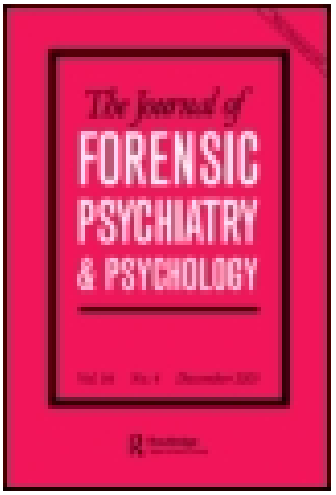

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'Fitness for interview' during police detention: A conceptual framework for forensic assessment

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'Fitness for interview' during police detention: a conceptual framework for forensic assessment

GISLI GUDJONSSON

ABSTRACT In recent years suspects detained at police stations are increasingly being questioned by forensic medical examiners and psychiatrists to assess 'fitness for interview'. However, fitness for interview is not a phrase that appears anywhere within the Police and Criminal Evidence Act 1984 (PACE) and there are no established criteria for judging it. In this article the author discusses a case involving a mentally ill patient where fitness for interview was a central issue in court. Even though all legal provisions in accordance with PACE were adhered to by the police and the interviews were conducted in 'an impeccably fair and considerate way' the interviews were ruled inadmissible by the trial judge. This judgment was given in spite of the fact that two doctors, both of whom testified at the trial during a *voire dire*, had found Mr S fit to be interviewed by the police. The case highlights the salient legal, psychiatric and psychological issues involved and provides an important conceptual framework for assessing fitness for interview in cases of mental disorder.

Keywords: fitness for interview, confessions, mental disorder, vulnerability, assessment

Persons suffering from mental disorder are commonly coming into contact with the criminal justice system (British Medical Association, 1994). This means that they often have to be interviewed by the police and that their statements can be

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subsequently used against them in court. Self-incriminating confessions, and on some occasions also denials, can be powerful evidence against defendants who in the United Kingdom can be convicted solely on the basis of such evidence (Gudjonsson, 1992a).

When mentally disordered persons are interviewed by the police there are special legal provisions which help to ensure that their statements to the police are reliable and obtained fairly. Even when all legal provisions are adhered to, a judge may on occasion consider it unsafe and unfair to allow the statement to go before the jury. In such cases, the crucial issue may be whether or not the defendant is considered by the judge to have been 'fit' mentally when he or she was interviewed by the police. In contrast to issues concerning 'fitness to plead' and 'fitness to stand trial', where some operational criteria exist (Bagby *et al.*, 1992; Chiswick, 1990; Grisso, 1986), there are at present no standard criteria for determining fitness for interview which can be applied by forensic medical examiners and psychiatrists when assessing suspects at police stations.

The purpose of the present paper is to discuss a conceptual framework for assessing fitness for interview when mentally disordered suspects are detained in police custody. A recent court case involving a patient from the Bethlem Royal Hospital is presented which highlights the problems involved in determining 'fitness for interview' in a case of murder and the subsequent legal issues.

CURRENT LEGAL PROVISIONS IN ENGLAND

The law regarding evidence in England, including confessions, is currently governed by the Police and Criminal Evidence Act 1984 (Home Office, 1985a), which became implemented in January 1986. PACE updates the law governing police powers for the investigation of crime, in relation to stop and search, entry to premises and seizure, and the questioning and treatment of persons by the police.

As far as interviews of suspects are concerned, the most innovative aspects of the new Act relate to the introduction of tape-recording of police interviews and the use of 'appropriate adults' during interviews of vulnerable suspects (i.e. suspects from special groups considered to be at risk), in order to strengthen the reliability and fairness of confession evidence.

PACE is accompanied by four codes of practice, referred to as Codes A, B, C and D, respectively (Home Office, 1985b, 1991). The codes of practice advise the police about procedure and the treatment of suspects. The codes have legislative power in that a substantive breach may result in evidence, including confession evidence, being ruled inadmissible by the judge during a *voire dire* (i.e. the judge will hear legal submissions in the absence of the jury and may refuse to allow disputed evidence to go before the jury). Even when there has been no breach of

the codes of practice evidence may be excluded, which was the situation in the present case.

