

The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing

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Introduction

“Fetal alcohol spectrum disorder” (FASD) is a non-clinical umbrella term that refers to a range of cognitive deficits associated with disabilities incurred when a mother uses alcohol during her pregnancy. Such disabilities are permanent and can result in a range of symptoms including poor memory, impulsiveness, inability to appreciate fully the consequences of one’s actions, and being easily influenced and even abused by others. In only some cases will FASD produce physical facial features such as thin upper lips, short eye slits and slightly recessed jaw that have been associated with fetal alcohol syndrome (FAS). Also falling within FASD are diagnoses of Fetal Alcohol Effects (FAE), partial Fetal Alcohol Syndrome, Alcohol-Related Neurodevelopmental Disorder (ARND), and Alcohol-Related Birth Defects (ARBD).

The exact incidence of FASD in the Canadian population is difficult to determine. A 1996 study found .5 births with FAS per 1000 live births but also estimated that alcohol related disorders could be 3 to 5 times higher than FAS. Other community studies have produced rates as high as 1 in 4 births with more recent estimates between 1 and 2 per 1000 live births.¹ It is clear from these estimates that FASD is a serious problem in Canada. It is thus not surprising that references to FASD in Canadian reported case law have been growing. Judges are starting to grapple with the problems presented by FASD throughout the criminal law from investigation to sentencing. As will be seen, however, references to FASD in the reported cases vary dramatically among jurisdictions in Canada with the most per capita references being made in the three northern territories

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¹ See generally Christina Kyskan and Timothy Moore “Global Perspectives on Fetal Alcohol Syndrome” (2005) 46 Canadian Psychology 153 at 154-5

and Saskatchewan, and with many of the most important decisions being made by a handful of trial judges. This suggests that awareness of FASD needs to become more wide-spread in the legal system. Many more judges including appellate courts may soon have to grapple with determining the relevance of FASD to their decisions concerning the admissibility of statements, fitness to stand trial, the determination of criminal liability, and sentencing.

The cognitive deficits associated with fetal alcohol spectrum disorder present a fundamental challenge to the standard assumptions of the Canadian criminal justice system. The justice system is premised on assumptions that people act in a voluntary manner that is determined by free will and that they can make informed and voluntary choices both with respect to the exercise of their rights and the decision to commit crimes. Such assumptions inform our approach to ensuring fairness in the investigative process with respect to the decision whether to talk to the police or to lawyers. At the trial stage, the accused is presumed fit to stand trial and not to suffer from a mental disorder that would exempt him or her from criminal responsibility. Exceptions have generally only been made under the mental disorder defence for extreme cognitive impairments that deprive the accused of the ability to understand the proceedings or to appreciate the consequences or wrongfulness of his or her actions. Contrary to the reality of the permanent brain damage caused by FASD, it is also assumed that mental disorders can be treated so that a person will eventually either be found fit to stand trial or to present no substantial danger to the public and therefore be safe to release.

The Crown has to establish some form of fault for criminal offences, but even with respect to subjective fault the focus is on whether the accused was aware of the prohibited risks of his or her conduct and not why he or she acted in such a manner. With respect to offences based on negligence including the serious offence of manslaughter, the law only allows consideration of the accused's personal characteristics if they render him or her incapable of apprehending the prohibited risk. Finally, similar assumptions about free will also influence much of the law of sentencing. The fundamental principle for sentencing adults is the retributive idea that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. The other purposes of sentencing for adults include specific and general deterrence, denunciation, incapacitation

, rehabilitation, and the promotion of a sense of responsibility in offenders. All of these purposes assume offenders are capable of making choices, understanding the consequences of their action and learning from their mistakes.

In short, Canadian criminal law is premised on assumptions about free will and individual responsibility, and temporary and treatable departures from that norm. These assumptions unfortunately do not fit well with what is known about FASD as a permanent form of brain damage that can often leave people with the basic ability to function but subject to memory loss, impulsivity and easily led by suggestions from others. In this paper, we will provide an overview of the issues that arise when someone with FASD encounters the justice system. We will examine the pre-trial, trial, and sentencing stages of the criminal process because of a belief that the FASD may be relevant at each of these stages of the criminal process.

Although some important preliminary work has been done with respect to the interaction of FASD and the criminal law² and Canada may be ahead of other jurisdictions in recognizing the problem, there is a need to better understand the growing jurisprudence in Canada that deals with FASD. Even more importantly, there is a need to evaluate how the criminal law can respond to the challenges of dealing with significant numbers of people with FASD who come into and may remain in the criminal justice system. Ignoring FASD will only make the problem worse and contribute to the increasing number of mentally disabled and Aboriginal people that are incarcerated.³ At the same time, those who advocate greater recognition of FASD in the criminal law should be careful to ensure that the solutions themselves do not impose greater harms on people with FASD.

The growing jurisprudence on FASD has been developed almost entirely by trial courts and is not uniform in its treatment of FASD, especially with respect to the taking

² See Julianne Conroy and Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: British Columbia Fetal Alcohol Syndrome Resource Society and Law Foundation of British Columbia, 2000); Timothy E. Moore and Melvyn Green, "Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System" (2004), 19 C.R. (6th) 99; Larry Chartrand and Ella Forbes-Chilibec "The Sentencing of Offenders with Fetal Alcohol Syndrome" (2003) 11 Health L.J. 35.

³ One study found that 31 of 40 offenders identified in the caselaw were Aboriginal while also warning of the problems of sampling error and stereotyping. Larry Chartrand and Ella Forbes-Chilibec "The Sentencing of Offenders with Fetal Alcohol Syndrome" (2003) 11 Health L.J. 35 at 40.

of statements and sentencing. The recognition of FASD by the court sometimes works to the advantage of the accused, but sometimes does not. For example, FASD sometimes is used as a mitigating factor in sentencing, but it has also been used as an aggravating factor with respect to concerns about future danger and the need for incapacitation or long term and intense supervision. Other developments such as decisions to find people with FASD unfit to stand trial by reason of mental disorder might be vulnerable to reversal if they were appealed and appellate courts continued to apply restrictive tests to determine when a person was unfit to stand trial. Appellate courts have largely not weighed in yet on how the criminal law will deal with FASD.

Outline of the Paper

The first part of this article will provide a brief overview of the nature and incidence of FASD. Readers should bear in mind that the authors are not trained in medicine or psychology but have, as lawyers, tried to understand the basics of FASD. The second part of this article will report the results of a survey of reported caselaw that was conducted in order to determine how frequently judges make reference to FASD in Canadian criminal law jurisprudence.

The remainder of the article will examine the growing jurisprudence about FASD as it affects various parts of the criminal process. The relevance of FASD in determining the admissibility of statements from accused, under both s.10(b) of the Charter and the common law voluntariness rule, will be examined. Special attention will be paid to the possibility that false confessions may be obtained from people with FASD and the related danger of wrongful convictions. The potential effects of *Oickle*⁴ and *Singh*⁵ on people with FASD will be evaluated as will the more protective approach for young people contemplated in the Court's recent decision in *R. v. L.T.H.*⁶

It should not be assumed that persons with FASD will only appear in the criminal justice system as the accused. The fourth part of the article will examine how identification as a person with FASD may affect the credibility of that person as a witness. The fifth part will examine the growing jurisprudence on whether and when people with FASD will be found unfit to stand trial by reason of mental disorder or

⁴ [2000] 2 S.C.R. 3

⁵ 2007 SCC 48

⁶ 2008 SCC 49

eligible for the mental disorder defence. Although the test for holding that a person is unfit to stand trial has traditionally been very restrictive,⁷ a number of trial judges have determined that accused were unfit to stand trial because of rather severe forms of FASD. As a result of the Supreme Court's decision in *Demers*⁸, it is now possible for a person who is permanently unfit to stand trial to obtain a stay of proceedings. Fitness to stand trial has commonly been thought to require a more extreme form of mental disorder than the mental disorder defence. Nevertheless, there are more reported decisions holding people with FASD to be unfit to stand trial than not criminally responsible on account of mental disorder. The sixth part of the essay will examine the potential relevance of FASD to the determination of criminal liability. This will include questions about the relevance of FASD to the determination of subjective and objective forms of fault, as well as its role in applying the modified objective standard that is used to administer defences such as self-defence, duress, and provocation.

The final substantive part of the essay will examine how sentencing judges have approached FASD. A threshold issue is the difficulties of obtaining assessments to determine whether an offender has FASD. At the same time, restrictions have been placed on judges in taking judicial notice of FASD. Another source of frustration for judges has been the lack of availability of resources to facilitate the ability of offenders with FASD to serve their sentences in the community. Cases where FASD has been used to mitigate punishment will be considered as will cases where FASD has implicitly or explicitly been used as an aggravating factor. We will examine how an FASD diagnosis may affect decisions such as whether to imprison an offender and how to craft conditions for release in the community. As a permanent form of brain injury, FASD cannot be cured but only managed. Many suggest that a structured and supervised environment are best practices with respect to people with FASD. Conversely, however, there is evidence that people with FASD may have trouble following the rules of supervision because of factors such as poor memories and impulsivity. As will be seen, there are no easy answers when sentencing people with FASD.

I. The Nature and Incidence of FASD

⁷ *R. v. Taylor* (1992) 77 C.C.C.(3d) 551 (Ont.C.A.); *R. v. Steele* (1991) 63 C.C.C.(3d) 149 (Que.C.A.); *R. v. Whittle* [1994]; *R. v. Morrissey* (2007) 227 C.C.C.(3d) 1 (Ont.C.A.).

⁸ [2004] 2 S.C.R. 489.

For a lawyer without special training, FASD is a difficult subject to research and understand. Research for this paper, for example, was started with a focus on fetal alcohol syndrome (FAS), but was then expanded to include the range of disorders, including fetal alcohol effects (FAE), that fall under the umbrella term “FASD”. The available literature that has been reviewed suggests that it is difficult to generalize about the effects of pre-natal exposure to alcohol on the fetus as it affects growth, the central nervous system, and cognitive abilities. An important factor for all those involved in the legal system is that FASD does not always appear to be easily recognized. Distinctive facial features are only found in the minority of people with FAS and this does not even capture the significant cognitive impairments that may cover the broader spectrum of fetal alcohol spectrum disorders.⁹ There is a danger that those with FASD without physical symptoms can be held “to higher standards than those with obvious developmental delays, facial dysmorphology, and mental retardation. Recognizing that something is absent is far more difficult than recognizing something is present.”¹⁰

The effects of FASD also appear to be quite variable. One study suggests that only 27% of clients with FAS and 9% of clients with FAE had IQ levels below 70, which are normally associated with a mental handicap.¹¹ As Drs. Conroy and Fast have observed “people with FAS/FAE can have a normal IQ but have significant impairments in memory, judgment, and adaptive living skills.”¹² A 1996 National Research Council report concluded that FAS “can be characterized by behavioral or cognitive problems that are thought to result from organic brain damage” and that frequently produce “problems with reasoning and judgment often recognized as a failure to learn from experience or to develop a logical approach to tasks of any type.”¹³ A 2003 study prepared for the federal Department of Justice warned about the lack of sound research on FASD and that “the

⁹ Julianne Conroy and Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: British Columbia Fetal Alcohol Syndrome Resource Society and Law Foundation of British Columbia, 2000) at 11.

¹⁰ *R. v. Gray* 2002 BCJ no 428 at para 33

¹¹ AP Streissguth et al, *Final Report of the CDC on Understanding the Occurrence of Secondary Disabilities in Fetal Alcohol Syndrome and Fetal Alcohol Effects* (Seattle: University of Washington, 1996). See also Ann Streissguth *Fetal Alcohol Syndrome* (Baltimore: Brooks, 1997).

¹² Conroy and Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* at 14.

¹³ Kathleen Stratton et al *Fetal Alcohol Syndrome* (Washington: National Academy Press, 1996) at 73.

reliance on anecdotal information can lead to the formation of stereotypes”¹⁴ and ignoring differences that may be relevant to the appropriate policies to be applied in each case.

There are many dangers when the legal system ignores FASD. For example, one 2003 study sought information from the provinces and the territories about the incidence of FAS in inmate population and obtained a response that only 13 inmates of a total of 148,797 had a reported diagnosis of FAS. This figure is astoundingly low, and well below even the most conservative estimates of FAS in the general population¹⁵. Given other studies of the incidence of FASD in high risk populations, this data suggests that not enough is done to diagnose and provide treatment for FASD in our prisons.

One striking feature that appears in some of the literature is the idea that people with FASD may be very vulnerable to abuse. One account states that people with FASD “have an overwhelming desire to have friends but, due to their social immaturity and ineptness, are often rejected by peers. One youth at school was beaten up three times in one day. He wanted friends and claimed, ‘I wasn’t beaten up. They just mugged me.’”¹⁶ On the other hand, a survey of Canadian case law that mentions FASD also reveals that people described with FASD have been accused and convicted of serious crimes including assault, sexual assault, and homicide.

II. The Growing Jurisprudence on FASD

To gather data on how often judges mention FASD, Quicklaw was searched by jurisdiction using the terms “fetal alcohol”, “FAS”, “FASD”, “FAE”, “F.A.S.”, “F.A.S.D.”, and “F.A.E.”. French language case law was not recovered using these terms. The English results were screened to eliminate subjects not related to fetal alcohol disorders and the cases retrieved were categorized as criminal, child and family service (CFS), or civil/other including cases dealing with divorce or common-law separations and custody applications, as well as claims in tort.

¹⁴ Paul Verbrugge, “Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice: A Discussion Paper” (Ottawa: Department of Justice, 2003) at 3-4.

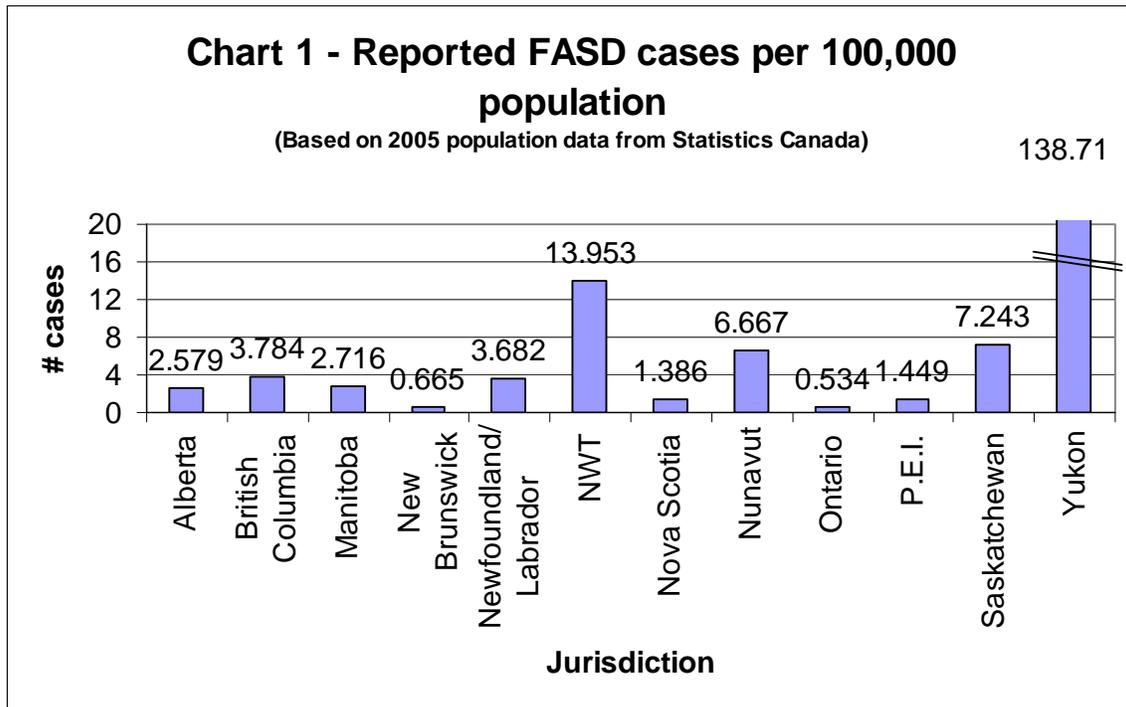
¹⁵ Larry Burd et al, “Fetal Alcohol Syndrome in the Canadian Corrections System” (2003), J. FAS Int. 1 The incidence was estimated to be 0.087 per 1000 offenders compared with a measure of 7.2 per 1000 revealed by one study in northern Manitoba. Robert Williams, Felix Odaibo and Janet McGee, “Incidence of Fetal Alcohol Syndrome in Northeastern Manitoba” (1999), 90 Canadian Journal of Public Health 192. Another estimate was that 10% of adults incarcerated in Winnipeg had FASD as quoted in Canadian Research for Law and the Family *FASD and Access to Justice in the Yukon* March 2008 at 20.

