[2020] NZLJ 33

A judicial response to Foetal Alcohol Spectrum Disorder

Professor Warren Brookbanks, AUT Law School, on *Police v Morrison* [2019] NZDC 13977

INTRODUCTION

This case concerns an offender who was identified as suffering from foetal alcohol syndrome disorder (FASD) as an adult. The decision records the Judge's notes on sentencing. FASD is a lifelong neurodisability with far-reaching effects that is associated with major central nervous system impairments, and often physical impairments as well. In this case the District Court Judge has taken the opportunity to spell out, in some detail, the central features of FASD and the way in which it has impacted on the defendant's offending history. It is hoped that the decision will be a catalyst for further discussion of this issue, and the development of official policy for the better management of offenders with FASD.

The case note begins with a brief account of the offending then moves to an analysis of the decision, with special reference to the court's account of FASD and how the condition may impact the criminal justice system at many points. The note concludes with a discussion of some of the problems around FASD that are highlighted in the judgment and offers some suggestions as to how the courts might be more effective in responding to the challenges of FASD.

THE FACTS

The defendant appeared for sentence on 30 charges involving a range of offences committed over a 12-month period. These included 22 theft charges and charges of assaulting a constable with intent to obstruct, threatening to kill, trespass, assaulting a constable in the execution of his duty and failing to supply particulars. For the worst of these offences, namely, threatening to kill, the defendant was liable to imprisonment for up to seven years under s 306(1)(a) of the Crimes Act 1961. The Judge observed that the defendant's criminal history spanned 24 pages, beginning in the adult court in 1997. All previous convictions were for similar offending. In the course of this history the offender had spent about 20 years in prison, having in fact spent most of his life in prison from the age of 17. On this occasion, however, the defendant was sentenced to nine months intensive supervision with special conditions. The implications of the sentence and the conditions imposed will be considered as the discussion proceeds. Suffice it to say that the sentence imposed represented a beneficial and compassionate response to the offending, driven by the Judge's clear appreciation by the Court of the highly debilitating impact FASD has had on the offender.

FASD

The decision is unusual in that, having outlined the offending history, Judge Hastings in an extended obiter judgment, commences a detailed account of FASD, surveying its diagnostic status and outlining its potential impact at different stages of the criminal justice process. Although the Judge's sources for this information are not always directly identified, it is evident that the account flows from the Court's broad understanding of FASD, informed by both a detailed neuropsychological assessment prepared for the sentencing by Dr Valerie McGinn, a leading authority on FASD, and a number of academic articles cited in the judgment.

The Court commences its survey by noting, at [5], that defendants with FASD "present challenges for every participant in the criminal justice process". These cannot be adequately met by a judge alone, "sitting at the end of the process". But as the Court observes, "individual and systemic criminal justice outcomes are improved by a more holistic wrap-around approach that involves health and social interventions, well in advance of a defendant's criminal justice system involvement, that reduce the risk of a defendant with FASD entering the criminal justice system" (at [5]). Early interventions by prosecution and defence counsel and judges at bail hearings, case review hearings, trial, and sentencing might, it is suggested, also improve outcomes in such cases.

The Court briefly describes the diagnostic criteria for FASD. In this case these draw on the Canadian Diagnostic Standard and include such well-attested factors as maternal alcohol exposure, characteristic facial anomalies, evidence of growth retardation, and evidence of central nervous system neurodevelopmental abnormalities (it is estimated that the particular set of facial features commonly associated with FASD occur in only 4 per cent of diagnosed cases of FASD: see A Gibbs and K Sherwood "Putting Fetal Alcohol Spectrum Disorder (FASD) on the Map in New Zealand: A Review of Health, Social, Political, Justice and Cultural Developments" (2017) 24(6) Psychiatry, Psychology and Law 825). However, as the Court also observes, FASD is closely associated with a range of cognitive deficits and maladaptive behaviour, which may overlap with FASD and coexist in many defendants with FASD. It is the fateful combination of FASD with other disorders like, but not limited to, ADHD that may account for the overrepresentation of juveniles with FASD in the correctional system.

