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Paths to Justice

Research in Brief

Access to Criminal Justice and FASD

**An Inventory of Programming for Youth and Adults
Who Have FASD and Are Involved with the Criminal Justice System**

Victim Services Workers' Experiences Working with Victims with FASD

Highlights from FASD Canadian Caselaw



I am pleased to introduce *Paths to Justice: Research in Brief*, a series of four short articles that describe current research dealing with access to justice, Fetal Alcohol Spectrum Disorder (FASD), and the criminal justice system.

Empirical research is important to inform the decision-making processes for developing legislation, policy, and programs. The Research and Statistics Division is committed to ensuring that its research is both relevant and timely so that policy makers' decisions are well-informed and resulting policy is evidenced-based. In these short articles, the authors have provided succinct, accessible summaries of on-going efforts in these areas with many questions and few known answers.

These four articles follow:

- Access to Criminal Justice and FASD
- An Inventory of Programming for Youth and Adults Who Have FASD and Are Involved with the Criminal Justice System
- Victim Services Workers' Experiences Working with Victims with FASD
- Highlights from FASD Canadian Caselaw

Much research work on FASD and the criminal justice system remains. *Paths to Justice: Research in Brief* highlights this need. I hope that these summaries spark many important discussions and I welcome your feedback on them.

Stephen Mihorean
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Ab Currie, Chief Researcher

It is frequently observed that the term *access to justice* has no precise meaning. It is one of those evocative concepts like the rule of law that, to no disadvantage, has the power to rally support around almost any issue of law or justice. However, access to justice can be understood more systematically in terms of its historical development since it first appeared in the lexicon four decades ago. The classic model of access to justice is the “three waves” model, famously stated by Cappelletti and Garth in the mid-1970s.¹ The first wave of the access to justice movement was legal representation for individual litigants and accused. The second wave was defined as the representation of diffuse interests in which legal action was aimed at achieving legal remedies for problems affecting groups or classes of people. The third wave was characterized as the development of a diffuse range of access to justice mechanisms, including public legal education, mediation, non-adversarial tribunals, the use of paralegals, and other mechanisms, all aimed at providing the appropriate solution taking into account the most appropriate resolution to the particular type of problem or dispute.

In its general form, the “three waves” model applies well to access to criminal justice.² The first and second waves of access to criminal justice are easily discernable as individual legal representation and, in the Canadian context, the litigation of Charter or rights issues under the *Canadian Charter of Rights and Freedoms*. The third wave of access to criminal justice has been slowly taking shape over the decades, beginning with the victim-offender reconciliation movement, evolving into the restorative justice movement and into the emergence of holistic or whole-client criminal defence, and, perhaps most prominently, into problem-solving justice expressed by drug courts, mental health courts, and community wellness courts. These initiatives all have the common objective of addressing the causes of criminal offending – mental health problems, substance abuse, or social conditions – and transforming the lives of offenders to the extent that they become able to take control of circumstances and conditions that are the precipitating factors of patterns of criminal offending. Preventing recidivism may be the outcome measure, but the desired changes are far more profound and durable.

A fundamental tenant of the third wave of the access to criminal justice movement is that criminal offending, family and relationship problems, other civil justice problems, long standing social problems in areas such as debt, housing, or employment problems, and mental or physical disabilities are interconnected problems in people’s everyday lives. In the seamlessness of everyday life, understanding and effectively dealing with one problem, in this case criminal offending, cannot be taken out of its context which, from this perspective, is the complexity of interrelated problems that may characterize individuals’ daily lives. This is the foundation of a fundamental principle of access to justice: that it is necessary to look at individuals’ legal problems from the point of view of the people who experience them.

