From shorthand to cyberspace: Journalists’ interview records as evidence

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Journalists have traditionally used established and time-proven methods of recording and storing their interviews, whether they be shorthand notes or recordings on tape or video. New communication technologies have opened up novel ways of recording conversations, but these prompt questions about the admissibility and veracity of data obtained in some of these ways when tendered in the courtroom, for example as evidence of truth or good faith in a defamation trial. This article reviews the basic rules of admissibility of evidence in relation to journalistic research and compares how these applied to earlier newsgathering methods with how they might apply to new practices and equipment. It subjects modern digital techniques to the tried and proven common law and legislative tests of evidential admissibility and suggests avenues for further research which might lead to new work practices for journalists and editors to bring them into compliance with courtroom requirements.

Journalists have traditionally used established and time-proven methods of recording and storing their interviews, whether they be shorthand notes, tape recordings, telephone recordings or video recordings.¹ Media organisations have long required their reporters to attain a minimum standard in shorthand speed and proficiency before allowing them to graduate from being a cadet to a graded journalist. Adelaide Advertiser cadet trainer Bob Jervis expounded upon the virtues of shorthand in his training manual News Sense,² and Sally White noted the broad shorthand requirements of industrial awards at 120 words per minute minimum speed for grading in 1996.³ Shorthand is still required in Australia today, as evidenced in modern industrial awards.⁴ Broadcast journalists’ practices have always involved recordings of interviews and they have had certain protocols for the filing and archiving of tapes.⁵

Traditionally when it seemed a journalist or their work might become involved in legal proceedings, whether by what they saw or heard or by what they published, their notes of interviews and associated research materials

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were gathered and stored in case they were required as evidence in a trial. A journalist’s notebook was viewed by the courts as compelling evidence based on the notion that records taken during or immediately after an incident or conversation were more likely to portray an accurate account of the facts than witness testimony given months or years after the event. Reporters’ notebooks were not specially valued because they were kept by journalists, more because contemporaneous notes are valued when taken by any record-keeper. In fact, some occupations whose note-taking is used frequently in court such as police and other officers of record, are required by law to maintain a good working notebook. If called upon by a court, their notebook provides the best reference point for later recall in a trial.

The same general principles apply to journalists’ notebooks. However, unlike police and other career witnesses such as fire officers and air safety officers, journalists’ training in notebook management has been at best haphazard and most newsrooms have not imposed minimum standards for recording and storing interviews and research. Some news organisations have conducted comprehensive training and strict requirements on note-taking and storage, while these practices have been largely ignored in many others. Practices also varied widely among individual journalists. This could be problematic for a media defendant’s case if a story written by a journalist whose notes did not lend themselves to being good evidence later became the subject of defamation proceedings.

Journalists today have experienced far more training about occupational legal hazards than their predecessors via university subjects and in-house training courses. While many have studied the laws of defamation and the threats they pose to journalism, few have been focused on, or have even been aware of, how their fact-finding methods complied with the laws of evidence. Pearson’s experience training regional and suburban journalists over 18 years suggests major news organisations have not followed any standardised protocols on journalists’ interview recording or record-keeping. This deserves examination in a future research project. While costly lawsuits have forced some journalists and media organisations to rethink the way they operate there is little in the literature on the evidential implications of journalists’ information gathering methods.

6 United Fisheries Ltd v Papasavas [2001] VSC 86; BC200101782 at [8] and [12].
8 Chisari v R (No 2) [2006] NSWCCA 325; BC200608168 at [28].
Basic rules of evidence

The central tenets of the rules of evidence are relevance, admissibility and weight.\(^{13}\) A court will only receive evidence that is relevant to the proceedings. However, evidence will not be admitted merely because it is relevant; it must first satisfy the admissibility rules set out in statute, common law and the rules of court.\(^{14}\) A party to a proceeding cannot seek to rely upon evidence that is not admissible to a court.\(^{15}\) The uniform evidence laws in New South Wales,\(^{16}\) Victoria,\(^{17}\) Tasmania\(^{18}\) and at the Commonwealth\(^{19}\) level have sought to codify early common law principles regarding the admissibility of evidence, such as disallowing evidence of rumour and innuendo as hearsay. Evidence legislation in other states, including Queensland\(^{20}\) and Western Australia\(^{21}\) tend to still rely upon a 200 year-old body of evidence law and have legislated 'some of its more important features in statutory form'.\(^{22}\) It is therefore necessary for media lawyers, journalists and editors to have a good understanding of the rules of evidence across all jurisdictions given the nature of the modern media and the fact that a story may be uploaded in one jurisdiction and downloaded in another.\(^{23}\)

Like many areas of the law evidence is not a pure science and its admissibility will depend on a range of human factors including judicial interpretation, precedents in similar fact scenarios, and pragmatic procedural issues. In practice, all evidence is deemed admissible until it is challenged by a party to the proceeding.\(^{24}\) Where a party challenges the admissibility of particular evidence, the court usually hears arguments by way of a pre-trial hearing or "voir dire" proceeding — that is, a 'trial within a trial' held in the absence of a jury.\(^{25}\) The most common arguments against admitting evidence are that the evidence was hearsay or was improperly or illegally obtained.

