

Production of Medical and Technical Reports in Court Proceedings

Terms of Reference

In 1973 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.

Background of Reference

At the time of the reference, the position at common law in Western Australia was to allow a party to litigation to withhold from the other party, a medical or technical report, which was created predominantly for the purpose of litigation. The privilege attaching to medical and technical reports was an extension of the common law legal professional privilege. This common law position was varied to some degree by the rules of court and by statute such that:

- (a) a litigant may be entitled to refuse to produce for inspection a report to which privilege attached, but he or she is not entitled to refrain from disclosing its existence;¹
- (b) a party to litigation may require another party to be medically examined;² and
- (c) any medical reports to be used in motor vehicle personal injury actions cannot be withheld on the ground of privilege.³

In practice, the parties to personal injury actions generally exchanged all medical reports, whether favourable or not. The exchange of non-medical expert reports was less common. In addition, it was the practice of some doctors in Western Australia to send copies of their reports to the Motor Vehicle Insurance Trust without first obtaining the permission of the patient or the patient's solicitor. In short, there were discrepancies in the practice as compared to the law in relation to the production of reports in court cases.

In 1972, the English common law privilege for expert reports (which is similar to that in Western Australia) was significantly altered by the *Civil Evidence Act 1972* (UK). It provided for the pre-trial production of all expert reports, the substance of which a party intends to rely on at the trial. Also, in New South Wales, South Australia and Tasmania there already existed provisions for the pre-trial production of expert reports. The question arose as to whether Western Australia should follow these jurisdictions and limit the privilege with regard to pre-trial production of expert reports. The Commission produced a working paper on the subject in June 1974 which examined the law in Western Australia and other jurisdictions and posed specific questions for respondents.

Nature and Extent of Consultation

The working paper was widely distributed for comment and attracted many submissions. Those responding to the issues raised in the working paper included; the Western Australian branches of the Australian Dental Association and the Australian Medical Association, the Consumer Protection Bureau, the Law Reform Committee of South Australia, the Law Society of Western Australia, legal practitioners, the Royal Australian Institute of Architects, a District Court judicial officer, and a number of private individuals.

The final report containing the Commission's recommendations was delivered in July 1975.⁴

¹ *Rules of the Supreme Court 1971* (WA) O 26, *Local Court Rules 1961* (WA) O 17.

² *Rules of the Supreme Court 1971* (WA) O 28 r 1.

³ *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 33(3).

⁴ Law Reform Commission of Western Australia, *Production of Medical and Technical Reports in Court Proceedings*, Project No 40 (1975).

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Recommendations

After examining the issues involved and submissions received, the Commission recommended that:

- Medical reports in personal injury actions and expert reports in all other types of actions, the substance of which are to be relied on at the trial, must be produced to the other party before trial, unless the court otherwise directs.
- A medical report need not be produced if:
 - (a) the action is one for medical negligence; or
 - (b) the report may contain evidence as to the manner in which the injuries were sustained or as to the genuineness of the symptoms.
- An expert report need not be produced if:
 - (a) the expert evidence is based on a version of facts in dispute; or
 - (b) the expert evidence is based on facts which are neither ascertainable by the expert himself nor within his professional knowledge.

The Commission made several other consequential recommendations pertaining to the procedure governing the exchange of reports. It also recommended amendments to specified statutes to facilitate the exchange of reports.⁵

Legislative or Other Action Undertaken

The Commission's recommendations were implemented by the *Acts Amendment (Expert Evidence) Act 1976 (WA)*.

⁵ Ibid 29. Specifically, the Commission recommended that amendments be made to the rule-making powers contained in the *Supreme Court Act; District Court Act; Married Persons and Children (Summary Relief) Act; the Workers' Compensation Act; and the Arbitration Act*.