Accused persons who are affected by Fetal Alcohol Spectrum Disorder (FASD) present the most challenging case-in-point for a modern access to criminal justice approach. The cognitive functioning problems that may be the main cause of criminal offending admit to no simple and definitive solution. The problem-solving approach may not mean for accused with FASD gaining control over the precipitating condition. It does mean taking into account the manifest FASD symptoms and the other problems that characterize the individual situation and applying the same basic problem-solving framework common to the main strains of the modern access to criminal justice approach, as in drug courts, mental health courts, community wellness courts, and holistic criminal defence. However, a sense of justice demands that something must be accomplished, as is currently being done in the other areas of access of criminal justice, although it is all a work in progress.

Providing access to justice for all Canadians involves serving the groups that have the greatest needs and are the most difficult to reach. At the same time, a progressive concept of access to criminal justice is demanding, requiring that more than the legal issues be addressed. Providing access to justice for individuals with FASD will be a great challenge. It is not by ignoring those in the greatest need that the country's commitment to justice will be judged; our commitment to justice will be judged through responding to those most vulnerable.

¹ Mauro Cappelletti and Bryant Garth , *Access to Justice: A World Survey*, Book 1, Part 1 (Milan: Sitjoff and Noordhoff, 1978).

² Albert Currie, *Riding the Third Wave: Thinking about Criminal Legal Aid from an Access to Justice Perspective* (Ottawa Department of Justice Canada, 2001).

By Charlotte Fraser, Research Analyst

Introduction

There is a dearth of information surrounding available programming for youth and adults with Fetal Alcohol Spectrum Disorder (FASD) in the justice system. This is due, in part, to the lack of awareness of the incidence of FASD among this population. This research note summarizes findings from an inventory search that identified programs aimed exclusively at persons with FASD involved with the criminal justice system.

Methodology

FASD projects were identified using a combination of different sources. The information sources included pilot projects funded by Youth Justice, Department of Justice Canada; the inventory of resources for individuals with FASD published by the Canadian Centre on Substance Abuse; the Canadian Northwest FASD Research Network website; provincial and territorial departments of justice; and a Google Internet search.

Managers of identified programs were contacted and asked to provide a thorough description of the program, including mandate, length of existence, recruitment procedures, if the program included persons suspected of having FASD or diagnosed or both, funding sources, sustainability, costs associated with operating, and whether the program had been formally evaluated.

Results

One hundred and twenty-five agencies were contacted by phone or email throughout Canada. As of June 2008, eight programs were operating, of which six were for youth and two for adults involved with the criminal justice system. Four of these programs had sustainable funding through their respective provincial jurisdictions or federal mandates. Only one of these programs has been formally evaluated. The eight programs are highlighted below.

Genesis House FASD Program, Westcoast Genesis Society, New Westminster, British Columbia

The Genesis House FASD Program offers transition housing and programming to adult male federal offenders released on parole. Genesis House opened in 2000 and is funded by the Correctional Service of Canada. Six of the 24 beds are reserved for clients suspected of having FASD or diagnosed with FASD. The costs associated with housing clients are \$290,000 annually. They also offer services for offenders once they are no longer under legal supervision (post-warrant of expiry) which are not formally funded.

Lethbridge Community FASD Justice Project, Lethbridge, Alberta

Operating since 2002, the Lethbridge Community FASD Justice Project aims to influence case management for youth suspected of having FASD, to divert youth from the criminal justice system where appropriate, and to make sentencing recommendations to the court. One police officer manages the program. The program is funded provincially by Alberta Children's Services. It costs \$117,000 annually to maintain this project. The program serves approximately 48 youth per year.

Youth Justice FASD Program, Maple Ridge, British Columbia

The Youth Justice FASD Program in Vancouver offers diagnostic services and specialized programming for youth on probation in the Vancouver area. Operating since 2003, the program is a collaborative effort between the Asante Centre for Fetal Alcohol Syndrome and PLEA Community Services Society of British Columbia. The program offers diagnostic assessment, family support services, and integrated community support services. The program is funded provincially by the Ministry of Children and Family Development. Each FASD diagnostic assessment costs approximately \$5,000, and the specialized programming offered by PLEA Community Services costs \$43,000 per youth.

