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# Fetal Alcohol Spectrum Disorders

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Foley's List

## Fetal Alcohol Spectrum Disorders?

- Umbrella term used for a range of effects/disabilities.
- FAS, PFAS, Neurodevelopment disorder, Alcohol-related birth defects.
- Frequently undetected, as can be an “invisible disability”.

## FASD and Criminal Justice System

- Research has identified individuals with FASD have an increased risk of contact with the criminal justice system.
- Important for legal professionals to identify when an individual might be affected by FASD.

## Characteristics of FASD

- Lack of impulse control;
- Trouble identifying consequences;
- Difficulty planning cause and effect;
- Difficulty empathising/taking responsibility;
- Difficulty delaying gratification/making good judgments;
- Tendency towards explosive episodes;
- Susceptibility to peer pressure.

## Diagnosis of FASD

- Requires a multidisciplinary approach and specialist assessment.
- Paediatrician, neuropsychologist, occupational therapist, speech and language pathologist, social worker.
- Neurocognitive profiles of FASD overlap with ADHD, ASD, other disorders.

## Groups at high risk of missed FASD diagnosis

- Aboriginal and Torres Strait Islander communities’;
- Communities experiencing social deprivation/poverty;
- Foster care or adoptive care;
- Youth involved in the criminal justice system.

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

## **Facts:**

- 15-year-old Aboriginal youth, sentenced for manslaughter of his infant son.
- Sentence appealed to the CoA (grounds sentence was manifestly excessive).
- Psychiatric Report tendered at original hearing which stated no evidence of a major psychiatric disorder.
- Completely dysfunctional and deprived upbringing.
- Involvement with child protection from a young age.

## **Appeal:**

- Diagnosis of FASD identified prior to appeal.
- Evidence relating to the diagnosis tendered.
- Resulted in a significant reduction in sentence.

## **Judgment (Mazza JA and Beech J) [123]:**

- FASD involves a spectrum of disorders – may lead to a varying number of deficits of varying intensity.
- Attention must be directed to the details of the particular diagnosis of FASD and how it relates to the charge.



**The Court found the appellants FASD impacted in at least six areas [128]:**

1. Diminished moral culpability;
2. Weight given to personal and general deterrence;
3. Diminished the adverse impact of the primary judge's findings that the appellant acted 'deliberately and violently';
4. Weight given to the appellant's lack of remorse;
5. Significance of the appellant's failure to call for treatment immediately after the offence;
6. Impaired language skills.

- The Court was satisfied that the appellant's FASD was a significant mitigating factor which was not known when the appellant was sentenced. Had it been known a different sentence should have been imposed.
- This decision is significant, highlighting the challenges that FASD pose for the criminal justice system and the need for education on the disorder.

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# FASD, ASD and ADHD: Issues for Criminal Law Practice



**Misdiagnosis For Individuals With FASD**

Sometimes, when someone is being assessed for the problems they are having, a person might be misdiagnosed as having only a single issue unless these problems are connected back to alcohol exposure in the womb.

Reactive Attachment Disorder

Bipolar Disorder

Psychotic Disorders

Autism Spectrum Disorders

Antisocial Personality Disorder

Borderline Personality Disorder

Attention Deficit Hyperactivity Disorder

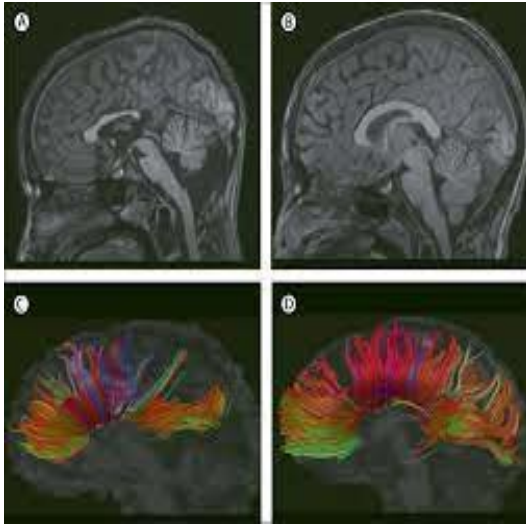
Some behavioural mental health issue, such as anxiety, aggression, or other problems arising from being poorly treated, may also develop as a result of how people with FASD are treated throughout their lifespans.



