

Neurodevelopmental and Neurocognitive Disorders, Criminal Responsibility and Culpability

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Conditions

- * **Attention Deficit Hyperactivity Disorder**
- **Intellectual disability**
- * **Autism Spectrum Disorder**
- * **Foetal Alcohol Spectrum Disorder**
- **Brain injury**
- **Dementia / Alzheimer's disease**
- * **Huntington's disease**



Aims



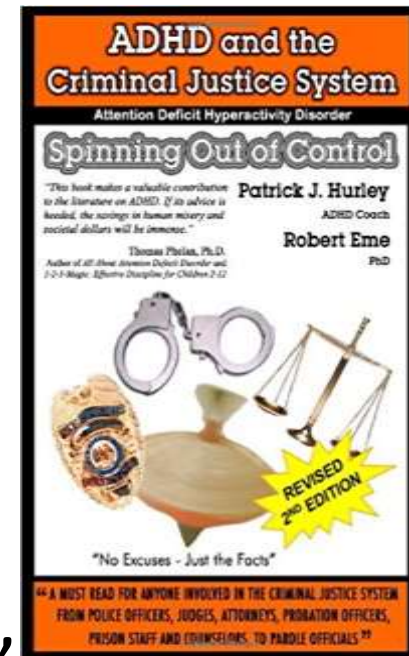
- Grapple with the “spectrum” of impacts of the neurodevelopmental and neurocognitive disorders
- Provide an insight into how the law deals with ND symptomatology
- Reflect on how the law can evolve to be suitably responsive to the emerging knowledge base
- Identify strategies that can be adopted by clinicians in discharge of forensic role – treaters & assessors

Neurodevelopmental and Neurocognitive Disorders

- Relatively poorly understood in the law and by lawyers and judges
- Like the symptomatology of mental illness, they exist on a spectrum of severity, varying from relatively minor in terms of impairment to very serious indeed.
- A legal response needs to be nuanced and individualised –generic evidence not so useful
- Relevant to:
 - fitness to be interviewed
 - fitness to stand trial,
 - insanity/mental impairment defence,
 - partial defence of diminished responsibility and
 - sentencing

1. ADHD and the Criminal Law

- Lack of attention
 - Hyperactivity
 - Impulsiveness
- Especially problematic if comorbidities, eg ASD, personality disorder:
(see Carceles & Fernandez, 2015)



***R v Friend* [2004] EWCA Crim 2661**

- F convicted of stabbing murder and sentenced to detention indefinitely - at Her Majesty's Pleasure
- Appealed on basis of absence of fair trial because he could not adequately participate because of ADHD
- At trial accepted F was fit to stand trial
- But ...Prof Gudjonsson gave evidence on F's mental capacity and ability to give evidence so that an adverse inference should be drawn from failure to give evidence because of his mental condition

R v Friend [2004] EWCA Crim 2661

- Criminal Case Review Commission reviewed on basis of fresh evidence about F's ADHD
- Dr Young:
 - F had features of ADHD. Although F was just fit to plead, he did not have the cognitive or psychological function or capacity to participate effectively in the trial as a result of, firstly, his level of mental impairment; secondly, inattentiveness and lack of ability to concentrate; and thirdly, his emotional state. Thus it was undesirable for him to give evidence. At the time of his trial, his ADHD was **unrecognised, undiagnosed and untreated**.

***R v Friend* [2004] EWCA Crim 2661**

Dr Young:

Mr F was hampered by:

- a) severe cognitive deficits associated with ADHD en inattention and impulsivity)
- b) poor behavioural controls (hyperactivity, restlessness, emotional liability)
- c) verbal intellectual deficits.
- d) deficits in short-term verbal memory.
- e) anxiety.
- f) his youth.
- g) no concessions made at trial.

R v Friend [2004] EWCA Crim 2661 at [29]-[30]: Court Decision

The understanding of ADHD has, on the expert evidence before us, significantly increased since the date of trial. Through no fault of the appellant or his advisers or anyone, the nature and extent of the appellant's problem was not fully appreciated at trial, as it now has been.

Having admitted that evidence ... , we conclude in the light of it that this conviction can no longer be regarded as safe. It is clear that the judge would not have ruled in favour of drawing any adverse inference, certainly in respect of the failure to give evidence, and we think probably also in respect of the interview or silence at the first interview in so far as he did direct the jury that they might do so.

