Legal Advice at Police Stations

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Introduction:

We should always be wary of euphemistic language. We should remember to speak of the Police Office – and not the Police Station – because a Police Station is an intimidating and sinister venue. [1] We used to deal with the Police Force – and not the Police Service. Equally, the solicitor is not participating in a mere 'interview' of his client. This is not some perfunctory business meeting – but a 'custodial interrogation' of a detainee (to apply the phraseology of the European Court[2]) in a criminal trial process, which is necessarily adversarial in character. As such, these can be occasionally hostile and aggressive encounters.

So, what exactly is the difference between a police interview and a police interrogation? In one word: everything. An interview is a fact-gathering contact. An interrogation is what the police do when your client is their suspect and their purpose is to extract an incriminating statement from him, which can then be used to convict him.

To the detainee, the whole interaction with the police correlates to his first day of trial; and the laying of a criminal charge, which is akin to a preliminary determination of guilt. The investigative stage of the criminal process involves an intimidating environment with accusatory features. All steps taken during this stage have an impact on the suspect's defence.

It should be remembered that the police are allowed to employ trickery, lies, and threats of certain kinds, promises and other forms of deception and psychological manipulation, in order to get suspects to waive their right to legal representation and to admit their crimes. In practice, the interrogation room is often imbued with an atmosphere of implied violence and physical coercion – none of which would be permitted in the courtroom context. [3]

Each police officer understands the enormous difference between, on the one hand, a police-station interrogation of an unrepresented, unprepared and frightened suspect – and, on the other hand, the formal questioning of a 'lawyered-up', well-prepared suspect. In the eyes of the police, the latter is no substitute for the former. Cops want to solve crimes in real time. They want to find the body while it is still warm – or, even better, still alive. They understand that confessions offered under the pressure of police interrogation may be faulty, but the physical evidence to which they may lead will often be self-proving and crime solving.

Police investigators will thus have considerable incentives to interrogate vulnerable suspects, especially if they can use the fruits of such interrogations to do their crime-solving jobs – an entirely different remit from the prosecutor who can only seek conviction at trial with admissible evidence.

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[1] *Chalmers v H.M. Advocate,* 1954 J.C. 66, 1954 S.L.T. 177, *per* Lord Justice General Cooper

[2] See *Salduz v Turkey*, Application no. 36391/02, 27 November 2008, *passim*

[3] *Is There a Right to Remain Silent*, Alan M. Dershowitz, 2008, at p. 162 – 3

Accordingly, safeguarding suspects' rights in a substantial and effective manner can demand real commitment from the defence solicitor.

The purpose of this paper is to address the following issues:

What exactly is the solicitor's purpose in attending on his client in police custody; the limitations of providing only telephone advice; special considerations in respect of the vulnerable or mentally disturbed suspect; consideration of whether detainee waiver of the right to legal representation has been legitimate; the pre-conditions, which the solicitor should insist upon, particularly by way of pre-interview disclosure; whether the police should even be questioning the 'chargeable suspect'; how the solicitor should deal with oppressive and objectionable police questioning or obstructive police conduct; whether absolute silence is truly the best policy; immunity; compulsory questioning under section 172 of the Road Traffic Act; the taking of forensic samples; whether the solicitor might even challenge a Search Warrant application, hitherto an exclusively *ex parte* affair, since any such hearing now coincides with his representation of his client; and how to deal with the refractory client who is determined to talk in defiance of legal advice.

The solicitor's purpose in being there:

The police would rather the solicitor were not involved. If so, he should only be stuck at the other end of a telephone, that his advice can be subsequently 'cured', out with his presence. If there, a cardboard cut-out providing the most token representation – that the box is suitably ticked for *Cadder* compliance. [4] Heaven forbid that the solicitor should try and provide the detainee with effective representation.

The purpose of the emergency legislation – the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 ('the LADA') – was to make provision for persons being questioned by the police (on suspicion of having committed an offence) to have a right of access to legal assistance.

The appointment of a legal aid lawyer does not exhaust the obligations of the State. The point is that the legal assistance, which is provided, must be practical and effective. [5]

Accordingly, legal assistance is about something more than the mere presence of the solicitor. It is implicit in the provision of effective assistance, that the solicitor is suitably proactive – and is not merely a passive participant in what can be fraught proceedings.

Clearly, the primary function of the solicitor is to protect his client from brutal or coercive interrogation techniques. The European Court is suitably cynical about what the police can be capable of – particularly in eastern or southern European. Realistically in Scotland, we are concerned with psychologically coercive interrogation techniques, which can still subvert the right to legal representation and the exercise of the right to silence.

[4] *Cadder v HM Advocate*, [2010] UKSC 43

[5] *Daud v Portugal*, April 21, 1998, R.J.D. 1998-II, No. 69; 30 E.H.R.R. 400; *Artico v Italy*, May 13, 1980, Series A, No. 37; 3 E.H.R.R. 1; *A Practitioner's Guide to the European Convention on Human Rights*, Karen Reid, 2nd edition, 2004, at paragraph IIA-129; see also *Archbold: Criminal Pleading, Evidence and Practice 2011* at paragraph 16-90

The Scottish solicitor's involvement has to be about something more than stopping the police beating up the suspect and being a safeguard against ill-treatment. It is about more than Article 3 considerations. Article 6 considerations – the suspect's privilege or right against self-incrimination – are equally engaged. The solicitor is primarily tasked with protecting the right of the suspect not to incriminate himself. [6]

The presence of the defence lawyer will assist the detainee in understanding how to exercise his rights; and provide support so that he is relieved of the pressures, which might induce false confessions.

Reference is made to the following passages from the decision of the Supreme Court in *Cadder*:

> '*Per* Lord Hope:
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> [33] The more one reads on through the judgment, however, the clearer it becomes that the Grand Chamber was determined to tighten up the approach that must be taken to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself. As Peter W Ferguson QC has observed, it marks an apparent change in approach: The right of access to a lawyer, 2009 SLT (News) 107, 108. In para 53 the Grand Chamber asserts that the principles which it outlined in para 52 are consistent with generally recognised international standards which are at the heart of the concept of a fair trial, whose rationale relates in particular to the need to protect the accused against abusive coercion on the part of the authorities. Reference is made to aims pursued by article 6, notably equality of arms between the investigating or prosecuting authorities and the accused. In para 54 reference is made to the particularly vulnerable position that the accused finds himself in at the investigation stage of the proceedings. <u>The point is made that in the majority of cases this vulnerability can only be adequately compensated for by the presence of a lawyer whose task it is, among other things, to help to ensure that the right of an accused not to incriminate himself is respected</u>. Early access to a lawyer is said to be part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has or has not extinguished the very essence of the law against self-incrimination. Reference is made to the numerous recommendations by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which underline the point that the right of any detainee to have access to legal advice is a fundamental safeguard against ill-treatment.
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> [34] There is perhaps an indication here that the primary concern of the Grand Chamber was to eliminate the risk of ill-treatment or other forms of physical or psychological pressure as a means of coercing the detainee to incriminate himself.
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> ...
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> [44] It may well be, as the appeal court suggested in *HM Advocate v McLean*, para 25, that the Grand Chamber was particularly influenced by what was said in Jalloh v Germany (2006) 44 EHRR 32, para 101, to which reference is made in a footnote to para 54 of its judgment in *Salduz*. In *Jalloh* where the applicant had been forced to regurgitate a bag of cocaine, there was a complaint that article 3 had been violated as well as article 6. In para 101 the court said that in examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, it will have regard, in particular, to the following elements: the nature and degree of compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained will be put. This passage was referred to by the Grand Chamber in support of its observation in para 54 of *Salduz* that early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against

[6] *Salduz* at paragraph [54]; which is referred to in *Cadder v HM Advocate* by Lord Hope at paragraph [44]

self-incrimination. It plainly had in mind that there was a consensus across Europe that the presence of a lawyer was a safeguard against ill-treatment, as can be seen from its reference in para 54 to the recommendations of the European Committee for the Prevention of Torture. But it is just as plain that the risk of irretrievable prejudice to the accused because of a lack of respect of his right to remain silent was at the forefront of its mind too: see para 110 of *Jalloh*, where the court observed that the privilege against self-incrimination is commonly understood in the contracting states and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. Its reasoning cannot be confined to cases where a violation of article 3 is in issue.'

Per Lord Rodger:

'[70] ...

A right to legal advice from that earlier stage could not, of course, be derived from the implied right against self-incrimination, but would have to be derived from the need for legal assistance for other purposes – for example, to support the accused in distress, to check his conditions of detention etc. See p 446, para O-III5. It is unnecessary to express any view on the merits of that argument since the point does not arise in this case. But, as I see it, if a suspect had the right to access to legal assistance from the time of his detention, as envisaged by Judge Bratza, it would mean that he could not be refused such assistance if it were available. But the State would not be under a positive obligation to ensure the availability of legal assistance in all circumstances. So there would be no violation of the right simply because, due, say, to the time of night or the remoteness of the police station, no legal assistance was actually available when the suspect was detained. *Cf Brennan v United Kingdom* (2001) 34 EHRR 507, 521, para 47. I would read Judge Bratza's opinion in that sense.'

Per Lord Brown:

[108]

...

It is clearly Strasbourg's judgment that whatever in the result may be lost in the way of convicting the guilty as a result (wholly or partly) of their voluntary admissions is more than compensated for by the reinforcement thereby given to the principle against self-incrimination and the guarantees this principle provides against any inadequacies of police investigation or any exploitation of vulnerable suspects.'

