A NEED FOR CLOSER EXAMINATION OF FASD BY THE CRIMINAL JUSTICE SYSTEM: HAS THE CALL BEEN ANSWERED?

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ABSTRACT

Individuals with FASD exhibit deficits in many domains that can include memory, learning, behavioural inhibition, executive functioning, interpersonal skills, and language. These deficits have serious implications for affected persons when they become engaged in the legal system. In 2004, Moore and Green reviewed case law and psychological literature which suggested that FASD-related deficits placed affected individuals at a significant disadvantage in the justice system. According to them, this disadvantage stemmed from the limited awareness and knowledge of FASD demonstrated by key players in the justice system, as well as the scarcity of effective interventions in place to rehabilitate affected defendants. The aim of the current paper is to assess the extent to which awareness of FASD-related issues in the Canadian justice system has advanced since the publication of Moore and Green's conclusions. First, the deficits associated with FASD and their implications for the justice system are described. Next, recent case law and psychological evidence are reviewed as we consider issues of witness reliability and false confessions. The significance of FASD for sentencing, fitness to stand trial, and the Not Criminally Responsible by Reason of Mental Disorder defence are also briefly discussed. Finally, emerging system wide responses to FASD-related issues are presented. Overall, it appears that the call for closer examination of FASD by the justice system has been answered, but a need for increased education and awareness remains.

Key Words: *Fetal Alcohol Spectrum Disorder, justice system, deficits, awareness, false confessions, rehabilitation*

The term 'Fetal Alcohol Spectrum Disorder' (FASD) refers to a range of disorders that commonly afflict individuals who were exposed to alcohol in utero. The deficits associated with FASD hold serious implications for such persons when they become engaged in the legal system.[1-4] Moore and Green reviewed case law and psychological evidence which suggested that the numerous (and often invisible) FASD-related deficits placed affected individuals at a significant disadvantage in the justice system.[5] They also argued that Canadian police officers, defence counsels, prosecutors, and judges, much like the general public, knew very little about FASD. They called for more extensive training on FASD for these key players. Further, Moore and Green[5] and Green[6] recommended that best practice guidelines and strategies be developed to promote the sensitive treatment of individuals with FASD who navigated a justice system that was poorly equipped to rehabilitate them.

The object of the current paper is to assess the extent to which awareness of FASD-related issues in the Canadian justice system has advanced since 2004. First, the deficits associated with FASD and their implications for the justice system are described. Next, recent case law and psychological findings are reviewed as we consider issues of witness reliability and false confessions, largely as they pertain to children and adolescents. The significance of FASD for sentencing, fitness to stand trial, and the Not Criminally Responsible by Reason of Mental Disorder defence are also briefly discussed. Finally, important examples of broader initiatives targeting FASD-related issues are presented.

Fetal Alcohol Spectrum Disorder and Related Deficits

Prenatal alcohol exposure is almost completely preventable and can, to a large extent, be avoided. Nevertheless, approximately 9.1 of every 1,000 Canadian and American children each year come into the world with irreversible brain damage.[7] FASD is an umbrella term that refers to the range of non-hereditary, lifelong, neurodevelopmental disorders linked to prenatal alcohol exposure.[8] These disorders include Fetal Alcohol Syndrome (FAS), partial FAS (pFAS), alcohol-related birth defects (ARBD), and alcohol-related neurodevelopmental disorders (ARND).[9] For any of these conditions to be diagnosed, there must be evidence of growth impairment, craniofacial anomalies (for FAS), and a panoply of neuropsychological, social, and physiological difficulties linked to central nervous system dysfunction.[10-12]

Despite being the least common manifestation of FASD,[13] FAS is the most commonly known (and easily recognized) disorder on the fetal alcohol spectrum because of the hallmark facial abnormalities. These include short eye slits, a thin upper lip, and a flat philtrum (i.e., the groove between the nose and the lips).[14] Some have proposed that these facial characteristics help individuals with FAS fare better in the justice system and other institutions (e.g., school) because they make these individuals' special needs more salient.[8] Though relatively easy to identify early on, the facial anomalies associated with FAS become less prominent with age.[8,15] Further, this dysmorphology, or lack thereof, is not reflective of an individual's cognitive capacity.[16-18] In other words, a young person without these facial abnormalities could be as cognitively impaired as an individual who displays these facial features, but the former's impaired status would be more difficult to detect.