¹⁶ Conroy and Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* at 17.

The results from the above-described search and categorization were plotted in various bar graphs. The numbers are current to April 24, 2008. Although not in any way a statistically valid exercise, some interesting results can be noted.

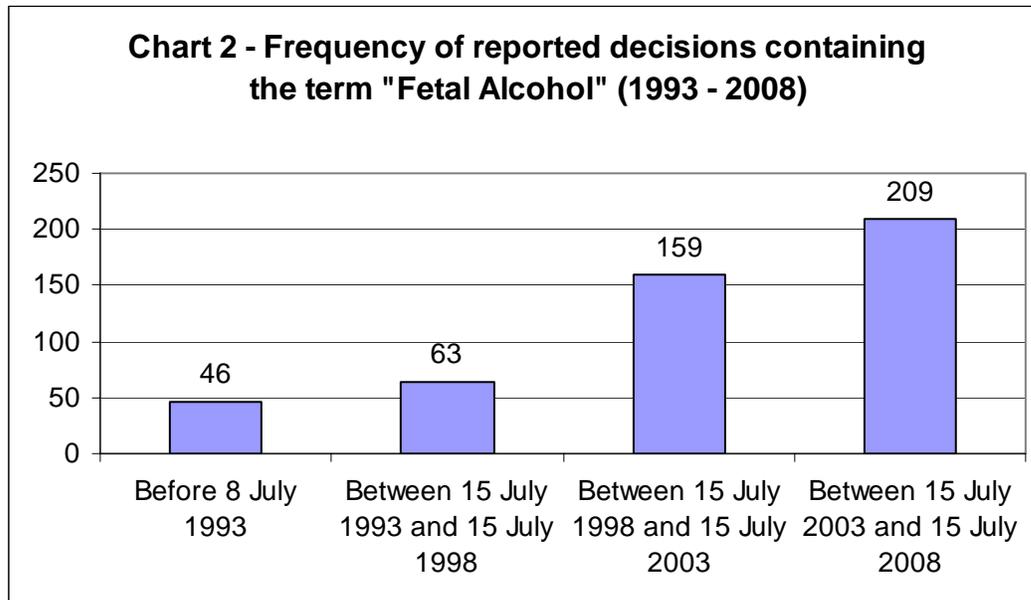
- 1) *In reported cases and especially at a broad, national level, FASD is considered most often in the context of criminal law. FASD is mentioned in 265 criminal cases compared to 165 child and family services cases and 76 civil cases.*

- 2) *Taking into account population size, FASD is considered proportionately more often in the northern territories than it is most southern provinces. In particular, the Yukon has published a high relative number of decisions that consider the FASD status of a party or an affected person (see **Chart 1**)¹⁷*



¹⁷ The numbers were generated by dividing the number of reported cases in a jurisdiction by the population of that jurisdiction. Population sizes were taken from 2005 Statistics Canada census data. For example, British Columbia had 161 reported cases and a population of 4,254,500 people, while the Yukon had 43 reported cases and a population of 31,000.

3) *Awareness of FASD in decisions has been increasing over the past fifteen years.*
(see Chart 2).¹⁸



What are the significance of these findings? FASD is most often dealt with under the criminal law. In many ways, this is not an ideal situation given the importance of preventing fetal alcohol syndrome, but it is also consistent with observations that the criminal justice system is being left to deal with more and more failures of social policy and the effects of mental illness, substance addiction, poverty, and despair. Another implication of the finding that FASD is mentioned disproportionately in the northern territories and Saskatchewan suggests that sensitivity and awareness of such issues are localized. This is also confirmed by the finding that the decisions that most comprehensively consider FASD and its implications seem to come from a small number of judges, and the issue often arises repeatedly in their decisions. This could indicate that sensitivity and awareness of the issues are somewhat localized. A final implication is that despite these regional variations, there is growing reference to FASD in the reported caselaw. FASD is a problem that is not going away. Lawyers and judges will increasingly have to deal with its implications.

¹⁸ Note that "fetal alcohol" was the only search term used here.

III. FASD and the Pre-Trial Process

Section 10(b) of the Charter

Many have characterized the effects of the Canadian Charter of Rights and Freedoms as a revolution in criminal justice in Canada and one that has increased access to justice, particularly in the pre-trial stage of the criminal process. The police now have Charter obligations not only to inform detainees and arrestees of the right to counsel, but to provide reasonable opportunities to exercise that right, including in many jurisdictions informing people that they can make free telephone calls to lawyers. It has been observed that Canadian right-to-counsel rules are broader and more equitable than their more famous American counterparts, the *Miranda* rules.¹⁹

There has been little research into the actual effects of such rights on the ground – let alone the effects with respect to people with FASD. American research suggests that many people who are given their *Miranda* warnings nevertheless go on and speak to the police.²⁰ One factor in explaining why many people talk to the police may be a lack of understanding of why one would want to talk to a lawyer or exercise the right to silence. Section 10(b) of the Charter is written in dense language that refers to the right to retain and instruct counsel. Only lawyers think in terms of retaining and instructing counsel, and there is some research demonstrating that young people have difficulties understanding right-to-counsel warnings couched in such legalistic terms.²¹ It is likely that people of all ages with FASD would have even greater difficulties both in understanding and exercising the right to counsel and right to silence.

One attempt to deal with the disadvantages that may be suffered by those with FASD in the criminal process is a card issued by the Youth Criminal Defence Office in Calgary to be carried by youths with FASD and which attempts to deny consent for searches or interrogations. It provides:

Medical Information for Police

¹⁹ Robert Harvie and Hamar Foster, “Different Drummers, Different Drums: the Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the *Charter*” (1992), 24 *Ottawa L. Rev.* 39; Kent Roach and M.L. Friedland, “Borderline Justice: Policing in the Two Niagaras” (1996), 23 *Am. J. Crim. L.* 241.

²⁰ Richard A. Leo *Police Interrogation and American Justice* (Cambridge: Harvard University Press, 2008).

²¹ M. Peterson-Badali, M., S. Care., & J. Broeking, , “Young people's perceptions and experiences of the lawyer-client relationship” (2007), 49 *Canadian Journal of Criminology and Criminal Justice*, 375.

I have the birth defect Fetal Alcohol Spectrum Disorder, which causes brain damage. If I need assistance, or if you need my cooperation, you should contact the person listed on the back of this card.

Because of this birth defect, I do not understand abstract concepts like legal rights. I could be persuaded to admit to acts that I did not actually commit. I am unable to knowingly waive any of my constitutional rights, including my right to counsel.

Because of my disability, I do not wish to talk with law enforcement officials except in the presence of and after consulting with a lawyer. I do not consent to any search of my person or property.²²

The effectiveness of such cards is not known. One precondition of effectiveness is that they be carried and used by people with FASD. Even if carried and used, it is uncertain whether they will effectively influence police and subsequent judicial behaviour. The cards are a creative attempt to deal with the reality that many police officers may not know that they are dealing with a person with FASD.

FASD has been raised in a number of cases involving statements and confessions to the police.²³ The 1996 case of *R. v. Henry* from the Yukon involved a man with fetal alcohol syndrome who was described as having “neurological damage such as mental retardation and speech defects” that resulted in an IQ of about 55 to 65, so that he “operates at a level of a seven-and-a-half-year-old child” and related “to authority in a child-like, passive manner and would have felt compelled to answer the police.”²⁴ The trial judge had little problem excluding initial incriminating statements that the man made to the police under s.24(2) because the police had detained and questioned the man in relation to the severe injury of another person without providing the right-to-counsel warnings required under s.10(b) of the *Charter*.

It is important that judges require that detainees be advised of the right to counsel in language that they understood and that waiver standards be adapted to the mental conditions of particular offenders if people with FASD are have equitable access to their

²² As quoted in Paul Verbrugge, “Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice: A Discussion Paper” (Ottawa: Department of Justice, 2003) at 9.

²³ A listing of some of the growing Canadian jurisprudence on FASD is available at <http://fasdjustice.on.ca/cases/index.html>.

²⁴ *R. v. Henry*, [1996] Y.J. No. 39 at para. 38 (Y.T.S.C.).

legal rights. In this vein, a 1997 decision by Oliphant A.C.J.Q.B. in the 1997 Manitoba case of *R. v. Sawchuk* is noteworthy. The case involved a man with FAS whose IQ was between 53 and 72 and whose mental age was between 7 and 9 years. His initial request for access to counsel was denied. When taken to the police station and informed of his right to counsel, he replied “No like I said, nope”, after a police officer stated, “There is a phone, do you want to call him now before I do anything further? It’s no big thing. I don’t want you saying that we didn’t let you phone your lawyer.”²⁵ This question by the officer suggests how a person could be encouraged not to ask for a lawyer or complain about his treatment afterward. In any event, the trial judge concluded that there was no valid waiver by the accused of his right to counsel on the basis that the accused “because of his mental condition, could not, in my opinion, have known what he was giving up.”²⁶ This decision is sensitive to the accused’s condition, but it does raise the issue of what might have happened and what, if any, remedy would have been available had the police provided the accused with a full opportunity to contact counsel. Access to counsel is an important part of constitutional justice in Canada, but it is not likely to be overly helpful for many people with FASD and will not be sufficient to ensure that they are not taken advantage of in the justice system.

The Voluntariness Rule

In *R. v. Henry*, the accused was interrogated after his initial encounter with the police. In this subsequent interrogation, the accused was provided with the right to counsel. Indeed, McCallum J. observed “the officers treated Joey with sympathy, understanding, and patience. With some people, regrettably, there is only so much that can be done to assure compliance with s.10(b) of the Charter and to assure voluntariness.”²⁷ This conclusion was supported by the testimony of an experienced RCMP officer “that even with all the precautions they had taken, he still had some doubt that Joey understood his s.10(b) rights.”²⁸ In the end, the trial judge excluded the subsequent statements on the basis that they were involuntary under the common law. He was assisted in this decision by the fact that the full interview had been videotaped and by

²⁵ *R. v. Sawchuk*, [1997] M.J. no. 186 at para. 35.

²⁶ *Ibid.* at para. 67.

²⁷ *R. v. Henry*, [1996] Y.J. No. 39 at para. 33.

²⁸ *Ibid.* at para. 35.

testimony from a forensic psychiatrist that the accused would have difficulty understanding the consequences of making a statement. In many cases, of course, there is no videotape of the interrogation and no expert evidence about the effects of FASD. But access to justice for those affected by FASD – even in the limited form of enforcement of the existing legal rules – will often require that the judge possess full and accurate information, not just about the accused’s encounters with police, but about FASD itself.

McCallum J. in *R. v. Henry* concluded that although there was “no oppressive conduct by the police”, there was “evidence of lack of cognitive ability and lack of appreciation of consequences, which raises a reasonable doubt that the statements were voluntary.”²⁹ This decision is an important one that raises squarely the issue of whether even full compliance with s.10(b) of the Charter will be sufficient for some people with FASD, as well as the possibility that the common law voluntariness rule could be used as a more flexible instrument to ensure that people with FASD are not unfairly taken advantage of in the investigative process. Other courts have excluded confessions from people with FASD on the basis that the police conduct “while perhaps not oppressive in terms of an individual with a normal developmental state, did become oppressive”³⁰ given the police awareness of the accused’s mental condition. This raises the question of the standard that should be applied when the police are not aware of the accused’s condition. The proper focus in such a case would be whether objectively the police should have known about the accused’s condition and whether objectively the accused’s statement was involuntary. Lack of knowledge by the police should not necessarily result in a finding that the statement was voluntary.

As a result of the Supreme Court’s recent and controversial decision in *R. v. Singh*³¹, the voluntariness rule has also subsumed the Charter right to silence. In other words, a voluntary statement will accord with the right to silence while infringement of the right to silence will result in a finding that the Crown has not established that the confession is voluntary. The finding that persistent police questioning in the face of refusals to speak did not produce an involuntary confession in *Singh* would cause concern if applied to a person with FASD. There would be a need to apply the confessions rule in

²⁹ *Ibid.* at para. 42.

³⁰ *R. v. Bohemier*, [2002] M.J. No. 313 at para. 46 (Q.B.).

³¹ 2007 SCC 48.

a manner sensitive to the realities of FASD. Nevertheless, there are still some benefits in using the voluntariness rule as opposed to the Charter, including the burden placed on the Crown to prove voluntariness beyond a reasonable doubt, the automatic exclusionary remedy once the Crown fails to establish voluntariness and the fact that judges at preliminary inquiries can exclude evidence under the common law but not the Charter.³²

False Confessions, *Oickle* and the Voluntariness Rule

One of the dangers of the suggestibility of some people with FASD is that they may be persuaded to provide false confessions to the police. Drs. Conroy and Fast have observed that “on repeated questioning, the individual with FAS/FAE, who is often susceptible to suggestions of what might have happened, may incorporate these suggestions into his or her own retelling of the event”.³³ Other researchers with an interest in false confessions have raised concerns that those with mental conditions similar to those with FASD may make false confessions.³⁴ There has been at least one case of a false confession that resulted in a wrongful conviction of a person with FAS in the United States, albeit one that should have been prevented by a competent police investigation before charges were laid.³⁵ The Simon Marshall case from Quebec provides an example of a person with a mental disability who pleaded guilty to 15 sexual assaults that he did not commit.³⁶ He served six years in prison before he was exonerated by DNA. He was beaten and raped while in prison and eventually awarded 2.3 million dollars in compensation.³⁷

The Supreme Court in *R. v. Oickle* has recognized that false confessions may produce miscarriages of justice and wrongful convictions. Although the Court in *Oickle* should be praised for recognizing the dangers of false confessions, confessions law may not be flexible enough to respond to the unique circumstances of people with FASD or

³² Gary Trotter, “The Limits of Police Interrogation: The Limits of the Charter” in Cameron and Stribopoulous, *The Criminal Justice and the Charter: 25 Years Later* (Toronto: Lexis Nexis, 2008).

³³ Conroy and Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* at p. 22.

³⁴ I C. Clare and G.H. Gudjonsson, “Interrogative suggestibility, confabulation and acquiescence in people with mild learning disabilities (mental handicap): Implications for reliability during police interrogations” (1993), 32 *British J. of Clinical Psychology* 295.