The following passage from *Codona v. H.M. Advocate* 1996 SCCR 300, at 321 E - 322A (where the Appeal Court had decided that the jury had acted unreasonably in accepting a confession of a fourteen-year-old girl), provides a salutary reminder of precisely the type of police interrogation, which the solicitor is there to prevent:

' ... (I)t is clear from the transcript that the two policewomen engaged in a prolonged cross-examination of the appellant, during which both officers were putting questions to her, often one after the other before answers were obtained. Despite numerous denials that she had kicked the deceased - we have counted nineteen such denials ... - she was questioned repeatedly on that issue. She was told repeatedly that her negative response to these questions was contrary to information in the possession of the police officers. We have the clear impression from what is recorded in the transcript that the

> questioning was designed to persuade the appellant to change her answers and to admit to what was being put to her. In the event it was only at a late stage, more than three hours after the start of the interview, when she had been crying and was clearly at her most vulnerable, that the answers were obtained from her upon which the Crown case depends.
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> The question which lies at the heart of the whole issue about fairness is whether the statements which she made at this stage in the interview were obtained from her under pressure as a result of the police questioning and were not made voluntarily. The police officers cannot be criticised for cross-examining the appellant, especially in regard to what she knew about the part played by the other suspects. But, in regard to her own involvement, their questioning was of such a character as to demonstrate an intention on their part to extract from her admissions about her participation in the assault which she clearly was not willing to make voluntarily. Of particular concern in this case is the length of the interview. This made the process for analysis for the jury unusually difficult.
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> ...
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> When account is taken of the difficulty of analysis and of the age of the appellant, which causes us particular concern in the light of the prolonged police questioning to which she was subjected, we consider that it would not be safe for us to rely on what the jury decided to do in this case in determining whether there was a miscarriage of justice. We are of the opinion, applying our own minds to the manner and detail of the questioning and to all the circumstances, that what happened in this case was unfair to the appellant.'

The admission of evidence obtained as a result of maltreatment with the aim of extracting a confession will inevitably violate Article 6. [7]

<u>Limitations of advice by telephone</u>:

In terms of section 15A(5) of the Criminal Procedure (Scotland) Act 1995 the right to have a private consultation with a solicitor before any questioning of the suspect by the police begins, means 'consultation' by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.

However, a pre-interview telephone consultation (only) with a solicitor is unlikely to amount to <u>effective</u> legal assistance.

Significantly, the right to have a private consultation with a solicitor continues to exists <u>at any time during questioning</u> (section 15(3A)).

Indeed, the unrepresented suspect can subsequently assert that right at any point, despite earlier waiver?

The Law Society of Scotland's initial advice was couched in the following terms:

> 'If the police contact the solicitor of choice on the instructions of the client, the question of attendance is a matter for the solicitor. Solicitors of choice may wish to consider providing advice by telephone, in the event that they are unable to attend the police station in person.' [8]

[7] *Montgomery v HM Advocate* [2003] 1 A.C. PC, per Lord Hoffmann (at p. 649D – E)

However, many members of the profession have expressed concerns that a telephone consultation is not an acceptable or even secure form of communication. [9]

In particular, there may be a failure to guarantee privacy. There is no requirement that the telephone be located in a private area; out of sight; or of the hearing of the custody suite (charge bar). Other police officers not necessarily connected with the enquiry or other suspects might be hovering in the vicinity (which militates against frank talking by a suspect on a sexual offence in particular).

This raises practical difficulties for the giving and receiving of effective advice by telephone, particularly when that is the only option available. [10]

This may not be a truly private consultation. Without proper safeguards, the risk of eavesdropping may not be adequately addressed. [Some police stations use a designated, exclusive mobile phone.]

- The solicitor should remind the 'client' that their conversation may not be entirely private
- The solicitor should have the client first confirm whether there are circumstances of at least apparent privacy
- The solicitor should suggest to the client that he tell the police that he is not content with only a telephone consultation – and that he seeks a consultation with the solicitor in person
- The solicitor should immediately express his discontent with the medium of communication – including in writing, by email or fax

<u>The vulnerable or mentally disturbed suspect</u>:

This situation will be greatly heightened if the detainee has a history of mental health issues; or has other health issues; or is deemed to be vulnerable in any other respect.

The mental state of a person being questioned by the police is an important factor in deciding on the admissibility of what was said in the course of any such interrogation. [11]

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[8] Letter from the Law Society of Scotland to criminal practitioners, 21 June 2010

[9] Peter Nicholson, *Rights under question*, JLSS, 15 Nov 10:

http://www.journalonline.co.uk/Magazine/55-11/1008872.aspx

'Experience shows that these are at best of limited use, as the interview thereafter takes place with only police and the suspect present, and the suspicion of pre-interview pressure still remains.' *Cadder v. HM Advocate: A Harassed Practitioner's Perspective*, Douglas Thomson, SCOLAG, January 2011, 4

[10] Jodie Blackstock and Peter Nicholson, *The Cadder Effect*, , JLSS, 16 August 2010:

http://www.journalonline.co.uk/Magazine/55-8/1008491.aspx

[11] *H.M. Advocate v Gilgannon*, 1983 S.C.C.R. 10; *Higgins v H.M.A.* 1993 S.C.C.R. 542

The special susceptibility of the mentally retarded, in particular, to the giving of false confessions has long since been recognised. They are particularly vulnerable to an atmosphere of threats and coercion – as well as fake friendliness, designed to induce co-operation. A suspect with mental disabilities will generally lack assertiveness and experience diminished self-confidence. In many cases he will have a heightened respect for authority and experience inappropriate self-doubt. This will render him more susceptible to offering a false confession when exposed to active persuasion. If a confession will please, it may be gladly given.

A custodial interrogation will inevitably be a stressful event and suspects with a personality disorder are more likely to have difficulty in dealing with that stress. Extreme personality traits are more likely to manifest themselves during a custodial interrogation.

Much, of course, turns on the nature of the mental disorder. Clearly, something more tangible than depression or anxiety would have to be involved.

Where a detained suspect has a mental health history, best practice dictates that the police should make arrangements for a defence solicitor to be personally present for the conduct of the interrogation; and to check on the suspect's conditions of detention.

For the police to proceed regardless may well be futile. It is submitted that the mentally disturbed or disordered detainee does not have full legal capacity and cannot knowingly and intelligently waive his right to legal representation. [12]

Indeed, as a general proposition, it is submitted that the police should not be interviewing a mentally disturbed suspect [13] – at least not without a legal representative present. The legal representative will be able to challenge the use of inappropriate persuasive tactics.

The basic test to be applied is well-settled by reference to *Brown v HM Advocate*, 1966 S.L.T. 105, *per* Lord Justice General Clyde at p 107:

> 'It is not possible to lay down *ab ante* the precise circumstances in which answers given to the police prior to a charge being made are admissible in evidence at the ultimate trial or where they are inadmissible. This is so much a question of the particular circumstances of each case and those circumstances way infinitely from one another. But the test in all of them is the simple and intelligible test which has worked well in practice – has what taken place been fair or not?' [14]

This test should never become a formality, especially where a suspect, due to age or mental impairment or other disability may be vulnerable under police questioning. [15]

It is fundamental that a vulnerable suspect continues to obtain legal assistance <u>during</u> police questioning – and not merely before it. In particular, it is submitted that it is not sufficient for a suspect with a background of psychiatric disturbance to have limited legal assistance confined to only

[12] See *Miranda v Arizona*, 384 U.S. 436 (1966)

[13] *H.M. Advocate v Gilgannon*

[14] This passage was cited in *Codona v HM Advocate*, 1996 S.C.C.R. 300. See also *Miln v Cullen*, 1967 J.C. 21

[15] *Codona v HM Advocate*, 1996 S.C.C.R. 400

a short, pre-interview telephone consultation with a solicitor. Properly, arrangements should be made for a 'vulnerable suspect' to have a solicitor personally present for the conduct of his custodial interrogation.

Accordingly, it is submitted that in the circumstances of a vulnerable suspect, particularly with a psychiatric history, consultation by telephone (only) may not always be appropriate. [16]

As such, the defence solicitor requires full (and perhaps repeated) access to the client to gauge something more of the client's mental state; and provide effective assistance at a time of acute vulnerability, stress and uncertainty. [17]

In short, arrangements should be made that a defence lawyer visits the suspect; and possibly intervenes or communicates with other necessary persons (such as medical professionals, if appropriate).

Instruction of Counsel:

This may be a consideration in a murder investigation and agents could make representations to the Board for the employment of Senior Counsel.

It might also be a consideration where Revenue Officers wish to interview the well-healed client.

It should be remembered that there may be exceptional cases where silence could be regarded as too cautious a tactic. The trick, of course, is to identify what exactly those exceptional cases are. Such a serious strategic or tactical call should preferably be taken by the trial Counsel.

That said it is difficult to see how a solicitor could ever be accused of defective representation or professional misconduct or negligence by counselling silence. Though there may be circumstances where, if, after the fact, the high-risk strategy of talking has paid off, it would be regarded as the optimum representation.