FASD Youth Justice Project, Winnipeg, Manitoba

The FASD Youth Justice Project in Winnipeg offers diagnostic services and specialized programming for youth remanded to custody. The program began in 2004 and is a collaborative project funded provincially by Manitoba Justice, the Clinic for Alcohol and Drug Exposed Children, and the Manitoba Adolescent Treatment Centre. The program offers diagnostic assessment, provides sentencing recommendations to the courts, and creates a comprehensive case management and re-integration plan for youth and their families. It cost just under \$500,000 to operate the pilot phase of the program, which occurred over a 1.5 year period. It costs approximately \$7,000 for each diagnostic assessment. This program has been formally evaluated.

FASD Justice Support Project for Youth, Edmonton, Alberta

Beginning in 2004, a Steering Committee representing members from various Alberta government departments (e.g., Alberta Justice and Attorney General, Youth Criminal Defense, Edmonton Police Service) and community agencies was formed to assist youth with FASD (both suspected and diagnosed) involved with the criminal justice system. The Steering Committee develops a comprehensive case plan for each youth with the goal of having them succeed in the community. Youth are linked with various community agencies. The project can assist up to 24 youth per year, and in 2007 the project served 10 youth. There is no funding requirement for this project as the employers permit the Steering Committee members to work on this project as part of their regular employment duties. An evaluation is planned for 2008.

Yukon Community Wellness Court, Whitehorse, Yukon

In April 2007, the Community Wellness Court pilot project was launched and received two-year funding from the Yukon Department of Justice and the Department of Justice Canada. The court offers an alternative to custody for adult offenders with mental health problems, addictions, and/or FASD (both suspected and diagnosed). The court has a multi-disciplinary team that takes a holistic approach to healing and wellness. The team includes probation, mental health nurses, addictions counsellors, a support worker and a consulting physician and forensic psychiatrist. This program has received \$609,000 in total. As of June 2008, there were 13 clients in the program.

Empowering Justice Program, Winnipeg, Manitoba

The Empowering Justice program offers education and wrap-around support services to youth diagnosed with FASD who are on probation and have an extensive auto-theft history. The program offers education services and extensive supervision. The program is operated by a community-based agency called New Directions for Youth, Children, Family, and Adults, and began in 2007. The program received three-year federal funding from the National Crime Prevention Centre and had an operating budget of \$145,000 for the first year.

Kairos Youth Outreach Program, Thunder Bay, Ontario

The Kairos Youth Outreach Program began in 2007 and received two-year funding from the Department of Justice Canada. The program offers individualized outreach services for youth suspected or diagnosed with FASD who are in custody or on probation. Similar to the Empowering Justice Program, Kairos Youth Outreach Program offers wrap-around support services, including education, employment training, transportation, and intensive supervision. The program received approximately \$100,000 for its first year of operation. The program serves approximately 14 youth per year. An evaluation is planned for the 2008-2009 fiscal year.

No civil or family justice related programming or services were identified from the scan. Other pilot projects have been conducted which offered programming to this population, but ceased operating due to lack of sustainable funding.

By Charlotte Fraser, Research Analyst, and
Susan McDonald, A/Principal Researcher

Introduction

No empirical information exists on victims or witnesses who have Fetal Alcohol Spectrum Disorder (FASD) or victims of offenders who have FASD. This research note summarizes highlights from interviews with victim services workers who have worked with victims who have FASD.

Victim Services in Canada

Each province and territory in Canada provides assistance to victims of crime. The manner in which these services are delivered varies considerably between and within jurisdictions. System-based services are those located within the structure of the criminal justice system and often, but not always, provide assistance to victims throughout the course of their contact with the system (from police contact through court hearings). The model of delivery also varies in terms of whether full-time, paid workers or volunteers, or a combination of both, are delivering the services.