R v Osborne [2010] EWCA Crim 547

- 14 yr old O convicted of murder by hitting victim on head with a piece of wood in company of others
- Sentenced to life imprisonment with a minimum of 9 years' jail
- Appeal on the basis of new evidence – ADHD
- Asserted that O's ADHD was characterised by **impulsiveness** that was an abnormality of mind that **substantially impaired** his ability to form a **rational judgment & exercise control** over his actions

R v Osborne [2010] EWCA Crim 547 at [31]: Court decision

We are prepared to accept on the balance of probabilities that the appellant was suffering from a degree of ADHD at the time of the killing. We do however underline that we are not suggesting that a diagnosis of ADHD is, of itself, sufficient to demonstrate the level of diminution in responsibility required for the purposes of the defence. For the reasons given by Dr B, and basing ourselves on a close study of the written material to which all the experts had access, and the absence of any sustained suggestion or recommendation that the appellant's mental capacity was reduced, or that his mental condition required some form of professional intervention, we conclude that the contention that the condition was one of utmost severity is not established on the balance of probabilities.

***R v Osborne* [2010] EWCA Crim 547 at [31]**

He was not so overcome with impulsivity that he ignored money which had fallen on the floor, or so that he immediately chased the victim and struck him there and then with his fist. Instead, and quite deliberately, together with his friends, he went across the road to find weapons. Having found and chosen the weapons, although the deceased was out of sight, led by the appellant, they all ran down the road after him. That was quite deliberate. The victim was chased down and attacked when he was defenceless. The blow with the weapon to the back of the head was administered with heavy force and without warning. The attack was not long premeditated, but it was utterly deliberate. It was not a spontaneous and instantaneous reaction to the earlier trouble for which the main cause, apart from the racist element, seems to have been the cannabis consumed by the appellant.

The level of ADHD, putting it as high as we can in favour of the appellant, did not substantially impair the appellant's mental responsibility for his actions at the time of the killing. There is clear evidence of calculation and deliberation. He knew exactly what he was doing, and why he was doing it.

***Ibrahim v The Queen* [2014] EWCA Crim 121**

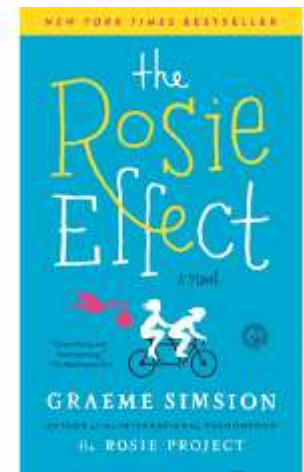
- Appeal from conviction for causing grievous bodily harm where I maintained he was acting in self-defence
- Recorder refused I the right to call a psychiatrist who had not seen I to speak about I's ADHD & about propensity to have exaggerated response to threats
- Appeal against conviction on the basis of the exclusion of psychiatrist's evidence

***Ibrahim v The Queen* [2014] EWCA Crim 121**

Held:

The report of Dr M would not have assisted the jury one way or the other on the main issue in the case. If the appellant was the sole aggressor, then his ADHD and its possible manifestations were irrelevant. In those circumstances no question of self-defence arose. (at [31])

2. ASD and the Law



- Dysregulation of emotions
- Difficulties understanding and processing information and others' behaviours
- Propensity to misperceive cues
- Heightened levels of anxiety & sensitivity, sometimes depression
- Impulsivity
- Disinhibition

Violence Issues

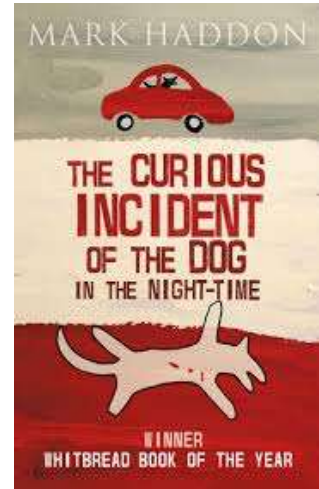


- Uncertain correlation with violence, dating back to Asperger's sample:
 - Fritz V observed to become aggressive quickly and attack other children
 - Harrow L observed to attack other children, gnash his teeth, hit out blindly, show unconcern in sexual play with other boys, going as far as attempted homosexual acts

