

FASD and the Criminal Justice System: Issues for Defence

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The FASD Learning Series is part of the Alberta government's commitment to programs and services for people affected by FASD and those who support them.

FASD – The Basics

- Terminology
- FASD – The Basics

Terminology

- Fetal alcohol syndrome (FAS)
- Fetal alcohol effects (FAE)
- Alcohol-related birth defects (ARBD)
- Alcohol-related neurodevelopmental disorder (ARND)
- Partial FAS (pFAS)

FASD – The Basics

- FASD occurs when the foetus is exposed to alcohol during the pregnancy
- There is no proven safe amount of alcohol use during pregnancy
- Binge drinking is particularly harmful
- “Binge” is four or more drinks on one occasion

FASD – The Basics

- Prenatal exposure to alcohol causes brain damage (Central Nervous System)
- This brain damage continues throughout the lifetime and cannot be cured
- Prenatal exposure may also affect the physical development of the foetus (heart, lungs, etc)
- Studies have shown alcohol affects different things depending on when it is consumed during the pregnancy, however the CNS is affected by alcohol consumption at any stage of the pregnancy

FASD and the Body

- Executive Functioning Processes
 - FASD – Executive Functioning
 - FASD – Central Nervous System

Executive Functioning Processes

Executive Functioning is a term used to describe a set of mental processes that helps us connect past experiences with present actions.

These processes include:

- Planning
- Selective Inhibition
- Cognitive Flexibility
- Concept Formation
- Rule Breaking

Executive Functioning Processes

Planning

- FASD affects the ability to predict, organize, prioritize, sequence, initiate, follow through, set goals, be on time, adhere to schedule

Selective Inhibition

- An important tool to regulate our behaviour
- FASD affects the ability to actively inhibit a well-learned behaviour

Cognitive Flexibility

- FASD affects the ability to shift between different tasks, rules, instructions in a flexible way

Executive Functioning Processes

Concept Formation

- FASD affects the ability to develop an action plan/deductive reasoning
- Difficulty with abstract concepts
- Inability to generalize information: forming links, applying learned rule in new setting

Rule Breaking

- Although understood, rules are not being followed
- Immaturity & Impulsivity

FASD – Executive Functioning

- Can not learn from past mistakes
- Egocentric
- Impulsive
- Concrete thinking
 - If you ask them to make the bed, they may think you actually want them to build a bed

FASD – Executive Functioning

- Have difficulty with “cause and effect”
- Have difficulty anticipating consequences
- Have difficulty understanding the perspective of another person (no remorse)
- Require structure and consistency
- Have difficulty adapting to new situations
 - Someone with FASD may do well in a prison setting, but could fail immediately upon returning to the community

FASD – Central Nervous System

- People with FASD have difficulty with time, memory, language and social skills
- Do not assume you can discuss an issue with your client once and that he will remember it
- Client may not understand what information is important to you, and may not remember all the details of the offence
- Because of low language skills, people with FASD often pretend to understand more than they do
- Client may not understand subtleties or sarcasm

FASD Issues

- General Issues
- Secondary Disabilities
- Key Points

General Issues

- Hard to diagnose because many medical professionals do not recognize it
- Behaviours may not improve – must improve the ways we deal with the behaviours rather than look to change the behaviours
- Huge memory lapses – must be constantly cued/reminded
- Easily distracted

General Issues

- Masking – pretend they know what is going on when they don't. Do not ask if they "understand", because they will say they do even if they don't.
- Followers/eager to please
- A person with FASD may look "normal" (no facial features of FAS)
- A person with FASD may have a normal IQ

General Issues

- It is necessary to look past the IQ and towards the behaviours
- Some young persons (but not all) have some structure through school and/or parents
- This structure often disappears when they are adults

Secondary Disabilities

Secondary disabilities often occur in individuals with FASD because of the problems they have adjusting to the realities and requirements of daily living. These are considered inorganic characteristics as they occurred through the individuals developing years and adulthood.

(Streissguth et al. 1997)

Secondary Disabilities

- Mental health problems
- Addictions problems
- Employment difficulties
- Victimization
- Problems in school
- Trouble with the law

(Streissguth et al. 1997)

FASD – Secondary Disabilities

“Secondary disabilities” can be prevented when proper supports are provided. (Boland, Burill, Duwyn & Karp,1998)

Those externalizing and internalizing behaviours can lead to the criminalization of people with FASD. (Correctional Service of Canada 2008).

FASD – Key Points

➤ FASD is often an invisible disability that substantially limits the individuals participation in life and society as a whole, including access to justice at all levels. FASD is permanent brain damage. Solutions must involve a collaborative multi-level response focused on accommodations and integrated support and monitoring.

