

# WHAT JUDGES AND LAWYERS NEED TO KNOW ABOUT FETAL ALCOHOL AND WITNESSES

For Mercy has a human heart  
Pity, a human face:  
And Love, the human form divine,  
And Peace, the human dress.

And all must love the human form,  
In heathen, turk or jew,  
Where Mercy, Love & Pity dwell,  
There is God dwelling too.

Wm. Blake 1820 The Divine Image

The people I love best  
jump into work head first  
without dallying in the shadows

M. Piercy 1973 To Be of Use

Everyone knows Fetal Alcohol issues are difficult and anyone who has easy answers is most likely an escapee from a HARRY POTTER film stage because this largely invisible disability can be very frustrating as there is no magic wand, no polysyllabic spell, or elixir that works here.

My intent here is to make a few suggestions about witnesses and Fetal Alcohol Spectrum Disorder (FASD), because I am not speaking to the larger issue of offenders.

Briefly: Alcohol in the womb is a solvent and acts on the baby's developing brain much like the effects of paint stripper has on old furniture: it dissolves brain cells - bubbles them away. Thus, brain functions are missing.

Thus FASD is a physical disability. From the point of view of this criminal defence lawyer, FASD is not a psychiatric illness, although many with this brain based birth defect have difficult mental health issues. FASD is a physical disability because like an amputee, they are missing body parts called brain cells.

Thus (because of the missing brain functions) we have a legal duty to accommodate witnesses with FASD. Accommodation takes many forms; one size fits all is not appropriate. The accommodation you may make depends on:

- (a) what you know because you have been advised (either by counsel, by aboriginal Court workers, by probation, or by another agency) about this invisible disability by someone with prior experience;
- (b) what an expert has advised (a diagnosis or opinion);
- (c) or because someone (lawyer, aboriginal Court worker, or a probation officer) has been puzzled by the witness behaviour and has asked the witness specific FASD related questions and has tentatively identified the witness as possibly having FASD;
- (d) or what you have learned on the job about FASD and you have made certain findings yourself that lead you to suspect there may be a brain problem or possibly FASD.

If you are now prepared, as either a Judge or Lawyer, to make adjustments in your practice, or “legal” accommodations because you have decided the witness seems to have some sort of brain dysfunction, you are to be congratulated, because now you will face difficulties that will challenge much of your legal training and will force you to question many of your accepted daily practices.

A quick note: the first change/accommodation you make will be in your initial interview. When you can ask questions like a psychiatric social worker interviewing a nine year old...you have arrived!

A note on primary and secondary behaviours is required here. Primary behaviours are presenting behaviours. These primary behaviours may be impulsivity, suggestibility, and “actions” we call crimes. Secondary behaviours are often invisible, the “feeling” of being stupid, depression, internalized criticisms that they can never “make” the grade to pass, alcoholism, and all the psychological/psychiatric difficulties that flow from these dreadful experiences of failure. Please see Professor of Psychiatry at the University of Washington (Seattle) Ann Streissguth’s landmark book: THE CHALLENGE OF FETAL ALCOHOL: Overcoming Secondary Disabilities 1997. Also I am indebted to Barry Stanley M.D. of Cedar Spring Medical Health Clinic Burlington, Ontario for his email note of March 2006.

### **THE DIFFICULTIES:**

Because the brain damage is permanent the affected are not going to “grow up”, “develop”, “change”, or learn in the ways you and I do.

THIS MEANS YOU MAY NEED TO EXAMINE YOUR UNTESTED ASSUMPTIONS ABOUT YOUR EXPECTATIONS OF BEHAVIOUR AND CAPABILITIES OF SUCH PERSONS WHERE COMPROMISED BRAIN FUNCTION IS SUSPECTED.

These witnesses will be the same way they are when you first meet them until you die: they are going to remain who they are with all their behaviours.

