

Keeping PACE: fitness to be interviewed by the police

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Abstract The second half of the 20th century witnessed a number of serious miscarriages of justice that resulted from improper police interviewing of suspects and unreliable and false confessions. To prevent miscarriages of justice involving people with mental disorder or particular mental vulnerabilities, psychiatrists have a role in determining the fitness to be interviewed of persons suspected of criminal offences. In this article, the role of the psychiatrist in assessing fitness to be interviewed is set against the background of the latest revisions of the Codes of Practice of the Police and Criminal Evidence Act 1984 and relevant case law in England and Wales.

Psychiatric opinion is needed at various stages in the criminal process. In this article, we are concerned with the provision of psychiatric opinion to the police at the stage of their investigation of an alleged offence by interviewing a suspect. This is the stage at which, having gathered sufficient evidence, usually including the interviewing of witnesses, the police conduct a formal interview with the suspect. The purpose of this interview is to obtain admissible evidence that will enable the police to seek advice from the Crown Prosecution Service as to whether to charge the individual with an offence or offences and that will, if the accused pleads not guilty, enable the prosecution to present its case at trial.

No one who has read Gudjonsson's (2003) *The Psychology of Interrogations and Confessions* can fail to be impressed, and disturbed, by the number of serious miscarriages of justice that resulted from improper police interviewing of suspects and unreliable and false confessions in the second half of the 20th century. The enactment of the Police and Criminal Evidence Act 1984 (PACE) and the application of its Codes of Practice ('the Codes') (Home Office, 2005) represent important steps towards preventing such miscarriages of justice. As a result, psychiatrists as well as forensic medical examiners (FMEs), or police surgeons as they were previously known, increasingly became involved in assessing people detained by the police and

advising as to their 'fitness to be interviewed' (Protheroe & Roney, 1996), and one of us prepared guidance on the topic for *Advances in Psychiatric Treatment* (Rix, 1997).

A steady trickle of 'post-PACE' cases going to appeal indicates that the safeguards created by PACE and the Codes are not completely effective or are not always properly applied and, as there have been revisions of the Codes and significant legal judgments since 1997, it is timely to provide here new and updated guidance for psychiatrists.

The legislative background

Section 76(2) of PACE requires the judge to exclude confession evidence if the prosecution cannot prove beyond reasonable doubt that it was not obtained by oppression or in consequence of something said or done which was likely to have made it unreliable, notwithstanding that it may be true. There is no discretion in this regard. Section 78(1) gives the judge discretion to exclude evidence, including a confession, on the grounds that its admission would adversely affect the fairness of the proceedings. Relevant circumstances here include the psychiatric state of the accused. These are specific provisions and section 82(3) gives the judge further wider discretionary power to exclude evidence. There is also a similar power under common law.

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Under section 77 of PACE there is a specific provision for the 'mentally handicapped'.¹ The judge must warn the jury that there is a special need for caution before convicting a 'mentally handicapped' person if the confession was not made in the presence of an independent person and the case depends wholly or substantially on the confession.

According to PACE, anyone suspected of being involved in crime and everyone in police custody must be dealt with fairly and properly in accordance with the law. To ensure that this is the case, and also to be confident that police interview evidence will be admissible, the police apply the various provisions of the Codes, in particular Code C (the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers), which may require the assistance of an FME, an appropriate adult and/or a psychiatrist.

The role of the psychiatrist

It is important to distinguish between the psychiatric assessment of a suspect or detainee that precedes, or takes place around the time of, an interview by the police and the forensic investigation of a case prior to trial, or on appeal, in which issues include the admissibility in evidence of the police interviews and/or their reliability.

One significant difference is the level of training and experience required. A psychiatrist called on by the police or by an FME to examine a suspect at a police station is likely to be a general psychiatrist such as a staff grade psychiatrist, a specialist registrar or a consultant, with little or no specialist forensic training, whereas it is usually from forensic psychologists and psychiatrists that opinions are sought pre-trial or on appeal. In this article we deal only with the role of the psychiatrist in assessing fitness to be interviewed.

In most cases an assessment of fitness to be interviewed will already have been made by the FME. However, FMEs vary considerably in their experience of making such assessments. In some parts of the country, where there are experienced and well-qualified FMEs, psychiatrists are likely to be consulted only in relatively difficult cases. In other parts of the country, where FMEs are unfamiliar with assessing fitness to be interviewed, psychiatrists may be consulted more often and in relatively simple as well as complicated cases. In all cases it is important for the psychiatrist to take

into account the findings of the FME and, where appropriate, refer cases back to the FME for further assessment.

The *dramatis personae*

Suspect, detainee, accused, defendant or offender?

Different terms are used at different stages to refer to persons involved in criminal proceedings. A person who is suspected of committing a crime is a suspect. If the police consider that there is sufficient evidence, the suspect is arrested and becomes a detainee or detained person (sometimes abbreviated to DP in the custody record). Following interview, a detainee may be charged with an offence or released without charge. A person released without charge may remain a suspect and may therefore be released on bail in order that the police can interview them again. If the person is charged with an offence they become an accused person. An accused may be remanded into police custody and remain a detainee and then appear before a court to be released on bail or remanded into prison custody. An accused person who attends court to plead guilty and await sentence or to plead not guilty and stand trial is also known as a defendant. Once convicted, upon a plea of guilty or a finding of guilt by a court, the person can be described as an offender. In this article we are concerned mainly with persons arrested and detained in police custody for interview and we mainly use the term detainee. Where we refer to case law relating to trials and appeals, we use the term defendant, as the context is the trial process, or the term appellant.

