A Review of the Interpretation of the Canadian Test for Fitness to Stand Trial

Laeticia Eid, MD, Amina Ali, MD, Leisha Senko, JD, and Graham Glancy, MB, ChB

In 1991, Canada introduced Bill C-30 to amend the Criminal Code (mental disorder). Bill C-30 codified accumulated law specifying the criteria for fitness to stand trial. This test was clarified in a landmark case, *R v. Taylor*, which appeared to accept the limited cognitive capacity test. This explanation has guided the assessment of fitness to stand trial in courts across Canada for three decades. It was recently tested in an Ontario Court of Appeal case, *R v. Bharwani*, which ruled that the common interpretation of *Taylor* was insufficient. The court ruled there is one test for fitness, which is contextual and nuanced, and this test is spelled out in the Criminal Code. This will likely change the test and manner for assessing fitness to stand trial in Canada from how it has evolved over the last three decades.

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The Ontario Court of Appeal (Court of Appeal) recently clarified the Canadian test for fitness to stand trial, noting there is but one fitness test for all accused, whether represented by counsel or not. The court made this and seven other conclusions about the test set out in the Criminal Code of Canada (hereafter, "Criminal Code" or "Code")[1] and previously interpreted in a landmark Court of Appeal case, *R v. Taylor*.[2]

Background

In *Taylor*, the accused was a lawyer charged with stabbing counsel who was employed with the Law Society of Upper Canada. Mr. Taylor had been a practicing lawyer until his suspension pending a psychiatric report. He had a diagnosis of paranoid schizophrenia, which included delusions of persecution. As often happens in landmark cases, this case had several intricacies,[3] but the final ruling of the Court of Appeal is most relevant. Mr. Taylor asserted, and the Court of Appeal appeared to accept, that the required test for fitness was the limited cognitive capacity test. The Court of Appeal found that the bar for fitness to stand trial is relatively low and the presence of delusions alone does not make the accused unfit unless the delusions distort the accused's rudimentary understanding of the judicial process. Thenceforth, the limited cognitive capacity test, or a variant thereof, became the prevailing test of fitness throughout Canada. In provincial mental health courts across the country, the "Taylor test" and "Taylor test questions" crept into common usage, even though the *Taylor* decision never mentioned either of these terms. Nevertheless, the Taylor test questions include the following:

What are the roles of the various people in the courtroom?

What charges is the accused facing?

What are the available pleas?

What are the consequences of a conviction?

What is the meaning of an oath?

What is perjury?

What are the consequences of perjury?

Since the *Taylor* decision, the limited cognitive capacity test, and common interpretations of it, have been subject to criticism[5], with critics arguing that the bar for fitness to stand trial was set too low.

Schneider and Bloom[6] reason that the Taylor test imposes an undue barrier to a fair outcome for some

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Dr. Eid and Dr. Ali are Assistant Professors, Ms. Senko is an Adjunct Lecturer, Dr. Glancy are a Professor and Director, Division of Forensic Psychiatry, Department of Psychiatry, University of Toronto, Toronto, Ontario. Ms. Senko is Senior Legal Counsel (Forensics) and Drs. Eid, Ali, and Glancy are Staff Psychiatrists, Centre for Addiction and Mental Health, Toronto, Ontario. Address correspondence to: Graham Glancy, MB, ChB. E-mail: graham.glancy@utoronto.ca.

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accused individuals with mental disorders. Both authors speak with authority, having several decades of firsthand court experience with mentally ill persons who are accused of crimes. These rules were developed as a protective measure to ensure that people who do not satisfy the factors enunciated in § 2 of the Criminal Code are found unfit to stand trial.[6] They conclude by noting that "In order for the words 'to choose his own defense' to constitute a meaningful right, it must be assumed that the choice is based upon the accused's rational understanding of his legal predicament; otherwise, his right to choose is a right to commit the sort of legal folly the rules were designed to prevent" (Ref. 6, p 205).

In the recent case, *R v. Bharwani*,[7] the Court of Appeal reviewed the decision in *Taylor* and offered its interpretation. The central question became whether the trial judge failed to consider that Mohamed Bharwani was incapable of making rational decisions in his best interests. Mr. Bharwani put to the court that, if this consideration was not currently part of the fitness test, then the court should add it, "even if this means overturning Taylor" (Ref. 7, p 11).