Legal issues concerning the admissibility of confession evidence are principally determined by ss. 76 and 78 of PACE, but s. 82(3) is sometimes used when the other two sections have failed (Birch, 1989). PACE replaced the common law on improperly obtained confessions (s. 76) and evidence in general (s. 78), whilst retaining the power given to the courts in common law to exclude any evidence at their discretion (Richardson, 1993).

Sections 76 and 78 are the legal tests most commonly applied in practice (Gudjonsson, 1992a, 1992b). There is an important difference between these two sections which relates to discretionary powers. Section 76 involves proof of facts concerning confessions where the burden of proof lies with the Crown (i.e. the Crown has to prove beyond reasonable doubt that the confession is reliable and was not obtained by oppression). In contrast, s. 78 involves the discretion and judgement of the court (Birch, 1989: 96). Here the burden of proof does not lie with the Crown.

Another difference between the two sections is the emphasis in s. 76 on police behaviour and the reluctance of judges to include under this provision unreliability due solely to internal factors (e.g. drug withdrawal, disturbed mental state). There is generally a need to establish some kind of impropriety to operate s. 76.

Inherent psychological factors, such as a suspect's disturbed mental state or learning disability, are principally relevant to inadmissibility under s. 78, where it may be considered unfair to the defence, in view of the circumstances of the case, to allow the evidence to go before the jury.

A third fundamental difference between ss. 76 and 78 relates to the fact that s. 76 applies exclusively to confession evidence, whereas s. 78 can be applied to any evidence that is considered unfair, including statements that contain no self-incriminating admissions (e.g. denials).

Section 77(1) of PACE applies to confessions obtained from persons who suffer from mental handicap (now more commonly referred to as learning disability). Here the judge must warn the jury that there is special need for caution before convicting the defendant solely on the basis of his or her confession. There is no similar provision in PACE for persons who suffer from other types of mental disorder, such as mental illness. However, there is general protection for persons suffering from mental disorder, which is described in detail in the revised codes of practice (Home Office, 1991: section C). The definition used for mental disorder is the same as in the Mental Health Act 1983, that is 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other mental disorder or disability of mind' (Home Office, 1991: 39).

Code C provides protection concerning the interviewing of special groups, such as juveniles, those who are hard of hearing, foreigners who do not speak

sufficient English, and persons who are mentally disordered (Home Office, 1991). An interpreter must be called to assist in cases where there is a language problem. The legal provision for other special groups includes: 'A juvenile or a person who is mentally disordered or handicapped, whether suspected or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult' (p. 60).

An 'appropriate adult' is a responsible adult called in by the police in order to offer special help to the detainee. The appropriate adult can be a relative of the detainee or a professional person such as a social worker. The detainee's solicitor cannot act as an appropriate adult (Home Office, 1991). Gudjonsson (1993) raised concerns about the use of relatives as appropriate adults, because their objectivity may be overriden by emotion and sometimes they suffer from problems (e.g. learning disability) which are not immediately obvious to the police.

The function of the appropriate adult is: 'to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly, and secondly, to facilitate communication with the person being interviewed' (Home Office, 1991:60). This means that the role of the appropriate adult is an active one (i.e. he or she is not acting simply as an observer) and on occasions the appropriate adult may have to give evidence in court about the fairness of the police interview (Gudjonsson, 1994a).

Persons with mental disorder are considered vulnerable or at risk

> because 'without knowing or wishing to do so' they may be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person, and the appropriate adult involved, if there is any doubt about the person's mental state or capacity. Because of the risk of unreliable evidence it is important to obtain corroboration of any facts admitted whenever possible. (Home Office, 1991:79)

There are two major problems with PACE and the codes of practice in connection with the generic term mental disorder. First, there is no operational definition given about what precisely constitutes mental disorder. This may create problems for police officers, who are expected to be able to identify persons suffering from a condition which is not properly defined or described in their codes of practice. Secondly, the codes of practice do not demonstrate how mental illness or mental handicap places suspects at risk. It is likely that the mental disorder places these persons at risk in that they may unintentionally provide the police with unreliable accounts of events, including a false confession, because they may not fully comprehend the importance of the questions put to them or the implications of their answers, or because they are unduly influenced by immediate gains and police pressure (Gudjonsson, 1994b; Gudjonsson and MacKeith, 1994).