FASD – Key Points

- The responsibility to accommodate for the invisible disability of FASD is the same as the responsibility to accommodate for a visible disability
- It is important that misconceptions about the issue do not result in harming people with the disability, including placing unwarranted infringements on their liberty (Kent Roach)

FASD – Key Points

- Cognitive-based therapy is not effective for individuals with FASD. Most programs, addiction and drug treatment programs are cognitive-based
- Behavioural modification techniques are problematic, because of the difficulty of learning from past mistakes and the difficulty with linking cause and effect

FASD and the Criminal Justice System

- Common Behaviours Seen in the Justice System
 - FASD and the Criminal Justice System
 - Red Flags
 - Criminal Process: Arrest and Detention

Common Behaviours Seen in the Justice System

- Easily led by more sophisticated peers
- Multiple low-grade offences – frequently with others – frequently arrested
- Offences do not make sense
- Impulsive/opportunistic crimes
- Failure to change strategy when something goes wrong (the inability to learn from their mistakes)

FASD – Common Behaviours Seen in the Justice System

- No exit strategy – fight or flight
- Right to silence almost always waived
- Guileless confessions – even false confessions
- No apparent guilt or remorse
- Unable to appreciate magnitude of their crime

FASD and the Criminal Justice System

An American study found that 60 percent of subjects with FAS or FAE had been in trouble with the authorities, charged with a crime, or convicted of a crime.

Streissguth, A.P.; Barr, H.M.; Kogan, J.; et al. 1996. *Understanding the Occurrence of Secondary Disabilities in Clients With Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)*. Final Report to the Centers for Disease Control and Prevention. Tech. Rep. No. 96-06. Seattle: University of Washington, Fetal Alcohol and Drug Unit.

FASD and the Criminal Justice System

The Criminal justice system is based on the notion that criminals will be caught, punished and then learn from their mistakes.

People with FASD CANNOT learn from their mistakes.

FASD and the Criminal Justice System

“Canadian criminal law was designed on assumptions about free will and individual responsibility, and temporary and treatable departures from that norm.”

“Contrary to the reality of the permanent brain damage caused by FASD, it is also assumed that mental disorders can be treated so that a person will eventually either be found fit to stand trial or to present no substantial danger to the public and therefore be safe to release.”

(Roach, 2009 p.3).

FASD and the Criminal Justice System

- Often the client will not have been diagnosed with FASD before appearing in Court
- Often FASD disorders are misdiagnosed
- Common misdiagnoses are Attention Deficit Hyperactivity Disorder, Conduct Disorder and/or Oppositional Defiance Disorder
- A misdiagnosis results in inappropriate treatment
- In these cases, if “treatment” has been unsuccessful, the accused is unfairly labelled as “non-compliant” or not amenable to treatment

FASD and the Criminal Justice System

If your client has been assessed in the past and his behaviours have not improved with treatment, consider whether you should retain an expert for an FASD assessment.

It is important to consider an FASD diagnosis if faced with a client whose behaviours mimic those that are common to individuals with FASD.

FASD and the Criminal Justice System

Even if there is no evidence of maternal drinking, most doctors can do an assessment that will at least tell you if the client has organic brain damage that is consistent with FASD

Red Flags

Defence counsel may encounter individuals repeatedly and note certain RED FLAGS that indicate that *“something is not right”*. This may indicate that there is a cognitive impairment, FASD related, or other issues that impair a youth’s cognitive capacity.

Red flags may lead counsel to seek further information. However, there is no validated screening tool available for use in the justice system.

Red Flags

Red flags may include:

- Involvement of child welfare and removal from parental home
- Sporadic school or work attendance
- Multiple diagnoses: ADHD, LD, conduct disorder, anti-social personality disorder, oppositional defiance disorder

((Judge Shelia Whelan, Dr. Jo Nanson, FASD & Youth in trouble with the law, March 2007.)

Red Flags

Red flags may include: (Continued)

- Numerous administration of justice breaches (Fail to Appear, Failure to Comply with Probation etc.)
- A lack of remorse or insight into how the offence may have affected other people

(Judge Shelia Whelan, Dr. Jo Nanson, FASD & Youth in trouble with the law, March 2007.)

Failure to recognize and properly respond to an FASD diagnosis could put your client at risk for an unfair conviction or sentence

FASD and the Criminal Justice System

In Alberta, Legal Aid will fund an expert for an FASD assessment if the funding request meets their criteria.