Waiver by suspect:

Matters should be governed by *pro forma* – the 'ACPOS Solicitor Access Recording Form' (SARF). [18]

[16] There are no recognised criteria within mental health practice, which would define a 'vulnerable suspect'. However, in the absence of a statutory or other legal definition of what exactly a 'vulnerable suspect' is, reference is made to the relevant statutory test for a 'vulnerable witness'. This is found at section 271 of the Criminal Procedure (Scotland) Act 1995: *viz*., that there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003); or fear or distress in connection with giving evidence at the trial.

[17] *HM Advocate v Sonja Wilson,* Glasgow Sheriff Court, 1 December 2010

[18] This is available in the *ACPOS Manual of Guidance on Solicitor Access*, January 2011, at Appendix B

It might be expected that by simply following this *pro forma*, the police should not overlook informing the suspect of the new statutory right of access to a private consultation with a solicitor before questioning (at section 2).

If the suspect does not wish to exercise this right, the police should then have him sign an express waiver of their right, prior to questioning (at section 3).

Indeed, the police should at this point be reminding the suspect that he is not prevented from changing his decision at a later stage.

In terms of the Police's own Guidelines, whenever a suspect's status changes; for example, from voluntary attendee to detainee, or from detainee to arrest, they must be reminded of their rights in relation to solicitor access. [19]

The police may only tell the suspect of his right to a telephone consultation if he has first exercised his right to a private personal consultation. However, the Scottish *pro forma* does not make it clear that the right includes the right to speak with a solicitor on the telephone. It is set out in such a way that if the suspect has waived his right to a consultation, the police could easily 'forget' to inform him about his right to a telephone consultation. Significantly, the suspect may only have waived his right because he has erroneously assumed that the police meant a private face-to-face consultation, and he may be reluctant to wait for his solicitor to arrive, and possibly spend the next 12 hours in police custody. The police should be making it clear to the suspect that he could equally exercise his right to an immediate or early telephone conference with his solicitor.

Further, the Scottish *pro forma* does not make provision for the suspect to give reasons for waiving his rights. [20]

In these circumstances, it could be argued that the waiver is not fully informed.

Practitioners should be wary of a police tendency to now dispense with 'dawn raids' altogether and instead detain and conveniently process a suspect at about 9.55 am on a business day - just as solicitors are stepping into court. It may well be that the suspect is pressurised, in a very passive sense, into waiving his right to even a telephone consultation, because the police tell him (correctly) that the solicitor may not be free until much later in the day.

The defence might focus on the chronology of police procedures in challenging the admissibility of a confession extracted in such circumstances.

Properly, the waiver should be knowing and intelligent. A vulnerable or mentally disordered suspect may not have the capacity to waive his rights.

It might well be that the waiver has been involuntary in the sense that police misconduct has caused the suspect to waive his rights.

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[19] *ACPOS Manual of Guidance on Solicitor Access*, January 2011, at paragraph 3.5.2

[20] This is in marked contrast to PACE Code C, which provides, at paragraph 6.5, that if the detainee declines to speak to a solicitor in person, the custody officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right the officer should ask them why and any reasons should be recorded on the custody record or the interview record as appropriate. However, the detainee is not obliged to give reasons for declining legal advice and should not be pressed to do so (PACE Code C Note for Guidance 6K).

What pre-conditions should the solicitor insist upon?

On arrival at the Police Station, the solicitor should not be kept waiting. He should insist on immediate access to his client – the reason being that while interrogation should not have commenced (or should have been suspended if the suspect has asserted his right mid-interview) pending his arrival, the client could still do damage, by making a 'voluntary' statement during the intervening wait.

In terms of section 15A(8) of the Criminal Procedure (Scotland) Act 1995 [21] and the Police's own Guidelines [22], it is only in exceptional circumstances that the right to private consultation should be delayed.

In the absence of any compelling reasons, it could conceivably be argued that delay amounts to a contempt of court (see below).

Private consultation with client – of adequate duration:

The right to have a private consultation with a solicitor exists before any questioning of the suspect begins, and at any other time during such questioning – Criminal Procedure (Scotland) Act 1995, section 15(3A), (as recently and reluctantly amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010).

However, section 15(7A) and (8) allows for questioning to take place without a private consultation where: 'it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders' and in 'exceptional circumstances'. Remarkably, this decision need only be taken by a constable.

In England there have only been very rare circumstances where such a restriction has been accepted by the Court. Properly, the police could only ever justify denial of the right of access to a solicitor by reference to specific circumstances involving evidence about the person detained or the actual solicitor involved. [23] Inadvertent or unwitting conduct apart, the police officer must believe that a

[21] As inserted by section 1(4) of the Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010

Section 15A(8) provides:

> 'In exceptional circumstances, a constable may delay the suspect's exercise of the right under subsection (3) [the right to have a private consultation with a solicitor] so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.'

[22] See the *ACPOS Manual of Guidance on Solicitor Access*, January 2011, at paragraph 3.3.2:

> 'It is only in exceptional circumstances that this right may be delayed and only in so far as necessary in the interests of the investigation or the prevention of crime or the apprehension of offenders that questioning of a suspect can begin or continue without the suspect having been provided a private consultation with a solicitor requested by them.'

[23] *R v. Samuel*, [1988] Q.B. 615, 87 Cr.App.R. 232, CA

solicitor would, if allowed to consult the person in police detention, thereafter commit a criminal offence and that, to sustain such as basis for refusal, the grounds put forward would have to be by reference to a specific solicitor. [24] Only rarely could a police officer genuinely be in such a state of belief. [25] It would be very difficult to justify consultation with the duty solicitor being delayed. [26]

It would be naive to assume that the police would never ever resort to electronic eavesdropping in sensitive cases. Unfortunately, though that would entail a breach of legal professional privilege, lawful intrusive surveillance – it would still be compliant with the human rights black hole, which is RIPSA – requiring only the retrospective sanction of a senior police officer – and not an independent judicial check. [27] So how paranoid (or fully in possession of the facts) does the solicitor have to be, in order to resort to counter-surveillance measures? I do not really know – but the solicitor should admonish his client to be suitably circumspect in what he says at this stage.

Further, the solicitor should also advise his client that if at any stage during his interview he wants legal advice, he should request that the recording device be turned off and a private consultation arranged.

It should be remembered that the appropriate adult is not subject to legal professional privilege and he should be excluded from consultation with the client.

Pre-interview disclosure:

It is the Crown who has the duty of disclosure – and not the police. [28] That said it is never too early to ask for disclosure.

The solicitor should ask the reporting officer to provide him with a briefing in advance of the interview. The reporting officer is not obligated to do so, but he might be convinced that it is in his interests to do so – this being the first chance to persuade the suspect how hopeless his predicament is

[24] *R v. Silcott, Braithwaite and Raghip*, The Times, December 9, 1991 (91/4944/SI; 91/4945/SI; 90/5920/SI

[25] *R v. Samuel* at pp. 626, 242

[26] *R v. Alladice*, 87 Cr.App.R. 380, CA, per Lord Hodgson J.

[27] It is submitted that if any such violation of legal professional privilege were established that would found the basis for a plea in bar of trial on the ground of oppression, notwithstanding RIPSA compliance: following *R v Derby Magistrates' Court, ex p B* [1996] AC 487. Privilege extends beyond a mere evidential rule, being regarded as a fundamental principle of justice (see above). It is absolute, in the sense that it may not be weighed against a countervailing public interest factor.

[28] In *R v Farrell* [2004] EWCA Crim 597, it was it was recognised that the police need not in effect 'show their hand'.

In *Ward v Police Service of Northern Ireland* [2007] UKHL 50, Lord Bingham held:

> 'But there is no rule of law which requires the police to reveal to a suspect the questions that they wish to put to him when he is being interviewed. Nor are they required to reveal in advance the topics that they wish to cover, even in the most general terms, in the course of an interview. In some cases providing these details in advance will not prejudice their inquiries. But in others it may well do so. This is a judgment that must be left to the police. The interview must be conducted fairly. But advance notice of the topics to be covered is not a pre-requisite of fairness.'

and why he should be pleading guilty. [29] Ideally, when the police have done their job right, they should be holding all the cards. If those cards are good, there is little reason not to show them early, and convince the defence to fold. It saves everyone the expense and burden of litigating a case that ought to just plead out. Meanwhile, if those cards are not so good, then fairness requires that they should still be shown.

Further, the lack of disclosure increases the likelihood of a 'no comment' interview, or of the interview being repeatedly interrupted that the solicitor can provide further guidance to the suspect when unexpected questions arise. [30] Does the reporting officer really want a 'stop-start' interview?

The failure of the police to comply with any defence request for disclosure from the defence can be subsequently exploited in cross-examination.

- The solicitor should ask the investigating officer for disclosure of the matters to be discussed in the interrogation – that he can properly advise his client. [31]
- Witness statements – these can be suitably redacted (or censored) so far as witness addresses are concerned.
- In the absence of witness statements, there is no reason why resort should not be had to excerpts from police notebooks (again, redacted if necessary).
- Copy or sight of the custody record
- Police Surgeon's report
- Post-mortem report
- The solicitor can ask to view any real or documentary productions, which the police have seized.
- Copy of the Search Warrant and Application or Petition [32]

Vulnerable suspects:

The client might be vulnerable due to age; mental disorder or disability; a difficulty in understanding English; or a hearing or speech disability. [33]

[29] If in future it transpires that an adverse inference can be drawn from silence, the fact of early disclosure provides less justification still for reticence.

