

CRIME AND COMMUNICATION:
ABORIGINAL HEARING LOSS AND CRIMINAL LAW

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I am going to be talking to you today about hearing loss, an issue that you may think of as a health matter and wonder of what relevance does it have to criminal lawyers or the courts to be afforded a place on this program. So, firstly, let me briefly address this question of why is hearing loss something that criminal lawyers and the criminal justice system should be concerned with.

There are a number of reasons the criminal justice system should be concerned about hearing loss. Firstly, hearing loss may be relevant to the reason for the defendant having committed the act with which he is charged. Secondly, hearing loss may affect the individual's ability to participate within the judicial system- to give instructions to counsel, or respond to questioning in court.

Aboriginal people suffer from middle ear disease, *otitis media*, which causes conductive hearing loss, to a far greater extent than the non-Aboriginal community. Among non-Aboriginal Australians conductive hearing loss is largely restricted to early childhood. Hearing loss comes and goes dependent on the disease state. In the non-Aboriginal community middle ear disease most often involves infrequent bouts of short duration during early childhood which leaves no permanent damage. Among Aboriginal Australians middle ear disease is almost universal in early childhood and a large proportion of children have chronic middle ear problems throughout childhood and adolescence. While the disease state itself commonly resolves in adolescence, often by then permanent damage has been done to the ear drum or middle ear structures. This results in some degree of permanent hearing loss.

Prevalence studies have found that 25-40 per cent of people in Aboriginal communities have some degree of hearing loss compared with approximately two per cent in the general community (Kelly and Weeks 1991).

So it could be expected that at least a quarter of Aboriginal defendants and witnesses are affected by hearing loss. In fact it is likely to be a much higher proportion than this, due to the social consequences of hearing loss which make sufferers more likely to be dysfunctional within both Aboriginal and the wider Australian society and more likely to be apprehended and dealt with within the criminal justice system. There are two reasons for this. Firstly the social problems caused by the hearing loss may contribute to criminal or quasi-criminal behaviour. Secondly the confusion engendered by police interrogation may cause police to charge

them immediately rather than face the more difficult task of issuing warnings.

Severe hearing loss has been found to be associated with certain characteristic emotional reactions among non-Aboriginals including: depression, unreasonable suspicion, undefined fears and withdrawal from social contacts (Hellenberg 1981).

In America, Dr Thomas Crowe, Director of the Communication Disorders' Laboratory at the Mississippi State Penitentiary, has put forward the hypothesis that criminal behaviour may be linked, either directly or indirectly, to hearing loss. Crowe (1990 p43) suggests that for a severe type of hearing loss, the causal relationship between hearing loss and criminal behaviour is conceivably direct in that "*the hearing loss is severe enough to produce reactive frustration from feelings of social alienation*". Where the hearing loss is mild to moderate, there may be an indirect cumulative link to criminal behaviour through "*a developmental process that includes social, economic and medical disadvantage*." There is some support for this second proposition in the National Report of the Royal Commission into Aboriginal Deaths in Custody which noted that "*the effects of hearing impairment in educational achievement is commented upon in several of the cases (of deaths in custody)*"

As you know Aboriginal people are disproportionately involved within the criminal justice system. To what extent conductive hearing loss contributes to the statistics on Aboriginal crime is currently unknown. There would seem to be an urgent need for research to be carried out but to date there has been no formal research undertaken. However, there is substantial anecdotal evidence that suggests there is indeed a connection between crime and hearing loss. For further information on this I refer you to a forthcoming article in the Aboriginal Law Bulletin that I have written in conjunction with Sue Quinn, Jenny Blockland and Martin Flynn.

As a psychologist I have been asked to provide assessments for the courts on a number of Aborigines who currently have, or have had a significant hearing loss in the past. I have also been involved in researching the relationship between conductive hearing loss and behaviour problems among Aboriginal school children. The following summarizes some of the issues that have arisen in these cases and from my research.