³⁵ *State v. Christoph*, 2000 WL 1854134 (Wash. App. Div. 3), cited in Timothy E. Moore and Melvyn Green, “Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System” (2004), 19 C.R. (6th) 99

³⁶ *R. v. Marshall*, [1997] J.Q. no. 4288, rev’d 2005 QCCA 852.

³⁷ “Mentally handicapped Quebec man receives millions for injustice”, *Globe and Mail*, Dec. 22, 2006.

the unique dangers that they may make false confessions. The Court's decision in *Oickle* focuses largely on police behaviour in the form of whether they engaged in threats, promises, or trickery or produced oppressive circumstances. Indeed the Court states that voluntary false confessions are not "of interest" because they "are not the product of police interrogation"³⁸, that coerced compliant confessions are the most common form of false confession, and that "fortunately, false confessions are rarely the product of proper police techniques".³⁹ The focus in the case was largely on what the police did as opposed to the mental conditions of the accused. The Court did not disapprove of police comments that suggested that the accused would feel better if he confessed but did not provide a quid pro quo.⁴⁰ The Court stressed that minor inducements, such as telling the accused that a confession would be good for him, would not necessarily render a confession inadmissible. Such an approach could have led to a different result in a 1999 decision in which the Alberta Court of Appeal held that a statement by a 13-year-old suspected of sexual assault, who was known by the police to have FASD, should be excluded because it was an improper inducement to tell the young person that a confession was the only way that he could be rehabilitated. .⁴¹ In that pre-*Oickle* case, the Alberta Court of Appeal was sensitive to the effects of on a young person with FASD of what might in other cases be unobjectionable police techniques.

Oickle has been criticized for its focus on police conduct as opposed to the personal characteristics of the accused, such as FASD, that may make them more susceptible to false confessions.⁴² Fortunately, there is some support for an individualized approach in *Oickle* because the Court did note "the need to be sensitive to the particularities of the individual suspect" and cited with approval statements by a researcher that:

False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make

³⁸ *R. v. Oickle*, [2000] 2 S.C.R. 3 at para. 37.

³⁹ *Ibid.* at paras. 44-45.

⁴⁰ *Ibid.* at para. 80.

⁴¹ *R. v. S.L.S.*, 1999 ABCA 41.

⁴² Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005), 30 *Queens L.J.* 601.

them prone to accept and believe police suggestions made during the course of the interrogation.⁴³

The doctrinal basis for such concerns about particularly vulnerable individuals is that part of the voluntariness rule that requires the accused have an operating mind.⁴⁴ The operating mind test, however, received only two paragraphs of brief discussion in *Oickle*, with much more emphasis being devoted to threats and promises, inducements, and trickery by the police. Even more troubling is that the Court in *Oickle* endorsed its previous 1994 decision in *Whittle*⁴⁵ that the operating mind requirement “does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment”⁴⁶. As will be seen below, *Whittle* also is the leading Supreme Court precedent on issues surrounding fitness to stand trial and it is not clear whether it is sufficiently sensitive to apply to the disabilities associated with FASD, especially those who do have very low IQs.

The Court in *Oickle* stated that the “operating mind doctrine should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule.”⁴⁷ Although the Court probably meant to relate the operating mind to the basic concerns about reliability and voluntariness, this statement can be interpreted as requiring judges to examine police conduct before excluding a confession as involuntary. The Court’s decision in *Singh* may also encourage this trend by collapsing the issue of whether the police complied with the right to silence into the voluntariness determination. Indeed, some of the cases involving people with FASD examined below show courts admitting statements that might arguably be involuntary because of a lack of an operating mind in large part because the police acted properly. This is an unfortunate approach because the operating mind approach should be seen as an independent basis for the exclusion of statements.⁴⁸ The dangers of collapsing operating mind tests with the other

⁴³ *Oickle* at para 42. See also *R. v. Spencer* [2007] 1 S.C.R. 500 at para 12.

⁴⁴ *R. v. Fitton*, [1956] S.C.R. 958; *Ward v. The Queen*, [1979] 2 S.C.R. 30; *Horvath v. The Queen*, [1979] 2 S.C.R. 376.

⁴⁵ [1994] 2 S.C.R. 914.

⁴⁶ *R. v. Whittle*, [1994] 2 S.C.R. 914 at 936 [Whittle]; see *Oickle*, *supra* at para. 63.

⁴⁷ *Oickle*, *supra* note 31 at para. 63.

⁴⁸ Professors Paciocco and Stuesser argue that the passage cited from *Oickle* above is “unfortunate because the ‘operating mind’ authority just outlined can only be understood as discrete or different from other involuntariness cases. The concern in these cases is with the impact that some intrinsic condition affecting the functioning of the mind of the accused has on his capacity to make voluntary statements. The concern is

components of the voluntariness rule are increased by recent cases that suggest that the accused's will may not be overcome even though the police are very persistent.⁴⁹ The best approach with respect to people with FASD may be simply to focus on whether they have an operating mind, and then only examine whether the police conduct has produced an involuntary statement if the accused has a basic operating mind. That said, there is little support for this approach on the authorities. Given the law, it is important for judges to view police conduct through the lens of the individual circumstances of a person with FASD, including concerns about their suggestibility and the possibility that they may provide a false confession.

Pre-*Oickle* decisions such as *Henry* which exclude confessions from people with FASD on the grounds that they have not been proven beyond a reasonable doubt to be voluntary tend to downplay the emphasis that the Court in *Oickle* placed on police conduct. More recent decisions demonstrate some reluctance to exclude statements in the absence of police misconduct. In the 2003 Alberta case of *R. v. Buffalo*,⁵⁰ the court admitted statements made by a prisoner who could not read or write and was described by the judge as "suspected of suffering from Fetal Alcohol Syndrome or some other intellectual deficit".⁵¹ The decision was made almost entirely on the basis of the police conduct and whether they had promised the prisoner a transfer from Drumheller Penitentiary or protective custody as an inducement. The trial judge held that the inducement was not sufficient to make the confession involuntary and stressed that the accused's "verbal skills are satisfactory and he has picked up some law from his time in prison."⁵² Some reports, however, suggest that people with FASD can have a superficial verbal glibness.⁵³

In a 2007 Manitoba decision of *R. v. Friesen*, the trial judge admitted three statements of an arson suspect with FASD. Schulman J. ruled that a new Charter warning

not with the conduct of authorities." David Paciocco and Lee Stuesser *The Law of Evidence* 5th ed (Toronto:Irwin Law, 2008) at 333

⁴⁹ *R. v. Spencer* [2007] 1 S.C.R. 500; *R. v. Singh* supra; *R. v. Oickle* supra.

⁵⁰ [2003] A.J. no. 1737 (Q.B.).

⁵¹ *Ibid.* at para. 48.

⁵² *Ibid.* at para. 49.

⁵³ Julianne Conroy and Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: British Columbia Fetal Alcohol Syndrome Resource Society and Law Foundation of British Columbia, 2000)

was not required when the police was interrogated at the police station despite evidence that the accused had a poor short-term memory.⁵⁴ The judge also held that there was sufficient threshold reliability to justify the admission of the statement despite some evidence that the accused was suggestible, and one example of him adopting a suggestion made by the police.⁵⁵ This decision demonstrates how the courts are reluctant to exclude evidence because of concerns about its reliability in cases where there is no proven police misconduct in the obtaining of the statements. In convicting the accused in this case, the trial judge also used the evidence of FASD, and in particular problems with the accused's short-term memory, to explain why some of the details that the accused supplied about setting the fire were incorrect.⁵⁶ This suggests that introducing evidence that an accused has FASD could in some cases work to the strategic disadvantage of the accused.

At the same time, it remains open to the trier of fact to assess the reliability of statements given by the accused in light of evidence presented about FASD. In the 2002 Alberta case of *R. v. Crane Chief*⁵⁷, the accused was acquitted in a judge-alone trial of first degree murder in part because the trial judge related the accused's confession to his suggestibility and the use of an extensive "Mr. Big" operation in which the accused, who had been diagnosed with ARND but not FAS, had been encouraged to confess to the crime. At the same time, a "Mr. Big" operation is also consistent with the post-*Oickle* trend identified above of only excluding statements as involuntary in cases where there is some police misconduct.

Statements from Young People

Section 146(2)(b) of the *Youth Criminal Justice Act*⁵⁸ provides that statements are also not admissible unless a person under 18 years of age has had various rights,

⁵⁴ The judge concluded "The interview took place minutes after the warning was given in Friesen's home. Despite Friesen's problem with short term memory he showed and awareness of his rights. No further *Charter* warning was required." *R. v. Friesen*, [2007] M.J. no 364 (Q.B.) at para 18..

⁵⁵ "Despite his problems Mr. Friesen is capable of telling the truth. His significant problem is in filling in details because of his short term memory problem. Although Mr. Friesen is suggestible, and there is one example of his accepting the suggestion of the police officer interviewing him, the bulk of the statement was unprompted and of his own making. The strongest evidence on the point lies in the spontaneity of his statement at his home and that his remarks were incriminating. ... [I am] satisfied beyond a reasonable doubt that the statements made were the product of an operating mind and otherwise voluntary ...*R. v. Friesen*, [2007] M.J. no 364 (Q.B.) at para 25.

⁵⁶ *Ibid.* at para. 12 (Q.B.).

⁵⁷ [2002] A.J. no 1706.

⁵⁸ S.C. 2002 c. 1.

including the right to have a lawyer or other adult present and the right to silence, and the statements can be used in court “clearly explained...in language appropriate to his or her age and understanding.” As will be seen, this places special obligations on the police with respect to young people with FASD.

In a 2006 Manitoba case involving a 15-year-old robbery suspect diagnosed with ARND and expert testimony on its effects⁵⁹, the trial judge concluded both that the accused had understood his legal rights and had made voluntary statements. In this case, the FASD evidence was used by the judge to explain his findings that the accused had lied about being threatened by the police.⁶⁰ In the end, the trial judge found that the confessions were voluntary because “there was nothing in the police treatment of the accused, the manner of questioning, or the circumstances of the questioning that was oppressive or even hinted of impropriety.”⁶¹ This decision underlines the danger of how under *Oickle* the emphasis can be on the police conduct as opposed to the mental condition of the accused. A 2005 Alberta case resulted in the exclusion of statements made by a 13-year-old with FASD on the basis of both Charter violations and lack of voluntariness. The court gave considerable weight to the fact that the boy had initially asked to see his lawyer, had indicated that he did not want to speak to the police, had been strip searched where he was visible to one of the female cells, and had been detained in the male drunk tank without a mattress.⁶² In the absence of such police misconduct, it is doubtful that the youth’s statements would have been excluded on the basis of a lack of an operating mind or unreliability.⁶³

The Manitoba case involving the 15 year old robbery suspect should now be re-evaluated in light of the Supreme Court’s recent decision in *R. v. L.T.H.*⁶⁴. This decision establishes that the Crown must establish compliance beyond a reasonable doubt with s.146(2)(b) of the *Youth Criminal Justice Act*. In that case, the police had been informed

⁵⁹ *R. v. B.K.T.S.*, [2006] M.J. no. 458.

⁶⁰ *Ibid.* at para. 55.

⁶¹ *Ibid.* at para. 69.

⁶² *R. v. S.M.B.*, [2005] A.J. no. 1647.

⁶³ The trial judge made a reference to the operating mind test and to the fact that it also applied to the waiver of the right to silence and the right to counsel, but did not base his decision on a lack of an operating mind: *ibid.* at para. 112,

⁶⁴ 2008 SCC 49

by the mother of the 15 year old accused that he had “a learning disorder”⁶⁵ and the interrogation was videotaped. The trial judge had a reasonable doubt about whether the young person understood his rights. Fish J. for the majority of the Court stressed the importance of an individualized approach to ensure comprehension by the young people including that the police must make a “reasonable effort”⁶⁶ to become aware of relevant factors such as learning disabilities.⁶⁷ An implication of this ruling is that police officers should make reasonable efforts to ascertain whether a young person has FASD. Although a young person’s prior involvement with the justice system is a relevant factor, the requirement of understanding and appreciation would apply to those who are “no strangers to the justice system.”⁶⁸ The Court also noted that judges should be aware of the dangers of false confessions from young people.⁶⁹ *L.T.H.* is an important precedent that could be used to assist young people with FASD, but it will not assist adults with FASD.

Summary

In order to ensure access to justice, including the rights to silence and counsel enjoyed by all suspects, it will be necessary for the police to make special efforts to accommodate those with FASD, and for lawyers and judges to be sensitive to the difficulties that those with FASD may have in understanding and exercising their rights and in appreciating the long term consequences of co-operating with the police. Both the informational and waiver standards in s.10(b) should be adapted to take into account the particular abilities of a person with FASD. This may be difficult for the police to do, especially in situations where they do not know that the suspect has FASD. Nevertheless, the jurisprudence has been clear that police fault is not required before a confession is excluded on the basis that the detainee was not properly informed of his right to counsel or did not make a voluntary and knowing waiver of the right to counsel.

Compliance with s.10(b) of the Charter will not, however, be enough to ensure that people with FASD are not taken advantage of in the pre-trial process. There are some signs that the common law rule that requires the Crown to prove beyond a reasonable doubt that a confession is voluntary may be more flexible and wide-ranging than the

⁶⁵ *ibid* at para 14.

⁶⁶ *Ibid* at para 30

⁶⁷ *ibid* at para 38

⁶⁸ *Ibid* at para 29

⁶⁹ *ibid* at para 33 citing *R. v. J.J.T.* [1990] 2 S.C.R. 755 at 766-67.

more discrete s.10(b) inquiry. Courts have excluded statements from people with FASD as involuntary even in circumstances where the police have made real efforts to provide the right the counsel in an appropriate manner. The Supreme Court's decision in *Oickle* should make all concerned more aware of the dangers of false confession. Unfortunately, there is some evidence that even in cases involving people with FASD, *Oickle* is being interpreted as focusing on police conduct more than the personal characteristics of the accused as they may affect whether that person has an operating mind. Nevertheless, the operating mind test remains a valid part of the voluntariness rule and the Supreme Court in *Oickle* did recognize the importance of examining the conditions of particular individuals.

IV. FASD and Witnesses

Just as FASD can affect the reliability of an accused's account of an event, so too can it affect the evidence given by a witness. Judges need to be alert to the issues that arise with a witness who has FASD, and must also be sensitive to striking a balance between protecting a vulnerable member of society and ensuring that the criminal burden of proof is met.

One extreme example of some of the problems that can arise when a witness has FASD is the Ontario case of *R. v. A.R.*⁷⁰. Here, the accused had been charged with a number of counts of sexual assault relating to two teenaged babysitters and his daughter, K.R.. K.R. had been adopted by A.R. and his late wife as an infant, and was significantly affected by fetal alcohol related issues. In the course of the police investigation, she was interviewed numerous times by both police officers and child and family service workers. The interviews took place over a two-and-a-half year period. K.R. had disclosed to one of her babysitters that she had been having sex with her father, but was initially reluctant to discuss the matter with family services or police. Eventually, however, statements were obtained from K.R. in which she disclosed having anal, vaginal, and oral sex with her father. While initially saying that the abuse had only occurred on one occasion, she later indicated that it had occurred several times. During direct examination at the preliminary hearing, K.R. said that she had sex with her dad ten times, but the number changed to 40 times in cross-examination, and still later K.R. testified that her dad had

⁷⁰ [2003] O.J. No. 1320 (S.C.), and see excellent discussion in Moore and Greene article, *supra* note 2.

been having sex with her daily since the death of her mother. As well, the details of the abuse changed and, as the case was being developed for trial, K.R. began to allege that her father had tied her down and used a vibrator on her, and that he had also raped one of the babysitters, a story that, despite the related charges, was not at all corroborated by their evidence. K.R. also began telling incredible stories about sexual encounters with other children.