[30] See the *ACPOS Manual of Guidance on Solicitor Access* at paragraph 14.1.7

[31] http://www.glasgowbarassociation.co.uk/media/21456/preinterview%20disclosure%20ipcc%20guidance.pdf

[32] It should be remembered that there is now a three week time limit for challenging a Search Warrant in summary prosecutions (section 191A of the 1995 Act, as inserted by section 7(3) of the Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010). Accordingly, this cannot be sought out too soon.

Whether a person may be suffering from a 'mental disorder' (within the meaning of the Mental Health (Care and Treatment)(Scotland) Act 2003) is essentially a medical question.

It should be remembered that learning disability can be a form of mental handicap – and, as such, is a relevant 'mental disorder', impacting on fitness to plead. [34]

The relevant legal issues are the detainee's fitness to plead; witness competency; and witness vulnerability. [35]

Of course, not all mental disorders will render a detainee unfit to plead; or incompetent; or vulnerable.

However, the police are not medically qualified, such that they might be entitled to make that kind of judgment.

Nor is the solicitor – but he does have professional instincts. The solicitor should ask himself whether he would feel comfortable calling his client as a witness at that particular point in time.

If not, the solicitor should make representations that his client is properly assessed by an appropriately qualified medical professional.

The solicitor should be wary of a police surgeon's credentials to conduct such an assessment. A police surgeon is employed by the police – primarily, to recover forensic evidence from the suspect. He may not have the relevant qualifications to make an informed psychiatric evaluation – or to assess mental handicap in particular.

Properly, these are matters for a suitably qualified expert in forensic psychiatry or psychology.

Findings of 'fitness to be detained' (whatever that might mean); or of 'fitness to be interviewed' (which is not legally defined as such) – the criteria, which police surgeons invariably invoke — are not necessarily determinative of these issues.

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[33] *The Law Society (of England and Wales) Criminal Litigation Accreditation Scheme, Standards of competence for the accreditation of solicitors and representatives advising at the police station*, February 2011

This is available at:

http://www.lawsociety.org.uk/new/documents/accreditation/criminallitigation_standardspolicestation.pdf

[34] The position in England and Wales is instructive: section 77 of the Police and Criminal Evidence Act 1984 provides additional safeguards for those who suffer from a mental handicap (see *Archbold: Criminal Pleading, Evidence and Practice 2011* at paragraph 15-370).

The term 'mental handicap' is defined as applying to any person who is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.

The test to be applied is an objective one. The court should consider medical evidence as to the actual mental condition of the suspect. The disorder must be of a type which might render a suspect's confession unreliable and there must be a significant deviation from the norm.

In addition, there must be a history of making admissions, which point toward, or explain the abnormality of mind suffered by the suspect and are not solely based on a history given by the suspect (see *Archbold* 15-368).

[35] See the test identified in the above footnote, involving extension, by analogy to the test for a 'vulnerable witness'

Meanwhile, the prosecutor has a duty under section 52(1) of the 1995 Act to bring before the court evidence of the mental condition of the accused if it appears to him that the accused is suffering from mental disorder. This statutory duty has been placed on the prosecutor for the protection of the accused – and not as an element of the Crown's investigation in furtherance of its case against the accused. [36]

However, it should be remembered that the psychiatrist, who has been instructed by the Crown, will be looking at matters from a Crown perspective. Properly, the defence should be sourcing its own independent expert at the earliest possible opportunity.

- The solicitor should make representations that the duty psychiatrist is summoned.
- He should seek reasons for any refusal by the police or police surgeon to comply with any such request.
- The solicitor should directly contact the Procurator Fiscal and request that he complies with his statutory duty (under section 52(1) of the 1995 Act)
- The solicitor should ask the police to obtain guidance from the Procurator Fiscal, if they are not prepared to accede to the representations of the detainee's solicitor.
- The solicitor should remind the police of the prosecutor's duty in such circumstances.
- Remember the police can in exceptional circumstances obtain an extension of the detention period, up to 24 hours. This is precisely such an exceptional circumstance.
- The solicitor should instruct a suitably qualified defence expert in forensic psychiatry and/or psychology. Such an expert will be involved at some point, anyway. There is no reason to delay. If there is any suggestion of a defence involving mental disorder (whether preliminary or substantive), the evaluation should be undertaken at the earliest possible opportunity.
- The solicitor should attempt to obtain funding from the Board. Even if unsuccessful, it is preferable that the solicitor is at least on record as having tried anyway.

The solicitor is there to provide the client with advice before the police embark upon the 'interview'. Strictly, there is no obligation as such on the solicitor to remain and participate in the interview. There might be a reluctance to do so, because if anything unfair happens at the interview, the solicitor will be deemed to have acquiesced in that.

However, the client expectation might be that the solicitor remains. This is when he really does need his lawyer.

<u>Don't be marginalised</u>:

[36] See the Annotated Statues

The imperative to provide practical and effective assistance means that the solicitor should not allow the police to completely control the interview environment. He should resist attempts by the police to stick him in the corner of the interview room, physically and psychologically distanced from his client. By insisting that he sit immediately beside his client, the solicitor provides him with vital professional support. The solicitor should also be careful to ensure that he can sit where the tape will pick him up.

After all, the solicitor sits immediately beside his client at committal proceedings – during a judicial examination – so, what exactly is different here?

The solicitor can suggest that he will be making his own audio or video recording – from his own mobile phone – on the basis that he can have this transcribed sooner.

The 'chargeable suspect':

It could be argued that, in consequence of the *Cadder* judgment, there has now been a reversion to the position in terms of *Chalmers v H.M. Advocate* (1954) – and that, properly, the 'chargeable suspect' should be regarded as out of bounds.

Per Lord Justice General Cooper:

> 'When the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded.'

Accordingly, the solicitor could insist that the police refrain from questioning altogether and simply charge the 'chargeable' suspect.

This would be a pertinent consideration if the police already proceeded by way of a Petition Warrant or have obtained a Search Warrant (having presumably told the Sheriff that there were reasonable grounds for suspicion).

That said there is some purpose, if suitably confident in the client's reticence, in the solicitor sitting back and ascertaining something of the strength of the case against his client. This is the time to gather information (albeit not to give it away: see below).

Oppressive questioning:

The solicitor should remember that he is now effectively at trial – in so far that what transpires during the custodial interrogation may be led in evidence at trial. [37]

[37] See *R v Howell* [2003] EWCA Crim 1; *Can v. Austria,* No. 9300/81,12 July 1984, A 96

It is not the job of the lawyer to help the police ensure that what transpires at interview is admissible. Nothing renders any statement, which his client makes more reliable still, than his solicitor acquiescing in the interview procedure, notwithstanding that it might be inherently unfair.

Accordingly, the solicitor should interject where appropriate.

Indeed, it is submitted that the solicitor is perfectly entitled to tell his client: 'Don't answer that!"

The solicitor should be seeking an interview model in which the police ask the suspect in a respectful voice to respond to a series of relevant, fairly framed questions, based on the available evidence. [38] [39]

For example:

> 'Mr B, it has been alleged that on X date, at locus Y, you killed Z.
>
> Witnesses A and B claim to have observed the killing.
>
> Did you kill the victim?
>
> If so, why?

Meanwhile, where applicable, the lawyer should be permitted to object to the form of the question, its relevance, and so on. The solicitor should ensure that his professionalism is put on the record.

He should also be permitted to confer with his client after each question is asked: in private, if necessary.

In England and Wales, the challenging of police questioning, is not deemed to be a sufficient ground for exclusion of the solicitor from the interview. [40]

- The solicitor should respond to any attempt by the police to undermine a decision by the suspect to exercise his right to silence.
- The solicitor should object at once to insulting, aggressive or hostile questioning [41]
- Object to repetitive questioning [42]

  The suspect will have already provided the police with details of his name, address, date of birth, place of birth and nationality. [43] Accordingly, there would appear to be little purpose in

[38] It should be remembered that historically, the interrogation of suspects was the function of the Sheriff – and not the police.

[39] What is described as the so-called Judicial Model: see *Is There a Right to Remain Silent*, Alan M. Dershowitz, 2008, at p. 160

[40] PACE Code C Note for Guidance 6E

[41] *Codona v. H.M. Advocate* 1996 SCCR 321 E-G

[42] *Codona v. H.M. Advocate*

[43] As required by section 13(1A) of the 1995 Act

the police repeating these standard or routine booking questions at the outset of the interview, other than to presumably condition the suspect into obediently answering questions.

- Object to irrelevant questioning

  This would include 'bad character' discussion – such as previous record or mention of people that the suspect has met in prison.

- Object to police accounts of anonymous witnesses [44]

  The solicitor should use this opportunity to seek disclosure or some specification of their identity.

- Object to compound questions or 'double questions':

  These questions are inherently unfair because a perfectly honest person may give a bad impression because he cannot answer directly – but has to instead enter an explanation. The solicitor might suggest that the police limit themselves to one fact per question.

- Object to police 'questioning', which usurps the function of the court and goes to the ultimate issue. [45]

  For example, if a 'question' is formulated in such a way to reflect police disbelief at a statement of the client.

- Object to police speech-making:

  The solicitor should politely remind the police that they should not be making statements or giving 'evidence', but should be confining themselves to asking questions.

  Long and involved questions will confuse the suspect. They may lead to an incomplete answer and create an unjustified bad impression.

- The solicitor should not allow the police to misstate the law without contradiction. For example, if the police were to state that it will help the detainee if he were to give his side of the story.