Evidence and journalists

The hearsay exclusion can be problematic for journalists for a number of reasons. The rule against the admission of hearsay ‘is one of the oldest, most complex and most confusing of the exclusionary rules of evidence’.\(^{26}\) This is largely attributed to the fact that the definition of hearsay — and the many
exclusions to it — remain unclear. Under the strict rules of hearsay a notebook of quotes or transcript of an interview would be inadmissible based on the notion that the person best placed to give evidence about what they saw or heard is the person who experienced it with their own senses, rather than the journalist questioning them about it after the fact. Therefore, if journalists seek to rely upon the contents of their notes they must be willing to call as a witness the person who gave them the information. This often presents an ethical quandary for journalists who have promised their sources confidentiality and indeed can be a career-limiting or even life-threatening for the whistleblower who gave them the information.

That said, there are certain statutory exceptions that dispense with the need to call witnesses to testify to the making of a statement. For example, in Queensland such circumstances include where the person has died or is physically or mentally unfit to make the statement, where they are absent or uncontactable, or where the statement was so long ago the witness could not be expected to recall its detail.

A journalist’s record of interviews in whatever medium — be it a notebook, audio recording, or any other means — falls under the category of documentary evidence for the purposes of evidence laws and will be classified as hearsay evidence. This has certain implications for admissibility and these will vary according to jurisdiction and whether it is a criminal or civil matter. The Queensland law, for example, identifies a range of criteria for the admissibility of documentary hearsay evidence in criminal and civil matters. Two important elements apply. First, such evidence will normally require the interviewee to also testify as to the authenticity of the record, which will present problems with confidential or reluctant sources, and with sources who have left the country or died. Second, the court would traditionally require the original document to be produced unless a satisfactory explanation is given for its absence. This is known as the secondary evidence or ‘best evidence rule’, which has been all but abolished in New South Wales, Victoria, Tasmania and Commonwealth jurisdictions. While Queensland, South Australia and Western Australia still technically require original documents, in practice the best evidence rule is ‘almost obsolete’.

Unlike scientists, doctors and pathologists, journalists do not fall into the category of ‘expert witnesses’ simply because they have interviewed somebody as part of their professional work. The court does not give any special value to the occupation of journalism for its note-taking or record-keeping practices. While there is an argument that journalists’ evidence may be allowed as opinion evidence by reason of experience, it is possible that future courts might follow the reasoning in ASIC v Adler and admit opinion evidence.

27 Ibid.
28 Field, above n 22, p 222.
29 Amendments to the Evidence Act 1995 (Cth) s 126H in March 2011 confer a limited privilege upon journalists in Commonwealth courts.
30 Evidence Act 1977 (Qld) s 92(2).
31 See Evidence Act 1995 (Cth) ss 3, 47.
32 Field, above n 22, p 75.
33 Ibid, p 279.
evidence of an experienced journalist to establish whether a journalist’s actions were reasonable in the circumstances. While the authors were unable to find a case example where journalists have called on their colleagues to testify as to what they would have done in the circumstances, in Adler’s case the court allowed evidence from a company director on the question of what constituted careful and diligent attention to company affairs, but not evidence on whether the former HIH Insurance chief’s behaviour met that standard.35

While journalists will not normally qualify as ‘expert’ witnesses, a reporter’s experience will be relevant in determining the weight of evidence and witness credibility. Once evidence is admitted the court will decide how much weight should be given to that evidence. A court may look to a journalist’s practices in a particular interview situation and assess their note-taking ability in weighing its credibility. Where it can be proven that a journalist (or any record-keeper) has an established system of recording information, a court will likely place high value on such evidence. Former New South Wales education minister Terry Metherell’s daily diary accounts of conversations with then-Premier Nick Greiner were found to be compelling evidence before the Independent Commission Against Corruption in 1992.36

Thus, the court will look to the methods of the note-taker and veracity of the notes, regardless of the individual’s occupation. It is not the fact that the interviewer is a journalist that adds weight — more the issues of whether shorthand speed and notebook management practices lead to the court’s confidence in the record of the interview.