**BIGGER ISSUES ARE LIMITED CAPACITY FOR
EMOTIONAL EMPATHY, MISPERCEPTION OF THREATS
AND PROPENSITY TO OBSESSIONALITY**

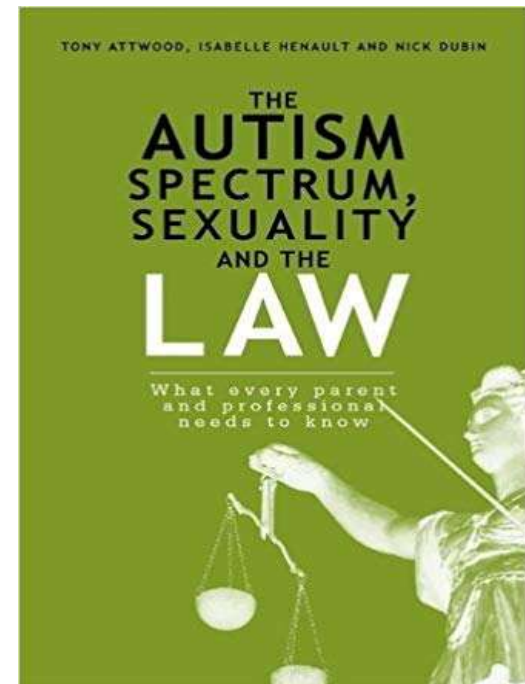
Autism Spectrum Disorder

- High functioning (Asperger's) the key population for criminal law purposes
- **Complex overlap and comorbidity** with anxiety disorders, depression, ADHD, PTSD, and personality disorders (obsessive/compulsive PD, anti-social etc)
- Impact of substance use - cannabis, ICE, cocaine - unknown
- Social Competence Scale may give some insight – problems with incapacity to interpret cues, lack of empathy, hypersensitivity or misinterpretation, obsessive preoccupations, sensory overload issue



Relevant forms of offending

- Violence
- Sexual assault
- Arson
- Harassment, stalking
- Internet offending - hacking



Challenges for Clinicians in Forensic Role

- Assessing nature of individual's symptomatology, its severity and its relevance to the offending behaviour – assessment being symptom- and conduct-focussed
- Need for court to understand the **internal experience** of the defendant
- In what way was the defendant impaired by their condition, eg reduced ability to deal with frustrations or anxieties? Likelihood of experience of misperceptions? Ability to understand impropriety of potential conduct?
- Dealing with **counter-intuitive presentations**, indifference, naivete etc

DPP v Sokaluk [2012] VSC 167 per Coghlan J; [2013] VSCA 48

- 10 counts of arson causing death in setting bushfires
- S suffering ASD + ID
- *Both taken into account*
- TES: 17 years and 9 months, 14 years non-parole
- No change on appeal by both sides



DPP v Sokaluk [2012] VSC 167 at [55] Prof Ogloff evidence

Whilst his overall level of intellectual functioning is in the borderline range, his verbal capacity is more limited and, in fact, falls in the intellectually disabled range. Conversely, his perceptual capabilities are much better, falling in the low average range. This suggests that while Mr Sokaluk has been able to hold a job, operate a motor vehicle, and live on his own own, his level of intellectual reasoning and verbal comprehension is very impoverished.

DPP v Sokaluk [2012] VSC 167 at [55] Prof Ogloff evidence

S has been dependent on his parents for maintaining his finances, cleaning his house, and providing him with meals. It takes him much longer to acquire information or to learn a task than would be the case for most others and his abstract reasoning capacity is very limited. His presentation, reasoning, receptive and expressive language are affected by the confluence of his Autism Spectrum Disorder and decreased level of intellectual functioning. For example, he is a very concrete and literal thinker.

Sultan v The Queen [2008] EWCA Crim 6

- Appeal against findings of guilt for rape and indecent assault of wife for which he received 4 years' imprisonment
- Appeal ground that person with Asperger's is prone to misunderstand signs and cues
- Ct of App accepted that Asperger's is characterised by severe and sustained impairment of social interaction

Court of Appeal Decision

**The new evidence about ASD
would have been relevant in 3 ways:**

- Would have enabled a **mens rea defence**;
- Would have enabled the jury to **evaluate accused's credibility** more informedly;
- Might have explained why **accused behaved so oddly** at trial

Compare DPP v HPW [2011] VSCA 88

McGraddie v McGraddie [2009]

ScotCS CSOH 142

- Question arose as to whether a defender with AD was “a witness in whom the court could have confidence” (at [19]).
- Lord Brodie declined expert evidence about AD being “an autistic spectrum disorder associated with literal thinking and difficulties in communication and in comprehension of contexts” which could also impact adversely on ability “to sustain a conversational interchange in which there is a reciprocal responsiveness to the communications of the other person”. (at [19])

McGraddie v McGraddie [2009]

