

Confessions: consensus in idem?

TAYLOR, L.J. and HENDERSON, S.E.

2002

This is a pre-copyedited, author-produced version of an article accepted for publication in Scots Law Times following peer review. The definitive published version TAYLOR, L.J. and HENDERSON, S.E. 2002. Confessions: consensus in idem? Scots law times [online], 2002(40), pages 325-327, is available online on Westlaw UK <http://legalresearch.westlaw.co.uk/>.

Confessions: Consensus in idem?

Linda J. Taylor and Sarah E. Henderson

The writers present a brief overview of confessions from the perspective of forensic psychology and argue that until reliable psychological techniques are developed to discriminate accurate from inaccurate memories, and these are utilised appropriately by the legal profession, all confessions should be regarded with considerable care.

Keywords

Admissibility; Confessions; Forensic psychology; Miscarriage of justice

Confessions: a brief history of crime

Extrajudicial confessions have long been recognised in Scots law as one of the single most damaging pieces of evidence against an individual, notwithstanding the necessity for corroboration in criminal proceedings. The common jurisprudential starting point is that of the confession being a statement against self interest and regarded as unlikely therefore to be false. As early as 1962 however, the legal profession was beginning to understand that such confessions were not as straightforward as may first be supposed: “an admission of guilt by an accused is not conclusive against him, unless it is corroborated by something beyond the actual admission. One reason for this rule is to ensure that there is nothing phoney or quixotic about the confession. What is required in the way of independent evidence in order to elide such risk must depend on the facts of the case and, in particular, the nature and character of the confession and the circumstances in which it is made” (*Sinclair v Clark*, 1962 JC 57; 1962 SLT 307, per Lord Justice Clerk Thomson at p 62 (p 309)).

The courts have become increasingly wary with regards the admissibility of confessions, particularly with the spotlight on the ECHR (see, for example *R v Mushtaq* [2002] EWCA Crim 1943) and previous potential miscarriages of justice; the following should be of interest to all criminal practitioners.

Fair means or foul?

”A confession is considered false if it is elicited in response to a demand for a confession and is either intentionally fabricated or is not based on actual knowledge of the facts that form its content” (Ofshe, “Coerced confessions: The logic of seemingly irrational action” (1989) 6 *Cultic Studies Journal*, 1-15, at p 13).

This implies that a false confession can, theoretically, be induced from both innocent and guilty suspects. The logical progression is that it is possible for a guilty suspect who has no recollection of having committed an alleged crime to give a false confession when he is manipulated into confessing to the details of something that he cannot remember.

Three distinct types of false confessions have been identified, all of which may have far reaching consequences for the criminal justice system in the widest sense.

Voluntary confessions

A voluntary false confession is one in which the individual intentionally confesses to a crime in the absence of any questioning, unequivocally waiving any privilege against self incrimination. By its very nature the legal system considers this genus of confession as likely to require the least strenuous corroboration. Particular difficulties may arise in the case of “special knowledge” confessions where the confession (in conjunction with the particular knowledge of the accused) will serve as self corroborating; in recent years however the courts have erred on the side of caution by reaffirming the necessity for adequate corroboration in such cases. Individuals may make a voluntary false confession for numerous reasons, including the protection of the actual offender, an unconscious need to expiate guilt over previous transgressions (of a legal or non-legal nature) via self punishment, a desire to achieve notoriety or infamy, or the presence of a mental disorder. In the most extreme cases of the former, collusion between the accused and the true offender could create implied special knowledge. It is not suggested that all voluntary confessions must be considered false; indeed that would not be in the interests of justice, particularly where there are strong elements of “special knowledge” present. It is, however, for the courts to exercise particular vigilance against the over-relaxation of normal corroborative standards in such cases.