1. Issues of consent will be thorny (does she know she must agree to have sex, or does she either not consider it or perhaps does she think you get hit each time before sex?).
2. Issues of competence to give evidence will be troubling (he seems eager and able to tell the truth, then tells “a whopper” without batting an eye).
3. Issues of style and the latitude in cross-examination will become problematic (how much can defence counsel “buddy up”, “be friendly” to this witness, get her comfortable and then get her to admit that black is white?).

There are other issues and my intent here is to provide some rough guidelines because there is no magic wand and each case will present difficulties.

There is lots of research out there to assist your learning and ease these difficulties. The website of Dr. K. Asante is the best: [www.asantecentre.org](http://www.asantecentre.org). Dr. Ann Streissguth of the University of Washington has a program director named Kay Kelly (1-206-543-7155) who will call you back if you have questions. Kay was, for 30 years, a probation officer in Hollywood and has worked with the University of Washington Fetal Alcohol project now for some 6 years. To find her site, google “fadu”. They have very fine materials on line specifically for Judges and Lawyers.

There is a resource list attached here. Note: from the University of Alberta (Edmonton) Dr. Dick Sobsey’s book, VIOLENCE AND THE ABUSES IN THE LIVES OF PEOPLE WITH DISABILITIES (1994) (441 pages) is considered the “bible”, the “classic text” by experts from all over the world.

The main lesson about Fetal Alcohol issues comes from the work of Diane Malbin of Oregon and is most accessible in her book TRYING DIFFERENTLY RATHER THAN HARDER.

Ms. Malbin suggests you match the task you set for the person...”Tell the truth here today...” to the brain before you. This is not easy. Judges and Lawyers have excellent brains and can predict, remember, process consequences and understand abstract notions...guilt and remorse...and Judges and Lawyers expect witnesses to use what they learned on Tuesday when in a similar situation Friday.

She continues: when you experience behaviour that troubles you or causes you to wince or perhaps form a negative judgment because you see.... no apparent remorse, nodding “yes” but not understanding, refusing to look at you, seems bored in Court, is easily distracted, fidgety behaviour, fails to “get” idiomatic or sarcastic language, misses obvious social cues, perseverates, maintains a position clearly not true, or fails to note the most obvious facts.....

then her three rules are:

- (a) IDENTIFY YOUR ASSUMPTIONS
- (b) LOWER YOUR EXPECTATIONS
- (c) CHANGE THEIR ENVIRONMENT

This means:

- Try to change from “tell me” mode to a “show me” mode.
- Reduce the stimuli in the Courtroom...this may require the use of a screen as sometimes used with children. Here the screen is not to block out the accused but to reduce ALL STIMULI.

Judges may need to tell the witness with FASD to continue with their evidence and assure the witness that you are listening, but that because you must take notes you cannot look at him eye-to-eye. I mention this because sometimes they will scan your face for clues as they are often eager to please and sometimes visual cues will encourage them to tell the Court what he thinks the questioner or the Court wants to hear. Perhaps ask the witness to speak to the photo of the Queen so the witness does not scan another live face for confirming visual/facial cues.

Again, this warning follows for both crown and defence. Engaging the person with FASD face-to-face in a pleasant manner giving them lots of eye contact and body language, may be counter productive to getting out the truth. Time, experience, and your research will be your guide.

I want to talk about shame next. This may be the core difficulty. Shame and the associated grandiosity are secondary behaviours/disabilities. Diane Malbin advises: THE GREATER THE SHAME, THE GREATER THE GRANDIOSITY. Grandiosity, being a defensive protective behavioural response to failure and internalized shame, and as such is also a secondary behaviour.

Sometimes the people with FASD have developed protective secondary behaviours in early grade school. It may be emotionally and socially safer to behave “badly” rather than to “appear stupid” to everyone else. How many children with FASD hold up the Bell curve? They learn it is safer psychologically to “be bad” rather than “to feel” stupid. Over the years they have been ashamed over and over again, to the point that it is a fundamental life experience almost like lawyer’s experience of legal entitlements.

