

# Cut and Paste Credibility Evidence

## Introduction

1. This paper explores the law in relation to allegations of witness contamination in legal proceedings from a witness copying another's statement (i.e. "cutting and pasting") or if the witness simply looks at the evidence of another.
2. Copying written material has a pedigree well before word processing. Think of the monks in the Middle Ages who laboriously copied the Bible by hand. However with the advent of word processing, copying, for monks, and ordinary people, is now easier.
3. Copying of witness statements has occurred in both civil and criminal cases. There seem to be two major culprits. Firstly Police, and the main critics of the practice, Lawyers.

## The Law

### Criminal Cases - Police copying

4. Police are adept at using the word processor; hint they also know how to email statements.
5. The copying by police of other police statements has a pedigree well before the advent of Word.
6. In *R v Bass* [1953] 1 QB 681 police officers produced near-identical accounts of an interview of a suspect. They were cross-examined and they denied copying. The Court said this (at p. 686):

This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

7. That logic, I would have thought, is debatable. However while it might be counterintuitive that different rules could apply to different witnesses, even to the same events the following has been said to justify the practice.
  - a. Because police have an investigatory function they need to confer in relation to evidentiary matters.

- b. As a consequence of being constantly involved in incidents police need to refresh themselves to remember them.
- c. Police will not immediately know which matters will be contentious (i.e. a plea of not guilty) and to require them to spend more time on statements and notes detracts from spending time catching criminals.
- d. Finally as a practical issue of self-protection. Criticisms of the use of force will always be made of police and no other job, apart from the military, has the same exposure to criticism from the use of force.

## Operation Barmouth

- 8. It is convenient to start with the report to the NSW Parliament by the Police Integrity Commission entitled "Operation Barmouth (the "Report")"<sup>1</sup>. The Report provides valuable discussion in relation to issues of police "cross – contamination".
- 9. Operation Barmouth arose out of events occurring in Ballina in 2011 and the arrest of Cory Matthew Barker.
- 10. Basically Mr. Barker was arrested by police and at the police station there was an allegation that he punched one Senior Constable Hill in the nose. All but one police officer (whose reluctance to write a statement can be more ascribed to laziness rather than to altruistic whistle-blowing) made statements giving similar versions of the punch, some with nice details.
- 11. Barker was charged with punching Hill in the nose.
- 12. CCTV footage from the police station, that should have shown the incident, was faulty.
- 13. The matter came on for hearing and the learned Magistrate (Heilpern) ordered the CCTV to be looked at by NSW Police Force Special Technical Investigation Branch to see if it could be recovered.
- 14. The Special Branch managed to retrieve the footage and by all accounts it did not show a punch to the nose. At least not against police.
- 15. The Report noted extracts from the NSW Police Force Handbook (and other internal police guidelines) in relation to police preparing statements. Broadly speaking those police guidelines instruct police that corroboration and collaboration between police in the preparation of their statements is acceptable provided each statement is that officer's own account of the incident and the officer acknowledges any materials that he or she has used in making their statement.

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<sup>1</sup> I am indebted to my attention being directed to Operation Barmouth from seeing an email from Felicity Graham Principal Legal Officer - Western Region Aboriginal Legal Service

16. The Report widely discussed the English decision of Underhill J in *R (on the application of Saunders) v Independent Police Complaints Commission* [2008] EWHC 2372.

17. *Saunders* was a case involving judicial review of an investigation by the Independent Police Complaints Commission of two police shootings. In that case it was noted at [11]-[12]:

Police officers routinely have to write accounts, as soon after the events in question as possible, of incidents in which they have been involved or which they have witnessed ("first accounts"). Typically the first account of an incident will be written up in the officer's pocket-book, although that may subsequently be followed by a more formal statement for use in court or otherwise; and in some circumstances an officer may proceed straight to a formal statement without an intermediate note.

There has never been any prohibition in English law, or as a matter of police practice, on police officers who have been involved together in an incident speaking to one another about their involvement before they give their first account. Not only may they confer in the immediate aftermath - as would be entirely natural and may often be necessary for operational reasons - but they may collaborate in the writing up of the first accounts themselves.

