

FETAL ALCOHOL THE ROLE OF CROWN COUNSEL

The RESEARCH LITERATURE on the prevalence of fetal alcohol effected persons in our criminal justice system....in any criminal justice system in the world is limited to one research paper written by Drs. Fast, Conry and Loock all from Vancouver. In their much quoted study, the doctors tell us that 24 % of young offenders in British Columbia have Fetal Alcohol Syndrome (FAS). Privately, the doctors estimate the percentages are even higher.

FAS means Fetal Alcohol Syndrome and a more recent term "FASD" means Fetal Alcohol Spectrum Disorder . FASD is the new umbrella term that describes the range of damage to the developing fetal brain caused by exposure to maternal alcohol consumption during pregnancy.

There are other informed opinions in the field (but no reliable statistical data) that says our prison population contains about 50% to 80 % persons with some form of a fetal alcohol birth defect - a birth defect that kills brain cells in the womb. Although science has not yet established a bench mark, I can tell you people from Corrections Canada, when pressed privately, do not disagree with these higher numbers. The point is: fetal alcohol is a KNOWN problem we cannot ignore.

That we are here today speaking about Fetal Alcohol and legal issues indicates Crown Counsel is tackling this problem head on. You are to be congratulated because the issue you are learning about confronts many of the basic assumptions lawyers hold near and dear to our legalistic hearts....including notions of intent, responsibility, and our systemic response to offenders.

In 2001 I was told about Fetal Alcohol by a Senior Probation Officer gobbling his soup at 222 Main Street in Greta's Café. Bill Ellis, after listening to me whine about my latest hopeless case, said between mouthfuls, "the kid is probably fetal alcohol". I wish I could be more dramatic: the lights came on...and Garth Leoppky had to endure my steep learning curve.

Later on the urging of Judge Carlie Trueman, I wrote a Paper called MISTAKES I HAVE MADE WITH FAS CLIENTS.....eventually published about 30 times including in the Provincial Court Judge's magazine. It is a list of my mistakes you might find instructive or at least prove positive that Defence Counsel really are dumber than a sack full of hammer handles. When I refer to the Paper or read from it at various conferences the audience reactions are always the same: nodding heads to tears. It is attached for your reading. When I speak or give workshops to police/probation or teachers or social workers, listeners quickly recognize the FAS/FASD persons from their caseloads.

Everyone wants to know what to do. They all ask the same question: “How is what you tell me going to change my day in a patrol car or behind a desk in this agency?”

I want to briefly (in 10 minutes) speak about three things:

- (a) the materials attached;
- (b) the ethics of being strictly a rights based defence counsel or trying to be more of a social work styled defence counsel; and
- (c) most importantly about Probation Orders.

THE MATERIALS.....for you to read later

1. Boulding: A Lawyer’s Brief on FASD
2. Jan Lutke: Non-competence vs. non-compliance
3. Diane Malbin: Paradigm shifts and fetal alcohol
4. Dr. Caron Byrne’s article: Criminalization of FAS
5. Boulding: Mistakes I have Made with FAS Clients

DEFENCE COUNSEL: Rights based or social worker?

There is an ethical dilemma Defence Counsel face, and I call it the difference between being a rights based legalistic lawyer and choosing to be more in the style of a social worker trying to solve future problems. With FAS/FASD clients, I have learned the decision to be strictly a rights based lawyer has painful implications. While Defence may succeed at trial securing an acquittal, or getting Crown to agree to a sweetheart deal on sentence, the client’s problem goes unrecognized and untreated. Thus effectively you have set up the client for his next fall and there will be another fall, because the brain damage is permanent. Defence Counsel have good reasons, as you well know, to avoid the black swamp of forensic custody. What to do?

First, talk about it! While this sounds simple, it is a rare conversation because Defense Counsel are defensive especially about forensic custody. Thus it falls to responsible Crown Counsel to begin a different conversation.

Please ask Defence Counsel : “Have you considered Fetal Alcohol issues?”

Hopefully this mild opening will lead to discussing an Assessment for the client. While at present Assessments are hard to get (lack of provincial cash and a floodgate fear) there is much that can be done. The Court of Appeal has again had to grapple with this issue lately in R. v. Synnuck (2005 BCCA 155). Clearly, there is no easy answer as to how to secure an Assessment.

But the good news is that Dr. E. Murphy of Forensic Psychiatric Services has been attending various Conferences on FAS/FASD as have some of her forensic colleagues. And although the “billing code” approval for MSP to allow doctors to bill for an FAS/FASD Assessment is stalled in a BC Medical Association Committee, it is expected to be released soon. The more requests to Judges for FAS/FASD Assessments will open up the process.

I warn counsel to remember how long it took to get a zero tolerance or mandatory arrest policy on spousal assaults - 25 years? While it may be a Charter application for an Assessment based on Section 7 or Section 15 alleged breaches that comes first, I believe if Crown and Defence put their heads together, eventually some Judge will create a way forward. The problem is the longer we wait, the more offences are committed and the more harm is done to our citizens. An Assessment is the key to protecting the public in the same way that appropriate Building Codes make urban life safer. A FAS/FASD Assessment gives appropriate structure to any response by the criminal legal system to a person with a permanent brain disability.

More good news! A few Defence Counsel have begun to look at their clients differently as they learn about how brains work when damaged by alcohol in the womb. I am suggesting that sometimes this right’s based legalistic thinking is inappropriate with clients with fetal alcohol effected brains because perhaps the greatest service Defence Counsel can do for these clients is make some positive contribution towards reducing the number of future offences. A brain damaged client will not respond to jail time or Probation Orders like other offenders. Let us try something different: a multi-sector prevention plan. We need to create more external brains.

