

By Garth Blake SC and Philippe Doyle Gray

# Can counsel settle expert reports?



**When asked 'Can counsel settle expert reports?' about half our colleagues in chambers replied *Of course!* and the other half replied *Of course not!* This article considers the distinctions between expert witnesses and lay witnesses; preliminary opinions and final opinions; and draft reports and final reports.**

**T**here are two distinct lines of authority: 'the Whitehouse Line' and 'the Federal Line.' The Whitehouse Line *discourages* the involvement of lawyers in the settling of expert reports, whereas the Federal Line *encourages* lawyers' participation.

## THE WHITEHOUSE LINE OF AUTHORITY

*Whitehouse v Jordan* was a case conducted in the UK in 1979 about the birth of a child that went wrong. The child's mother, Mrs Whitehouse, alleged professional negligence against her obstetrician, Mr Jordan.

There are two different reports of this case, which address the litigation at different stages. The first report, *Whitehouse v Jordan* [1980] 1 All ER 650, was a decision of the Court of Appeal (*Whitehouse No. 1*). The second report is *Whitehouse v Jordan* [1981] 1 WLR 246, the appeal from the decision of the Court of Appeal in *Whitehouse No. 1* to the House of Lords (*Whitehouse No. 2*). The most often cited decision is *Whitehouse No. 2*. However, the Victorian Court of Appeal acknowledged that an understanding of *Whitehouse No. 1* is relevant to understanding *Whitehouse No. 2*.<sup>1</sup> We agree.

In *Whitehouse No. 1*, the relevant passage appears in the



reasons for judgment of Lord Denning MR at 655e:

‘...Professor Sir John Stallworthy (Oxford, now retired) at first made a report saying that Mr Jordan was not negligent. He said that he had dealt with the case ‘with courage and skill’. But afterwards, Sir John Stallworthy joined with Sir John Peal (also Oxford, retired) in holding that Mr Jordan was negligent. Their joint report was the justification for the continuance of this action to trial. But their joint report has been subjected to severe criticism and has been shown to be mistaken on some very important points.

...the joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually “settled” by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel “settles” a document, we know how it goes. “We had better put this in”, “We had better leave this out”, and so forth...’

Other than these two paragraphs, there is no exposition of precisely how lawyers were involved, what changes were made, or what the effect was of their involvement.

In *Whitehouse No. 2*, the relevant and famous passage is taken from the reasons for judgment of Lord Wilberforce at 256H:

‘While some degree of consultation between experts and legal advisers is entirely proper, it [is] necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.’

Two years later, Lord Denning MR considered the issue again in *Kelly v London Transport Executive*.<sup>2</sup> This was a case brought by Mr Kelly against his employer for injuries that Mr Kelly allegedly sustained in the course of his employment. Mr Kelly’s employer, London Transport, asserted that Mr Kelly’s disabilities were caused by his chronic alcoholism. At trial, Mr Kelly ultimately succeeded, but he received only £75 by way of compensation. The relevant passages again appear from the reasons for judgment of Lord Denning MR at 847c, 847j, and 851c:

The Judge’s Ruling

‘Caulfield J ... rejected completely the evidence of Dr Denham. He said that he was “over-obliging in his quest for the plaintiff”. He condemned him for changing his report at the request of the plaintiff. He said, “I do not think the solicitor should have asked him anyway to have changed his report and, secondly, if a consultant was asked, knowing that he is delivering a forensic report, one that is going to be used in the courts, he should not have obliged and therefore he falls down in my estimation.”

‘... Counsel had advised the obliteration of references to previous medical reports. ... It is quite plain to my mind that the specialist’s report should not have been changed at the request either of the solicitor or counsel ...

...

These then are the duties of solicitors who act for legally aided clients ... They must not ask a medical expert to change his report, at their own instance, so as to favour

their own legally aided client or conceal things that may be against him.’

... As Lord Wilberforce said:

‘Expert evidence presented to the court should be, and be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.’

It is striking that the quote from Lord Wilberforce was selective in that it omitted the words: ‘While some degree of consultation between experts and legal advisers is entirely proper...’

### AUSTRALIAN AUTHORITIES

Australian authorities have espoused views that accord with, and sometimes adopt, the *Whitehouse* line of authority.