In the result, the Court found that, despite the fact that much of the evidence of the accused was not worthy of belief, the Crown had not proven the case with respect to K.R. beyond a reasonable doubt. This was even despite the fact that Taliano J. attempted to consider K.R.'s evidence in light of her FASD, noting that “[g]iven her limitations, her evidence cannot be expected to be symmetrical”. In trying to understand K.R.'s evolving evidence, Taliano J. heard from Dr. Timothy E. Moore, a professor of psychology at York University. He noted that the reliability of K.R.'s descriptions was influenced by the manner of the interview and her own cognitive abilities. He spoke about the potential for tainting and confabulation when children, and especially children with intellectual impairments, get confused. In these situations the child believes that what they are saying is the truth. Justice Taliano indicated that there are certain protocols that should be in place when police are interviewing children, and especially when these children are “compliant”, as these witnesses are “susceptible to suggestion, and suggestions can actually lead to imaginary inflation”⁷¹. In the case of K.R., many of the protocols appeared not to have been observed. Of particular concern was the fact that the first interview with K.R. was not recorded and that her first disclosures came as a result of leading and potentially confusing questions. There was concern that the subsequent interviews cemented ideas that were improperly generated right at the outset of the investigation.

Another case that deals with evidence given by a witness affected by FASD is *R. v. Carroll*⁷². Carroll and two co-accused were convicted in connection with charges relating to the hiring out of young girls as prostitutes, one of whom was F.M., a 13-year old who was affected by FASD. During F.M.'s trial testimony she indicated her

⁷¹ *Ibid*, para. 32.

⁷² 1999 BCCA 65

difficulty in remembering certain events and after an unsuccessful attempt to refresh her memory, the transcript of her evidence at the preliminary hearing was read in. There was evidence from a psychiatrist that F.M.'s cognitive skills, including memory, were affected by FASD. The appellants raised the use of the preliminary hearing evidence as a ground of appeal, claiming, among other things, that this evidence was unreliable and should not have been admitted as a principled exception to the rule against hearsay. This ground was not accepted by the Court. The judge found that F.M. had been lucid and responsive at the preliminary hearing and that the jury, which had been instructed about the witness's FASD diagnosis, was in a position to "assess the credibility of her preliminary inquiry evidence having regard to the admitted false statement and fetal alcohol syndrome".

Accommodation has also been made for an FASD-affected complainant in the context of a sentencing hearing. In *R. v. C.M.S.*⁷³, the offender had sexually assaulted a 36-year old woman who was affected by FASD and a number of other physical and intellectual disabilities. Although she did testify at his trial, the complainant's victim impact statement introduced at the sentencing stage was prepared by her social worker and its admissibility was challenged by counsel for C.M.S. Veale J. admitted the statement pursuant to s. 722(4) of the *Criminal Code*, finding that the social worker was a person 'responsible for [the victim's] care and control' and that the victim herself was "unable to articulate the entire impact of the sexual assault".

V. Fitness to Stand Trial and the Mental Disorder Defence

A significant number of cases involving accused with FASD have revolved around the question of fitness to stand trial. Writing in 2003, Paul Verbrugge concluded that "it would rarely be in an FASD youth's strategic interests to be found unfit to stand trial" in part because "if found unfit, the accused will be under the control of the provincial Review Board for an undetermined amount of time" while still also facing the possibility of facing charges if eventually found fit.⁷⁴ The calculus may have changed as

⁷³ 2005 YKSC 2

⁷⁴ Paul Verbrugge, "Fetal Alcohol Spectrum Disorder and the Youth Criminal Justice: A Discussion Paper" (Ottawa: Department of Justice, 2003) at 8.

a result of the Supreme Court's decision in *Demers*⁷⁵, which found that the unavailability of an absolute discharge to a person found permanently unfit to stand trial violated s.7 of the Charter because it was an overbroad application of the criminal law. Nevertheless, the option of being found unfit to stand trial can still be an awkward means for the criminal justice system to deal with offenders with FASD, but it is one that may be used, if only because in some cases there may be no other better option.

The classic case of unfitness to stand trial is a case where an accused either before or after the crime becomes so mentally disturbed that he or she would not understand the proceedings or be able to instruct counsel. The idea that such a person can be treated or otherwise recover sufficient mental capacities to be put on trial is well demonstrated by Code provisions which require the issue of fitness to stand trial to be determined every 2 years⁷⁶ or which contemplate 60 days of treatment in cases where such treatment will render the accused fit to stand trial.⁷⁷

Procedure and Fitness to Stand Trial Determinations

Section 672.23(1) of the Criminal Code allows the court on its own motion, or on an application from the accused or the prosecutor, to determine whether an accused is fit to be tried. Section 672.24 requires the judge to appoint counsel for the accused and requires the Attorney General to pay for counsel where an unrepresented accused cannot pay for counsel. This inquisitorial power of the judge may be attractive as a means of avoiding the routine processing of offenders with FASD. It allows the judge to raise the issue of FASD and to ensure that the accused has the representation that will be necessary to ensure that the court can hear expert and other evidence about FASD. The powers of the trial judge in this respect are more certain than his or her powers in devising FASD specific sentencing conditions. For example, in 2004 it was reported that Youth Court in Saskatchewan had made 150 referrals for FAS assessment with 80% of the referrals confirming some form of FASD.⁷⁸ The same court had, however, encountered difficulties

⁷⁵ [2004] 2 S.C.R. 489. For earlier cases reading in such a remedy see *R. v. D.B.*, 2004 S.J. no. 185, which also found a s.15 violation, and *R. v. T.J.*, [1999] Y.J.

⁷⁶ *Criminal Code of Canada*, R.S.C. 1985, c. C-46, [Code], s.672.33.

⁷⁷ *Code*, ss.672.58-672.62. Note that there are restrictions on some forms of treatment and the consent of the hospital is required for treatment.

⁷⁸ *R. v. D.B.*, 2004 S.J. no. 185.

when it had tried to order that programs be provided for offenders with FASD as part of probation orders.⁷⁹

Judges under s.672.25 can postpone the determination of fitness to stand trial until after the close of the Crown's case. This discretion extends to those sitting as judges at a preliminary inquiry.⁸⁰ The purpose behind the discretion seems to be to ensure that the Crown has enough evidence to sustain a conviction against the accused and that the accused is not subject to a fitness determination⁸¹ or social control in cases where there may not even be enough evidence to convict. A person found unfit to stand trial is subject to the same disposition hearing as a person found not criminally responsible because of a mental disorder. The difference, however, is that where an accused is found unfit to stand trial, the Crown may not have proven beyond a reasonable doubt that the accused committed the criminal act. For this reason, the Crown is required under 672.33 to establish a *prima facie* case against the accused every two years until the accused is either found fit to be tried or is acquitted because the Crown cannot establish a *prima facie* case.⁸² These safeguards are designed to ensure that a factually innocent accused is not subject to detention in the same manner as an accused who committed the criminal act, but was found not guilty by reason of a mental disorder. It will be recalled that there is a danger that people with FASD or other permanent mental disabilities may, as in the Simon Marshall case, make false confessions. This underlines the importance of requiring the Crown to demonstrate the strength of its case even if the accused is found unfit to stand trial.

A 1999 Yukon case demonstrates the severe impact that an unfit to stand determination could have on an accused with a permanent condition such as FASD, at least before the 2005 post-*Demers* amendments to the Code. The case involved a 22-year-old Aboriginal man with FAS, who was described as having the appearance of a 12-

⁷⁹ *R. v. L.E.K.* (2000), 153 C.C.C.(3d) 250 (Sask.C.A.) while recognizing at para. 35 that various decisions dealing with FAS by youth court judges were “a clear cry for assistance and help. There is a strong request for help from provincial authorities to assist youth court judge with appropriate programs so they can impose dispositions that will assist in breaking the invidious cycle of in/out as exemplified by this young offender who, at 16 years of age, has a string of at least 45 convictions.”

⁸⁰ *R. v. L (B.V.)* (2004), 187 C.C.C. (3d) 283 (Ont C.J.).

⁸¹ The fitness issue will not be tried if the accused is acquitted or discharged: *Code* s.672.3.

⁸² *Code*, s. 672.33.

year-old boy “in both physical size and demeanour”⁸³, who was accused of a sexual assault against a 15-year-old that lived in a group home when the accused was also 15 years old. He was found unfit to stand trial in 1993. From 1993 through 1999, he had been subject to strict conditions, including that he reside at an approved residence, attend at places for rehabilitation and treatment including those in Calgary, not have contact with children under 16 years of age, not consume alcohol or drugs and report periodically. Lilles J. surveyed much information about FAS in his judgment, noting that “T.J.’s mental disability is permanent and is unlikely to improve with time” and unlike others subject to a similar disposition “is not responsive to treatment, by drugs or otherwise.”⁸⁴ In a decision that foreshadowed the Supreme Court’s decision in *Demers*, Lilles J. found that the scheme for imposing conditions on those found unfit to stand trial was an unjustified violation of ss.7 and 15 of the Charter, especially compared with the less restrictive alternative of an absolute discharge that was available for an accused found not criminally responsible who was not a significant threat to public safety. The rights of those such as T.J. were “significantly impaired by the impugned provision since his or her freedoms is restricted and he or she may be under control of the criminal justice indefinitely”⁸⁵ with no assessment being done of whether they were a significant threat to public safety.

In *Demers*, a person with Down’s Syndrome accused of sexual assault was found unfit to stand trial. The Supreme Court found that the unfitness to stand trial scheme violated s.7 of the Charter because it did not provide for an absolute discharge for the permanently unfit accused who did not present a continuing danger to the public. The Court ruled that the scheme was overbroad relative to the objective of social protection.⁸⁶ Parliament responded to *Demers* with the enactment of s.672.851 of the Criminal Code which allows a trial court to enter a stay of proceedings where an accused is not likely to ever become fit to stand trial, but also does not pose a significant threat to the safety of the public. In determining whether the person is a significant threat to the public, courts

⁸³ *R. v. T.J.*, [1999] Y.J. no. 57 at para. 1.

⁸⁴ *Ibid.* at para. 3.

⁸⁵ *Ibid.* at para. 89.

⁸⁶ *R. v. Demers* [2004] 2 S.C.R. 489.

have applied the same principles articulated in *Winko v. British Columbia*⁸⁷ with respect to a disposition of a person who is found not criminally responsible.⁸⁸ This means that there is no burden on the accused or presumption of dangerousness and there should be an absolute discharge (or in this case a stay) in cases where there is doubt about dangerousness. Dangerousness must relate to criminal activity and must be supported by evidence and not just speculation.⁸⁹

To enter a stay, the court must conclude not only that the accused is not likely ever to be fit to stand trial⁹⁰ and that he or she does not pose a significant threat to the safety of the public, but also that a stay is in the best interests of the proper administration of justice considering factors such as the seriousness of the offence and any harm of a stay to public confidence in the administration of justice.⁹¹ One court has held that while the accused does not have a burden with respect to dangerousness, the accused does have a burden with respect to the determination of whether the stay is in the best interests of justice.⁹² The requirement that a stay be in the best interests of the administration of justice suggests that the stay decision will not be informed solely by concerns about the offenders condition and the threat to the public, but also by factors such as the nature and seriousness of the alleged offence and the effect of granting a stay on public confidence in the administration of justice. This is a significant factor given the serious nature of the some of the charges faced by people with FASD and some evidence that people with FASD may frequently be charged with sexual offences.⁹³ Although the Court has upheld

⁸⁷ [1999] 2 S.C.R. 625.

⁸⁸ *R. v. Kearly*, [2005] O.J. no. 5394; *R. v. Pollard*, [2007] O.J. No. 615 (C.J.).

⁸⁹ Hy Bloom and Richard Schneider, *Mental Disorder and the Law* (Toronto: Irwin Law, 2006) at 91-92.

⁹⁰ Such person included mental retardation, severe fetal alcohol effects, brain injury, dementia and can be contrasted with other mental disorders that can be treated so that the accused regains fitness to stand trial. *Ibid* at 94-96.

⁹¹ Criminal Code s.672.851.

⁹² *R. v. Wong*, [2006] B.C.J. No. 1539. Bruce J. reasoned that: “Uniquely, however, Section 672.851(7) also requires the Court to consider whether a stay is in the interests of the proper administration of justice and specifically directs the Court to consider certain factors during this inquiry. No similar requirement is found in the parallel authority to order an absolute discharge in Section 672.54(a). In my view, it was not Parliament's intention that the Court carry out a form of inquisition to determine this factor. The language of Sections 672.851(7) and (8) clearly directs the Court to apply the onus and standard of proof equivalent to that required for a stay under Section 24(1) of the Charter; that is, the onus rests with the accused on the balance of probabilities to satisfy the Court that a stay is in the interests of the proper administration of justice.” *ibid* at para, 40

⁹³ Larry Chartrand and Ella Forbes-Chilibec “The Sentencing of Offenders with Fetal Alcohol Syndrome” (2003) 11 Health L.J. 35 at 42-43.

similar public confidence in the administration of justice factors under s.11(e) of the Charter with respect to bail determinations⁹⁴, they sit awkwardly with the more accused-centred factors that were stressed by the Supreme Court in *Demers* in the fitness context.

In some cases, offenders with FASD may have a defence on the merits or the Crown may be unable to establish a *prima facie* case because, for example, exclusion of statements as involuntary. Although an acquittal will fail to treat or manage FASD, it is still the preferred option within a system that requires the Crown to establish guilt beyond a reasonable doubt. Although a stay of proceedings is now available as a disposition, it should not be assumed that a person found unfit to stand trial will not be subject to detention or other forms of social control.

The Standard for Fitness to Stand Trial

The common law standards for fitness to stand trial have been codified in s.2 of the Criminal Code to provide that “A person is unfit to stand trial if he or she is:

unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.⁹⁵

The accused is presumed to be fit to stand trial, and unfitness must be proven on a balance of probabilities.⁹⁶ It is not necessary that a person be able to act in his or her own best interests or to employ analytical reasoning, but it is necessary that he or she have “limited cognitive capacity to understand the process and to communicate with counsel.”⁹⁷ As will be seen, most judges have accepted that FASD constitutes a mental disorder. For people with FASD, the critical issues may be their ability to communicate

⁹⁴ *R. v. Hall* [2002] 3 S.C.R. 309.

⁹⁵ *Code*, s. 2.

⁹⁶ *Code*, ss. 672.22 and 672.23. The burden placed on the accused when the accused argues unfitness to stand trial has been held to be justified under the *Charter*. *R. v. Morrissey* (2002), 8 C.R. (6th) 41 (Ont. S.C.J.). Similar burdens on the accused to establish the mental disorder and automatism defences have also been held to be justified under the *Charter*.

⁹⁷ *Whittle, supra* at para 25 (S.C.C.).

effectively with counsel, especially with respect to past allegations, given memory problems. In addition, people with FASD may have difficulties understanding “the possible consequences of the proceedings” given evidence suggesting that some with FASD may be specially impulsive.