Shame and other preventable secondary defensive behavioural symptoms end up being far more destructive than FASD. FASD witnesses have internalized shame like Lawyers have internalized their own personal experiences. Make the adjustment.

Shame is a core body experience; it is not going away with warm kind words or pleasant suggestion: it is a fact you must consider. They want to please. They will say what they “think” you need to hear. We often label these words “untrue” or call them “confabulations”. They may not be able to conceptualize the notion of truth. In concrete terms they want to please...and if saying black is white makes you an apparent friend then they will agree – easily. So often these witnesses are lonely beyond anything Lawyers can imagine and it often seems they will do anything for “friends”.

**Shame is invisible.** Their brain-based birth defect is invisible. This physical disability is invisible in most of the cases since the window of the timing of alcohol exposure that results in classic facial characteristics is considered to be three days in pregnancy...between days 18 – 21. Accordingly a small percentage of people exposed even to significant amounts of alcohol and other drugs have the “face” of FASD. Their language skills may be lower than your expectations, as are their rational thinking processes, their predicting skills are compromised, and their memory may be poor compared to other witnesses.

So what can you do? First, do not let these difficulties close your mind. In Hamlet, Shakespeare has his hero say to Horatio something we all need to bear in mind:

*...”there are more things in heaven and earth, Horatio, than are dreamt of in your philosophy.”*

**You need to stretch your definition of success.** This is clearly a huge problem in a world ruled by “beyond a reasonable doubt”. Again, I refer to your experiences in cases where the evidence was from young children. The witness with FASD may have had 18 birthdays but may be 9 years old cognitively. Make the adjustment.

The witness may be visually skilled. Diagrams, pictures, sketches, and his own drawings may be more useful to the Court than his words.

I have already referred to this as a shift from “tell me” to “show me”. Everyone who has done assault cases with children knows this strategy works and it works because we accommodate the brain before us to match the task. No one expects the kid with one leg amputated to race with two legged others in the 100-metre dash!

**Consider a “walkabout with a video camera”.** Diane Malbin advises that often their anxiety will become elevated when they cannot meet your standards...they will confabulate. However, they do well in situations where the context is familiar..... “the scene of the crime”. A visit to the site of the offence may be rewarding.

**Watch for clues of elevated anxiety.** They may give off signs radiating information that seems to be asking “am I doing this right”? They may “shut down or have a flat affect” when overwhelmed. If you detect these indicia of anxiety, the signs may mean their anxiety is high. STOP. IMMEDIATELY. A break or a few moments to gather themselves is important now. This warning about anxiety means you must be vigilant to their emotional state (as opposed to concentrating solely on their intellectual/verbal state). No one wants confabulations in their Courtrooms. Confabulations are often produced when witnesses with FASD are anxious. Again, remember the notion of shame as a core body experience and the need to have friends. Preserving dignity is easy: think of the witness as your mother who has advanced Alzheimer’s!

**Clearly these witnesses can be easily overwhelmed.** You must instruct counsel to avoid complex questions. Again think younger advises Ms. Malbin.....MUCH YOUNGER! Do not be fooled when they seem to talk above their abilities...this is pleasing mode.

Our brains drive our behaviours and we all have moral constructs that describe positive and negative behaviour. Judges are trained to notice and be aware of how their personal assumptions may change the interpretation of facts given in evidence. Judges guard against inflicting their moral standards on others. Persons with FASD have primary presenting behaviours (being impulsive and being suggestible) that some may view as negative. Jan Lutke has some pregnant advice for us: do not confuse non-compliance with non-comprehension. Separate the layers of behaviour. Notice your assumptions!