The Court observes that the concern is not to criminalise people with FASD, nor to excuse their misconduct, but to figure out what to do about the behaviours of people with FASD that bring them into the criminal justice system (at [8]). This is an interesting observation, since the common experience of many offenders with FASD is that they *have been* criminalised and subjected to often severe criminal sanctions, as the experience of the defendant in this case testifies to. A

1996 study reported that among a sample of 253 people affected by FASD, 60 per cent reported having been charged, convicted or in trouble with authorities, and 42 per cent of adults had been incarcerated for an offence (AP Streissguth, HM Barr, J Kogan & FL Bookstein *Understanding the Occurrence and Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects* Final Report to the Centres for Disease Control and Prevention (CDC), Seattle: University of Washington, Fetal Alcohol & Drug Unit (1996) cited in S Popova, S Lange, D Bekmuradov, A Mihic & J Rehm "Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review (2011) 102(5) Canadian Journal Of Public Health 336). However, the increasing tendency to characterise FASD as a justice issue, in the sense that FASD sufferers are also victims who are in no way responsible for the condition that may have pre-disposed them to forms of antisocial conduct, raises important questions concerning the appropriateness of the continued use of criminal sanctions in such cases; and whether the time may have come to treat FASD as primarily a health problem, with all that that implies.

Nevertheless, at the present time the typical characteristics of people with FASD create a host of difficulties that affect an offender's meaningful participation in criminal proceedings at each stage of the process. Their suggestibility, reduced capacity to foresee the consequences of behaviour and their tendency to want to give answers pleasing to a first responder/interviewer will often lead to outcomes that are contrary to their best interests, and which may cement them into an inappropriate assignment of guilt, with the consequences that follow. This, as the Court observes, may extend to questionable confessions, harsh, uncontested bail conditions, inappropriate entry of guilty pleas, and failure/inability to give clear instructions to a defence lawyer at a defended hearing of charges.

Assuming that the majority of FASD defendants either plead or are found guilty, questions may then arise as to the degree of the offender's culpability, raising questions of proportionality and the appropriateness of notions of denunciation and deterrence, in respect of someone who lacks the capacity to learn from previous experiences with the law.

A problem with the notion of rehabilitation, if a relevant consideration, is (as the Court notes) that it presupposes an offender's ability to understand how to avoid the actions that brought him/her into contact with the criminal justice system. While rehabilitative efforts "conveyed in a one-size-fits-all format" (at [16]) are clearly undesirable and may in fact be counter-productive in seeking an offender's reintegration into the community, local anecdotal accounts suggest that needs assessment and service co-ordination service providers (NASC) may not, in any event, accept offenders with FASD unless the person is also intellectually disabled, suffering from autism spectrum disorder or otherwise experiencing a sensory disorder.

If appropriate assessment resources are unavailable in the community, in particular, relevant multi-agency support and services, then the likely default will be imprisonment, despite its appalling cost and inappropriateness for FASD sufferers. The cascading factors that may inhibit rehabilitation following even a short period of imprisonment include 'free floating' monitoring conditions, likely to be breached by FASD offenders unable to remember and keep appointments, punishment for breaches of conditions, keeping the person in the criminal justice system longer than is necessary, and unsupported conditions, which effectively set up the person with FASD to fail. In effect, as the Court notes, punishing such offenders for breaching conditions "effectively punishes them for having FASD rather than for criminal behaviour" (at [18]).

As Judge Hastings notes, even conditions administered by probation services can present special difficulties for people with FASD, because the continued existence of such conditions, as opposed to their removal or relaxation, may be necessary for rehabilitative success.

The Court then observes that a judge cannot have direct influence beyond the expiry of a sentence, but that any contribution made up to and sometimes during sentence, may make a difference (at [21]):

> Failure to take FASD into account at all stages of the criminal justice system does not achieve justice for the person with FASD or for the general community. There is little to be gained by holding persons with FASD to standards they cannot achieve, and there is much to be lost by not doing things currently within our reach to address recidivism.