In cases from Saskatoon, Judge Whelan found two twin brothers who had been diagnosed with FAS at an early age and scored in the mildly mentally retarded range as unfit to stand trial. The issue of fitness to stand trial and FAS had been raised a year earlier, but was resolved when the Crown exercised its discretion to stay proceedings against the then 13-year-old boy. At that time, Judge Turpel-Lafond had expressed concern that the boy had been repeatedly before the justice system and been in jail, but that the justice system had yet to consider the effects of FAS which had been diagnosed at an early stage. She observed that “it is a sad commentary on our society that a severely disabled boy, who is highly vulnerable to antisocial individuals, would end up in a youth jail.” She observed the dangers of a pattern of offending and the lack of “specific programming in the community, such as a school for children with FAS, or a one-on-one coaching program for him to model good behaviour”⁹⁸ The next year both twins were declared unfit to stand trial with Judge Whelan observing in one case that the accused “had no concept of the roles played by the crown, defence counsel, and judge in the courtroom and there was real doubt as to his ability to receive information and communicate his instructions to counsel on even the most basic level.” She stressed expert testimony that the accused “is unlikely to gain much information from what he hears.”⁹⁹ With respect to the second brother who was described as functioning at a higher level, Judge Whelan found that there was a danger that he would have difficulty testifying about the events, that he would be highly reliant on his lawyer and “would likely not be able to give instruction which would be reflective of or in response to the information conveyed”¹⁰⁰, that he would not have understood the adversarial nature of the proceedings and had “no sense of the consequences of a guilty plea and no concept of the

⁹⁸ *R. v. W.D.* [2001] S.J. no. 70 at paras. 29, 35.

⁹⁹ *R. v. W.A.L.D. (1)*, [2002] S.J. no 221 at para. 46.

¹⁰⁰ *R. v. W.A.L.D. (2)*, [2002] S.J. no 222 at para. 62.

range of sentences available; he understands only those aspects of the justice system that he has experienced, such as remand, an undertaking and probation”.¹⁰¹

The two brothers were again found unfit to stand trial in 2004 when they were 17 years old and faced charges relating to stolen vehicles. They were subject to a conditional discharge but only after the judge had convened a conference under s.19 of the YCJA of many governmental, tribal, and health officials to devise a plan of supervision for the two 17 year olds.¹⁰²

In a 2003 Saskatchewan case, a 16-year-old accused of sexual assault who had been diagnosed at 6 months with FAS and had an IQ of 51 was found unfit to stand trial. Judge Turpel-Lafond noted that the leading cases of *Whittle* and *Taylor* required only a limited cognitive capacity to understand the proceedings, their possible consequences and to “be able to recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence”¹⁰³ and did not require the accused to have an analytical capacity or make rational and beneficial decisions. Nevertheless, she held that the boy’s memory and attention deficits were such that he did not understand the legal process or the roles of the players and “we cannot be assured he can communicate with counsel relating to the event or on matters pertaining to the conduct of his defence.”¹⁰⁴

In the 2007 Saskatchewan case of *R. v. Jobb*¹⁰⁵, Justice Whelan found that a man with an IQ in the 60s, FASD and Attention Deficit Disorder was unfit to stand trial, not on the basis that he did not understand the nature and object or possible consequences of the proceedings, but rather on the basis that he was unable on account of a mental disorder to communicate with counsel. The judge heard expert evidence that the accused “would not be able to follow court proceedings sufficiently so as to provide instructions to counsel” in part because of “distractibility” and in part because of “limits upon

¹⁰¹ *Ibid.* at para. 63.

¹⁰² *R. v. W.A.L.D.*, [2004] S.J. no. 120. A subsequent decision was made to grant bail to one of the brothers: see *R. v. W.A.L.D.*, 2004 S.J. no 494. The challenges of developing a multidisciplinary approach to the administration of those conditions will be examined below under the heading “difficulties in fashioning conditions for community sanctions or release.

¹⁰³ *R. v. B (D)*, [2003] S.J. no 688 at para. 57.

¹⁰⁴ *Ibid.* at para. 59.

¹⁰⁵ [2007] S.J. no 625.

comprehension.”¹⁰⁶ Judge Whelan made her decision on a slightly different basis, concluding that the accused “is unable to comprehend the course of the proceedings so as to assist his counsel in making a proper defence. Specifically, he is not able to communicate with his counsel regarding facts of his charges in such a way that counsel may prepare a defence, nor can he participate in a meaningful way or assist his counsel during the course of a trial or other proceedings so that his counsel may pursue a defence on his behalf. He does not have the ability to testify as to the facts of the charges against him given the challenges he faces with recollection, comprehension, and attentiveness.”¹⁰⁷ The accused was faced with 27 charges, including three different theft charges as well as many other system charges. It will be interesting to see if this decision encourages the Crown to simplify the charges faced by a person with FASD.

R. v. Jobb suggests that the communicating-with-counsel arm of the fitness test has a potential to make difficulties with memory caused by FASD relevant to the fitness determination in the way that they are not relevant to either the fitness arms that relate to the nature or the consequences of the proceedings or indeed the s.16 defence. As will be discussed below, the same judge (who sits in a busy Saskatoon criminal court) has considered and rejected a s.16 defence by a person with FASD symptoms. In the last two cases, the accused found unfit to stand trial had very low IQs. FASD is not, however, always associated with very low IQs and this raises the question of how viable the option of being unbound to stand trial is for the wider population of people with FASD.

We have been unable to discover any appellate cases dealing with whether accused with FASD are unfit to stand trial. Outside of the FASD context, some trial judges have candidly expressed their displeasure with the restrictive approach to fitness to stand trial as represented by leading decisions such as the Ontario Court of Appeal’s decision in *Taylor* and the Supreme Court’s decision in *Whittle*. Indeed Justice Schneider of the Ontario Court of Justice has recently refused to follow the limited cognitive capacity of the Ontario Court of Appeal in *Taylor* in a case dealing with a delusional accused.¹⁰⁸ Nevertheless, a recent Ontario Court of Appeal decision suggests that the

¹⁰⁶ *Ibid.* at para. 37.

¹⁰⁷ *Ibid.* at para. 40.

¹⁰⁸ Justice Schneider concluded that the paranoid accused was not rational and stated “the limited cognitive capacity test articulated in *Taylor* fails adequately to protect Ms. Xu. The fitness rules must have as a

Court of Appeal will continue to follow *Taylor* and that a person who is not competent or able to provide reliable testimony may in certain circumstances nevertheless be held fit to stand trial. In that case Blair J.A. stated:

An accused must be mentally fit to stand trial in order to ensure that the trial meets minimum standards of fairness and accords with principles of fundamental justice such as the right to be present at one's own trial and the right to make full answer and defence: see *R. v. Steele* (1991), 63 C.C.C. (3d) 149 (Que. C.A. at pp. 172-173 and 181; *R. v. Roberts* (1975), 24 C.C.C. (2d) 539 (B.C.C.A.). Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.

Minimum standards of reliability and trustworthiness, on the other hand, are the principal underpinnings of testimonial competency concerns. These are different goals than those underlying the requirement of fitness for trial.¹⁰⁹

This case dealt with an accused who, because of an unsuccessful suicide attempt after having killed his girlfriend, had significant permanent brain damage and amnesia with respect to the events in question. Nevertheless, the Court of Appeal indicated that an instruction on the limited cognitive capacity test that focused on questions such as his mental capacity to instruct counsel, his ability to understand advice from counsel and to make a decision whether to testify, was not in error.¹¹⁰ This case follows a pattern of appellate authority that restricts unfitness determination to those who have a mental disorder that is more severe than even required for the mental disorder defence.

Although some accused with FASD may be found unfit to stand trial particularly with respect to their ability to instruct counsel, the bulk of appellate authority suggests that many people with FASD may not satisfy the restrictive test that only requires limited cognitive capacity. That said, appellate courts should be willing to re-consider the

central requirement a rational understanding of one's legal predicament." *R. v. Xu* Court File 0710000395 unreported decision of Schneider J. of Ontario Court of Justice April 18, 2007 at para 10. Schneider J. stated that the "limited cognitive capacity" test in *Taylor* only required an accused to have "a rudimentary factual understanding of his/her legal predicament. It is not necessary that the accused have a 'rational' understanding of his legal interest or be able to act in his 'own best interests'." Ibid at para 8. Perhaps noteworthy, he contemplated the fitness to stand trial rules "are to protect the accused. They operate to hold the prosecution in abeyance until the accused is fit to respond." Ibid at para 9.

¹⁰⁹ *R. v. Morrissey* (2007) 227 C.C.C.(3d) 1 at paras 35-36 (Ont.C.A.)

¹¹⁰ *ibid* at para 58

traditionally restrictive test, especially with respect to whether a particular accused with FASD can, because of the permanent brain damage including symptoms such as memory loss, effectively communicate with counsel or truly understand the possible consequences of the criminal proceedings.

Mental Disorder Defence

Although the courts have defined mental disorder or disease of the mind broadly to include newly diagnosed conditions such as FASD, the mental disorder defence in s.16 of the Criminal Code only applies if the mental disorder is so severe that it renders the person incapable of appreciating the physical consequences of their actions or knowing that they are wrong.

In *R. v. R.F.*¹¹¹, Judge Whelan of the Saskatchewan Provincial Court held that partial fetal alcohol syndrome in the form of characteristic facial features and neurodevelopmental dysfunction was a mental disorder or a disease of the mind for the purpose of the mental disorder defence. She stressed that partial fetal alcohol syndrome was a permanent condition that was caused by a factor internal to the accused as opposed to some transitory condition caused by an external factor such as intoxication or a blow to the head.¹¹² The judge then held that neither arm of the s.16 defence was made out. She observed with respect to the branch that requires that the offender be capable of appreciating the nature and quality of the acts that the “standard is set relatively low, in that the offender’s appreciation of the nature and quality of his acts need not be very sophisticated”.¹¹³ It only requires appreciation of the immediate physical consequences of actions and not “an appreciation of remote or long term consequences”¹¹⁴ relating to the punishment of the offences. The judge also held that it had not been established that the accused was incapable of knowing that his actions were wrong given that the accused did not know that her actions were illegal and had “a general capacity to abstract with respect to the principles of right and wrong”¹¹⁵ and there was no evidence that at the time the acts were committed the accused was unable to know they were morally wrong. Thus the expert evidence suggested that while the accused would have difficulty appreciating the

¹¹¹ [2002] S.J. no 742.

¹¹² *Ibid.* at para. 30.

¹¹³ *Ibid.* at para. 77.

¹¹⁴ *Ibid.* at para. 76.

¹¹⁵ *Ibid.* at para 80.

long term consequences of breaking the law or having empathy for the victim, this did not result in a finding of not criminally responsible by reason of mental disorder. Doctrinally, the conclusions in this case were based on an accurate interpretation of the Supreme Court's s.16 jurisprudence, much of which was developed in the context of murders by psychopaths.¹¹⁶ The mental disorder defence has certainly not been developed with FASD in mind.

Other cases confirm the difficulties that people with FASD have in establishing the mental disorder defence. In *R. v. C.P.F.*¹¹⁷, the Newfoundland Court of Appeal approved of a trial decision that, again, accepted FASD as a mental disorder, but found that it did not render the accused unable to appreciate the nature and quality of the accused in the sense of "perceiving the consequences, impact, and results of the physical act for the victims, for example, that injury would result".¹¹⁸ The Court of Appeal also held that while evidence of mental disorder could be considered in some cases with respect to *mens rea*, it did not raise a reasonable doubt in relation to the offence of aggravated sexual assault. This case however does leave open the possibility of raising FASD as evidence that could raise a reasonable doubt about some higher forms of subjective intent. This also underlines the importance of ensuring that an accused with FASD does not have a valid defence on the merits before running unfitness or mental disorder defences that will expose the accused to the risk of indeterminate detention or conditions.

Another Newfoundland case, *R. v. Faulkner*, also accepted that FASD was a mental disorder but held that the evidence did not establish "that the accused lacked the capacity to know right from wrong or that he did not appreciate the nature and consequences of his acts." Although the accused assaulted another person as a result of being threatened, the court stressed that he had the intent to commit the assault and rejected a duress defence on the basis that he had the opportunity to escape the threats.¹¹⁹ This case demonstrates a tendency in the caselaw for the two arms of the mental disorder

¹¹⁶ Though for arguments that the Court's jurisprudence did not correctly interpret what is known about psychopathy and that s.16 could apply to psychopaths, see Richard Schneider and David Nussbaum, "Can the Bad be Mad?" (2008), 53 C.L.Q. 206.

¹¹⁷ 2006 NLCA 70.

¹¹⁸ *Ibid.* at para. 22.

¹¹⁹ *R. v. Faulkner*, [2007] N.J. no. 46

defence to converge to something strikingly similar to a requirement that the accused be able to have a subjective knowledge of the physical consequences of his actions.

Summary on Fitness to Stand Trial and Mental Disorder Defence

The existing doctrines with respect to both unfitness to stand and the mental disorder defence do not appear to have been designed with FASD (or indeed any other permanent but non incapacitating mental disability) in mind. The ultimate disposition regimes for both defences speak to the assumption that mental disorders can be treated and mitigated. It appears that the mental disorder defence will not be available for most people with FASD because of its requirement that the mental disorder render the accused unable to appreciate the physical consequences of his or her actions or know that they are wrong. In contrast, some people with FASD have been declared unfit to stand on account of their mental disorder. This finding is surprising because it has commonly been thought that a mental disorder must have more severe consequences to result in an unfitness to stand determination than a mental disorder defence. Nevertheless, a number of trial judges have made persuasive cases that particular accused with FASD were unable to communicate with counsel or appreciate the consequences or nature of legal proceedings because of factors such as poor memory and distractibility caused by FASD. Section 672.851, added to the Code in 2005, which allows a trial judge to order a stay of proceedings for a person who is permanently unfit to stand trial, may make the unfitness determination more attractive to accused with FASD, who before the amendments faced mandatory and indeterminate release upon conditions, a situation that the Supreme Court found to violate s.7 of the Charter in *Demers*.

An accused with FASD who seeks to be declared unfit to stand still faces some risks. One is that courts may apply restrictive appellate authority and hold that the person is fit to stand trial despite FASD. If, however, the person is found unfit to stand trial, there is no guarantee that the result will be a stay of proceedings. There may be a finding that the accused poses a significant threat to the safety of the public that could support the imposition of conditions or even detention. Even if there is no finding of dangerousness, a court could find that the accused has not established that a stay of proceedings is in the best interests of the administration of justice given factors such as the nature and seriousness of the offence and the effect of a stay on public confidence in the

administration of justice. It is possible to imagine considerable public, prosecutorial and victim resistance to an attempt to obtain a stay in a case where the person with FASD is charged with serious offences. For these reasons, those representing accused with FASD should seek an acquittal on the merits whenever possible and be aware of the risks of seeking an unfitness determination. From a social perspective, it is not clear that a finding of unfitness to stand trial is an optimal disposition. If entered, a stay of proceedings will disentangle the person with FASD from the justice system. Nevertheless, it will amount to a statement that the system is simply unable to deal with the person rather than a long term solution.

VI. Mens Rea Requirements and Defences

In all criminal cases, the Crown must prove fault beyond a reasonable doubt. As discussed above, the Newfoundland Court of Appeal in *R. v. C.P.F.*¹²⁰ considered whether FASD raised a reasonable doubt about the accused's fault for aggravated sexual assault. The Court of Appeal stressed that aggravated sexual assault was an offence of general intent that only required the accused to be aware of the immediate consequences of his actions and that the issue of whether the aggravating factors were present should be determined on the basis of their objective foreseeability. Cameron J.A. stated:

For the general intent offence of aggravated sexual assault, any intent necessary was established when the sexual assault was proven. No other intent was required. The objective test applied on the "aggravated" aspect considers only whether the reasonable person would have foreseen bodily injury. The sole personal factor considered is the capacity of the accused. In this case, the only factor going to his capacity relied upon by the respondent is that he suffered from fetal alcohol spectrum disorder, the very thing relied upon for the s. 16 application. The accused having failed in his application under s. 16, the presumption of capacity applies. Parenthetically, I would add that counsel for the respondent does not argue that any lack of capacity resulting from the respondent's voluntary intoxication can provide a defence to the charges of aggravated sexual assault¹²¹

This decision leaves open the possibility that FASD could raise a reasonable doubt about whether the accused had some higher forms of subjective fault. In cases where the accused had been drinking, the issue of the effect of voluntary and temporary intoxication

¹²⁰ 2006 NLCA 70.