The weight prescribed to oral testimony which cannot be supported by evidence will ultimately come down to witness credibility. In 2004 the Mosman Daily successfully defended a defamation action brought by the proprietors of a real estate business as a result of an article about a dispute with their co-tenants sharing the premises.37 During the hearing the court heard evidence from the journalist who wrote the story and the tenants who had contacted the paper, along with each of the plaintiffs. In entering judgment in favour of the newspaper group, Hoeben J found the oral evidence of the parties ‘revealing’ and made the following observation:

I did not find [the first and third plaintiffs] to be impressive witnesses. Their evidence was at times internally contradictory and evasive . . . Where [their] evidence is in conflict with that of [the tenants], I prefer the evidence of [the tenants].38

The lesson for journalists who are called upon to give evidence in proceedings is the court will look favourably upon witnesses who are honest and give a fair account of their version of events.39

35 See Field, above n 22, p 284.
37 Millane v Nationwide News Pty Ltd t/as Cumberland Newspaper Group [2004] NSWSC 853; BC200406363.
38 Ibid, at [23]–[24].
39 Ibid, at [24].
Similarly, in the case of *Field v Nationwide News Pty Ltd*\(^{40}\), a *Sunday Telegraph* journalist reporting on a Blue Mountains hotel that had fallen into disrepair was forced to recount her conversation with the proprietor to the court in circumstances where their recollections were very different. The trial judge concluded the journalist was more likely to be telling the truth based on the fact that she took notes of the conversation soon after it occurred, separate witness testimony supported her version of events and, importantly, she was a ‘credible and straightforward witness’.\(^{41}\) This indicates that even a journalist’s recollection of the contents of an interview without supporting evidence might alone outweigh the recollection of the interviewee.

However, while a court may prefer a journalist’s recollection over that of another witness it may not be enough to convince a court to find in their favour. The matter of *Zunter v John Fairfax Publications Pty Ltd*\(^ {42}\) involved a claim for defamation over an article published in the *Sydney Morning Herald* which suggested the plaintiff caused a bushfire by carrying out an illegal backburn. The journalist who wrote the article produced accurate notes of her conversations with the local fire chief, which were not in dispute.\(^ {43}\) The problem for Fairfax was that the story had been edited at the last minute to include information provided by the photographer who interviewed the plaintiff in the absence of the journalist. The court accepted that ‘not being a reporter, (the photographer) did not take notes of the conversation he had with Mr Zunter’ yet concluded the photographer’s evidence was ‘more likely’ to be accurate than the plaintiff’s.\(^ {44}\) In spite of this the Supreme Court still awarded the plaintiff $100,000 plus costs on the basis the publication was unreasonable.

**On the record: The evidential burden**

In any legal proceeding each party usually bears the burden of proving their case, regardless of who initiated the action. The evidential burden of proof — the obligation imposed upon a party by law to prove or disprove a fact in issue — will often vary depending on whether the case is criminal or civil in nature, the cause of action and any defences available. Generally, the same rules of evidence apply in both criminal and civil matters but the standard of proof (‘beyond reasonable doubt’ versus ‘on the balance of probabilities’) will vary.\(^ {45}\)

Taking the example of defamation proceedings, the plaintiff has the legal burden of proving that a statement containing defamatory imputations which can quite reasonably be interpreted as referring to the plaintiff was published to at least one other person.\(^ {46}\) In order to prove defamation, a plaintiff must adduce enough evidence to prove each of these elements on the balance of probabilities. The defamed plaintiff need not prove that the publication caused

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41 Ibid, at [81].
42 [2005] NSWSC 759; BC200505702.
44 [2005] NSWSC 759; BC200505702 at [22]–[4].
45 See Evidence Act 1977 (Qld) ss 92–93.
actual damage or economic loss,\textsuperscript{47} and in this sense the legal burden for proving defamation is much less onerous than other tortious wrongs, such as negligence.\textsuperscript{48} The defendant, on the other hand, must prove their case by tendering enough evidence to support any defence raised.\textsuperscript{49} Truth as a defence may rely on records of interview as part of a brief of evidence attempting to convince a court of ‘substantial’ truth on the balance of probabilities. If a journalist pleads the publication was protected by statutory qualified privilege they must satisfy the court that publication was made in good faith by adducing sufficient evidence to prove that the publication was ‘reasonable in the circumstances’.\textsuperscript{50} The contents of a journalist’s notebook can therefore be crucial to a media defendant’s case.