It is the responsibility of the police to identify persons who are at risk and they have to find a suitable person to act in the capacity of an appropriate adult. In the case of juveniles, the police will normally ask a relative to act as an appropriate adult, whereas with adult suspects they commonly request a social worker.

FITNESS FOR INTERVIEW

The role of forensic medical examiners (FMEs, also known as police surgeons) is discussed in detail by Robertson (1992) in his report for the Royal Commission on Criminal Justice. Traditionally and prior to PACE, FMEs commonly addressed issues relevant to fitness for detention (i.e. whether the suspect was physically or mentally well enough to be detained). In recent years they increasingly also specifically assess fitness for interview and the need for an appropriate adult, although great regional variations have been found in England (Robertson, 1992).

The terms 'fitness for detention' and 'fitness for interview' are not contained within PACE or its current codes of practice. Fitness for detention is undoubtedly easier to assess and determine than fitness for interview. Whereas the former relies principally on physical signs and symptoms and possible referral to hospital, the latter is typically concerned with the effects of substance abuse and mental factors on the suspect's functioning whilst in police custody and these are not always easy to detect on the basis of a short interview.

At present there are no set legal or medical criteria for determining fitness for detention and fitness for interview. However, the British Medical Association (1994) has recently produced a leaflet which provides general headings under which these are to be assessed. For example, fitness for interview refers to a consideration of the following:

1 assessment of competence to understand and answer questions;
2 the mentally ill and the need for an appropriate adult;
3 substance misusers;
4 conditions and length of interview; and
5 reassessing the detainee after a police interview.

ADMISSIBILITY OF POLICE INTERVIEWS

Increasingly, confessions made by suspects during police interviewing in the United Kingdom are disputed when the case goes to court (Gudjonsson, 1992a). Typically this happens for one of three reasons. First, the defendant claims that he or she never made the confession and alleges that the police made it up (known as 'verbals'). Second, the defendant accepts that he or she uttered the words comprising the confession, but claims that the confession is false (i.e. the

confession has been formally retracted). Third, the defendant accepts that he or she made the confession and has not retracted it, but the defence wishes to dispute it on technical grounds (i.e. the prosecution has to prove its case without any assistance from the defence even though the defendant admits to his or her lawyers that he or she committed the offence).

Statements of denial to the police can also be used to convict people when the prosecution can demonstrate that the denials represent deliberate lies (e.g. the suspect denies having been to a particular house where his or her fingerprints were found). Here the prosecution makes the assumption that the defendant was lying, because he or she was attempting to hide from the interviewing officers an involvement in the offence. Since lying is often considered by a jury as indicating a sense of guilt (Shaffer, 1985), the defence may attempt to have such statements excluded from the jury on the basis of 'unfairness' under s. 78 of PACE.

When the defendant's statement to the police is disputed, then the judge has to decide, during a *voire dire* (also known as a 'trial within a trial'), whether or not the statement should be allowed to go before the jury. The legal question is one of admissibility. If the confession is disallowed in evidence then the prosecution may offer no other evidence and the case be dismissed. If the judge considers the statement to be admissible, then the jury will hear it and decide on its probative value within the context of all the evidence in the case presented at the trial.

CASE STUDY

Background

Mr S was a 34-year-old man with a history of at least 12 years of schizophrenia. His childhood had been unremarkable and he received normal education. He left school at the age of 16 after having obtained two CSEs and worked as a hairdresser for 3 years and subsequently as a night security officer. In his early twenties he became increasingly withdrawn, was dismissed from his job because of mental illness and was admitted to a local hospital. He discharged himself from hospital about 9 months later. About a year later he was admitted to the Bethlem Royal Hospital and the diagnosis of schizophrenia was confirmed. His main symptoms were extreme social and emotional withdrawal and complaints of voices insulting him. He had four separate admissions to the Bethlem Royal Hospital, after which he was discharged from hospital and his care was transferred to a general practitioner. S's intelligence was measured during his first admission to the Bethlem Royal Hospital. His full scale IQ score was 83, his verbal and performance scores being 89 and 78, respectively.