Compliance is a powerful phenomenon; individuals will overstep the bounds of moral and ethical norms in order to comply. It can best be described as acquiescence to some form of social influence to achieve some immediate gain, such as being released from custody or bringing the interrogation to an end and thereby escaping the inherent psychological or physical pressures of such a procedure. Brandon and Davies (*Wrongful imprisonment* (1973, London: Allen and Unwin Brothers Ltd) conducted a study to compare a group of alleged false confessors (i.e. defendants who had been convicted with regards their confession, but whose convictions were subsequently overturned on appeal). They found that the majority of these defendants displayed common factors of low intelligence, some form of mental disorder (e.g. depression) and youth. The evidential weight of each of these factors has been considered by the courts in recent years (see, for example, *HM Advocate v Hartley*, 1979 SLT 26 (young suspect with limited intelligence); *HM Advocate v Gilgannon*, 1993 SCCR 10 (mentally subnormal accused)). Gudjonsson and Mackeith ("Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 *Medical Science and Law*, pp 187-194) carried out a similar study comparing a group of alleged false confessors referred for psychological assessment with other forensic cases referred on the four psychological variables which researchers consider fundamental in the clinical assessment of alleged false confession cases. These were intellectual functioning, suggestibility, compliance, and acquiescence. It was found that there were some substantial differences between alleged false confessors and other forensic referrals on the psychological variables investigated. These included highly significant differences in IQ, suggestibility and compliance. However, generalisations should not be formed from these findings because it is possible that the types of cases considered were only referred for psychological assessment because of their suspected low intelligence and high suggestibility.

The concept of suggestibility has, in itself, raised judicial eyebrows (see, for example *Blagojevic v HM Advocate*, 1995 SLT 1189; 1995 SCCR 570 (suggestibility under police pressure); *R v Pendleton* [2000] WL 824108; revd [2001] WL 1479761; [2002] 1 WLR 72 (abnormal suggestibility)). In the former case, the appellant was said not to be suffering from any specific mental illness, but rather from abnormally high suggestibility. The issue raised by the appellant was one of fact, namely whether the stress of the interview situation on this particular occasion was such that it had influenced any response given by the appellant. It was concluded that any evidence led to this end must only be from those present at the material time and, in the absence of such, the appeal was refused. The nature of the interview situation is such that in order to lead expert psychological evidence for defence purposes, an accused may be compelled to take the stand himself, assuming there to have been no other persons present. Whether or not the court may justify such compulsion of an accused for this purpose, bearing in mind the possible implications of any cross examination, is a moot point.

A suggestible and compliant criminal suspect of low intelligence may be capable of giving a reliable statement to both police personnel and his solicitor about his or her movements and behaviour when carefully interviewed by such persons. Problems inevitably arise when vulnerable individuals are placed under pressure and accept unfounded or incorrect suggestions, and comply with requests made by interviewers only in order to relieve the pressure of the immediate situation. Irving and Hilgendorf (*Police Interrogation: The psychological approach* (1980, London, Royal Commission on Criminal Procedure)) describe three types of stressors that may occur during the course of an interrogation: (1) stress caused by the physical environment at the police station; (2) stress caused by confinement and isolation from peers; and (3) stress caused by the suspect's submission to authority.

These elements were considered by the courts at length in *Magee v United Kingdom* (28135/95) (2001) 31 EHRR 35 (p 822); (2001) 8 BHRC 646. In this case, the applicant was questioned for a period of 48 hours without access to legal advice, permitted contact only with his doctor and otherwise retained in virtual solitary confinement. Physical violence by the interviewers against the applicant was alleged, prior to the obtaining of the confession, although this failed to be objectively proven. The holding facilities themselves were the subject of criticism in a report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment. Ultimately, the authorities were held to have violated art 6 of the ECHR ("the right to a fair trial") by denying access to a legal representative. Although one may be wary of traditional interrogation methods in light of Convention rights, it seems that such psychologically coercive techniques may be admissible provided they are counterbalanced (with regard to procedural fairness) by appropriate legal representation. In light of the above, it may be suggested that this does not go far enough to protect the accused.