Counsel may want to retain an expert for the purpose of determining:

- Fitness/NCR
- Admissibility of a statement
- Whether there is a defence
- Sentencing

FASD and the Criminal Justice System

An FASD diagnosis can affect the accused at all stages of the criminal process. I will consider the following:

- Arrest/Detention
- Taking of statements
- Role of defence counsel
- Client interview
- Fitness
- Conduct of the defence
- Guilty pleas
- Sentencing Considerations

Criminal Process: Arrest and Detention

- Accused will often commit offences along with other individuals, but may be the only person apprehended
- Sensory perception issues: may seem to “over-react” to being touched, being handcuffed, etc.
- May be “over-cooperative” and willingly admit involvement in criminal activity

Criminal Process Statements

- Criminal Process Statements
 - Admissibility
 - Reliability

Criminal Process Statements

Two issues with statements are:

- Did accused understand his rights/is statement admissible
- Was statement a false confession

Admissibility

R. v. Oickle, [2000] 2 S.C.R. 3

Endorsed “operating mind” test from *R. v. Whittle* [1994] 2 S.C.R. 914: “does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment”

Admissibility

R. v. B. (S.M.) 2005 ABQB 784

Young person with FASD – statement excluded after expert evidence that he would not have understood his rights or his waiver throughout the interview

Admissibility

R. v. S. (B.K.T.) 2006 MBQB 275

Statement of Young Person with FASD admitted

R. v. L.T.H 2008 SCC 49 (YCJA s. 146)

Individualized approach to ensure comprehension by the young people including that the police must make a "reasonable effort" to become aware of relevant factors such as learning disabilities

Reliability

People with FASD are susceptible to making false confessions:

State v. Christoph

2000 WL 1854134 (Wash. App. Div. 3)

- False confession to abusing younger sister
- Accused plead guilty and served sentence of 21-28 weeks
- Conviction set aside 4 years later

Reliability

Bryan Tait:

- Falsely confessed to a double murder he could not have committed as he was in prison at the time. At first he denied culpability, but then he broke down and confessed. He simply repeated the facts the police had recited to him in the course of their interrogation.
- He spent 11 months in jail before it was discovered he was innocent.
- Montreal Gazette, October 7, 1991

Role of The Lawyer

- Issues That Must Be Identified To Lawyer
- Issues The Lawyer May Have
 - Client Interview
- Court: Fitness To Stand Trial

Issues That Must Be Identified To Lawyer

- Ability of client to provide a linear account of what happened
- Ability of client to understand what is important to the lawyer
- Ability of client to understand his or her rights

Issues The Lawyer May Have

- Must be able to effectively interview client
- Must provide options to client in a manner client can understand
- Is client fit to stand trial?
- Is client able to effectively understand what is happening in the courtroom?
- May need to explain everything before court and repeat explanation after court

Client Interview

- **Keep statements and questions short and to the point**
- **Provide information in small pieces – and ask for information the same way**
- **Ask a question in several different ways**
- **Keep communication concrete – if you ask someone to “make the bed” he may think you want him to build a bed**
- **Read material to client**

<http://fasdjustice.on.ca>

Client Interview

- **Avoid pronouns – use names**
- **Use visual aids as much as possible**
- **Avoid multi-step questions**
- **Avoid complex wording – keep it simple**
- **Always confirm what they heard is what you said**
- **Do not ask if they understand – ask questions about the content**
- **Allow client more time to respond**
- **Try to have interview in quiet place away from any distractions**

<http://fasdjustice.on.ca>

Court: Fitness To Stand Trial

R. v. Jobb, 2008 CarswellSask 799 (SCA)

- **Very low threshold to determine client is fit to stand trial**
- **Accused only need be able to communicate the necessary facts to prepare his defence**
- **Accused does not require capacity to determine his own best interest**

Conduct Of The Defence: Role of FASD

- Conduct Of The Defence: Role of FASD
- Guilty Pleas

Conduct Of The Defence: Role of FASD

May provide a defence to the charge

R. v. Jeffrey, AQB No. 070231642Q1, October 24, 2008

- Charge of second degree murder reduced to manslaughter after hearing expert evidence regarding Accused's cognitive deficits. Court left with a doubt Accused formed intent to kill or cause bodily harm he knew is likely to cause death.

Conduct Of The Defence: Role of FASD

- Does the client testify?
- Will client be able to maintain a consistent story when being cross examined by Crown counsel?
- May have to make an application for expert evidence regarding client's cognitive deficits

Conduct Of The Defence: Role of FASD

- Consider that client will have issues with memory and time
- Client is eager to please and therefore likely to change his story at the urging of the Crown
- If Court does not understand client has FASD, Court may have a negative impression of client

Guilty Pleas

Court may not accept guilty plea unless assured accused is making the plea voluntarily and that the accused understands:

- The plea is an admission of guilt
- The nature and consequences of the plea
- The Court is not bound by any plea bargain

Does client understand he or she is waiving their right to a trial when they agree to plead guilty?

