on a version of the facts in dispute between the parties (see paragraph 25 below). A distinction between medical and non-medical reports is apparently made because as a general rule the former are rarely based on disputed fact and usually contain nothing more

than a diagnosis or prognosis of the injuries, both of which matters are matters of opinion. If this characterization of medical reports is considered accurate, then in light of the comments contained in paragraph 15 above, there should be no objection to removing the privilege medical reports for all actions.

18. It sometimes happens that a party desires to use only part of his expert's report. The report may contain conflicting facts to those pleaded or an adverse opinion, but may nonetheless be useful in other respects. The effects on the disclosing party's case of requiring the pre-trial production of the entire report in such circumstances are obvious. On the other hand, to require disclosure of only that part to be relied on may not be satisfactory. It is not always easy to sever one part of a report from another, and in any case to do so could serve notice to the opponent that part of the report is adverse to the disclosing party's case, thus taking away a tactical advantage.

19. It would appear that the only practical solution to the difficulties arising out of the pre-trial production of expert reports based on or containing facts in dispute may be to require the pre-trial production of all reports to be relied upon irrespective of their contents, or alternatively not to require the production of any. The first alternative makes significant inroads into the adversary system: the second inhibits the ascertainment of the truth and the achievement of justice.

(iii) Other factors

20. To compel parties, prior to trial, to produce expert reports intended to be used by them at the trial probably would encourage pre-trial compromises and settlements, thus saving time and expense. Of the first 2,074 cases commenced in the Third Party Claims Tribunal of this State a consent judgement was entered in 1,738. Of that number 601 were settled without the action being set down for hearing. It appears likely that the pre-trial production of medical reports has had a large bearing on this high rate of settlements.

21. In personal injury cases in this State, it is common for the parties, prior to the trial, to exchange the medical reports upon which they intend to rely. This frequently leads to the parties submitting agreed reports to the judge, and to the parties agreeing not to call the authors as witnesses.

22. Where such reports are agreed there is little doubt that much time and expense is saved although sometimes at the cost of clarity, since often the reports do not fully explain the position or may even be inconsistent, as in *Harrison v. Liverpool Corporation* [1943] 2 All E.R. 449. Judges, as in the last mentioned case, have sometimes commented that they would have preferred to ask the author of the report for some elaboration on issues raised in the report (see also *Devine v. British Transport Commission* [1954] 1 All E.R. 1025, 1026: *Jones v. Griffith* [1969] 2 All E.R. 1015, 1019, 1020; *Mullard v. Ben Line Steamers Ltd.* [1971] 2 All E.R. 424).

23. Time lost through adjournments may also be saved if expert reports are disclosed prior to trial. An opposing party who is taken by surprise as to the opinions of the other party's expert may be granted an adjournment to enable him to call contradictory evidence. On the other hand, pre-trial disclosure of expert reports could in some cases lengthen the trial and increase costs. Cross-examination of the expert might be more lengthy, and the cross-examining party might be driven to call further evidence in contradiction.

24. If the experience in this State with personal injury cases arising out of the use of motor vehicles is a guide, it would appear that more trials are likely to be shortened rather than lengthened by the pre-trial production of expert reports.

(iv) Removal of privilege

25. Despite the inconsistency with the adversary system which would arise out of a relaxation of the rules attaching privilege to expert reports, there appears to be a growing body of opinion in favour of some relaxation of these rules. An example of this is the English *Civil Evidence Act 1972* which empowers courts to make rules providing for the disclosure of experts' reports which a party proposes to adduce as part of his case. The relevant provisions of the Act and Rules are set out in the Appendices to this paper. The rules came into operation on June 1, 1974. Apart from legislative action, in recent times the English courts, by using their power to stay proceedings, have required parties to civil proceedings to exchange medical reports intended to be relied on at the trial (*Edmeades v. Thames Board Mills Ltd* [1969] 2 All E.R. 127; *Lane v. Willis* [1972] 1 All E.R. 430; *Clarke v. Martlew* [1972] 3 All E.R. 764; *McGinley v. Burke* [1973] 2 All E.R. 1010 but cf. *Causton v. Mann Egerton*

(Johnsons) Ltd. [1974] 1 All E.R. 453). Because of this growing support, the remainder of this paper draws attention to matters to be decided if a change is to be made.