¹²¹ *Ibid* at para 23.

with the permanent brain damage caused by FASD should both be considered in determining whether the accused was at fault.

R. v. C.P.F. also suggests that the accused's FASD was not relevant in determining whether bodily injury was objectively foreseeable. A similar question could arise in determining whether a person with FASD had the necessary negligence needed to be guilty of manslaughter. The Supreme Court has rejected the relevance of personal characteristics in applying objective standards of fault unless they render the accused incapable of appreciating the risk.¹²² Although some have suggested that FASD may be relevant in such determinations,¹²³ it is difficult to see how FASD would render a person incapable of appreciating obvious risks to safety or health. Indeed, this determination may well not be that different from the mental disorder issues discussed above in terms of the ability of many people with FASD to appreciate the immediate physical consequences of their actions.

Mens rea issues are also raised in *R. v. Faulkner*¹²⁴ another case in which a mental disorder defence was rejected. In *Faulkner*, the accused with FASD assaulted, stabbed and robbed the victim in order to obtain his bank card and pin number, but only after being threatened and encouraged by another person. As discussed above, people with FASD may be particularly open to suggestion. Before the Supreme Court's decision in *R. v. Hibbert*¹²⁵, it might have been possible to argue that the circumstances of duress may have raised a reasonable doubt about subjective fault. After that decision, however, it will generally not be possible to use duress as a factor that negatives most forms of subjective fault. Nevertheless, it is possible that FASD may be relevant to some higher forms of subjective intent and *Hibbert* only decides that duress experienced by the accused cannot raise a reasonable doubt to the intent requires of s.21 of the Criminal applying to parties that commit a crime.

¹²² *R. v. Creighton* [1993] 3 S.C.R. 3.

¹²³ "It cannot be assumed that an accused person with FAS/FAE has the ability to plan or to understand the consequences that flow from his or her acts. He or she may not be able to formulate an intent that a specific result occur." Julianne Conroy and Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: British Columbia Fetal Alcohol Syndrome Resource Society and Law Foundation of British Columbia, 2000) at 47.

¹²⁴ *R. v. Faulkner*, [2007] N.J. no. 46

¹²⁵ [1995] 2 S.C.R. 973

Duress may be a viable offence with respect to persons with FASD such as Mr. Faulkner who are pressured into committing a crime. The judge in that case rejected the defence both on the basis that the accused had a safe opportunity to escape the threat and on the basis that the assault committed by the accused was disproportionate to the threat.¹²⁶ Both conclusions can be questioned. The issue of safe avenue of escape in the defence of duress is determined on the basis of a modified objective standard that endows the reasonable person with relevant characteristics and capacities of a reasonable person. People with FASD may be especially vulnerable to threats both because of their personal characteristics, but also because of a short term orientation that may not always make a safe avenue of escape obvious to the person. The case represented a lost opportunity to individuate the reasonable person test so as to incorporate the characteristics and capabilities of a person with FASD. One challenge in the future will be to educate the judiciary about FASD so that they feel comfortable in individuating reasonable person standards used for common law duress, provocation, and necessity defences. The trial judge in this case also rejected the duress defence on proportionality grounds¹²⁷ which may be measured on an objective basis without any attempt at individuation. Here, the relevant but neglected principle seems to be that courts generally do not require exacting measures of proportionality with respect to people who face real threats.

At sentencing, the judge in *Faulkner* did, however, consider the circumstances of duress and the fact that the accused committed the offence in response to threats and not for personal gain.¹²⁸ He ruled that the accused's actions were "not the product of the mind of a fully functioning unimpaired individual" but nevertheless sentenced him to five years' imprisonment for robbery while armed with an offensive weapon.¹²⁹ Although the judge concluded that the "sentence must make allowance for his cognitive impairment, his reduced coping skills, and the threats that were made that led him to commit these

¹²⁶ *R. v. Faulkner*, [2007] N.J. no. 46 at para. 29.

¹²⁷ Orr Prov Ct J. concluded that "the harm inflicted in Mr. Teevan was very serious and on balance was at least as serious as the threats made to Mr. Faulkner." *Ibid.* at para. 29.

¹²⁸ *Ibid.* at para. 30.

¹²⁹ *R. v. Faulkner*, [2007] N.J. no. 90.

offences”¹³⁰, there was no discussion in the judgment of how the offender would cope with his time in the penitentiary.¹³¹

VII. Sentencing

Given the difficulty observed above of fitting FASD into traditional criminal law doctrines of fault and defences, it is not surprising that FASD is most commonly discussed in judgments at the sentencing stage. The *Criminal Code* sets out the purposes and principles of sentencing in ss. 718-718.2. The fundamental principle in s. 718.1¹³² instructs the court that a just sentence is one that takes into account the “degree of responsibility of the offender”. Courts should not simply focus on the fact that the offender has been found guilty, but explore some of the other reasons that explain why the accused committed the offence. For example, the fact that an offender with FASD was led into or coerced into crime would be relevant to determining the level of responsibility, even if it does not amount to a defence of duress. Similarly mental disabilities, short of unfitness to stand trial or a mental disorder defence, may also be relevant to determining the degree of the offender’s responsibility. One judge has considered FASD to be capable of taking away an individual’s ability to act within the norms expected by society¹³³.

The *Code* also instructs courts to consider six objectives: denunciation, deterrence, separation of the offender (for the protection of society), rehabilitation, reparations, and instilling a sense of responsibility in the offender¹³⁴. Some judges have rejected in strong terms the idea that either general or specific deterrence is an appropriate consideration with respect to offenders with FASD¹³⁵. Denunciation can be related to the seriousness of the offence, but probably should not be separated from the

¹³⁰ *Ibid.* at para. 23.

¹³¹ See *infra* note 157 for a discussion of the difficulties that offenders with FASD may have in prison. criminally responsible on three counts of sexual assault was detained in the Whitehorse Correctional Centre.

¹³² “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.

¹³³ *R. v. Sam* [1993] Y.J. No. 112 (T.C.).

¹³⁴ s.718.

¹³⁵ One judge has concluded that “it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person.” *R. v. Abou* at para 23. See also footnote 4.

offender's degree of responsibility¹³⁶. The relevance of reparations and a sense of responsibility may depend on the particular circumstances of the offender. Professor Chartrand and Ella Forbes-Chilibeck have argued that the only appropriate sentencing purposes for offenders with FASD are protection of society and rehabilitation¹³⁷.

The determination of an appropriate sentence for the FASD offender is a challenging task for courts. Although it is increasingly recognized that FASD is a disability that can have a profound impact on the level of an offender's moral culpability, the mitigation that this consideration would normally have on the length of a sentence is frequently tempered by the practical need to protect the community. As will be described below, the programming available to an FASD-affected offender is inadequate and the resources to support and monitor such an individual in the community are severely lacking. Despite the fact that jail is the harshest sanction our courts can impose, and should only be imposed where less restrictive sanctions are not appropriate or reasonable with particular attention to the circumstances of Aboriginal offenders¹³⁸, judges often impose significant jail terms when sentencing an offender with FASD, viewing this as the best way to secure rehabilitative programming and the best means of ensuring the safety of the community¹³⁹. As well, there are some, thankfully rare, examples of decisions where the intractability of FASD-linked behaviours prompt judges to view the offender as being incapable of any degree of rehabilitation or as being 'irredeemable'¹⁴⁰.

Obtaining Assessments for FASD Before Sentencing

An FASD diagnosis is clearly very relevant to a court's consideration of the circumstances of a particular offender. Nevertheless, getting this information before the

¹³⁶ In *R. v. C.J.M.* 2000 BCPC 199, Trueman J., in sentencing an FASD-affected offender on a charge of robbery, wrote at para. 110: "Robbery with threats of violence should always be denounced, on pure principle. A sentence of two years less a day is sufficient for this purpose. Using C.J.M. as a vehicle to express society's abhorrence for this type of offence, by imposing a sentence of greater length, is to use him as a whipping boy. He would take the punishment for the acts of others who should know better and are capable of knowing better. To sentence him with the objective of deterring others of like mind is pure fallacy. To sentence him with the objective of specifically deterring him is to fail to understand his background, his diagnosis, the secondary disabilities that are associated with partial FAS or its equivalent, and the type of support he needs to succeed".

¹³⁷ Chartrand and Forbes Chilibeck "The Sentencing of Offenders with Fetal Alcohol Syndrome" supra at 47

¹³⁸ s. 718.2(d) and (e). On the need for the judge to require full information about the circumstances that bring Aboriginal offenders before the courts see *R. v. Gladue* [1999] 1 S.C.R. 688.

¹³⁹ See e.g. *R. v. Obed* 2006 NLTD 155, discussed *infra*.

¹⁴⁰ See, e.g., *R. v. J.* [1996] B.C.J. No. 2754, *R. v. I.D.B.* 2005 ABQB 421.

court is problematic. There are no provisions in the *Criminal Code* that would allow a judge to order an FASD assessment for sentencing purposes, and the question of who pays for such an assessment is often hotly contested.

In the B.C. cases of *Gray* and *Creighton*, Trueman J. of the Provincial Court made orders to require that the offenders be examined and assessed for developmental disorders, including specifically FASD, prior to their sentencing hearings. The sentencing judge reasoned that if confirmed, FASD would be the “main criminogenic factor” and one that would require immediate intervention and would be critical to the sentencing decision including whether or not to impose a custodial disposition¹⁴¹. She purported to act under ss. 672.11-672.14 of the Mental Disorder provisions in the *Criminal Code*. Both orders were subsequently quashed by Wong J., who found that Justice Trueman had acted in excess of her jurisdiction because such orders can only be made where the judge had reasonable grounds to believe that the accused was either unfit or NCRMD¹⁴². Even if the assessment order could be justified in this manner, they exceeded the court’s jurisdiction. Assessments under Part XX.1 of the *Code* must take place at certain institutions designated by the province or territory, and the provincial court had ordered a specific FASD assessment by an undesignated agency. It was not open to the court to name an undesignated agency, and neither could it specify the nature of the assessment to take place. Finally, without finding a violation of an offender’s *Charter* rights, the court did not have jurisdiction to order that an assessment be state-funded.

Despite finding that Trueman J. had erred in making the order she did, Wong J. did recognize what she was trying to accomplish, and suggested an incremental – and lengthy – way in which her objectives could be met. The first step would be to order a standard pre-sentence report with an emphasis on developmental disorders. If this did not provide sufficient information for sentence, further data could be sought from specialist assessments. Given the inability of courts to direct government disposition of funds, it would be incumbent on them to explore other funding options before requiring that the

¹⁴¹ *R. v. Gray* 2002 BCPC 58, para. 53.

¹⁴² *R. v. Gray* 2002 BCPC 58, overturned 2002 BCSC 1192, *R. v. Creighton* 2002 BCPC 564, overturned 2002 BCSC 1190.

Attorney General cover the assessment costs, and indeed, such a condition could only be imposed if the failure to provide an assessment violated the offender's *Charter* rights¹⁴³.

The final *Creighton* decision arguably suggests that there is some impracticality in the multi-step process. Here, Trueman J. had been directed by order of *mandamus* to sentence the offender¹⁴⁴. The order was requested by Creighton, presumably because he had already spent a significant amount of time in custody and was unwilling to wait for the assessment process to slowly roll to a finish. Judge Trueman, in strong language, noted her discomfort at being forced to impose a sentence in the absence of critical information and went so far as to express her preference to stay the charge pursuant to s. 7 of the *Charter* until an assessment could be done, but neither the Crown nor Mr. Creighton supported this option. In the result, the provincial court declined to impose a conditional sentence and sentenced Mr. Creighton to one day in addition to his 9 ½ months of time served. In doing this, Justice Trueman noted that sentencing without an assessment would not be in Mr. Creighton's best interest, would not generate respect for the law, and would not contribute to a just, peaceful and safe society.

Although specialized assessments are clearly very difficult to obtain in the adult sentencing context, there is more flexibility with respect to court orders when the offender is a youth. In the Nunavut case *R. v. T.K.*¹⁴⁵, Johnson J. found that he did have jurisdiction to specifically order an FASD assessment for a young person. While Wong J.'s decision in *Gray* was before him, the order in *T.K.* reflects the broad language found in s. 34 of the *Y.C.J.A.*¹⁴⁶. Moreover, the validity of such an order meant that the government would most likely be responsible for paying the associated costs. Nevertheless in keeping with the incremental approach advocated in *Gray*, counsel

¹⁴³ The multi-step process was used by Dossa J. in *R. v. Mackenzie* 2007 BCPC 109. Here, the Forensic Psychiatric Services ("FPS") prepared a report that indicated Mr. Mackenzie may have FASD, but they had insufficient information to make a formal diagnosis. Although MacKenzie argued that the failure to order further specialized testing was a breach of his s. 7 *Charter* rights, the court determined that the information before it was sufficient for sentencing. Notably in light of *Creighton*, discussed below, it was also argued that there was an unconstitutionally long delay preceding the sentence.

¹⁴⁴ *R. v. Creighton* 2002 BCPC 564.

¹⁴⁵ 2006 NUCJ 15

¹⁴⁶ Section 34 provides that a "youth justice court may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person". The assessments contemplated specifically include ones for mental or learning disabilities, and are available throughout the trial process, including for the purpose of making or reviewing a sentence.

agreed to seek out other funding pools available through the government before such a payment order was issued.

Restrictions on Judicial Notice and Diagnosis of FASD

The practical effects of the difficulty of obtaining an assessment are also seen in *R. v. Harris*¹⁴⁷, a case where Justice Trueman in sentencing a 43 year old with 62 convictions for breaking and entering and breach of probation, ordered a pre-sentence report that included information about possible FASD. Based on the report, information obtained from the accused, including a statement that his mother “drank a lot” and her knowledge of the symptoms, Justice Trueman concluded that the accused probably suffered from FASD and ordered a conditional sentence of nine months with three years probation. The British Columbia Court of Appeal found that Justice Trueman had erred by taking judicial notice of Mr. Harris’ situation and making a diagnosis, with Levine J.A. concluding that “it is wrong in principle for a sentence to be based on a conclusion about the mental capacity of an individual offender derived from assumptions and general knowledge.”¹⁴⁸ This conclusion was reached despite the Court of Appeal’s recognition “that it is practically impossible for an adult to be assessed for FAS/FAE/ARND in this province”¹⁴⁹ because of an unwillingness of the province to pay for such multidisciplinary and specialized assessments.

The Court of Appeal nevertheless upheld the sentence in *R. v. Harris* in spite of the Crown’s request for a 30 month sentence and the report of a clinical and forensic psychologist who concluded that the accused was at a high risk for general and violent offending.¹⁵⁰ In one breath, the Court of Appeal effectively prohibited trial judges from taking notice or mentioning FASD¹⁵¹ but in the next breath uphold the sanction because it

¹⁴⁷ 2002 BCCA 152

¹⁴⁸ Ibid at para 20. But note that Trueman J. is hardly the only judge to have made use of “assumptions and general knowledge”. Some of the most important and influential cases dealing with FASD come from judges who engage with medical literature and incorporate a deeper understanding of how it affects an individual’s behaviour. See e.g. *R. v. Sam* [1999] Y.J. No. 112 (T.C.), *R. v. T.J.* [1999] Y.J. No. 57(T.C.), *R. v. W.A.L.D.(1) and (2)* [2001] S.J. No. 70 (P.C.), 2002 SKPC 37, 2002 SKPC 38, 2004 SKPC 40, 2004 SKPC 42, 2004 SKPC 87.