A few years after his discharge from hospital, S was one evening arrested at his home on the suspicion of murder. He had no previous criminal convictions. It was alleged that he had battered an old woman to death. The murder weapon was

thought to be a champagne bottle, which had been found in the vicinity of the murder victim. S's fingerprint was on the bottle and there was a small trace of blood found on the bottle which could have come from the victim, although this was far from conclusive.

Prior to S's being interviewed, the police were aware that he had a psychiatric history and through a local appropriate adult scheme they contacted a psychiatric social worker who attended the police station. An appropriate adult and a solicitor were present during all the police interviews. Within 1½ hours of arriving at the police station, S was seen by a forensic medical examiner, who considered that he was fit to be interviewed, but in view of the seriousness of the case and concerns raised by the solicitor he recommended that S be assessed by a psychiatrist. Within an hour S had been assessed by a consultant psychiatrist who concluded:

'He is calm and coherent; he has no overt psychotic symptoms but some evidence of thought block. He seems to understand why he has been brought to the police station. In my opinion he is fit to be interviewed.' The appropriate adult was also of the view that S was fit to be interviewed.

S was interviewed by the police on five occasions over a 36-hour period. The interviews were all fairly short. The longest interview lasted 40 minutes and the five interviews lasted in total less than 2 hours. There was a solicitor and an appropriate adult present during all the interviews. From the audio tape-recording of the interviews, S appears to have been interviewed very carefully by the police officers who clearly asked him simple and non-leading questions and avoided placing him under pressure.

S made no self-incriminating confession during any of the interviews. However, he made certain comments which were to be used against him at his trial. First, he had made certain false denials (e.g. not having been out of his house for 3 weeks), which the prosecution were relying on as indications of guilt. Secondly, there was, according to the prosecution scenario, an indication of special knowledge, which involved his acknowledging during the third interview that the woman had been hit on the head with a bottle.

The psychological assessment

The purpose of the psychological assessment was to evaluate whether or not S had been fit for interview whilst in police detention, which involved focusing on his mental state at the time and the content of his answers to police questioning during the five interviews with a view to assessing their reliability. All the police interviews had been recorded on audio tapes and transcripts made. I listened to the tapes of these interviews and read the transcripts.

I interviewed S on a regional secure unit where he was detained during the latter part of his remand. It proved very difficult to assess him, because he was very agitated and seemed totally absorbed in his immediate needs (i.e. smoking

his cigarettes, constantly wanting to go and watch television). An intellectual assessment indicated a prorated full scale IQ of 62, which was very much lower than the score of 83 which he had obtained when assessed in 1983. His memory and concentration also proved extremely poor on testing. It did not prove possible to have meaningful conversation with him and his answers were very concrete. He denied ever having been mentally ill and told me that he only goes into hospital when he 'needs a rest'. When I asked him what he meant by rest he replied, 'Watching television and sleeping on a bed.'

An inspection of the custody record indicated that S's solicitor had been unable to explain the police caution to him and he had told the custody officer that he did not think that his client was fit for interview. The police were not obliged to accept the solicitor's views and continued to interview S. They had the benefit of the opinion of two doctors and a psychiatric social worker, all of whom had found S fit for interview.

S's answers and comments during the police interviews were of considerable interest, because they indicated that he was in some respects not functioning well. For example, at the beginning of the second interview S stated that he could not recall anything about the previous interview which had been conducted a few hours previously. Second, it was clear from the taped interviews that S was preoccupied with being released from custody. Third, some of S's accounts were incoherent (referred to as 'gibberish' by the trial judge). Fourth, there was an indication from two of the tapes that S confused the identity of his solicitor and the appropriate adult with the police officers (e.g. at one point he turned to his solicitor and said, 'Are you the chief inspector?'). Fifth, during the fourth taped interview, on Sunday 7 February, S became confused when the police asked him to think back 6 days. For example, the officer asked: 'Now just going back, just count back to Monday and tell us what you think the date was on Monday.' S replied: 'I actually feel a bit tired you see, five days, 31st days in January, 30 or 31 sorry, that is 20, 30, 25, 22nd of January isn't it.'