It is important to note that, with very few exceptions (for example being suspected of terrorism), the general safeguards of Code C apply, irrespective of a person's status at a police station. They need not have been arrested or indeed be a suspect when interviewed to qualify for these safeguards.

Forensic medical examiner

Forensic medical examiners are medical practitioners contracted to police authorities to provide the necessary medical expertise for the investigation of crime and the medical care and treatment of suspects, witnesses and victims of crime. They may be full-time or, more often, part-time. They vary from those with recognised post-graduate qualifications such as the Diploma in Medical Jurisprudence or the Master of Medical Jurisprudence awarded by the Society of Apothecaries or Membership of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians to those with no formal qualifications in

1. Defined in law as 'a person ... in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning'.

Box 1 The appropriate adult

- A relative, guardian or other person responsible for (the detainee's) care or custody
- Someone who has experience of dealing with mentally disordered or mentally handicapped people but is not a police officer or employed by the police (such as an approved social worker as defined by the Mental Health Act 1983) or a specialist social worker; or
- Failing either above, some other responsible adult aged 18 or over who is not a police officer or employed by the police

(Police and Criminal Evidence Act 1984 (PACE):
Code C, para. 1.7(b))

forensic medicine and little or no relevant training or experience.

The appropriate adult

Qualification for the role of the appropriate adult is set out in paragraph 1.7(b) of Code C (Box 1). In practice the appropriate adult is usually a social worker (and approved mental health professional under the Mental Health Act 2007) from the emergency duty team. Only occasionally is the appropriate adult a relative of the detainee.

The first question in relation to the appropriate adult is whether or not, to comply with Code C, the services of such an individual should be obtained. Paragraph 1.4 of Code C states:

'If an officer has any suspicion, or is told in good faith, that a person ... may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code.'

In these circumstances the custody officer must, as soon as practicable, inform the appropriate adult of the grounds for the person's detention, their whereabouts and ask the adult to come to the police station to see the detainee.

According to paragraph 11.15, unless special provisions apply:

'A ... person who is mentally disordered or otherwise mentally vulnerable must not be interviewed ... in the absence of an appropriate adult.'

It would seem to follow that if a person has a mental disorder, whether or not affecting fitness to be interviewed, the appropriate-adult provisions should be followed, including the presence of an appropriate adult at the interview. On this basis it is the status of the detainee, whether or not they

have a mental disorder or mental vulnerability, that activates the appropriate-adult safeguards rather than any clinical assessment as to the effect of the disorder or vulnerability. According to Annex G of Code C, when called on by the custody officer:

'Health care professionals should advise on the need for an appropriate adult to be present' (para. 5),

and

'Once the health care professional has provided that information, it is a matter for the custody officer to decide whether or not to allow the interview to go ahead and if the interview is to proceed, to determine what safeguards are needed' (para. 8).

This latter provision allows the custody officer to stipulate extra safeguards beyond the presence of the appropriate adult, for example determining the duration of the interview, ensuring that regular breaks occur or requesting the healthcare professional to be present to provide support. It does, however, also suggest that ultimately the custody officer retains discretion to proceed to interview, even when in possession of advice that the person is 'at risk'.

Psychiatrists are therefore advised to recommend the presence, during any interview, of the appropriate adult in all cases where there is mental disorder or mental vulnerability, whether or not they judge the detainee to be fit to be interviewed. Gudjonsson *et al* (1993) and Bean & Nemitz (1995) found evidence that appropriate adults were substantially underused in cases where their presence was indicated. Realistically, however, it would be extremely difficult to provide an appropriate adult in all cases where somebody is 'mentally disordered' within the meaning of section 1 of the Mental Health Act 1983. This would necessarily include all those with a personality disorder. Even if related only to people remanded in custody, this would be a very large number and the resource implications are 'huge' (Evans, 2001). Singleton *et al* (1998) found that 78% of remand prisoners had a diagnosis of personality disorder. Over a typical 24 hours in Leeds, for example, it has been estimated that, just for overnight detainees and excluding those with personality disorder, appropriate adults would be needed for about three cases of 'serious psychiatric disorder', four cases of alcohol dependence, four cases of drug dependence and perhaps two cases of intellectual disability (Rix, 2001).

Paragraph 11.17 of Code C sets out the role of the appropriate adult at a police interview (Box 2).

The custody officer

The custody officer is a police officer, in the rank of at least sergeant, who is responsible for the welfare of suspects detained at a police station and has a

Box 2 The role of the appropriate adult at a police interview

- To advise the person being interviewed
- To observe whether the interview is being conducted properly and fairly
- To facilitate communication with the person being interviewed

(Police and Criminal Evidence Act 1984 (PACE):
Code C: para. 11.17(b))

pivotal role in ensuring compliance with all of the provisions of the Codes. This is a welfare role that is separate from the investigative role. The custody officer decides if and when the investigating officers can have access to the detainees in his or her care and with what precautions or safeguards, such as the assistance of the appropriate adult.

Definitions and concepts

Fitness to be interviewed

Now that 'Fitness to be interviewed' has its own Annex to the Codes it seems reasonable to formulate the definition of fitness to be interviewed by the police (Box 3).

Where an individual is 'at risk' in an interview, the additional safeguards of Code C mitigate against that risk, reducing the likelihood that any confession subsequently will be considered unreliable, although, as will be seen, a suspect being fit for interview does not automatically render their confession reliable.

Although this article is concerned with the law of England and Wales, and other jurisdictions have different legal and statutory provisions, most embody similar principles:

Box 3 Fitness to be interviewed – the risks

A detainee may be at risk in an interview if:

- conducting the interview could significantly harm the detainee's physical or mental state;
- anything the detainee says in interview about their involvement or suspected involvement in the offence about which they are being interviewed might be considered unreliable in subsequent court proceedings because of their physical or mental state.

