

FINAL – ANNOTATED BIBLIOGRAPHY – A2J – PERSONS WITH DISABILITIES

(arranged in alphabetical order by author's last name)

Valentina Capurri, *The Medical Admissibility Provision vis-à-vis the Charter of Rights and Freedoms*, (2012) 16:1; online <http://lh.journals.yorku.ca/index.php/lh/article/view/38499/34911>.

The *Immigration and Refugee Protection Act* (IRPA) contains provisions allowing the IRCC to refuse persons entry into Canada on the grounds of mental and/or physical disabilities. Decisions to exclude persons with disabilities from admission focus on the excessive costs that the disease or disability would likely place on Canadian medical and social services. The article argues that the provision discriminates against persons with disabilities. The author notes that the removal of immigrants on disability-related grounds may be contested under the *Charter of Rights*, but litigants appear unwilling to make the argument, perhaps because of fear it would not succeed.

Ab Currie, *Civil Justice Problems and the Disability and Health Status of Canadians*, *Journal of Law and Social Policy* 21. (2007): online, <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1012&context=jlsp>.

This paper examines the relationship between experiencing legal problems that can be resolved (“justiciable legal problems”) and experiencing some form of disability or other health problem. This is important because there is a potential value to society of providing assistance with justiciable problems beyond achieving strictly legal objectives or outcomes. To the extent that justiciable problems and a range of other types of problems involving health care and other social issues are interconnected, providing legal or related assistance to resolve the justiciable problem may have positive effects on the non-legal problems. Connecting access to justice policy with other public policy domains strengthens the case for addressing the unmet legal needs of the public.

Trevor C.W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* [2016 Everyday Legal Problems Overview], 2016 Canadian Forum on Civil Justice, Toronto, Canada: online CFCJ <http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.

This overview report summarizes some of the basic findings of the Canadian Forum on Civil Justice's 2014, *Everyday Legal Problems and the Cost of Justice in Canada* survey. The report builds on, and in some cases updates and clarifies, some of the preliminary findings released in the initial report on this survey (Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Fact Sheet*, (12 March 2015), online <http://www.cfcj-fcjc.org/a2jblog/everyday-legal-problems-and-the-cost-of-justice-in-canada>).

A. Gray, S Forell, and S Clarke, *Cognitive impairment, legal need and access to justice*, Justice issues paper 10, Law and Justice Foundation of NSW, Sydney (2009) [Gray, Forell & Clarke] online at http://www.lawfoundation.net.au/ljf/app/4016D540ECE363B3CA25756F001DEE70.html#bmk_fnote42.

This article examines the barriers to access to justice faced by people with cognitive disabilities because of various factors including lack of awareness of the justice system, higher dependence on others, fear of retribution, failure of those in the justice system to recognize their impairment, communication barriers, misconceptions about mental disabilities, anxiety and stress resulting from legal processes, reliance on formal written processes, the complex and stressful nature of legal processes, and under-resourced specialist services.

Patricia Hughes, *Inclusivity as a Measure of Access to Justice*, (2013) 31 Windsor Y B Access Just [Hughes, "Inclusivity as Measure of A2J"]; <http://ojs.uwindsor.ca/ojs/leddy/index.php/WYAJ/article/view/4308>.

This paper was prepared for the CBA, Envisioning Equal Justice Summit in Vancouver in April 2013. It reviews the findings of recent Canadian access to justice reports and notes that they identify "generic" access to justice barriers affecting all Canadians. The author argues that studies and proposed solutions to access to justice problems require a more holistic analysis that looks at the justice system from the viewpoint of particular disadvantaged groups such as members of Aboriginal communities, persons with disabilities, and women. This approach requires a nuanced understanding of how social identity is affected by and in turn affects how people perceive particular aspects of law. Reforms need to consider and explain how they would promote a particular form of equality and thus how these reforms would effect broader change. The article discusses the relevance of inclusivity to access to justice, a consideration of the operational barriers and their possible impact on the effectiveness of generic solutions to increasing access to justice. To illustrate the application of this holistic approach, the author focuses on how literacy skills and living in rural and remote areas can create barriers to accessing justice for those in aboriginal communities and persons with disabilities. It concludes that unless we adequately consider the impact of access to justice reforms on the circumstances of disadvantaged groups, we risk perpetuating an underclass of persons excluded from justice.

Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities - Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice, Final Report* (September 2012) [LCO Disabilities Report]: online, Law Commission of Ontario, <http://www.lco-cdo.org/persons-disabilities-final-report.pdf>.

