

# **Is the criminal justice system failing defendants with acquired brain injuries?**

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MOST CRIMINAL defence solicitors have experience of representing clients who have mental health difficulties. However, there is another section of the community who also may have to be considered within the Mental Health Act but do not have a mental health condition as such. Instead, they have an acquired brain injury (ABI). These are often the result of road traffic accidents or falls. These clients can be rather problematic not only for solicitors but for many professionals involved within the Criminal Justice System to identify. Some will have a physical disability, but many will not and sadly it seems that those with head injuries are often missed.

Headway, the brain injury association, estimate that there are a minimum of 1 million people in the UK living with long term effects as a result of a brain injury. Following a brain injury, many people live with after-effects, which can include a variety of problems, including problems with memory and difficulties with attention and concentration levels. There are often personality changes in individuals. Irritability, tiredness, and rapid mood changes can be a feature.

Those with head injuries can find themselves under arrest for a range of offences. However, families often report that they had never been involved in the criminal justice system before but, as a result of personality changes after head injury, things changed dramatically. They might be arrested following allegations of assault or public order offences as members of the public have felt threatened by their behaviour. Some families note that loved ones suffer from a lack of inhibition following a brain injury and, in the more extreme cases, this has led to arrest under the Sexual Offences Act.

Many have very little insight into their problems and so they are unlikely to tell a custody sergeant, solicitor, or doctor when asked exactly what their difficulties are. You often find that those with ABIs and their families have no previous experience of the criminal justice system and find it difficult to understand what is happening.

## **A significant proportion of our prison population report having suffered a brain injury**

Studies have shown that there is a prevalence of acquired brain injury in the UK male prisoner population. Studies undertaken in the UK in adults and juveniles

have shown a significant number of the prison population reporting that they had suffered a head injury. In adults, the rate is around 47 per cent and I have seen studies in juveniles reporting a much higher rate of 70 per cent.<sup>1</sup> Of those who self-reported to researchers that they had suffered from a brain injury, 73 per cent reported that the injury pre-dated their very first offence. Eighty per cent had a history of drug use, which can often make assessing those with brain injuries even more difficult. Although these studies appear to have relied upon prisoners accurately reporting a brain injury, it is clear from these studies that these individuals make up a significant part of the prison population. It is also clear that a number of these individuals have 'slipped through the net'. Some of those with brain injuries have not been properly identified prior to trial and sentence.

### **Clients in the police station**

The ways in which head-injured clients present can often make it very difficult for even a member of the medical profession to identify the problem. It can therefore be very difficult for solicitors and police officers at the police station to recognise individuals with brain injuries. Custody officers will of course ask a series of questions when an individual is first brought into custody, but they are reliant upon those individuals having insight into their disability and difficulties. Often, those with head injuries will have insight into their physical disability (however, many do not show any physical disability) but lack insight into any executive or cognitive impairment. Those with head injuries typically might report that they have poor memory or that they suffer from headaches. However, they will not be able to explain the full range of difficulties that they will face while in the setting of a police station and in interview.

Can they understand the allegation being made against them? Can they even recall the allegation ten minutes or an hour after having it explained to them? If they can recall the allegation, do they actually understand what it means? Is their memory such that they could recall where they might have been at the relevant time so as to be able to account for their movements? These are very basic considerations but often pose difficulties for clients with brain injuries.

Under codes of practice C (Annex E), the custody officer has an obligation if a detainee is a juvenile, mentally disordered, or otherwise mentally vulnerable person to as soon as practicable inform an 'appropriate adult' and ask them to attend the police station. However, there have been numerous cases of key workers and family members contacting the police and informing them of a detainee's brain injury and the limitations and difficulties that that person suffers as a result and custody sergeants have simply disregarded that information.

Often, those with acquired brain injuries can appear to understand much more than they really do about the world around them, and in particular

about the allegations that they face. I have represented individuals who have suffered brain injuries whose family were already well known to the criminal justice system prior to their head injury. They can recall many of the phrases that they will have learnt at that time and trot those out at appropriate places in conversation. It is for reasons such as these that custody sergeants are often difficult to persuade that, while individuals may well know the terminology, they lack any understanding or comprehension of the allegations being made against them or the consequences of what they may say in terms of instructions or an account that they may give in interview.