(a) *Exceptions to requirement to disclose*

26. Even if it is accepted that benefit can come from pre-trial production of expert reports intended to be relied upon at a trial, it does not follow that in every case the report should be disclosed. The element of surprise is usually essential where the credit of a litigant is put into question. Thus any medical report which contains an opinion as to the genuineness or cause of injuries is probably better not disclosed against the wish of the holding party. The circumstances in which this arises will almost always be where the plaintiff has been sent for examination at the request of the defendant. Further, the nature of a patient's ailment may be such as to render it inexpedient to produce the report even to the patient. In a case of medical negligence there is good reason to withhold the report of a medical expert from production. Such report is likely to concern the acts or omissions which are the basis of the litigation and thus cease to be in the nature of normal expert evidence.

27. The rules made under the English *Civil Evidence Act 1972* permit the court, in the case of medical reports, to refrain from ordering their production where they contain opinion as to the genuineness or cause of injuries or in cases of medical negligence (Order 38 Rule 37 see, Appendix II). Although the Commission cannot envisage any circumstances where it might arise, there is no reason why similar considerations should not apply to non-medical reports, particularly if the onus is on the resister to justify his objection to producing the report (see paragraph 28 below). In the circumstances, provision could be made in this State exempting from pre-trial production all expert reports, the disclosure of which might prejudice a fair trial, injure the health of the disclosing party or for any other reason which the court considers expedient. Because of the difficulty in listing all the circumstances in which it might be desirable to restrict production, the courts could be given a general discretion in the matter.

(b) *Onus*

28. Where one party objects to pre-trial production of expert reports held by him, then the question arises on whom should the onus rest - the applicant or the resister. The 17th Report of the English Law Reform Committee (1970 Cmnd. 4489) recommended that in the case of

medical reports the onus should rest on the person resisting the disclosure, and in the case of other reports, on the person seeking production. This recommendation has been embodied in the rules made under the English *Civil Evidence Act 1972* (Order 38 Rule 37 and see Appendix II).

29. It would seem that the objecting party, who will in normal circumstances hold the reports, is in a better position to justify his resistance than the other party is to justify its production. It is difficult to see how, not having seen the report, the party seeking its production could make out a case for its production (but cf. W.A. *Rules of the Supreme Court* Order 26 Rule 12(1)). If pre-trial production is accepted as a general rule, it may be preferable for the party seeking to deviate from it to justify his stand. In this respect, to differentiate between medical and non-medical expert reports is probably not justified.

(c) *When should reports be available*

30. If one party is not to gain an unfair advantage over the other the production of expert reports should be carried out by exchange. This was the recommendation of the English Law Reform Committee in its 17th Report (1970 Cmnd. 4489). This principle seems implicit in the provisions of s.33(3) of the *Motor Vehicle (Third Party Insurance) Act*, but this was not always so. Prior to its amendment in 1972, s.33(3) removed the privilege from a medical report as soon as a party formed an intention to rely on its contents at the trial. In theory, therefore, a report could have lost its privilege immediately upon being made.

31. Because it is fair that neither party should have the opportunity of seeing the other's reports before compiling his own, it becomes necessary to fix an exchange date late enough to enable a party to decide which are the reports the substance of which he intends to rely upon at the trial, If a party is not to make this decision prematurely, It would appear that this date should not be earlier than the time the pleadings are deemed to have closed.

32. The Winn Report (1968 Cmnd: 3691) recommended that reports should be exchanged 28 days prior to the date for hearing. The English Law Reform Committee in its 17th report (1970 Cmnd, 4489) recommended that the relevant time be 14 days after the action was set down for trial. To fix a time related to the entry for trial seems more realistic, since the parties should know by then which are the witnesses they intend to rely upon. If a party is not ready

for the hearing and another party countermands the request to set down for hearing, the need to produce his reports would presumably be deferred.

33. There are probably three ways in which reports, the substance of which are to be relied upon at the trial, could be required to be disclosed.