Only a small proportion of individuals with FASD are mentally retarded (i.e., IQ<70).[12,19] More generally however, alcohol-exposed individuals tend to function cognitively, socially, and emotionally at a level younger than their age.[12] Prenatal alcohol exposure impairs multiple domains of functioning. For instance, emotion regulation problems and mood disorders are commonly observed in individuals with FASD.[20] It is also difficult for them to concentrate on, and pay attention to, what they see and hear.[21] In addition to attention difficulties, individuals with FASD commonly show impairments in visual, visuo-spatial, short-term and delayed memory.[12,19,22] Because memory is instrumental in the process of learning, it is not surprising that individuals with FASD struggle in school.[22-24] Learning from their mistakes and understanding the consequences of their actions are equally challenging.[3] This may partly explain findings from one study in which, relative to parents of children with Attention Deficit Hyperactivity Disorder, parents of children with FASD reported significantly more often that their child felt no guilt after misbehaving.[25]

Executive functioning is also severely impaired in alcohol-exposed individuals. As a result, it is difficult for them to integrate knowledge and accomplish tasks that involve multiple brain areas simultaneously.[26] Their ability to plan, prioritize, reason, understand what is expected of them, and exercise good judgment is also impaired.[12,26] Individuals with FASD can have trouble generalizing information and may find abstract notions such as money, time, and math difficult to grasp.[12] Behavioural inhibition is also disproportionately diminished by exposure to alcohol.[27]

Language is another commonly impaired domain among individuals with FASD. They have low verbal IQ, have difficulty reading aloud, recalling verbal information, and show deficits in receptive and expressive language.[19,28] Evidence also suggests that the ability to understand the emotional components of a speaker's message (e.g., intonation) is impaired.[29] Impairments in executive functioning and language make it difficult for affected individuals to understand what they are told, however over the years they may learn to disguise their comprehension difficulties, and may feign an understanding that they do not possess.

Together, these difficulties in attention, language, executive functioning, and memory often contribute to impairments in social functioning. In one study, alcohol-exposed children with executive functioning problems had difficulty cooperating with others, starting conversations, making friends, and selecting an appropriate conflict-resolution method.[30]

In another study, when compared to nonexposed adolescents, alcohol-exposed teenagers were more concerned with minimizing negative consequences to themselves than others, and did not report normative affiliation values such as a desire to help family members and friends.[11]

Findings from a large body of neuroimaging studies are consistent with the behavioural manifestations of impairments in multiple domains of functioning.[26,31] The deficits associated with prenatal alcohol exposure are numerous and pervasive, yet no single profile has yet been identified.[18] As such, the diagnosis of any condition within the fetal alcohol spectrum is a complex process that should involve a multidisciplinary team of trained professionals.[14] It is therefore not surprising that FASD goes largely unnoticed by key players at all levels of the justice system.

FASD and the Criminal Justice System

There are many reasons why individuals with FASD become involved in the justice system. For instance, it is common for these individuals to perform at a lower level of moral maturity, which puts them at risk of committing illegal acts.[11] It is also difficult for individuals with FASD to control their impulses and 'do what they are told',[27] which includes respecting the law. Impaired social skills can result in rejection by peers. Social rejection—along with the ensuing allegiance to a deviant peer group— are related to a higher likelihood of delinquency.[30-33] The lack of appreciation for cause and effect renders FASD-affected individuals particularly likely to misunderstand the gravity and long-term consequences of their actions, nor do they grasp the purposes of legal proceedings in general. Evidence suggests that some Courts are beginning to grapple with many of the impairments linked to FASD.

In his review of 81 Canadian criminal cases, Sorge found that five deficits relevant to FASD were considered at sentencing with some frequency (less than 25% for all factors).[34] These factors included the accused's difficulty linking punishment to crime, risk of being taken advantage of in prison, compromised ability to instruct counsel, trouble deciphering right from wrong, and having been influenced by someone else to commit the crime. Judges also sometimes considered lack of insight and impulsivity as mitigating factors.

The frequency with which judges consider FASD-related mitigating factors in their dispositions varies greatly across provinces.[34] Surprisingly, Sorge found that the number of court cases in which FASD was mentioned was not related to provincial estimated prevalence rates. Yukon case law contains a wealth of FASD cases, with relatively few being reported from Québec and Ontario.[34] Similarly, of the 42 cases they reviewed, McDonald, Colombi, and Fraser found no FASD-related cases from Québec, Nova Scotia, and Prince Edward Island between 2005 and 2008.[35] Most of the cases they reviewed originated from British Columbia and Saskatchewan. Roach and Bailey also found that awareness of, and sensitivity to, FASD were localized primarily in the Northern Territories and Saskatchewan.[36]

