

Justice and Fetal Alcohol Spectrum Disorder, for Lethbridge, 2007

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We can improve our legal system. We all believe that, or we would not be here having lunch together.

While I am speaking about Fetal Alcohol Spectrum Disorder (FASD) and the law, much of what I have to say you already know in a common sense kind of way.

Now we have 28 minutes left. I will not refer to all items in the paper. You can read later and if you have questions I am here for the next two days. There is time for follow-up conversations.

First, three points marking out the landscape.

Point #1

In 1853 McNaughten tried to assassinate the English prime minister. His single shot missed the PM and killed another fellow. An English jury found him not guilty of murder by reason of insanity. There was a public uproar and Queen Victoria asked the House Lords to investigate. The House of Lords reviewed the case and issued some new legal “rules”. The resulting rules are the main beam of all criminal law in Western democracies and are called the McNaughten rules.

Briefly, the rules are:

- We are presumed to know the nature and quality of our actions.
- If we know what we do is wrong, we are not insane.

The trick here is that Sigmund Freud was born in 1856. He started publishing in 1890. What did the House of Lords know about human brains in 1853? The word “unconscious” as we know it was not even in common usage until about 1890.

Point #2

A few months ago I read in the *Economist*, a magazine for the severely sober, a story about a good man, a teacher who suddenly became a sex offender. His new and disturbing behaviour was contrary to all he had done in his life prior to offending. The day before he is sent to jail a doctor orders an MRI and the teacher/sex offender is discovered to have a brain tumor. After the tumor is removed, all offending behaviour stops.

Years later he begins to re-offend, and yes, the brain tumor came back and was removed

again. Is he a criminal? How is he different from Uncle Albert with Alzheimer's? Or from Auntie Clara who has had a stroke?

Point #3

Joe Schildkraut died last November. You have never heard of him. But the Schildkraut hypothesis, like the McNaughten rules, is a main beam in our lives. In 1965 he suggested in a paper that is still the most cited scholarly paper in the psychology/psychiatric journals his opinion about the "catecholamine hypothesis of affective disorders". You know this word salad as the "chemical imbalance theory of the brain".

Later the good doctor himself described the "Schildkraut hypothesis" as "reductionistic and oversimplified". Alas, this "suggestion" of Dr. Joe Schildkraut has become the mantra, the profit-driver, of drug companies, the "Bible" of psychologists, criminologists, psychiatrists, and the rest of us. Much of sentencing in criminal courts relies on this now discredited theory.

I am suggesting both the McNaughten rules and the Schildkraut hypothesis need to be rewritten and that the *Economist* tumor story has some important news for us.

Now to FASD and the Law.

You have in your materials the two-page "Lawyer's Brief". Let us review quickly, starting with the five main points and some comments on the external brain.

I would add today to the brief an excellent website that belongs to Dr. Anne Streissguth at the University of Washington (Seattle): Google "fadu".

Kay Kelly is at: faslaw@hotmail.com. Kay was a probation officer in Los Angeles for 30 years and is now the one to call on FASD in the USA. She has worked with Anne for several years. Her phone number is: 1.206.543.7155. She returns all phone calls about FASD, and is an enthusiastic resource.

Some Practical Interview Tips

Here is a quick and dirty way around the most perplexing problem today: assessments for a FASD diagnosis. As you know, a diagnosis costs lots of money and takes a multi-disciplinary team to complete.

Everyone in this room has valuable experience interviewing and tons of common sense. Below are some questions that if pursued in a heartfelt and disciplined way will give you valuable information that may in itself suggest "real experts" conduct a proper assessment. And if you cannot get a real assessment, you can say to judge, probation, police, Crown or defence: "I am not a psycho-neurologist, but this information from my

interview suggests this person may have some FASD issues, for instance...” Then let the person higher up the food chain make the decision. I have faith in the system; eventually we do the right thing.

NUMBER ONE

After birth date information, ask if the person was adopted or in foster care; if the latter, about foster placements, visits to various professionals (doctors, educational professionals, psychologists, speech therapists, etc.).

NUMBER TWO

Ask about maternal drinking. This may be as innocent as “Have your parents ever spent the night in jail?” Clearly, some sensitivity is required here. You may have to gather collateral information from other relatives about maternal drinking. Do not worry if you get firm negative answers. Be informative and open, not judgmental.