¹⁴⁹ 2002 BCCA 152 at para 18.

¹⁵⁰ Ibid at para 14. This psychologist also said he was not qualified to diagnose FASD.

¹⁵¹ Levine J.A. candidly recognized that: “If a sentencing judge may only take into account that an offender may or does suffer from FAS/FAE/ARND if she has an assessment performed by a properly qualified physician, the condition and concomitant disabilities may be irrelevant, in practical terms, to the criminal justice system and the sentencing process in this province.” Ibid at para 18.

provided the accused “the opportunity to function in the community with supervision while pursuing a diagnosis of FAS or ARND, which is not apparently available in the federal or provincial correctional systems”¹⁵². The ambiguity of the judgment is underlined by the Court of Appeal’s statement that “this case should not be taken to establish a precedent” because “a sentencing judge is not qualified to diagnose FAS and every, suspected or confirmed, case does not warrant a conditional sentence.”¹⁵³

FASD as a factor in sentence

In making decisions about the appropriate length of sentence, courts are also instructed to consider any relevant aggravating or mitigating circumstances.¹⁵⁴ As a factor to be considered, FASD is not straightforward. Although with some exceptions¹⁵⁵, the caselaw indicates that it is properly viewed as a mitigating factor because of its influence on moral culpability, its effect on sentencing does not always reflect this characterization. Indeed, there are a number of cases in which an FASD diagnosis serves to increase an offender’s time in custody. Although some of these cases reflect poor judicial understanding of the consequences of FASD, others reflect expert opinion on rehabilitation prospects or the availability of effective programming. There are essentially two types of cases where custodial time increases in response to an FASD diagnosis. The first are cases where an offender is presented as a high risk to reoffend and deemed unlikely to complete or benefit from programming. Here, custody is considered the best way to ensure the protection of the public¹⁵⁶. The second type of case are those where it is recognized that the offender will benefit from programming, but the court finds that the best programs are offered in jail. Given substantial differences in expert opinion on whether and how an offender with FASD can be rehabilitated and reintegrated into society, the first type of case raises an issue about the consistency of

¹⁵² Ibid at para 24

¹⁵³ ibid at para 26

¹⁵⁴ s. 718.2(a) of the *Criminal Code*.

¹⁵⁵ See e.g. *R. v. J.* [1996] B.C.J. No. 2754 (P.C.), where de Villiers J. expressly considered FASD an aggravating factor and one worthy of ‘moral condemnation’. He likened FASD-affected offenders to pedophiles, and indicated that the dominant sentencing concerns were denunciation and deterrence (at para. 20). This seems to be the most extreme example of FASD’s use as an aggravating factor, and QL indicates that the case has never been relied on.

¹⁵⁶ As phrased by the Saskatchewan Court of Appeal in *R. v. B.L.M.* 2003 SKCA 135, “Public protection through rehabilitation ... must give way to public protection through a custodial sentence” (at para. 66).

medical and judicial understanding of FASD. The second approach raises some well-founded concern about the criminalization of people with disabilities.

*R. v. I.D.B.*¹⁵⁷ is one example of the first type of case, in that the offender was found to be incapable of rehabilitation, and it has an interesting counterpart in the Ontario decision of *R. v. L.A.B.*¹⁵⁸. Both I.D.B. and L.A.B. were FASD-affected youths who pleaded guilty to murder, and were subjected to expert evaluation prior to sentence. In I.D.B.'s case, his FASD made him a poor candidate for an Intensive Rehabilitation, Custody and Supervision order (an "IRCS order"), whereas in L.A.B. the court found that an IRCS order was the most appropriate disposition because of her FASD.

In terms of characterizing I.D.B., LeGrandeur J. of the Alberta Provincial Court looked to expert reports, and described his FASD as "severe, such that it prevents rehabilitation to any degree" and wrote "the most that can be expected is that he be maintained through constant supervision and reinforcement for the rest of his life"¹⁵⁹. The Alberta Court of Appeal concurred, noting the "inescapable conclusion" that I.D.B.'s condition was "so severe that rehabilitation [could] not be expected to reduce the risk of his re-offending", and found that the sentencing objectives of protecting the public and rehabilitating the offender could not be reconciled¹⁶⁰. I.D.B. ultimately entered a guilty plea to a count of first degree murder before Hembroff J. of the Court of Queen's Bench, and was sentenced to life in prison, with the maximum time to be served before parole eligibility (seven years in the case of a youth his age). In his reasons, Hembroff J. repeatedly noted his pessimism about I.D.B.'s potential for rehabilitation. Ultimately, he found that I.D.B. was "likely beyond redemption" and indicated that no hope could be seen for him.

In contrast, the expert reports about L.A.B. were, although not exactly optimistic, certainly less pessimistic. Although she was considered a high risk to reoffend, the experts also agreed that the best hope for her rehabilitation was an IRCS order, and that adult jail would be harmful and disruptive to progress she had made since the offence. In

¹⁵⁷ I.D.B.'s situation was considered in each of the Alberta Provincial Court, the court of Queen's Bench, and the Alberta Court of Appeal – see *R. v. I.D.B.* 2004 ABPC 219 (re eligibility for IRCS under YCJA), affirmed by 2005 ABCA 215. I.D.B. was sentenced in 2005 ABQB 421.

¹⁵⁸ 2007 ONCJ 538

¹⁵⁹ *R. v. I.D.B.* 2004 ABPC 219, at para. 44.

¹⁶⁰ *R. v. I.D.B.* 2005 ABCA 215, at para. 15.

making the determination that an IRCS order would be appropriate, the judge considered *I.D.B.*, but distinguished it on the basis of the different expert opinions before him. Despite the fact that L.A.B. had “extreme difficulty in being able to understand and control on her own her aggressive and impulsive tendencies”, and had a high risk of recidivism, an adult sentence would be excessive in light of her deficits and immaturity. An IRCS disposition was found to be appropriate, as it would provide L.A.B. with the community commitment required to reduce her risk to herself and the community¹⁶¹.

Another example of a case in which FASD, although not considered aggravating, was found to greatly decrease the rehabilitation prospects of an offender such that time in custody was increased, is *R. v. T.P.F.*¹⁶². Here, the youth had committed a robbery, during the course of which he used a knife to inflict severe injuries to the victim’s face. He had participated in a specific FASD Justice Support Program for Youth, and after a YCJA conference the Crown resiled from its previous intention to seek an adult sentence; a decision that Wilson J. did not hesitate to question¹⁶³. In imposing a custodial sentence of three years, which he considered to be inappropriately low, Justice Wilson noted that T.P.F. did “not understand because of his cognitive difficulties what this is all about and he will not be rehabilitated ... nor will he be reintegrated”¹⁶⁴. He found that T.P.F. would continue “to be a danger, and also at risk, unless he is continually monitored”. While the secure custody order would satisfy public safety concerns for a “very short while”, the subsequent probation order, which was all the control available in the circumstances, would be of no assistance in rehabilitation, accountability or protection of the public¹⁶⁵. It was made quite clear that, but for the statutory barriers of the YCJA, the appropriate disposition was a lengthy custodial one.

In terms of the second class of cases, they are ones in which it is recognized that the offender has some prospect of rehabilitation, but sentences are increased because of the increased availability of programming in custody. Indeed, with respect to offenders in Newfoundland and Labrador, it appears that the only place that an offender can receive

¹⁶¹ *Ibid.*, at paras. 70 and 74.

¹⁶² 2005 ABQB 68.

¹⁶³ *Ibid.*, para. 20.

¹⁶⁴ *Ibid.*, para. 22.

¹⁶⁵ *Ibid.*

FASD-specific programming is the federal Dorchester Penitentiary in New Brunswick¹⁶⁶. If this is true, it presents a risk that an offender could be sentenced to a longer term of custody than that which would otherwise be warranted in order to secure rehabilitative programming. Perhaps reflecting a similar situation in the Yukon, in *R. v. D.J.M.*¹⁶⁷, Ruddy J. found it preferable to impose a penitentiary term on an offender who would stand to benefit from an intensive treatment program designed for offenders with cognitive disabilities that was only available in the federal system. While the two year sentence in this case was not out of the appropriate range, *R. v. D.J.M.* illustrates the sometimes strange interplay in the objectives sentencing judges must consider. It again raises the risk of federal jail terms being imposed for their perceived therapeutic value. This gives more cause for concern in light of the recent ‘three strikes’ amendment to the dangerous offender provisions of the *Criminal Code*¹⁶⁸.

Increasing custody to achieve programming and therapeutic goals seems to have been the approach used in the Saskatchewan case of *R. v. S.L.N.*¹⁶⁹. Here, available supports and programs were the dominant factor in the youth court’s determination about whether a young offender should be tried as a youth or an adult. Meekma J.’s decision to send S.L.N. to adult court was made after lengthy consideration of the increased access the youth would have to counsellors, psychiatrists and programming in the adult penitentiary system as opposed to in a Saskatchewan youth facility.

Although some cases discussed above suggest that jail is sometimes considered a therapeutic place for an FASD offender, there are other cases that view jail as punitive and dangerous for those with FASD. These cases recognize that, although the community is not an ideal place for an offender to serve a sentence, jail can be often worse. As the British Columbia Court of Appeal stated:

... in some cases it is unrealistic to think that some of these unfortunate persons can be rehabilitated once the cycle starts, by successive and increased periods of imprisonment, especially when, upon release, they are returned to the same environment, lifestyle, frustrations and temptations which contributed to their misfortune in the first place.

¹⁶⁶ *R. v. Obed* 2006 NLTD 155

¹⁶⁷ *R. v. D.J.M.* 2005 YKTC 125

¹⁶⁸ s. 753(1.1)

¹⁶⁹ [1998] S.J. No. 709 (Youth Court).

This, of course, is especially the case with those of our citizens who have not had the advantages of a stable family structure in their formative years, or were harmed before or at birth, or afterwards by some form of alcohol syndrome, or from other physical or cognitive impairment or from the additional misfortune of abuse in childhood...¹⁷⁰

Stuart J. in *R. v. Sam* described the effects of jail on someone with FASD in even more graphic terms, calling it a “cheap, short-sighted remedy”, and

... a totally crude and undisguised form of human warehousing that will spew back into our community an angrier, more dysfunctional, and frustrated sexual predator, whose innocent victims will be, in part, our responsibility, for we would have done nothing to prevent and everything to foster certain tragic consequences to young children at the hands of a man whose life is distorted by F.A.S.¹⁷¹.

FASD was used in this case as a mitigating factor that may result in significantly less jail time with community sanctions often being used for rehabilitative purposes¹⁷².

Another example of FASD being used as a mitigating factor is found in *R. v. C.J.M.*¹⁷³. C.J.M. was a recidivist offender who had spent a good part of his adult life in jail. In this decision, he was being sentenced for his fifth robbery conviction, and the Crown was seeking a jail term of four years, which represented an incremental increase from C.J.M.’s most recent robbery sentence. In agreeing with the defence submission that an 18-month conditional sentence would be appropriate given C.J.M.’s particular circumstances, and in particular his FASD, Trueman J. focused on rehabilitative and supportive programming that would allow C.J.M. to better function in day-to-day life. She found that his frequent stays in jail had compounded his problems, and increased his risk of violence such that life outside was essentially unmanageable¹⁷⁴. Although he had in the past been non-compliant with community dispositions, she was optimistic that with proper programming and supports in place, he would benefit from serving his sentence conditionally, especially as the skills he would learn outside would have practical value

¹⁷⁰ *R. v. R.B.M.*, (1990) 54 C.C.C.(3d) 132 at 136 (B.C.C.A.), dealing with the sentence appeal for a 22-year old offender with FAS.

¹⁷¹ *R. v. Sam* [1999] Y.J. No. 112 (T.C.), at para. 12.

¹⁷² *Ibid.* Here Mr. Sam was given a relatively short custodial term but a lengthy probationary period, designed to assist his rehabilitation.

¹⁷³ 2000 BCPC 199.

¹⁷⁴ *Ibid.*, at paras. 66, 106.

in managing his life and keeping himself out of jail. A similar view of custodial programming was taken by the majority of the B.C. Court of Appeal in *R. v. J.M.R.*¹⁷⁵, when they overturned the substantial custodial term imposed on an offender with FASD and substituted a strict conditional sentence that they found would “provide more effective protection ... while creating a realistic chance of staring the appellant on the road to managing her condition”¹⁷⁶

The resolution of these cases presupposes solid supports and programming in the community, but unfortunately this is not always the case. Even community sanctions will have their share of problems. Given the nature of FASD, it is unrealistic to think that offenders sentenced in the community will not have difficulty abiding by the terms of the orders that have placed them there. Memory problems and impulsivity are a recipe for breaches of conditions. Indeed, the frequency with which FASD-affected individuals breach bail and probation orders is borne out in the charges documented in the caselaw¹⁷⁷.

FASD in Dangerous Offender Applications

Although using a different statutory framework than the sentencing one, the consideration of FASD in dangerous offender (“D.O.”) applications is similar, in that a diagnosis can be considered either as ‘aggravating’ or as ‘mitigating’ depending on whether it serves to support the application or serves to partially defeat it.

In *R. v. Mumford*¹⁷⁸, the offender had a criminal record that included a number of violent sexual offences. Following his guilty plea to two extremely serious offences involving choking and sexual assault, the Crown sought a D.O. order. The defence position was that, although the criteria for a D.O. designation was met, Mr. Mumford

¹⁷⁵ 2004 BCCA 617. The conviction was for robbery, and J.M.R. had a history of violent offences. The initial sentence was just short of two years.

¹⁷⁶ *Ibid.*, at para. 12.

¹⁷⁷ See e.g. *R. v. R.F.* [2002] S.J. no. 742 (Youth Ct) (6 substantive charges and 11 breach charges), *R. v. W.A.L.D.(2)* 2002 SKPC 38 (1 substantive charge and 7 breach charges), *R. v. J.L.M.* 2003 SKPC 28 (4 substantive charges, 8 breach charges), *R. v. Jobb* 2007 SKPC 129 (8 substantive charges, 16 breaches).

¹⁷⁸ [2007] O.J. No. 4267 (S.C.). See also *R. v. George* (1998) 126 C.C.C.(3d) 384 (B.C.C.A.) overturning a dangerous offender determination in part because the trial judge had erred in considering defiance of authority by the accused in school as evidence of persistent aggressive behaviour and noting that the accused was “an aboriginal foster child living in a non-aboriginal culture with an I.Q. at or near the retarded level..” consistent with a history of maternal alcohol abuse during pregnancy. *ibid* at para 15. Finally see *R. v. L.T.P.* 2005 BCSC 97 for another example of when the past failure to adequately address an offender’s FASD meant that rehabilitation prospects better than earlier thought, and a D.O. order was not appropriate.

could be treated and controlled in the community as a Long Term Offender (“L.T.O.”). Five experts testified about the possibility of effective treatment and control at the hearing. Kitley J., although considering both the Crown and the defence experts, ultimately preferred the evidence of the defence psychiatrist to the Crown’s. This was so because the defence expert had the benefit of considering Mr. Mumford’s FASD diagnosis, whereas the Crown expert had thought FASD possible but unlikely. In the judge’s view, the FASD diagnosis was “relevant to treatability and eventual control and therefore relevant to establishing a fit and just sentence”¹⁷⁹.