(Police and Criminal Evidence Act 1984 (PACE):
Code C, Annex G)

- the interviewing or interrogation of suspects should not result in physical or mental harm;
- so far as possible, measures should be taken to avoid the evidence provided by a mentally disordered or vulnerable suspect being excluded on the grounds of unreliability;
- where mentally disordered or vulnerable suspects have provided potentially unreliable evidence, there should be provision for its exclusion or for the exercise of caution regarding its weight in order to avoid potential miscarriages of justice.

These provisions reflect the principles of natural justice and the rights and fundamental freedoms now embodied in the Human Rights Act 1998. To cause physical or mental harm to suspects could be a breach of Article 3, 'Prohibition of torture'. The exclusion of evidence of people who are mentally disordered or vulnerable, or caution as to the weight to be attached to it, is necessary in order for them to have under Article 6 their 'Right to a fair trial'.

In this article we are concerned primarily with the mental state of detainees. The FME is responsible for taking into account their physical state, and in the exceptional case in which a psychiatrist considers that the physical state of the detainee has implications for fitness to be interviewed they should refer the case back to the FME.

Mental disorder and mental vulnerability

Code C now addresses not just mental disorder, for which it adopts the definition of mental disorder in section 1 of the Mental Health Act 1983, but also 'mental vulnerability', which applies to anyone who 'because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies' (Code C, guidance note 1G). This term has replaced 'mentally handicapped' used in previous versions of Code C but, as is seen below, has rather wider scope than the term 'learning disability' or 'intellectual disability'.

Reliability

In attempting to describe reliability in this context we first consider how the judgment in *R v. McKenzie* (1992), which concerns a 'mentally handicapped' man (as judged by the court), establishes a definition of an unreliable confession:

'the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them'.

The court went on to mention some of the factors that might lead to such unreliability:

'because they lack the incriminating details to be expected of a guilty and willing confessor, or because they are inconsistent with other evidence, or because they are otherwise inherently improbable'.

Statute and case law make it clear that there are factors beyond the actual content of the confession that influence reliability, for example the circumstances in which it was obtained. Dictionary definitions of reliability encompass such elements as accuracy, trustworthiness and truth. We therefore suggest that, in the context of a police interview, reliability is essentially that a person has the capacity for truthfulness and accuracy that is not impaired by either mental disorder or vulnerability or, where such dangers exist, steps have been taken to negate their potential effect on the interview. Reliability therefore has two components: internal – relating to the interviewee; and external – circumstances or things that are said or done that might affect the interviewee and what he or she says. It has been established (*R v. Cox* [1991]; *R v. Crampton*, 1991) that confessions are potentially unreliable, and therefore inadmissible, even if they are a true and accurate reflection of a person's involvement in a crime, i.e. where the 'internal' component has no effect on unreliability, but the 'external' factors do. This might be the case where no appropriate adult was present or another breach of Code C occurred.

The PACE and its Codes were introduced to provide a clear set of rules governing the conduct of the police and the obtaining of confessional evidence. One might therefore reasonably expect uniformity of approach from the courts (both trial and appeal) in considering such evidence but, as will be shown, this is not always the case.

Fitness to be interviewed and capacity

Fitness to be interviewed, like, for example, fitness to plead and stand trial, is a capacity issue. The Mental Capacity Act 2005 has given a statutory basis to capacity being approached in terms of function rather than status or outcome. The functional approach is already adopted by the Codes. Annex G of Code C, states that:

'It is essential health care professionals who are consulted consider the functional ability of the detainee rather than simply relying on a medical diagnosis, e.g. it is possible for a person with severe mental illness to be fit for interview' (para. 4).

It is not the case that someone lacks capacity just because they have a mental disorder. What is critical is the effect of that disorder on the ability to participate in the interview process. In *R v. Law-Thompson* [1997] the appellant was charged with the attempted murder of his mother. He had 'autistic

psychopathy' and Asperger syndrome, with marked rigidity of thought and a belief that his mother was evil. He was interviewed without an appropriate adult but the Court of Appeal held that there was no basis for believing that his confession was unreliable and should therefore have been excluded under section 78 of PACE. Therefore, it is necessary to be able to show that the mental disorder has led to some unreliability. As held in *R v. Hall* (quoted in Gudjonsson, 2003: p. 498):

'[T]he real criterion must be whether the abnormal disorder might render the confession or evidence unreliable'.

It is a functional test. It is not the case that anyone who has a psychiatric disorder, or a history of psychiatric disorder, will be unfit to be interviewed.

Police and Criminal Evidence Act 1984: Code C, Annex G

Annex G of Code C, 'Fitness to be interviewed', is guidance 'to help police officers and health care professionals assess whether a detainee might be at risk in an interview'. Box 3 shows the possible risks. Box 4 shows the various considerations to be taken into account when assessing whether a detainee should be interviewed.

The assessing health professional is also required to advise on the need for an appropriate adult to be present, advise whether or not reassessment of fitness to be interviewed may be necessary if the interview lasts beyond a specified time and advise on a further specialist opinion.

When risks are identified, Annex G requires them to be quantified and the custody officer to be informed of them along with any advice or recommendations. Advice and recommendations have to be in writing and form part of the custody record.

Annex G introduces the additional safeguard, if indicated, of having an appropriate healthcare professional present during the interview in addition to the appropriate adult, 'in order constantly to monitor the person's condition and how it is being affected by the interview'.

Mental or personality abnormalities and vulnerabilities affecting fitness to be interviewed

It is important to note at the outset that 'any mental or personality abnormalities may be of relevance' (*R v. Wilkinson*, 1996).

