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Mark Kennedy and the strange case of undercover sex

Undercover police investigations are one thing, but having sex with suspects is quite another



⌚ Mark Kennedy is said to have had sexual relations with activists while under cover

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There are already STDs and contraception to worry about, but it seems this week a new hazard has been added to the already perilous world of sexual relationships - your partner might just be an undercover police officer.

Mark Kennedy, the officer who was embedded with climate change protesters for seven years, had sexual relationships with at least one of the women he was embedded to spy on.

This revelation raises a troubling but simultaneously intriguing question - can the police authorize someone to dupe you into sex?

You may not think it takes a lawyer to answer that question. It seems so wrong on so many levels. As "Anna", the woman who came forward to the *Guardian* said: "if somebody was being paid to have sex with me, that gives me a sense of being violated."

Anna suspects that Kennedy's sexual relationship with her, and others, was not a genuine and private act of intimacy but a "tactic" to further his mission of gleaning inside information about the environmental protest movement.

Which is relevant because, as every student of tort knows, the question of whether Anna or anyone else in her position has a legal case here depends on whether Kennedy was acting in the course of his employment.

But Kennedy would only have been "on a frolic of his own," as the case law so colourfully defines it, unless he was doing something unauthorised, or which he was expressly prohibited from doing.

So far, we have no idea what Kennedy was authorised to do, or for that matter what the police are generally in the habit of authorising when it comes to embedding undercover officers for such long periods of time.

Having said that, it is not unforeseeable that placing an officer for seven years would increase the possibility of his having intimate or sexual relationships with the subjects of his surveillance.

There is no guidance - or at any rate no published guidance - on the subject, and the Association of Chief Police Officers have been unable to shed any more light.

But there are many, many undercover officers at work. As former DPP Ken Macdonald told me yesterday "When I was DPP I saw very many undercover

operations that were very successful if bringing criminals to justice. I used to meet with people who did it. There were some really impressive people there, who had been doing it for years."

And as any criminal lawyer will tell you, the role of an undercover officer in an investigation that results in trial is one of the major reasons why prosecutors invoke the rules on public interest immunity, a procedure specifically designed to protect the authorities from revelations in open court that might damage their work.

But this is not James Bond. Kennedy was not foiling a nuclear conspiracy to obliterate the West, or exploding serious organised crime. He was investigating environmental activists - vegetarians who prefer to cycle. Apart from the also intriguing question as to how on earth seven years of covert surveillance could have been a proportionate way to monitor their activities, there is also the minor issue of liability under ordinary UK law (Bond's conduct would have been regulated by the Intelligence Services Act, but Kennedy was not a spy).

The police do not owe a general duty of care to the public - the courts have always said that would be too onerous - but in specific circumstances they might. Just this week a [judgment](#) was handed down in the high court confirming the point:

“the police and the CPS do not generally in the interests of the whole community owe individual members of the public... a common law duty of care in undertaking and performing their operational duties of investigating, detecting, suppressing and prosecuting crime.”

But the court adds that this "may not apply in exceptional circumstances at the margins."

I'd be willing to take bets that having sexual relationships with the subjects of undercover investigations amounts to "exceptional circumstances." And even if it doesn't, if the requirement of respect for privacy under the Human Rights Act, which governs the conduct of all public bodies including the police, doesn't cover a person's right to know who she is having sex with, then it would be a fairly pointless piece of law.

At the moment this is speculation because we don't know why Kennedy was having sex with the women he met. Maybe he was absolutely off duty. Either way one lesson should already be being learned - a man, or woman *in* uniform is a much safer bet.

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