(a) Provision could be made requiring a party to an action to serve on the other party copies of all expert reports the substance of which he intends to rely upon at the trial. This was the procedure under Rule 170 of the *Third Party Claims Tribunal Rules 1967* with respect to medical reports. Any new rules could then prescribe that, when a party serves his request to set down for hearing, he serve with it copies of the reports he intends to rely upon, and that within, say, seven days thereafter the opposing party must likewise serve copies of his reports on the other party. Thus when the action is listed for trial each party has some idea of the other's expert evidence.

(b) Provision could be made removing the privilege attaching to reports as from a specified time, for example, at the time when the action is set down for hearing, in the same way as s.33(3) of the *Motor Vehicle (Third Party Insurance) Act* operates at present. However at least two modifications to the existing procedural rules would be required -

(i) an amendment to the practice direction dated the 8/12/69 requiring a certificate of readiness for trial, to take account of the possibility of parties requiring discovery after the certificate has been made; and

(ii) an amendment to Order 33 Rule 10 of the *Rules of The Supreme Court*, which prohibits an application, without leave of the Court, for an order to produce once proceedings have been set down for trial.

Although under alternative (b), reports would not be available until a demand was made by one party, to avoid a battle of tactics it might be desirable to provide that for the demand to have effect, the person making it must deliver with it copies of the reports he intends to rely on.

(c) Parties seeking to rely on expert evidence could be required to apply to the court for directions as to the date of exchange and as to any objections to the production of reports. It is suggested 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.

The disadvantage with the preceding alternatives in subparagraphs (a) and (b) is that if a party objects to producing any reports it would be necessary to apply to the court for directions and this would delay proceedings. The Commission feels that alternative (c) is probably the most satisfactory alternative. One of its advantages is that other matters relating to the conduct of the trial could be dealt with on the summons. A similar provision exists under the *Rules of the English Supreme Court* requiring a plaintiff in most actions to take out a summons for directions within one month of the pleadings being deemed closed (Order 25). The purpose of the summons is to take stock of the issues involved and the manner in which the evidence should be presented at the trial. With the coming into operation of the *Rules of the Supreme Court (Amendment) 1974*, on the return of that summons, directions are now required to be sought as to the pre-trial production or otherwise of expert reports the substance of which is to be relied upon at the trial (Order 38 Rule 36 - see Appendix II).

34. It could be provided that the failure to comply with a request, demand or order to exchange reports would result in the defaulting party being prohibited from calling evidence from the authors of reports not produced. If such a consequence is considered to be too grave, an alternative sanction could be to stay the proceedings until the order is complied with.

35. Because of the possibility of unforeseen events at the trial or because a party may belatedly discover an hitherto unknown injury or problem, it may be necessary to rely on a report not produced for inspection by the time set for production. Therefore, it seems reasonable that a party should be able to apply, even as late as at the trial, for leave to adduce evidence the substance of which is in a report not produced to the opposing party.

36. The suggested procedures to enforce pre-trial production of expert reports would at least involve an amendment to the *Supreme Court Rules.* It has been held that a rule of court requiring the production of medical reports is, in the absence of express empowering legislation, ultra vires as an unlawful infringement of the privilege protecting communications between a legal practitioner and his client (*Circosta v. Lilly* (1967) 61 D.L.R. (2nd) 12). On the other hand Lord Denning M.R. has suggested that this could be overcome by courts ordering a stay of the proceedings until the parties had exchanged reports (*Edmeades v. Thames Board Mills Ltd.* [1969] 2 All E.R. 127, 129).

37. In any event, because of the departure from the common law right to privilege, the Commission suggests that any change in the law should be made by amending the *Evidence Act 1906*. If the *Evidence Act* is amended to empower courts to make rules to qualify the privilege now attaching to expert reports along the lines of the English *Civil Evidence Act 1972*, it would permit all courts to adopt appropriate procedural rules.

(v) Other tribunals

38. It seems clear that the same principles relating to privilege attaching to expert reports should apply to all tribunals where strict rules of evidence apply, and in particular to arbitration proceedings. Often experts are more widely used in arbitration proceedings than in court proceedings. At present there is no provision for discovery in arbitration proceedings in this State. The *Arbitration Act 1895* would require amendment to provide rules for discovery. This step was recommended by the Commission in its *Report on Commercial Arbitration and Commercial Causes* (1974 Project No. 18 paragraph 38(b)).