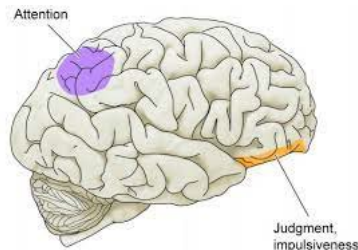
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# Neuropsychological Conditions and the Law

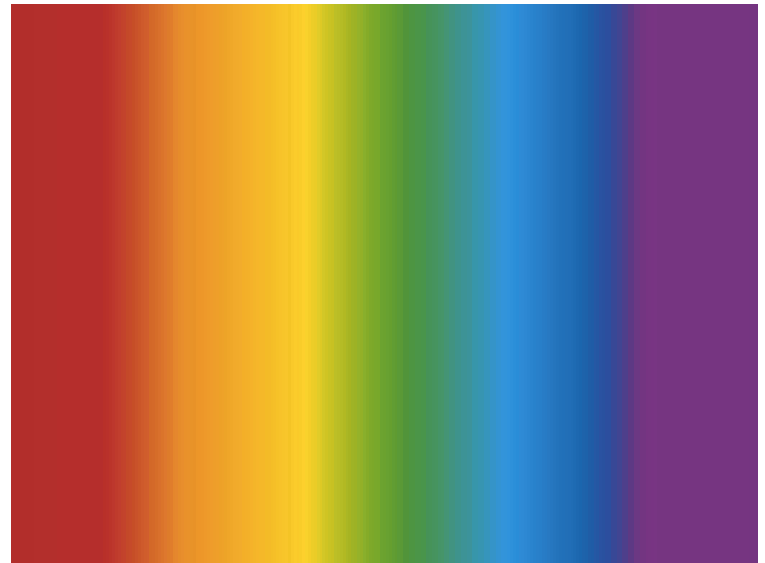


- Potential to exculpate
- Potential to impact on voluntariness of interviews
- Potential to impact upon fairness of a trial
- Potential to mitigate/contextualise culpability
- Potential to bear upon how a custodial sentence is experienced: see *Verdins*