The effect of some mental disorders, for example profound dementia and mania, on fitness to be

Box 4 Considerations as to fitness to be interviewed

- (a) How the detainees's physical or mental state might affect their ability to understand the nature and purpose of the interview, to comprehend what is being asked and to appreciate the significance of any answers given and make rational decisions about whether they want to say anything
- (b) The extent to which the detainee's replies may be affected by their physical or mental condition rather than representing a rational and accurate explanation of their involvement in the offence
- (c) How the nature of the interview, which could include particularly probing questions, might affect the detainee

(Police and Criminal Evidence Act 1984 (PACE): Code C, Annex G)

interviewed is fairly obvious. The effects of others are not so obvious but there is now a substantial body of case law that shows the approaches adopted by the courts when considering the reliability of admissions or confessions by people with mental disorders.

Case law**Inducing a delusional state**

Mental or personality abnormalities seem more often to put detainees at risk in police interviews when their mental state renders them potentially unreliable than when conducting the interview puts them at risk of significant harm (Box 1). However, there has been a case in which the issue was whether conducting the interview could have significantly harmed the detainee's mental state. This was the case of *R v. Miller* [1986], where it was said that it might be oppressive to put questions to an accused who was known to be mentally ill so as 'skillfully and deliberately' to induce a 'delusionary' state in him. So, even though a detainee might not be potentially unreliable as a result of their mental condition, a patient with active psychosis, or one in what might be regarded as a fragile state of remission, might be unfit to be interviewed if the interview might aggravate a pre-existing psychosis or precipitate relapse. This might be especially likely in someone whose delusions are of a persecutory nature and the more so if they involve the police.

Prone to fantasise

In *R v. Dutton* (unreported case no. 4627.G1/87, details available from the author), a 42-year-old man, who was born in a psychiatric ward where his mother was an in-patient, attended a residential school for 'retarded' pupils and was considered 'mildly mentally handicapped' with a mental age of 13 years and an IQ of 60, was convicted of sexual offences. The trial judge acknowledged that the police should have requested an appropriate adult for the interview with the prisoner, whom they knew had attended a special school and had been subject to a hospital order under the Mental Health Act. However, he allowed the confession evidence to be put to the jury. The appellant successfully appealed against conviction and the Court of Appeal judges explained:

'... paragraph C.13 is intended to deal with ... an interview by the police of a person who is mentally handicapped or at least probably so. It is notorious that such people may be prone to fantasize and may on occasions admit to crimes they have not committed ... we believe that ... (a) the appropriate adult would, before the police interview, have ascertained ... quietly and without any pressure, what he wished to say; and/or (b) ... ensured that Mr. Dutton had the advice of a solicitor before he was interviewed. It follows that if Mr. Dutton had been accorded the assistance of a responsible adult, he might well have made no admissions at all. Certainly, we cannot be sure that he would nevertheless have made the admissions he did make'.

The arbitrary line

So far as the significance of the degree of 'mental handicap' or 'learning disability' is concerned, the case of *R v. Raghip* (1991) is relevant. Engin Raghip was convicted of the murder of a police officer in the Broadwater Farm riots. Prior to his trial it was known that he had a history of what were described as 'serious learning difficulties' and that he had been recommended to attend a special school. Evidence given at his successful appeal was that he had a verbal IQ of 73 and a performance IQ of 77 and the Court of Appeal Judges said that they were:

'... not attracted to the concept that the judicial approach to submissions under section 76(2)(b) should be governed by which side of an arbitrary line, whether at 69/70 or elsewhere, the IQ fell'.

Physically ill and emotionally distressed

R v. McGovern (1991) is the case of a woman with an IQ of 73 who was 19 years old and 6 months pregnant when she was charged with murder. It was part of her successful appeal against conviction that the incriminating confession was made without the assistance of a solicitor when she was:

'... physically ill, emotionally distressed and unable to understand the caution until it was explained in simple language.'

The evidence for physical illness was that she had been vomiting in her cell before the interview.

Emotionally aroused

In the case of *R v. Delaney* (1988) the IQ was even higher. Delaney was a 17-year-old so-called 'educationally subnormal' man who was convicted of indecent assault. The Court of Appeal heard that he had an IQ of 80 and his emotional arousal was such that he might wish to rid himself of an interview as rapidly as possible. It was ruled that:

'... the (trial) judge ... should have ruled against the admission of these confessions, particularly so against the background of the appellant's age, his subnormal mentality and the behaviour of the police and what they admittedly said to him'.

Boasting and exaggeration

Low IQ was also the issue in *R v. Ali* [1999], where the appellant, who had an IQ between 66 and 72, was interviewed in the absence of an appropriate adult about allegations of drug dealing. The trial judge concluded that he was 'mentally handicapped' and he excluded some of the interview evidence on the basis that, if an appropriate adult had been present:

'... there would have come a point in the interview where such a person could and probably should have intervened to establish from the defendant privately whether he really meant what he was saying, whether he was boasting, whether he wanted to suspend an interview so that a solicitor could give him further advice or, if he wished to continue the interview, such a person could have established that he appreciated the need to stick closely to the truth and not exaggerate'.

However, he was convicted. Nevertheless the Court of Appeal quashed his conviction. It acknowledged that, although some of his evidence was sensible and reliable, his admissions and assertions, which were the sole basis for the evidence that he was supplying drugs, were obviously exaggerated and likely to be unreliable. Here, the boasting and exaggeration arose from what was presumably an intellectual disability but they may also be the reason why some people with personality disorder are at risk.

The product of delusions and hallucinations

Psychotic disorders are particularly likely to raise issues regarding unreliability. In *R v. Miller* [1986], discussed earlier, the court went on to acknowledge that there was a discretion to exclude 'a confession which came from a mind which at the time was

possibly irrational and [where] what the defendant said may have been the product of delusions and hallucinations.'