Contrast this with the criminal standard of proof of beyond reasonable doubt. It is very rare that a journalist will be charged with criminal defamation, although it is an option still available to Attorneys-General in Australia.\textsuperscript{51} However, journalists may be called as witnesses in criminal trials and ordered to hand up their research notes, perhaps when an accused has made certain admissions to them in the course of an interview or in cases where it is the alleged whistleblower facing criminal charges over the leaking of documents to a reporter. This occurred in the events leading to the contempt trial of \textit{Herald Sun} reporters Michael Harvey and Gerard McManus, centred upon the alleged leak of confidential information by public servant Desmond Kelly.\textsuperscript{52}

In such cases the evidence obtained by journalists can mean the difference between an acquittal or a guilty verdict. The controversial ‘Jihad Jack’ case\textsuperscript{53} illustrates how journalists’ evidence might be received by a court and the problems that must be overcome in order to admit evidence. Joseph Terrence Thomas, or ‘Jihad Jack’ as he is infamously known, became one of the first Australians to be charged under the post-9/11 terrorism laws. In the first instance he was convicted at trial for receiving funds from a terrorist organisation and providing support to a terrorist organisation\textsuperscript{54} and sentenced to imprisonment. He appealed the conviction on the basis the evidence relied upon to secure a conviction was inadmissible in that it was illegally obtained. The Victorian Supreme Court upheld Thomas’ appeal on the basis of the confessional statements he had made to the Australian Federal Police while being detained by Pakistani officials in questionable circumstances were made under duress.\textsuperscript{55} The Director of Public Prosecutions subsequently brought an

\textsuperscript{48} Ibid, p 126.
\textsuperscript{49} Field, above n 22, p 19.
\textsuperscript{50} See Defamation Act 2005 (Qld) s 30(3).
\textsuperscript{51} See Criminal Code Act 1899 (Qld) Ch 35; Crimes Act 1990 (NSW) s 529.
\textsuperscript{52} Harvey v County Court of Victoria (2006) 164 A Crim R 62; [2006] VSC 293; BC200606489; R v Kelly [2006] VSCA 221; BC200608277.
\textsuperscript{53} Director of Public Prosecutions (Cth) v Thomas [2006] VSC 120; BC200601691; Director of Public Prosecutions v Thomas (Ruling No 3) [2006] VSC 243; BC200605047; R v Thomas (2006) 14 VR 475; (2006) 163 A Crim R 567; [2006] VSCA 165; BC200606396.
\textsuperscript{55} Ibid, at 320.
application for a retrial on the basis of an ABC *Four Corners* interview in which Mr Thomas had admitted to training with Al Qaida in Afghanistan and receiving money from a terrorist organisation. The court granted a retrial and Mr Thomas was eventually convicted on lesser charges.\(^56\) There was no question that the interview he had given to *Four Corners* was in contravention of the rules of procedural fairness because the interview had been freely given and it was recorded on video. Journalist Ian Munro from *The Age* in Melbourne was also served with a search warrant for his notes of interviews with Thomas. An interesting question would have arisen had the interview been given to a print journalist whose shorthand notes were illegible, audio tapes inaudible or erased all together, or whose interview was carried out via ‘ephemeral’ media where records might be irretrievable. Without solid, admissible evidence it is unlikely a jury would be able to return a guilty verdict on the basis that it could not be said beyond reasonable doubt that the accused was guilty of the charges asserted.

**Proving the case**

Generally an editor or indeed editorial counsel’s first port of call upon being served with a claim or writ will be to check what they have on record. Traditionally, this meant obtaining a journalist’s original notebook or tape recordings of interviews. A quick survey of the available evidence will assist media defendants in weighing up their prospects at trial and developing a strategy for the resolution of disputes.

Once an action is on foot, a journalist’s notebook — like all evidence — becomes discoverable under the rules of disclosure in civil proceedings.\(^57\) It is for this reason that the News Limited *Australian Media Law* guide advises reporters to ‘secure any notes/tapes/emails/computer files/research material that you used in preparing the article in question’ when threatened with legal action.\(^58\)

The journalist-source relationship has not enjoyed the same privileges afforded to other professional relationships where confidentiality is observed, such as between lawyer-client, doctor-patient, and priest-penitent. Journalists are compellable as witnesses just as any member of the public can be called on to give evidence, as former NSW Premier Bob Carr discovered when his diary notes were subpoenaed in defamation proceedings brought by former minister Eddie Obeid against the *Sydney Morning Herald*.\(^59\) Mr Obeid claimed that the defamatory publication of articles accusing him of trying to elicit bribes in exchange for political favour had cost him his ministerial position.\(^60\) While the court awarded Mr Obeid substantial damages on the basis the publication was unreasonable (in part due to inadequate

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\(^{56}\) *Director of Public Prosecutions (Cth) v Thomas* [2006] VSC 120; BC200601691.

\(^{57}\) Uniform Civil Procedure Rules 1999 (Qld); Uniform Civil Procedure Rules 2005 (NSW).


record-keeping of interviews and research by the journalists concerned),
counsel for the Herald was able to rebut the claim his ministerial career had
been damaged by the publication by introducing the Premier’s diary in
evidence, which outlined in unfavourable detail why Mr Obeid was eventually
dumped from Cabinet.\textsuperscript{61}

While journalists are compellable as witnesses, the 1997 reforms to
evidence laws in New South Wales do offer a limited protection for journalists
in this regard. As mentioned earlier, reforms passed by the Commonwealth
Parliament in the form of independent MP Andrew Wilkie’s Evidence
Amendment (Journalists’ Privilege) Bill 2010, conferred a limited shield law
upon journalists, broadly defined under s 126G as ‘a person who is engaged
and active in the publication of news and who may be given information by
an informant in the expectation that the information may be published in a
news medium’.