*Phosphate Co-operative Co of Australia Pty Ltd v Shears*<sup>3</sup> concerned an application for the approval of a scheme of arrangement between a company and its shareholders, and a related application for the reduction of share capital. In support of the application, the plaintiff relied upon a report initially written by one Mr Williams, accountant of the Arthur Andersen firm of accountants. In the course of hearing, it came to light that the tendered version of Mr Williams’ report had been the last in a series; the series of meetings between Mr Williams and the company’s solicitors and counsel were often in the presence of officers of the company, and other partisan advisers; the opinion that Mr Williams had expressed earlier had changed; and Mr Williams produced a final, signed report. However, as the result of further discussions, that report was withheld and a further final signed report was issued in its place.

In considering all this material, Brooking J was satisfied that pressure exerted by or on behalf of the company did affect to a significant extent the contents of Mr Williams’ final report. In dismissing the plaintiff’s application for approval, his Honour held that:<sup>4</sup>

‘It is impossible to lay down specific rules ... The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert...’

*Collins Thomson v Clayton*<sup>5</sup> addressed whether the independence of an expert is a prerequisite to admissibility. To this question, Austin J commenced his analysis by reciting with approval the well-known judgment in *The Ikarian Reefers*<sup>6</sup> that laid down a number of principles, including the famous passage from Lord Wilberforce in *Whitehouse No. 2*. Austin J concluded that each of these elements may lead the court to exercise its discretion to exclude evidence that would otherwise be admissible.<sup>7</sup> Austin J opined<sup>8</sup> that this conclusion was consistent with the famous decision of *Makita (Australia) Pty Limited v Sprowles*.<sup>9</sup>

*Farley-Smith v Repatriation Commission*<sup>10</sup> was an appeal to the Administrative Appeals Tribunal from a decision made by the Veterans Review Board. The appeal was in relation to the death of a veteran who had been exposed to petrol while cleaning weapons and machinery, which may have contributed to his death. In addressing that question, the Commission had received evidence from Professor Parkin, which was the

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Legal advisers making suggestions is quite different from an expert witness's opinion being influenced by the exigencies of litigation.

subject of criticism and attack on the grounds of perceived bias and lack of independence. Professor Parkin's initial view was unfavourable to the applicant for compensation, but after the applicant commissioned him to provide a report, his contrary opinion was favourable. Furthermore, the Tribunal found that Professor Parkin's report had been changed at the suggestion of the applicant or her legal advisers. The Tribunal reviewed, among other things, the decisions of *Makita v Sprowles*, *The Ikarian Reefer*, *Whitehouse No. 2*, and *Phosphate Co-operative of Australia*. The Tribunal held that Professor Parkin had not brought any independent assistance to the Tribunal by way of objective, unbiased opinion, and that 'he had clearly crossed the line into advocacy'.<sup>11</sup>

The principles to be derived from this line of authority include the following:

- (a) Some degree of consultation between experts and legal advisers is entirely proper: *Whitehouse No. 2*, *Phosphate Co-operative*, and see *Secretary to the Department of Business and Innovation v Murdesk Investments* [2011] VSC 581.
- (b) It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert: *Whitehouse No. 2*, *Phosphate Co-operative*, *Farley-Smith*, *Secretary to the Department of Business and Innovation*.
- (c) The settling of an expert report by counsel, such that it wears the colour of a special pleading rather than an impartial report, is improper: *Whitehouse No. 1*.
- (d) Alterations to expert reports that alter or disguise the expert witness' genuinely held opinion are improper: *Whitehouse No. 1*, *Kelly v London Transport*, *Farley-Smith*.

### THE FEDERAL LINE OF AUTHORITY

All the cases below occurred in federal courts.

*Boland v Yates Property Corporation*<sup>12</sup> was an action against solicitors for professional negligence in which Callinan J commented upon the relationship between the experts called in this case and the lawyers,<sup>13</sup> concluding:

[279] 'What the Master of the Rolls categorically said in *Kelly*, in my opinion, goes too far. ... For the legal advisers to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. ... It is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisers who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately.'

*Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 7)*<sup>14</sup> was a claim for native title supported and defended by numerous voluminous reports of expert witnesses, which in turn generated numerous evidentiary objections and exposed deficiencies in those reports. None of the reports had had any input from any legal advisers before trial. Lindgren J analysed the material in light of the objections at [18] – [28], which most relevantly included (emphasis in original):

[19] 'Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship.' ...

[27] '... My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of ss56 and 79 of the *Evidence Act*, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe. It does not serve the interests of anyone, including those of the expert witness, to deny him or her the benefit of guidance of the kind mentioned.' *Jango v Northern Territory of Australia (No. 2)*<sup>15</sup> and *Risk v Northern Territory of Australia*<sup>16</sup> are both decisions which quote the dicta from *Harrington-Smith* before adding concurring thoughts.