It would be easy to think of hearing loss inhibiting communication in a specific situation which results in a crime being committed. However, this is too simplistic a way of viewing the social and psychological effects of hearing loss. The impact of hearing loss tends to be cumulative over an individual's lifetime,

resulting in problems in establishing normal social relationships and positive self regard. Hearing loss can have a pervasive effect on an individual's sense of connectedness to their family and community.

Those working with Aboriginal defendants should be aware that the defendant may be affected by social and psychological problems that are related to hearing loss. It may be helpful to outline some indicators of these problems and how these problems may be of relevance to the court.

One symptom of psychological and social problems among Aborigines is excessive involvement in teasing in childhood and adolescence. Teasing is very important as a form of social regulation in Aboriginal society. It provides social control exercised by humour rather than through hierarchical and coercive power relations between individuals; as is more the norm in exercising of Western social control. However, in Aboriginal society, excessive involvement in teasing is a symptom of social maladjustment; of not being accepted by the social group and of extreme attempts to influence others in the social group. In my experience, Aboriginal youths and adults with chronic hearing loss who have also been involved in excessive teasing, either as victims or perpetrators, have some degree of social maladjustment. Therefore questioning family and friends about the degree of involvement in teasing may help to determine if there are significant hearing related social problems present.

A consequence of being excessively teased is the experiences of social rejection and low self esteem. Antagonistic relationships with peers may be evident and often the individual may be socially ostracised outside their family. Individuals from low status families with hearing loss are liable to experience the highest levels of teasing and social rejection. This rejection can prompt a desire to be accepted by others. This desire for social acceptance may result in them being willing to be 'led' or 'urged' to do what others tell them to do, including illegal acts.

Language development, both in first and subsequent languages, is also often adversely affected by chronic hearing problems. Individuals may also adopt strategies to disguise their communicative disability. Most often this involves a reluctance to speak. However, to avoid their difficulties in listening being discovered some individuals adopt the strategy of speaking constantly in conversation, ignoring attempts to interrupt them.

The most severe communication difficulties of individuals with hearing loss are experienced in group situations. When communication is with one other person there are fewer problems. They often develop a close relationship with one individual who they rely on for support and help. This reliance

may extend to dependence on this person and on family members. An individual who appears highly dependent on family and friends for assistance with communication and in 'coping' with unfamiliar settings may have hearing related problems.

Some care needs to be taken in determining if an individual has communicative difficulties. Those who communicate on a one-to-one basis are likely to perceive there being minimal problems and not understand the problems seen by others. Close friends and family members are likely to report there are few communication problems but those less close are more likely to identify such difficulties.

The following list summarizes indicators to alert those working with Aboriginal defendants of the possibility of hearing and related communication problems.

Indicators of hearing related communication problems

- poor oral English,
- a low level of competence in their first language,
- extreme levels of shyness and reluctance to speak,
- tendency to talk constantly during interview,
- answering questions inappropriately,
- over-reliance on relatives or friends to assist with communication.

Individuals with hearing loss can cope best when they are in familiar situations, with people they know well. In these contexts their knowledge of what is likely to happen and what is going to be expected of them, helps compensate for their difficulties in communication. In unfamiliar situations they will often be uncomfortable and are likely to have major difficulties in coping if they are not supported by friends and family. A symptom of this may be that an individual with hearing loss will ignore or refuse to comply with demands placed on them. In these situations they are likely to be seen as trying to be 'cheeky'. This may prompt antagonism from others (including police) and instigate involvements in disputes and violence. This kind of communicative breakdown is exacerbated if alcohol is involved.

Because hearing loss limits normal social interaction, the social judgement of individuals who have experienced chronic hearing loss may be affected. There is a propensity to do what their family and community see as 'silly things', since they do not

understand legitimate ways to obtain their needs. There are often high levels of frustration for these individuals at the inability to obtain their needs successfully. Frustration is often expressed through acts of vandalism and property destruction.

The impact of hearing related communicative breakdown and poor social judgement will be most relevant to charges which arise when the defendant is in an unfamiliar situation, with people he is not familiar with, for example, when someone from a remote community is in an urban environment.