THE NEUROPSYCHOLOGIST'S REPORT

As noted above, the Court was assisted by a report from Dr Valerie McGinn, a leading neuropsychologist. Dr McGinn had previously given evidence in the appeal to the Privy Council by Teina Pora (*Pora v The Queen* [2015] UKPC 9) that was instrumental in achieving his acquittal.

The report described the defendant's history in detail, outlining his early trauma with a mother who was a chronic alcoholic and methamphetamine addict, and his own experience of having been expelled from school on many occasions. Time spent in state care was often associated with the defendant's propensity to steal. His adult life had largely been spent in jail and he had never been in paid employment or had an invalid's benefit.

Compounding these considerable disadvantages was the fact that even when being released from prison the defendant had no identification documents, was homeless, and had resorted to stealing to obtain food and clothing. His accommodation was typically chaotic, and he had never received official disability support or assistance from a post-release hostel.

The defendant's experience with the probation service, as described in the neuropsychologist's report, was equally impoverished. The defendant's experience was that the probation officer "just makes it difficult" (at [25]). The typical pattern was that M would forget to report. He would then be required to report twice a week, but with no money for food or transport was unable to get to meet the increasing reporting requirements. In order to accommodate the defendant's expressed need for a routine he could follow, the Probation Officer would change the appointing times and he would then get confused and forget. This, on his account, was met with claims that he was "mucking them around deliberately" which, as far as he was concerned, was not correct.

In this light, M's indication in the neuropsychologist's report that he would have liked the level of support understood to be available for people with FASD as regards supported housing and employment, and an FASD key worker to help with problems, is sad, to say the least. That he was keen for Probation and the Police to learn about FASD so they would know how to help him, simply reinforces the tragedy of this case and others like it.

In her report Dr McGinn summarised her assessment of M in the following terms (at [27]):

> [He] was exposed to alcohol prenatally ... show[ing] deficits in the five brain domains of adaptive function ... motor skills, motor planning and non-verbal reasoning, attention, distractible limited attention span, memory, slow to learn, quick to forget visual and verbal information, and executive function, disorganised, impaired reasoning and decision making, structure dependent, can't inhibit himself. Deficits in three or more domains of brain function are required for an FASD diagnosis, and [M's] areas of brain impairment are well in excess of this. [M] also suffered disadvantage in his childhood and has been a long-term substance abuser of morphine. However, the wide-ranging areas of severe brain deficit found on testing could not be attributed to postnatal factors. He clearly has suffered the problems described by these results since childhood, and FASD is a lifelong condition.

Of significance, for the purposes of assessing the relative cost of providing adequate services for the care of people with FASD was the fact, identified in Dr McGinn's report, that approximately $2,000,000 had been spent on imprisoning M for many petty crimes and his inability to follow Court-imposed conditions. Dr McGinn observed that had even a quarter of this sum been spent on meeting M's disability needs he would "have been able to live a happier and more successful, supported life, and the community would have been safer" (at [28]).

Perhaps ironically, in a pre-sentence report prepared for the sentencing hearing the probation officer wrote that the key issue from a Community Corrections perspective was that M be released from prison "with the recommended support in place, that being in terms of accommodation, meaningful occupation, and a key worker to support his day-to-day living" (at [29]).

To illustrate the cross–sectoral challenges that arise when an attempt is made to provide appropriate support for persons with FASD, the judgment then recalls the difficulties arising when Probation endeavoured to make a referral for a needs assessment for M. It found it was unable to make a referral for a needs assessment by a NASC service provider at the local District Health Board because the Board required the defendant to be living at a specified address, in order to get appropriate disability support. A referral for an assessment was made by Dr McGinn on the basis of the defendant's instructions that he wished to live with his grandfather at his Kawerau address. In M's case this meant that nothing could be progressed until the local NASC Bay of Plenty service provider was satisfied he was actually living at his grandfather's Kawerau address.