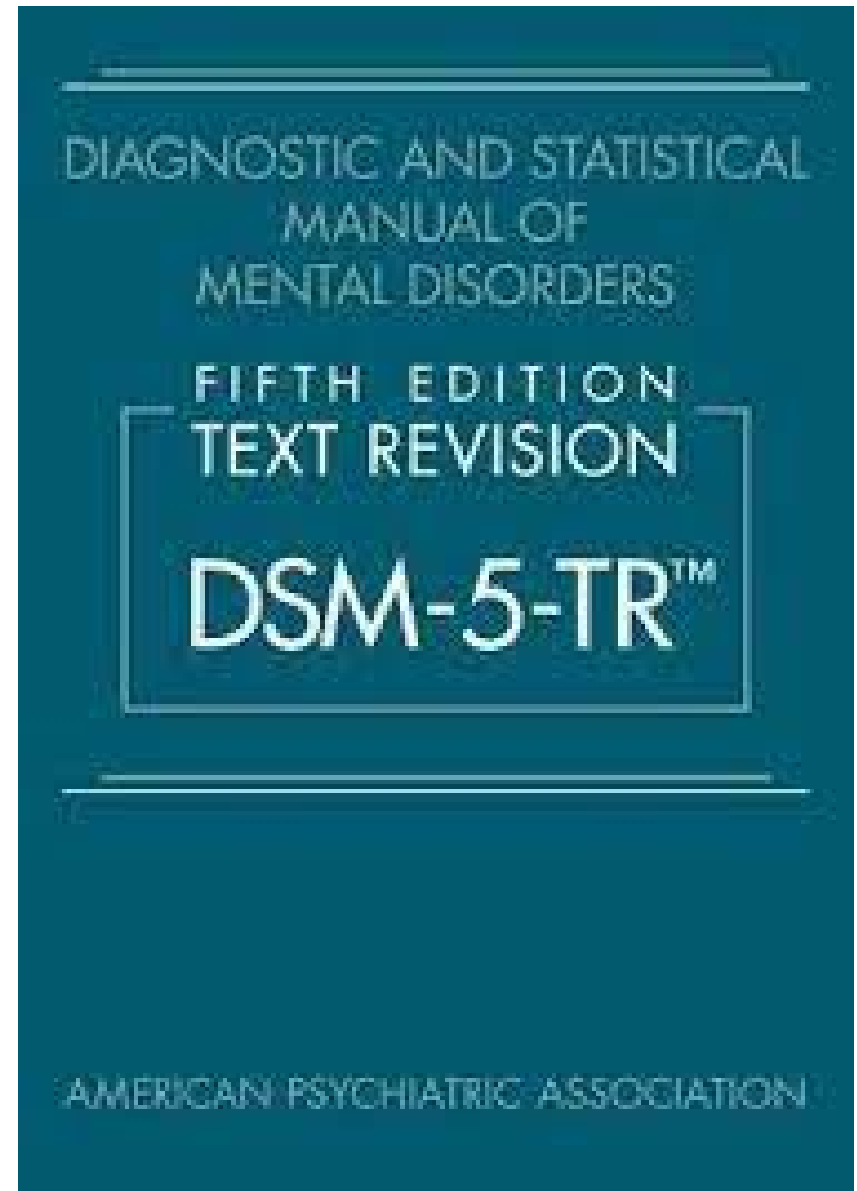


# Each Exists on a Spectrum of Symptomatology

- At the severe end, they can be highly exculpatory, eg depriving of capacity to understand nature and consequences of actions: that is rare
- At the minor end, will generally impair exercise of judgment and may only be marginally relevant to a decision on criminal responsibility or culpability
- **Place on the spectrum is important**

