

What Judges and Lawyers Need to Know About Fetal Alcohol Spectrum Disorder and Witnesses

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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.

“The Divine Image”, William Blake, 1794

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

“To Be of Use”, Marge Piercy, 1973

Introduction

Everyone knows FASD issues are difficult, that this largely invisible disability can be very frustrating, and that no easy answers exist. My intent here is to make a few suggestions about witnesses and Fetal Alcohol Spectrum Disorder (FASD); I will not be speaking to the larger issue of offenders.

Briefly, alcohol in the womb acts as a solvent on the baby’s developing brain, much like the effects paint stripper has on old furniture: alcohol dissolves brain cells—bubbles them away. As a result, 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 also have difficult mental health issues. FASD is a physical disability because like an amputee, individuals with FASD are missing body parts called brain cells.

However, unlike the visible disability of the amputee or other persons with external physical disabilities, the brain-based birth defect of FASD individuals is invisible in most of the cases. The window of time during which alcohol exposure will result in classic FASD facial characteristics is considered to be just three days during the pregnancy, between days 18–21. Accordingly, only a small percentage of people exposed even to significant amounts of alcohol and other drugs have the “face” of FASD.

Because of these missing brain functions, the language skills of people with FASD may be lower than your expectations, as will be their rational thinking processes; their predicting skills are also compromised, and their memories may be poor compared to those of other witnesses.

Because this is a brain-based physical disability, we have a legal duty to accommodate witnesses with FASD. Accommodation takes many forms; a one-size-fits-all approach is not appropriate. The accommodation you may make depends on:

1. what you know because you have been advised (by either counsel, aboriginal court workers, probation officers, or another agency) about this invisible disability by someone with prior experience; or
2. someone (lawyer, aboriginal court worker, or probation officer) who has been puzzled by the witness behaviour, has asked the witness specific FASD-related questions, and has tentatively identified the witness as possibly having FASD.

If you, as either a judge or a lawyer, are now prepared to make adjustments in your practice, to make “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!

Some brief clarification of primary and secondary behaviours is required here. Primary behaviours are presenting behaviours, such as 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”, alcoholism, and all the psychological/psychiatric difficulties that flow from these dreadful experiences of failure.

The Difficulties

Because their brain damage is permanent, those affected by FASD 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 and expectations about the behaviour and capabilities of such persons in whom compromised brain function is suspected.

These witnesses will always be the same as they are when you first meet them; they are going to remain who they are, with all of their behaviours.

1. Issues

Issues of consent will be thorny (e.g., does she know she must agree to have sex, or does she not consider it, or does she perhaps think it’s normal to get hit each time before sex?).

Issues of competence to give evidence will be troubling (e.g., he seems eager and able to tell the truth, then tells “a whopper” without batting an eye).

Issues of style and latitude in cross-examination will become problematic (e.g., 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 specific difficulties.

2. Research and resources

There is a lot of research out there to assist your learning and ease these difficulties. The website of Dr. K. Asante is the best: 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 a probation officer in Hollywood for 30 years, and has worked with the University of Washington Fetal Alcohol Project for over 6 years. To find her site, Google “fadu”. They have very fine materials online, *specifically* for judges and lawyers.

Dr. Dick Sobsey’s book *Violence and the Abuses in the Lives of People with Disabilities* (1994) is considered the “classic” text by experts worldwide.

I have included a resource list at the end of this paper.

3. Shame

Shame is invisible, and yet 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.

Sometimes the people with FASD have developed protective secondary behaviours in early grade school. For example, it may be emotionally and socially safer to behave “badly” rather than “appear stupid” to everyone else. How many children with FASD hold up the Bell curve? They learn it is safer psychologically to engage in bad behaviour and get in trouble, 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. Shame is a core body experience; it will not go away with warm, kind words or pleasant suggestions—it is fact you must take into consideration. These individuals want to please. They will say what they think you need to hear. We often label these words “untrue” or call them “confabulations”. Witnesses with FASD may not be able to conceptualize the notion of truth. In concrete terms, they want to feel the positive reinforcement of pleasing you, 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 or judges can imagine, and it often seems they will do anything for “friends”.

4. Match the task to the person

The main lessons about FASD issues come from the work of Diane Malbin, in her book *Trying Differently Rather Than Harder*.

Ms. Malbin suggests you match the task to the person before you, which in the case of FASD people means 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 such as guilt and remorse. Judges and lawyers also expect witnesses to use what they learned on Tuesday when in a similar situation Friday. These expectations cannot be applied to persons with FASD.

Ms. Malbin advises that when you experience behaviour that troubles you, or causes you to wince, or perhaps to form a negative judgment because you see the witness:

- showing no apparent remorse
- nodding “yes” but not understanding
- refusing to look at you
- seeming bored in court

- being easily distracted, fidgeting
- failing to “get” idiomatic or sarcastic language
- missing obvious social cues
- perseverating
- maintaining a position that is clearly not true
- failing to note the most obvious facts

then her four rules are:

1. Match the task to the brain before you.
2. Identify your assumptions.
3. Lower your expectations.
4. Change their environment.

These shifts in approach and actions can be expressed as “Make the required accommodation to ensure fairness.”

5. Make the adjustment

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 you to your experiences in cases involving evidence from young children. The witness with FASD may have had 18 birthdays but may be 9 years old cognitively. Make the adjustment.