Guilty Pleas

- Difficult for person with FASD to understand an abstract concept like “you are entitled to have a trial even if you are guilty”
- In my experience, most clients with FASD want to plead guilty – they just do not understand why

Sentencing Considerations

- YCJA (Youth)
- Criminal Code (Adults)
- Factors Lawyers Should Consider
- Potential Tools

YCJA (Youth)

Court must consider a number of factors including any previous criminal convictions, the seriousness of the offence, the harm done to the victims and whether it was reasonably foreseeable, etc.

The sentence must be the one most likely to rehabilitate the Young Person and all other sentences other than custody that are reasonable in the circumstances must be considered before a custodial sentence may be imposed

YCJA (Youth)

Court may order a presentence report and/or a psychological/psychiatric assessment before sentencing

This may be the first stage where the parties become aware the Young Person has FASD

Criminal Code (Adults)

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

Sentencing Considerations: Criminal Code (Adults)

- To denounce unlawful conduct
- To deter the offender and other persons from committing offences
- To separate offenders from society, where necessary
- To assist in rehabilitation of offenders

Sentencing Considerations: Criminal Code (Adults)

- To provide reparations for harm done to victims or to the community
- To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community

Sentencing Considerations: Criminal Code (Adults)

A sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender

(S. 718.1 CC)

Factors Lawyers Should Consider

Probation: is it the best option?

- Will client be able to comply with the conditions?
- Too many conditions or complicated conditions may be setting client up to fail

Conditional sentence/Deferred custody

- Consider the likelihood of an offender breaching a conditional sentence order and ending up serving a more lengthy sentence

Factors Lawyers Should Consider

Custody – what kind of influences will client be subject to while in jail?

- How will client adjust to release from custody – does he have community supports?

Factors Lawyers Should Consider

- It is optimal for Crown and defence counsel to work together – joint submissions and sentencing plans are helpful
- If you fail to factor your client’s diagnosis into the sentencing process, your client could fail and end up with multiple breach charges/custodial sentences
- Can the client complete his or her sentence without assistance?

Factors Lawyers Should Consider

In the past, courts have considered FASD as both an aggravating and mitigating factor at sentencing

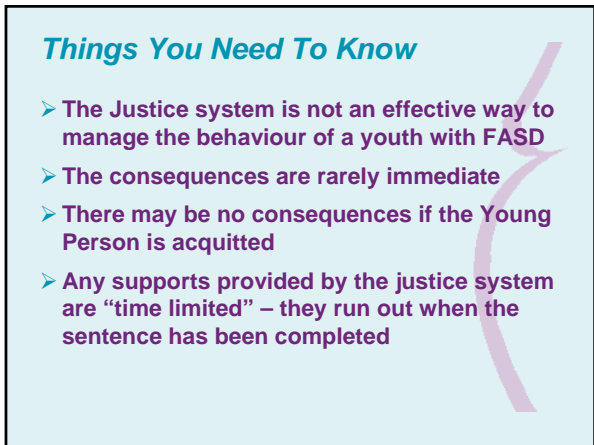
- More likely to be considered a mitigating factor in youth court
- Some view “need for structure” as calling for custodial sentence - some defence counsel are cautious about raising FASD as it may result in a longer sentence with increased restrictions imposed on the accused.

Potential Tools

YCJA s. 19 allows the Court to convene a conference

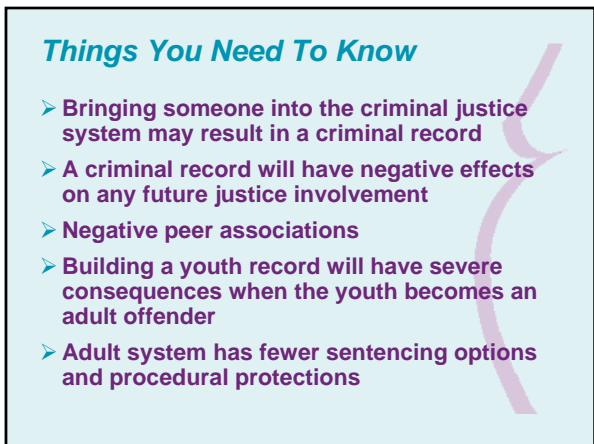
- Justice Support Project for Youth with FASD