R v. Bharwani

Mr. Bharwani had been experiencing mental health symptoms for at least four years before his arrest. He stopped attending school in Grade 11 and had been using cannabis and alcohol.[7] He complained people were picking on him. He was seen for mental health consultation but did not return for the follow-up appointment. At age 17, Mr. Bharwani was picked up by the police and taken to the hospital for a psychiatric assessment under the Mental Health Act. He had been asked to leave the family home because he had been aggressive. A few months prior to the allegations, Mr. Bharwani attended a walk-in clinic complaining about "pressure" and "obsessive thoughts" requiring "symmetry." Two weeks before the incident, his brother described him as being "very different, very abnormal." Mr. Bharwani visited the walk-in clinic several times and was referred to a psychiatrist but did not attend because he was arrested soon after.

On the day of the incident, Mr. Bharwani called the police, stating he had just killed a girl. Later the same day, he admitted to hitting and strangling his roommate in a house where he rented a basement apartment. He claimed the victim had done something offensive to him and went on to say she had peeked into his room and gasped because it was a mess. He said she then gossiped on the phone about him. He was subsequently charged with first-degree murder.

The Law Regarding Fitness to Stand Trial

In accordance with § 672.22 of the Criminal Code of Canada, each accused person is presumed fit to stand trial. This presumption can be displaced on a balance of probabilities. Either party or a judge may raise the question of fitness if there are reasonable grounds to do so. If it is a jury trial, then the jury determines fitness on a balance of probabilities. In most cases, fitness is questioned in the lower courts. In some jurisdictions, the accused person might be traversed to a specialized mental health court or, alternatively, the provincial or territorial judge may deal with the question of fitness.

Following the Supreme Court decision in *R v. Swain*[8] and drawing on existing common law, the new section, which became § 2, of the Criminal Code defined "unfit to stand trial" as being unable on account of mental disorder to conduct (or instruct counsel to conduct) a defense at any stage of the proceedings before a verdict is rendered, particularly when the accused is unable to understand the nature and object of the proceedings, understand the possible consequences of the proceedings, or communicate with counsel.[8]

Canada's common law legal system is similar to those of the United Kingdom and the United States, in that many laws are created by judges making decisions on individual cases, thereby creating precedent. This leads to the body of decisions known as "common law." Generally, if similar cases can be found, courts are guided by the previous decisions, a principle known as *stare decisis*.[3] The provincial Court of Appeal may hear appeals from the trial courts regarding criminal and other matters. These cases can be taken to the Supreme Court of Canada if the matter is of national or significant social importance. *Stare decisis* binds lower courts to respect the authority of higher courts. There is also a principle whereby horizontal *stare decisis* attempts to ensure consistency between courts of "coordinate jurisdiction." Precedence in other jurisdictions, though not binding, has persuasive authority, and a ruling by the Ontario Court of Appeal is persuasive up to the appellate level in the other provinces and territories. Thus, the decision in the *Bharwani* case will likely have significant influence across Canada.

A mental disorder is considered a disease of the mind and is broadly defined in *R v. Cooper*[9] as "any illness, disorder, or abnormal condition which impacts the human mind and its functioning" (Ref. 9, p 117). It is a matter for the trier of fact to determine. Understanding the nature, object, and possible consequences of the proceedings encompasses a rudimentary grasp of the players and processes of the court, perhaps encapsulated by the Taylor test questions.

The final criterion, whether an accused can communicate with and instruct counsel, is an area of contention. In *Taylor*, this was interpreted to mean the accused does not need to trust, cooperate with, or have an amicable relationship with counsel; nor must defendants decide in their own best interests. One psychiatric expert witness in *Taylor* gave evidence that Mr. Taylor experienced delusions and paranoia, including persecutory ideas about counsel, and that this affected his ability to communicate decisions in his best interests to counsel. The Court of Appeal indicated that Mr. Taylor was fit despite this, arguing the test was not an analytic capacity test but a limited cognitive capacity test. In establishing this low threshold for fitness to stand trial, the Court of Appeal protected defendants' constitutional right to choose their own defense and have a timely trial while balancing the important objective of ensuring fitness.