*R v Doogan* [2005]<sup>17</sup> was an appeal to the full court of the Supreme Court of the ACT about irregularities in the conduct of a coronial inquiry. In a unanimous judgment, the Court quoted part of the dicta from *Harrington-Smith*, before concluding:

[119] '... It has not been established that any of the lawyers assisting the first respondent sought to change passages in the reports conveying relevant opinions or information, so the prosecutors' complaints seem to have been based upon the editing of passages that were, at best, of marginal relevance.'

From this line of authority, the following principles emerge:

- (a) For the legal advisers to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt: *Boland*, *Harrington-Smith*, *Jango*, *R v Doogan*, *Risk*.
- (b) Counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might



appropriately or more accurately state the propositions that the expert would advance, and which particular method might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions: *Boland, Harrington-Smith, Jango, R v Doogan, Risk*.

**ACADEMIC LITERATURE**

We have identified four articles and one book that, to varying degrees, address the central issues:

- (a) H Stowe, *Preparing Expert Witnesses*, *Bar News*, Summer 2006/2007, NSW Bar Association, p44.
- (b) P Hall, 'Expert Reports – The Role of Lawyers' (2006) 33(4) *Brief* 19, WA Bar Association, p19.
- (c) D Moujalli, *Expert Opinion Evidence in Civil Litigation*, August 2011, unpublished seminar paper.
- (d) D Ipp, *Lawyers' Duties to the Court* (1998) 114 LQR 63, particularly at pp91-2 and pp105-6.
- (e) PW Young, *Civil Litigation: A Practice Guide for Advocates*, 1986, Butterworths, Chapters 4 and 18.

While these learned authors do not entirely agree with one another, they usefully include the following observations:

- (a) The drafting of an expert report is but one small component of the entire process of lawyers interacting with expert witnesses, and the courts receiving that evidence. Consequently, in determining the acceptable limits for counsel to settle expert reports, the relevant question is not merely 'What can counsel do?' but also 'How may counsel do it?' While reasonable minds may agree as to what a lawyer may do, there is ample scope for disagreement about how it may be done.<sup>18</sup>
- (b) The word 'settled' bears a variety of meanings. Apparent differences in judicial attitudes towards the settling of expert reports by counsel may evaporate after attention is paid to the precise acts, and the manner in which those acts are performed, in the course of counsel settling an expert report.<sup>19</sup>
- (c) Contrary to the practice in England and Wales, in New South Wales it has always been considered part of counsel's function to interview witnesses, and in all cases in which there is to be oral evidence in a contested action, it is imperative that counsel does so. After the witness has told his story, counsel needs to test him on it. This extends to what the witness is saying when it is contrary to some document; counsel cannot let this pass, but must put the matter to the witness.<sup>20</sup>
- (d) Counsel should give instructions to a witness about giving evidence that include the following matters:<sup>21</sup> if you don't understand the question, say so; if the question can be answered yes or no, answer it yes or no; answer questions as briefly as possible; never volunteer information; don't be smart; avoid exaggeration; tell the truth.
- (e) It is far more likely that counsel will win a borderline case by the way he presents his evidence-in-chief, rather than by cross-examination. Accordingly, attention should be paid to the evidence-in-chief.<sup>22</sup>
- (f) It is not improper to refer witnesses to the pleadings, affidavits, and other sources, including during the conduct

of the hearing, the oral evidence of other witnesses, in order to ascertain what they will say about that material. Witnesses may not be placed under pressure to provide other than a truthful account of their evidence nor may witnesses be rehearsed, practised or coached in relation to their evidence or in the way in which it should be given. It is particularly important that an expert's report is in its content the product of the expert. An expert witness should not be asked to change a report so as to favour the client or conceal prejudicial material.<sup>23</sup>

**CONCLUSION**

Insofar as expert witnesses are concerned, other than the fact that they are entitled to give evidence of an opinion instead of merely evidence of observation, there is no reason why counsel should fall under different obligations when conferring with an expert witness as compared with conferring with a lay witness.

Insofar as expert witness opinions are concerned, it is difficult to identify any meaningful difference between preliminary and final opinions. The authorities, and the expert witness code of conduct, recognise that an expert opinion may change. We have had experience of so-called final opinions changing in the witness box. One might reasonably submit that, irrespective of the label assigned to it, there are simply initial opinions that may be followed by more recent opinions later. There is no reason why counsel should fall >>



**SCHOOLS**

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under different obligations when dealing with opinions formed earlier in time, as compared with those formed later.