Sadly, we Lawyers often are oblivious to the role of brain dysfunction in behaviour. These witnesses have trouble retrieving information (memory problems). So when anxious the retrieval function will be compromised even more. Context emotional, physical, or visual is an aid to memory. Therefore, questions like “What happened?” will be of more assistance to the trier of fact than more complex questions because the information is easier to retrieve.

This points to an ethical dilemma I cannot resolve here. Is the function of a trial to find the truth, or is it simply a forum for the Crown to prove the case beyond a reasonable doubt? Lawyers ask questions for many reasons including discrediting a witness, confusing a witness, testing the memory of a witness, and generally putting the witness on trial. By now you can see that witnesses with FASD will not always do well in trials, but may do very well talking into a video camera as Constable Betty asks him to “show me “.

Lower your expectations means you need to adjust your notions of witnesses as accurate historians. These witnesses may not see material facts (THE ENGINE OF COURT ROOMS) as of any interest to them. There may be no emotional or contextual hook for them. Remember Doctors Conry and Fast’s mnemonic ALARM.

The doctors developed this mnemonic to train RCMP investigators to be sensitive to Fetal Alcohol issues. Briefly each letter of the mnemonic indicates a category of questions to ask. If you get positive answers to some of the ALARM categories, you have set off the alarm bells: adjust your process accordingly.

ALARM means.....

Adaptive behaviours  
Learning  
Attention  
Reasoning  
Memory

These headings will give you the basics of Fetal Alcohol in a glance.

I do not want to wreck an acronym and I know readers here can take extra information. There are two other headings I must mention here:

- a. Sensory systems; and
- b. Processing pace.

Sensory Systems means when you see fidgety, distracted, agitated and irritated behaviours and there may be over and under sensitivity to inputs issues. They may “shutdown”. These persons may not respond as you would in similar circumstances and you see the manifested behavioural response to stress.

Processing pace refers to the slow cognitive and auditory processing pace. Think: this may be a 10 second kid in a one second world. The best demonstration of this notion of processing pace/sensory inputs was by Karen Serret Ph.D. given at a conference in 2005 in Edmonton, Alberta for Lawyers and Judges on Fetal Alcohol.

Karen had us wear funny hats, put constricting cloth elastic bands around our necks, then added dollyboobler head bands that obscured our vision by jiggling coloured balls in front of us, gave us New Year’s Eve noise makers to twirl and rattle, she played some loud rock music and had assistants walk around the room making more noise and distracting movements.

Then on a power point screen show she gave us a furiously fast spelling/word match/ geography test...20 questions. I gave up at about question 11. I was sitting at a table with five Judges....none finished, most had wrong answers, several, like me, threw down their pencils. Doctor Serret began her presentation by saying: "Welcome to the world of FASD."

I would add "time" to a list of problematic notions to consider with witnesses with FASD. This may not be your experience, but it is mine. With these clients and witnesses there is sense of them living in the moment....as if the past and the future do not exist. I suspect this may be connected to their inability to understand "value" also. Minutes and hours can be interchangeable as dollars and cents...they may know what they are but the intellectual competence that we have is sometimes missing. Lower your expectations. They may not have your skill with abstract thought.

Once, I had a client tell me in the Young Offender holding cells that each night she puts "the bad day over there" before she went to sleep so when she woke up " all the bad is gone". She was a teenage (14/15 years) sex worker who did not know what condoms were for. If you want this client to "tell you" about her being sexually assaulted, you will have difficulties.

David Raithby, a counselor from Nanaimo, suggested I try a technique he uses with people in his office. His method works for me.

He sits quietly for a few minutes with no talking, no movement. Then he slowly begins breathing long slow deep breaths. Usually the person sitting beside him in the next chair begins also to breathe in long slow deep breaths. He moves and speaks slowly. He may or may not extend his hands to hold the hand of the person in the chair. Mr.Raithby cautions that being sensitive to the person's boundaries is crucial. Using a few words as possible Mr. Raithby asks what brings you here, or what has happened.