The witness' presentation was **strangely casual**, even when talking about his mother's terminal illness. Moreover, he **did not appear to engage with his counsel's questioning**. He was abrupt. He gave the impression of being **wearily exasperated** at the questions he was being asked. Perhaps to his credit, he did not seem overly concerned to present himself in a favourable light. ... He **did not always seem to understand his counsel's questions**. Sometimes he failed to answer them. His presentation suggested that his abilities might be impaired by medication, although I have no reason to believe that the first defender was in fact taking medication. On one occasion he used the less than ceremonious formulation when responding to counsel: 'Say that so I can understand what you've just said' . (at [19])

McGraddie v McGraddie [2009]

ScotCS CSOH 142

- Lord Brodie declined expert evidence
- Concluded that AD may or may not have provided an explanation for presentation in court
- Found the witness unreliable



***R v Kagan* (2007) 261 NSR (2d) 285;
(2008) 261 NSR (2d) 168**



- Kagan charged with using bear spray on victim in Nova Scotia.
- Kagan claimed to have acted in self-defence
- Expert evidence about the effects of Mr Kagan potentially feeling paranoid and anxious about the victim



Decision of Nova Scotia Sup Ct

- McDougall J found Kagan to be an unreliable witness
- However, he accepted that Kagan's perceptions *may have been distorted* by Asperger's symptomatology
- Rejected self-defence and convicted BUT
- Imposed a non-custodial sentence – compromise?

*Glover v New Zealand Police,
Unreported, NZ H Ct, 28 August 2009*

- Appeal against sentence of conviction + 40 hrs community work for 38 yr old “road safety activist” who had twice caused damage to garden that had been licensed for Council’ s road reserve
- Glover at trial claimed to have a claim of right

•**Prof Attwood**: conviction would lead to increase in alienation and in frustration & despair

•**Dr Barry-Walsh**: obsession with road safety, no malice, convinced of rectitude of actions, rigidity of thought, vulnerability To depression & minor setbacks: **impact of conviction greater than it would be on others, likelihood of rumination & despair**



Clifford J: I place considerable reliance on diagnosis; conviction would have effect out of proportion to gravity of offending

R v Walker [2008] NZHC 1114

- Pleaded guilty to computer fraud offences while 16-18, using software he developed to remotely control infected computers which formed a robot network (a “bot net”)
- W’s software considered by cyber-crime investigators highly advanced



R v Walker [2008] NZHC 1114

- Potter J:
 - Accepted W was motivated by curiosity and has a “diminished understanding in relation to the nature of his offending” by reason of AD (at [17])
 - concluded that “W was unaware of the nature of the harm that his activities could cause and was immature to the extent that he was unable or failed to set proper boundaries for himself
 - found that W had an outstanding future, including possibly with the police
 - discharged without conviction

Excell v New Zealand Police, unreported, H Ct, 17 Feb 2010

- Male with child pornography on computer
- AD found on appeal to have reduced capacity to develop special relationships & empathy & to have propensity to obsessiveness
- Lack of understanding of appropriate sexual behaviours & then social isolation and attachment to children
- Prison would be very onerous
- No jail time ordered

R v Conroy [2017] EWCA 81

- Unsuccessful appeal against conviction of murder and dismissal of plea of diminished responsibility
- Conroy (born 1995, 18 at time of offending) diagnosed as having ASD characterised by incidents of inappropriate sexualised behaviour & violence against females.
- Resident in a special residential home for persons with AD.
- Went to M's room to have sex with her and strangled her

R v Conroy [2017] EWCA 81

- Agreed by experts that Conroy was suffering from an **abnormality of mental functioning** which arose from a **recognised mental condition**, ASD. The central areas of dispute were as to whether or not the abnormality of the mental functioning **substantially impaired Conroy's ability to form a rational judgment and/or to exercise self-control**. Whether it was in causative terms a significant contributing factor was also in issue.

R v Conroy [2017] EWCA 81

Dr Rooprai: 'In my view he was aware of the nature of his actions. However his deficits affected his ability to form a rational judgement and to exercise self-control. To form a rational judgement about an action, the person should be able to appraise the social, emotional and intellectual dimensions of an action. [SEP] However, due to his ASD and mild learning disability, Jason suffers with deficits in all of these domains, which in turn would affect his ability to form a rational judgement. Additionally his lack of theory of mind, a very egocentric view of the world, ADHD and mild learning disability would all contribute to the impairment of his ability to exercise self-control. [SEP] Jason's desire was to have sex and he was unable to form a rational judgement as to how to go about that, in the right way. He could not understand what the normal way was to approach the question of having sex. His actions might appear to have been planned and thought through, but they are not, because what Jason was seeking was the end result, namely sex, and so he was simply intent on achieving an end goal, which appeared rational to him.'