Methodology

A letter of information was sent in November 2007 to Directors of Victim Services across Canada and Crown Witness Coordinators in the North, asking them to identify workers who have experience working with victims who have FASD or victims of offenders who have FASD. Victim services workers who were identified were contacted to gauge their interest in participating in a telephone interview to discuss their experiences.

Questions focused on the victim services worker's knowledge of FASD, the type of victim services offered in their region, the challenges identified in working with this population, the strategies and approaches they used, and suggestions for how to improve awareness of FASD.

Results

Twelve semi-structured telephone interviews were completed between November 2007 and March 2008. Interviews lasted between 30 minutes and 90 minutes. The participants were from eight jurisdictions. The majority of respondents were employed in rural areas, and several also worked on circuit.

The types of victim services offered varied. Some victim services described by several respondents involved continued contact and support from first contact (police) to post-sentencing. Other respondents provided court-based support, which involved preparing witnesses for court and informing victims about court processes.

Victim services workers had previous experiences in other helping professions, such as child welfare or counselling. Most respondents had backgrounds in social work and several had studied FASD in their educational backgrounds. Several themes emerged from the results and are highlighted below.

Importance/Prevalence

All respondents felt that victim services workers should be aware of FASD. There was a consensus that FASD is under-diagnosed and that in many cases FASD is suspected and not diagnosed. One respondent commented that "it is much higher than we realize because it's either misdiagnosed or it's just not noticed at all." The perceived prevalence of FASD among their caseloads was highly variable and dependent on the respondents' knowledge of the characteristics of FASD as well as their particular regional jurisdiction. One respondent noted "different populations have different social issues going on. And I know for us this is one of the big issues within our communities here." The perceived prevalence of FASD among their caseloads ranged from a low of 1% to over half of respondents' case loads. Among participants who worked with victims who were children and youth, there was a perception that the prevalence of FASD was between 10-15%. For example, one respondent thought that "it's more prevalent in some of our youth and older teens, and they're blaming it on maybe drug usage or other things."

Challenges

One respondent provided an example of a child victim who had FASD and the trouble he had providing witness testimony. The respondent noted: “Nobody asked specific questions to get the information that was needed, and it never came out. And then here’s this kid who, for the first time in his life, had spoken out against his abusive father, got a strip torn off him by the judge because he was an unreliable witness.”

It was also noted that writing Victim Impact Statements is very challenging for victims with FASD. One respondent noted that “writing skills and writing comprehension is not their strong suit typically. They require a really concerted effort to assist them in summarizing emotionally how this crime has affected them.”

Several respondents noted that the delivery of victim services makes it very challenging to identify individuals who may have special cognitive or behavioural challenges, including FASD. These respondents noted that they often do not spend much time with victims, and sometimes they only speak with victims over the telephone.

Strategies and Suggestions

Several suggestions were provided with respect to strategies for working with victims who have FASD. A couple of respondents mentioned the importance of making victims with FASD feel relaxed, which could be done by providing them with a stress ball or giving them pen and paper for drawing. One respondent suggested that dealing with the victim in the present is the best way to help them, noting that “maybe they’re looking for a way to get something for dinner, and what your concern is, is about how they’re going to behave in the witness box. Help them with the immediate things and work up towards what they’re going to do in the witness box.” Several respondents reported that when providing referrals for victims who have FASD, respondents often make the appointment for the victim and sometimes accompany the victim to their first appointment to make sure they go.

Many respondents suggested that training identifying the behavioural characteristics associated with FASD and strategies for appropriately responding to victims and witnesses with FASD should be a priority for all criminal justice professionals, including victim services workers. It was also suggested that a written resource would be very useful, such as a book with best practices which provides concrete examples for individuals who work with victims who have FASD. Similar to results from other research on FASD, having access to diagnostic services was repeatedly suggested.