Burd, Selfridge, Klug, and Juelson found that, in the entire Canadian correctional system, only 13 inmates had been identified as having FAS – a clear underestimate of the true incidence.[37] There is currently no FAS screening program in the Canadian correctional system. The identified inmates had received a diagnosis prior to entering the system.[37] Although Burd, Martsolf, and Juelson have devised four screening strategies for FAS intended for use in the correctional system, these strategies remain to be implemented and studied empirically.[38] Recent evidence suggests that there may have been a recent increase in the rates of assessment and identification. Sorge found that the cases tried in Saskatchewan courts between 1990 and 2006 were more likely to include a formal diagnosis, compared to cases in British Columbia and the Yukon Territories where FASD was frequently suspected, but not necessarily corroborated with a diagnosis.[34] In contrast, McDonald and colleagues found that when the issue of FASD arose, it was more often than not diagnosed in the 2006-2008 cases they reviewed.[35]

In light of the under-identification of FASD and the gravity of its symptoms, there is a high probability that individuals with FASD fail to understand their role in an offence, the consequences of their actions, legal proceedings, and the possible outcomes of these proceedings.

Consequently, the Court's ability to fairly judge these special needs defendants is seriously compromised. FASD thus carries implications for multiple aspects of criminal proceedings, from the investigation to sentencing and beyond (i.e., probation, supervision, custody). The following section provides a discussion of certain aspects of criminal proceedings for which FASD carries serious implications, namely witness reliability and capacity, the reliability of confessions, sentencing, fitness to stand trial, and the Not Criminally Responsible by Reason of Mental Disorder defence.[i]

Suggestibility and FASD: Reliability of Witnesses and Victims

Factors such as leading questions, coercive interrogation techniques, mental health problems, youth, intoxication, and a tendency to want to please others consistently result in unreliable statements, both in and out of the laboratory.[39-41] Even more caution is warranted when assessing the reliability of accounts of victims and witnesses with FASD, as their documented memory deficits and difficulty with planning and organizing undoubtedly affect the consistency of their accounts. In *R. v. B.K.T.S.*, the Manitoba Court described in detail some of the features of FASD that may impact affected individuals' recollection of events and their response to questioning:

> I am not going to review the complete list of possible impairments suffered by those affected with FASD, but generally, they can include the following: difficulties with memory, especially remembering things like appointments, losing belongings, and remembering what happened in the past…difficulties with complex and hypothetical reasoning, as opposed to concrete thinking; difficulties with understanding and processing language, especially if the language is complex and is presented quickly; tendency towards confabulation, that is, make up stories and mixing up real events that occurred in the past with imagined or made-up events to fit the question or the situation (para. 22).[42]

A recent survey of workers who assist victims and witnesses with FASD revealed that because youth with FASD are very concrete thinkers it is crucial to ask direct, specific questions when documenting the crime and during the trial.[43] If certain questions are omitted during the investigative portion, important information may be produced at the trial for the first time. In this event, the witness's statements would appear to be unreliable and inconsistent when they may not be.[43] The workers noted that, in light of their expressive language difficulties, writing Victim Impact Statements is also challenging for victims with FASD.[43] In a story-telling context, narratives were solicited from a small sample of children with and without FASD. Those with FASD elaborated concepts significantly less often than their normally developing counterparts. They also tended to decontextualize the story, thus making it harder for the listener to understand.[44]

In *R. v. Switzer*, the accused was found not guilty of extortion and threats of bodily harm because the 17 year-old witness with FASD provided inconsistent evidence with respect to the timing of the threat.[45] In *R. v. R.L.*, a 19 year-old youth was accused of sexually assaulting his younger, adopted, sister who had FAS. [46] Justice Spies allowed documentation of the complainant's FAS diagnosis, propensity to make false allegations, and inappropriate sexual conduct because it was deemed necessary for the defence and relevant to the victim's credibility. In *R v. Anderson*, Justice Veale demonstrated informed scepticism after the accused complained of memory problems because of "alcohol syndrome," saying:

> While I accept that individuals with FASD are suggestible and can be easily led in cross-examination, I do not believe that this was the case with Mr. Anderson. He was incredibly detailed in his examination-in-chief and simply could not keep track of his story in his cross-examination (par. 122).[47]

Although they enhance the risk of false or inconsistent statements, FASD-related deficits by no means render witnesses' accounts false or completely unreliable. For instance, in *R. v. R.T.*, the judge dismissed an appeal to overturn the conviction of a man for sexually abusing two of