He stresses: sometimes he just waits...that is all. He waits and breathes. His questions are simple, concrete, and direct.

I have used this technique in the hallway outside busy Provincial Courts as people rush to and fro. I have been successful asking hard questions (Did you drink like you do now when you were pregnant?) to biological mothers just before their affected son goes into Court for sentencing. When I speak to women who have been sexually assaulted I use the Raithby technique – it takes only 3 to 5 minutes and it took me 15 years of lawyering to learn that the questioning system I honed as Duty Counsel interviewing people in jail was inappropriate for some witnesses. For me, the trick to get past the flippant, “nothing”, “whatever” façade understood that the shame experience was a cover, a defence, to speaking the truth.

Perhaps the most distressing difficulty for Lawyers is the decision to have a trial or not. I am not here to debate the difficult public policy issues here. I want to point out in some cases a witness with a brain dysfunction is a consideration that may lead you to try another method of resolution, find other evidence, or at least consider the effect this trial may have on this vulnerable witness.

A word about discretion:

Judicial discretion seems to me the hallmark of our Canadian legal system when compared to our southern neighbours. These witnesses can give excellent evidence. They can be tested in Court and stand up to vigorous cross-examination. I remember with father-like pride when one of my clients withstood a Federal Crown’s blistering cross examination and the ensuing “Not guilty”, only to be staggered by his next words: “When do I go to Jail?”

Sometimes you will see puzzling behaviour. I want to suggest if you consider the brain and if you consider the physical power that shame has on behaviour, then you might sometimes exercise discretion not because the witness has a child like aspect, but because our system is a human system and part of being human is accommodating and being as flexible as possible to get the job done. I am suggesting discretion is creative, takes time, enormous energy, and no one decision is exactly like another.

David Boulding  
Lawyer

## MATERIALS LIST

1. [www.asantecentre.org](http://www.asantecentre.org) Canada's premier FASD site
2. Google "fadu"...University of Washington...Anne Streissguth Ph.D. and Kay Kelly "info source extraordinaire"
3. FETAL ALCOHOL SYNDROME and the Canadian Justice System by Julianne Conry Ph.D. and Diane K. Fast M.D. Ph.D.
4. Fetal Alcohol Spectrum Disorders: TRYING DIFFERENTLY RATHER THAN HARDER by Diane Malbin M.S.W.  
[dmalbin@fascets.org](mailto:dmalbin@fascets.org)
5. ABORIGINAL JUSTICE WORKERS AND FETAL ALCOHOL SPECTRUM DISORDER David Boulding (available at Doctor Asante's website [www.asantecentre.org](http://www.asantecentre.org))
6. VIOLENCE AND ABUSES IN THE LIVES OF PEOPLE WITH DISABILITIES by D. Sobsey 1994
7. SPECIAL CHILDREN SPECIAL RISK: Maltreatment of Children with Disabilities by James Garabino 1987
8. [www.disability-abuse.com](http://www.disability-abuse.com) this is the website of Doctor Nora Baladarian...the energetic Queen Bee of American disability studies. She runs the only ongoing national conference on abuse/disability. Go to the website click on "can do", scroll to then click on "library". You will find a resource list of 30 years...from sex education to helping witnesses!
9. Get on Elspeth Ross's web based mailing list. She is a retired librarian (and foster mother to children with FASD) and collects FASD info from all over the world and sends it to your computer FREE! Email: [rosse@ncf.ca](mailto:rosse@ncf.ca)

Some of the people I would not hesitate to contact:

Judge Cunliffe Barnett, retired B.C. Provincial Court

Kay Kelly at the University of Washington (1-206-543-7155)

Doctor Sterling Clarren at Vancouver's Hospital for Sick Kids

Audrey Salahub: Asante Center, Maple Ridge, British Columbia  
(1-604-467-7101)

Finally the best conferences on FASD are in Victoria and Vancouver.  
Contact University of British Columbia: Interprofessional Studies.