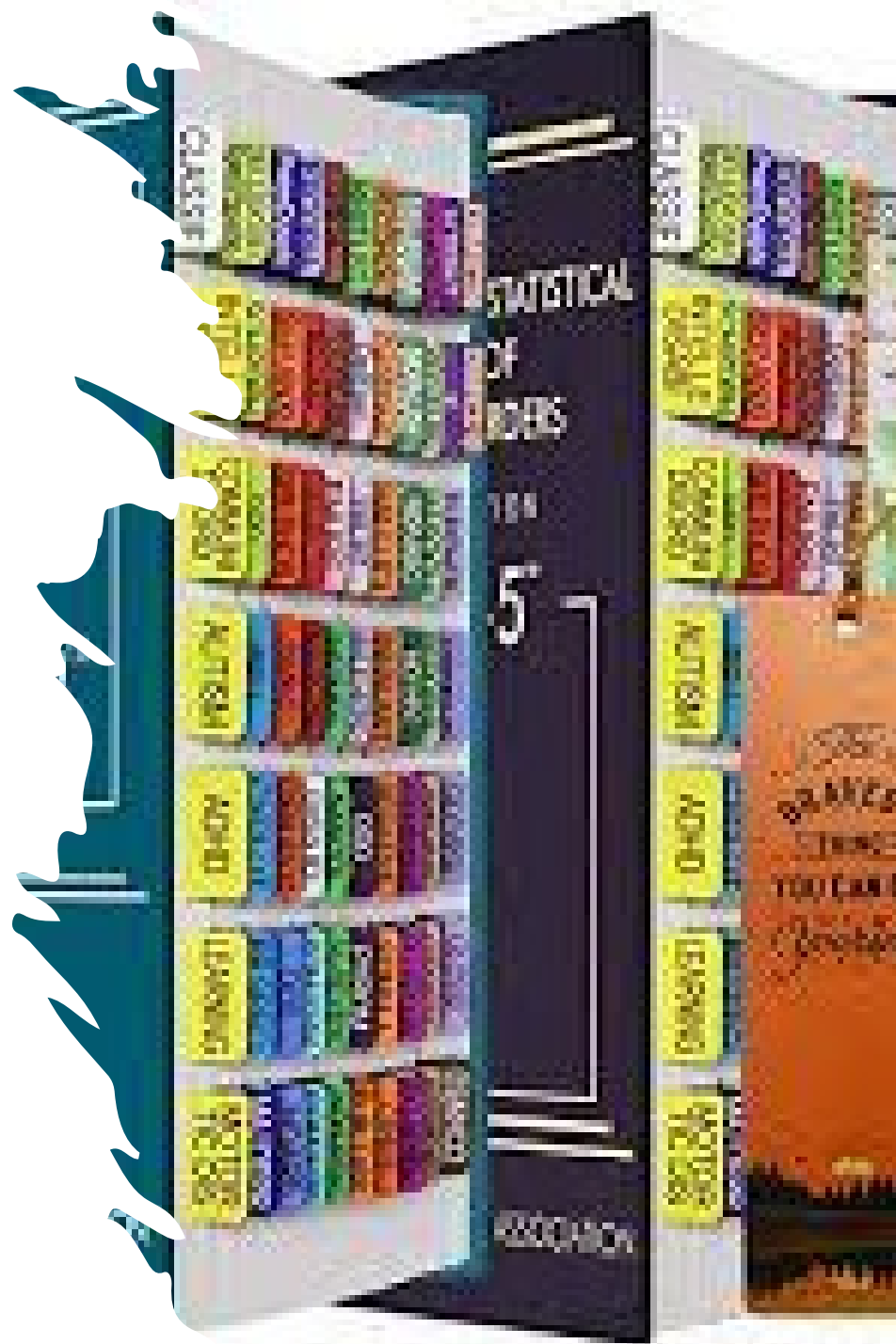


Common  
Absence of  
Diagnostic  
Clarity:  
the yardstick  
is the DSM-  
5-TR (2022)



# DSM-5-TR

- Neurobehavioral Disorder Associated with Prenatal Alcohol Disorder: FASD (p916: Condition for further study)
- Autism Spectrum Disorder (p56)
- Attention-Deficit/Hyperactivity Disorder (p68)





# Spectrum Issues

- Each carries a risk of failure to diagnose and of misdiagnosis
- Each can too readily be dismissed in terms of forensic relevance
- Each tends to exist with comorbidities:
  - Intellectual Disability
  - Conduct Disorder
  - Obsessive Compulsive Disorder
  - Personality Disorders
  - Tourette's Disorder
  - Anxiety and depression
- For FASD and ASD there is no treatment
- For ADHD there is effective treatment

# ***Pora v The Queen* [2015] UKPC 9: FASD & Suggestibility**

- 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

# Principal evidence: Pora's Admissions



- 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

- 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

- 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: P 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 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

- However, 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



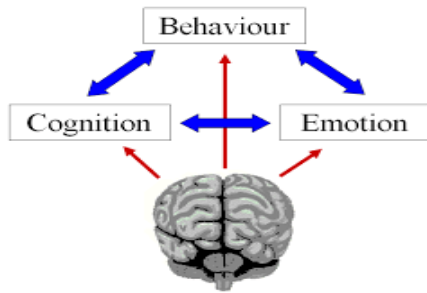
# DNA evidence as to the Rapist

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



# FASD Evidence before Privy Council

- Neuropsychologist: deficits of regulatory control in P, 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 & limited thinking, cognitive rigidity & 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 Evidence

- Prominent tendency in his interviews with police for P's **speech to be impoverished and very simple** – at times there were long delays in his responding where he seemed confused and did not know how what to say



# Neuropsychologist 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 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 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.



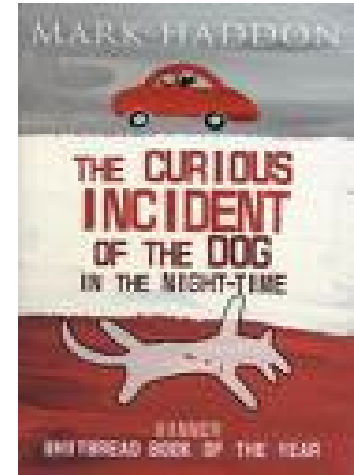
# *Pora v The Queen* [2015]

## 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.

# Asperger's Amongst Autism Spectrum Disorders

- Frith (1991): those “with a dash of autism”



# Autism Spectrum Disorder: DSM-5-TR

- A. Persistent **deficits in social communication and interaction** across multiple contexts as manifested by the following, currently or by history:
  - 1. **Deficits in social-emotional reciprocity**;
  - 2. Deficits in nonverbal communication behaviors used for social interaction
  - 3. Deficits in developing, maintaining and understanding relationships

# Autism Spectrum Disorder: DSM-5-TR

- B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by 2 of the following:
1. Stereotyped or repetitive motor movements, use of objects, or speech
  2. Insistence on sameness, inflexible adherence to routines or ritualized patterns of verbal or nonverbal behavior
  3. Highly restricted, fixated interests that are abnormal in intensity of focus
  4. Hyper or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment

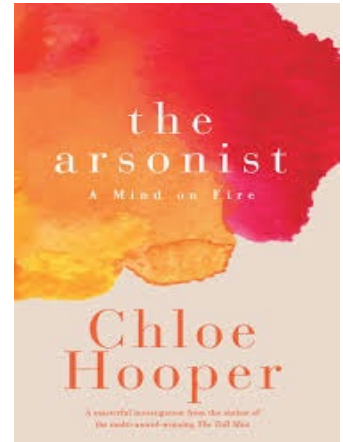
# Autism Spectrum Disorder: DSM-5-TR

- C. Symptoms must be present in the early developmental period
- D. Symptoms cause clinically significant impairment in social, occupational or other important areas of current functioning
- E. Disturbances are not better explained by ID, or global developmental delay.

Requiring support, substantial support of  
very substantial support

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

- 10 counts of arson causing death in Churchill 2009
- Offender suffering autism spectrum disorder + mild intellectual disability
- *Verdins* applied
- 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, his level of intellectual reasoning and verbal comprehension is very impoverished. He 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.”

# *DPP v HPW* [2011] VSCA 88 at [53] per Tate JA

- The psychologist's opinion suggested that the sexual offending occurred in a context in which
  - (1) the respondent had sexual preoccupations with his daughter, fantasising about her in a manner reflective of his previous unusual sexual relationship with an earlier partner of whom his daughter reminded him;
  - (2) he was sexually frustrated with his current partner;
  - (3) his level of alcohol abuse led to disinhibition; and
  - (4) his deficient empathy meant that he believed that his sexual offending was having no emotional impact on his daughter.

The psychologist's opinion did not provide a proper evidentiary base supporting the finding of the sentencing judge that the respondent 'may have misinterpreted [his] daughter's cues' (Compare *Parish v DPP* [2007] VSC 494)



# ***DPP v HPW [2011] VSCA 88***

- Sentencing judge found by Vic Ct of Appeal to have wrongly found a causal connection between HPW's Asperger's and his sexual offending against his 11/12 yr old daughter
- Psychologist found him to have significant deficits in social interaction, restricted behaviour and to be atypical in awareness of his deficiencies in empathy and friendship skills

# ***Paparone v The Queen* (2000) 112 A Crim R 190; [2000] WASCA 127**

- P sentenced to 5.5 years' imprisonment for drug offences
- Appeal on the basis that trial judge had not accepted that an ADD had been the real cause of P's offending and should be treated as a mitigating factor.
- P asserted that his ADD had resulted in his taking drugs on a self-help basis for the purpose of alleviating his disorder and that this had resulted in the circumstances leading to the offences.
- The sentencing judge said that he was not able to make a finding of fact on the matter and that while the disorder was not in dispute, it had no necessary connection with the manufacture or possession of illicit drugs: many people with the disorder had no connection with the drug trade at all.

# *Paparone v The Queen* (2000) 112 A Crim R 190; [2000] WASCA 127

- Psychologist, Ms Coxon:
  - ADHD sufferers self-medicate with a variety of substances in order to be able to function normally in society and that it seemed that in a bid to get rid of the boredom and to get things done Paparone had turned to **illicit drugs**. He had initially experimented with a friend's prescribed medication for ADHD and found that this made his life more manageable and that he performed more efficiently at work. He asserted that **this led him to attempt to make his own variety of amphetamine from a recipe he discovered on the Internet.**

# ***Paparone v The Queen (2000) 112 A Crim R 190; [2000] WASCA 127***

- Dr Srna, psychiatrist, told by P:
  - A friend had been diagnosed with ADD and had been taking stimulants prescribed for him by his psychiatrist. He had accepted several stimulant tablets from his friend. Within a short time he had felt significantly better, with his self-esteem and concentration improving. Instead of seeking expert help he had embarked upon the use of amphetamines and cocaine. He had initially benefited from using these, but later the effect had worn off and the whole exercise had become very expensive. He had been buying meth from drug dealers.

# ***Paparone v The Queen (2000) 112 A***

## **Crim R 190: Dr Srna**

Mr P's alleged offence was directly linked to him seeking relief from symptoms of attention deficit disorder which he has been suffering from since his childhood. The disorder seems to have been interfering with his overall functioning and performance and upon experimentation with prescription stimulants he turned to illicit stimulants. Sufferers from ADHD tend to act in an impulsive and often self-damaging manner which has resulted in Mr P's case in his dependence upon illicit stimulants. His obsessional personality and associated depression further complicated the matter. At the time of his presentation he was clearly suffering from a mild psychotic state related to excessive use of stimulants.