[i] The case law and literature presented in this paper are by no means exhaustive. We provide an introduction to current FASD-related judicial issues. The reader is directed elsewhere for a broader discussion. [36]

his foster children who had FASD.[48] R.T. had claimed that the victims' statements, one of which reinforced the other, should not have been admitted at trial because both victims had FASD. Justice Finch ruled that FASD had not affected the reliability of the victims' statements in this case. Similarly, in another case, *Walle* was found guilty of manslaughter and not guilty of second-degree murder, based in part on the statements of a witness who had FASD.[49] The judge ruled that the witness's evidence regarding a statement made by the accused was not reliable, however his testimony regarding the accused's attitude after the crime was accepted.[49] In *R. v. R.L.*, Justice Spies used an expert's findings to gain a better appreciation of the complainant's diagnosis and help decipher which documents would be relevant to assess the complainant's tendency to confabulate.[46] He said:

> According to Dr. Stanley's papers…all those with FAS will have mental health problems that will meet criteria in the Diagnostic and Statistical Manual of Mental Disorders as well as other primary disabilities that they have been born with including confabulation which is often interpreted as lying, memory problems and they will be impulsive and have poor judgment. In addition, secondary disabilities may develop depending on the individual, which include disrupted school experience, trouble with the law and inappropriate sexual behaviour (para. 10).

Overall, these examples suggest that, when in doubt, the possibility of FASD can be determined with an assessment that would also shed light on the reliability of a witness' or victim's account.[36]

Suggestibility and FASD: The Risk of False Confessions

Confession evidence is one of the most influential forms of evidence shaping jurors' determinations of guilt.[50] Most people are unaware that innocent people can falsely confess under certain circumstances.[51] Although the exact incidence and prevalence of this phenomenon are not known, supportive evidence abounds.[52-54] Thus far, social psychological research has revealed several situational and individual characteristics known to increase an individual's vulnerability to confess to something he or she has not done.

In controlled experiments, manipulative tactics have resulted in confessions from innocent and guilty participants alike.[39,52,55] The possibility of a false confession also increases as a function of a person's degree of interrogative suggestibility, defined as the likelihood that a person will alter his or her account of events as a result of misleading information and social pressure during an interrogation.[56] Moreover, acquiescence to a person in a position of authority, social desirability,[57] and fear have also been linked to increased susceptibility to persuasion.[58] In light of the impulsivity, memory problems, language deficits, cognitive deficits, and executive functioning impairments related to FASD, alcohol-exposed individuals are at increased risk of making a false admission. Understandably, much care should be taken when interrogating an individual with FASD, as a confession elicited from an individual with a mental handicap or who is extremely compliant is of little value.[59]

In *R. v. B.K.T.S.*, an expert witness confirmed the accused's impairments in a report (i.e., ARND; borderline intellectual ability, Grade 8 reading level, memory deficits, attention problems, EF impairments) but could not comment specifically on his comprehension during the interrogation.[42] Justice Beard declared that the statements made by the accused were voluntary and therefore admissible, saying that:

> In my assessment of the accused, I have given significant weight to the testimony of the two experts regarding the limitations and coping mechanisms of a person with one of the FASD conditions. In the end, however, I have concluded that (par. 27)…the accused was a youth and he has a mental disorder, however, his rights were explained to him in a manner appropriate to a youth and I have already found that he understood those rights and in particular, that he did not have to answer any questions (par. 67).[42]

According to the Confessions rule, which arose from *R. v. Oickle*, an admission of guilt is deemed voluntary if produced with an operating mind, in the absence of promises, threats, and

oppression, and without police trickery that would "shock the conscience of the community" (para. 60-61).[60] All detainees are in need of protection against interrogation tactics that pose a risk for eliciting unreliable confessions. The right to counsel and the right to silence are supposed to provide such protection. Without them, a naive detainee may be at the mercy of aggressive strategies that can include tricks, inducements, lies, and various psychological ploys. A suspect who gets advice from counsel will invariably be advised to keep silent at all costs. Even with such advice, most suspects are hard pressed to maintain their silence in the face of constant police pressure to engage in a dialogue. *Without* such advice the right to silence virtually disappears. It is most improbable that a suspect with FASD could voluntarily and knowingly waive their 10b rights, much less their option to decline to speak to the police. There is thus an increased risk of unreliability for admissions obtained from FASD suspects.[36,59] Sadly, however, there is little incentive for police and prosecutors to discredit, or look beyond the seeming veracity of an admission of guilt, especially when it is consistent with the police theory of the case.[5]