R v Conroy [2017] EWCA 81

Dr Amos: Jason was clear that he went to Melissa's room to have sex with her. He had been thinking about it and was sexually attracted to her. He did not have a clear plan as to how he was going to achieve that end. When he got there he decided the best way was to strangle her to unconsciousness so that he could drag her to his room. He said if he could get her back to his room, he had no clear plan beyond having sex with her.^[SEP] He said that none of us know what the defendant was thinking, nor may he have done.

***R v Conroy* [2017] EWCA 81**

Dr Amos: Jason knew attacking Melissa was wrong and bad but not how wrong. He understood the nature of his conduct. He wanted to have sex with her and knew that he had to incapacitate her. The defendant approached it from the standpoint that he wanted to have sex with her and the only way he could do that was by incapacitating her.

The rationality of his judgement was questionable from the standpoint that the defendant had not thought through the consequences

R v Conroy [2017] EWCA 81

Dr Sandford: "There is no evidence to suggest that he to suggest that at the time of the offence he was suffering from a disturbed or abnormal mental state. By this I mean that although he had an abnormal sex drive and difficulty with social communication, he was not deluded, he was able to think rationally, he was not suffering from an abnormal state, state, such as extreme anger, depression or elation, and he was fully aware of what he was doing. Analysis of the offence shows that it was a planned, thought out and instrumental assault on a sleeping female who was known to him and who he had previously shown an abnormal interest in."

***R v Conroy* [2017] EWCA 81**

- No error in jury accepting the expert evidence of Dr Sandford over that of the other experts.

Pathological Demand Avoidance

- Not in DSM or ICD
- Criteria:

<https://www.pdasociety.org.uk/what-is-PDA/about-pda>

- Need to be careful and explanatory, setting out Newson's work and its status within the therapeutic ASD community, differentiating ASPD, if incorporating a child with PDA within the ASD



3. FASD: Centers for Disease

Control and Prevention

A person with a FASD might have:

- Abnormal facial features, such as a smooth ridge between the nose and upper lip (this ridge is called the philtrum)
- Small head size
- Shorter-than-average height
- Low body weight
- Poor coordination
- **Hyperactive behavior**
- **Difficulty with attention**
- **Poor memory**

Fetal Alcohol Spectrum Disorder (FASD)



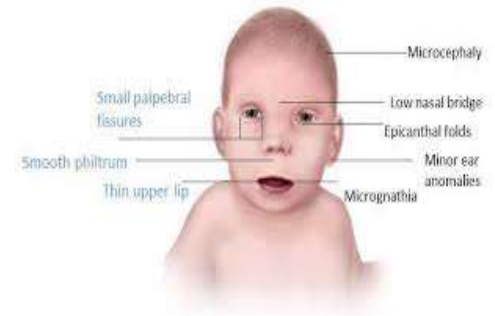
Faces in Fetal Alcohol Syndrome



Streissguth, 1998

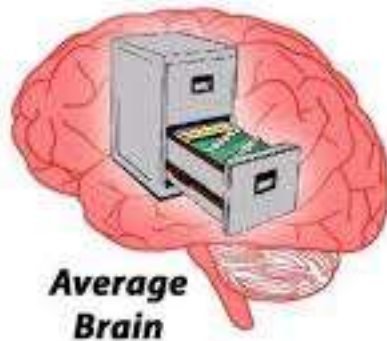
Centers for Disease Control and Prevention

- Difficulty in school (especially with math)
- **Learning disabilities**
- Speech and language delays
- **Intellectual disability or low IQ**
- **Poor reasoning and judgment skills**
- Sleep and sucking problems as a baby
- Vision or hearing problems
- Problems with the heart, kidneys, or bones



Illustrative Appellate Decisions: UK (NZ) & Aus

- *Pora v The Queen* [2015] UKPC 9
- *LCM v The State of Western Australia* [2016] WASCA 164



Auckland Criminal Justice Issues



Pora v The Queen [2015] UKPC 9

- 1992: Susan Burdett raped & murdered
- 1994: Teina Pora convicted
- 1999: Conviction quashed on appeal
- 2000: Pora again convicted
- 2000: Unsuccessful appeal to Court of Appeal
- 2015: Appeal allowed by Privy Council



Teina Pora's Admissions & Confessions

- P's cousin claimed that a week after the murder P said he had discarded blood-stained softball bat in drain
- Brother of P's girlfriend said P looked in a culvert where baseball bat was visible & said it could've been the bat that "wasted" the deceased

Pora's Confessions to Police



- 1992 police interview: P said he had seen a baseball bat in a concrete pipe but denied having made the remarks attributed to him by his cousin
- 1993: arrested for stolen vehicle and asked if anyone had been arrested for the Burdett murder and said he knew who had done it

Pora's Confessions to Police

- P claimed that he had taken two men whom he identified only as “Dog” and “Hound” to Ms Burdett’s home to carry out a burglary. At first he claimed that he did not know their true names. After the burglary, he said they had returned to his car carrying a baseball bat with blood on it.