Difficulties in establishing relationships with age appropriate peers may also introduce levels of frustration which find an outlet in abuse of younger or vulnerable members of their community.

To summarize from my experience, an individual's hearing loss may be of relevance to the court in cases where there are:

- Acts of violence resultant from hearing related communication problems.
- Acts of property destruction related to expression of frustration at communication problems.
- Charges of sexual abuse when hearing related social problems contributed to difficulties in establishing appropriate sexual relationships.
- Where an individual has been 'led' or 'urged' to an illegal act because of a desire for social acceptance.
- Charges which arise when the defendant is in an unfamiliar situation, with people he is not familiar with.

Communication in Court

Verbal communication is dependant on hearing and speaking. If an individual has difficulties in hearing, communication with them and by them is going to be distorted. A defendant's ability to understand what is said and reply to questions put to them is likely to be adversely affected. This means defendants are disadvantaged in their ability to give adequate instructions to their counsel and to participate in court procedures. I am sure you are far more aware than I of the likely judicial consequences of this disadvantage.

Communication with Aboriginal defendants and witnesses is notoriously difficult. This difficulty has been thought to result from the major differences between Western and Aboriginal

socio-linguistic etiquette; for example, in expectations about eye contact and the obligation to answer questions. One judge commented that Aboriginal defendants spent most of their time staring out the window and when asked a question, either ignored it or mumbled inaudible replies.

This reluctance or inability to participate as expected in the criminal justice process obviously creates great frustration and concern to lawyers and magistrates. There has been much comment and consideration on the obvious disadvantage that Aborigines experience within the criminal justice system. This disadvantage has generally been ascribed solely to linguistic and cultural factors. I understand the Anunga rules were developed to try to provide some measure of protection for Aboriginal defendants.

However, I want to put to you the argument that communication difficulties of Aboriginal people within the criminal justice system are also contributed to significantly by hearing loss interacting with linguistic and cultural factors. Work that I have carried out within the education system indicates that this is what happens in classrooms (Howard 1991). Aboriginal children who have greatest difficulties in participating as expected in classroom processes are seen by their teachers to be "more Aboriginal" than other Aboriginal children. That is, they speak less English and have less awareness of Western social expectations. However, when hearing tests were carried out it was found that the students with least English and bi-cultural knowledge were students who had a hearing loss. It would seem that among these children, hearing loss inhibited the acquisition of English and understanding of Western social expectations that are needed to participate in an unfamiliar environment.

It is very likely that Aboriginal adolescents and adults who have some degree of hearing loss have least confidence in speaking English, particularly in unfamiliar settings such as in the courtroom or in giving instructions to legal representatives. Further, I would suggest that unidentified hearing loss contributed to the communication problems which prompted the enactment of the Anunga rules.

The physical environment in which interviews between defendants and their legal representatives take place may further compound communication problems. For example, in the Darwin Magistrates court, Aboriginal liaison staff report that the interview rooms present major problems in communicating with defendants. Conversation with defendants is muffled by a separating glass wall, and high levels of background noise result from the absence of separating walls from other interviews in progress. A contrast of a different but equally inadequate environment is Berrimah prison where the interview area is an

open air space without partitions. While there are no glass partitions the absence of external walls mean lawn mowers, passing aircraft etc. regularly intrude on conversation.

In these adverse listening conditions hearing impaired defendants are even more likely to refuse to answer questions they do not understand or mumble inaudible replies. In these circumstances the ability of their counsel to obtain reliable instructions is highly questionable. The type of demeanour engendered by hearing loss also disadvantages defendants in court.

Many experienced court officers are aware of differing socio-linguistic etiquette that contribute to Aboriginal court-room demeanour. However, there is the very real danger that the type of demeanour that could be expected of hearing impaired Aborigines in court (not answering questions, avoidance of eye contact, turning away from those attempting to communicate) being interpreted as indicating guilt, defiance or contempt.