Things You Need To Know

- The Justice system is not an effective way to manage the behaviour of a youth with FASD
- The consequences are rarely immediate
- There may be no consequences if the Young Person is acquitted
- Any supports provided by the justice system are “time limited” – they run out when the sentence has been completed



Things You Need To Know

- Bringing someone into the criminal justice system may result in a criminal record
- A criminal record will have negative effects on any future justice involvement
- Negative peer associations
- Building a youth record will have severe consequences when the youth becomes an adult offender
- Adult system has fewer sentencing options and procedural protections

Things You Need To Know

- Sentencing considerations in the adult system are much different
- While an FASD diagnosis may be a mitigating factor in youth sentencing, it could be an aggravating factor in adult sentencing
- Youth with a lengthy record more likely to serve lengthy prison terms as an adult

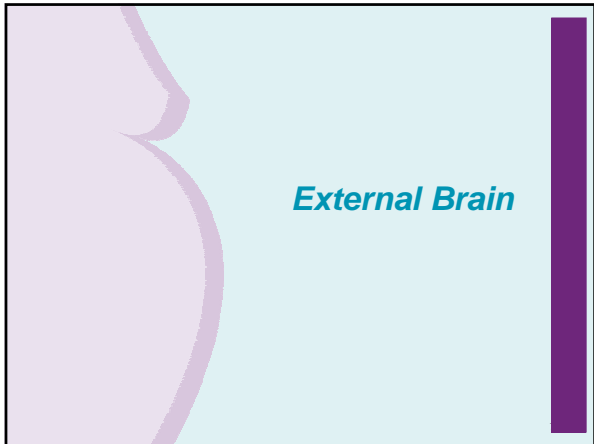
Things You Need To Know

DO NOT JUDGE

- The mothers of people with FASD often feel guilt, shame and remorse. They may not want to admit they may have been drinking while pregnant. In many cases they may not have even known they were pregnant during the early stages of the pregnancy
- Their own substance abuse issues may be related to the abuse and mental health issues they have suffered

Things You Need To Know

- Explain things to your client more than once
- Before I go into the courtroom I explain what is going to happen. When we are finished in court I explain again
- People with FASD tend to be easily distracted and over-stimulated. The Courtroom is an intimidating place and they may appear to not be taking things seriously, when in fact they have lost track of what is happening



External Brain

- One of the most effective ways to support a person with FASD is to pair them with a person who can provide external guidance (aka “External Brain”)
- External Brains can help persons with FASD recognize and avoid situations that may cause stimulus overload and help them regain emotional control
- It may be appropriate to include community support agencies, parents or caregivers, family and capable friends as External Brains
- External Brains can help persons with FASD attend probation appointments or counselling sessions

(Justice Committee of FASD Ontario, 2007)

Reference

- FASD Focused Program Models
 - Resources
 - Bibliography
 - Contact Information
- Youth Criminal Defence Office

FASD Focused Program Models

- SOS integrated system program, Abbotsford, BC
- Lethbridge Community FASD Justice Project, Constable Mark Waage
- Genesis House FASD Program, West Coast Genesis Society, New Westminster, BC
- Youth Justice FASD Program, Maple Ridge, BC
- FASD Youth Justice Project, Winnipeg, MB
- FASD Justice Support Project for Youth, Edmonton, AB

FASD Focused Program Models

- Yukon Community Wellness Court, Whitehorse, YK
- Elsipogtog First Nations , New Brunswick; *Ngoma Healing Lodge*, Dr. Lori Vitale Cox
- Empowering Justice Program, Winnipeg, MB
- Kairos Youth Outreach Program, Thunder Bay, ON
- Mennonite Central Committee
- Canadian Association of Independent Living

Resources

- Ontario Working group on FASD - Justice system and FASD website: <http://fasdjustice.on.ca/media/reframe.pdf>
- A DVD entitled: FASD and the Criminal Legal System: Are we Criminalizing disability? Rutman, D., Laberge C., Nevin, D. 2007
- FASD and the Judicial/Criminal Justice system: An Inventory of Education and Training Programs Diana Fox, October, 2008 (to be released)
- This is Me: <http://www.mefasd.com>

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- Center for Excellence on FASD , SAMHSA <http://fasdcenter.samhsa.gov/educationTraining/educationTraining.cfm>.
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Youth Criminal Defence Office

- A program of Legal Aid Alberta
- Provides legal representation to the majority of young persons charged with criminal offences in Edmonton and Calgary
- Employs a holistic approach to the defence of young persons
- Staff include lawyers and youth workers/social workers who work with clients to address the underlying issues that have caused them to come into conflict with the law

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www.fasd-cmc.alberta.ca**

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