18. The danger of conferring and contamination was well set out in *Saunders*:

The acceptance of this practice - which was referred to before me comprehensively as "conferring", although it might in fact be more useful to distinguish between "mere" conferring and actual collaboration in the production of notes or statements - obviously has the potential to impact on the value of evidence which an officer may subsequently have to give about an incident. That evidence will often depend very heavily on the officer's first account, to which he will be allowed to refer in giving his evidence. However much an officer who has conferred with colleagues may strive to record only what he has seen or heard for himself, there is a real risk that his recollection will have been "contaminated" by what he has been told; and he may in perfect good faith incorporate elements in his own account which have in fact derived from other witnesses, or subconsciously suppress elements which seem to him inconsistent with their accounts. That is a matter of common sense and common experience, but it is confirmed by psychological studies (helpfully reviewed and summarised in the recent paper published by the Research Board of the British Psychological Society entitled *Guidelines on Memory and the Law*: see in particular section 6.ii).

There is also the risk that, quite apart from such innocent contamination, officers collaborating in producing their notes or statements may be tempted deliberately to produce an account which does not accurately reflect the individual recollections of each. Such collusion may involve no more than the smoothing out of minor inconsistencies which the officers fear may lead to the evidence being regarded as unreliable (though the unsophisticated belief that inconsistencies always diminish the credibility of evidence is in fact wrong); but it may sometimes involve substantial distortion or fabrication. Collusion of the latter kind is no doubt rare, but it is a very serious matter when it occurs. (I should add that although the

distinction which I have drawn between innocent contamination and deliberate collusion is conceptually clear, its application may of course be a lot less clear in particular cases.) Similar risks of contamination are of course well-recognised in other contexts: see e.g. *R v Richardson* [1971] 2 QB 484 (at p. 490 B-C - witnesses not to be shown each others' statements before giving evidence); *R (Green) v. Police Complaints Authority* [2004] 1 WLR 725 ([2004] UKHL 6) (risk of "trimming" if complainants see other witnesses' statements - esp. *per* Lord Rodger at para. 71, pp. 747-8); and *R v Momodou* [2005] 1 WLR 3442 ([2005] EWCA Crim 177) (witness coaching- see esp. para. 61, p. 3453).

19. Paragraph 61 of *R v Momodou* is as follows:

There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See *Richardson* [1971] CAR 244; *Arif*, unreported, 22nd June 1993; *Skinner* [1994] 99 CAR 212; and *Shaw* [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

20. However in *Saunders* it was noted that an "uncontaminated" first account of an incident is not necessarily more accurate than an account produced after discussions; at[15]. The court was unwilling to endorse a general prohibition on police conferring. It noted that the risk to the quality of the evidence by conferring can vary greatly. It also noted practical considerations; that a "ban" could be difficult to enforce and would, in many cases, have serious operational disadvantages. Also the theoretically optimal practice of notetaking could be cumbersome; see [16].

## Australian Authorities –

### NSW

21. In *The State of NSW v Houda* [2005] NSWSC 1053 Cooper AJ held that the weight to be given to police officers using statements from other police was “seriously diminished”. The relevant portion of the judgment is as follows [246] –[247]:

All of the police officers said that they saw nothing wrong with using the notebook or statement of another police officer in order to assist them in preparing their own statements. They emphasised that it was merely to help them refresh their memory and if something was said with which they did not agree they would not have adopted it as part of their own statement.

The fact, however, is that what each of the officers was doing was not writing down something that was his/her own independent recollection. What they were doing was accepting the recollection and statements of Constable Stebbing as their own recollection. This practice overlooks the fact that in relying upon another officer’s statement as to the details of conversations there is a real danger of it being accepted as correct even though the personal recollection of the writer of the statement may be unclear or slightly different.

Furthermore, the value of evidence as corroboration is seriously diminished when that evidence is all based upon a statement of the witness sought to be corroborated.

