Fitness to be interviewed/Capacity to be interviewed under caution

Q. I have had a request from a solicitor to undertake an assessment for capacity to be interviewed under caution. My question is - Is capacity to consent to be interviewed under caution the same as fitness to be interviewed (FTBI) by police? Also, are there specific criteria to go through during my assessment other than the going through the obvious questions with the Mental Capacity Act (MCA) functional and diagnostic elements in mind?

A. It is FTBI. There are specific criteria. But be careful about the MCA particularly as the MCA requires you first to find lack of capacity (cf unfitness) and then to work backwards and see if there is an explanatory diagnosis in the form of a disorder or impairment of the functioning of the mind or brain.

First look at the caution. What is the decision he has to make?

> *"You do not have to say anything. But, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."*

The decision is whether to say anything.

So does he understand that if he remains silent and wants later to rely on something not mentioned in the police interview this may harm his defence?

So, if he does not remain silent, does he understand that anything that he says can be used in evidence? Does he understand that there will be no option to disregard some things he said?

Then, go through what is written about FTBI. Look at pages 105 – 107 in *Expert Psychiatric Evidence* (2nd ed). Say whether or not he is 'vulnerable' within the meaning of PACE Code C. Say whether or not he needs an AA.

Have regard to PACE Code C, Note for Guidance 11C. On the basis of your assessment, in the circumstance of a police interview would he be prone to providing information that may be unreliable, misleading or self-incriminating' ('the three heads'). If that is your opinion on a balance of probabilities, you have to decide if this could be avoided by having an appropriate adult (AA) present. This is a bit like fitness to plead and stand trial (FTP) and whether special measures would make the difference between unfitness and fitness. Look carefully at the role of the AA. It is to facilitate communication (c.f. the role of an intermediary at trial). So, you have to say whether unreliability, misleading information, or self-incrimination could be avoided by an AA facilitating communication. Thinking about this, the AA can have a pro-active role, best illustrated in the case of someone with an intellectual disability, by ensuring that the questions take into account his limitations, and/or a reactive role by intervening if the AA considers that as a result of how the question is put the detainee is providing what may be unreliable, misleading or self-incriminating.

I suggest that as early as possible in the assessment you ask some open-ended questions that give him the opportunity to talk at some length with as little leading or prompting as possible, as this may help you get an initial impression as to his vulnerability (under the three heads).

It will be for the solicitors to decide whether to advise him to (1) go 'No comment', (2) answer questions if there is an AA present or (3) answer questions in the absence of AA. Consider this as the ultimate issue which it is for them to decide. But bear in mind that you have to provide them with your expert evidence to enable them to give the right advice to their client.

If he goes 'no comment' and then wants to rely in court on something of which the court has previously been unaware and which could have been disclosed at the time, the prosecution may submit that he was fit to be interviewed and in which case the matter would have been explored by the police. If you decide that he can be interviewed in the absence of AA, and he is convicted, it might be a ground for appeal, based on subsequent expert analysis of the police interviews that he was not fit to be interviewed and therefore the court should disregard what he said in the police interview.

You could consider administering the Gudjonnson suggestibility test. But first you need to reach an opinion as to whether the detainee has an intellectual disability. If he does not, you can assess him using the GSS1 and then if you consider that he needs a more in-depth assessment by a psychologist or if the prosecution instructs an expert they can use the GSS2. However, as the GSS2 is particularly adapted for someone with an intellectual disability, if you were to conclude that they had an intellectual disability and administered GSS2, this would make it difficult for another expert, such as a neuropsychologist or ID consultant, to re-test him.

Keep the MCA in the back of your mind. I would avoid explicitly referring to it or using it as the framework. Remember that for FTP the case law is clear that the test is *Pritchard* and not the MCA. I suggest that this applies to FTBI.

Q. I'm presuming I will need to take a full psychiatric history and ask for case papers and medical records?

Also, does the client need to know that the interview is voluntary and he is free to leave anytime if he isn't under arrest in custody?

A. Yes. Standard history. Yes, you need case papers so that you understand the questions he is likely to be asked. Yes, you need medical records as they will help you triangulate with your assessment and the case papers/evidence.

I suggest that you clarify with your instructing solicitors whether you can ask him about the alleged offence(s). On the one hand this will assist as to the risk of unreliability, misleading information, or self-incrimination when interviewed by the police but if the solicitors rely on your report what he said to you will become evidence in the case. In my experience, when carrying out these assessments in police stations at the request of police surgeons, the duty solicitor would advise the detainee not to say anything about the allegations.

All of my such assessments were done on the hoof and I do not recall such an assessment being planned in advance as yours is being. As is emphasised in a well-known book, the negotiation with instructing solicitors prior to the assessment is very important in any case. I therefore suggest that you write in the following, or substantially similar, terms.

> "I refer to your request for me to assess your above-named client as to his capacity to consent to be interviewed under caution. Please correct me if I have misunderstood but I take this to mean what is still sometimes called fitness to be interviewed and that you want my opinion as to whether (a) he understands the caution sufficiently to decide whether to say anything and, if he does, (b) having regard to PACE Code C, Note for Guidance 11C, he would be prone to providing information that may be unreliable, misleading or self-incriminating and, if so, (c) whether such might be avoided by having an appropriate adult facilitating communication.

> "As to (b) the best evidence will come from eliciting a spontaneous account, without leading questions, of how he has ended up being charged with the offence(s) and then putting to him some of the questions which the police would be likely to put to him. However, I am aware that if you rely on my report, what he has said about the alleged offence(s) will become evidence in the case. I am aware that in circumstances such as these, solicitors often advise their client not to discuss the allegations with the expert and they expect the expert to remind the accused that they should not discuss the actual case. I therefore seek your instructions as to this aspect of my assessment.
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> "In any event, I would hope that on the basis of my otherwise standard forensic psychiatric assessment, consideration of the evidence in the case and triangulation with his general practitioner, and any specialist, records, I will be able to provide an opinion on the issues as I have identified them (subject to any clarification by you).
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> "Please ensure that I have all relevant evidence, including witness statements, MG5, list of any previous convictions, and, if he has been held in custody, a copy of his custody record. Please also arrange for me to have unredacted copies of his full general practitioner records. They need to be unredacted because the AI systems used by some general practitioners to redact records redact any terms to do with mental health, medication for mental disorder and contacts with criminal justice agencies or the courts. I emphasise that I need the complete general practitioner records as often the response to a request for general practitioner records is to provide only a summary comprising an undated list of diagnoses, current medication and the details of the previous 3 or 5 consultations."

You also ask whether the client needs to know that the interview is voluntary and he is free to leave at any time if he isn't under arrest in custody.

He has a number of rights and the one which you have been asked to address is his right to silence. In the circumstances where the solicitors have a concern about his understanding of the right to silence, it would make for a more comprehensive assessment, and perhaps a more fully informed opinion on the identified issue, if you also assess his understanding of this other rights: (1) the right to free legal advice; (2) the right to leave at any time (and the risks of doing so); (3) the right to know of what he is being accused; and (4) the right to have an appropriate adult present if he is considered vulnerable.