Pora's Confessions to Police

- P accompanied police to a house where he said that Dog and Hound lived. On his return to the police station he said that he had lied about his involvement in the murder. He said that he had gone to Ms Burdett's home but only as a lookout and that he had not entered her house.

Pora's Confessions to Police

- P said that he did indeed go into the house and there observed Dog and Hound raping Ms Burdett.



Pora's Confessions to Police

- When taken by police on a drive designed to show his route to Ms Burdett's house, P appeared disorientated, unable without assistance to indicate the way to her house and had great difficulty in identifying the house even when he was standing directly outside it.
- Incoherent and inconsistent on means of access to house

DNA evidence as to the Rapist

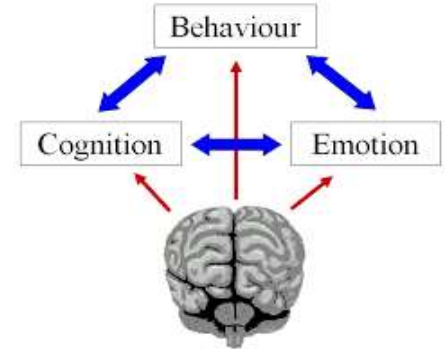
- DNA showed another man had raped Mrs Burdett
- In all of his other sexual offences Pora had acted alone



FASD Evidence before Privy Council

- Neuropsychologist found deficits of regulatory control, common in those with FASD who struggle to regulate their moods and actions. When placed in a complex situation P was likely to act impulsively with reduced capacity to think through to consequences. P had significant impairments of executive function including impaired reasoning, literal and limited thinking, cognitive rigidity and deficits of regulatory control

Neuropsychologist Evidence



P showed **no capacity for abstract thought**, interpreted sayings entirely literally and could not appreciate deeper or implied meaning. He was **cognitively rigid**, sticking to one way of responding and was unable to appreciate a range of differing options. This indicates that he will get something in his mind and stick to it even when the evidence is contrary to it. He will **not be well able to match his thinking to the circumstances and adapt with changes of situational demands**

Neuropsychologist Evidence



- Due to his brain limitation **P tends to say and do what seems to his advantage** at the time, without a realisation that he is doing this. This **tendency can be perceived as manipulative and self-serving** until the underlying brain damage is considered and it is appreciated that this is not wilful or intentional. A lack of insight into one's own limitations is a universal feature of FASD

Neuropsychologist's evidence

- Persons with FASD most especially when they have memory and executive deficits are **prone to confabulate**; that is make up stories to fill in the gaps that are not in keeping with the truth. This is different to lying as it is not intentional and is a feature of executive brain impairment.

Psychiatrist's evidence

- P had very significant impairments in frontal executive function, with no demonstrable capacity for abstract thought and a strong tendency to maintain a position even when it was shown to be entirely untenable

Psychiatrist's evidence

- P might be uncertain about what the correct answer to the question should be, because he does not remember and **may therefore provide an incorrect answer in order to satisfy the interviewer**. Secondly, he might also place trust in the person questioning him, and be eager to please. Thirdly, he might be **reluctant to admit uncertainty** about his lack of knowledge and continue to maintain a position which is different from the true facts.

Pora v The Queen [2015] UKPC 9 at [55]-[56]

- The FASD evidence unquestionably establishes the risk of a miscarriage of justice. It provides an explanation as to why Pora's confessions may have been false. ... The impact that evidence of a confession will have, especially a confession to heinous crime, is difficult to overstate.

Bunbury

- Western Australia



LCM v The State of Western Australia [2016] WASCA 164

- LCM at age of 15 bashed his newborn son to death in hospital for no apparent reason
- Psychiatrist & psychologist prepared reports for court focussing on LCM's dysfunctional background & antisocial behaviours but making no reference to FASD: minimally remorseful
- 10 years' imprisonment, eligible for parole after 5 years

LCM v The State of Western Australia

[2016] WASCA 164

- On appeal clear FASD diagnosis by multidisciplinary team
- Paediatrician: Some with FASD exhibit physical characteristics but others do not. She observed that often those with the disorder are diagnosed only when it is noticed that their behaviours have become difficult. The best means of diagnosing the condition is by a multidisciplinary team, comprising of a medical practitioner, usually a physician or a paediatrician, a psychologist, preferably a neuropsychologist, a speech and language pathologist, and an OT

LCM v The State of Western Australia [2016] WASCA 164

FASD assessed over **eight domains**, although it was acknowledged that norms did not exist for Aboriginal children:

- Cognition;
- Attention and activity levels and sensory processing;
- Executive functions;
- Memory and learning;
- Language;
- Adaptive functioning, social communication and social skills;
- Academic functioning; and
- Motor skills.