While journalists are compellable as witnesses, rarely do they voluntarily
hand up their notebooks to the court, particularly in cases where
confidentiality has been promised to otherwise anonymous sources. Some
journalists have gone to great lengths to prevent disclosure or at least prevent
the other party gaining a benefit from the production of the notes. Such was
the case in \textit{Lew v Herald and Weekly Times Ltd}.\textsuperscript{62} The court ordered the
journalists whose story was at the centre of a defamation action to hand up
their notebooks. Before doing so, however, they ‘blackened’ references to
their sources. The plaintiff’s solicitors sought the court’s ruling that the
newspaper rule (which gives the court a discretion to allow journalists to keep
their sources secret during the preliminary stages of an action) should be
waived and the journalists ordered to hand up a ‘clean’ copy of their notes.
The Victorian Supreme Court did not find it necessary to make such finding
because the Herald withdrew its defence of qualified privilege, thereby
negating the need to prove the credibility of the source.\textsuperscript{63} While this case
demonstrates the great lengths journalists will go to in order to protect their
sources, journalists should be cautious of taking similar steps because they
may find themselves in serious trouble for tampering with evidence.

Where a journalist refuses to give up their notebook the court has significant
powers to force them to do so. The court can issue a subpoena to produce and
give evidence.\textsuperscript{64} Failing to comply with a subpoena can lead to arrest on
charges of contempt. A review of case law suggests courts are not convinced
by the journalists’ argument that tendering their notebooks or tape recordings
of interviews would constitute a breach of the MEAA Australian Journalists’
Code of Ethics when it comes to issuing or upholding subpoenas. Three
Australian journalists have been imprisoned for refusing to comply with court

\textsuperscript{61} R Wainwright, ‘The horror! Carr’s diary exposes his brutal days’, \textit{Sydney Morning Herald},
\textsuperscript{63} Obeid v John Fairfax Publications Pty Ltd (2006) 68 NSWLR 150; [2006] NSWSC 1059;
BC200608170 at [28].
\textsuperscript{64} See Uniform Civil Procedure Rules 1999 (Qld) Pt 4.
orders in order to protect their sources. All centred on their refusal to answer questions on ethical grounds.

Lost or misplaced notebooks or recordings may also be quite damaging to a journalist’s or publisher’s case. As Gibson has noted ‘not having any documentation may be said to show a lack of care or professionalism on the part of the publisher’. The absence of a journalist’s record of an interview or research may make it difficult for them to make out a defence to defamation. However, it should be noted that a lack of evidence does not automatically establish the plaintiff’s case: ‘Inability to prove something does not automatically establish the opposite . . . (it may be that) the particular journalist who gathered that particular information is unavailable as a witness and his or her notes cannot be found’.

Gathering news

New communication technologies have changed the way journalists gather news. Computer access and internet connectivity have provided more opportunities for journalists to source information. While the basic role of a journalist to find and report news remains unchanged, technology savvy reporters have embraced the digital age and are using technology to improve the way they operate.

In 1972 Hugh C Sherwood grappled with journalists’ use of tape recorders to record interviews:

Within recent years the portable tape recorder has made many recruits among journalists in all media . . . It’s shown up at news conferences held by candidates for the United States Presidency and at interviews conducted with servicemen in bunkers in Vietnam . . . In some cases it has enabled the talented, intelligent non-journalist to compete on equal terms with the professional journalist.

Today interview exchanges are far more likely to be recorded by the latest iPhone application than by the audio cassettes of old. A study of journalism texts and recent media reports suggest the time honoured methods of recording and storing news may not apply to the new paradigm of newsgathering. The following list provides some examples of how modern journalists employ technology during interviews to record notes:

- Typing notes directly into the computer;
- Recording telephone conversations with listening devices;
- Using digital recording devices to store audio on memory chips or downloading audio files on to computers;
- Using mobile phone technology and voice recording applications;

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67 Hartley v Nationwide News Pty Ltd (1995) 119 FLR 124 at [7].
• Conducting interviews via email, text messaging (SMS) or instant messaging;
• Using Facebook, Twitter and other social media as a source of quotes and photos.