An example of S's concrete thinking is well illustrated during the fourth interview when he was asked about what a lie is, as shown by the following conversation with a police officer.

Police Do you know what a lie is?
Mr S What do you mean?
Police Can you tell me what a lie is?
Mr S What lie?
Police Do you know the difference between truth and a lie?
Mr S What lie?
Police Any lie.
Mr S What do you mean?

The main conclusion from the psychological assessment was that S had not been functioning well mentally during the police interviews and it was unsafe to

rely on his answers. My view was that S had not been fit for interview, which was highlighted by his confusion, disorientation and concrete thinking during the police interviews.

The legal proceedings

At S's trial, the first legal issue addressed was his fitness to plead. He was found unfit to plead by a jury empanelled for that purpose. A second jury was then sworn in to try the issue of whether he had committed the criminal act he was charged with (i.e. murder or manslaughter). Prior to the actual trial, there was an application by the defence under the Police and Criminal Evidence Act 1984 to exclude the five police interviews. The basis for the submission related to S's mental state at the time of the police interviews. That is, the defence argued that he had been unfit to be interviewed by the police and it was therefore *unfair* to allow his statements to go before the jury in accordance with s. 78 of PACE.

The prosecution called the two medical witnesses who assessed him at the police station prior to the interviews. They gave evidence during the *voire dire*.

The forensic medical examiner testified that:

> his views were that the question that he had to ask himself in the context were whether or not when he asked general questions about how he came to be there, and what he had been doing, and matters of that kind by way of general discussion, if his answers were given rationally and no incongruity was found . . . he regarded him as fit for interview.

The consultant psychiatrist testified about her report and considered that S had been fit to be interviewed by the police.

The present author, who testified on the behalf of S's defence, argued on the basis of his psychological assessment that S had clearly not been fit to be interviewed whilst in police custody. He based his arguments on S's poor mental functioning whilst in police custody and his answers and comments during the police interviews.

The judge ruled that the police interview statements were inadmissible under s. 78 of PACE. That is, 'it would be unfair, and that the fair conduct of these proceedings would be adversely affected by the admission of these interviews'. This judgement was in spite of the fact that the judge clearly thought that the police had dealt with S 'in an impeccably fair and considerate way'. Thus: 'In the course of the interviews these officers were, in my judgement, extremely careful to avoid long, oppressive, complicated, or leading questions and they, as far as I can tell, did their utmost to avoid asking questions which were suggestive of the answers that they wished to be heard.'

In order to study the judge's ruling in detail, the author obtained an official transcript of it. The main basis of the judge's ruling is as follows.

(1) The two doctors, at the time of their assessment, had failed to approach

'the question of the fitness on the basis of considering whether or not any answers given by S . . . to any questions asked of him by the police officers were necessarily reliable'. Instead, the two doctors had 'considered that the ordeal and stress and strain of being interviewed, particularly on such a serious charge as this, was something that in their judgement the suspect could sustain without suffering any consequential harm to either his physical or mental health'.

(2) The present author's psychological evidence was discussed in detail by the judge and it formed the basis on which the judge ruled the police interview statements inadmissible. Thus:

> The point Dr Gudjonsson makes is having regard to S's low intellectual capacity, and the impact of the schizophrenia on his disordered mind, which leads him to such a high degree of withdrawal and self-absorption, that the presence of such an overriding interest, or overriding desire, means that he may pay little or no attention to the significance of the questions he is being asked, and he regards any external questions, or stimulus, as being of much less significance than a normal person might. . . . Accordingly, says Dr Gudjonsson, it is not possible to deduce from apparent falsehoods, assuming them to be so, told by S . . . in the course of the interview in relatively straightforward matters it is not possible to deduce that these lies are told with the necessary, or as a result of the necessary, sense of guilt which would otherwise make such lies available to the Crown as having probative value in relation to the matters with which he is charged.

(3) The judge accepted that S was 'incapable of appreciating or understanding the full impact of the cautions properly administered at the outset and beginning of every interview'.