Following the recommendation of the pre-sentence report the Court sentenced M to nine months intensive supervision, "as the appropriate sentence for this offending and for you" (at [33]). The sentence was imposed on the basis of M's actual presence at the Kawerau address where the needs assessment could be undertaken. Three additional conditions aligned the sentence with recommendations in the neuropsychological report. They were that M:

(1) Engaged with disability support services as directed by the probation officer;

(2) That he attend an assessment for substance abuse as directed by the probation officer; and that he attend and complete any counselling, treatment or programme recommended by the assessment;

(3) That he attend an interview with a psychiatrist to be arranged by Forensic Mental Health, to develop a treatment plan for M's ADHD, and to comply with that treatment plan.

The Court also imposed a judicial monitoring condition because of the Judge's expressed interest in knowing how M's life turned out following the sentence.

DISCUSSION

The judgment provides an excellent overview of the nature of FASD and its impact within a criminal justice setting. The case illustrates the immense handicaps experienced by people with FASD who become involved in the criminal justice system. But it is by no means atypical. FASD is known to have a close relation to criminality and increased offending (M Mela and G Luther "Fetal alcohol spectrum disorder: Can diminished responsibility diminish criminal behavior?" (2013) 36 International Journal of Law and Psychiatry 46 at 48). From the very outset until the termination of the process with the imposition of a formal sentence, those with FASD are, at every point, victims of a system that typically either fails to understand or is otherwise indifferent to the nature and extent of their pervasive disability. The problem is also compounded by the fact that as people with FASD move through the criminal justice system, they may appear to understand the reasons why they have been arrested, the offences they are being charged with their trial rights while in custody and the reasons why they could be imprisoned, amongst other reasons (CL Tait, M Mela, G Boothman and MA Stoops "The lived experience of paroled offenders with fetal alcohol spectrum disorder and comorbid psychiatric disorder" (2017) 54(1) Transcultural Psychiatry 107 at 110). Yet, as has already been noted, their "ability to understand, process, and remember details may be significantly impaired" (Tait and others, above). In the present case the sentencing Judge did perceive the multiple personal and systemic disadvantages that had been, or would be, experienced by the defendant as he traversed through the criminal justice process. This meant that the Court was alive to the impact of the trauma endemic in the defendant's personal history — events in life for which he was not responsible, yet which framed his extensive and persistent offence history. Trauma, victimisation and abandonment were clearly important elements in the defendant's social background such that his traumatic victimisation was clearly a factor in his fertile offending history. As Ko and others have observed (SJ Ko, JD Ford, N Kassam-Adams, SJ Berkowitz, C Wilson, M Wong, MJ Brymer and CM Layne "Creating Trauma — informed Systems: Child Welfare, Education, First Responders, Health Care, Juvenile Justice" (2008) 39(4) Professional Psychology: Research and Practice 396 at 400):

> The delinquent behaviour of a youth who is attempting to ward off victimization or who is reacting to reminders of past victimisation may be no less dangerous than that of a youth who is callously indifferent to the law or the harm inflicted on people. Yet the sanctions and services needed for these youths may differ greatly.

The need for differential sanctions in such cases is reinforced by the fact that people with FASD do not learn from their experiences. "They do not connect cause and effect" (DK Fast

and J Conry "The challenge of fetal alcohol syndrome in the criminal legal system" (2004) 9(2) Addiction Biology 161 at 162) which seriously limits the effects of most criminal sanctions, which are largely based on deterrence and rehabilitation (A Gibbs and K Sherwood "Putting Fetal Alcohol Spectrum Disorder (FASD) on the Map in New Zealand: A Review of Health, Social, Political, Justice and Cultural Developments" (2017) 24(6) Psychiatry, Psychology and Law 825 at 833). Furthermore, people with FASD sometimes confabulate "confusing details of a specific event with previous and subsequent real events and with fictional events. They may have poor concepts of time and sequence" (Gibbs and Sherwood, above). These difficulties with abstraction and in generalizing from one situation to another, which may be characterised as neuropsychological deficits, are said to increase the likelihood of maladaptive functioning and criminal activity (Mela and Luther, above, at 48).

