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**FETAL ALCOHOL SYNDROME DISORDERS
SYMPOSIUM FOR JUSTICE PROFESSIONALS**

“A Judicial Perspective”

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Thank you for inviting me to this important symposium.

The program bills my address as a “Judicial Perspective”.

I have to immediately caution you that I have only been a judge for some two months now. My judicial perspective is extremely limited. That said, there are some things that I expect are almost immediately apparent to any judge. I am thinking here of the hard fact that judges only know (or are permitted to know) what counsel, by way of evidence and submissions, are prepared to tell them. My seat may be the best one in the courtroom, but I can only see what counsel allow me to see. My experience – and I am sure its shared by all other judges – is that I am too often left feeling that I am the only one in the courtroom that doesn't know what's really going on. Sometimes, it's almost as though there's a conspiracy of silence to keep me from the truth. Most times, however, I feel my frustration is a function of counsel simply failing to know, or to tell me, what I need to know to render the most just result possible.

This all-too-common situation describes, I fear, the plight of many persons with FASD who appear before the courts. A judge wants to do the right thing. But a judge, like any mortal, can only work with what he's given. In too many cases, I suspect, judges are hamstrung because they're denied the information they need. This doesn't serve the interests of justice or the public or, perhaps

* The views expressed in this paper are those of the author and are not intended nor should they be construed as those of the Ontario Court of Justice.

most importantly, the interests of defendants with FASD who, far too often, find themselves in conflict with the law.

This is one of the two intertwined themes I want to address this afternoon. That first theme is ignorance and, ultimately, its remedy, education. The second theme, which I will soon come to, relates to the challenges to the very fundamentals of criminal justice posed by defendants who suffer from FASD.

I must begin by telling you how I come to be here today. And, even before that, by telling you that I am no expert on the subject of FASD. I come to this sideways, but I come to it with an abiding concern that the justice system fairly serve all of those who are drawn into its net. I am concerned, then, that those compelled to participate in criminal justice – and by that I mean, in particular, accused persons -- understand and appreciate what is going on. From what little I know of FASD, I fear that some significant portion of those affected by this disorder do not have this appreciation and, as a result, learn nothing of value from their forensic experience. Too often, I fear, they are neither helped nor deterred, and the public is left no safer. Such results serve no one's interest.

I was a defense counsel before my recent appointment to the bench. In almost a quarter-century of defense work, I never once identified a client as affected by FASD. This was, I am now sure, completely a product of my own ignorance. I have some inkling that the *scientific* linkage of maternal prenatal alcohol consumption to cognitive birth defects is of relatively recent vintage. And I expect I suffered through most of my career from the still all-too-common view that FASD inevitably announces its presence through craniofacial abnormalities. I know better now – I now understand that there is a spectrum -- but I am still astonished at how stupid I was, about how I couldn't myself put 2 and 2 together.

With the advantage of hindsight, I have no doubt that I represented a number of young men who had FASD, particularly in the early years when I had

a very busy 'street practice'. Given the little more I now know, I am able to look back and recognize behavioural patterns that seemed inexplicable to me at the time. I can only speculate from this distance, but I believe I now understand why some clients were so often 'repeat customers', why they had to constantly relearn the same lesson, why they never seemed to mature, why their judgement seemed so immutably impaired.

My re-education didn't begin until 2002. I have a friend – Tim Moore – who is a very fine psychologist and academic. Over the past decade or so he has become especially interested in the interface between psychology and the criminal law, and he has often been qualified as an expert witness in this area. He has also recruited me as a co-author of several papers that address some troubling issues in the realm of forensic psychology. In terms of division of labour, Tim sets out the science and I endeavour to project it onto the Canadian legal landscape. One of the issues he brought to my table was FASD, and our joint effort ultimately produced an article that was published in *Criminal Reports* and which, frankly, attracted far more attention than anything else I've ever written about the law. I expect it is that article (and, likely, Tim's unavailability) that leads to my appearing before you today.

The overview that Tim prepared for me, and the background materials that I then read, were for me astonishing. I had no idea of the prevalence of FASD in the general population. I had no idea how despairingly overrepresented persons with FASD are in the criminal justice system. I had no idea that the inevitability of facial abnormalities was more myth than substance. And I certainly had no idea how profound the dysfunctionality or with what glibness it could be masked among those who did not share the distinctive facial morphology.

I realized, of course, that I was not the only criminal justice worker to suffer from this ignorance. In truth, the cognitive liabilities of many persons with FASD were – and still are -- invisible to naïve observers. Couple this with the

recognition that many persons with FASD are poor and marginalized. Then add to this toxic mix the fact that, at least until very recently, this population has been virtually voiceless. It seems hardly surprising, then, that the police, counsel and the courts routinely “miss” the underlying pathology.