In *R. v. S.M.B.*, the Defence argued that the accused, a 13 year-old boy accused of murder, had unwillingly made self-incriminating statements to the police who had failed to inform S. of his right to counsel.[61] The police admitted they had made no effort to determine whether S suffered from cognitive deficits or FAS. Two experts, a forensic psychiatrist and an expert on the neuropsychology of FAS, provided somewhat conflicting testimony regarding the conditions in which the statements were made. In the *voir dire*, Justice Sulyma concluded that the statements were inadmissible for the following reasons:

> Given how Constable Corbett kept talking despite S.'s lack of response, it is difficult to envisage how this 13 year old boy who had verbal and other deficits could have comprehended or acted on the avalanche of information being thrown at him (para. 114)…I accept Dr. Sutherland's opinion that S.'s cognitive deficits in attention and reasoning would have affected S.'s level of understanding of his options. I accept his assessment that Constable Corbett did not use appropriate methods to confirm S.'s comprehension and his view that although a lawyer was mentioned frequently by Constable Corbett, it is doubtful S. would know how to arrange for his lawyer to be there. Finally, I agree with Dr. Sutherland's conclusion that: "I don't think, given the interview and seeing the form, that anyone can say S. understood his rights and his own waiver throughout" (para. 119-120).[61]

Unreliable confessions and wrongful convictions carry an abysmal cost to victims and considerable cost to the state. It is therefore important to remain aware of the possibility of FASD to assist the Court in making an informed decision. The following strategies to promote informed decision making regarding individuals with FASD were highlighted in *R v. B.K.T.S.*:

> …removing distractions, such as noise and other activity; having a one-on-one discussion; speaking slowly; breaking down a complex phrase or idea into simple parts; repetition can sometimes help; having the person repeat back what has been communicated; and have the person explain what the phrase or idea means to them (par. 23).[42]

Sentencing

The number of court decisions that take FASD into account has increased over the past decade,[36] and FASD is still primarily considered at sentencing.[62-68] Sentencing an individual with FASD is a complex task for any Court, especially if the judge is unaware of the presence of important deficits. Sorge observed that expert testimony or reports provided by the defence appeared to increase the judges' appreciation of FASD-related issues.[34] Assessment reports also aided judges in determining a sentence. Sorge found that an existing diagnosis of alcohol-related disorder was linked to greater consideration of FASD issues at sentencing.[34] It is unsurprising that judges are more likely to consider FASD when a previous diagnosis exists than when FASD is only suspected or not mentioned by counsel. As noted earlier, the absence of a diagnosis and the sometimes subtle deficits displayed by individuals with FASD can make recognizing this disorder most difficult.

When making a disposition, judges consider six possible objectives: denunciation, deterrence, protection of the public, rehabilitation, reparations, and instilling a sense of responsibility in the offender (s. 718).[69] When it comes to offenders with FASD, issues of protection of the public and rehabilitation appear most relevant.[70] For instance, Justice Picard denied a 17 year-old defendant's application to remain in youth court because she deemed that the defendant's deficits were too great to benefit from the limited treatment options offered to young offenders, and the public would be best protected if he were to be moved to an adult institution.[71] Similarly, in *R. v. B.T.K.S.*, the judge sentenced the 15 year-old defendant with ARND to serve an adult sentence, as he deemed a longer sentence would be necessary for the youth to benefit from support programs, and believed long-term support to be essential for his rehabilitation.[72] In a recent judgment, Justice Cameron told Mr. Kendi, an accused who suffered from FASD:

> The Court is cognizant of the fact that Mr. Kendi has severe cognitive delays and has been diagnosed as FASD, and these are the reasons that he continues to fall into the system. But we have to reach a point, Arthur, where it is just too dangerous to be letting you out, because when you are out and you go drinking, you endanger others…For that reason, unfortunately, you are very quickly finding that the door is going to close harder and harder on you at the jail, because if we do not put you in jail, then we are not protecting people from the potential violence that you show when you are drinking. We certainly cannot stop you from drinking. You are the only one that can do that (par. 3).[73]

In Ontario, Mumford was designated as a long-term offender rather than a dangerous offender because the Court deemed his FAS could be treated and managed.[74] This decision was recently appealed and, fortunately, upheld based on FASD.[75] Justice Duval reached different conclusions in *R. v. Cook*, however, when she ruled that Cook should be designated as a dangerous offender on the basis of his long history of violent crimes and apparent lack of appreciation of the impact of his actions on others. Despite having never formally been diagnosed, expert witnesses in the case opined that certain of Mr. Cook's behaviours were consistent with FASD.[75]