(4) The judge finally concluded that the jury would find it 'impossible, even if they have the benefit of Dr Gudjonsson's evidence and the appropriate warning that I would otherwise have to give, to pick and choose between those parts of the interviews which give rise to such inferences, and those parts which do not'.

DISCUSSION

The case presented in this article raises a number of important issues which merit a discussion. Most important, the case provides a potential conceptual framework for the assessment of fitness to be interviewed. Prior to PACE, doctors attending police stations considered only questions related to fitness for detention and it is only in recent years that issues pertaining to fitness for interview have been addressed. However, the trial judge rightly pointed out that the term 'fitness to be interviewed' does not appear anywhere in PACE and there are no standard criteria by which to assess it. This is a serious omission which must urgently be corrected by the Home Office in its revision of PACE and the

current codes of practice. Interestingly, fitness for interview was not an issue that was specifically addressed by the recent Royal Commission on Criminal Justice (Runciman, 1993).

The present case illustrates that in practice the criteria used by judges to determine fitness for interview are likely to be very stringent. For example, the trial judge came to the firm conclusion that the term does not mean that 'a person must be shown to be capable of understanding or dealing properly and accurately with questions put to him', because this is adequately dealt with by various provisions within PACE and its codes of practice for special groups considered to be at risk during interviewing. These provisions include the presence of an appropriate adult during interviews and a warning to the jury by the judge about the defendant's vulnerabilities.

Along the lines considered important by the trial judge in the present case, what is clearly required for unfitness for interview are mental factors which (1) *substantially* impair the detainee's ability to understand his or her basic legal rights such as the police caution; and (2) render any statement he or she makes to the police likely to be unreliable. Gudjonsson (1994b) has discussed these two sets of factors in detail within the context of mental disorder, abnormal mental state and personality characteristics.

Using the present case as a yardstick, there appear to be at least three broad criteria for fitness for interview, although all three may not necessarily be required in every case.

First, does the detainee understand the police caution after it has been carefully explained to him or her? If, for example, a solicitor finds it impossible to explain the police caution to his client after making several attempts, this would be a strong sign that the detainee may be unfit for interview. This was certainly the case with S.

Second, is the detainee fully orientated in time, place and person and does he or she recognize the key persons present during the police interview (e.g. can he or she differentiate between the police, the solicitor and the appropriate adult?). In the case of S, he confused both the solicitor and the appropriate adult with the police.

Third, is the detainee likely to give answers which can be seriously misconstrued by the court? In the case of S, for example, the normal assumption that lies during a police interview indicate a sense of criminal guilt was considered possibly unfounded, because of his obsession with his immediate needs, concrete thinking and inability to foresee the likely consequences of his answers. In some extreme cases involving confessions, detainees may be so mentally disturbed that they will say anything in order to fulfil their immediate needs (e.g. being released from custody, going to hospital).

The three basic criteria mentioned above relate to the *functional abilities* of the detainees and therefore require a functional assessment (i.e. an assessment that directly addresses the relevant areas of the detainee's functioning, such as his or her understanding of what is happening).

Within the conceptual framework provided above, and based on the findings of

the studies by Gudjonsson *et al.* (1993) and Gudjonsson *et al.* (1994), it seems likely that it would be extremely rare for suspects detained at a police station to be found to fulfil the criteria set out above as being unfit for interview. However, the present case clearly indicates the possibility of this happening, even if rarely, and forensic medical examiners must learn to address issues relevant to *reliability* rather than focusing principally or exclusively on factors that relate to possible consequential harm from the interview to the detainee's physical and mental health.

This article has dealt only with questions related to fitness for interview in connection with mental disorder. During detention at a police station there are other important issues to be addressed, such as fitness for detention and suspects being able to give informed consent about the provision of intimate samples (e.g. blood specimen) and attending identification parades. In addition, assessing the mental disorder among suspects represents less than 10 per cent of the consultation time of forensic medical examiners (Robertson, 1992). Associated with the mental health of detainees is the growing problem of substance misuse (British Medical Association, 1994; Department of Health, 1994; Davison and Forshaw, 1993). The present article provides a conceptual framework for assessing the 'fitness for interview' of detainees which is applicable to any mental condition likely to render a statement unreliable.

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