Insofar as expert witness reports are concerned, it is difficult to identify any meaningful difference between draft and final versions, for the same reasons.

Having regard to the totality of all this material, in our opinion the following principles state the current position in New South Wales on the question of counsel's role in settling expert evidence:

- (a) Counsel may *and should* identify and direct the expert witness to the real issues.<sup>24</sup>
- (b) Counsel may *and should* suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.
- (c) Counsel may *and should*, when counsel holds the view, suggest to the expert witness that an opinion does not adequately:
  - (1) illuminate the reasoning leading to the opinion arrived at; or
  - (2) distinguish between the assumed facts on which an opinion is based and the opinion itself; or
  - (3) explain how the opinion proffered is one substantially based on his specialised knowledge.
- (d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.
- (e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

### RECENT DEVELOPMENTS

Since this article was first published, two further decisions have addressed some of the issues discussed.

Briefly, in *Anderson on behalf of the Numbahjng Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215, Cowdrow J observed [emphasis added]:

[15] 'This court has, on prior occasions, expressed a complaint relating to the poor preparation of expert reports in native title matters: see for example *Jango v Northern Territory* (No. 4) [2004] FCA 1539; (2005) 214 ALR 608 and *Harrington-Smith (on behalf of the Wongatha People) v Western Australia* (No. 7) [2003] FCA 893; (2003) 130 FCR 424. Shortcomings previously identified by the court have included reports which have been prepared in accordance with terms of reference which are overly broad and imprecise; reports which **lack sufficient lawyerly intervention** in their preparation; reports which fail to distinguish between passages which have a factual basis and are based upon the expert's specialised expertise compared to statements which are mere advocacy; and reports which do not pay regard to the law of evidence, the Rules and Practice Note CM7.'

In *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [2013] NSWSC 211, Ball J observed:

[23] '... It is common for a party's legal advisers to communicate with an expert retained by the party for the purpose of giving instructions and commenting on the form of the expert's report. In some cases, those advisers may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion. In some cases, the legal advisers may suggest wording to be included in the report which expresses in admissible form an opinion stated by the expert in an inadmissible form. The court depends heavily on the parties' legal advisers to assist experts to address properly the questions asked of them and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, the court depends heavily on the parties' legal advisers to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct. That requirement is reinforced by the acknowledgment that the expert is required to give concerning the code. The fact that legal advisers have communicated with an expert and provided comments on drafts of a report in a way which is consistent with discharging the first obligation is not a reason of itself for supposing that they have failed to discharge the second ...' ■

**Notes:** **1** In *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33. **2** *Kelly v London Transport Executive* [1982] 2 All ER 842. **3** *Phosphate Co-operative Co of Australia Pty Ltd v Shears* [1989] VR 665. **4** *Ibid*, at 683:30. **5** *Collins Thomson v Clayton* [2002] NSWSC 366. **6** *National Justice v Prudential Insurance (The 'Ikarian Reefer')* [1993] 2 Lloyd's Reports 68. **7** *Collins Thomson v Clayton*, see note 5 above, [22]. **8** *Ibid*, [23]. **9** *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705: [23]. **10** *Farley-Smith v Repatriation Commission* [2010] AATA 637. **11** *Ibid*, at [148]. **12** *Boland v Yates Property Corporation* [1999] HCA 64; (1999) 167 ALR 575. **13** *Ibid*, at [276] – [277]. **14** *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No. 7) [2003] FCA 893; (2003) 130 FCR 424. **15** *Jango v Northern Territory of Australia* (No. 2) [2004] FCA 1004. **16** *Risk v Northern Territory of Australia* [2006] FCA 404. **17** *R v Doogan* [2005] ACTSC 74; (2005) 158 ACTR 1. **18** Stowe, *Preparing Expert Witnesses*. **19** *Ibid*. **20** *Ibid*. **21** *Ibid*. **22** *Ibid*. **23** D Ipp, *Lawyers' Duties to the Court*. **24** In NSW, ss55-60 of the *Civil Procedure Act 2005* (NSW), with corresponding provisions elsewhere to the extent that they exist. In the absence of corresponding provisions, this conclusion may differ.

This article is based on a longer version that first appeared in the Summer 2012-2013 edition of *Bar News* (pp56-66). It was abbreviated by Sue Foote, a law graduate who has worked as a legal research assistant for a number of barristers over the past 10 years. The article has been reproduced with the kind permission of *Bar News*, and the authors.

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