NUMBER THREE

Inquire about developmental delays. Ask about developmental milestones, i.e. tying shoes, riding a bike, age-appropriate friendships; are the answers reasonable? Ask about school ages, matching chronological age to grade. For example, ask:

Grade six: what age?

Grade seven: what age?

Grade eight: what age?

Develop a grid of age and development, and note disparities between chronological age and adaptive age.

Ask the individual whether a “special person” at school ever tested him/her. Find out about his/her marks in school. Ask yourself, “Was this person a ‘social pass’?”

NUMBER FOUR

Note the individual’s vocabulary in his/her answers. Are there any words that seem to be “above” his/her learning? If you suspect the person may be speaking above his/her learning, ask, “What do you mean by that word?” Note if he is using words but is unable to define their meanings. Is there a gap between expression and the comprehension of his expression? Do you suspect he heard this and misunderstands the appropriate context?

Again, there is good research to help you. Dr. Julianne Conry is a neuropsychologist who has developed a helpful tool called ALARM. The acronym stands for:

A...Adaptive behaviours

L...Language

A...Attention

R...Reasoning

M...Memory

Go through each category and note what you discover. Here you need to give yourself some credit for common sense, as well as your ability to ask questions and make observations.

For example: Do you see problems with memory, language, reasoning, attention, and those behaviours we use to get through the day? No one expects you to be the next Dr. Conry. But, you have skills! Use them! You have conducted enough interviews to know how to ask curious questions. ALARM is a guideline checklist that may enable you to consider whether the person in front of you has FASD issues. All you are doing is exploring. Experts give a complete diagnosis. Still, much good can come from skillful exploring. Your exploration notes may be enough for a judge to order a proper assessment. If that order for an assessment is made, you have done your job 100%.

NUMBER FIVE

Note unusual behaviours and manner of dress. If it was -40°F and he was hitching a ride without a coat, write that down! Often, persons with FASD have marked sensory threshold issues. They frequently have high tolerances for pain and cold. Be aware of cleanliness and type of clothing: this may be a sign of tactile defensiveness (the person does not like scratchy clothing or wrist bands and tight collars); dental hygiene: oral defensiveness (lisps or speech defects like cleft palette); posture, gait and fidgeting: postural defensiveness (being hunched over as if expecting a blow, concave chest, no eye contact). Speak in a louder voice for signs of auditory defensiveness (sensitivity to loud noise).

Ask about hospitalizations and/or injuries, as these can be clues of risky behaviours and inability to predict outcomes. Again, observe carefully. Make notes.

NUMBER SIX

Ask your subject to write something. Provide a pen and paper and ask her to draw a family tree of relatives, or something related to the interview: a map of the offence, a diagram of the city; you will be amazed at what you learn. Again, proceed heart first. Notice gaps and what is missing.

NUMBER SEVEN

Try a brief mental health quiz. Ask whether the individual has ever taken Ritalin or any anti-depressant, has ever seen a psychiatrist, psychologist, or suicide counselor. Inquire about problematic behaviours in school, any expulsions. Has she been considered lazy, disruptive, or violent?

NUMBER EIGHT

Ask about family. Get a sense of siblings, birth order, ages, size, body build. Ask about unusual birth defects (e.g., cleft palettes, dental defects). Get a sense of how the person is in weight-to-age ratio. Not every question will bear perfect fruit.

NUMBER NINE

Ask other questions and make observations to assess the following:

1. Is there a “victim” quality present?
2. Could this person be taken advantage of easily?
3. Do you sense that this person likes repetition, structure, and stable environments?
4. Is he uncomfortable with noise and activity, and multi-stimuli environments?
5. Does she not “get” the notion of consequences?
6. Does he have difficulty generalizing from experience?
7. Is this person extremely literal minded? Perhaps she does not pick up on sarcasm or idiomatic expressions?
8. Has this person ever had a driver’s license?
9. Do you sense this person does not understand some of your questions?
10. Does this person appear eager to please?

NUMBER TEN

What questions are you not asking because they do not seem necessary? You will be surprised what you assume, so check your assumptions. Stand back and do the interview as if the person was from a distant country. Remember the interviews you did early in your career. Be aware of how much you have learned since. Review your past mistakes, and credit yourself with what you have learned over those years. If there are any sexual issues, use the Yuille Stepwise Protocol.

I suggest the above questions will give you some new information that could suggest the person may have Fetal Alcohol Spectrum Disorder. Armed with this new information, tell the probation officer, tell Crown counsel, tell defense counsel, and make sure the judge knows.