QUESTIONS FOR DISCUSSION

39. The Commission would welcome comment on any matter arising out of this paper, and in particular on the following -

(a) Should the privilege be removed from all expert reports obtained prior to trial, or only from those the substance of which it is intended to adduce at the trial?

(b) Should expert reports relating to personal injury litigation be regarded any differently from other litigation in so far as privilege attaching to those reports is concerned?

(c) Should expert reports based on or revealing disputed fact be disclosed prior to trial where it is intended to rely on the substance thereof at the trial?

(d) Should provision be made for exempting parties in certain circumstances from the need to produce, prior to trial, expert reports held by them? If so, in what circumstances should there be such an exemption and on whom should the onus rest?

(e) Should there be a provision enabling the Court to grant leave to adduce evidence the substance of which is contained in an expert report which has not been disclosed?

(f) If expert reports are to be liable to pre-trial production, should it be compulsory to obtain directions as to the reports to be produced as a condition precedent to the action being listed for hearing? If not, when, and in what manner should a party's expert, report be produced?

(g) What sanctions, if any, should be imposed for failing to produce those expert reports liable to pre-trial production?

(h) If expert reports are to be liable to pre-trial production should this be facilitated by an amendment of the *Rules of Court* without any statutory amendment?

(i) Should any proposal to alter the law attaching privilege to expert reports extend to local courts, quasi-judicial tribunals and, more particularly, arbitration proceedings?

WORKING PAPER APPENDIX I

Extracts from English Civil Evidence Act 1972

Rules of court with respect to expert reports and oral expert evidence.
1968 c.64.

2. - (1) If and so far as rules of court so provide, subsection (2) of section 2 of the *Civil Evidence Act 1968* (which imposes restrictions on the giving of a statement in evidence by virtue of that section on behalf of a party who has called or intends to call as a witness the maker of the statement) shall not apply to statements (whether of fact or opinion) contained in expert reports.

(2) In so far as they relate to statements (whether of fact or opinion) contained in expert reports, rules of court made in pursuance of subsection (1) of section 8 of the *Civil Evidence Act 1968* as to the procedure to be followed and the other conditions to be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 2 of that Act (admissibility of out-of-court statements) shall not be subject to the requirements of subsection (2) of the said section 8 (which specifies certain matters of procedure for which provision must ordinarily be made by rules of court made in pursuance of the said subsection (1)).

(3) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court -

(a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial; and

(b) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of paragraph (a) above from adducing in evidence by virtue of section 2 of the *Civil Evidence Act 1968* (admissibility of out-of-court statements), except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.

(4) Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings.

(5) Without prejudice to the generality of subsection (4) above, rules of court made in pursuance of that subsection may make provision for prohibiting a party who fails to comply with a direction given as mentioned in subsection (3)(b) above from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction.

(6) Any rules of court made in pursuance of this section may make different provision for different classes of cases, for expert reports dealing with matters of different classes, and for other different circumstances.

(7) References in this section to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

1925 c.49
1959 c.22
1949 c.101

(8) Nothing in the foregoing provisions of this section shall prejudice the generality of section 99 of the *Supreme Court of Judicature (Consolidation) Act 1925*, section 102 of the *County Courts Act 1959*, section 15 of the *Justices of the Peace Act 1949* or any other enactment conferring power to make rules of court; and nothing in section 101 of the said Act of 1925, section 102(2) of the *County Courts Act 1959* or any other enactment restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court in pursuance of this section or the operation of any rules of court so made.

Interpretation, application to arbitrations etc. and savings
1968 c.64

5. - (1) In this Act "civil proceedings" and "court" have the meanings assigned by section 18(1) and (2) of the *Civil Evidence Act 1968*.

(2) Subsections (3) and (4) of section 10 of the *Civil Evidence Act 1968* shall apply for the purposes of the application of sections 2 and 4 of this Act in relation to any such civil proceedings as are mentioned in section 18(1) (a) and (b) of that Act (that is to say civil proceedings before a tribunal other than one of the ordinary courts of law, being proceedings in relation to which the strict rules of evidence apply, and an arbitration or reference, whether under an enactment or not) as they apply for the purposes of the application of Part I of that Act in relation to any such civil proceedings.