By Susan McDonald, A/Principal Researcher; Angie Colombi, Student;
and Charlotte Fraser, Research Analyst

Introduction

Persons with Fetal Alcohol Spectrum Disorder (FASD) who have come into contact with the criminal courts face special challenges whether as accused, victims, and/or witnesses. This research note summarizes a more in-depth review of Canadian caselaw involving persons suspected of having or diagnosed with FASD. It builds upon an excellent Web resource³ which provides a review of caselaw where “FASD” has been mentioned during court proceedings. The Web resource included published Canadian caselaw up until December 2005. This research note provides an overview of caselaw where “FASD” was mentioned *after* December 2005.

Methodology

Using QuickLaw, the following terms were used in searching criminal cases from December 2005 to March 2008: “fetal alcohol” (to capture “Fetal Alcohol Syndrome,” “partial Fetal Alcohol Syndrome,” and “Fetal Alcohol Spectrum Disorder”), and “Alcohol-Related Neurodevelopmental Disorder.” Published caselaw is not representative of the incidence of criminal offences involving persons suspected of having or diagnosed with FASD. Caselaw does, however, provide an overview of some of the important legal issues concerning persons with FASD.

Results

Forty-two criminal court cases mentioned FASD during the 15-month timeframe. The caselaw represented cases from every province and territory except Quebec, Nova Scotia, and Prince Edward Island.

Four cases involved victims who were diagnosed with FASD. The diagnosis of FASD among victims was not considered at sentencing for these cases. The remaining cases involved offenders who were suspected of having or diagnosed with FASD. FASD was more often diagnosed than suspected in the reviewed caselaw.

Common offences among accused persons with FASD included violent crimes, especially robbery. There were also some cases of sexual assault. Most accused persons with FASD had extensive criminal histories.

Compared to the caselaw review completed prior to 2006, there has been an increase in the number of reported cases that reference FASD, in particular cases involving youth.

There was no consistent approach to responding to offenders or victims with FASD mentioned in the caselaw. FASD was explicitly incorporated into the judicial decision making in ten of these cases. In three of these cases, FASD was considered in the judicial decision making in the context of the defendant raising the issue of FASD. For example, in *R. v. J.D.M.*,⁴ the defendant unsuccessfully tried to appeal the decision to register with the *Sex Offender Information Registration Act*, arguing that he was incapable of complying with the order as a result of his FASD. In *R. v. B.K.T.S.*,⁵ the defendant unsuccessfully argued to have two statements that he provided police deemed inadmissible. In *R. v. Jobb*,⁶ the defendant was found unfit to stand trial.

FASD was considered at sentencing in three cases. In *R. v. L.A.B.*,⁷ a 14 year-old girl was accused of second degree murder. Many factors such as her diagnosis of FASD, troubled upbringing, and lack of criminal record were considered in determining whether she should be sentenced as an adult. Ultimately, she was sentenced as a youth because her moral culpability was deemed insufficient to warrant an adult sentence. Having FASD appeared to be detrimental for the

offender in the other two cases where FASD was considered at sentencing (*R. v. Obed*⁸; *R. v. C.P.S.*⁹). In *R. v. Obed*, it was noted that the offender was an unrealistic candidate for rehabilitation due to his diagnosis of FASD. Similarly, in *R. v. C.P.S.*, the judge was unaware of any community treatment programs that could meet the offender's complex needs (as a result of FASD and other personal history factors); as such, he was given a custodial sentence.

Three cases involved applications or appeals for long-term offender or dangerous offender designation. In *R. v. Mumford*,¹⁰ an application for a dangerous offender designation was declined in favour of a long-term offender designation. The incurable nature of FASD was mentioned as one of the deciding factors for this decision. In the other two cases, the application for dangerous offender designation was approved. In *R. v. Vicaire*,¹¹ an application for dangerous offender designation was approved after examining personal history factors (FASD, neglectful upbringing) and lengthy criminal history. In *R. v. Otto*,¹² an appeal by the Crown to change the long-term offender designation to a dangerous offender designation was allowed. It was determined that previous attempts to hold the offender in the community had been unsuccessful.