- Object to hypothetical questions. The suspect is not an expert witness and it is not appropriate for him to speculate.

- Object to leading questions where a suggestible or vulnerable suspect is involved.

- Object to any police enquiry about matters, which are subject to legal professional privilege [46]

[44] It is a fundamental principle of justice that the accused knows who his accusers actually are. Until recently, British courts had not used anonymous witnesses since the Star Chamber. With faceless witnesses how can the accused check that they are not nursing some grudge against him or otherwise have an interest in securing his conviction. Anonymity is a perjurer's dream. Without knowing the identity of the complainers there is no way that their 'evidence' can be properly scrutinised. Without this disclosure, the accused will not have a fair hearing.

[45] Under reference to *Haq v. HM Advocate*, 1987 S.C.C.R. 433; *AB v. CD*, 1848 11D 289; and *King v. King*, 1842 4D 590

[46] *HM Advocate v Parker*, 1944 J.C. 49; *Renton and Brown* at paragraph 24 – 55

- Indeed, object to protracted questioning and the length of time taken by the interview, particularly with regard to the age or vulnerability of the suspect [47]

Firms of solicitors might consider writing the Procurator Fiscal and the Chief Constable (or senior officer locally), making 'suggestions' as to what exactly their expectations are with regard to the conduct of custodial interrogations. In doing so, they have to naturally acknowledge that while these can hardly be absolute requirements applying in every single case, there would have to be compelling reasons to justify the investigating officers exercising their discretion to the contrary.

A local faculty might wish to broker some form of protocol or guidelines with the senior police officer locally. Clearly, a collective deputation might have greater weight.

There may be some purpose in having any such representations approved by the Law Society or the Glasgow Bar Association – though any such initiative need hardly wait on prior clearance.

It should always be remembered that the police cannot really conduct the interview where the suspect has requested a solicitor, without the solicitor present. Further, if the police blunder on by summoning a substitute solicitor, a solicitor accepting police 'instructions' in such dubious circumstances, might be hesitant to become involved, standing the risk of a professional misconduct complaint. [48]

What happens if the police are obstructive?

By his continued presence, there is a real risk is that the solicitor actually cures the very unfairness, which he has been trying to prevent, and thus acquiesces in a coercive or tainted interrogation.

Beggs v Scottish Ministers [2005 CSIH 25]

R v Derby Magistrates Court, ex parte B [1996] AC 487 at 507; [1995] 4 All ER 526 at 540–541the then Lord Chief Justice, Lord Taylor said:

> "The principle which runs through all these cases, and many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests…. . Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms…. Whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched."

Article 6(3)(c), ECHR: *Campbell and Fell v United Kingdom*, A 80 (1984) 7 EHRR 165; *Goddi v Italy*, A 76 (1984), 6 EHHR 457; *Can v Austria*, A 96 (1985)

AM & S Europe Limited v Commission of the *European Communities* [1982] ECR 1575; 1983 Q.B. 878

[47] *Codona v. H.M. Advocate*

[48] Article 5 of the *Code of Conduct for Criminal Work* – see above

The commercial dilemma for the solicitor is that the police will simply contact a substitute solicitor. They have no interest in the professional niceties involved. Compliance with the *Law Society Code of Conduct for Criminal Work* is no concern of theirs. They know that this is the solicitor's weak spot. The eagerness to retain the client – and avoid the impression of abandonment – is an understandable commercial impulse. But a cut-off point would surely be reached if the police actually tried to prevent the solicitor from intervening and making objections to inappropriate procedures or questioning. Then it would have to be asked: what exactly is the point of the solicitor being there?

The solicitor must be satisfied that he can continue to provide practical and effective assistance. That is the substance or essence of the Convention right under Article 6.

In particular, it is stated in Article 1 of the *Law Society of Scotland's Code of Conduct for Criminal Work*:

> 'No instructions should be accepted in circumstances where those instructions are subject for whatever reason to restrictions or constraints which compromise the solicitors freedom to give appropriate independent legal advice.' [49]

Accordingly, if the police are restricting or constraining the solicitor in his ability to provide effective representation, the solicitor need not remain. If, by their conduct, the solicitor considers that the police are denying the detainee of his Convention right to practical and effective legal representation, it is submitted that the solicitor's decision to depart and dissociate (as distinct from actually withdrawing from acting) could hardly be professionally impugned: quite the contrary.

It might well be a concern that the police would then prevail upon the unrepresented suspect to waive his right to representation – and that in not preventing the taking of a coerced statement from the 'abandoned' client; the solicitor is culpable of defective representation.

If the police throw the solicitor out of the interview room, the accused has not waived his right to legal representation. It is submitted that if a detainee has invoked his right to legal representation, he cannot subsequently waive that right, not at least without his solicitor actually being present.

If a new solicitor breaches Article 5 of the Code of Conduct and accepts instruction that does not necessarily render evidence of any ensuing interview inadmissible.

[Because something is unethical does not mean that it is inadmissible. Professional ethics and the rules of evidence are not one and the same.]

However, the police approaching a new solicitor would not be without its complications:

If legal aid advice and assistance has already been provided to the original solicitor, the new solicitor will have to make representations to the Board to transfer the certification. A new solicitor might be reluctant to act in such circumstances, clearly unremunerated, in a state of legal aid limbo, until such time as actioned by the Board?

[49] http://www.lawscot.org.uk/members/member-services/a-to-z-rules--guidance/a---f/code-of-conduct/code-of-conduct-for-criminal-work

Meanwhile, the original solicitor would be entitled to resist the transfer application on the basis that a change of agency has been effected in circumstances, which have been tainted by professional misconduct.

Ultimately the decision for the solicitor to stay or go involves a complex balancing exercise in which much will turn on how experienced or vulnerable the client actually is.

Certainly, the solicitor should be careful to anticipate and canvass such a controversial strategy with his client in advance, and assure him that he is not being left in the lurch by a dramatic exit. The solicitor should ensure that the client is suitably briefed as to what this tactic is intended to achieve - lest the client is left with the impression that he has simply been abandoned when at his most vulnerable.

Contempt of Court:

Since the detainee has a right to legal representation of his own choosing, any obstructive police conduct, which is designed to engineer the removal of his chosen solicitor, or is intended to frustrate the exercise of the detainee's statutory and Convention right to practical and effective legal representation – in short, wilful defiance of an officer of the court – is arguably on attack on, or contempt for the integrity of the criminal trial process; and is conduct, which is calculated to prejudice the administration of justice; and amounts to an indirect contempt of court. This is a form of disturbance, which effectively impedes the functionality of the court.

From the moment of arrest, the suspect is under the care and protection of the Court. Relevant proceedings have commenced, so as to bring into play the contempt jurisdiction of the Court.

Depending on the day and time, the solicitor could immediately refer his problem to the Sheriff. The obvious difficulty is that there may as yet no live court process such as to engage the Sheriff. Nonetheless, it could be argued that criminal court proceedings are now active. [50] The granting of a Petition Warrant or Search Warrant would be eloquent of a live court process.

[50] Contempt of Court Act 1981, Schedule 1, paragraph 4:

> 'The initial steps of criminal proceedings are:—
>
> (a) arrest without warrant;
>
> (b) the issue, or in Scotland the grant, of a warrant for arrest;
>
> (c) the issue of a summons to appear, or in Scotland the grant of a warrant to cite;
>
> (d) the service of an indictment or other document specifying the charge;
>
> (e) except in Scotland, oral charge.'

See *Hall v Associated Newspapers Ltd*, 1978 S.L.T. 241, where it was held that from the moment of arrest (or the moment when the Warrant to arrest is granted, the person concerned is under the care and protection of the court. At either of those points, relevant proceedings have commenced, such as to bring into play the contempt jurisdiction of the court.

However, this proposition, involving, as it does, a rather expansive approach to the meaning of contempt of court, remains as yet untested. [51]

Certainly, the solicitor should ensure that his protest is a matter of record – both on tape and in the relevant police *pro forma.*

Resort could also be had to civil remedies – such as interdict – though it is appreciated that this is fraught with funding difficulties.

That said I would provide a note of caution. This is experimental legal territory in Scotland and the precise parameters have still to be established.

- The solicitor should put his protest on record – on tape – expressed in a speedily-delivered opening statement.
- He should state that he has made (repeated) requests for information/disclosure – but that the police have refused to comply – without giving (adequate) reasons for their denial. The request should be repeated.
- The solicitor should invite the police to have his request considered by a senior officer or the Procurator Fiscal.
- If rebuffed, the solicitor should again seek reasons.
- The solicitor could make representations to the police in writing – remembering to bring headed note paper for precisely this type of exercise.
- Modern technology such as an *Iphone* can also be utilised.
- The solicitor could take his complaint to the Sheriff.

Consultation with client

What should the solicitor's advice be?

'Don't Talk to the Police' (or anyone else for that matter):

It may be trite to say that the professional imperative is to tell the client to exercise his right to silence.

To begin by saying to a client: "If you are guilty, you should tell the police all about it," is hardly legal advice. It is a moral view, which the client may not share and it is of no legal assistance to the client. Confession might be good for the soul, but it is seldom advantageous in the legal world. Most suspects end up worse off for unburdening themselves by admitting what they have done as soon as they are arrested. What the client 'ought' to do is a completely separate question from advising him as

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It is a moot point whether detention is a relevant initial step. Certainly, if the police have handcuffed the suspect that would hardly be consistent with only a voluntary attendance and a case could be made for arrest.

