

Accountability in the moment: Lawyers attending Garda Interviews

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Overnight Change

- *People (DPP) v Gormley & White* [2014] 2 IR 591; [2014] IESC 17
- DPP's letter
 - 'We were like Martians arriving on the moon. Guards didn't know what we were doing, we didn't know what we were doing. But it was incredibly exciting.' (YD24)

Lack of regulation

- Nothing like PACE in England & Wales
- Judges Rules, Custody Regs, Electronic Recording Regs, rules of evidence (confessions)...
- 2015
 - Garda Code of Practice on Access to a Solicitor by persons in Garda Custody
 - Law Society Guidance for Solicitors Providing Legal Services in Garda Stations

Garda Code

- 'The solicitor's only role in the Garda station should be to protect and advance the legal rights of their client'

Law Society Guidance

- ‘The solicitor’s duty is owed to the detainee. Solicitors are required to protect and advance their client’s rights without fear or favour. The detainee’s fair trial rights, which are the primary basis for the right to a solicitor being present during interview, commence the moment a solicitor is asked to provide legal services to a detainee. It is now well accepted that the trial process begins, at the latest, the moment a person is detained.’

Role of the Lawyer

A – Advice

D – actively Defend

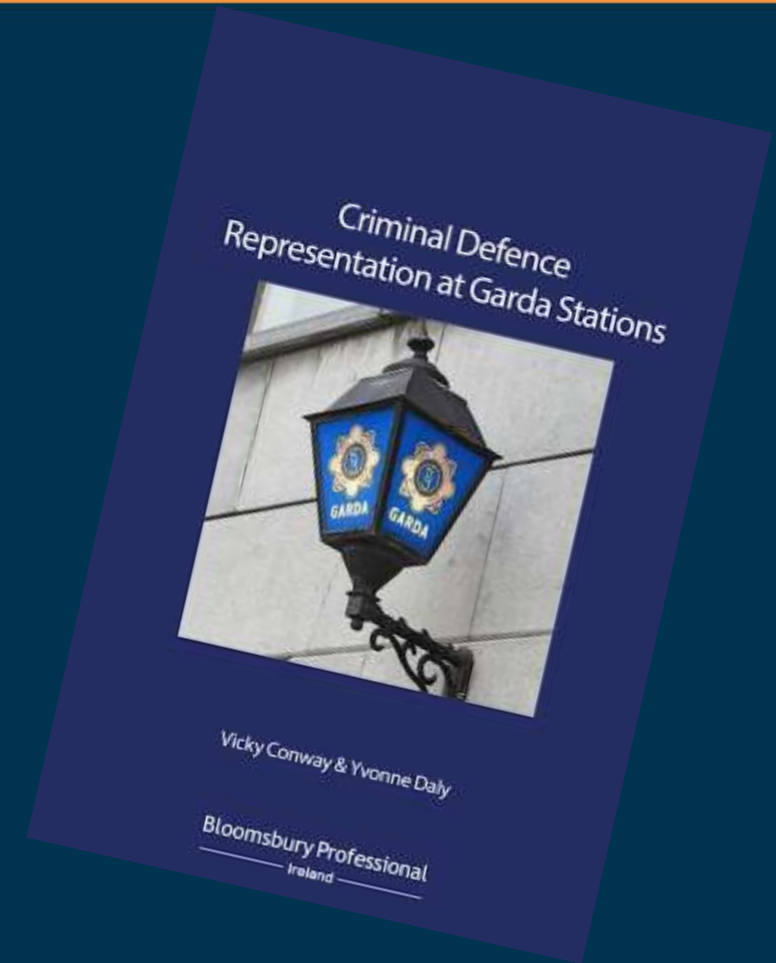
J – prevent miscarriages of Justice

R – protect Rights

E – ensure Equality of arms

S – provide Support

S – protect the right to Silence



Active, client-centred lawyering
- SUPRALAT training programme

Lawyers' Fears

- general concern of letting the client down;
- worries around the possible downstream consequences of decisions made and advice given at this early point in the process;
- fears of being called to give evidence, reprimanded or even sued

Effective Communication

- With clients
- With gardaí
 - Addressing client concerns
 - Access to medical attention etc
 - Seeking disclosure
 - Intervening in interviews
- Good working relationship – mutual respect for one another's roles
- Open communication and dialogue
- Acknowledge perspective
- Remember importance of effectively ensuring protection of client's rights
- Assertive
- Direct advice to client
- Remain calm

Lawyer's Presence at Interview

- Pivaty lists a number of ways in which the presence of a lawyer at interview can protect against false confessions which are brought about through police impropriety:
 - 'Lawyer's presence at interrogation might deter police from using coercive or illegal tactics, or deliberately misrecording interrogations. Alternatively, a lawyer may serve as an independent witness of illegal interrogation methods, or of what was actually said. Legal assistance might also help minimise the effects of coercive interrogation environment, or manipulative interrogation tactics. A lawyer could challenge the use of manipulation, or alternatively, support the suspect to resist against it.'
- Even where there is no police impropriety, a person detained for questioning in the unfamiliar space of the garda station may find themselves feeling stressed and pressured to the point where they make 'admissions' which are in fact untrue.
- Morris J in the Report of the Tribunal into Certain Gardaí in the Donegal Division:
 - '[T]here are many different circumstances in which a false confession can come about. Persons exhibiting diverse physical and mental characteristics have been caused to make false confessions in the past. Even persons who appear to be of robust disposition can in certain circumstances make false confessions.'

Interventions at Interview

- Garda Code indicates that a solicitor may intervene during questioning to:
 - ‘Seek clarification,
 - Challenge an improper question put to their client or the manner in which it was put,
 - Advise their client not to reply to a particular question(s), or
 - To request suspension of the interview if they wish to give their client further legal advice.’