This Final Report of The Law Commission of Ontario is the result of a multi-year, multi-stage project to develop a principled analytical framework, the *Framework for the Law as it Affects Persons with Disabilities* (Framework) that can be used as a tool by those who develop laws and policies, such as legislators and

policy-makers; develop policies and programs in the private sector; interpret laws, such as courts and tribunals; or identify needs and advocate for reforms, to evaluate the relevance, effectiveness and accessibility of the law for persons with disabilities. This Project aims to contribute to the ongoing development and evolution of the law as it affects persons with disabilities. The overarching goal of the project is to achieve substantive equality for persons with disabilities. Substantive equality is contrasted with “formal equality”, and goes beyond simple non-discrimination. It includes values of dignity and worth, the opportunity to participate, having one’s needs met, and the opportunity to live in a society whose structures and organizations include them. It recognizes and responds to societal patterns that result in different outcomes on the basis of irrelevant characteristics, as well as real differences that inappropriately disadvantage members of a particular group. The Final Report includes case studies throughout to illustrate how the concepts and principles in the Report apply to the everyday experiences of persons with disabilities.

The Project involved four stages of public consultation, including a very broad community consultation in 2010. It also involved extensive research including six commissioned research papers. The Advisory Group for the project included representatives from government, service providers, academics, lawyers, and community and advocacy organizations.

Part I of the Final Report discusses the following key considerations that guide the development of the Framework:

1. Understanding that access to justice requires looking beyond the clarity, efficiency, and effectiveness of the law to consider normative issues;
2. Recognition of the broader social and environmental contexts of the experience of disability, and how they may affect the ways in which persons with disabilities encounter the law;
3. The importance of building on the considerable existing foundation for the law as it affects persons with disabilities, including international documents, domestic law and numerous domestic policy documents at both the federal and provincial levels;
4. The benefits of a framework based on a set of principles, which can provide guidance while remaining flexible and applicable in changing circumstances;
5. The centrality of the experiences and perspectives of persons with disabilities to the identification and application of the principles; and
6. The design of the framework as a strong foundation for further research, analysis and discussion.

Part II of the Final Report discusses the factors relevant to understanding the lives of persons with disabilities, providing an example of challenges facing young adults with disabilities as they transition to living independently. The Report identifies a number of key themes in the law as it affects persons with disabilities, which create barriers to accessing justice:

1. The “invisibility” of persons with disabilities in the law: Laws may not take into account the ways in which those with disabilities may be differently circumstanced, and so may disadvantage persons with disabilities or be ineffective in meeting their needs.
2. Negative attitudes, stigma and the law: Negative attitudes arise both in individual interactions and in the content or implementation of laws, policies and practices.
3. Complexity, overlap and silos: The law as it affects persons with disabilities is complicated and fragmented making it difficult for both persons with disabilities and for service providers and advocates who attempt to assist individuals in navigating systems. Well-intentioned laws may be effectively inaccessible for persons with disabilities who do not have the supports and resources necessary to understand and make use of them.
4. Implementation and access to justice issues: Laws may be positive on paper, but may fall short of their goals in practice for several reasons, including barriers that persons with disabilities and other marginalized groups may face when attempting to obtain information about their rights and responsibilities under the law; failure to ensure that processes accommodate disability-related needs; reliance on self-advocacy to navigate complex systems; power imbalances between persons with disabilities and service providers; limited resources; and a lack of monitoring and accountability mechanisms.

Part III explains the benefits of a principles-based approach to developing and reviewing law, policy, and programs and why substantive equality is an overarching value and not a specific principle. It discusses the following six principles that are the foundation of the Framework:

1. Respecting the Dignity and Worth of Persons with Disabilities
2. Responding to Diversity in Human Abilities and Other Characteristics
3. Fostering Autonomy and Independence
4. Promoting Social Inclusion and Participation
5. Facilitating the Right to Live in Safety
6. Recognizing That We All Live in Society

Part IV of the Report explains the Framework. It explains how to use the Framework, factors important to its application, and an eight-step process for applying it to evaluate the law, using questions to guide the application.

Part V of the Report illustrates the application of the Framework through consideration of a current issue in the law as it affects persons with disabilities: the legal framework through which persons with disabilities receive supports in the community for needs related to activities of daily living. The intent of the illustration is to reflect on this area of the law in light of the principles and considerations identified in the Report.

Part VI explains that the Report and Framework have been disseminated to a wide range of organizations and individuals and that the LCO intends to develop simplified materials related to the Framework.

Part VII includes the recommendations of the LCO for the future use of the Framework by a range of public and private actors and for its review and evaluation after a period of seven years.

The Framework (September 2012) can be downloaded as a standalone document here <http://www.lco-cdo.org/en/disabilities-final-report-framework>. It is implemented through a step-by-step approach which asks the following questions:

- Step 1: How Do the Principles Relate to the Context of the Law?
- Step 2: Does the Legislative Development/Review Process Respect the Principles?
- Step 3: Does the Purpose of the Law Respect and Fulfill the Principles?
- Step 4: Who Does the Law Affect and How Does This Relate to the Principles?
- Step 5: Do the Processes Under the Law Respect the Principles?
- Step 6: Do the Complaint and Enforcement Mechanisms Respect the Principles?
- Step 7: Do the Monitoring and Accountability Mechanisms Respect the Principles?
- Step 8: Assessing the Results of the Evaluation: Is the Law True to the Principles?

Ravi Malhotra, *The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States*, (2009) 33 Man. L.J. 1, online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198027.

