

AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: A Canadian Legal Perspective

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Canadian legal tests of fitness to stand trial, while similar to tests in the United States, place less emphasis on rational understanding of the complexities of the trial process and greater emphasis on communicating with legal counsel. The limited cognitive capacity test has gained wide acceptance in Canadian jurisprudence as a balance between ensuring that an accused person can provide the necessary information to allow his legal counsel to defend him adequately while also minimizing the potential delay in a speedy trial. The tests have been criticized by organized psychiatry and legal scholars but have been supported by advocacy groups for the mentally ill. Canadian research on accused persons committed to hospitals for fitness evaluations suggests that this process may be used or, arguably, misused by psychiatrists to provide treatment to persons who would otherwise be inaccessible to psychiatric intervention. This raises complex ethics-related questions not yet fully addressed.

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The authors of the *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*¹ have done an excellent job in providing a thorough, well-researched, and well-referenced guide to the assessment of adjudicative competence. The Guideline is logical yet eminently readable and deals with the complex matters involved in a rational and well-considered manner. Evaluations of fitness to stand trial are probably the most common forensic evaluations requested by the courts. Competency evaluations are usually utilized by residency and fellowship programs as a cornerstone of the teaching program in forensic psychiatry. This Guideline will serve in the future, not only as a resource for practicing psychiatrists but as a teaching tool that is likely to be utilized in all training programs for both general psychiatrists and forensic fellows.

I have been asked to offer commentary on the Guideline and in particular to offer a Canadian perspective. I will confine my remarks to two main areas: the different approaches to the legal definition of

competency to stand trial; and the different uses and arguable misuses of fitness to stand trial remands and evaluations.

In Canada, the fitness to stand trial provisions are defined under the Criminal Code of Canada (CCC).² In 1992 the Code was amended, and mentally disordered offenders were addressed in Section 2 of the CCC. The term “unfit to stand trial” was defined as:

Unable on account of mental disorder to conduct a defense 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.²

The Canadian definition was in many ways very similar to the *Dusky v. U.S.*³ decision. The CCC made provisions for remanding evaluatees for five days to determine fitness, with the provision of extending the remand if required, but not to exceed 30 days in duration. The CCC makes it explicit that a remand assessment order must not direct that the evaluatees receive psychiatric treatment during the assessment period.

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While at first blush the CCC definitions of evaluation of fitness to stand trial would imply an assessment of the defendant's rational capacities, a subsequent Ontario Court of Appeal case limited the tests quite significantly. *Regina v. Taylor*⁴ was a complicated case in which the defendant was a lawyer who had suffered chronic paranoid schizophrenia with delusions primarily directed toward the justice system. Mr. Taylor was very knowledgeable regarding the court system and the possible pleas and technicalities, but he would not or could not cooperate with his legal counsel. Psychiatric evaluations determined that his delusions were so "pervasive and irrational that he was not merely capable of disagreeing with counsel but was unable to perceive his own best interests and how those interests should be addressed in the conduct of the trial."⁴ The trial judge found him unfit to stand trial and he was placed in a secure mental health center for treatment.

Mr. Taylor appealed the findings of unfitness and his disposition. The Ontario Court of Appeal was concerned that the Crown may not in fact have been able to prove the charges of assault against Mr. Taylor and suggested that had the trial judge required the Crown to show it was able to prove the allegations it may have provided valuable insight into Mr. Taylor's capacity to stand trial. Ultimately the Court of Appeal held that there was no question that Mr. Taylor understood the nature and object of the proceedings and its possible consequences but noted that the Crown had argued that he was unable to communicate with defense counsel. The appeal court held that the trial judge applied too broad a test and instead narrowed the test to "one of limited cognitive capacity" in determining the accused's ability to communicate with his counsel. The court opined that it was only necessary for the accused to relate the details of the offense in such a way that his counsel could properly present a defense and that it was not necessary for the accused to be able to act in his own best interests. The court noted that any accused is entitled to choose his own defense and to present it as he chooses and not necessarily do what others consider to be in his "best interests." They concluded that "the limited cognitive capacity test strikes an effective balance between the objective of the fitness rules and the constitutional right of the accused to choose his own defense and to have a trial within a reasonable time."⁴