LCM v The State of Western Australia

[2016] WASCA 164

Major difficulties with:

- Executive functioning
- Processing complex information
- Abstract thought
- Memory
- Manipulating information
- Giving accounts containing key information



LCM v The State of Western Australia [2016] WASCA 164

Psychologist:

- LCM started his ex utero life with a brain that could not work normally, and was already impaired. On top of this, he had undergone traumatic life events, each of which could be considered 'a noxious insult' to the brain. In LCM's case, he has had many such insults, but his ability to 'make sense of and repair' such events was impaired because of the organic brain damage he had suffered prenatally. Thus, *his capacity to cope with each lived traumatic event he experienced was less than someone without FASD*. Further, his lived trauma compounds and exacerbates the likely consequences of the appellant's brain injury

LCM v The State of Western Australia [2016]
WASCA 164, Mazza JA & Beech J at [123]

Blanket propositions about how a diagnosis of FASD bears on the sentencing process should be avoided. Rather, attention should be directed to the details of the particular diagnosis of FASD, including the nature and extent of the specific disabilities and deficits, and how they bear upon the considerations relevant to sentence.

LCM v The State of Western Australia [2016]

WASCA 164, Mazza JA & Beech J at [126]

Although it was known when LCM was sentenced that his behaviour had been shaped by dysfunction and trauma, what was completely unknown was that prenatally he had suffered permanent brain damage which left him with significant and lifelong deficits, most relevantly in his cognitive, linguistic and executive functioning.” While some further testing was required, **the evidence clearly established that LCM's powers of reasoning, logical thought and self-control were all compromised, as was his ability to deal with traumatic events. This is all in addition to the effects of his lived trauma, which itself compounded the effects of his FASD.**

LCM v The State of Western Australia [2016]
WASCA 164, Mazza JA & Beech J at [127]

- We are satisfied that the appellant's **FASD** was a significant cause (but not the sole cause) of his offending behaviour.

LCM v The State of Western Australia [2016] WASCA 164

FASD impacted in at least six areas:

- (1) it diminished his moral culpability for the offence;
- (2) it moderated the weight to be given to personal and general deterrence;
- (3) it diminished the adverse impact of the primary judge's findings that the appellant acted 'deliberately' and 'violently';
- (4) it bore on whether and to what extent LCM was to be seen as lacking remorse, and the weight to be given to that;

LCM v The State of Western Australia

[2016] WASCA 164

(5) it bore on the significance of LCM's failure to call for treatment immediately after the offence, a matter on which the primary judge made an adverse finding; and

(6) LCM's impaired language skills may well explain his persistent adherence to the position that his actions were an 'accident', a position which the primary judge regarded negatively.

LCM v The State of Western Australia [2016]

WASCA 164, Mazza JA & Beech J at [129]

- LCM's offending was impulsive and unexpected: he was, at the time, faced with the responsibility, at 15, of taking home and rearing a newborn baby. For any young person of that age, that would be a daunting and stressful prospect. For a young person with the appellant's background and impairment, it would have been an extremely traumatic prospect. LCM's irrational behaviour was in part a reflection of the impairments which he has and which are attributable to FASD.
- Resentenced to 7 years' imprisonment, eligible for parole after 3.5 years

LCM v The State of Western Australia [2016]
WASCA 164 at [4], Martin CJ

It is remarkable that those responsible for his care and protection did not initiate an assessment of whether or not he was affected by FASD. ... if the extent of LCM's neurological deficits had been understood and addressed by appropriate management intervention early in his life, the trauma which he subsequently experienced and caused to others may have been averted

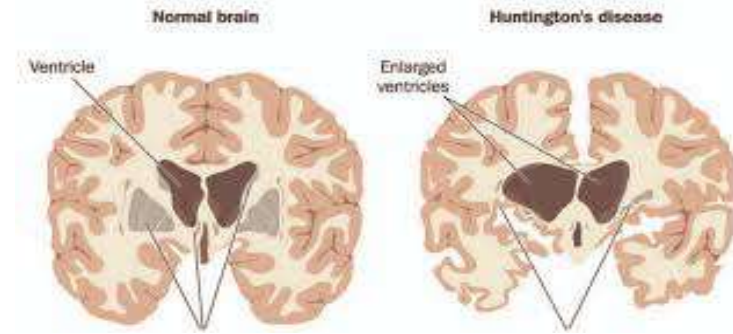
LCM v The State of Western Australia [2016]
WASCA 164 at [25], Martin CJ

- The case of LCM illustrates that **levels of awareness** with respect to the possibility that an offender might be suffering FASD, and the arrangements which pertain to an assessment of that prospect and for the management of an offender found to be suffering that condition **are inadequate**, especially when compared to the awareness of and attention given to this issue in another comparable jurisdiction – namely Canada.