On the issue of treatability, the judge considered Mr. Mumford’s past failed attempts to complete treatment or counseling programs while in custody; a circumstance that the Crown had pointed to as being indicative of his imperviousness to treatment. Rather than finding that Mr. Mumford was incapable of rehabilitation, Justice Kitley considered that the problem was the fact that the programming was not responsive to the limitations he had as a result of FASD and inferred that “it was equally probable that the lack of achievement in these programs was related to the failure to provide programs which responded to his cognitive needs”¹⁸⁰.

While the comparison is not exact given differing facts and expert opinions, the opposite conclusion on a D.O. application was reached in the Saskatchewan case of *R. v. Otto*¹⁸¹. Mr. Otto had a history of violence and had just been convicted of a brutal home invasion robbery against an elderly lady. Psychiatric evidence at the D.O. hearing discussed the impact of Mr. Otto’s FASD diagnosis and suggested that with sufficient community support the risk he posed to the community could be markedly reduced. While the sentencing judge was satisfied that Mr. Otto could be controlled and monitored through appropriate conditions, the Court of Appeal took a different view. Finding that the psychiatrist’s evidence was flawed insofar as it failed to take into account the past failure of community supervision to control Mr. Otto’s behaviour – it had been “unsuccessful, and unsuccessful spectacularly quickly, in each instance” – the Court found that the evidence at the hearing in fact did “not show any realistic prognosis for

¹⁷⁹ *R. v. Mumford, supra*, at para. 219.

¹⁸⁰ *Ibid.*, para. 231. Kitley J. continued on, noting that “Mr. Mumford could not be expected to work on written materials at the grade 9 level when he had grade 3 reading skills”.

¹⁸¹ 2006 SKCA 52; overturning 2004 SKQB 465.

actual treatment”. They further found that the release plan for Mr. Otto contemplated 24 hour a day supervision, and this was inconsistent with a finding that he could be controlled in the community. Unlike the case with *Mumford*, there was no consideration of barriers that may have faced Mr. Otto in the community or discussion of how to eliminate them.

Difficulties in Fashioning Conditions for Community Sanctions or Release

Although most courts recognize that jail is not a good place for offenders with FASD, it is not always feasible to simply leave them in the community. This frustration has played out in the courts, with sentencing judges either indicating that they have no alternative to custody or making orders that address both the rehabilitation of the FASD offender and the protection of society, but being told at the appellate levels that the funding and resources to fulfill the terms are simply not there. Without rigid structure and extensive supports, individuals with FASD may continue to come into conflict with the justice system given their susceptibility to negative peer influences and inability to meaningfully understand their actions by linking cause and effect.

One example of a court trying to impose a community-based sentence meaningful to the offender is *R. v. L.E.K.*¹⁸². The young person at issue had an extensive criminal record that was linked by the court to his FASD diagnosis. In her sentence, Justice Turpel-Lafond determined that the just and appropriate disposition was a probation order with the condition that the youth have “a youth worker with special training and understanding in the organic brain impairment (*sic*) who is assigned to his file, and that a comprehensive case plan be prepared for the day of his release”. She also requested “an in-patient treatment centre with an aboriginal focus, [that included] special educational supports and special supports in terms of residence”.

The Saskatchewan Court of Appeal found that the sentencing judge had exceeded her jurisdiction because there was nothing in the Y.O.A. that authorized the judge to order the provincial director to do anything, nor was there any authority to demand the creation of a new program or the expenditure of money for a particular purpose. Assigning a specialized youth worker of the nature contemplated was beyond the court’s competence, as was the requirement that a comprehensive case plan be developed subject

¹⁸² 2001 SKCA 48

to her approval. After quashing these two portions of the probation order, the Court observed that the judge was “attempting to act in the best interest of the young offender and to obtain for him the best treatment possible”. She was “attempting to ensure that [he] would receive the kind and type of treatment and post-disposition care most appropriate to permit him to function in society”. The court further noted that “a clear cry for assistance and help” from provincial authorities was discernable.

The ‘partial solution’ imposed by the Court of Appeal was to direct intensive probation supervision, require a regular reporting mechanism to monitor the youth’s progress under the *Y.O.A.*, and require that L.E.K. report to a youth court worker for the purpose of receiving specialized inpatient treatment for his organic brain impairment and substance abuse. While the latter part of the direction parallels the requirement of the sentencing judge, it does not presuppose the existence of the program. If such a program failed to materialize, the youth court worker would not be requiring his attendance at it.

L.E.K.’s progress on this order was subsequently documented by Judge Turpel-Lafond¹⁸³. L.E.K.’s ARND diagnosis and its practical consequences were reviewed in light of still-limited community resources. Although ideally a ‘team’ could be around L.E.K. to support and manage him in the community, the Court did not have the jurisdiction to create such a body. Rather, it could only observe that such a team was imperative to L.E.K.’s success. In the result, he was placed on a single probation order, subject to Intensive Supervision and under conditions largely imposed by his youth worker. He was to return to the court monthly for progress updates.

The idea of assembling a ‘support team’ from resources already available in the community was explored further in *R. v. W.A.L.D.(I)*¹⁸⁴, and this case highlights the gaps in and shortcomings of available services. As discussed early, the case involved two brothers who were discharged on conditions approximately two years after being found unfit to stand trial because of their FASD. Prior to their discharge, the court considered the support structures available via a number of Conferences convened under the *Y.C.J.A.*. This was an extraordinary amount of work, with Whelan J. hearing from representatives of the Department of Corrections and Public Safety, Saskatchewan

¹⁸³ *R. v. L.E.K.* [2001] S.J. No. 434 (Youth Ct.).

¹⁸⁴ 2004 SKPC 40

Health, the Saskatoon Health Region, Saskatchewan Learning, Saskatchewan Abilities Counsel, Community Living, the Saskatoon Tribal Council, and the Saskatchewan Fetal Alcohol Support Network, among others. In noting the need for numerous supports the Court wrote that the community was ‘doubly challenged’ as a result of the justice system’s prior disregard for their primary disabilities, as the twins had since been acquiring secondary disabilities that also had to be addressed¹⁸⁵.

The Department of Corrections and Public Safety agreed to manage the overall supervision, although it did not consider it was required to do so under any legislation. With respect to the day-to-day arrangements, the boys would be supervised by a relative, who would receive some support funding from the Department of Community Resources and Employment. This funding was apparently extremely unusual, as the youth had not actually been found to be ‘in need of protection’. There were also issues with resources for schooling, including the need for educational assistants for classroom work and support workers to assist with coping strategies for bullying or, in the alternative, a need to make arrangements for a vocational assessment and arranging supervision throughout that process. As well, the court wanted to ensure that the family had advocates when they were seeking to secure certain services that, for whatever reason, they needed assistance accessing, especially after W.A.L.D.(1) and W.A.L.D.(2) reached the age of 18. The court also tried to secure assisted, independent living once W.A.L.D.(1) and W.A.L.D.(2) were adults.

In the end, despite a number of programs that could theoretically assist W.A.L.D.(1) and W.A.L.D.(2), they were largely uncoordinated and practically inaccessible. As a result, the responsibility for supervision and structure in the boys’ lives fell on the family, who were over-extended and ill-equipped to deal with them. The frustration of the court is apparent in the final parts of the judgment. The court noted “either reluctance, or inability on the part of the Departments of Corrections and Public Safety and Community Resources and Employment, including Community Living Division, Saskatchewan Health, and Saskatoon Health Region to come together, on their own, to arrive at an effective plan around the issue of support and supervision”¹⁸⁶ for

¹⁸⁵ *Ibid*, at para. 43

¹⁸⁶ *Ibid*, para. 85.

W.A.L.D. (1) and W.A.L.D.(2). Rather, the arrangement put into place was not the result of any government policy or program, but was assembled after a great deal of work by the Court.

Whelan J. articulated a number of recommendations after this extraordinarily intensive approach to sentencing¹⁸⁷. Among other things, she recommended: the development of broad education and training programs for government workers and the community at large; integrated policy and programs to provide for the social needs of FASD-affected individuals; improved advocacy service for FASD-affected individuals; better supports for FASD caregivers; development of specialized courts with dedicated staff; creation of Crown/police policy addressing appropriate responses to accused persons with FASD; and improved information sharing so that people in the justice system know when an individual has FASD and so that support workers can better collaborate to address an individual's specific needs.

Difficulties of FASD in Prison

Pervading the FASD case law is a sense of frustration about the lack of resources or institutional capacity to properly address the needs of affected individuals. The British Columbia Court of Appeal took notice of the inability of an offender to receive a FASD diagnosis in either the provincial or federal correctional systems¹⁸⁸ and another British Columbia judge expressed that view that he “had no doubt” that a 20 year easily led man with FASD “will be victimized in prison.”¹⁸⁹

Another stark example of the difficulties of dealing with FASD in prison is the Yukon case of *R. v. D.J.*¹⁹⁰, which reflects an institutional inability and seeming unwillingness to make arrangements to accommodate an offender. D.J., who had severe FASD, had been found NCRMD of break and enter and sexual assault in youth court and was put into the jurisdiction of the Review Board. On subsequently being found guilty of a fraud charge as an adult, the Board, pending assessment, remanded D.J. into the Whitehorse Correctional Centre in its capacity as a ‘designated hospital facility’. Although this was supposed to be a short-term order and the therapeutic resources

¹⁸⁷ *Ibid*, see list at para. 88

¹⁸⁸ *R. v. Harris* 2002 BCCA 152 at para 24

¹⁸⁹ *R. v. Williams* [1994] B.C.J. no.3160 at para 37.

¹⁹⁰ 2000 YTSC 513

available to him at the W.C.C. fell shockingly short of what any hospital would be able to provide, the lack of community resources frustrated D.J.'s conditional discharge into the community. Four and a half months after this placement, the Review Board pleaded with the Yukon Government to provide a more appropriate alternative. While not ideal, the proposal was that D.J. be housed at the Adult Resource Centre (ARC) in Whitehorse. Because of an intervening Territorial election, however, necessary funds from the Yukon Government were not made available. Some six months later, D.J. was still being housed in the WCC and he applied to the Yukon Supreme Court for an order of *habeas corpus*. Veale J., in granting this remedy, ordered D.J.'s remand into the ARC, effectively circumventing the necessity for government funding approval. This order was never challenged. It is striking that the difficulties faced by people with FASD has inspired various forms of "judicial activism" by judges frustrated with the limited options before them.

Conclusion

This paper has outlined the jurisprudence dealing with FASD and the criminal law from the investigation of crime through to the sentencing process. Much of this jurisprudence is only available in electronically reported decisions of trial judges and it is difficult to know if there are many other cases that are not reported or where the issue of FASD is simply not raised. Nevertheless, the growing number of reported cases suggests that the interaction between FASD and the criminal justice system is not going away and in the coming years more appellate courts will likely weigh in on the subject.

It is unlikely that Parliament will address issues concerning FASD, given the primacy of the courts in terms of supervising statements from the accused and the important role of the provinces and territories in providing services and supervision for offenders with FAS. This raises important questions about what institutions are best suited to provide access to justice for people with FASD. The courts can provide some relief in the worst cases, but provincial and territorial governments are in the best position to the extent that FASD is a health care and community safety issue. Judges have, with mixed success, taken initiatives designed to prompt provincial governments to take actions with respect to FASD assessments and services. They have expressed frustration about the difficulties of getting provincial governments to take a more holistic and

proactive approach to FASD issues. A number of judges have sent important warnings to governments about what they are seeing in the front lines of their courtrooms.

Although the courts are by no means the optimal actor to address FASD, they cannot ignore it. In particular, the courts have a core obligation to ensure that the mentally innocent are not punished. The cases outlined in this paper concerning voluntariness and right to counsel suggest that there are real dangers of false confessions and miscarriages of justice involving people with FASD. Courts should be concerned about whether those with FASD have an operating mind regardless of whether there is police misconduct in their interrogation. In addition, the courts must interpret the informational and waiver requirements of the right to counsel in a manner that attempts to make these rights real for people with FASD. The cases, however, also suggest that introducing expert evidence about FASD is not always a winning strategy for the accused because in some cases the evidence is used by judges as part of the basis to dismiss allegations made by the accused about police abuse or inconsistencies in witness accounts of people with FASD.

There is a slight trend in the caselaw to hold that people with FASD are unfit to stand trial. Parliament's 2005 post-*Demers* amendments, which allow proceedings to be stayed for people found permanently unfit to stand trial, may encourage more accused with FASD to attempt to be found unfit to stand trial now that they no longer face the certainty of indeterminate conditions being placed on them. That said, a stay of proceedings is not the automatic disposition and there remain some risks for the accused including refusal to enter stays on public confidence and potentially long term and intensive conditions. Although an unfitness to stand trial determination will provide a means for some people with FASD to escape the criminal justice system, it will not address the underlying causes of their offending behavior and it may not be a viable option for people with FASD who do not have very low IQs. In addition, the greater use of the unfitness option has largely been limited to trial decisions. There is a real possibility that appellate courts may restrain trial judges from finding people with FASD unfit to stand trial simply by applying the leading and restrictive appellate authorities on fitness to stand trial.

The traditional doctrines of fault and the mental disorder defence seem at present unwilling to accommodate FASD. Although FASD has been recognized as a mental disorder, it has not been held to be severe enough to prevent accused from appreciating the physical consequences of their actions or knowing that they are wrong. A person with FASD may be easily led and coerced into committing crimes, but they generally have the required level of fault. Courts have yet to attempt the task of individuating the ordinary person standard used for defences such as duress to include the person with FASD. This should be done to ensure that these defences do not require people with FASD to make unrealistic efforts to resist external pressures to commit crimes.

Given the failure of the criminal law to make accommodations, it is not surprising that FASD is most often considered with respect to sentence. But deferring consideration of FASD till this end point of the criminal process is problematic. Trial judges can find themselves in an impossible position: it is often very difficult to obtain an FASD assessment especially for adult offenders, but they may be restricted from taking judicial notice of FASD symptoms. To be sure, a diagnosis of FASD can require costly multidisciplinary assessments, but there is a danger that judges will not have adequate information about the effects that FASD may have played in the commission of the offence or the offender's future prospects. That said, a diagnosis may not turn out to be overly helpful if the resources are not available in the community or prison to respond to it with appropriate treatment and supervision. Even when such resources are present, judges should be careful not to use FASD as an aggravating factor in sentencing or to be overly enthusiastic in taking a therapeutic approach. FASD, unlike addictions and some mental health issues, cannot be cured. There is need to ensure that accused with FASD are guilty under the law and their sentences are proportionate to the seriousness of the offence and the offender's degree of responsibility. Professional opinion that people with FASD do best when they are closely supervised and live in an orderly environment should not be used to justify disproportionately long community sanction or prison terms.

FASD should be considered at the early stages of the criminal process and the buck should not be passed to the sentencing judge. The acceptance of false confessions or false testimony from people with FASD could result in miscarriages of justice. Ignoring FASD could result in the trial of people who may not fully be able to understand the

consequences of legal proceedings or to assist in their defence. It will also produce a situation where rights to silence and counsel, the requirements of fault and the defences may not be truly meaningful for some people with FASD.

The trend of increasing reference to FASD in reported criminal cases is a positive development to the extent it suggests that FASD is not being ignored in the courts. Nevertheless, it should not be assumed that recognition of FASD will always work to the benefit of the person with FASD. There is no magic legal solution to the sad problem of FASD.