In *S.D.F. (Re)*¹³ the youth offender, who was diagnosed with FASD, was transferred to an adult correctional facility due to his behaviour. It was noted by the judge that his behaviours (as a result of FASD) cannot override the safety of those at the youth facility.

The remaining cases that mentioned FASD appeared to include it as part of the facts of the case and did not impact judicial decision making.

Additional Cases Included

R. v. J.K.W. [2006] B.C.J. No. 313 2006; *Young v. Halverson* [2006] O.J. No. 3492 2006; *R. v. D.J.R.* [2006] B.C.J. No. 598 2006; *R. v. K.D.T.* [2006] A.J. No. 501 2006; *R. v. Stein* [2006] B.C.J. No. 1190 2006; *R. v. C.J.M.* [2006] B.C.J. No. 1536 2006; *R. v. T.K.* [2006] Nu. J. No. 15 2006; *R. v. Green* [2006] O.J. No. 3118 2006; *R. v. C.O.* [2006] N.W.T.J. No. 44 2006; *R. v. M.B.B.* [2006] A.J. No. 1175 2006; *R. v. Gauthier* [2006] N.J. No. 340; *R. v. D.W.* [2006] S.J. No. 683 2006; *R. v. Potter* [2006] S.J. No. 665 2006; *R. v. C.S.U.* [2006] S.J. No. 674 2006; *R. v. D.M.L.* [2006] A.J. No. 1517 2006; *R. v. Suarak* [2006] N.J. No. 366 2006; *R. v. Horeczy* [2006] M.J. No. 444 2006; *R. v. MacKenzie* [2007] B.C.J. No. 508 2007; *R. v. MacKenzie* [2007] B.C.J. No. 793 2007; *R. v. Faulkner* [2007] N.J. No. 46 2007; *R. v. Beaulieu* [2007] N.W.T.J. No. 17 2007; *R. v. Gares* [2007] A.J. No. 222 2007; *R. v. Faulkner* [2007] N.J. No. 90 2007; *R. v. Mustard* [2007] O.J. No. 1786 2007; *R. v. Dayfoot* [2007] O.J. No. 2869 2007; *R. v. Sisco* [2008] O.J. No. 157 2008; *R. v. Friesen* [2007] M.J. No. 364 2007; *R. v. Friesen* [2007] M.J. No. 365 2007; *R. v. S.A.P.*; J.I.D. [2007] No. 548 2007; *R. v. J.D.L.* [2007] A.J. No. 1280 2007; *R. v. Curtis* [2007] A.J. No. 1348 2007; *R. v. Pottle* [2008] N.J. No. 31 2008.

³ FASD Ontario Justice Committee. *FASD and the Justice System* (2007). Accessed June 18, 2008, from <http://fasdjustice.on.ca/cases/summary-of-legal-literature.html>

⁴ *R. v. J.D.M.* [2006] A.J. No. 1598 2006.

⁵ *R. v. B.K.T.S.* [2006] M.J. No. 458 2006.

⁶ *R. v. Jobb* [2007] S.J. No. 625 2007.

⁷ *R. v. L.A.B.* [2007] O.J. No. 4473 2007.

⁸ *R. v. Obed* [2007] C.N.L.R. 355; *R. v. Obed* [2006] N.J. No. 284 2006.

⁹ *R. v. C.P.S.* [2006] S.J. No. 418 2006.

¹⁰ *R. v. Mumford* [2007] O.J. No. 4267 2007.

¹¹ *R. v. Vicaire* [2007] N.B.J. No. 198 2007.

¹² *R. v. Otto* [2006] S.J. No. 303 2006.

¹³ *S.D.F. (Re)* [2007] A.J. No. 397 2007.