LCM v The State of Western Australia [2016]
WASCA 164 at [7], Martin CJ

- Unless those arrangements are improved, not only will injustice be suffered by those who commit crime at least in part because of a condition which they suffer through no fault of their own, but also the opportunity to reduce the risk to the community by appropriately managing such offenders will be lost

4. Huntington's Disease



- Inherited disease that causes the progressive degeneration of nerve cells in the brain: 15-25 years until death.
- Has a broad impact on a person's functional abilities and usually results in movement Involuntary jerking or writhing movements; muscle problems, such as rigidity or muscle contracture (dystonia); slow or abnormal eye movements; impaired gait, posture and balance; difficulties with the physical production of speech or swallowing,
- Cognitive and psychiatric disorders (mostly depression) that can result in suicidality.

Huntington's Disease



Cognitive impairments often associated with Huntington's disease include:

- Difficulty organizing, prioritizing or focusing on tasks
- Lack of flexibility or the tendency to get stuck on a thought, behavior or action (perseveration)
- Lack of impulse control that can result in outbursts, acting without thinking and sexual promiscuity
- Lack of awareness of one's own behaviors and abilities
- Slowness in processing thoughts or "finding" words
- Difficulty in learning new information
- **As with Alzheimer's dementia offenders, issues with criminal responsibility and with ethical and logistical appropriateness as a sentencing option**

***R v Norman* [2008] EWCA Crim 1810**

- N (50) charged with child abduction to keep hi out of the lawful custody of mother
- Question arose as to fitness to plead
- Psychiatric reports unanimous he was unfit and would remain so
- Detained for 12 months at Lewes Prison, in the health unit

***R v Larmour* [2004] NICC 4**

- L sentenced in 1988 to 2 life terms for brutal, premeditated IRA murders
- Hearing to determine tariff in relation to sentence – earliest release date
- L has been diagnosed with HD and had progressive dementia
- Already in need of full time care and would become increasingly disabled.
- Tariff of 15 years set

R v Miller, 2011 BSC 1292

- M had a historical diagnosis of Huntington's dementia
- Stage II of HD with an estimated total functional capacity of 8/13
- On assessment no active psychotic disorder or mood disorder
- Some impact on cognition: could not give birth date or state the year, subtract by 3s, repeat phrases – short-term memory impaired
- Held his cognitive functioning due to HD had not dropped below the limited cognitive capacity that an accused must possess in order to communicate with his counsel

The Criminal Responsibility Question

- NDs potentially relevant to fitness to be interviewed
- NDs potentially relevant to fitness to plead/stand trial
- Counter-intuitive expert evidence may be admitted and useful in relation to anomalous conduct of defendant
- NDs potentially relevant to self-defence, provocation, diminished responsibility
- NDs highly relevant to vulnerability & health in custodial environment

Other Issues

- “Can get too caught up with diagnoses” (Drew McAnespie)
- BUT DIAGNOSES ARE IMPORTANT FOR THE LAW: it deals with dichotomies
- “Paranoid schizophrenics are insane”
- NO. It depends on severity of symptomatology and nature of it – eg delusions, command hallucinations.
- THE ISSUE is the individual impact of a condition for the responsibility, culpability & functionality of accused person

Expert Evidence Challenges



- Assisting court to understand **internal experience** of world of defendant: much more than test results!
- More than just **information provision**
- Differentness of individual's life experience, relevant to charged conduct, needs to be explicated, recognising the law proceeds on the assumption that people generally understand what they are doing and the nature & consequences of their conduct
- Challenges in presenting counter-intuitive perspectives

“The Spectrum Issue”



- NDs are ubiquitous
- Their overlap with each other is complex, often potentiating and little understood
- The contamination effect of substance use is yet to be explored rigorously
- NDs **can** generate **impulsiveness**, erode **inhibition**, diminish **empathy** with victims, detract from exercise of **rational** judgment, reduce **alertness** to consequences of conduct
- Fundamentally relevant to moral culpability & informed sentencing