

Ignore FASD at your peril

Christine Rogan – Health Promotion Advisor, Alcohol Healthwatch - comments on the implications of the Privy Council decision on Teina Pora's appeal.

Question: What would possess someone to confess to a rape, murder and aggravated burglary that they didn't commit for some reward money?

Answer: Someone unable to foresee the consequences of their actions.

I am of course talking about Mr Teina Pora and his 1999 conviction for the rape and murder of Ms Susan Burdett in her South Auckland home. Pora's confessions were accepted by two separate juries as primary evidence of his guilt. That is, until an appeal to the Privy Council in London allowed evidence that appeared to provide a credible explanation as to why a false confession might have been made.

Mr Pora has Fetal Alcohol Spectrum Disorder (FASD), which means he has significant and permanent brain impairment caused by alcohol consumed by his mother when she was pregnant with him.

The panel of five Judges - including Dame Sian Elias, Chief Justice of New Zealand's Supreme Court - learned that the battery of standardised testing of Mr Pora's brain function showed that he, "... tended to respond without due consideration, especially in complex situations, that he tended to confabulate without realising that he was doing so and that, while he could not comprehend more complex words or sentences, he tended to respond as if he understood." Further it was found "He had no demonstrable capacity for abstract thought

and a strong tendency to maintain a position even when it was shown to be entirely untenable". The findings are consistent with the permanent brain damage that alcohol can cause during gestational development. The diagnostic evidence presented in this case was not in dispute.

The Privy Council concluded that this evidence "...could potentially have had a significant impact on the safety of the conviction". After hearing submissions from both sides involved with the appeal, the Panel concluded, "The combination of the Appellant's frequently contradictory and often implausible confessions with the diagnosis of FASD leads to the conclusion that reliance on his confessions gives rise to a risk of a miscarriage of justice. Therefore the Board deemed that his convictions must be quashed".

What can be learned from Mr Pora's case? The first lesson is that authorities and agents have been given a stark and very costly reminder of the implications of ignoring FASD as a possible factor. To be fair, the International Consensus Statement on Legal Issues of FASD (Canada, 2013) does state that the actions of people affected by FASD "clash with assumptions about human behaviour at almost every stage of the justice system". However that does not explain how, in the words of the Privy Council, such 'implausible' and 'contradictory' statements made by Mr Pora could be taken at face value as confirmation of his guilt. The Scales of Justice demand all available information to be assessed objectively, not just those pieces that suit an argument. In the Pora case, no one bothered to look beyond the façade to join the dots.

New Zealand has known for over 40 years that alcohol consumed during pregnancy can cause

permanent and irreversible brain damage to the fetus. The failure to consider the impact of that continues today where significant gaps in knowledge and practice remain. Alcohol is an ever present link to antisocial offending. How much of a stretch is it to explore a link to possible early exposure?

There are likely hundreds if not thousands who, like Mr Pora, have undiagnosed FASD and who are misunderstood and mismanaged as a result. It would be easy to respond with 'who cares?'. The problem with that is we are talking about a permanent brain-based disability and a system that sets the affected person up to fail again and again. International evidence suggests that individuals with FASD are 19 times more likely to be imprisoned than those in the general population. Compared to the cost of repeated crime and incarceration, any investment in prevention of FASD is a bonus.

New Zealand authorities have ignored and marginalised FASD for too long. Claims at the policy level that FASD is difficult to diagnosis, too complex, uncertain and expensive are excuses for doing little and not born out in reality. It is acknowledged that assessing for FASD is a comprehensive process, requiring the skills of a multi-disciplinary team. However, when comparing that to the costs to society in time and resources wasted in cases like that of Mr Pora's, such investment clearly pays off.

An interdisciplinary FASD diagnosis can provide answers to long-held questions over previously unfathomable behaviour. It provides signposts and a roadmap for living a supported and fruitful life. The Privy Council panel of five learned Judges gives weight to the integrity of the diagnosis.

Prevailing attitudes that deny public access to such a service deserve to be strongly challenged.

Alcohol and pregnancy has been a key focus of Alcohol Healthwatch since our beginnings in

the 1980s. We have long recognised the serious consequences of ignoring FASD and how crucial diagnosis is for prevention and intervention.

Growing tired of "the chicken and the egg" situation, we set about the development of clinical services to improve FASD surveillance, assessment and treatment within justice and health settings. This timely investment and ongoing commitment has equipped families and communities with more accurate information that improves understanding of ongoing care where FASD is a factor.

A young man lost his freedom for 20 years for the want of such information. It takes the skill and courage of people like neuropsychologist Dr Valerie McGinn, putting their clinical reputations on the line to identify a fairer pathway for those affected by FASD.

Leaving FASD marginalised at the bottom of the cliff is wasteful and unjust.

FASD and justice matters were discussed on a Radio New Zealand Insight programme on May 3rd 2015, and at series of Hui hosted by Alcohol Healthwatch, the University of Auckland Law School and Northland DHB Health Promotion in May.

<http://www.radionz.co.nz/national/programmes/insight/20150503>

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