



The Legacy of Childhood Trauma:

Considerations for Sentencing

Brendan Lloyd PhD, January 2016

What special considerations could or should be given to an adult, who appears before a court for sentencing, who was subjected to childhood trauma? In other words we're talking about a person who suffers from the legacy of childhood trauma and how this fact could or should influence a magistrate or judge in calculating a sentence for that person as an adult. I believe there is a strong argument here for some consideration.

Take for example the Case Law where special considerations are given to people with intellectual disabilities, namely in *Muldrock* (2011) and *Dawson* (2013). It is possible to isolate in these two cases the special consideration that was given to these offenders.

In *Muldrock* a 30 year old man with a mild intellectual disability was sentenced for the opportunistic sexual assault on a boy of nine. In *Dawson* a 55 year old man with a borderline intellectual disability was sentenced for five counts of sexual assault on the 15-16 year old daughter of his *de facto* partner.

The special consideration that was common to both *Muldrock* and *Dawson* is in relation to establishing contrition and remorse. In both cases these men either denied and diverted blame or blamed the victim. In normal circumstances this type of diverting or blaming is seen as an expression of the offender's criminality and does not go well for the offender in sentencing. But in both *Muldrock* and *Dawson* the appeal judges took the view that the diverting and blaming was an expression of the intellectual disability, not of criminality. So that's the point; allowances were made to favour the offenders in the case of intellectual disability.

With intellectual disability it is easy to see how the disability itself would bring into question all sorts of assumptions that would apply to someone of adequate or high levels of intellectual ability. The whole question of *mens rea*, the guilty mind, becomes uncertain and even doubtful in the face of a clear intellectual disability. This particularly applies when you are able to talk with the offender and it becomes clear that he or she is not really able to comprehend the problem and the process for remedy. Also, with intellectual disability a psychologist can quantify the degree of disability from *borderline* (IQ in the 70s), *mild* (IQ in the 60s),

moderate (IQ 40s and 30s) and *severe* (IQ below 35).

The same simplicity and certainty cannot apply in any immediate sense to people who suffer from the legacy of childhood trauma. Of course a psychological assessment would reveal the facts. A psychologist is fully equipped to take a history, to apply psychometrics, and thus draw conclusions and even provide a diagnosis. This assessment would not necessarily try to establish a connection between the diagnosis and the commissioning of the offense, no, this is not the point. The point is whether the current diagnosis can be explained as the legacy of childhood trauma.

Offenders who suffer the legacy of childhood trauma potentially are in danger of disadvantaging themselves purely through the expression of their personality. In other words their presentation in court could be prejudicial to their intention. This point is clearly demonstrated in Hart (2013) where a 26 year old man pleaded guilty in the district court to a charge of robbery whilst armed with a dangerous weapon. Such an offence has a prescribed maximum penalty of 25 years imprisonment. The offender here received a sentence of 4½ years with a non-parole period of 2 years and 8 months. This was the discounted sentence for a plea of guilty at the earliest opportunity. It was also his first indictable offense.

The offence took place early one Sunday morning in 2011 at a service station at Chippendale, Sydney. The offender and another man arrived on the scene by taxi. Both men were "dressed in female clothing, the [offender] was wearing heavy makeup, a blonde long haired wig, a pink t-shirt, a black hooded jacket and high-heeled boots. He was carrying a purse." The manner of dress was not seen as relevant to the commissioning of the crime as such.

The offender entered the retail section of the service station where there was a solitary console operator sitting behind a wire security barrier. The offender threatened the console operator with a Taser by causing it to arc several times and then took off with all the cash from the draw.

For sentencing, the subjective case included a psychologist's report, which stated this is "one of the most troubling histories that I have encountered in thirty years of clinical practice".

The offender's parents split up when he was about 4 years of age and he lived for ten years back and forth between the households. At around the age of 14 his brother hung himself from a tree in the backyard after an argument with his mother. The offender was the one who cut the brother down; then soon after his older sister committed suicide after the birth of her child and in association with a drug addiction.

After the death of his siblings the offender dropped-out of school and he "drifted into serious drug use, including, at times, heroin, cannabis, cocaine and ecstasy. He ... described auditory and visual hallucinations as well as delusions and, although not hospitalised, he has been placed on anti-psychotics". The psychologist also reported the use of crystal amphetamine (Ice), as part of the offender's drug of choice. The psychologist diagnosed post-traumatic stress disorder and poly-substance abuse disorder.

The offender challenged the sentence in the Court of Criminal Appeal on the grounds that the "sentencing judge failed to have any or proper regard to the fact that the applicant was unlikely to re-offend and that the offender had good prospects of rehabilitation". The appeal failed mainly because the appeal judges were not able to see any evidence for the claim. The appeal judges were convinced that evidence apparently pointed in the other direction.