The benefits of these and other new methods of recording information are advanced in journalism texts. Potter suggested ‘telephone interviews take less time, and some reporters find it easier to take good notes when they don’t have to worry about maintaining eye contact with the source. They can even type their notes into the computer’. However, while new technologies present opportunities for journalists to gather news, they also pose a threat to media organisations that rely upon the information gathered when defending defamation proceedings. As Brady wrote:

taking notes is a tedious part of the interviewing process. But you not only have to be a good reporter and writer, you may also have to be a good witness in court some future day defending what you wrote.71

The legal position

The prevalence of technology poses a unique problem to news organisations seeking to defend defamation proceedings. New technologies call for new interpretations of established rules. However, both the courts and the legislature have failed to keep pace with technological developments, leaving the legal status of some digital evidence uncertain. ‘Generally, despite some attempts to accommodate the advent of computers, Australian evidence legislation has not been uniformly updated to reflect the increases in electronic documentation and communication.’72

During research the authors canvassed case law and the rules of evidence to ascertain the evidential status of common industry practices in respect of recording and storing information. An understanding of how evidence laws apply to journalists’ notes would allow journalists and media organisations to assess their own methods and develop better working practices to avoid the costly embarrassment of having their evidence struck out by a court. It should be noted, however, that it is difficult if not impossible to predict how a court will determine the question of admissibility of, or in the alternative, the weight prescribed to evidence. The decision in each case falls on the facts.

The traditional method: Shorthand notes

A journalist’s notebook may be compelling as evidence based on the fact it is likely to be the only contemporaneous record of an interview or conversation. However, even an impeccable notebook where every interview is dated and every page accounted for73 can be problematic for the courts if it cannot be read by an ordinary person. Quotes recorded in shorthand require translation

71 Brady, above n 12, p 146.
and while it is possible a plaintiff will engage an expert to read it, it is far more
time and cost effective for journalists to provide a transcript of their notes.\textsuperscript{74}
This is particularly so where journalists have developed their own unique or
hybrid shorthand style.

One of the key principles of the rules of evidence is that any evidence
adduced must be capable of being tested in court. This means that evidence
will be subject to examination, cross-examination and, if necessary,
re-examination in order for the court to ascribe weight to evidence and
determine witness credibility. In the case of journalists’ notes, ‘real’ evidence —
that is, the physical notebook — will almost always be accompanied by
testimonial evidence by the person who made the notes to provide context and
translation as needed. This may indeed present the opportunity for expert
evidence from a shorthand instructor on the translation of the notes.

This process can be a professional minefield for journalists called into the
witness box. Their practices and credibility become subject to public scrutiny
among their peers, as BBC journalists Susan Watts, Andrew Gilligan and
Gavin Hewitt discovered when they were called upon to give evidence at the
UK’s Hutton Inquiry in 2003 into the suicide death of British defence expert
Dr David Kelly after he was exposed for leaking intelligence information.
During the hearing, the journalists were questioned and at times publicly
criticised for their working practices, later prompting the BBC to issue new
editorial guidelines on note-taking.\textsuperscript{75} As Marr noted, the inquiry highlighted
the importance of taking and keeping good notes: ‘Many of the reporters
slouched at the back of the courtroom . . . wondered how their own practices
would stand up to that kind of examination’.\textsuperscript{76} In 2011, the journalists’
shorthand, longhand and hybrid notes still sat at the inquiry’s website for the
gratification of those interested in the subject.\textsuperscript{77}

**Digital recordings and transcripts**

Audio recordings of interviews and conversations are the most effective shield
against accusations of sources being misquoted and, if dealt with properly, are
convincing evidence in court. If a media defendant can produce an original,
unaltered recording of interviews given voluntarily it will be very difficult for
a plaintiff to argue against the recording being admitted in evidence. For this
reason, the solicitors for Jack Thomas were unable to raise successful
arguments against admitting the *Four Corners* interview in evidence.\textsuperscript{78}

Difficulties arise when audio recordings have been compromised or
recordings destroyed before a claim or writ has been served. While in earlier
times journalists were advised to archive tapes, modern day dictaphones and
mobile recording devices are far more likely to record the contents of an
interview on to a memory card, which can be difficult to preserve physically

\textsuperscript{74} The admissibility of transcripts is dealt with below.
\textsuperscript{77} L Hutton, *Investigation into the Circumstances Surrounding the Death of Dr David Kelly*,
2004, at <http://www.the-hutton-inquiry.org.uk/content/evidence.htm> (accessed 15 June
2011).
\textsuperscript{78} *R v Thomas (No 4)* (2008) 19 VR 214; 218 FLR 242; [2008] VSCA 107; BC200804629.
and expensive to replace. The advantage of digital recordings is that they can be downloaded on to a computer using special software and stored electronically. In reality, time pressed journalists may be tempted to record the quotes they need and then erase interviews in order to free up memory on their recording devices.