This paper explores the implications of the social model of disablement for the legal regulation the workplace in Canada and the United States. The social model recognizes how structural and attitudinal barriers in society marginalize people with disabilities. The author discusses how legal rules and decisions affect workers' empowerment, in particular, in respect of workers with disabilities. People with disabilities face critical structural and attitudinal barriers in the workplace. It is important to address these barriers because work allows people to escape poverty and be included and contribute to society. Work can also be an important part of a person's identity.

The author challenges the myth that the market is self-regulated and shows how the market and contemporary workplace are deeply regulated by the state and legal rules. Historic rulings of the United States Supreme Court highlight the arbitrary character and choice inherent in the formulation of legal regulation. The author argues that the same analysis can be applied to Canadian jurisprudence. The paper then examines how workers with disabilities have been affected by the Supreme Court of Canada's decision in *Meiorin* and the evolving doctrine of reasonable accommodation. The author concludes that the application of the social

model of disablement could result in substantive conceptual and physical control over day-to-day production decisions and systemic disability supports over the lifespan of the worker.

Robin L. Nobleman, *Addressing Access to Justice as a Social Determinant of Health*, (2014) 21 Health L. J. 49: online, CFCJ, <http://www.cfcj-fcjc.org/a2jblog/are-health-problems-legal-problems-in-disguise>.

Poor housing, insecure employment, inadequate education, and other disadvantages negatively affect health accumulate throughout life. The author argues that these problems may actually be unmet legal needs that can be dealt with in a poverty law practice. The author argues that evidence that access to justice has positive consequences that extend further than the courthouse could increase public support and political will for making the system more accessible. If access to justice is considered a social determinant of health, and action is taken to improve access, the result could be a healthier and more just society.

Yvonne Peters and Debra Parkes, *Making Poverty a Human Rights issue for People with Disabilities Related Documents* (November 2014): online, Council of Canadians with Disabilities, <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/making-poverty-a-human-rights-issue-for-people-with-disabilities>.

The authors argue that the poverty experienced by people with disabilities must be regarded as more than a social policy issue. They argue that true equality and human rights recognition for people with disabilities can only be achieved when the impact of poverty is understood and recognized.

Part I reviews significant cases that have resulted in key gains made by people with disabilities under human rights and equality rights law.

Part II assesses how these gains could be used to begin to tackle the discriminatory effects of economic barriers. The authors recognize that the relationship between disability and poverty is complicated involving several factors and that this may require a much more complex human rights analysis. The authors discuss the general reluctance of courts to recognize poverty as a human rights issue. The fact that Canada has new obligations under the United Nations *Convention on the Rights of Persons with Disabilities* (UNCRDP) may help to advance the understanding that poverty must be viewed as a human rights issue. The UNCRDP reflects a new and conscious commitment by all levels of government to take proactive measures to eliminate disadvantage and achieve full inclusion for people with disabilities.

The authors conclude that having a disability means there is a high likelihood of living a life of poverty and that living in poverty increases the incidence of disability. Although Canadian courts have tended to say that poverty is not a human rights issue, the authors are optimistic that this may change.

Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, (2010) 2 Georgetown Journal of Law & Modern Critical Race Perspectives 209.

Ribet argues that actions taken by people of colour to overcome systemic disadvantage can produce disabilities. One common tactic is to over-perform in order to rebut the presumption of incompetence as a result of being a person of colour. The author focuses on the experiences of women of colour in the workplace and educational settings, and the consequences of the disproportionately higher discrimination they face. The experience of aggression, subtle, and overt racial discrimination or sexual harassment, and earning disparities lead these women to over-perform. The author argues that the stressors that these women experience as a result of the discrimination they face, can over time, increase the likelihood that they suffer from disabilities and result in a sense of shame in their inability to overcome these conditions. Thus, disability is both an outcome of structural marginalization and the cause of continued marginalization, because the disabled experience disproportionately higher poverty.

Mark C. Weber, *Immigration and Disability in the United States and Canada*, from the Selected Works of Mark C. Weber, (2015) 32 Windsor Y B Access Just 1 (June 13, 2016): online http://works.bepress.com/mark_weber/18/ .

This article compares provisions under Canadian and United States immigration and refugee law that allow immigration to prevent persons from disabilities from immigrating to those countries, based on their disabilities. The article traces the history of these provisions in both countries, showing that they have become less restrictive over time. The policy of Canadian immigration laws focuses on excluding persons from immigrating to Canada if they could be expected to place excessive demands on health or social services, with some exceptions. The Supreme Court of Canada ruled in *Hilewitz v Canada (Minister of Citizenship & Immigration)*, 2005 SCC 57 at paras 54-56, that medical officers must assess likely demands on social services, “not mere eligibility for them,” as well as the willingness and ability of the applicant or his or her family to pay for the services. The Court directed that officials must make individualized assessments rather than a mere classification of the impairment. However, the author suggests that the Court’s focus on excessive demand for social services, rather than medical services, might diminish the applicability of the decision.