Under the influence

Personality disorder was the basis of the successful appeal against conviction of a prostitute who was convicted of robbery (*R v. Walker* [1998]). This case also indicates how drug intoxication may be regarded as affecting the reliability of admissions. It was Rebecca Walker's case that she had smuggled some 'crack' cocaine into the police station and had smoked this, and was under its influence, while she was interviewed. In her defence, psychiatric evidence was called to the effect that she had a severe personality disorder. Having listened to the tape of the interview, the psychiatrist was of the opinion that her psychiatric condition might have rendered her admissions unreliable because she might have elaborated inaccurately on events without understanding the implications and this effect was likely to have been exacerbated by the effects of cocaine. The trial judge did not accept that the personality disorder rendered the interview unreliable and he did not believe her evidence that she had smoked 'crack'. However, her appeal against conviction was allowed on the grounds that, as the trial judge had accepted the uncontradicted evidence of the psychiatrist as to her personality disorder, her mental condition was one of the circumstances that should have been taken into account in considering the reliability of her admissions. It should be noted that the Court of Appeal did not go on to consider the effects of the intoxication and held that it was not central to the evidence of the psychiatrist, 'which was principally concerned with the pre-existing disorder'.

A child-like desire to protect

Personality disorder in combination with 'low normal intelligence' was of importance in the case of *R v. Harvey* [1998]. Ms Harvey had a psychopathic disorder and heard her lover confess to murder. As this experience may have led her to make a false confession out of a child-like desire to protect him, her statement was excluded under section 76(2)(b) of PACE on the basis that the prosecution could not prove beyond reasonable doubt that her confession was not a consequence of hearing her lover's confession.

Extreme emotion and distress

R v. Souter [1995] was the case of a soldier whose confession was held to be inadmissible because he made it when he was in a state of extreme emotion and distress to an officer who had been sent to calm

him down. In this case it was a mental vulnerability rather than a mental disorder that led to the inadmissibility of his evidence.

Getting home to the missus and kids

Tiredness, stress and worry gave rise to mental vulnerability in the case of *R v. Aspinall* [1999], although it was critical also that he had an actual mental disorder, specifically schizophrenia. Mr Aspinall had been arrested for the supply of heroin and he informed the custody officer that he suffered from schizophrenia. An FME found him to be medication adherent and lucid. A second FME considered him fit to be interviewed. Mr Aspinall declined the offer of a solicitor saying, 'I want to get home to my missus and kids'. He was eventually interviewed 13 hours after arrest without an appropriate adult. At his trial, his own consultant psychiatrist said that he would probably have been tired, under stress and worried and, as a consequence, he might have been less able to cope with questions and might have given answers in order to effect his early release from custody. However, the interview was ruled admissible and he was convicted. At his successful appeal it was held that:

'... there was a clear breach of the Code because A should have had an appropriate adult with him when being interviewed ... A vulnerable person who has been in custody for some 13 hours and who is more likely to be stressed than a normal person cannot be equated with a person lacking any disability ... A significant part of the duty of an appropriate adult is to advise about the presence of a solicitor at interview and this appellant was deprived of such advice which in all likelihood would have urged him to have legal representation ... Assuming the account given at trial was the truth, the appropriate adult or legal advisor could have been expected to advise him to tell the truth at interview. If he had done that, his answers would have assisted the defence and not the police ... The appellant's credibility was undermined by his lies, which was essentially unfair, not by reason of malice or pressure, but by lack of safeguards to which he was entitled by reason of his disability.'

The Court ruled that the interview evidence should have been excluded under section 78 of PACE having regard to its adverse effect on the fairness of the proceedings.

Abnormally suggestible and compliant

The mental vulnerability that is particularly relevant to fitness to be interviewed is suggestibility. In the case of *R v. Smith* [2003] the appellant was a man who had been convicted of attempted rape and burglary with intent to commit rape. The only evidence that implicated him was his confession. At his trial the defence relied on a report by a psychiatrist that

indicated that, whatever character deficiencies he might have had, they were not so severe as to be classified as abnormal. At his appeal there was new evidence, from a forensic psychologist instructed on his behalf and from another psychologist instructed by the Crown, that he produced abnormally high confabulation scores, both on immediate and delayed recall. The psychologist called on his behalf was of the opinion that he was 'abnormally suggestible and compliant on testing'. His conviction was quashed on the basis that it was unsafe.

The borderline of abnormality

The case of *R v. Steel* [2003] concerned a man convicted of murder in 1979. The psychiatrist who had been instructed at the time of his trial disregarded the IQ of 67 and, perhaps because the defendant 'spoke easily and gave a good account of himself', decided that the IQ score was an underestimate and that 'clinically he is of dull normal intelligence'. The psychiatric report was not in evidence and in his summing up the judge said that the defendant was 'not very bright intellectually. Well, you have seen him and you have heard what has been said about him. I repeat, it is for you to judge it and nobody else'. At Smith's successful appeal 24 years later it was held that it was 'his unforeseen abnormally low IQ which rendered him particularly vulnerable to interrogation'. At his appeal there was evidence obtained in 1996 and 2001 to the effect that he had a full scale IQ of 74 in 1996 (WAIS-R) and of 65 (WAIS-III) in 2001, and degrees of suggestibility and compliance 'near the borderline of abnormality'.

Prolonged questioning

Vulnerability is not to be considered in isolation from the circumstances of the interview. In *R v. Blackburn* (2005), expert evidence was considered admissible regarding the issue of whether someone, after prolonged questioning, might make false confessions.

