

Legal aid, justice and the criminal courts

Dr Vicky Kemp
Visiting Scholar
University of Nottingham


From Suspect to Trial:

“The aphorism that trial starts at the police station is now more true than ever ...”

“It is not only what the suspect does say, but also what they do not say, which can be used as evidence against them”

- ▶ *Professor Ed Cape:*
- ▶ *Designing out Defence Lawyers*

Outline of presentation

- ▶ Methods
 - ▶ Managerial/financial influences and implications for police station legal advice
 - ▶ Police attitudes towards legal advice and the quality of legal decision-making
 - ▶ Relationships in the criminal process: sidelining the defence
 - ▶ Pre-charge decisions and implications for Crown Court cases
 - ▶ Issues arising
- 

Methods

Police Station Legal Advice:

- ▶ Survey of over 1,000 users in the CJS: observing custody suites and interviews with 24 defence solicitors in the six cities surveyed
- ▶ Analysis of over 30,000 police custody records in four police force areas – 44 police stations
- ▶ Examination of four large police stations: interviews with 50 custody sergeants and observing custody suites
- ▶ The Bridewell Legal Advice Study: two phases each of three months – observing police custody and interrogations – interviews with 12 custody sergeants, 7 police investigators, 12 defence lawyers and 27 suspects

A Small-scale study of Crown Court cases –observing court hearings over 9 days (101 hearings) and conducting a review of 43 defence case files (CC ineffective and ‘cracked’ trials)

Managerial influences: Police Performance Targets

- ▶ Narrowing the Justice Gap – 2002: A police target to increase the number of detections was to have a ‘net-widening’ effect – from 2003 to 2008 the number of out-of-court disposals increased by 135%
- ▶ The police were targeting ‘low hanging fruit’, particularly children for minor matters and other ‘easy hits’
- ▶ The target was revised and then withdrawn in 2010 – the number of out-of-court disposals subsequently decreased
- ▶ In some areas the police have incorporated the target to increase the number of detections as an operational target
- ▶ Performance measurement encourages a ‘command and control’ style of management. This has led to senior police officers seeking to influence decisions which PACE requires to be made by ‘independent’ custody officers

Financial influences:

Fixed fees for police station legal advice

- ▶ From 2008 a fixed fee is payable for police station legal advice – this does not include a separate fee for waiting time
- ▶ Solicitors report that this has led to less time being spent on cases as well as advisers spending less time in police stations
- ▶ From an examination of custody records 45% of suspects on average requested legal advice and 37% received such advice. When excluding cases where there was no police interview in the majority of cases legal advice was received – 91% to 100%
- ▶ Payment of a higher fee has led to the majority of advice being provided face-to-face: 86% to 93% in the four stations
- ▶ The downside: Legal advisers tend to wait until the police interview before contacting their client – f to f advice waiting on average 6 to 7 hours. Tend to focus on the offence only
- ▶ Long delays were main factor discouraging legal advice – potential for police ploys

Managerial influences: sidelining the defence

- ▶ Police performance targets seem to have led to a sidelining of the defence from the pre-charge process (it is easier to impose cautions without any evidence when legal advisers are not involved)
- ▶ From 2008, 10 large stations observed and in three stations legal advisers excluded from custody suites. In the other stations access tended to be restricted until the police interview
- ▶ Such exclusion/restrictions for legal advisers to custody suites can limit their access to their clients and to custody sergeants
- ▶ As an alternative telephone contact with custody suites can be limited, particularly at busy periods of time as the calls are not answered – inhibits the defence from making representations
- ▶ Sidelining the defence at the pre-charge stage can damage relationships between the police and legal advisers (particularly in large stations)
- ▶ Poor relations between the police and the defence are examined in relation to police ploys discouraging legal advice and issues relating to the disclosure of evidence and police interviews

Custody sergeants' attitudes towards legal advice

Custody sergeants are required to be 'impartial' when reading out to suspects their legal rights. Such 'impartiality' can mask police ploys:

- Active discouragement: the way the rights are read, i.e. reading the rights quickly/incomprehensibly – rolling all three rights together
- Encouraging and perpetuating the myth that solicitors are the main cause of delays (different tactics noted when dealing with low-level offending and serious offences)
- Custody sergeants can hide behind 'impartiality' in order to discourage suspects from having legal advice:

“They might be in here for mass murder and I won't influence them one way or another. As long as I'm happy they understand their rights and have made an informed decision, that's what counts” (BN)

- Just two out of 50 custody sergeants said they would explicitly encourage legal advice for rape or murder. However, this one said, “I know when I'm doing it that this is completely unlawful” (UI)

Police investigators: attitudes towards defence practitioners and disclosure

Legal advisers tended to be seen as the ‘lowest of the low’, ‘money grabbing’ and accused of ‘telling lies’ – cop culture

By way of disclosure a written note would generally be provided to the defence. What was included would depend on the approach adopted by the police investigator

Those having fairly good relations with legal advisers would tend to disclose some evidence. As the following comments highlight:

“I will reveal some things [disclosure] but not others” (VT)

“I’ll open up more to some legal advisers than others” (CP).