# *Paparone v The Queen (2000)*

**112 A Crim R 190 at [54]**

**Murray and Kennedy JJ:** There was no causal link of the required kind between the applicant's attention deficit disorder and his offending behaviour. He did not commence to manufacture, consume and sell amphetamines because he suffered from the disorder, but by reason of his deliberate choice, initially taken to obtain relief from the symptoms of the disorder. There was never any suggestion that the disorder precluded him from seeking treatment and the prescription of appropriate medication. No doubt the fact that he suffered from the disorder provides some explanation for his commission of the offences, but it does not in my opinion in any way mitigate punishment.

**Appeal dismissed**

# *Paparone v The Queen (2000)*

**112 A Crim R 190 at [29], [33]**

**Wallwork J:** it is clear that the learned Judge was not satisfied on the balance of probabilities that the applicant's offences were connected to a significant extent to the ADHD problem. However, a question arises as to whether his Honour adequately and correctly dealt with the submission which had been made to him on that aspect. The learned Judge erred when he stated that the medical diagnosis had no necessary connection with the manufacture or the possession of the drugs. The word "necessary" indicates that his Honour was apparently not applying the correct standard of proof

# Harnessing FASD, ASD & ADHD

- Alertness is necessary to potential diagnosis
- More than an expert diagnosis is necessary for forensic relevance
- The disorders are specialist areas of clinical practice: this is relevant for expert selection
- Extent of symptomatology experienced by defendant needs to be proven
- High likelihood of comorbidities
- Nexus between disorder and the criminal conduct needs to be shown, eg impact on capacity to exercise judgment, appreciate consequences, abstain from impulsiveness etc



# Harnessing FASD, ASD & ADHD

- Generally relevant to context and blameworthiness
- Treatment, especially for ADHD can be very relevant to reassuring about recidivism
- Significant potential for generating counterintuitive, better informed understanding: obsessionality, high levels of anxiety if extradition (Love), peculiar impressions given
- Issues may exist for impact of custodial environment

# Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure



- A. More than minimal **exposure to alcohol during gestation**, including prior to pregnancy recognition. Confirmation of gestational exposure to alcohol may be obtained from maternal self-report of alcohol use in pregnancy, medical or other records, or clinical observation.
- B. **Impaired neurocognitive functioning** as manifested by one or more of the following:
1. Impairment in global intellectual performance (ie IQ of 70 or below, or a standard score of 70 or below on a comprehensive developmental assessment).
  2. Impairment in executive functioning (eg poor planning and organization; inflexibility; difficulty with behavioral inhibition).

# Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure

3. **Impairment in learning** (eg lower academic achievement than expected for intellectual level; specific learning disability).
4. **Memory impairment** (eg problems remembering information learned recently; repeatedly making the same mistakes; difficulty remembering lengthy verbal instructions).
5. **Impairment in visuo-spatial reasoning** (eg disorganized or poorly planned drawings or constructions; problems differentiating left from right).

# Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure

C. **Impaired self-regulation** as manifested by one or more of the following:

1. Impairment in mood or behavioral regulation (eg **mood lability**; negative affect of irritability; frequent behavioral outbursts).
2. **Attention deficit** (eg difficulty shifting attention; difficulty sustaining mental effort).
3. **Impairment in impulse control** (eg difficulty waiting turn; difficulty complying with rules).

# Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure

D. **Impairment in adaptive functioning** as manifested by two or more of the following, one of which must be (1) or (2):

1. **Communication deficit** (eg delayed acquisition of language; difficulty understanding spoken language);
2. **Impairment in social communication and interaction** (eg overly friendly with strangers; difficulty reading consequences);
3. **Impairment in daily living skills** (eg delayed toileting, feeding, or bathing; difficulty managing daily schedule) social.
4. **Impairment in motor skills** (eg poor fine motor development; delayed attainment of gross motor milestones or ongoing deficits in gross motor function; deficits in coordination and balance).

# Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure

E. Onset of the disorder (symptoms in Criteria B, C and D) occurs in childhood.

F. The disturbance causes clinically significant distress or impairment in social, academic, occupational or other important areas of functioning.

G. The disorder is not better explained by the direct physiological effects associated with postnatal use of a substance.