The judgment of those present at the time

Mental disorders that may in some cases be accepted as rendering an interview unreliable may not always be so accepted. In *R v. Crampton* (1991) a man with a drug addiction appealed unsuccessfully against conviction on the grounds that his incriminating admission had been made when he was withdrawing from opioid drugs. The Court held that:

'Whether or not someone who is a drug addict is fit to be interviewed, in the sense that his answers can be relied upon as being truthful, is a matter for judgment of those present at the time'.

Likewise, in *R v. Heaton* [1993], a case in which a man was convicted of the manslaughter of his own

child, the Court of Appeal upheld the trial judge's decision to exclude the evidence of a psychiatrist who stated, from a single interview, that the defendant was 'not exceptionally bright', was of 'dull normal intelligence' and was 'highly suggestible'.

In a concerning contradiction to other findings and to the provisions of Code C, the Court of Appeal dismissed an appeal in *R v. Lewis* [1996], holding that the roles of the appropriate adult and solicitor were in fact 'very similar' and that the absence of an appropriate adult (Lewis had a low IQ and a strong suggestion of brain damage) had not made his police interview unreliable, since his solicitor had been present at the interview. This suggested that the role of the appropriate adult could be incorporated into that of the solicitor, potentially negating the need for their presence at all.

The influence of mental disorder and vulnerability on fitness to be interviewed

We will now consider some specific mental disorders and vulnerabilities, and identify the processes by which unreliability can arise.

Acute and chronic organic mental states

The main effect of an organic mental state may be to make it difficult or impossible for the detainee to understand the nature and purpose of the interview, comprehend what is being asked and appreciate the significance of any answers given. Even if the degree of cognitive impairment is not so great as to cause such problems, unreliability may still arise. For example, a detainee with an expressive dysphasia may not be able to give an accurate explanation for their involvement in the offence and misleading conclusions may be drawn from what they say.

Alcohol and drug intoxication are specific organic states that can lead to unreliability, as potentially are alcohol and drug withdrawal states. Where withdrawal symptoms are severe, they may lead a detainee to say or do anything to get the interview finished and get out of the police station in order to resume alcohol or drug misuse.

Schizophrenia and related psychoses

Psychotic disorders are particularly likely to raise issues as to unreliability. Instead of giving a rational explanation of their involvement in an offence, a psychotic detainee may give an account that is the product of delusions and hallucinations.

However, a person in a psychotic state may be able to give an accurate and reliable account even though

they may suffer delusions, providing they satisfy the conditions demonstrating capacity in this context. So, for example, a man may well be able to give a very accurate detailed account of his material actions in killing his wife (e.g. 'I stabbed her three times to the abdomen at 9 pm') but he may also describe his motivation based on psychotic symptoms (e.g. 'I did it because voices told me to do it'). Each statement may well be accurate and a truthful account of the man's motivation and, as such, reliable.

A detainee so distracted by hallucinations as to be unable to attend to the question is likely to be unfit.

Particular care is needed with detainees who, although they may not be floridly deluded or hallucinating, or whose delusions or hallucinations do not touch on the area of enquiry by the police, experience schizophrenic thought disorder. Even relatively mild thought disorder can affect the ability to give a rational and accurate explanation of their involvement in the offence.

Particular care is also needed to identify detainees whose psychosis may be aggravated or re-activated by a police interview.

Mania and hypomania

A detainee in a manic state will probably be unable to understand the nature and purpose of the interview or comprehend what is being asked. Even if they can, they may not appreciate the significance of what they say and what they say may not be a rational and accurate account of what has happened.

A detainee with hypomania, especially if mild such that they can keep it apparently under control through the course of a psychiatric consultation, may nevertheless be at risk because they are grandiose enough to think that it does not matter what they say or it does not matter whether they exercise their right to silence or their right to be legally represented.

Particular care is needed in the assessment of abnormal mood states arising from psychiatric conditions that might lead to an adverse inference. For example, a man who was alleged to have committed a serious act of violence appeared to be especially callous and unfeeling because of his hypomanic irritability, which was the main presenting feature of his illness. This led to questioning that sought to expose that callousness and about which a jury might have drawn an adverse inference (unreported, details available from the authors).

Depressive disorders

A detainee who is depressed and feeling hopeless may be so little bothered by police interview that they give answers without appreciating their significance.

A detainee who is depressed and feeling guilty may make false admissions to bring punishment on him- or herself. A detainee who is severely depressed may be unable to understand the nature and purpose of the interview or comprehend what is being asked.

Intellectual disability

It is fundamental to a just and fair interview about an alleged criminal offence that the detainee should understand the nature and purpose of the interview. As some of the cases mentioned above illustrate, individuals with intellectual disability (referred to as mental handicap in section 77 of PACE and in earlier versions of the Codes) do not always understand the caution. If they do not understand the caution they do not understand the nature and purpose of the interview. Detainees with intellectual disability may be more prone to boasting and do so without appreciating the significance that will be attached to their answers. They may be more prone to exaggerating. Indeed, they may fantasise and admit to crimes they have not committed. Such individuals are also at risk of compounding these difficulties because they are less likely than a person of ordinary intelligence to exercise their right to legal advice the effect of which might be to advise them not to boast, not to exaggerate and just to tell the truth.

Personality disorder

The case law indicates that personality disorder has the potential to render admissions unreliable. The personality disorders particularly likely to give rise to unreliability are those in which there is a tendency to elaborate inaccurately on events or to exaggerate without understanding the implications of doing so. It may be the very dependent person who makes a false confession out of a child-like desire to protect the person with whom they are in a dependent relationship.