In recognition of the differential needs for 'sanctions and services' of offenders with FASD, and accepting that FASD is, above all, a justice issue, it is, arguably, inappropriate for the courts to continue to penalise such persons in the absence of a thorough investigation in each case of the psychological, sociological, clinical and neurobiological precursors that have both produced and empowered this truly tragic phenomenon. Where judges are trauma-informed and appropriately aware of the intense complexity of the disability they are dealing with, then there is a prospect, as in the instant case, of a therapeutic intervention aimed at care rather than criminalisation.

In a paper presented some years ago at an Australian & New Zealand Association of Psychiatry, Psychology and Law conference (see W Brookbanks "Fetal Alcohol Spectrum Disorders and the Criminal Justice System: Some Challenges and Solutions" (unpublished paper), I endeavoured to project a more affirmative strategy for conferring special legal recognition of the unique claims of FASD sufferers. I floated the idea of creating a statutory presumption that an offender who has been diagnosed with FASD will, upon conviction, be made subject to a regime of treatment and rehabilitation, and not punishment, unless custodial detention is unavoidable in the circumstances of the case. Imprisonment would be seen as a last resort, only to be engaged when no other option would be adequate to meet the demands of public protection. Anyone seeking to challenge the presumption favouring treatment would have the legal burden of proving the conditions which justified rebutting the presumption. The presumption would only be rebutted where there was clear evidence of a significant risk to public safety, that could only be met by a custodial sentence. Evidence favouring other grounds of punishment, in particular, denunciation, deterrence and retribution, would be insufficient by itself to rebut the presumption of non-imprisonment.

The benefit of such a presumption would be that where an offender has been formally diagnosed with FASD, he or she would automatically be presumed to be in need of treatment or other appropriate intervention. An investigation would be immediately commenced, by the appropriate agency, the purpose of which would be to assess the offender's needs and explore non-custodial options with a view to securing the best available therapeutic intervention for the person. Thus, from the outset of any sentencing or disposition hearing, the focus of the task would not be primarily upon the formal purposes of sentencing, as set out in s 7 of the Sentencing Act 2002, but upon ensuring the offender has access to the best appropriate services for managing the sequelae of FASD and preventing the recurrence of the offending behaviour.

The idea of establishing a presumption favouring treatment over punishment for offenders with FASD is also consistent with moves in other jurisdictions towards the greater use of diversion for mentally impaired offenders convicted of less serious offences (see, for example, F Davidson, E Heffernan, D Greenberg, R Waterworth and P Burgess "Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia" (2017) 24(6) Psychiatry, Psychology and Law 888). The model would recognise that offenders suffering from a mental impairment like FASD have reduced moral culpability, and, generally, are not fit objects for criminal punishment. The presumption model supports this principle but takes it a step further by requiring positive action favouring treatment wherever FASD is identified. ❐

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cannot be ignored, but it also emphasises that the section must be interpreted in the light of its purpose.

Section 135 is strict. But it is not draconian. Whether deliberately, or by accident, the drafter of s 135 has come up with a formula for insolvent trading that works. Apart from acknowledging the proper place of the business judgement rule and the importation of a solvency test, no judicial gloss on the plain words of the section is required.

Directors can avoid liability under s 135 so long as they have proper regard for solvency. Solvency requires liquidity. Lack of liquidity is an immediate indicator of insolvency. But balance sheet solvency must stand behind liquidity. Balance sheet solvency in the context of s 135 means having capital that is adequate to cater for any business decision-making that without it would be likely to create a substantial risk of serious loss to creditors.

Many companies are able to trade with minimal capital without the likelihood of creating a substantial risk of serious loss to creditors. But others, and in particular many start-ups, trade on a basis where there is a likely substantial risk of loss. Directors of these companies must not take decisions that are likely to give rise to a substantial risk that the company's capital will be wiped out and result in a serious loss to creditors. If the company's capital has already been wiped out, the directors need to be very careful and can only trade on where they would not be likely to run a substantial risk of making matters worse.

Section 135 should not inhibit companies from taking business risk, including substantial business risk, so long as they have sufficient capital to cater for any business decision-making that without it would be likely to create a substantial risk of serious loss to creditors. In assessing this, Courts allow directors a wide discretion in matters of business judgement. Section 135 is designed to ensure directors do not abuse this privilege at the expense of creditors. ❐