[51] Of course, the objectionable conduct can take place out with the precincts of the court.

to the legal consequences of his options. It is about those options and consequences that the client needs the solicitor's advice. It is really an abuse of his position as legal advisor, for the lawyer to impose his moral views on the client. If he thinks his client needs absolution he should be directing him to a clergyman. The truth will not set him free!

Mr Zuss-Amor, the barrister in Colin MacInnes' fifties London novel *City of Spades*, dispensed the following timeless advice:

> 'If you want to know the fruits of my experience ... I'll give you these three golden rules. Never accept trial by magistrate, unless it's a five-shilling parking offence, or something of that nature. Never plead guilty – even if the Law walks in and finds you with a gun in your hand and a corpse lying on the floor. And when you're arrested, never, never say a word, whatever they do, whatever they promise or threaten – that is, if you have the nerve to stick it out. Always remember, when they've got you alone in the cells, that they also have to prove the case in the open light of day. Say nothing, sign nothing. Most cases, believe me, are lost in the first half-hour after the arrest.
>
> You mean if you make a statement to them?
>
> Exactly. Tell them your name, your age, your occupation and address. Not a word more. Even then, they may swear you did say this or that, but it's harder to prove you did if you've signed nothing and kept your trap shut.' [52]

The use of silence as evidence:

The Crown should not be allowed to exploit a 'no comment' interview at trial. Silence is not evidence of anything. It is just an absence of evidence. If the suspect has said nothing, then, properly, the interview can have absolutely no probative value. While it may not be strictly correct to say that no legally significant event will have occurred, because the police will have at least charged the suspect; in the absence of any response to that charge, that will not have been an evidentially significant event. Accordingly, there is no justification for the Crown insisting on leading evidence of an interview in which no evidentially significant event has occurred. [53]

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[52] Now, of course, there is an additional statutory requirement on the suspect to provide his place of birth and nationality (Criminal Procedure (Scotland) Act 1995, section 13(1A))

[53] Under reference to *Nyugen v. HM Advocate*, 2008 S.C.C.R. 825

The *Carloway* Review might well result in there being evidential consequences if a suspect remains silent: such that the Court could take into account any inference from a suspect refusing to answer questions, in accordance with the approach in England and Wales.

[*Access to Legal Advice in Police Detention: Consequences for Law and Practice*:

http://www.scotland.gov.uk/News/Releases/2010/11/18123816

http://www.bbc.co.uk/news/uk-scotland-13004941]

The right to silence is narrower in England and Wales. The position presently is that the Court or jury may not draw an adverse inference from the exercise of the right to silence. There is no Scottish equivalent of the rider or caveat, which appears in the English police caution:

> 'You do not have to say anything, but it may harm your defence if you do not mention when questioned something, which you later rely on in court.'

Other, that is, than to prejudice the jury, who will, in defiance of all notional instruction to the contrary, assume that the client has been evasive and has had something to hide by that (regardless of efforts to spin that he has been the hapless 'victim' of the instructions of his legal adviser).

It is submitted that the use of 'silence as evidence' constitutes a breach of the Convention right of the accused against self-incrimination (and the right to not answer any questions) in terms of Article 6(2), ECHR. [54]

Selective silence:

Blanket silence is preferable to only selective silence. Where the suspect invokes selective silence at the most sensitive phase of police questioning, the Crown will naturally attempt to lead evidence of the entire interview, including passages where selective silence has been invoked. This should be resisted – but while it can be argued that the Court should exclude those passages where the privilege has been invoked, it might be more difficult to persuade it to do so where a policy of only selective silence has been adopted.

It is submitted that the solicitor should always provide the suspect with advice as to the desirability of exercising his right to silence:

In *Condron v United Kingdom* (2001) 31 E.H.R.R. 1, the European Court held that the judge's directions had failed to strike the balance required by Article 6. The jury should have been directed, as a matter of fairness, that if the applicants' silence at interview could not be attributed to their having no answer, or none that would stand up to cross-examination, then no adverse inference could be drawn.

If the English approach – that an inference can be drawn – were ultimately adopted, it should be remembered that it is nothing more than that (*Cadder*). Silence cannot provide substantive evidence. It should always be remembered that client 'indiscretion' is likely to weigh more heavily in the balance.

In any event, the client will be able to explain away his silence is on legal advice.

Significantly, cute English police investigators provide up-front disclosure, to prevent the defence from arguing that the suspect's silence is the *quid pro quo* of non-disclosure.

[54] See *Condron and Ors v United Kingdom*, May 2, 2000, 31 E.H.R.R. 1

The European Court considered that there had been a denial of fair hearing. During an interview with police, the applicants, who were suspected of drug-trafficking, had refused to answer questions, on the advice of their solicitor, who considered that they were not fit to do so, as they were suffering from withdrawal symptoms. This explanation was put to the jury, who were given an option of whether to draw an adverse inference from the applicants' failure to explain what had been taking place as a police surveillance team had observed them passing certain items to other individuals. Although the Appeal Court had criticised the trial judge's direction to the jury, it had nevertheless considered that the convictions were safe. However, the Court reiterated that particular caution is required before an accused's silence can be invoked against him, since basing a conviction wholly or mainly upon an accused person's refusal to answer a question would be incompatible with the Convention. Here, the applicants had advanced an explanation for their refusal to answer questions. The particular charge to the jury, however, had left the jury free to draw an adverse inference were it to have been satisfied that the explanation was plausible: rather than instructing it to refuse to draw any such inference in such a situation. Since juries did not give reasons for their decisions, it was impossible to ascertain what weight had been given to the refusal to answer questions, and accordingly there had been a violation of Article 6(1).

> '[A] person being questioned by the police is in a position of disadvantage. He is unlikely to be properly aware of the legal intricacies of the situation, to understand, for example, the legal concept of intent or the desirability of exercising his right to silence, or to know what the penalty is likely to be for the offence of which he is suspected. Only an experienced lawyer can give him this kind of information and advise him how best to proceed. In the interests of justice he should always have that advice, unless he chooses to forgo it.' [55]

U.S. Supreme Court Justice Robert H. Jackson (a career prosecutor) commended:

> '[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.'[56]

Indeed, the failure to dispense such advice would not represent a reasonable exercise of the discretion which a defence lawyer has in the conduct of the defence. It might well be regarded, in *Anderson* terminology, as: 'contrary to the promptings of reason and good sense'. [57]

<u>There is no way it can help</u>:

The detainee cannot talk his way out of being charged. After all, have you ever seen someone give 'their side' of the story – and do so? Once? Ever? Can you think of a single case in which you have looked back in hindsight and thought: 'Thank goodness, my client talked to the police!'

You may have watched British police procedurals where the defence brief sits silently as the suspect delivers up his story. However, that is only so that things can work dramatically, where the lawyer is an extra, peripheral to the story. You will not have heard or seen a high-profile case or legal thriller where some big-shot lawyer has advised their client to waive their right to remain silent and talk to the police?

But you may have seen detectives become frustrated, because they may not have had quite enough evidence to bring a charge – figuring that a few minutes talking with a person might just give them enough to proceed – and then find themselves dead-ended by the person's refusal to say anything. So the moral of the story is to make sure your client understands the need to exercise his right to remain silent. Solving a crime is the job of the police, not the person being investigated.

<u>The client cannot give an account, which will help him at trial</u>:

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[55] The conclusions of the Royal Commission, reporting in 1980 on *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* – cited in Jodie Blackstock and Peter Nicholson, *The Cadder Effect*, J.L.S.S., 16 August 2010

This is available at: http://www.journalonline.co.uk/Magazine/55-8/1008491.aspx

[56] *Watts v. Indiana*, 338 U.S. 49 (1949)

[57] See *McIntyre v H.M. Advocate*, 1998 S.C.C.R. 379, at 388E-G, citing Rougier J in *R v Clinton* [1993] 2 All ER 998

If the loquacious detainee does not ultimately give evidence; and the Crown decides against playing the tape or leading evidence of the interview (because it might not be in their interests to do so), then the self-serving or exculpatory aspect of his account will be excluded as objectionable hearsay. [58] In such a case there is, legally, no point in his giving the police a statement, as it could only be used as evidence against him – but it cannot be used for him!

Even if your client is innocent, and denies his guilt, and mostly tells the truth, he can easily get carried away and tell some little lie or make some mistake, which will hang him. [59] Being caught out in a single lie can be devastating. [*Falsus en partes, et falsus en omnia* ('False in part, false in all').]

Even if your client is innocent, and only tells the truth, he will always give the police some information, which can help convict him.

Even if your client is innocent, and only tells the truth, and does not tell the police anything incriminating, there is still a grave chance that his answers can and will be used to crucify him, if the police do not recall his account, out with the recorded interview, with 100% accuracy.

Even if your client is innocent, and only tells the truth, and does not tell the police anything incriminating, and the entire interview is recorded, his answers can still be used to crucify him, if the police have any evidence, even mistaken and unreliable evidence, which suggests that any of his statements are false (even if, in fact, they were true).

There is always the admittedly remote risk of prosecution for making false exculpatory statements. If the client elects to speak, he must speak truthfully, at the risk of criminal prosecution. The guilty client needlessly boxes himself into a corner, at a time when he is not fully informed about the prosecution case. He is hopelessly exposed, in so far that any subsequent change in his position might result in a perjury charge.

