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Grappling with the challenge of fetal alcohol disorder in law

Prenatal alcohol exposure 'quite clearly prevalent,' judge says

By Cristin Schmitz

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The man pleading guilty to sexual assault set off alarm bells in the judge's head.

"It was his speech, plus the fact that he would answer that he understood something, but could not then say it back to me in his own words, or even repeat my words," Chief Judge Carol Snell of Saskatchewan's Provincial Court explained.

Instead of convicting him, the judge sent the man for a specialized assessment. Her decision averted a miscarriage of justice.

The accused was eventually diagnosed with fetal alcohol spectrum disorder (FASD), a permanent brain injury caused by prenatal alcohol exposure, the effects of which often include lifelong physical, mental, cognitive and behavioural disabilities.

"In the end this person turned out to have very significant deficiencies and ... [was later found] not fit to stand trial," recalled Chief Judge Snell. "That did bring home to me that a number of people had really missed that this person was very significantly cognitively impaired."

University of Toronto law professor Kent Roach, who in 2008 examined in-depth how the criminal law addresses FASD, agreed "the criminal justice system has a lot of work to do" to adjust to challenges posed by FASD.

"When we did the study, we found there really wasn't a lot of thinking about how FASD can affect the fairness and the effectiveness of the criminal justice system from the very start to the end," he said.

Yet there are encouraging signs in recent court- and government-led initiatives, particularly in the West.

Judge Snell and her court organized an innovative FASD presentation last November that was video-linked to 12 Saskatchewan courthouses. It not only educated Crowns, legal aid staff, probation officers, police, judges and others, but brought them together to identify resources and gaps and develop local strategies for responding to people with FASD who are involved in the justice system.

Legal luminaries are also lending their support to the cause of reform, including former Supreme Court Justice Ian Binnie, who will chair the "jury" at a novel "consensus development" conference on FASD legal issues in Edmonton on Sept. 18 to 20. A dozen judges, lawyers, criminologists and other justice system players will be presented with expert "evidence" and scientific findings to help them recommend how the criminal justice system can respond more effectively to FASD, including more readily identifying people with the brain injury. Hundreds of people will attend and organizers hope the conference will be



Judge Larry Anderson, seen here at the Provincial Courthouse in Edmonton, says people with fetal alcohol spectrum disorder 'tend to fall through the cracks.' [Photo by Dan Riedlhuber for The Lawyers' Weekly]
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a breakthrough. "The biggest thing [we are striving for] is awareness of the issues, and secondly, are there better approaches, and are there things we can do to assist these people as they go through the court system?" said Marguerite Trussler, the former Alberta Provincial Court judge who chairs the steering committee on Alberta initiatives on FASD.

Trussler noted FASD is "a very live issue" in many countries, including Russia, Italy and South Africa. In Canada, it is the leading cause of developmental disability among children.

"We see people with FASD in the courts every day — of course, sometimes we recognize it, and sometimes we don't," said Larry Anderson, Assistant Chief Judge for the Alberta Provincial Court, Edmonton Criminal Division. "The problem is immense, particularly among the recidivist offenders, starting in Youth Court, and the percentage of persons with FASD in jails is believed now to be alarmingly high."

There are no definitive statistics of FASD's incidence in the general population or in the criminal justice system. The government of Manitoba, since 2007 a leader in FASD prevention activities and service supports, estimates about one per cent of all babies born in Canada have FASD, or about 130 Manitobans born each year. An estimated 15 per cent of pregnant Manitobans consume alcohol. The direct economic costs are high —about \$1.5 million per person with FASD, and running into billions across Canada, including the health and justice systems and incarceration costs.

"It's quite clearly prevalent, and I think it's one of the biggest challenges that we face because the people with FASD tend to fall through the cracks because the condition is not a mental illness per se... and it's not necessarily readily apparent," Judge Anderson said.

Providing the tools to identify FASD early is critical, he said. Alberta "has made a good start" in creating diagnostic centres around the province, but there are waiting lists and often "time is of the essence," especially when the accused are in jail. "Hopefully there will be more access with time," he said.

Prevention is the only silver bullet for FASD, but Judge Anderson said there is also a pressing need to come to grips with it in the justice system. In his own experience, on "any given day in docket court there will be a number of people who I will suspect have FASD," Judge Anderson said.

Many are accused of failing to appear, or breaching their release conditions or probation orders, or other offences against the administration of justice. Judge Anderson suggested a "robust diversion program" for low-level offences that are tied to FASD would be "an important step forward."

"For those kinds of offences...which are directly tied to the person's inability to organize their life, and to remember things, and to make appointments and those sorts of things, we don't have the tools to really properly respond to that, and as a result they will be dealt with in the same way that most people will be dealt with when they fail to comply with court orders. And that is, eventually, at least, it's going to result in escalating jail sentences...which is the last place a person with FASD should be because they tend to be highly suggestible, and quickly identify with peers and follow the lead of those who will pay attention to them."

Judge Anderson noted that sentencing "is all predicated on the assumption that the person is acting the way they are as a result of reason and choice." It assumes that people can learn from punishment.

But offenders with FASD "are often going to be acting without the same capacity to think through the consequences," he said. "They have not developed the same learning mechanisms that other people have to learn from their past mistakes or to foresee the consequences of their actions."

Roach agreed. "We are sort of locked in a Victorian time warp" when it comes to dealing with mental disabilities and mental disorders — including outdated evidentiary rules and a too-low threshold for fitness for trial.

Roach queried whether the situations of people with FASD were taken into account when the federal government recently proposed to further tighten the mental disorder defence, and enacted more restrictions on conditional release and more mandatory minimum sentences.

"I do have some concerns that we're eliminating some things that may be helpful, and I do think just generally that over the next 10 years the criminal justice system really does have to fundamentally rethink the way we deal with mental disabilities and mental disorders," Roach said. "Maybe we need to look at in terms [of] what sort of effect could it have on vulnerable communities."

There are signs that reforms are coming. On August 17, the Canadian Bar Association's council passed a multipronged resolution urging Ottawa to amend the *Criminal Code* and other laws. Justice Peter MacKay responded Aug. 19 by pledging to table legislation after a committee of federal-provincial-territorial officials makes its recommendations in the fall. The CBA's proposal would see FASD legally defined, but in a way that permits judges to waive the present diagnostic requirement of evidence of maternal drinking (which is often unavailable). Under the proposal, judges would be empowered to order a FASD assessment; FASD would be deemed a mitigating factor in sentencing; judges would be permitted to order an external support plan recommended by an offender's probation officer, to kick in

after probation expires; and the federal prison service would be required to “accommodate FASD as a disability” for inmates who have, or likely have, FASD. That resolution follows one made in 2010 urging the federal government to amend the criminal sentencing laws to accommodate the disability of people with FASD, and to develop policies and allocate resources for alternatives to the current practice of criminalizing people with FASD.

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