

Mark Kennedy case: News of sexual liaisons may result in civil actions

Lawyers say there may be grounds for common law actions for negligence after news of undercover policeman's relationships



News of Mark Kennedy's sexual relationships has fuelled speculation about civil lawsuits.

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News of undercover policeman Mark Kennedy's sexual relationships with environmental activists has fuelled speculation about the possibility of civil lawsuits, as experts say there may be legal grounds for action.

The Guardian revealed on Monday that Kennedy had infiltrated environmental protest groups over seven years before quitting the police in March last year.

The six protesters - whose trial for conspiring to shut down Ratcliffe-on-Soar power station collapsed earlier this week - and several women who had sexual relationships with Kennedy while they believed him to be a fellow activist are expected to consider bringing civil claims against the police for the way the operation was conducted.

There are also question marks over previous cases that may have involved undercover intelligence gathered by Kennedy. If lawyers could show that he acted as an agent provocateur that could provide grounds for appeal.

Although there are few published rules on the conduct of undercover police operations, lawyers say there may be grounds for common law actions for negligence or misfeasance in public office.

If the protesters or the women could show that the police owed them a duty of care, there is a possibility for a claim of negligence. "If it can be shown that the police have a responsibility, then there could be grounds for a case," said Stephen Cragg, barrister at Doughty Street chambers. "There are just no guidelines on this kind of situation. It is very difficult to establish a duty of care, but if he was sleeping with these women in order to gain information from them, then there may be a strong case."

He said that any case would be likely to be settled by police, to prevent the courts setting precedents for future claimants.

"It could well be that if a claim was brought, the police might not want to risk a judgment saying that such a duty was established," said Cragg.

Women who had intimate relationships with Kennedy would have to show that they suffered damage, such as a recognised psychiatric condition, as a result of discovering his identity was false.

But the possibility of claims under the Human Rights Act, which guarantees respect for private life at the hands of public authorities, would circumvent the need for specific loss or damage as a result of the relationship with Kennedy.

Home Office guidance on the activities of covert human intelligence sources, which includes the police, recognises the likelihood that human rights issues could arise when relationships are formed between undercover officers and the public.

"Article 8 [of the European Convention on Human Rights] includes the right to establish and develop relationships," the guidance says. "Accordingly, any manipulation of a relationship by a public authority (eg one party having a covert purpose on behalf of a public authority) is likely to engage Article 8, regardless of whether or not the public authority intends to acquire private information."

"It is therefore strongly recommended that a public authority consider an authorisation whenever the use or conduct of a CHIS [Covert Human Intelligence Source] is likely to engage an individual's rights under Article 8, whether this is through obtaining information, particularly private information, or simply through the covert manipulation of a relationship."

But as senior figures including the former Director of Public Prosecutions Lord Macdonald questioned whether a seven-year undercover operation could ever be properly authorised, a violation of the right to privacy seemed increasingly likely.

A separate issue is whether previous convictions of environmental protestors are safe. Mark Kennedy's involvement as agent provocateur in actions might provide grounds for appeal, but during a trial it is difficult for the defence to have access to such information unless it is formally disclosed by the prosecution. Defence lawyers have long complained that the odds are stacked against them because the other side can decide what information they reveal. Since 1996, the law has made prosecutors and police responsible for informing the defence about evidence which may be relevant to their case. But lawyers say the system frequently fails to ensure fair trials.

"There is a feeling at the defence bar that disclosure does not always work very well," said Paul Mendelle QC, a criminal defence barrister at 25 Bedford Row. "The prosecution are meant to look at the unused material and objectively decide whether it supports the defence case or undermines the prosecution, but with the best will in the world, it's very difficult to do that as a prosecutor or police officer."

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