### Western Australia

22. The issue was dealt with by Johnson J in the Supreme Court in *Heanes v Herangi* (2007) 175 A Crim R 175. Mr Heanes was found guilty in the Magistrate’s Court of disorderly conduct. Police had approached Mr Heanes after it was said that he deliberately walked into one of them crossing a road. While being questioned Mr Heanes’s phone rang and he took the call. Police asked him to get off the phone, to which Mr Heanes loudly said “I am on the phone. I am on the phone. I’m fucking talking to my dad. Fuck off”. Mr Heanes was then arrested.
23. Johnson J rejected an appeal against conviction. One of the grounds of the appeal was that the evidence of the police officers should have been rejected, as *inadmissible* because one of the police officers had used the other one’s statement as a template in making her own statement.
24. Unsurprisingly Her Honour rejected this argument and decided that the issue of collaboration was a question of weight. Her Honour made the following comments:

It would be naïve to suggest that witnesses do not discuss with others events which are significant or important to them. Witnesses make complaints to others who might question them and to police officers who

participate in obtaining a statement from the witness. With respect to police officers, in many cases it will be necessary to discuss the circumstances of an incident with a fellow officer in order to determine the extent of the available evidence and whether charges should be laid. There are a multitude of circumstances with the potential to affect a witness's account of a particular event. If the absence of discussion with another were the criteria for admissibility there would be little available evidence.

Of course, the type of discussion or collaboration which occurred in this case, and which is the subject of the appellant's submission, is with another person with actual knowledge of the event as a result of which there is the potential for one person's recollection to be influenced by the other person's recollection of events. However, police officers who take statements from witnesses often also have knowledge of the event. That, too, would be a situation where there is the potential for the witness's recollection to be influenced by the person preparing the statement. If the potential for personal recollection to be influenced provides a basis for excluding evidence, the effect of such a principle would be far-reaching indeed.

25. However Johnson J seemed to go further and condoned collaboration, even with respect to contentious matters, at [87]-[88]:

With respect to contentious matters, provided that police officers are aware that they may reproduce the recollection of another officer only if it accords with their own recollection, I can see no problem with using the statement of another officer as a template from which to produce their own statement.

....

I consider the practice adopted to be a legitimate and efficient method of preparing witness statements, provided the content of the statement is in accordance with the particular officer's recollection of events; something which should be tested in cross-examination as it often is with lay witnesses.

26. Johnson J indicated comments in *Houda* were case specific.

## Civil Cases

27. *In the matter of Colorado Products (in prov liq)* [2014] NSWSC 789 Justice Black set out various matters in circumstances where a “cut and paste” was involved, at [16]:

... It does not seem to me to matter whether the identical passages in Helen's and Kenneth's affidavit evidence was the result of collusion between the witnesses personally or was the result of Helen's adopting evidence that had been copied from Kenneth's affidavit, or Kenneth's adopting evidence that had been copied from Helen's affidavit, since each substantially devalues both witnesses' affidavit evidence where no explanation has been given of what occurred. It is not possible for the Court to be satisfied in this situation, in my view, that Helen's and Kenneth's evidence reflects a genuine recollection of events....

In *Seamez v McLaughlin* [1999] NSWSC 9, Sperling J concluded from the high degree of similarity in content, detail, terminology and sequence between the affidavits of three witnesses that they could not have come

into existence without direct or indirect collaboration and observed at [40]) that:

"[a]cceptance of one of the three accounts of the events ... means not only that the other two are not genuinely recollected, independent accounts. It also means that the authors of those other accounts have misstated the way in which their respective accounts came into existence, and seriously so. The credit of the others would then be worthless."

28. His Honour further noted at [18] – [19]:

I accept that, in some cases, the courts have taken the view that difficulties of this kind do not render the credit of a witness worthless, although they require care before accepting the evidence of one or other of the witnesses: *Macquarie Developments* above at [89]-[91]; *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43; (2009) 223 FLR 460 at [324], [326] per Ward J; *Celermajer Holdings* above at [183]-[189]. In this case, where the difficulties relate to the most important disputed conversations and where the manner in which they arose remains unexplained by the Plaintiffs, I consider that they substantially devalue the weight to be given to the affidavit evidence of each of Helen and Kenneth as to those matters, to the point that neither's affidavit evidence can be treated as reflecting a genuine individual recollection of events as distinct from a collective reconstruction of them.

These difficulties are exacerbated by the fact that Kenneth was provided by the Plaintiffs' solicitors, prior to his cross-examination, with access to the transcript of Helen's cross-examination, although he claimed in cross-examination that he had read only some parts of that transcript (T328). This further undermined the likelihood that Kenneth could give independent evidence under cross-examination.