(3) Nothing in this Act shall prejudice -

(a) any power of a court, in any civil proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or

(b) the operation of any agreement (whenever made) between the parties to any civil proceedings as to the evidence, which is to be admissible (whether generally or for any particular purpose) in those proceedings.

WORKING PAPER APPENDIX II

Extracts from the Rules of the Supreme Court (Amendment) 1974 - (English)

1. - (1) These Rules may be cited as the *Rules of the Supreme Court (Amendment) 1974*.

(2) In these Rules an Order referred to by number means the Order so numbered in the *Rules of the Supreme Court 1965* as amended.

(3) The *Interpretation Act 1889* shall apply to the interpretation of these Rules as it applies to the interpretation of an Act of Parliament.

5. Order 38 shall be amended as follows:- . . . .

(2) After rule 33 there shall he added the following rule and Part:-

"Statements of opinion

34. Where a party to a cause or matter desires to give in evidence by virtue of Part I of the Act, as extended by section 1(1) of the *Civil Evidence Act 1972*, a statement of opinion other than a statement to which Part IV of this Order applies, the provisions of rules 20 to 23 and 25 to 33 shall apply with such modifications as the Court may direct or the circumstances of the case may require.

IV. EXPERT EVIDENCE

Interpretation

35. In this Part of this Order a reference to a summons for directions includes a reference to any summons or application to which, under any of these Rules, Order 25, rules 2 to 7, apply and expressions used in this Part of this Order which are used in the *Civil Evidence Act 1972* have the same meanings in this Part of this Order as in that Act.

Restrictions on adducing expert evidence

36. - (1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence has applied to the Court to determine whether a direction should be given under rule 37, 38 or 41 (whichever is appropriate) and has complied with any direction given on the application.

(2) Nothing in paragraph (1) shall apply to evidence which is permitted to be given by affidavit or shall affect the enforcement under any other provision of these Rules (except Order 45, rule 5) of a direction given under this Part of this Order.

Medical evidence in actions for personal injuries

37. - (1) Where in an action for personal injuries an application is made under rule 36(1) in respect of oral expert evidence relating to medical matters, then, unless the Court considers that there is sufficient reason for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the Court may specify.

(2) The Court may, if it thinks fit, treat any of the following circumstances as a sufficient reason for not giving a direction under paragraph (1): -

(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.

Other expert evidence

38. - (1) Where an application is made under rule 36(1) in respect of oral expert evidence to which rule 37 does not apply, the Court may, if satisfied that it is desirable to do so, direct that the substance of any expert evidence which is to be adduced by any party be disclosed in the

form of a written report or reports to such other parties and within such period as the Court may specify.

(2) In deciding whether to give a direction under paragraph (1) the Court shall 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.

Disclosure of part of expert evidence

39. Where the Court considers that any circumstances rendering it undesirable to give a direction under rule 37 or 38 relate to part only of the evidence sought to be adduced, the Court may, if it thinks fit, direct disclosure of the remainder.

Expert evidence of engineers in accident cases

40. In an action arising out of an accident on land due to a collision or apprehended collision a party who intends to apply to the Court under rule 36 in respect of the expert evidence of an engineer sought to be called on account of his skill and knowledge as respects motor vehicles shall before the hearing of the summons for directions make available to all parties for their inspection a report by the engineer containing the substance of his evidence.

Expert evidence contained in statement

41. Where an application is made under rule 36 in respect of expert evidence contained in a statement and the applicant alleges that the maker of the statement cannot or should not be

called as a witness, the Court may direct that the provisions of rules 20 to 23 and 25 to 33 shall apply with such modifications as the Court thinks fit.

Putting in evidence expert report disclosed by another party

42. A party to any cause or matter may put in evidence any expert report disclosed to him by any other party in accordance with this Part of this Order.

Time for putting expert report in evidence

43. Where a party to any cause or matter calls as a witness the maker of a report which has been disclosed in accordance with rule 40 or in accordance with a direction given under rule 37 or 38, the report may be put in evidence at the commencement of its maker's examination in chief or at such other time as the Court may direct.

Revocation and variation of directions

44. Any direction given under this Part of this Order may on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter."