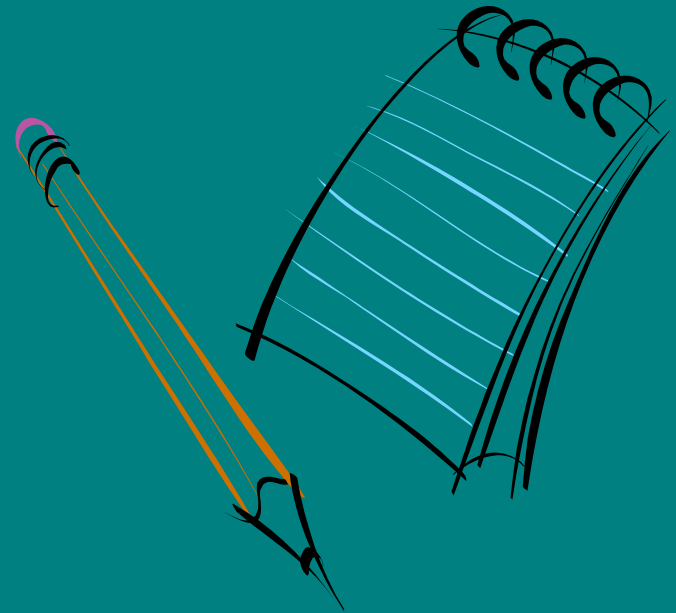


Preserving the Integrity of Police Officers' Notes

- Independence and the value of notes
- Challenges at home and abroad
- Managing the risks



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The value of notes



Fundamentally important to our justice systems

Reliance by the courts

- Memory aids in giving evidence
- May be evidence *per se* – *past recollection recorded*

Their trustworthiness critically important

The value of notes

The Canadian consensus

Notes should reflect an officer's independent recollection of an incident

- Should be authored while events are still fresh in officer's mind; and
- Without any conferral or collaboration with other witnesses

The independence of notes

Prevailing instruction and training in Ontario

Your notes are made from independent recollection and are your link to the past.

Notes must contain your independent recollections providing an accurate and complete account of police observations and activities.

See Ontario Police College, "Student Workbook on Evidence", p. 2.

The independence of notes

The Report of the Taman Inquiry

The proper practice is for each officer to make his or her own independent set of notes. When officers collaborate in preparing notes, there is a serious risk that one officer may unconsciously supplement something from the other officer's recollection which he or she never observed. If it is then written down in the officer's notebook to be used to refresh his or her memory, it will become part of the officer's recollection even though he or she never saw it. Once combined memories are committed to a uniform set of notes, each officer will later refresh his or her memory as to an event that they never saw

See Taman Inquiry Report, The Honourable Roger Salhany, Q.C., Commissioner, September 2008, at p. 137.

The independence of notes

Canadian case law

R v Barrett (1993), 82 C.C.C. (3d) 266 at 275 (Ont. C.A.)

[Sgt VanDemark] made these notes by reading Sgt. Hanlon's notebook and, since he agreed with the content, he initialled Sgt. Hanlon's notebook and copied Hanlon's notes into his own book. When asked in cross-examination why he did not take his own independent notes while the interview was being conducted, he replied: "That's not the way we conduct our investigations." It is not for me to tell the hold-up squad how to proceed for investigative purposes, but in so far as there are evidentiary consequences to those practices, I can say that they are unsatisfactory. Whenever possible, every officer in attendance at the interview who will want to refer to his or her notes as a memory aid for the purpose of giving evidence should take contemporaneous independent notes. [emphasis added]

The independence of notes: The Ontario landscape

SIU investigations

Mandate involves civilian investigation of serious injuries and deaths in police incidents

Historical difficulties in obtaining independent notes

Review conducted by The Honourable George Adams and recommendations made for segregation and non-communication requirements in SIU cases

The independence of notes: The Ontario landscape

SIU investigations

Ontario Regulation 673/98

- Per section 6(1), “The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews.”
- Per section 6(2), “A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.”

Impact?

The independence of notes: England and Wales

R (on the application of Tucker) v Independent Police Complaints Commission and another (Association of Chief Police Officers and others, interested parties) – [2009] 1 All ER 379

- Justice Underhill's decision released October 10, 2008
- Judicial review against IPCC by families of two men shot and killed by police officers
- Allegation that IPCC derelict in its investigations

The independence of notes: England and Wales

The applicants' claim

IPCC violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”)

Per European Convention, state under obligation to conduct “adequate” investigations into deaths at the hands of state agents

An “adequate” investigation requires that appropriate measures be taken to secure the best possible evidence

The notes (“first accounts”) of officers constitute important evidence

Conferral / collaboration by involved officers in the preparation of first accounts compromises their evidentiary value

The independence of notes: England and Wales

The applicants' claim (continued)

The involved officers in both shootings conferred / collaborated in the preparation of their first accounts

IPCC did not exercise its authority to prevent it

IPCC's failure to do so rendered each investigation "inadequate", resulting in a breach of the claimants' human rights

The claim was dismissed by Justice Underhill

The independence of notes: England and Wales

The court's decision

No prohibition, in law or practice, on conferral / collaboration

The practice is inherently risky from an evidentiary perspective

The independence of notes: England and Wales

The court's decision (continued)

The acceptance of this practice ... 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.

See at para 13

The independence of notes: England and Wales

The court's decision (continued)

Notwithstanding risks, outright ban on conferral / collaboration not in order

- Practice endorsed by Court of Appeal
- Instruction and training mitigate the risks
- Not necessarily true that first accounts prepared without conferral/collaboration more accurate
- Prohibition practically difficult and could harm police operations

The independence of notes: England and Wales

The court's decision (continued)

If absolute ban on conferral / collaboration not in order, should the practice be prohibited in death / serious injury (“DSI”) cases?

- Firearms incidents and ACPO guidance
 - ✓ permits conferral

The independence of notes: England and Wales

The court's decision (continued)

- IPCC critical of ACPO guidance

“...the practice of officers conferring to make their notes following an incident should be discontinued and procedures put in place to demonstrate that the accounts individual officers give are their best and genuinely independent recollections”

“...the public do not have confidence in the current procedure in which police witnesses and civilian witnesses to the same incident are treated very differently”

See at para 21

The independence of notes: England and Wales

The court's decision (continued)

Officers collaborated in their first accounts in both shootings

Risk that first accounts contaminated, though no evidence of collusion

Per *Ramsahai v Netherlands* [2007] ECHR 52391/99, positive obligation on states to conduct “adequate” investigations into deaths at hands of state agents

Per *Ramsahai*, investigation not “adequate” unless appropriate measures are taken to prevent, so far as possible, conferring/collaboration between key witnesses

The independence of notes: England and Wales

The court's decision (continued)

Ramsahai involved shooting death of Moravia Ramsahai by Amsterdam police officer

Per Court of Human Rights, investigation of shooting had been “inadequate”, and therefore in breach of the European Convention, because the shooting officer and his partner, the other witness, had not been segregated from each other for the three days following the incident until they were interviewed

The independence of notes: England and Wales

The court's decision (continued)

Per Court of Human Rights in *Ramsahai*, cited at para 37 of Justice Underhill's decision:

Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.

The independence of notes: England and Wales

The court's decision (continued)

Per Justice Underhill, based on *Ramsahai*, were shooting cases before the court considered by the Court of Human Rights, it might well find a breach of the European Convention, particularly since they involved actual conferral, as opposed to the potential conferral in *Ramsahai*

The independence of notes: England and Wales

The court's decision (continued)

Having gone that far, Justice Underhill would go no further

The mere fact of conferral / collaboration in the production of notes does not necessarily result in an “inadequate” investigation

The independence of notes: England and Wales

The court's decision (continued)

According to Justice Underhill, decisions of the European Court of Human Rights on the facts of a particular case are not binding, even where material facts appear similar

The independence of notes: England and Wales

The court's decision (continued)

Per Justice Underhill at para 40:

The only authoritative parts of a judgment are the statements of principal which it expounds. In my view, the relevant statements of principal emerging from Ramsahai v Netherlands are that there must in every case of a killing by state agents be an effective investigation, and that in order to be effective such an investigation must be both independent and “adequate”. The case also establishes that an investigation may be inadequate, and therefore ineffective, if “appropriate steps” are not taken to “reduce” the risk of collusion (see para 330): I do not myself regard that as a statement of principal so much as an application of the underlying principals which I have identified. But, even if I am wrong about that, the principle in question is far from absolute in its formulation and involves the need to make judgments as to what steps are “appropriate” and to what extent it is possible to “reduce” the risk.

The independence of notes: England and Wales

The court's decision (continued)

The question of breach might be approached in two ways:

- An investigation is “inadequate” simply because conferral has occurred, or
- Conferral / collaboration gives rise only to a potential breach, with the ultimate question being whether the investigation was nonetheless effective

The court was inclined to the latter view, but decided to dispose of the claims for other reasons

The independence of notes: England and Wales

The court's decision (continued)

The court reasoned:

- The Human Rights Act prohibits public authorities from acting incompatibly with the rights set out in the European Convention
- This duty does not apply to acts done in compliance with the home jurisdiction's laws
- Accordingly, not enough to show that investigations were “inadequate” because of conferral / collaboration
- Need to show that the “inadequacy” corresponded with a breach of the IPCC's duties under the Human Rights Act

The independence of notes: England and Wales

The court's decision (continued)

The court proceeded to examine the scope of the IPCC's statutory powers

- Doubtful that the IPCC had the authority to issue directives mandating that police services prohibit conferral/collaboration as a general policy
- However, within the IPCC's power to have issued a specific direction prohibiting conferral/collaboration in the two shooting investigations

The independence of notes: England and Wales

The court's decision (continued)

The court noted that no such direction was given in either case

The question, therefore, was whether such a direction was required under the Human Rights Act

The independence of notes: England and Wales

The court's decision (continued)

Justice Underhill concluded that the IPCC was not in breach of its duties under the Human Rights Act

The court accepted the IPCC evidence that to have issued the directions would have done more harm than good

- IPCC has no power to compel statements from officers
- Consequently, IPCC had genuine concern that issuing a direction countermanding the ACPO's guidance regarding conferral / collaboration in the production of notes would have alienated officers and rendered their cooperation less likely

The independence of notes: England and Wales

The court's decision (continued)

The IPCC was caught between a rock and a hard place

- Issue the direction, and risk non-cooperation from the officers; or
- Not issue the direction, and risk first accounts and subsequent evidence being contaminated via conferral / collaboration

In these circumstances, Justice Underhill accepted that the IPCC had made a reasonable judgment in the interests of best preserving the effectiveness of its investigations

The independence of notes: England and Wales

The court's decision (continued)

I have come to the conclusion, albeit after some hesitation, that it was reasonable for the Commission to judge that the giving of directions that conflicted with the ACPO guidance would be more likely to hinder than to promote an effective investigation in these cases, because of the risk that it would encourage non-co-operation by officers (ie 'element (ii)' above). My hesitation is based on the fact that, on an objective analysis, it is hard to see why an officer who is required to give his first account without collaboration should invoke his right of silence in circumstances where he would not otherwise do so. Such a requirement is not an indication that the officer is a suspect; and, in so far as that is the impression that they might gain, in a perfect world that could be corrected by careful and sympathetic explanation. But it is not a perfect world. The Commission is entitled, indeed obliged, to make its own judgment of the practical impact of giving a direction of the kind contended for. It has to be recognised that in the fraught circumstances of a DSI investigation following a shooting police officers, and their advisers, may not adopt a wholly dispassionate approach. Perceptions are important.

See at para 59

The independence of notes: England and Wales

The court's decision (continued)

Justice Underhill dismissed the argument that the IPCC was duty bound to issue the direction, and put matters to the test, as its sole concern ought to be with the quality of the evidence and not its quantity

According to the court at para 64, “that seems to me altogether too glib. The Commission’s concern should not be about who is to blame if the crucial evidence is not obtained but about maximising the chance that it is. Its job is to make reliable findings about what happened. If the officers give statements after conferring, that is not the best evidence; but that does not mean that it is bad evidence (see para [61], above), and it is certainly preferable to having no evidence at all.”

The independence of notes: England and Wales

The court's decision (continued)

In arriving at this determination, the court indicated it was further persuaded by the safeguards in place to mitigate contamination via conferral / collaboration

- Focus in ACPO guidance on independent recollection
- Involvement of solicitors in the drafting of statements

The independence of notes: England and Wales

The court's decision (continued)

The court was further convinced by the ongoing consultations between the ACPO and the IPCC aimed at abolishing the practice of conferral / collaboration

[T]he relevance of the Commission's attempts to achieve the abolition of collaboration by the consensual route is that they make its judgment that, pending such consent, taking unilateral action in particular cases would do more harm than good the more worthy of respect.