Even if Courts considered FASD earlier during proceedings, as Roach and Bailey recommended, sentencing judges still face limited options.[36] Indeed, although a custodial sentence provides much needed structure and some programming to inmates with FASD, it also increases exposure to antisocial peers and allows for further victimization.[70] Further, programs specifically designed for inmates with FASD are both inadequate and scarce. Resources available after release from prison are also desperately needed.[36] Fraser identified a mere eight programs in Canada designed to assist offenders who suffer from a disorder on the fetal alcohol spectrum.[77] Six of these programs served youth, the others adults, and only one had been formally evaluated.[77] When programs are available in the community, there are limits to the amount of support judges can order for a given youth, and the time-limited nature of probation terms and related supervision increases the likelihood of the young person re-entering the justice system. A greater number of special programs and alternative sentencing options are required, as individuals with FASD do not learn from their mistakes and are unlikely to make progress in a conventionally recognized fashion.[3]

Nevertheless, some judges have attempted to adapt sentences to better suit individuals with FASD and accommodate their deficits. Specifically, Sorge found that British Columbia judges typically altered the length of sentences traditionally given for the offence in question in an attempt to meet the needs of the offender with FASD.[34] For instance, a youthful defendant suspected of having FAS was given a shorter sentence than usual for aggravated assault because the judge deemed that his reintegration into the community would promote rehabilitation and found that continued imprisonment would only encourage negative behaviour.[62] In a Manitoba case, the appeal judge reduced the young offender's initial sentence, saying:

> …I conclude that the judge erred in failing to adequately consider the significant

> mitigating factors in this case and overemphasized the aggravating factors, as well as overemphasizing deterrence and denunciation, in considering an appropriate sentence for this first time offender suffering from FASD…the sentence is simply unfit for this offender and these offences (par. 20).[78]

Saskatchewan judges, on the other hand, were more likely to modify the type of sentence imposed (e.g., custodial, non-custodial) to increase the likelihood that the offender with FASD would have access to a location that would meet these offenders' special need for structure.[34] Although these modifications suggest increased awareness, Chartrand and Forbes-Chilibek recommended that the creation of mental health courts would be a more appropriate solution for offenders with FASD.[70]

Fitness to Stand Trial

A person is found unfit to stand trial if it can be demonstrated that the person does not understand the nature, object, and potential consequences of the proceedings, and cannot effectively instruct counsel (s.2).[69] The memory and language deficits associated with FASD could impair a defendant's capacity to adequately communicate with counsel.[36] Similarly, it would be difficult for individuals with FASD, who are concrete thinkers and tend to act impulsively, to fully appreciate the possible outcomes of criminal proceedings.[36] There are relatively few instances in which a defendant with FASD was found unfit to stand trial,[79-80] partly because the mental disorder defence was developed with the assumption that a disorder could be treated and mitigated, which is not the case with FASD, a life-long condition.[36] Roach and Bailey cautioned that a finding of unfitness to stand trial would not preclude detention or other forms of social control, partly due to public pressure or significant concerns about public safety.[36] They considered the risk to be significant for offenders with FASD, and encouraged counsel to seek an acquittal whenever possible.[36]

Not Criminally Responsible by Reason of Mental Disorder Defence

Contrary to the designation of 'unfit to stand trial,' where there remains reasonable doubt regarding the accused's responsibility in the offence, an individual found Not Criminally Responsible by Reason of Mental Disorder (NCRMD) has been found guilty of an offence. In the instance of NCRMD, however, the onus is on the defence to prove that the accused was unable to fully comprehend the consequences of his or her actions, and/or that these actions were morally wrong, because of a mental disorder.[81] From the previous discussion of deficits related to FASD, one can assume that FASD could, in some cases, undermine an accused's ability to form intent and appreciate the wrongfulness of his or her actions. The ability of FASD to render an accused NCRMD has indeed been determined in a few cases,[82-84] and FASD accounts for approximately three per cent of the cases that appear before Canadian review boards.[85] In *R. v. D.B.*, Justice Turpel-Lafond pointed out that *D.* differed from NCR offenders without FASD because he would never become fit, and did not pose a danger to society.[83] In a recent case, Justice Ruddy found the accused was not criminally responsible.[84] Although there was evidence of prenatal alcohol exposure, the accused in this case did not have a FASD diagnosis. Assisted by expert opinion evidence, the judge determined that the cognitive impairments resulting from his exposure to alcohol in utero, background of abuse, and epilepsy, together constituted a 'mental disorder', as did his schizophrenia symptoms.[84] The judge was also convinced that these disorders rendered Sam NCRMD. [84]