Additionally, Sommer (*Personal space* (1969, NJ: Englewood Cliffs, Prentice-Hall)) suggests that suspects have limited opportunity for privacy, and indeed police interrogators may cause stress by positioning themselves very close to the suspect during the interrogation. Such invasion of the suspect's personal space can cause agitation and increased physiological arousal. This remains true of all judicial interview situations. On a separate note, many suspects complain of having had insufficient sleep prior to the interrogation and thus seriously impaired ability to cope with the demands of the process. There is a considerable body of research that evidences the relationship between lack of sleep and impaired mental functioning, especially if it continues for two or three days (L E Hinkle, "The Physiological State of the Interrogation Subject as it affects Brain Function", in *The Manipulation of Human Behaviour*, A D Biderman and H Zimmer. (1961, New York: Wiley), pp 19-50; M Milkulincer, H Babkoff, et al, "The Effects of 72 Hours of Sleep Loss on Psychological Variables" (1989) 80 *British Journal of Psychology*, pp 145-162). Loss of sleep is associated with increased

circadian oscillations (heart rate irregularity), lack of motivation to initiate and perform tasks, attentional problems, cognitive confusion and slowness of thought. It is suspected that this could not only affect the suspect's memory for the event in question, but could also ultimately lead to false confessions.

Coerced-internalized confessions

Coerced-internalised confessions are confessions that are allegedly false and occur when the investigator successfully convinces an innocent suspect that he is guilty of a crime he does not remember committing. The human memory appears to be subject to a reconstructive process (i.e. the gist of the event is remembered and memory is constructed from other information gathered from past experiences and other related knowledge or schemata). It follows that memory is not infallible; if the suspect is confused, or is experiencing self doubt, and evidence pointing to them committing the crime is plausible, then they could begin to believe they were guilty. Gudjonsson and Mackeith propose that coerced-internalised confessions can be elicited through a less aggressive, but more persuasive form of questioning.

Some observers have likened the interrogation process to hypnosis. Foster ("Confessions and the station house syndrome" (1969) 18 *De Paul Law Review*, pp 683-701) notes that the interrogation process "can produce a trance-like state of heightened suggestibility", so that "truth and falsehood become hopelessly confused in the suspect's mind" (pp 690-691). Another theory suggests that these internalised false confessions could come about from a process of distorted self perception; if the false confession is given in an atmosphere more commonly associated with telling the truth then the suspect may begin to believe the false information they have provided. As noted above, memory is a reconstructive process and as such multiple sources are relied upon to provide the information to recreate our memories. When an individual incorporates incorrect information into this reconstructive process, a false memory may be formed, the consequences of which may be particularly severe in the legal process. Such false memories are typically defined as incorrect beliefs about past events that have been incorporated and experienced as genuine memories. A related phenomenon is that of confabulation; part of the so called "gap-filling hypothesis" where extensive gaps in memory are filled with fictitious information. In amnesic individuals in particular, the memory gaps are much more extended than in normal subjects and the amount of fictitious information utilised is greater, thereby resulting in confabulation.

Some concluding remarks

This is but a brief overview of confessions in a forensic psychology context. Numerous studies suggest that the high levels of stress inherent in criminal suspects during both the commission of a crime and the subsequent legal proceedings may lead to impairment of recall. Such impairment may manifest itself as one of the various forms of false confession or confabulation and will ultimately serve to complicate the defender's case. Bearing this in mind it would be useful if there were associated behaviours displayed by those at risk of confabulation or falsely confessing in order to help practitioners distinguish between a genuine confession and a false one. It is questionable as to whether interviewers would recognise key behavioural pointers evidencing suggestibility or indeed whether such pointers clearly exist. It might, for example, be expected that such suspects would appear excessively nervous; it is however reasonable to assume that any individual would feel nervous in an interrogation situation. As an isolated behaviour pattern, this is clearly unhelpful.

It should now be realised that the field of psychology has much to teach the legal practitioner about both the problems associated with many traditional interrogation techniques and the various complex motivations behind extrajudicial confessions. Until reliable psychological techniques are developed to discriminate accurate from inaccurate memories, and these are utilised appropriately by the legal profession, all confessions must be regarded with considerable care.