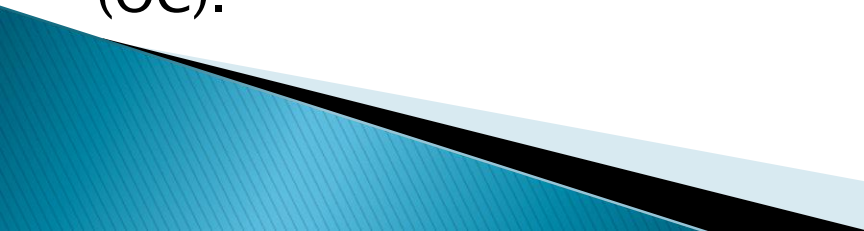
Police investigators: negative attitudes and implications for disclosure

Those having negative attitudes towards the defence would seek to limit disclosure. As this investigator explained:

“I don’t like them [legal advisers]. I think it’s built into my DNA now. The difference is that we are after the truth. Most of the time the truth is that their client is guilty and they are only interested in getting them off. As a consequence they can play dirty. That’s one of the reasons why I’m careful about disclosure ... [They] can sometimes be bloody minded because they want more disclosure and I think ‘You’re not having it, I’m not going to give you more’. The solicitors should speak to their client and if they’ve done it then they should tell them to say so. It’s better that they admit it rather than going ‘no comment’ and getting charged” (UC)

So guilt tended to be judged on a ‘moral’ rather than ‘legal’ basis.

Relationships between the police, the defence and the CPS and the quality of legal decision-making – police perspectives

- Some police officers said that there were legal advisers who routinely advised their clients to make ‘no comment’ – source of conflict
 - There was a lack of awareness more generally about the extent to which solicitors advised their client to answer questions in the police interview based on the quality of the disclosure. A ‘no comment’ response was often perceived as a lack of co-operation on the part of the defence – possible implications for the case disposal
 - Liaison with CPS – increasingly charging decisions made remotely by CPS Direct. This approach preferred by some investigators, i.e. “I have found [CPS Direct] to be so much better. They don’t really have ownership of the decision whereby CPS locally try to get this idea of owning a case from the cradle to the grave” (UC)
 - Such distance can lead to the police becoming more discerning about the evidence presented to the CPS. As this respondent put it, “The anomaly is that we have to tell them little white lies on occasions because with some prosecutors everything is very black and white” (OC).
- 

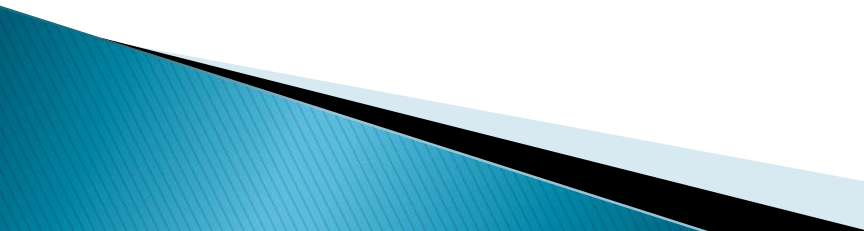
Police disclosure and “no comment” interviews – the defence perspective

- There were suggestions from the defence of some legal advisers routinely advising their clients to make “no comment”, irrespective of the strength of the evidence
- More generally, solicitors acknowledged that when advising clients each case had to be considered on its merits. For example:

“[No comment] isn’t always appropriate. I mean a monkey could do this job if you didn’t differentiate when it was needed or not. Sometimes you need to test out the strength of the prosecution case by saying nothing. If your client has something to say, it might be a full denial, a defence or alibi details, then these need to be mentioned early on. If you always get your client to go no comment then you are an idiot really” (GI)
- Without any ‘meaningful disclosure’, and to avoid self-incrimination – the defence are likely to advise “no comment”
- But, what about those suspects who decline legal advice? How are they to assess the strength of the evidence and decide what to say in the police interview?

A small-scale study of Crown Court cases (work in progress)

Pre-charge decision-making and Crown Court trials. There were cases sent up to the Crown Court unnecessarily. Key issues involved the following:

- ▶ The police, CCTV and ‘little white lies’
 - ▶ Decisions should be based on what the evidence is and not on what it might be – young people and knives
 - ▶ Cases where there were serious mental health issues involved. Often no appropriate adult involved at the police station (but no application to exclude the police interview). The priority on prosecution rather than on the mental health needs of the defendant
- 

Issues arising

- Is it appropriate for the police to be the guardians of police station legal advice?
 - To what extent are PACE safeguards being undermined?
 - How can the legal rights of vulnerable suspects in police custody be upheld?
 - Should what is said in the police interview no longer be admissible in court?
 - Managerial and financial issues are encouraging ‘silo’ methods of working. Could more effective working practices between criminal justice organisations at the pre-charge stage help to improve the quality of legal decision-making?
 - But, MOJ proposals for ‘price competitive tendering’ – this would have the effect of undermining the quality of criminal defence services and increase fragmentation within the pre-charge process
 - A time for change – a radical approach is required to provide a more effective system of justice
- 