The extent to which deficits related to FASD truly cause one to be NCRMD must be determined on a case-by-case basis.[81] Overall, successfully raising a NCRMD defence based on FASD is very difficult to achieve because few judges are convinced that FASD-related impairments inevitably result in an under-appreciation of even the immediate consequences of committing a crime, or significantly impair an accused's moral judgment.[81] Determining the state of mind of an accused with FASD is no easy task. In his judgment, Justice Lilles explained that he could not consider the accused with FASD as NCRMD or unfit to stand trial because counsel had failed to raise these issues before sentencing.[86] He further quoted the following excerpt from a report based on a FASD and

Justice Conference held in the Yukon in 2008:

> Given the stringent criteria associated with defences of "Not Criminally Responsible due to Mental Disorder" and "Unfit to Stand Trial" in the Criminal Code, most individuals with FASD do not meet the thresholds. Instead, they are processed as fully responsible individuals with handicaps that are sometimes viewed by sentencing judges as mitigating, on other occasions as aggravating. (par. 25)[86]

The Emergence of System Wide Responses in Recent Years

Many Canadians affected by FASD have come into contact with the justice system since 2004. In response, broader initiatives concerning FASD and the justice system have emerged and they are slowly gaining momentum. In 2003, the Public Health Agency of Canada produced a framework for action for FASD as part of its Pan-Canadian FASD initiative.[87] The framework was developed to enhance the amount and quality of support granted to individuals with FASD across all sectors of government, including criminal justice, police services, and corrections.[87] The five broad goals of the initiative include: 1) increasing awareness and understanding of FASD among the public and professionals, 2) developing and increasing community resources for FASD (e.g., sharing of best practices, additional training), 3) developing national screening and diagnostic approaches, 4) enhancing knowledge of FASD and promoting the dissemination of this knowledge, and 5) increasing funding and support for action on FASD.[87] Goals identified specifically in the context of corrections, justice, and police services included increased training to ensure the safety and appropriate care of individuals with FASD in residential settings, preventing the "revolving door" phenomenon, ensuring that special needs are considered in the sentencing of affected individuals, calling upon community-based supports to facilitate the reintegration of people with FASD into the community, and increasing police officers' training to promote a more sensitive response to victims, accused persons, and witnesses with FASD.[87]

As part of this broader initiative, the Public Health Agency of Canada supported the publication of Canadian guidelines for the diagnosis of FASD in order to promote the accurate assessment and diagnosis of this spectrum of disorders. It also helped First Nations and Inuit communities establish substance use treatment facilities in an effort to prevent FASD.[87]

Efforts continued in 2008, when a conference was held in the Yukon Territories to address FASD and justice issues.[88] During the conference, not only were the implications of FASD on access to justice discussed, but programs and initiatives designed to assist Canadian youth and adults with FASD who are in conflict with the law were identified. Overall, the recommendations that emerged from the conference mirrored the goals of the government's framework for action for FASD. Specifically, they pertained to education and awareness, identification of FASD, information sharing and establishing partnerships, and treatment programs and initiatives catered specifically to the needs of individuals with FASD. This conference served as a catalyst for further initiatives across Canada. For instance, the Policy and Communications Branch of the Yukon Government's Department of Justice agreed to consider ways to make materials about programs and services easier to understand for all clients of the justice system. Further, Legal Aid Manitoba explored ways to improve the services they provide to people with FASD. Justice Canada and the Public Health Agency of Canada committed to pilot test existing training materials on FASD with different professionals across the justice system.[88]

With the help of the Public Health Agency of Canada and the Department of Justice Canada, the FASD Ontario Network of Expertise recently launched a website intended to increase public awareness of legal issues related to FASD.[89] The website provides information about FASD and its deficits, strategies and interventions, as well as the challenges these deficits pose when combined with legal issues. The website also offers synopses of case law involving FASD in many capacities and stages of court proceedings (e.g., pre-trial, sentencing, child welfare, aboriginal offenders, and reliability of confessions).