See at para 62

The independence of notes: England and Wales

The court's decision (continued)

The court made clear that its dismissal of the claims should not suggest to anyone that conferral / collaboration in the production of notes complies with the state's obligations to ensure an "adequate" investigation

On the contrary ... I believe that a practice of permitting principal officers to collaborate generally in giving their first accounts is highly vulnerable to challenge under art 2.

See at para 65

The independence of notes: England and Wales

Post - *R (on the application of Tucker) v IPCC*

ACPO has amended firearms manual regarding conferral in firearms cases

Present ACPO guidance is that conferral should not occur in the preparation of first accounts

However, guidance is focused on an officer's subjective "belief" which resulted in the use of force

Conferral still authorized, where necessary, regarding other aspects of incidents

The independence of notes: England and Wales

Post - *R (on the application of Tucker) v IPCC*

Impact of change in ACPO guidance?

Why distinction between officer's subjective "belief" of the situation at time force used, where conferral not permitted, and officer's understanding of other aspects of the incident, where conferral allowed?

- The latter will also figure prominently in a court's or investigative agency's understanding of the event

Research project across UK, supported by ACPO and conducted by the Metropolitan Police Service, will examine the impact of conferral on recollection

The independence of notes: The Ontario landscape

In Ontario, at least in death and serious injury cases involving the police, it is not mere policy that prohibits conferral / collaboration in the preparation of notes, it is the law

To reiterate, by virtue of a regulation governing SIU cases, chiefs of police are obliged, to the extent practicable, to segregate involved officers pending SIU interviews

Also, involved officers are under a legal obligation to refrain from communicating about the incident pending SIU interviews

The independence of notes: The Ontario landscape

There is a fly in the ointment in Ontario's regulatory scheme regarding segregation of, and non-communication by, involved officers pending SIU interviews

- The involvement of lawyers

The independence of notes: The Ontario landscape

The problems have crystallized in Toronto with the Toronto Police Service

The integrity of the notes of TPS officers is threatened when the officers, as appears to happen with regularity in SIU cases and beyond, are represented and meet with the same lawyers before authoring their notes

Lawyers with multiple clients under a professional obligation to share information

The independence of notes: The Ontario landscape

In Ontario, the lawyer's professional duty is set out in rule 2.04(6)(b), dealing with joint retainers:

[W]here a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned.

Same rule in other Canadian provinces

The independence of notes: The Ontario landscape

In *R v Dunbar*, (1982) 68 CCC (2d) 13, the Ontario Court of Appeal commented on the lawyer's disclosure duties in joint retainer situations at paragraph 57:

The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. [underline added]

The independence of notes: The Ontario landscape

In summary:

- Lawyers cannot keep information confidential between clients in joint retainer situations
- To do so would be inconsistent with the lawyer's equal duty of loyalty to each and every client
- However, when lawyers share information across multiple witness officers, or witness and subject officers they might represent, there is a risk of contaminating the witnesses' recollection of events

The independence of notes: The Ontario landscape

The real risk NOT that officers would intentionally tailor their notes

Similarly, it is NOT bad faith on the part of lawyers who represent multiple involved officers that results in the contamination; to the contrary, it is the lawyer's good faith discharge of his or her duties that raises the spectre of contamination

The independence of notes: The Ontario landscape

Consequently, in Toronto with respect to SIU cases, the involvement of lawyers representing multiple involved officers undermines the legal regime which stipulates segregation and non-communication

- Conferral by proxy

What is worse, the information now passes through a third hand, creating the added risk of miscommunication and misunderstanding

The independence of notes: The Ontario landscape

What is an oversight agency to do?

- SIU Director has consulted and corresponded with the Chief of TPS, attempting to persuade the chief to amend internal police policies to mandate that involved officers author their notes prior to speaking with lawyers who represent other involved officers
- It remains to be seen what action the TPS will take

The independence of notes: The Ontario landscape

Stumbling block?

- By virtue of the same regulation governing SIU cases, an involved officer is “entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview”
- Provision says nothing about when an officer is entitled to consult a lawyer

The independence of notes

Managing the risks

Effective prohibition, whether in law or policy, regarding conferral in the preparation of notes, whether directly or by proxy via lawyers who represent multiple involved officers

Vigilance in insisting that conferral be documented in the notes

Careful scrutiny of first accounts and in follow-up interviews with involved officers to identify instances of conferral

These steps should assist the fact-finding and truth seeking mission