# DSM-5-TR ADHD (2022)

A. A persistent pattern of **inattention and/or hyperactivity-impulsivity** that interferes with functioning or development, as characterized by (1) and/or (2):

**1. Inattention:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:

☐ *Note:* For older adolescents and adults (age 17 and older), at least five symptoms are required.

(1) **Often fails to give close attention to details or makes careless mistakes** in schoolwork, at work, or during other activities (e.g., overlooks or misses details, work is inaccurate).

(2) Often has **difficulty sustaining attention in tasks or play activities** (e.g., has difficulty remaining focused during lectures, conversations, or lengthy reading).

# DSM-5-TR (2022)

(3) Often **does not seem to listen** when spoken to directly (e.g., mind seems elsewhere, even in the absence of any obvious distraction).

(4) Often **does not follow through on instructions** and fails to finish schoolwork, chores, or duties in the workplace (e.g., **starts tasks but quickly loses focus and is easily sidetracked**).

(5) Often has **difficulty organizing tasks and activities** (e.g., difficulty managing sequential tasks; difficulty keeping materials and belongings in order; messy, disorganized work; has poor time management; fails to meet deadlines).

(6) Often **avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort** (e.g., schoolwork or homework; for older adolescents and adults, preparing reports, completing forms, reviewing lengthy papers).



# DSM-5-TR (2022)

(7) Often **loses things necessary for tasks or activities** (e.g., school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).

(8) Is often **easily distracted by extraneous stimuli** (for older adolescents and adults, may include unrelated thoughts).

(9) Is often **forgetful in daily activities** (e.g., doing chores, running errands; for older adolescents and adults, returning calls, paying bills, keeping appointments).

# DSM-5-TR (2022)

**2. Hyperactivity and impulsivity:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:

☐ *Note:* For older adolescents and adults (age 17 and older), at least five symptoms are required.

(a) Often **fidgets with or taps hands or feet or squirms** in seat.

# DSM-5-TR (2022)

- (b) Often **leaves seat in situations** when remaining seated is expected
- (c) Often **runs about or climbs in situations where it is inappropriate**. (*Note: In adolescents or adults, may be limited to feeling restless.*)
- (d) Often **unable to play or engage in leisure activities quietly**.
- (e) Is often “**on the go**,” acting as if “driven by a motor” (f) Often talks excessively.
- (g) Often **blurts out an answer** before a question has been completed.
- (h) Often has **difficulty waiting his or her turn** (e.g., while waiting in line).
- (i) Often **interrupts or intrudes** on others

# DSM-5-TR (2022)

B Several inattentive or hyperactive-impulsive symptoms were **present prior to age 12 years**.

C. Several inattentive or hyperactive-impulsive symptoms are **present in two or more settings** (e.g., at home, school, or work; with friends or relatives; in other activities).

D. There is clear evidence that **the symptoms interfere with or reduce the quality of, social, academic, or occupational functioning**.

E. The symptoms do not occur exclusively during the course of schizophrenia or another psychotic disorder and are not better explained by another mental disorder (e.g., mood disorder, anxiety disorder, dissociative disorder, personality disorder, substance intoxication or withdrawal).

# Further Reading

- C Allely, *Autism Spectrum Disorder in the Criminal Justice System* (Routledge, 2022)
- F Volkmar, M Woodbury-Smith, Loftin and Westphal, *Handbook of Autism Spectrum Disorder & the Law* (Springer, 2022)
- I Freckelton & D List, “Asperger’s Disorder, Criminal Responsibility and Criminal Culpability” (2009) 16 PPL 16
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- I Freckelton, “FASD, Expert Evidence and Unreliability during Police Interviews” (2016) 23 PPL 173
- I Freckelton, “Assessment & Evaluation of FASD: Relevance for Sentencing in Western Australia” (2017) 24 PPL 485
- I Freckelton, “Sentencing Offenders with FASD: The Challenge of Effective Management” (2016) 23 PPL 815
- I Freckelton, “Tourette’s Disorder and the Criminal Law” (2019 ) 27 JLM 223
- I Freckelton, “Autism Spectrum Disorder and Extradition” (2020) 27(1) PPL 181
- I Freckelton “ADHD and the Criminal Law” (2019) 26 PPL 816
- I Freckelton, “Expert Evidence about ADHD” (2023) *Bond Law Review* (in press)

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