The solicitor might prefer to avoid the ethical dilemma of suborning perjury be knowingly eliciting false testimony from his client.

Certainly, the position is simpler if the client wants to plead guilty to the charge. Though co-operation with the police can be advanced in mitigation of penalty, as an indication of genuine remorse, it is surely preferable to delay key decision-making, until such time as the client actually arrives at court and has had ample opportunity to contemplate his fate.

A 'delay', by only a day or so, should hardly jeopardise the *Du Plooy* discount. [60] There is as yet no court process, which can be conceivably delayed.

The solicitor should also be careful to ensure that the police have not tempted the client to make a confession by way of an inducement: for example, a promise of bail; or a promise that a prosecution would not arise from the confession.

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[58] *Morrison v HM Advocate*, 1990 J.C. 299; 1990 S.C.C.R. 235; 1991 S.L.T. 57

[59] See Professor James Duane of the Regent University School of Law, Virginia, *Don't Talk to the Police*, which is available at:

http://www.youtube.com/watch?v=i8z7NC5sgik&NR=1

[60] *Du Plooy & Others v. HM Advocate*, 2005 J.C. 1; 2003 S.L.T. 1237; 2003 S.C.C.R. 640

Knowing that the police 'lawyer-up' whenever they are questioned about their own actions, or inaction, knowledge or lack thereof, why on earth would anyone ever answer police questions?

Prepared statement:

Predictably, there are no absolutes. There will be exceptions to the general 'rule'.

For example, in a 'cut-throat' defence situation, a tactical advantage might be secured by being the first to incriminate a co-accused, at the expense of copycat co-accused.

An early explanation confirming a partial defence of provocation might just persuade the police to proffer a charge of only culpable homicide.

This might be the time to ventilate a consent defence if forensic evidence, confirming that intercourse had recently taken place, is inevitable.

Accordingly, in certain exceptional circumstances, consideration should be give to the client making a prepared statement – prepared in private with the assistance of the solicitor. The client can read this out, closing with the qualification that he will not be answering any further questions, on legal advice. [61]

Of course, as a precaution, the solicitor would first want to satisfy himself that there is already an evidential sufficiency in place. A hurried assessment will also have to be made of how much information the police already have about the offence and the identity of the offender – and, more importantly, whether this amounts to admissible evidence. Even an experienced lawyer, who has become increasingly familiar with the case, will have great difficulty in advising his client on which horn of the dilemma to hang his liberty, without a far deeper knowledge of the facts and the law than he is likely to have at that point in time. Evidence, which has been wrongfully obtained, may be excluded, creating a black hole in the middle of the prosecution case. There would be no legal advantage to the client in making admissions in a statement, which might just fill that gap. The solicitor should be reluctant to provide the missing evidential link in the Crown case. Further, given more time, the trained legal brain may find a hole or two that can be picked in it.

Given that there is always a professional risk that acting in defiance of the right of silence might be impugned as defective representation, [62] most would incline to caution.

There may also be some purpose in raising an objection to any disputed prior admission, which the police may have obtained in legally dubious circumstances. While it is not strictly necessary to do so, in order to preserve the issue for trial, in making it clear, at the earliest possible opportunity, that this was not voluntary information, credibility is bolstered.

Immunity:

A person's right to silence may be trumped by the granting of immunity.

[61] http://www.glasgowbarassociation.co.uk/media/24162/justice%20-%20police%20stations2.pdf

[62] See *McIntyre v H.M. Advocate* at 388E-G

However, only the Crown can make a formal grant of immunity. The police have no such authority.

If immunity were offered, the solicitor would first require the Procurator Fiscal to provide confirmation in writing. That said the Procurator Fiscal is unlikely to sanction immunity without an affidavit of the client first providing some form of insurance policy.

If the use of the privilege is preventing restitution to the victim – of goods, money, even of a kidnapped child – the prosecutor's remedy is surely to grant a narrow 'derivative use immunity'. That would mean that the fruits of any 'immunised' statement could not be used against the suspect in any subsequent prosecution. This is distinct from a grant of absolute or blanket immunity ('transactional immunity'). It does not operate as a bar to prosecution. It prevents the prosecution only from using the suspect's own statement, or any evidence derived from that statement. Should the police otherwise obtain evidence substantiating the alleged crime – quite independently of the suspect's statement – a prosecution could still be pursued. [63]

The difficulty is that the Crown might subsequently argue that any such evidential concession has been made on the back of a coerced or corrupt bargain, which is repugnant, voidable and unenforceable – and which should not be protected by the Court.

<u>Compulsory questioning under section 172 of the Road Traffic Act</u>:

If the investigation relates to a driving offence, the likelihood is that by the time of the solicitor's arrival at the police station, the police will have long since had the detainee confirm that he was the driver, or connected to the vehicle, having already invoked the statutory Warrant, available under section 172 of the Road Traffic Act.

Focused preliminary questioning to ascertain the identity of a suspect driver in terms of section 172 is not exceptionable. [64]

In *Brown v Stott* [65] it was held that the admission of answers, pursuant to powers of compulsory questioning under section 172, was compatible with Article 6. In contrast to the position in *Saunders v UK* [66] section 172 provided for the putting of a single simple questioning, albeit not prolonged interrogation as such. Significantly, the penalty for non-compliance was moderate and non-custodial. Accordingly, section 172 was a perfectly proportionate response to the problem of maintaining road traffic safety.

The European Court agreed in *O'Halloran and Francis v. United Kingdom*, 27 September 2007, Application Nos. 15809/02, 25624/02:

It noted that anyone who chose to own or drive a car knew that they subjected themselves to a regulatory regime, imposed because the possession and use of cars was recognised to have the

[63] *Is There a Right to Remain Silent*, Alan M. Dershowitz, 2008, at p. 142 and pp. 155 – 159

[64] However, it is submitted that any extended questioning of a suspect at the locus would be challengeable: see *HM Advocate v Sonja Wilson,* Glasgow Sheriff Court, 1 December 2010.

[65] [2003] 1 A.C. 681, PC

[66] 23 E.H.R.R. 313

potential to cause grave injury. Those who choose to keep and drive cars could be taken to have accepted certain responsibilities and obligations, as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, those responsibilities included the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion.

A further aspect of the compulsion applied in the applicants' cases was the limited nature of the inquiry which the police were authorised to undertake. In particular, section 172 (2)(a) applied only where the driver of the vehicle was alleged to have committed a relevant offence, and authorised the police to require information only 'as to the identity of the driver'.

Having regard to all the circumstances of the case, including the special nature of the regulatory regime at issue, and the limited nature of the information sought, the Court considered that the essence of the applicants' right to remain silent and their privilege against self-incrimination had not been destroyed. Accordingly, there had been no violation of Article 6(1), ECHR.

Clearly, conviction on a 'section 172' charge may be the lesser of two evils where the investigation relates to a serious road traffic offence where a custodial sentence is a possibility (for example, a contravention of section1, section 2, section 3A or even culpable homicide), standing that a conviction on a 'section 172' offence may only trigger discretionary disqualification.

Taking of forensic samples:

The solicitor should tell the police that while his client will not be formally consenting to the taking of forensic samples[67], he will not physically resist should they attempt to obtain these.

The point is that if the client does consent to this procedure, his DNA may be subsequently retained, even if he were not ultimately convicted.

The client should be advised not to physically resist the police.

Meanwhile, the police should obtain the authority of a Warrant from a Sheriff if they wish to obtain intimate samples; or if they want to belatedly obtain samples, which have been overlooked after they have charged the suspect. [68]

Since the solicitor is now instructed, there is no reason why any such Warrant Application should be heard and determined *ex parte.* The DNA of the suspect is not going anywhere.

Road traffic evidential procedures:

In *Dickinson v DPP* [1989] Crim. L.R. 741, the defendant had been advised by his solicitor to refuse a lawful request at the police station for him to provide two evidential specimens of breath for analysis.

[67] The police are entitled to invoke the statutory Warrant under section 18(2) and (6) of the 1995 Act in respect of non-intimate samples.

[68] *HM Advocate v Rudling,* 2010 S.C.C.R. 115

It was held that such bad advice could not amount to a reasonable excuse for failure to provide a specimen. To have held otherwise would have been to defeat the entire purpose of the statute. [69]

Meanwhile, the client should not sign anything. If the police want a handwriting sample, they should get a Warrant. Now that a solicitor is involved, any such hearing should not be conducted on an *ex parte* basis. It is a moot point whether any such Warrant would be granted given the practical difficulties in *bona fide* enforceability.

Complaining constantly about anything he can think of, might well give the solicitor an edge later on – though it could compromise his working relationship with local police.

Search of the suspect's home:

If the solicitor is now instructed, there is (again) no reason why any pending Search Warrant Application should be heard and determined only *ex parte.*

There would be some purpose in challenging an Application of the police or the Procurator Fiscal for an *ex post facto* Search Warrant to legitimise a hitherto Warrant-less search. It is not suggested that the police should have not continue to remove whatever contraband they have found, in accordance with the *Hepper* principle. [70] However, the Application may well be contested on the ground that the Sheriff or Justice of the Peace who grants a retrospective Search Warrant will be effectively fettering the discretion of the trial Judge or Sheriff to rule on the admissibility of such evidence.

Interpreter:

The solicitor should ensure that the interpreter is suitably proficient in the suspect's language. This is not always so. Preferably, the interpreter should not be translating from his second language into third language.