Mental vulnerabilities

Heightened emotional arousal is a vulnerability that has been identified in a number of cases. It may be the reason why a detainee wants to end the interview as quickly as possible and will admit anything in order to do so, without appreciating the significance that will later be attached to their answers. Tiredness can have the same effect, as can worry about family or friends.

Guilt and bereavement are other types of vulnerability. They need to be considered especially in cases where a detainee has injured or killed a friend or family member.

The mental vulnerability that is particularly relevant to fitness to be interviewed is suggestibility. It may manifest in the giving of misleading answers to leading questions or in the changing of answers under pressure. Related to suggestibility is compliance. Abnormally compliant detainees are at risk of giving an inaccurate explanation of their involvement in the offence.

Vulnerability is not to be considered in isolation from the circumstances of the interview, such as the use of prolonged questioning or particularly probing questions.

Assessing fitness to be interviewed

The assessment of fitness to be interviewed is essentially a capacity test for that particular individual and that particular interview. In Box 5 we set out the questions that the assessing physician will need to be able to answer. It is important to have these questions in mind in the course of the assessment that is outlined here.

The assessment of a suspect in police custody is often of a person unknown to the assessing doctor and there may be little background information. Occasionally a psychiatrist is asked for an opinion on the fitness to be interviewed of a patient under their care and this raises particular ethical considerations (see below).

Box 5 Questions to be answered in assessing fitness to be interviewed

- Can the detainee:
 - understand the questions being put to them?
 - understand the nature and significance of the police caution?
 - understand the nature and purpose of the interview?
 - understand the significance of what is being asked?
 - understand the significance of any answers given?
 - make reasoned and rational decisions about whether they want to say anything?
- Does the detainee's mental state adversely affect their capacity to be accurate or tell the truth?
- Would the process of interview lead to a significant deterioration in the detainee's condition?

The psychiatrist should prepare by obtaining as much information as possible before the examination of the detainee: information from the arresting police officers and custody officer; information in the custody record; the observations of the FME and/or appropriate adult; and, if possible, information from the detainee's general practitioner, psychiatrist or other mental health professional.

As with any medico-legal examination, having introduced him- or herself, the psychiatrist should seek valid consent. Where a detainee lacks the capacity to provide consent, a formal assessment should take place, in accordance with the Mental Capacity Act 2005, as to whether it is in the best interests of the detainee to proceed with the examination. There would need to be very persuasive reasons for not proceeding, given that the purpose of the assessment is to ensure that potentially vulnerable suspects are treated fairly and are afforded safeguards where necessary.

Although not incorporated into Code C, guidelines produced by a Home Office Working Group may assist in quantifying the risk of unreliability in interview (Box 6). It is useful to undertake the assessment with these potential outcomes in mind, along with the considerations in Boxes 3 and 4.

The assessment of fitness to be interviewed is based on the standard psychiatric history, mental state and appropriate physical examination.

Enquiry should be made as to any history of mental illness, including admissions to hospital, treatment, adherence and typical symptoms.

A history of dependence on, or recent use of, drugs and alcohol, including any current or anticipated withdrawal symptoms, should be sought.

Pointers as to the presence of personality disorder may be apparent from the history and examination, and should be pursued accordingly.

Box 6 Quantifying the risk of unreliability

- 1 *Definite risk* The detainee is unlikely to be fit for interview at any stage.
- 2 *Major risk* Detainee is unfit for interview at the time of the assessment but a further evaluation is required at a later time.
- 3 *Some risk* Precautions are advised, which may include recommendation of an appropriate adult or referral to a medical or psychiatric service.
- 4 *No discernible risk* Interview can proceed without the presence of an appropriate adult or further medical or psychiatric intervention.

(Home Office, 2001)

Box 7 The police caution

'You do not have to say anything. But it may harm your defence if you do not mention now something which you later rely on in court. Anything you do say may be given in evidence.'

(Police and Criminal Evidence Act 1984 (PACE): Code C, para. 16.2)

Examination of the mental state is essential. Testing of cognitive function, including the Mini-Mental State Examination (Folstein *et al*, 1975) may be necessary.

Understanding of the police caution (Box 7) should be assessed. This can be explained in simple terms if necessary. The person should then be asked to explain the caution in their own words.

The nature of any medication may provide hints as to mental or physical illness, including organic conditions with psychiatric sequelae, for example cerebrovascular disease, epilepsy or dementia.

The intellectual ability of the detainee is assessed on the basis of the history and of simple testing. It is important not to guess at IQ but to focus on functional ability as indicated by the developmental, educational and social aspects of the history and the person's performance and understanding in ordinary conversation. The psychiatrist should not hesitate to recommend formal IQ testing even though this may not take place for weeks or months.

The presence and severity of any physical disorders, including a history of head injury or brain damage, should be noted. An appropriate physical examination should be carried out.

The history and examination may reveal other features that may affect reliability, such as bereavement, extreme anxiety, tiredness or fatigue, or pain. Craving for alcohol or drugs may also affect reliability. These, although not mental disorders *per se*, may make the detainee 'mentally vulnerable' under Code C.

The examination may also reveal features of abnormal suggestibility or compliance. Gudjonsson *et al* (2000) suggest that these are difficult to identify without psychological testing. Nevertheless, where suspected, the presence of an appropriate adult can be recommended. In extreme cases, such abnormalities may lead to a finding of unfitness for interview, although in these circumstances it would be wise to suggest the involvement of a forensic psychologist to assess the detainee further.

The presence of mental disorder or other 'mental vulnerability' is sufficient to trigger the safeguards of Code C, including the provision of an appropriate

adult. Establishing that a suspect is unfit for interview may be more difficult. Although helpful as a memory aid, relying on a list of psychiatric conditions that may affect fitness to be interviewed is something of an oversimplification. A judgement must be made as to the likely impact of the symptoms of the disorder on the police interview and reliability (the functional test), rather than assuming that a diagnosis alone renders a person unfit (the status test). In particular, it should be noted that the presence of psychosis does not necessarily render a person unfit to be interviewed. Box 8 lists abnormalities that may render a person unfit to be interviewed.