The *Taylor* decision has been highly criticized by legal authors and psychiatrists as being unduly re-

strictive.⁵ It is argued that a "rational" understanding is no longer required. The case has been criticized as demonstrating the court's lack of understanding of the degree mental illness affects self-preservational functions such as motivation, insight, and volition. It was argued that the limited cognitive capacity test may not adequately pick up those who would arguably be unfit to stand trial by reason of mental disorder.

The minimum cognitive capacity test precedent was set in Ontario and does not mandate similar interpretation in other jurisdictions. There was, however, some affirmation of the decision in the Supreme Court of Canada case of *Regina v. Whittle*,⁶ a case dealing primarily with the cognitive ability to waive legal rights as opposed to fitness to stand trial.

While no further court reviews of the test were offered, the political process has examined the determination. The Fourteenth Report of the Standing Committee on Justice and Human Rights, a subcommittee of Parliament, addressed the matter in its report of February 26, 2002.⁷ It was noted that the Canadian Bar Association and the Canadian Psychiatric Association expressed the views that higher levels of functioning should be required of persons attempting to defend themselves, whereas other groups representing defendants argued for a more simplified test that may well reduce the number of persons found unfit to stand trial. They were also concerned about the speedy resolution of criminal charges, which would be delayed by fitness procedures. After deliberation, the committee recommended to the Minister of Justice to review the definition of fitness to stand trial "including a test of real or effective ability to communicate and provide reasonable instruction to counsel."

In response to the committee's recommendations, the Government of Canada⁸ noted that there was not unanimity in opinion to expand the test and ultimately avoided making a difficult decision by referring the matter for further consideration to the provincial attorneys general. Effectively, their decision was a nondecision. At this point, Canadian law requires only that defendants be able to provide a factual account to their lawyers but not necessarily an analytical or rational analysis.

While the debate over tests to determine fitness is stimulating and challenging, what is equally interesting is the rise in number of accused persons being referred for fitness evaluations. Schneider⁹ reviewed

data in the last decade that demonstrate a 10 percent annual increase in the number of psychiatrically ill people entering the criminal justice system. This coincides with other observations of an increasing number of mentally ill persons being housed in criminal justice systems as the mental health systems limit their funding and resources. We are also becoming more aware of data looking at the results of fitness evaluations that generally show that most persons remanded for assessment are held to be legally fit to stand trial.¹⁰ Zapf and Roesch¹¹ looked at 180 males remanded for inpatient evaluation of fitness to stand trial. While the Criminal Code provides for five-day remands, most were requested for an extension, so that the average stay was 23 days in custody. Most of the individuals had significant psychiatric illnesses and were committed under the Mental Health Act and treated with psychotropic medications. The data revealed that 86 percent had previous contact with mental health professionals, 33 percent had been hospitalized for psychiatric illness, and 75 percent had criminal histories. Almost 90 percent of the evaluatees were found to be fit to stand trial. The authors noted that many of the evaluatees, when initially admitted, were considered by their psychiatrists to be unfit, but after a short course of psychotropic medications were deemed to have improved and were by discharge deemed to be medically fit to stand trial. The authors concluded that the fitness process was in fact being used for purposes other than assessing fitness and specifically to assess and treat individuals with psychotic illnesses who otherwise were treatment-resistant or avoidant. It could be argued that the study provided evidence that mental health professionals were able to work around some of the logistical difficulties in providing treatment to mentally ill persons, arguably at the expense of the integrity of the legal process.

Other Canadian studies have shown similar high rates of findings of fitness following psychiatric evaluations. Chaimowitz and Ferencz¹² reported that 74 percent of evaluatees seen in outpatient clinics were found fit to stand trial, while Roesch *et al.*¹³ reported that 79.4 percent of the accused evaluated in inpatient units were found fit to stand trial.