The interpreter should be made aware of his duty to be impartial and to keep information confidential.

Refractory client who simply won't 'take' instructions from the solicitor:

Or a client who goes off-message:

How does the solicitor deal with a client who is unable to grasp the concept of the right to silence – and who, the solicitor apprehends, will not be able to comprehend the police caution and will instead blurt out a spontaneous statement?

[69] The Commission considered that the blood test ascertaining the blood alcohol count in a road traffic investigation was justified 'for the protection of the rights of others'*: X v Netherlands*, DR 16 (1979).

[70] *Hepper v HM Advocate*, 1958 J.C. 39; *Tierney v Allan*, 1989 S.C.C.R. 334; *Hepburn v Brown*, 1998 J.C. 63

In the first instance, the client might well suffer from learning disability, such that he might be categorised as suffering from a relevant mental disorder - in which case, the solicitor should make representations for psychiatric assessment (see above).

- Make an opening statement – politely explaining that your client has been advised to exercise his right to remain silent – essentially confirming, for the record that you are not some hapless legal buffoon, providing duff representation.
- If the client starts answering non-formal questions, the solicitor can always invite the police to re-administer the caution.
- The appropriateness of prompting the client by means of a 'No Comment' idiot board
- The appropriateness of passing notes to the client – which fall within the ambit of privileged work product

  In England and Wales, providing written replies for the suspect to quote would be deemed to be unacceptable conduct, which would justify the removal of the solicitor. [71]
- The solicitor can ask that the interview be stopped – to give further legal advice in private.

  Again, the right to have a private consultation with a solicitor exists before any questioning of the suspect begins, and at any other time during such questioning- section 15(3A).

  However, it is appreciated that eventually, the point will be reached where this becomes a lost cause.
- Short of applying duck tape, the solicitor might at least want to deliver a disclaimer: 'I would like the record to reflect, that against legal advice, Mr. X has decided to make a statement.'

The solicitor's 'opening statement':

The solicitor could indicate, in an 'opening statement' that his client will not be answering any questions.

Indeed, if his client is in the category of a 'chargeable suspect', the solicitor could invite the police to desist from questioning the client altogether. The revitalised case of *Chalmers v HM Advocate* would appear to be solid authority for this proposition. Accordingly, the solicitor should ask that his client be charged or released without further questioning.

The solicitor might enquire whether the police have sufficient evidence to charge the client.

Then again there are practical reasons for flushing out the police case at this early stage.

[71] PACE Code C Note for Guidance 6D

The solicitor's 'closing statement':

The solicitor should indicate that there should be no further questioning of the client in the solicitor's absence. He should provide a reminder of the prohibition on subsequent questioning on the same matter after caution and charge.

The solicitor should subsequently advise his client in a closing consultation on how to respond to subsequent approaches by the police to question him in the solicitor's absence.

The solicitor's response to inappropriate police behaviour:

The police may not appreciate the defence solicitor's role. They may not truly understand what legal professional ethics entail. They may become frustrated at the defence solicitor denying them that vital admission, which might just provide the missing evidential link.

So what if the police threaten to throw the solicitor out of the interview room? Or what if over-zealous police officers were even to suggest that by hindering their enquiries, the solicitor – in 'contempt of cop' – is attempting to pervert the course of justice?

Of course, what defence lawyers in common law jurisdictions will routinely do – and are often required to do in terms of ethical rules and professional guidelines – would constitute an obstruction of justice in some European countries. [72]

However, in England and Wales, a solicitor can only be excluded from an interview if the conduct of the solicitor is such that the interviewer is unable properly to put questions to the suspect. [73] Hindering the investigation does not include giving proper legal advice to a detainee. [74]

Significantly, advising a client not to answer questions, or challenging police questioning, are not sufficient grounds for exclusion. [75]

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[72] *Is There a Right to Remain Silent*, Alan M. Dershowitz, 2008, at p. 202, citing George P. Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics*, 2005

[73] PACE Code C paragraph 6.11

[74] PACE Code C paragraph 6.12.A and Note for Guidance 6D

[75] PACE Code C Note for Guidance 6E

The Lord Advocate's Guidelines at paragraph [6] provide:

> 'For the avoidance of doubt advice given by a solicitor not to answer a question or to offer no comment does not fall to be regarded as being either obstructive or hindering the investigation.'

Significantly, the police should be readily aware of this provision – because they are suitably admonished, in the *ACPOS Manual of Guidance on Solicitor Access*, at paragraph 5.2, that they should familiarise themselves with defence Guidelines (specifically, *Giving Legal Advice at Police Stations: Practical Pointers*, which is readily available, having been incorporated as an appendix).

It should always be remembered that the detainee is not required to assist the police in their enquiries and commits no crime by declining to do so. Accordingly, the solicitor cannot commit a crime by aiding and abetting him to do so.

It should never be the situation that the solicitor is hindering police enquiries by encouraging his client to advance a bogus defence, or even provide a false denial, because the solicitor will almost certainly be advising his client on how to fully exercise his (Convention and common law) right against self-incrimination. [76]

It is submitted that the solicitor is entitled to object to any question, which would be objectionable in a court of law – because if he were not to do so, the risk is that he might be held to have acquiesced in the objectionable. [77]

However, it could be countered that the police are at this stage only eliciting information from the suspect, and not evidence as such.

Of course, a police station is hardly a comfortable environment or place, for most people – including defence solicitors. It is not designed to be. After all, this is 'somebody else's playground'. [78]

Nonetheless, the defence solicitor will appreciate that the case still has to see the light of day in court. He should hold his nerve, call the police bluff and counter-threaten!

The solicitor is perfectly entitled to tell the police that outrageous police stunts will compromise the prosecution. The solicitor can tell the police that they will have to account for their actions before the Sheriff.

In the first instance, oppressive police conduct, which prejudices the Convention right of the detainee to legal representation, could amount to a contempt of court (see above).

The defence can make 'plea in bar of trial', on the ground of oppression, arising from oppressive police conduct. To threaten the defence solicitor would appear to amount to what the English regard as an abuse of process. That said a plea of oppression involves an extremely high threshold. It is apprehended that the Court might proceed on the basis that defence solicitors should be sufficiently resilient to withstand idle police threats.

Applying some creative thinking, police intimidation of the defence solicitor is a 'tactic', which could conceivably constitute an offence against the course of justice; or amount to the crime of extortion; or malfeasance in public office.

However, it is virtually unimaginable that the Crown would ever mount such a prosecution.

The solicitor can also threaten civil action for wrongful or false imprisonment. [79]

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[76] Coaching could amount to an offence against the course of justice: *R v E* 29/8/03, CA 62/03; *R v Momodou* [2005] 2 All ER 571 (CA).

[77] However, it is submitted that the fairness of police questioning should still be capable of being tested by way of a 'trial within a trial' (or at a 'trial before the trial'): following the procedure prescribed by *Thompson v Crowe*, 2000 J.C. 173.

[78] See *Justice, Legal Advice at Police Stations, The Experience in England and Wales*, Glasgow Bar Association, CPD Seminar, 29 October 2011

http://www.glasgowbarassociation.co.uk/media/21453/gba%20police%20station%20handout.pdf

If the police were to make a bogus complaint to the solicitor's professional body or to the Scottish Legal Complaints Commission, the content of any such complaint is not subject to absolute or even qualified privilege and could be considered defamatory.

The solicitor should insist that he speak to a senior officer.

The police should not dare confiscate the solicitor's mobile phone (which may being used to record matters; and which may otherwise contain privileged work product, such that other prosecutions and appeals might be jeopardised).

The solicitor should contact the Sheriff; the Procurator Fiscal; and the Legal Defence Union.

Follow-up:

- The solicitor should prepare detailed file notes as soon as possible.
- This can be done by reference to a *pro forma*, such as the English *Public Defender Service* Police Station Attendance Form provides a useful template. Presentationally, this is far more professional, if relied upon as a production.
- The solicitor should write the Procurator Fiscal and put any concerns on the record
- The solicitor should tell the Court at the first opportunity of any irregularity.

  Judicial declaration procedure can be utilised to challenge any involuntary admission.
- The solicitor should pursue disclosure of what the police have refused to disclose.
- The solicitor should push for early disclosure of the transcript of the interview.

Conclusion:

I hope I do not come across as suggesting outright aggression as a standard operating tactic. Defence solicitors and the police alike, are presently finding their way and establishing post-*Cadder* boundaries. Working practices are still to develop now that Scottish defence agents are required to become involved much earlier in criminal procedure, and in a proactive way. [80] Scottish police officers will have suffered the culture-shock of having their authority challenged in their own station house. Of course, this type of zealous advocacy need only be invoked *in extremis*. Fortuitously, most defence solicitors will enjoy, most of the time, a mostly good working relationship with most of their local CID officers. Most cases will not ultimately be contested cases, with or without the eliciting of confession evidence. There will otherwise be rock-solid evidence against the client so a conviction is practically guaranteed, and a decent plea bargain will be negotiated. But that should not be because

[79] In England and Wales, the failure by a police officer to observe any provision of the Codes of Practice does not render him liable to civil or criminal proceedings (PACE 1984, section 67(10)).

[80] See the *ACPOS Manual of Guidance on Solicitor Access*, at paragraph 5.3

the defence solicitor has failed in his professional duty to provide a strong and vigorous defence at the first opportunity.

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