Sentencing and Rehabilitation

Social and psychological problems related to hearing loss are also relevant when considering sentencing and rehabilitation

The effects of detention on an individual affected by hearing loss imposes a degree of social isolation, which detention is likely to exacerbate. For some individuals, who already have problems coping with the social isolation created by their hearing loss, detention may magnify their problems beyond their ability to cope. There is some anecdotal evidence that unidentified hearing loss may have been involved in some deaths in custody.

In some circumstances there may also be a risk of dependency of individuals with hearing related communication problems on correctional institutions fostered by long periods in detention. The structured and predictable routine of institutional life provides an environment where they may face fewer challenges and experience less confusion due to their communicative difficulties. For Aboriginal youths who have been social outcasts among their peers, the consistent attention provided by staff in supportive correctional institutions may provide a welcome, if artificial, form of 'social acceptance'. For an individual with an extreme degree of social dysfunction outside the correctional institution, detention may proffer the only alternative 'family' that seems viable, and/or may push them toward profound despair.

Rehabilitation may be better served by an individual remaining within their community with appropriate levels of support and supervision.

Unfortunately the options for rehabilitation are severely limited by the time an individual is involved within the criminal justice system. The options would be far wider for earlier health and education intervention. Fitting a hearing aid is an obvious first option. For some individuals this can result in dramatic improvements. For example, a dramatic change was noted in one adult Aboriginal male with a long criminal record after he had been identified as having a hearing loss and fitted with a hearing aid. He changed from someone who was socially isolated, uncommunicative and often violent to being a cooperative family and community member (personal communication). However, among adolescents, the sensitivity to being teased for being different is often an obstacle that inhibits regular use of hearing aids.

Further, support in relation to the social and psychological problems that hearing loss have contributed to would be advisable. At present there are not these type of support services available. A first step to providing these would be training for probation officers in social and psychological problems related to hearing loss.

Many of you may be wondering at this point, why is it that defendants who have a hearing loss do not let people know of their hearing problem? The short answer to this is that few Aboriginal adults who have a hearing loss are aware of the fact and many who are aware of it are too embarrassed about it to mention it. One Aboriginal man who was aware of having a hearing loss related that he was so embarrassed about his communication difficulties that he made a guilty plea rather than face questioning in court. Also, Aboriginals affected by hearing loss but unaware of their disability are liable to perceive their communication problems as due to their poor English language skills and/or prejudice against them individually or as Aboriginals generally.

Despite the high prevalence of hearing loss in the Aboriginal community it is rare that audiological assessment of Aborigines' hearing takes place. In recent times there has been some attention focused on identifying Aboriginal children's hearing loss, but almost none on Aboriginal adults' hearing loss. Even if hearing loss has been identified in the past it may not come to the notice of lawyers or the courts. Last year I was asked to prepare a psychological assessment of an Aboriginal juvenile whom I knew had been identified some years earlier as having chronic hearing problems. A hearing test indicated that he had a hearing loss at the time he committed the offences he was charged with.

In her judgment (The Queen v A.T.) Justice Thomas noted:

"These reports highlight the behavioural problems that can arise when a young person has a hearing impairment and the subsequent frustration and difficulties they face when they can neither properly understand what is said to them or make themselves understood in the community... I quote one section of the report prepared by Mr Howard in which he states: 'these communication difficulties have been a major contributor to the development of serious social and psychological problems. Angus has a negative self concept, low tolerance of frustration, and high degree of impulsiveness, together with a limited social intelligence'."

Conclusion

Hearing loss may contribute many cases of Aboriginal defendants brought before the courts. Awareness of hearing loss is a first step towards minimizing the potential communications problems the defendant has with counsel or in court. Knowledge of the current hearing status, and in some circumstances past hearing history, may be an important consideration for the defense.

Acknowledgements

I would like to thank the Liaison Officers of The North Australian Aboriginal Legal Service for background information provided. Also, Wendy Asche, Trish Burroughs and The Hon. Austin Asche QC for their helpful comments on this paper.

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