29. In civil cases it appears that lawyers, in particular are often the culprits; but this still affects the evidence. In *Macquarie Developments v Forrester* [2005] NSWSC 674 Palmer J observed (at [89] - [90]) that:

Clearly, the Defendants' solicitor failed to appreciate that the evidence of each witness must be in the words of that witness and that it is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own.

Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

30. In *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40, Justice Ward took this up and noted, at [186]:

... even if there has not been collusion as such between the witnesses, in the sense of changing their evidence to make it fit with that of another, the fact that the affidavits may not contain the actual words of one or other of the deponents devalues their evidence.

31. In another case, *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 Her Honour also observed at [334]:

At the very least, the way in which Mr Lyons' affidavit evidence was prepared must give rise to doubts as to whether that evidence represented his own views uninfluenced by Mr Wawn. While I accept it likely that Mr Lyons expressed to Mr Wawn in no uncertain terms what he recalled of the meeting, the fact that Mr Wawn cast (or perhaps recast) it in such substantially similar terms can be consistent only with the pair having near perfect and identical recall of a particular conversation, some two years later, (which seems unlikely, particularly as the way in which Mr Lyons gave evidence was not in such formal language) or did so in collaboration with each other to an extent which must devalue the weight of their evidence.

#### Discussion

32. For all that might be said about the decision in *Heanes* there is a point that comments made by judges about witness collaboration do have to be read in the context of the actual decisions being made. How the witnesses is otherwise viewed may be an important factor in the weight that is given to the conferring of a witness.

33. In relation to credibility (whether focused in veracity or reliability) it is for the tribunal of fact to assess whether it accepts a witness. The law has always held that the tribunal of fact need not accept everything that the witness has said nor reject it all, but one thing a Judge must do is give reasons.

34. It seems to me that the following observations can be made:

- i. Whether a witness has conferred with another witness will be a question of weight not admissibility.
- ii. Distortion of evidence can occur from conferring; and this can be conscious or unconscious.
- iii. Conferring on uncontentious matters is often seen as acceptable and possibly advantageous (although this begs the question; what is "uncontentious"?).
- iv. There might be operational or investigatory reasons why police will need to confer between themselves as potential witnesses.
- v. Witnesses should set out the sources they have used in making their statements particularly on contentious matters.

35. I do not think many practitioners, and the weight of authority, would readily endorse the general acceptance of Her Honour in *Heanes* of police using statements as "templates"; but this approach may be closer to reality and human nature than the reverse.



## Addition matters - Proof matters and some tips.

36. The proof of whether a witness has been influenced by another relies upon opportunity. In both a criminal and civil context the relationship will normally provide the opportunity for collaboration to occur.
37. Check whether a statement has been copied simply by checking the words, spelling and grammar.
38. A lot can be taken from the form of a statement as opposed to its substance. For instance the date it was created, who witnessed the statement, the language and grammar as well as the setting out of ideas in the statement.
39. For instance in relation to the setting out of ideas, it may or may not be remarkable that another witness has dealt with the similar ideas in the same sequential order as another witness.
40. Also if a witness appears to have limited English in the witness box, the very fact of their written language or grammar, in a statement can be important; and this applies equally to people of English speaking backgrounds.
41. In my experience I can't really remember coming across two witnesses similarly misspelling the same unusual word which is an example often used to show collaboration. However I have often come across, detailed conversations, which are either word for word, or near word for word. How can this happen without conferring?
42. Also in my experience police officers are quite reluctant to acknowledge their use of each other's statements. However it seems more common nowadays for police is to say that they have referred to the fact sheet (a COPS event entry) or to their notebook in making a statement.
43. Remember the "Fact Sheet " is likely to have been written by the Officer in Charge (i.e. it is the same as looking at some else's statement). See whether it has conversations recorded in it because otherwise a cut and paste must have come from other material. One tip for the common answer from police that they "cannot remember whether they saw anyone else's statement" is to cross-examine on the police guidelines. The answer "I can't remember" seems a bit disingenuous to me if they acknowledge they follow the guidelines; as the real answer should either be yes or no; and if they don't follow the guidelines what do they follow? Also why, if they mention the fact sheet, would they not remember reading someone else's statement at that time? Also see above, police can email statements.

44. While this may make interesting cross-examination, my experience is that unless a Judge has another reason to doubt evidence, conferring is normally tolerated.

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