Rarely discussed in forensic journals are the financial and human resource costs of forensic assessments. These costs are generally justified as supporting the justice system and the protection of civil liberties; certainly, determinations of fitness to stand

trial fall squarely within these parameters. It is likely, however, that fitness evaluations are serving other purposes, especially in the era with diminishing psychiatric treatment resources and an increasing number of mentally disordered persons being admitted to jails and prisons. The Canadian experience suggests that at least in some jurisdictions, the fitness to stand trial provision is being used somewhat creatively, albeit questionably, to provide treatment to mentally disordered offenders who might not otherwise have access to psychiatric intervention. Psychiatrists engaged in such practices may certainly be criticized for violating the ethics guidelines of the American Academy of Psychiatry and the Law (AAPL) in assuming a treatment role while conducting forensic evaluations. By the same token, these psychiatrists are providing a benefit to a difficult population who might not otherwise receive treatment. At this point, we do not have good data as to the frequency of such "creative" use of procedures to assess fitness.

The Guideline provides an excellent review of ethics-related concerns pertaining to assessment of fitness to stand trial. In an ideal world, forensic evaluators remain objective and independent and do not assume treatment roles that may compromise their objectivity. In many provincial and state forensic mental hospitals, however, forensic psychiatrists are often required to take on dual roles of assessor and treater and then resume a role of assessor once the person is considered to be medically fit to stand trial. It would be optimal to have these roles clearly divided, yet often workload pressures and budget restrictions limit this ability. Similar situations are found in the treatment of persons found not guilty by reason of insanity or unfit to stand trial in which treating psychiatrists may be expected to send in letters to review boards and/or courts regarding their patients' current functioning and status. While practicing forensic psychiatrists recognize the benefit of having the assessment and treatment roles taken up by different psychiatrists, funding authorities and hospital administrators may not share that perspective. Our colleagues in such settings are placed in difficult situations that are not fully addressed by our current ethics guidelines.

References

1. Mossman D, Noffsinger SG, Ash P, *et al*: AAPL Practice Guideline For the Forensic Psychiatric Evaluation of Competence to Stand Trial. *J Am Acad Psychiatry Law* 35(Suppl):S3-72, 2007
2. R.S.C., C.C.- 46 (Can.)

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3. Dusky v. U.S., 362 U.S. 402 (1960)
4. Regina v. Taylor, (1992) 77 C.C.C. (3d) 551
5. Schneider RD, Bloom H: R v. Taylor: a decision not in the best interests of some mentally ill accused. *Crim Law Q.* 38:183, 1955
6. Regina v. Whittle, (1994) 2 S.C.R. 914
7. Fourteenth Report: The Standing Committee on Justice and Human Rights, House of Commons Committee, June, 2002
8. Department of Justice: Response to the fourteenth report of the Standing Committee on Justice and Human Rights: review of mental disorder provisions of the Criminal Code. Ottawa, Ontario, Canada: Department of Justice, November 2002
9. Schneider RD: Statistical survey of provincial and territorial review boards. Ottawa, Ontario, Canada: Department of Justice, 2000
10. Canadian Centre for Justice Statistics: Canadian Crime Statistics Ottawa, Ontario, Canada: Canadian Centre for Justice Statistics, 2002
11. Zapf PA, Roesch R: Fitness to stand trial, characteristics of remand since the 1992 criminal code amendments. *Can J Psychiatry* 43:287-93, 1998
12. Chaimowitz GA, Ferencz J: Cost savings associated with fitness to stand trial assessments in detention centres: a pilot program. *Can J Psychiatry* 44:808-10, 1999
13. Roesch R, Ogloff JRP, Hart SD, *et al.*: The impact of Canadian Criminal Code changes as remands and assessments of fitness to stand trial and criminal responsibility in British Columbia. *Can J Psychiatry* 42:509-14, 1997