Offering this information in an understandable and easily accessible manner has brought much visibility to issues of FASD and the justice system. To date, the website has attracted over 730,000 visitors.[89] In addition to government

initiatives, FASD has recently been considered more closely by the Canadian Bar Association (CBA).[90] In a resolution produced last year, the CBA urged the federal government to reform criminal law in order to better address the needs of people with FASD. The resolution noted that FASD challenges the assumptions of voluntariness and one's ability to appreciate the consequences of one's actions. It also warned that the principles of deterrence and other sentencing principles were not valid with this population of offenders, that detention centers do not appropriately meet the special needs of these individuals, and that affected people have the right to have their behaviour judged on a standard they can actually meet, given their disability. Overall, the CBA supported the government's initiative to improve services for individuals with FASD. Further, the organisation urged the federal and provincial governments to 1) develop alternatives to the criminalization of affected individuals, 2) create policies to improve the lives of individuals with FASD and prevent them from entering the criminal justice system, and 3) amend sentencing laws to better address the special needs of affected individuals.[90] The government responded positively to the CBA's demand. In October 2010, Justice Minister Mr. Rob Nicholson met with provincial justice ministers to discuss FASD-related issues in response to the Canadian Bar Association's resolution.[85] Together, these initiatives suggest that awareness of the implications of FASD for the justice system is growing.

Current Awareness of FASD in the Justice System

To date, the call for the identification of best practices and strategies for addressing FASD in the justice system has not been answered. It is clear that FASD is not going away and that affected individuals would benefit from an increased awareness of FASD among legal officials. Researchers have shown a growing interest in the implications of FASD for the justice system, and some have made efforts to catalogue FASD-related legal issues.[34-36] Findings suggest that knowledge of FASD is expanding, but awareness remains localized.[34,36] Broader initiatives such as the Yukon conference, the public health agency's FASD initiative, and the FASD and Justice website all speak to a growing consideration of FASD and justice issues.[88-90] They will hopefully ignite the development of further interventions, both broad and specific. Relative to the Canadian case law reviewed before December 2005, McDonald et al. reported an increase in cases in which FASD was mentioned, particularly in youth court, between 2006 and early 2008.[35] Nevertheless, FASD was an explicit part of the judicial decision making in only 10 of the 42 cases they identified.[35] Thus, despite some increased awareness, FASD-related deficits are not always appreciated as potentially mitigating factors. Much remains to be done, as can be seen in the sentencing of a 17 year-old young woman with FASD in *R. v. Bird*.[91] In this case, Justice Ross acknowledged that the accused struggled to learn from her behaviour, yet sentenced her to 9 years in prison so that she could experience the consequences of her actions, saying:

> …she has Fetal Alcohol Spectrum Disorder ["FASD"], which has a disinhibiting effect on behaviour and makes it difficult for individuals to learn new behaviours. FASD also makes it more likely an individual will be easily led by others, which a number of those observing Miss Bird have concluded is the case with her. Intelligence testing put her at the 7th percentile when compared to others her age. Her overall intellectual ability is in the "Borderline" range. She has also been described as having a lack of affective maturity: (par. 25).

> . . . the evidence is that she is capable of functioning in society. Before she may be permitted to do so, *she must experience meaningful consequences that will hold her accountable for her actions* (emphasis added; par. 53).[91]

FASD has serious implications on judicial proceedings, and judges are left with the challenging task of deciphering the impact of related deficits on the proceedings, often in the absence of a diagnosis. A survey conducted with 39 New-Brunswick judges and prosecutors revealed that both parties sought more education and training about FASD, especially around knowing when to order an assessment, how to improve professionals' ability to work with individuals with FASD, and developing a mental

health court to handle cases involving individuals with FASD.[92] FASD Justice Ontario's website provides a wealth of information regarding the aetiology of FASD, and the myriad legal issues stemming from it.[92]

CONCLUSION

Issues associated with FASD-related deficits surface more and more often in criminal proceedings. They continue to pose complex problems with respect to witness reliability, confessions, sentencing, fitness to stand trial, and the NCRMD defence. Of course, the justice system cannot and should not become a substitute for social services for individuals with FASD.[90] Victims, witnesses, offenders with FASD, and members of the Canadian justice system still have everything to gain from increased education and awareness, identification, information sharing and linkages with community resources, and the development of specialized programming.[90] Only when these advances are made will we see fewer cases like that of Kishayinew, a man with FASD who accrued 85 convictions and spent most of his adult life in prison.[93]

Many judges have made efforts to treat FASD offenders, witnesses, and victims sensitively and justly, however it is essential for counsel to bring forth the possibility of FASD early in the proceedings (preferably before sentencing) to best serve alcohol-exposed individuals. Court-ordered assessments and expert testimony can also be instrumental in aiding the Court in its truth-seeking function. What is the answer to the question posed in the title of this review? Has there been closer examination of FASD within the justice system? Yes, but there is a pressing need for increased education and awareness.

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