I don't have to recite the inventory of cognitive deficits, their behavioural and ethical correlates or their depressing demography to this audience. What gripped me – then as counsel, and now as a judge -- was the forensic implications. The questions are not unique to this pathology, but the general misunderstanding of FASD and the invisibility of much of it raises especially profound and poignant challenges for any criminal justice system that prides itself on the fair treatment of all those within its domain.

Our system of justice is founded on the premise that defendants understand the relationship between actions and outcomes, between intentions and consequences, that people who make choices are responsible for the fallout. The cognitive impairments of persons with FASD call these fundamental premises into question. As a judge, I am called upon every day to assess individual responsibility against legal standards – often *objective* ones – at both trial and sentencing stages of the adjudicative process. How do I measure individual responsibility – in short, blameworthiness and, more challenging still, the appropriate sanction – when the person before me is, in a sense, organically irresponsible? How do I assess fault when the fault is no fault of the defendant? And how do I, as a judge, do this when, as I expect still often happens, I don't even know that the person I am judging suffers from a disabling cognitive disorder? Or, even if I do, *how disabling it is in the case of the particular individual* who appears before me?

These are big questions. Metaphysical even. But they play out in a very tangible way for many of those with FASD who appear before the courts.

One area of obvious concern is that of “fitness to stand trial”. I do not intend here to rehearse this debate, as many of you I expect are familiar with the problems. First, there is the question of whether FASD is even a “mental disorder” so as to engage the question of forensic competency. And then, of course, there is the much more subtle question of whether a defendant with FASD falls below the already low threshold for fitness captured in what is known as the “limited capacity test”. Most persons with FASD, I suspect, would meet this standard – meaning that even though they may not even have the capacity to make choices in their best interest, they are still fit to be tried and punished. It is undeniably true that many mentally competent actors make choices that, viewed rationally, are not in their best interests. But what are we to do with those don’t even have the cognitive capacity to make the wrong choices?

Let me briefly address two other concerns.

One arises from memory disabilities and their poisonous handmaiden, suggestibility. When placed in the pressure cooker of a criminal investigation and trial spanning months or even years, the resulting narratives are often widely variable or elastic accounts that are quite simply unreliable. When this happens it inevitably frustrates the search for truth because it impacts not only on defendants with FASD but, as well, on the credit-worthiness of any witness who suffers from the same liability. I expect that some – perhaps many – FASD-affected witnesses can provide reliable testimonial accounts. I expect, further, that persons with FASD, *because of their cognitive compromises*, may be particularly vulnerable and thus require the sedulous protection of the law. We would not want to too easily dismiss the allegations of FASD-affected *victims*. So do we -- as judges – really need to know whether certain witnesses have FASD and, if so, the extent of their cognitive impairment? And, if we do know, do we then risk either unfairly discounting their evidence *or* unfairly relaxing the standards for its acceptance? I don’t profess to know the answers to these

questions. But what I do know is that we must strenuously avoid replacing one set of invidious stereotypes with another.

A second concern relates to sentencing. I expect that the comments I am about to make are probably inapplicable to judges who sit in some Canadian communities, particularly those with large aboriginal populations, or to judges who preside in Gladue courts. But, in Toronto, my guess is that at least some judges are simply uninformed about or insensitive to the condition of many FASD-affected persons who appear before them for sentencing. What judges see is defiance of court orders. What judges see is the absence of remorse. What judges see is a criminal record of incorrigibility, calling, of course, for stiffer penalties in the cause of individual deterrence. What is missed is the etiology of the apparent incorrigibility and, with it, the chance to fashion a disposition that's responsive to the special needs of the defendant. This begs, of course, the question of whether appropriate assessment and treatment programs exist; and, if so, whether they are available. And then there's the much larger question of whether there is legal right to demand and a judicial power to compel the provision of necessary services.

Finally, I want to return to where I began: to my belief that judges can be trusted to do the right thing – or at least the best they can do – *if* they're given the right information. This is the problem of ignorance. Its remedy is education.

Judges need to have a basic understanding of FASD. They need to know enough to recognize it in a courtroom setting. They need to appreciate its cognitive, affective and behavioural implications. This knowledge should be part of the basic toolkit that every judge takes with him into court every morning. And it's knowledge that any judge *can* learn through the continuing education programs that judges routinely attend – so long, of course, that the subject of FASD forms part of these education programs.

Of at least equal importance, however, is the education judges need about every defendant with FASD who appears before them for sentencing. This obligation does not fall to the judges' conference organizing committee. It falls, primarily, to counsel -- Crown as well as the defense -- whose job it is to inform judges when a defendant is FASD-compromised. A FASD-educated judge will then have the ken to ask the salient questions: How impaired? What history of therapeutic intervention and with what success? What alternatives to jail are available? How effective are they likely to be *in this one, single, individual case?*

Judges are at the far end of the forensic food chain. Please give us the tools to do our job.