At the end of the assessment the doctor should record the main findings in the custody record,

Box 8 Abnormalities that may render a person unfit to be interviewed

- *Appearance and behaviour*: severe distractibility, arousal or agitation, psychomotor retardation, impaired or fluctuating consciousness. Signs of intoxication or severe withdrawal from drugs or alcohol.
- *Mood/affect*: Signs and symptoms of mania, particularly disinhibition. Extreme anxiety or perplexity. Severe depression may be associated with profound thoughts of guilt, increasing the risk of making a false voluntary confession.
- *Speech/thought*: Thought disorder.
- *Beliefs*: Delusional beliefs related to the circumstances of detention in custody or suspected offence, the police or legal representation. Delusions of thought insertion, withdrawal or broadcast. Grandiose delusions or delusions of guilt. Preoccupation with other types of delusion to a degree that interferes with conversation, or active and ongoing delusional misinterpretation of words and actions of others
- *Perceptions*: Hallucinations that are likely to interfere with process of an interview, e.g. with content related to the interview or circumstances of arrest or that are severely distracting.
- *Cognition*: Disorientation in time, place, person. Minor disorientation in place and time may be acceptable if clarification can be made with cues and cross-referencing. Severe impairment of attention, concentration or memory. Evidence of confabulation.
- *Intellect*: Inability to understand the police caution even when explained in simple terms. Inability to communicate even in simple terms.

including an opinion on fitness to be interviewed, along with any recommendations. These might include the provision of an appropriate adult, the use of simple language in interview, checking that the suspect understands the questions put to them, shorter interview sessions and longer breaks. An opinion should be given as to the likely duration or permanence of a detainee being unfit for interview and an appropriate time for re-examination should be suggested. The doctor should also state whether any medical or psychiatric treatment is needed, how soon it might be effective and whether further assessment of fitness to be interviewed by another specialist, for example, a consultant in the psychiatry of intellectual disability or a psychologist is indicated.

Ethical issues

The courts do expect psychiatrists to apply their training and skills and are willing to admit their evidence subject to the rules of evidence being satisfied. It is therefore incumbent on psychiatrists to ensure that their relevant skills are kept up to date and that they keep up to date with the statutory and case law that affects their opinions in this area.

The new Criminal Procedure Rules (Rix, 2008) and the case of *R v. Bowman* [2006] make it clear that the role of the expert is to provide independent assistance to the courts by way of objective, unbiased opinion. The psychiatrist must avoid crossing over from their area of expertise into the unfamiliar territory of the legal representative or advocate and they must avoid treading on the toes of the judge and offering their opinion on ultimate issues such as the guilt or otherwise of the defendant.

Potential conflicts of interest may arise if, for example, the suspect is a patient of the psychiatrist, the psychiatrist has provided a report on an alleged victim or is personally the victim of an alleged offence. In these circumstances the psychiatrist should decline instructions and ask that another psychiatrist be instructed. An expert's opinion is not, however, automatically inadmissible because there is a conflict, or potential, conflict of opinion. This is for the court to decide. As the case of *Toth v. Jarman* [2006] indicates, the key question is whether or not the expert's opinion is independent. There may be cases in which the court will prefer the opinion of the psychiatrist who knows the detainee well, even though there is a risk of bias.

Conclusions

Thorough assessment of a detainee's fitness to be interviewed is essential if proper safeguards are to be maintained so as to prevent unreliable evidence being admitted in court with the real dangers of

miscarriages of justice. With attention to case law, which is constantly exploring and refining all aspects of detainees' rights, and the PACE Codes of Practice, which are periodically updated, the psychiatrist can make a real contribution to fairness in the administration of justice.

Declaration of interest

None.

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MCQs

- 1 **A person is unfit to be interviewed by the police if:**
 - a conducting the interview could significantly harm their physical state
 - b they have schizophrenia
 - c they have autistic psychopathy
 - d they have a mental disorder as defined in the Mental Health Act 1983
 - e they have a mental vulnerability.

- 2 **The following are essential features of the assessment of fitness to be interviewed by the psychiatrist:**
 - a Mini-Mental State Examination
 - b IQ testing
 - c a test of interrogative suggestibility
 - d a mental state examination
 - e a physical examination.

- 3 **In assessing or advising on fitness to be interviewed**
 - a functional ability is more important than medical diagnosis
 - b quantification of the risks is not required
 - c medical recommendations should not be revealed to the custody officer
 - d emotional arousal is not a relevant consideration
 - e IQ testing is necessary.

- 4 **The Codes of Practice of PACE:**
 - a were last updated in 2000
 - b contain provisions for the exclusion of evidence by judges
 - c do not apply to custody officers
 - d do not apply to investigating officers
 - e contain guidance on assessing risk to detainees of being interviewed.

- 5 **Fitness to be interviewed:**
 - a is defined in section 76(2) of PACE
 - b is defined in Code C of PACE
 - c has its own Annex to the PACE Codes of Practice
 - d does not relate to a person's physical condition
 - e does not relate to the potential harm caused by a police interview.

| MCQ answers | | | | |
|-------------|-----|-----|-----|-----|
| 1 | 2 | 3 | 4 | 5 |
| a T | a F | a T | a F | a F |
| b F | b F | b F | b F | b F |
| c F | c F | c F | c F | c T |
| d F | d T | d F | d F | d F |
| e F | e F | e F | e T | e F |