Those who work closely with individuals who have acquired brain injuries often report that doctors without any specialist knowledge in this area can react in a similar manner. It is perhaps little wonder, then, that the police are sceptical as they have no medical background at all. However, it can sometimes be very difficult to persuade the custody sergeant that a detainee lacks the ability to understand what is happening at the police station, and perhaps is even unfit to be interviewed in some circumstances.

If an officer has any suspicion or is told in good faith that a person of any age may be mentally disordered or otherwise mentally vulnerable or incapable of understanding the significance of questions or their replies, that person shall be treated as mentally disordered or otherwise mentally vulnerable for the purpose of this code (code of practice C see annexe E). It is important therefore for families and key workers to make the police aware when those with brain injuries are arrested. If they are ultimately not taken seriously, then at least the fact that information was provided can play an important part in later excluding any evidence that was secured at that stage by police.

Last year, the government announced a £25 million scheme being trialled in London and Merseyside police stations. The government announced that nurses with specialist mental health training were to be based in police stations in those regions in order to identify those with mental health problems at an early stage. However, that is unlikely to improve things for clients' with head injuries as those with particular experience of mental health problems will have a very different experience than those who deal purely with individuals who suffer from head injuries.

Thought also needs to be given to who is best equipped to act as an appropriate adult at the police station if an interview is to take place. An appropriate adult under the codes can be a relative or guardian or someone with experience in dealing with mentally disordered or mentally vulnerable people (see 1.7(b) and note 1D). If police do not accept that a detainee is suffering from a brain injury, it may be that a key worker is able to bring some relevant reports which may assist in reinforcing that point.

Under s.1(2) Mental Health Act 2007, a mental disorder is defined as 'any disorder or disability of the mind'. Examples of clinically recognised mental disorders include personality disorders, eating disorders, autistic spectrum disorders, mental illnesses such as depression and schizophrenia, and learning difficulties. Learning disability means a state of arrested or incomplete development of the mind, which includes significant impairment of intelligence and social functioning (s.2)(3) Mental Act 2007.

One of the big differences between clients with mental health problems and those with brain injuries is that while someone with mental health problems can recover and improve with medication, the same cannot be said for those with a brain injury. Indeed one of the features of someone suffering from a brain injury is that a client may not be able to learn from their mistakes. Therefore telling them to stop doing something or punishing them for a certain type of behaviour may be a pretty pointless exercise as they have no way of preventing themselves from repeating that behaviour.

Solicitors therefore need to think very carefully about any representations that they make on a client's behalf as to how best to deal with the matter once they have been arrested. For example, while a caution may be a simple way of dealing with matters, it may be that the client does exactly the same thing the following week. In that way, things can easily escalate. Studies have reported that 43 per cent of those in the prison population who reported suffering a head injury also reported that they had been sentenced to a period in custody on five or more occasions.<sup>2</sup>

We have to accept as solicitors that if these statistics are correct, we are sadly not always getting things right for this section of the community. We need to more readily take on board what we are told about clients with brain injuries and think more long term about how best to approach issues. For example, are they living in a section of community where they are being taken advantage of? Are they living in an environment where their behaviour is more likely to be repeated? In such cases it is likely that if they accept a caution, they will quickly come to the attention of the police again, and fall into a cycle of repeat offending.

An assessment needs to be made as to whether your client has the ability to understand proceedings at all, whether they are fit to be interviewed and subsequently to stand trial. Many solicitors and clients are cautious about going down a route where a hospital order might be imposed. However, if your client is in a situation where the behaviour is likely to be repeated and they are at risk in the environment that they are currently in, it is perhaps something that should be considered. We need to carefully consider the situation where a brain injured client comes before the courts repeatedly for similar behaviour.

Sadly, pressures on budgetary funding also have an impact upon funding for suitable available placements at specialist units if hospital orders under the Mental Health Act are considered suitable. However, it is undoubtedly in the public interest as well as that of the client that they receive appropriate rehabilitation in a safe environment which might help prevent further offending in the future.

I fear that, in these dark days for criminal legal aid, practitioners will have less and less time to investigate the difficulties faced by this section of our community. These are exactly the type of clients that need the time and the benefit of experienced practitioners, which are so much under threat from the government's proposals.

**References**

1. Pitman, I. , Haddlesey, C. and Fortescue, D. (2013), "The prevalence of traumatic brain injury among adult male offenders in the UK", Disabilities Trust Website.
2. Ibid.