Simply put: If enough of you do these interviews over and over, and keep telling judges, the judges will eventually ask for an expert report. You must be the squeaky wheel. If you do not keep asking for expert assessments, nothing will change and these individuals will continue undiagnosed and without help, repeatedly re-offending, filling up our jails.

Probation Orders

I believe that it is a waste of time and resources to jail 90% of offenders. Probation can achieve what is needed to protect the community and develop good citizens. I see jail as cold storage, as a deep freeze; upon release, our clients thaw and we are all back where we started before the jail time. This is my assumption based on my years as a criminal lawyer; you may not share this assumption.

Ask yourself what, are your assumptions about jail and how do they play out when you interview? Do you assume jail is necessary or inevitable in your interview?

I believe probation, or what I prefer to call “community response”, is far more effective than jailing persons with FASD. Here is where we need to talk about the good news called the “external brain”.

An external brain is what the experts say we need to construct for the individual involved with the judicial system and living with FASD. An external brain is family, friends, and community members who will step in and assist with decisions and actions, helping the individual with FASD to stay crime-free. Persons with a brain-based birth defect from alcohol exposure in the womb are missing brain cells, resulting in a physical brain disability just as if they were missing a left leg. They have compromised or reduced brain function in some areas. For example, they may have impulse control problems, be easily led, be unable to take what they learned on Tuesday and apply it in a similar but not same situation on Thursday. Time in jail does not repair or create new brain cells.

I believe a community can create probation orders that focus on successes, not weaknesses. Probation orders can intervene in a positive way if we understand that the person on probation has a neurological deficit, a brain-based birth defect that can be managed through help from the community.

Diane Malbin, an expert in the study of FASD, advises that we:

- match the task to the brain before you;
- assess our personal assumptions;
- lower our expectations; and
- change their environment.

Obviously, we need to expect failures, but we can expect fewer failures if we fashion a community response to help these individuals. Here are suggestions for how to do this:

1. Make probation orders “fridge-proof”. This means use language familiar in the home. Judges in criminal courts do not speak everyday English. For example, the phrase “keep the peace and be of good behaviour” means nothing to a brain affected by alcohol; it is too abstract. This first rule means that before going to court, you should consult the family and find out what language works and what language does not. Identify the language used in the home. The parents/caregivers have years of experience; draw on their experience.

2. List positive alternatives for actions. Instead of listing “do not...do not...do not...”, include positive possibilities. For example: “Do not hang out with Bob Smith; you CAN hang out with Joe White or Sam Black.” Or, “You cannot go to 7-11; you CAN go to Quick Stop.”

3. Keep it simple. Use as few clauses and terms as possible. Confirm that the individual understands. As Judge Jeffreys from Alaska State Court says, do not assume that because the person heard the order read out in Court and nodded, he understands. Check to make sure.

3. Ask the family and community members for help; get them onside as part of the team. Family connections are often overlooked. You may also need to contact schools, employers, doctors, neighbours, business owners, coaches, and religious leaders.

“Deputize” family friends and other care providers to support the person in making appointments, getting to work, staying away from persons and places of trouble. Build in daily reminders and have as many people as possible know about the terms of the probation order.

4. **Use teamwork.** This external brain is a combined effort. No one, not even you, can do this alone, so make sure you get help. You have a great deal of common sense, and a well of community learning to draw from. Now is the time to use this community reservoir of knowledge.

Do not expect lawyers, or police, or judges to solve this situation alone. No one can create an external brain alone. And remember, the treasure you find depends on the map you use. If you rely solely on a police map you will get a police solution, if you rely only on lawyers and judges, you will get a legalistic solution, but if you have a community map—an external brain—you will find a community treasure.

Conclusion

You have now enough grist for your intellectual mills. You now know more about FASD than most doctors, lawyers, and policy makers. Clearly, the McNaughten rules need revising, but that is not going to happen today, or tomorrow. No one in the academic world believes the Schildkraut hypothesis, but its magical and profitable hold on drug companies and our social stock of knowledge will persist. Everyone here knows someone with a stroke, with Alzheimer’s, or with some form of brain damage that would derail a criminal case at the charge approval stage. Now, can you see some connections and the work to be done?

What is next? It is up to you.

References to stories, ideas and quoted facts are available on request. I have learned much from others at conferences like this one, and there is much more to learn.