Try to change from a “tell me” mode to a “show me “ mode. The witness may be visually skilled. Diagrams, pictures, sketches, and her own drawings maybe more useful to the court than her words. Everyone who has done assault cases with children knows this strategy works, and it works because we accommodate to the brain before us, matching the task to the abilities. No one expects the kid with one leg amputated to race with two-legged children in the 100-metre dash!

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

Watch for cues of elevated anxiety. They may give off signs, radiating the question, “Am I doing this right?” They may “shut down” or have a flat affect when overwhelmed.

If you detect these indicia of anxiety, this may mean their anxiety is high. **Stop immediately.** A break or a few moments for them to gather themselves is important now. To detect their anxiety, you must be vigilant to their emotional state (as opposed to concentrating solely on their intellectual/verbal state). 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. Judges must instruct counsel to avoid complex questions. Again, think younger, advises Diane 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!

Identifying Assumptions

Do you assume jail is necessary?

Do you assume previous actions are accurate predictors of future actions?

Do you assume a damaged brain can learn if the person only tries harder?

Lowering Expectations

Lowering your expectations means adjusting your notions of witnesses as accurate historians. These witnesses may not see material facts (which are the engine of court rooms) as of any interest. There may be no emotional or contextual hook for them. Doctors Julianne Conry and Diane Fast have developed a useful mnemonic: ALARM.

The doctors developed this to help RCMP investigators be sensitive to FASD 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 – those behaviours we use to get through daily difficulties

Learning – our style of learning

Attention – for how long and what is missed

Reasoning – does he/she make sense?

Memory – note gaps in narratives

Changing Their Environment

Reduce the stimuli in the courtroom. This may require the use of a screen, as is sometimes used with children. Here the screen is not to block out the accused but to reduce all stimuli.

Realize they wish to please. Judges may need to tell the witness with FASD that because you must take notes you cannot look at her eye to eye, but that she should continue with her evidence and know that you are listening. I mention this because sometimes these witnesses will scan your face for clues, as they are often eager to please; sometimes visual cues will encourage them to tell the court what they think the questioner or the court wants to hear. You might ask the witness to speak to the photo of the Queen so that the witness does not scan another live face for confirming visual/facial cues.

My next warning applies to both Crown and defence. Engaging the person with FASD face to face in a pleasant manner, giving them lots of eye contact and positive body language, may be counter-productive to eliciting the truth. Time, experience, and your research will be your guide.

Adjustments: Ethics

Sadly, we lawyers often are oblivious to the role of brain dysfunction in behaviour. These witnesses have trouble retrieving information (memory problems). So when they are 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 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 a witness with FASD will not always do well in trials, but may do very well talking into a video camera, as Constable Betty asks her to “show me”.

There are two other topics I must mention here:

Sensory Systems and Processing Pace

Sensory systems refers to fidgety, distracted, agitated and irritated behaviours; these indicate that there may be over- and/or under-sensitivity to input. 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 their slow cognitive and auditory processing pace. Think: this may be a 10-second kid in a one-second world.

The most instructive demonstration I have ever witnessed about FASD was by Dr. Kathy Serrett of Calgary. At a conference for judges and lawyers, she had everyone wear a tight, restrictive neck band, a funny party hat that did not fit and partially obscured your vision, and then had assistants roam the room with New Year's Eve noisemakers, while she played loud heavy metal music. As all this was happening she gave us a very quick, racing fast, 20- question test composed of ten spelling and ten basic geography questions. I was at a table with five judges. I gave up at question 11. No one at my table finished the test and several judges threw down their pencils in disgust. Then the good doctor said: "Welcome to the world of FASD."

Time

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 as interchangeable as dollars and cents; these people may know what money and time 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 goes to sleep so when she wakes up "all the bad is gone". She was a teenage sex-trade 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.

The Raithby Method

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 as 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 was to understand that the shame experience was a cover, a defence, against speaking the truth.

Ethical Dilemma

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 that 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 FASD 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 for me 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.

References

1. **The Asante Centre for Fetal Alcohol Assessment.** <www.asantecentre.org>. Canada’s premier FASD site.
2. **Fetal Alcohol and Drug Unit.** U. of Washington <<http://depts.washington.edu/fadu>>.
3. *Fetal Alcohol Syndrome and the Canadian Justice System.* Julianne Conry and Diane K. Fast. Vancouver: Fetal Alcohol Syndrome Resource Society, 2000.

4. *Trying Differently Rather Than Harder: Fetal alcohol syndrome and alcohol-related neurodevelopmental disorders*. Diane Malbin. Oregon Dept. of Human Services, 2002. dmalbin@fascets.org
5. "Aboriginal Justice Workers and Fetal Alcohol Spectrum Disorder." David Boulding.
6. *Violence and Abuses in the Lives of People with Disabilities: The end of acceptance?* Dick Sobsey. Baltimore: P.H. Brooks, 1994.
7. *Special Children, Special Risks: The maltreatment of children with disabilities*. James Garbarino et al. New York: Aldine De Gruyter, 1987.
8. Disability, Abuse & Personal Rights Project <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! Project", 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), collects FASD information from all over the world, and sends it to your computer, FREE! Email: rosse@ncf.ca.

Some of the people I would not hesitate to contact:

Judge Cunliffe Barnett...retired BC Provincial Court judge
Kay Kelly at the University of Washington (Seattle)...1.206.543.7155
Doctor Sterling Clarren at BC Children's Hospital
Audrey Salahub: The Asante Centre, Maple Ridge, BC 1.604.467.7101

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