This can have serious evidential implications. While the 1995 amendments to the Commonwealth Evidence Act abolished the best evidence rule which would have precluded transcripts or excerpts of interviews being received in evidence unless the original recording was produced, a journalist may have a difficult time convincing the court to accept their version of events in the absence of any proof. It has been held that ‘if a tape is not available and its absence has been accounted for satisfactorily the evidence of its contents given by a witness who heard it played over may be received as . . . evidence’. However, the common law rules pertaining to secondary evidence will still apply to determine how much weight should be given to that evidence. For example:

If the last possessor of the original document whose contents are disputed fails to produce it in court, that possessor’s oral evidence as to the document’s contents will be admissible. However, any court would be justifiably sceptical as to the reliability of that evidence in the circumstances.

One of the key traps journalists may face in having their audio recordings admitted as evidence is where questions are raised as to the legality of the recording. Journalists may find themselves relying on recorded telephone exchanges or secret recordings of conversations in circumstances where the source was unaware they were being recorded. In most jurisdictions such recordings would be held to have been illegally obtained in contravention of surveillance or listening devices legislation.

If a court follows the black letter of the law, evidence of recordings which were illegally obtained would be rendered inadmissible. This is particularly so in criminal cases where the overriding interest is justice and a person’s constitutional right to a fair trial. However, as can be seen from earlier examples, civil cases may fall within the grey area where illegal recordings may be received in evidence.

**Typing notes directly into a computer**

It is not uncommon for journalists conducting telephone interviews to type notes of their conversations directly into the computer. Typically these notes are entered into a word processing program or recorded on screen using software employed by a newsroom to write, file and edit stories. While this method may assist some journalists in taking down conversations and expediting the writing process, it presents a challenge to journalists who are called upon to defend their stories. Often the story itself will be the only evidence of a conversation having taken place. Where notes have been

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79 Butera v DPP (Vic) (1987) 164 CLR 180; 76 ALR 45; 30 A Crim R 417; BC8701825.
80 Thomson Reuters Legal Online, above n 72, (at 16 September 2009) 16 Evidence, 5 ‘Documentary Evidence’ at [16.5.550].
81 See Surveillance Devices Act 2007 (NSW) s 11.
preserved (that is, the journalist has saved the document in which they recorded the interview) it may be difficult to convince a court that the notes are in their original, unaltered state.

The potential problem with electronic records of interviews was raised in the Hutton Inquiry. Journalist Andrew Gilligan told the inquiry that soon after an informal meeting with a defence official he recorded his recollection of the conversation on a personal digital assistant for later use in a story. While ordinarily such evidence might be regarded highly because of its contemporaneous nature, in this case there was some evidence to suggest he had later amended the notes when it became clear he would have to produce his notes to the inquiry. As a result, two forensic computer analysts were called as expert witnesses to testify as to the reliability of the records at great expense and embarrassment to the BBC. Interestingly, in the aftermath of the inquiry Andrew Gilligan admitted he no longer used his PDA as a source of recording notes of conversations and records all interviews as a matter of routine.\(^{82}\)

The authors were unable to find case examples where such a method of recording and storing notes has become a fact in issue in proceedings in Australia. It is possible that counsel have discounted such evidence so heavily that it has influenced decisions on whether to settle rather than contest. However, it may be necessary for a journalist seeking to rely on notes which have been electronically recorded to lead evidence that typing notes directly into the computer is a routine practice for that particular journalist and perhaps a habit of other journalists who regularly conduct interviews via telephone. Such evidence is known as “tendency evidence”.\(^{83}\)

Lawmakers have sought to clarify the status of electronic evidence by introducing statutory provisions dealing specifically with computer-produced evidence. As previously mentioned, the definition of documentary evidence is sufficiently wide to include computer systems that record information.\(^{84}\) Furthermore, s 95 of the Queensland Evidence Act 1977 (which is mirrored in evidence legislation in other jurisdictions) suggests that any statement contained within a document created by a computer will be admissible as evidence so long as it meets the conditions set out in the Act. It follows then that a journalist may adduce a document containing notes of interviews and telephone conversations typed directly into the computer so long as they can prove that they regularly used the computer to record and store such information, the hardware was functioning properly at the time and the information contained in the document reproduced the information supplied to the computer in the ordinary course of those activities.\(^{85}\)

**New textual media and social networking**

A good example of computer-produced documents is email, which also illustrates the challenges faced by the courts and the legislature in adapting established rules to modern-day realities. As Musgrave notes:

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82 Harcup, above n 75, p 82.
83 See, eg, Evidence Act 1995 (NSW) s 97.
85 Evidence Act 1977 (Qld) s 95; Evidence Act 1995 (NSW) s 146.
It is fair to say that electronic communications have been a fertile source of evidence. One reason is that there are just so many of them. Short, direct written communications of the type thought extinct with the telegraph are now ubiquitous in human intercourse whether commercial, social or even conjugal.\(^86\) However, while courts routinely accept emails in evidence, the exact evidential status of email has yet to be determined judicially.\(^87\)