If you have a case where the accused has a string of similar offences, or a pattern of guilty pleas where he is clearly “not learning”, begin to consider FAS/FASD.

Consider gently asking Defence Counsel these questions:

1. Was he in foster care? Adopted?
2. Did he pass grade 8? 9? 10? How do you know? Have you read the records?
3. Can your client give you a coherent story...no gaps?
4. Any indication of maternal drinking during pregnancy?
5. What is going on with his complete lack of remorse?
6. Does your client understand the gravity of these allegations?
7. What is the reason for the umpteenth guilty plea for the same offence?

I am not suggesting Crown Counsel do Defence Counsel's job but I am suggesting Crown Counsel begin a different conversation that may spark Defence Counsel to do the right thing for the brain damaged client as opposed to being solely concerned with securing an acquittal. Vancouver Crown at 222 Main Street for some years now has already had these conversations especially when one Crown was tasked with the "Mentally Disordered Offenders". Although the "Mentally Disordered Offender" Crown's position is now spread around the bail teams, Defence Counsel do respond appropriately when the issue is *gently* raised.

PROBATION ORDERS

Probation Orders are the guts of what we do as criminal lawyers. I believe time in jail while protecting the public in a warehouse or cold storage fashion, has little effect on day-to-day behavior of persons with fetal alcohol issues.

As you know persons with FAS/FASD may "do well" in jail: they thrive on structure and constant supervision. And you also know that these offenders are often physically and sexually assaulted in jail as well as frequently getting into more trouble because they do not understand the social rules of jail.

While I have only a few suggestions here, I know that after you have digested the materials attached, you will frame your submissions for Probation Orders differently.

FAMILY CONNECTIONS

A feature that is often overlooked in most cases, but frequently emphasized in cases involving persons with FAS/FASD is the help from the family. A number of cases highlight that the family can assist with Probation Orders. The Mark Steeves case is one success story.

I am suggesting rather than seek: "...and attend at Probation once a week" that you consider adding some way to have a parent/caregiver, family, or capable friend also know about the Probation, counseling, or other appointments. This will not only help with attendance, it will also bring the family onside beginning to create the external brain.

Rather than seek Orders "...and no contact with...." tell the family who the problem contacts are and seek their input. Consider having a printed sheet on the fridge that has the same information. So that the Order is repeated daily in the home. Create learning and re-learning structures.

SET UP SUCCESS STRUCTURES

Here is the external brain concept working. When Mark goes to work June Steeves phones the restaurant and says “Mark is on the bus going to work”. Later the restaurant phones home to confirm his arrival. Again after work the restaurant phones home saying “Mark is leaving”. This sounds complicated and it is a lot of work for Bob and June Steeves. They would rather do this than visit Mark in jail. And it works as Mark has not re-offended for some years. Bob, a prison guard with 27 years experience, says without the Probation Order helping them, Mark would be in jail. These creative Probation Orders requires Crown to understand how fetal alcohol brains work and have a relationship with parents and caregivers.

BEST RESULTS ARE NOT CONFINED TO COURTROOMS

Probation Orders to be effective for persons with fetal alcohol issues will require a multi-sector approach, involving family, social services, employers, police/probation, schools, and Defence Counsel. Mr. Justice Vickers made the point eloquently in the Victor Williams case. Judge Cunliffe Barnet has been saying the same for years. Crown cannot go alone and expect success. I am urging Crown to make phone calls to various agencies before seeking Probation Orders. Think: “I am creating an external brain”.

You may find it helpful in small towns to distribute the FAS/FASD person’s picture to the local constables, with an explanation on the back describing his disability, his previous behavior, and phone numbers of family or caregivers...as you would for your Uncle Fritz who has Alzheimer’s. I have yet to meet a family or person with FAS/FASD who did not want the police to know about his brain disability. You may include family in the drafting of Orders so that when the Probation Order is on the fridge, the family/caregiver knows what it means, in plain English, and they are involved in the success.

LAST WORDS

Canada is the world leader in thinking and doing about Fetal Alcohol issues. Dr. Julianne Conry from North Vancouver and her colleagues under the Health Canada umbrella, have published the Canadian Diagnostic Guidelines this March. Dr. Sterling Clarren, the University of Washington expert, has moved to Vancouver, and bought a house here. The Alberta and Saskatchewan governments have web published the world’s best school curriculum for fetal alcohol students...it is free. Maple Ridge, British Columbia is home to the Asante Centre, a diagnostic facility, the first of its kind in the world . I urge you to cruise through their excellent website at: www.asantecentre.org.

The Asante Centre website has links to other fine websites. Audrey Salahub is the Asante Centre Administrator who will answer any questions you may have. Jan Lutke of Surrey, British Columbia (see her attached materials) will also provide assistance if you ask. Professor Allan Manson of Queen's Law School has available electronically an excellent 80 page L.LM course paper by two of his Master's students on FASD and the law as of January 2004. (Ask me for copies.)

The American expert Dr. Ann Streissguth of the University of Washington (Seattle) not only has another excellent website ([http:// depts.Washington.edu/fadu/legalissues/](http://depts.Washington.edu/fadu/legalissues/)), she also has a Project Director Kay Kelly who will also answer any questions.... especially about the new research. Kay is at: faslaw@u.washington.edu.

Now it is your turn.

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