Interventions at Interview

- Law Society Guidance - circumstances which 'require' interruption:
 - 'Solicitors should intervene if they become concerned about a question. Examples of circumstances which might necessitate that a solicitor intervene to seek clarification or challenge an improper question include questions which may include:
 - Leading
 - Oppressive or threatening
 - Overly informal
 - Insulting
 - Based on an incorrect premise/assumption
 - Based on undisclosed information
 - Concern family or friends not relevant to the investigation
 - Excessive interruption or cutting off of the suspect
 - Negative statements about witnesses, for example, "are they telling lies?"
 - Relate to previous convictions or criminal activity
 - Statements by a garda which state their view of alleged facts
 - Misrepresenting known facts
 - Requesting the suspect's opinion
 - References to someone else, for example, a garda belief about the situation.'

Limitations

- Law Society Guidance:
 - “Gardaí can then decide to reconsider their approach or proceed irrespective of a solicitor’s objections. Most importantly, the issue which caused an objection has been raised and can be referred to later in the process.”

- Pivaty notes that

‘[t]he lawyer’s role is not to control the compliance of police with procedural rules in general, but only to protect their clients against the possible harm caused by such non-compliance. Therefore, lawyers must only react to those procedural breaches and irregularities which adversely impact their clients’ position.’

In that context, some lawyers are concerned that by intervening and correcting some aspect of garda questions or procedure, the lawyer might be improving the prosecution case rather than defending their client’s interests. If the client is maintaining a ‘no comment’ position that is one thing, but there is something of a dilemma for lawyers in a situation where the client might respond to an inappropriate question or provide an answer following some other incorrect garda action. If one does not intervene to address an inappropriate question or procedure, and the client provides an inculpatory response, an argument might possibly be made in later proceedings that such response should be inadmissible. However, a court may also deem such response admissible given the presence of the lawyer throughout the relevant time. If one intervenes at interview and cures the defect, there is a fear that this may be more likely to lead to the admissibility of the client’s response:

- ‘You’re under huge pressure and again, there’s always that fear that one day, some judge is going to say, “I cannot believe the solicitor of this length of time in their job would have allowed that to go unchallenged.” And you worry about, would that have consequences? Will the judge say, “You had a solicitor there who didn’t challenge it?”’ (VC3)

Reflections

- ‘Gardaí have an interview process to conduct and they have certain styles they might use and certain question techniques and it’s not for me... to stop the flow of the interview.’ (VC1)
- ‘I try not to intervene too much, as maybe, a basic approach to it because I recognise they’ve a right to interview the person.’ (VC3)

Split-second decisions

- ‘So you have to weigh up, is it worth creating a hostile atmosphere? Because maybe up until that point things were going fine, everybody’s working reasonably well together. So there’s a lot of things to weigh up.’ (VC9)
- ‘There’s not an interview I come out of that I don’t think, “should I have [intervened], should I have, should I have?” Never.’ (VC7)

Making an intervention

- ‘That’s when your backbone is checked because quite a lot of gardaí think you’re just being objectionable for the sake of it and think you’re interfering with the interview process and will kick up.’ (VC5)
- ‘My heart goes crazy when I know it’s coming, like I get really nervous, because you just don’t know what’s going to be fired back to you, but I will do it... I would be nervous, but I will intervene.’ (VC10)
- ‘[A]t the start... you get that quick heart beat and you know you have to do it now. But now I’ve no problem, because I’ve done it a lot and I’ve dealt with the hostile guards, I’ve dealt with whatever. A lot of the time I go in thinking they’re going to kick up when I say this, so I’m ready for it.’ (YD10)

Power

- ‘...when you’re in that situation, you’re not the person in power, the guards have the power, so sometimes when you’re making that intervention, it can come across as weak. And ultimately, they have the power to just forge on with the interview... [Y]ou can really feel it in that moment... [Y]eah, I’m making my little comments here, but they’re not cutting the mustard. And it’s so different than in court... it’s similar to cross examination in that you have the same things to weigh up in the same timeframe where you have to make a very quick judgement call on whether you intervene and how you do that. But what’s not similar is that you don’t have a judge there to say what’s fair or not fair. And you’re not in a neutral environment, so you’re in a very, very different situation.’ (VC9)

Threat of Removal

- Garda Code: if ‘the solicitor’s approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect or prevents the suspect’s response(s) from being recorded by talking over them or constantly interrupting them when they are trying to respond’ – can require solicitor to leave interview room...
 - ‘I’ve had one case where, at the very beginning of the interview I said, “I just want everyone to know, this will be a no comment interview,” and at that point I was threatened to be removed from the interview.’ (VC9)
 - ‘There are certain guards who will tell you “You’re on your first warning...” Your job is just to sit there, effectively, is their view. So you’ll be put on warnings... often clients, particularly if you’re dealing with somebody for a long period of time, they’ll get insulted on your behalf then when you’re put on warnings....and that creates a whole atmosphere that’s unnecessary.’ (YD17)
- Garda Síochána (Powers) Bill

Lack of oversight

- Garda internal spot checks on interview techniques
- Unannounced visits by oversight bodies (OPCAT, NPM...)
- GSOC complaints
- Trial oversight (90% - no trial)

Training

- GSIM
- SUPRALAT
- Joint training? At least on some issues?
 - Interpreters?
 - Responsible/appropriate adults?
 - Trauma-informed garda station work?

References

- Conway and Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury, 2023)
- Pivaty, 'The Right to Custodial Legal Assistance in Europe: In Search for the Rationales' (2018) 26(1) *European Journal of Crime, Criminal Law and Criminal Justice*, 62
- Sixth Report of the Morris Tribunal, Volume 2