Traditionally, the best evidence rule would preclude a copy of original correspondence from being tendered as evidence where the original was not available. This meant a photocopy or carbon copy of a letter would be inadmissible as evidence where the absence of the original could not be satisfactorily accounted for. When it comes to email, however:

> there are a number of possibilities on the evidential status of a message that is sent from a computer and also stored on that computer. The original could be deemed to be the version that remains stored on the originator’s computer and the copy deemed to be the version sent to the recipient. Alternatively, the reverse assumption could be made, leaving the originator with the copy and the recipient with the original.\(^88\)

The same principle applies to text messages sent by a mobile device.

In practice, however, courts will rarely concern themselves with such arguments unless insisted upon by one of the parties and in any event, the question over originality would likely only arise in circumstances where authenticity was in question. The introduction of the uniform evidence laws largely abolished the best evidence rule so it is unlikely that courts will reject a print-out of an email as good evidence. The uniform legislation has also sought to clarify the hearsay status of email by including a provision which provides an exception to the rule in respect of certain particulars, such as the date and time the email was sent and the identity of the correspondents.\(^89\)

While emails may be saved or archived, the same cannot always be said of more transient forms of communicating such as text messages on mobile devices or information gained from social networking sites. Facebook and Twitter provide fertile ground for journalists seeking information about a source. However, the ephemeral nature of social networking combined with the ability of users to control the information that is shared publicly may present a problem for journalists who publish information gained via such means. In these circumstances, a prudent journalist may print off the relevant information or store it in some other permanent form.\(^90\)

### Other records

In addition to keeping good notes of interviews and conversations, journalists should keep a record of phone calls and other attempts made to contact a source or verify information before it is published. In order to establish a

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87 Thomson Reuters Legal Online, above n 72, at [8.9.1080].
88 Ibid.
89 Evidence Act 1995 (Cth) s 71; Evidence Act 1995 (NSW) s 71.
defence of fair comment, honest opinion or qualified privilege in defamation proceedings, a journalist must prove good faith.\textsuperscript{91} This can be difficult to prove without evidence to support the claim that a journalist acted fairly. The statutory defence of qualified privilege will also require evidence that a journalist at least made an attempt to provide a balanced story. Section 30 of the Defamation Act 2005 states that when deciding whether a publisher’s behaviour was ‘reasonable in the circumstances’ a court may take into account a range of factors including whether a reasonable attempt was made to obtain and publish a response from the individual being defamed and other steps taken to verify the information published.

In other words, the Act effectively imposes record-keeping obligations on journalists who may wish to use the defence in potential legal proceedings. However, many journalists are unaware of these requirements until after the fact, at which point a lack of evidence may preclude them from successfully arguing a defence.

Conclusion

A basic understanding of the rules of evidence by news organisations and individual journalists would assist reporters and their editors in developing improved newsgathering and information storage practices. While this article explains there are sometimes safety nets for journalists who have had less than meticulous note-taking and file storage practices, news organisations and university courses should be emphasizing best practice in notebook and file management, and imbuing journalism students and graded reporters with the importance of preserving records of interviews.\textsuperscript{92} Any improvement in industry training and practice will better enable media organisations and individual journalists to fend off defamation lawsuits if and when they arise. While jurisdictional differences in evidence law might impact on the advice given by media lawyers, it should be sufficient for journalists and their news managers to understand the basic principles and incorporate them into their daily newsgathering and file management practice.

The challenge to journalists, their managers and their lawyers is that the laws of evidence are complex and remain unsettled, particularly in respect of technology-based evidence. As a result, it is difficult to anticipate how a court might receive a journalist’s evidence where new methods and technologies have been applied in practice, particularly if suitable records have not been kept or if some of the information has been obtained in breach of other law. To this end journalists need a set of basic protocols for their recording and filing of interviews which are insisted upon by editors and senior editorial staff.

While many of the judgments reviewed touched upon the reliability of journalists’ evidence and witness credibility of journalists, further research of court transcripts (which are ordinarily not published) is required in order to examine the legal challenges and debate about journalists’ methods of


\textsuperscript{92} The reverse is also the case — in an era of sophisticated electronic record-keeping and widespread surveillance in public places, it is becoming increasingly difficult for a journalist to avoid a digital trail leading to a confidential source, an issue for further research.
recording and storing news. Further research might also seek to interview journalists and media lawyers to gain better insights into how journalists go about their daily interviewing tasks and identify specific examples where journalists’ information gathering and record keeping has been tested against the laws of evidence. A comparison of the application of the differing laws of evidence across jurisdictions may also prove useful for media attempting to develop best practice protocols.