The appeal judges take the psychologist's report and use it to demonstrate the lack of evidence for the offender's grounds for appeal. The appeal judges start by focusing on the offender's "conduct and behaviour" in relation to his history of "illicit" drug taking. The appeal judges then focus on the offender's admissions about his "criminal behaviour and cross-dressing for prostitution to enable him to support his drug dependence and lifestyle".

The appeal judges then quote from the psychologist's report that states, "work focused upon relapse prevention, social skills training and general behaviour change will enhance the prospects of a better prognostic outcome". Here the psychologist's report is apparently used to support the idea that the offender is anti-social and morally corrupt in supporting a drug-dependent "lifestyle".

The appeal judges then finally focus on the offender's oral evidence. The offender is not candid about how he obtained the taser and why he had it. When he was asked about "how he intended to approach taking responsibility for managing the issues in his life", he said to the court "I'm seeing a therapist on a weekly basis

maybe, I don't know". These are all the wrong responses for the court's purpose. The court wants to see an offender who bends and yields to the authority, not someone who defies and trivialises the authority.

Everything about the offender is wrong. He seems to be out of control. There's the cross-dressing, the prostitution and the illicit drug taking; and there's the unexplained Taser. The psychologist says that the offender needs social skills training, presumably because the offender displays anti-social attitudes.

But this is the thing. A person such as the offender in *Hart* will always present as wrong. People who suffer the legacy of childhood trauma are the people who will bite the helping hand. It's like one plus one is two. These are the people who predictably make a bad situation worse. These are the people who will escalate an emotional display rather than defuse. These are the people who, like clockwork, create paradoxical intentions in their lives; paradoxical in the scenes of biting the helping hand. In other words, they will spit in your face to gain your respect. Of course it's wrong from the point of view of an emotionally stable person.

Interestingly, the only other offence the offender in *Hart* had committed was eight years earlier for "offensive language and resisting an officer in the execution of duty". It sounds like an offence in relation to an emotionally charged situation. It would fit the profile if that offence occurred within the context of a domestic dispute.

People who suffer the legacy of childhood trauma are often in a constant state of stress. They are often toppled into states of distress very easily. The most reliable trigger will be something, anything that somehow causes an awareness of invalidation. Like, by being asked, "what are you going to do about yourself?" An emotionally unstable person is likely to respond with a "far q" and/or say something like, "I could always kill myself if that would suit you".

Someone with the legacy of childhood trauma is likely to have two main features in their personality, namely *emotional instability* and *socially maladaptive behaviours*. Further to this there could be other features such as narcissism, histrionics, extreme defensiveness and sensitivity, projected anger, delusional ideation, simplistic solutions, cynicism, righteousness, impulsiveness, suicidal intention and self-harming. Denial and blame are default responses for an emotionally unstable person.

Paradoxical intention is the most damaging result for a person facing sentencing. In *Hart* the applicant sought to challenge the sentence. There was a paradoxical intention in the sense that he put out that he was unlikely to reoffend and that he was a good prospect for rehabilitation. What came back was disbelief and rejection.

In *Hart* the offender needed to match his presentation to his intention. From what I can glean from the Case Law, the offender is saying, by way of the appeal, "I won't do it again and I'll fix myself up". Then he needed to show the court an open and honest account of where he obtained the Taser, and then he needed to clearly articulate his need for treatment. Is that asking too much? Yes I do believe it is for someone who is before the courts for the first time and who suffers the legacy of childhood trauma.

In both *Muldrock* and *Dawson* the appeal judges took the view that the diverting and blaming was an expression of the intellectual disability, not of criminality; the parallel here for someone who suffers the legacy of childhood trauma is that their paradoxical intentions are likewise an expression of the childhood trauma not of criminality.

This article is not at all intended to critique the learned judges in *Hart* because the connection hasn't been made yet as far as I can tell. At the same time I can always take the opportunity to offer my tuppence worth on this topic whilst I'm at it. I would humbly submit that the solution would be to hold-off sentencing until the offender is able to make amends. The solution would be for the court to give the offender explicit instructions to correct his/her approach to the court. Then there would be a need for sufficient time with someone like a psychologist who is able to provide an assessment, qualified explicit coaching and a report.

Muldrock (2011), High Court of Australia, *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.

Dawson (2013), New South Wales Court of Criminal Appeal, *Dawson v R* [2013] NSWCCA 61
Hart (2013), New South Wales Court of Criminal Appeal, *Hart v R* [2013] NSWCCA 13.