In *R v. Whittle*,[10] Mr. Whittle was said to be behaving strangely while panhandling on the street. He was apprehended based on three outstanding warrants and transported to the police station. Police officers were familiar with Mr. Whittle and skeptical of his spontaneous claims that he had recently killed his roommate (though it was subsequently found he had). He continued to speak incessantly about this event and his actions at the material time. Although he repeatedly refused to speak to an attorney, the police called one on his behalf. Against his lawyer's advice, Mr. Whittle gave a video statement about the circumstances of the killing. The video confessions were ruled inadmissible at trial because of his mental disorder at the time, and he was acquitted. The Supreme Court stated, "In exercising the right to counsel or waiving that right, the accused must possess the limited cognitive capacity that is required in fitness to stand trial. . . It is not necessary to possess analytical ability" (Ref. 10, p 917). The court equated limited cognitive capacity with sufficient mental capacity to make a voluntary statement.

R v. Morrissey[11] was a case that involved amnesia for the events of the material time. Mr. Morrissey picked up his girlfriend and sped off with her in the car. When he raced through a radar speed trap, the police squad car followed him. During the chase, Mr. Morrissey fatally shot his girlfriend and then shot himself in the head, subsequently claiming to have no memory of the offense. The question was whether he was fit, considering he could not testify about the material events. The court ruled that testimonial competence was not part of the test for fitness to stand trial. This was affirmed at appeal, and the Court of Appeal again cited the limited cognitive capacity test. The Court of Appeal highlighted that, beyond the Taylor test (which speaks to an understanding of the nature, object, and consequences of the proceedings), meaningful presence and participation at trial were "touchstones of the inquiry into fitness" (Ref. 11, p. 9).

In the case of *R v. Xu*,[12] the inviolable right to autonomy would seem to be reasonably and sensibly challenged. In this case, Ms. Xu wished to convince the judge that she did not have a mental disorder and therefore chose to self-represent. The court concluded that, because her psychotic disorder included complex delusions, she did not have a rational understanding of her legal predicament and thus was unfit to stand trial. This was despite the fact that she was found to meet the limited cognitive capacity test as set out in *Taylor*. The court concluded that the test failed to protect Ms. Xu adequately.

In 2013, the Ontario Superior Court of Justice (Superior Court) heard *R v. Adam*[13] and commented on the importance of meaningful participation in the context of a self-represented accused individual with paranoid schizophrenia who acted ineffectively and, at times, in a self-defeating manner in his own defense. In *Adam*, Judge Trotter (who would decide the case of *Bharwani* in the Court of Appeal 10 years later) decided, "It cannot seriously be contended that rationality has no role to play in this determination. Moreover, the three arms of the fitness test are not freestanding fitness criteria to be mechanically applied but tools to assist in determining whether a mentally ill accused person is able to defend him or herself" (Ref. 13, p 9). Justice Trotter concluded that the question becomes whether the mental disorder prevents the accused from being able to "meaningfully participate in his trial" (Ref. 13, p 29). This case favorably reflected commentary

from legal scholars that the limited cognitive capacity test (or a variant of it) became the prevailing test and that it represented too low a threshold.

Positions on Appeal

Surprisingly, until *R v. Bharwani*,[7] no cases had been taken to the Supreme Court of Canada specifically regarding the defendant's ability to instruct counsel. The respondent for the prosecution and all three parties of the case (Mr. Bharwani; the intervener for the Criminal Lawyers Association; and the respondent, representing the prosecution) agreed the Taylor test questions alone were not sufficient for determining fitness to stand trial. The intervener agreed with Mr. Bharwani that, following the *Taylor* decision, if the test for fitness was interpreted as the ability to respond to a checklist of questions, it must be overruled. The intervener proposed a "principled, contextual, and functional" approach to fitness (Ref. 7, p 74), whereby the constituents of § 2 of the Criminal Code "are necessary considerations when determining fitness but not necessarily sufficient for assessing the ability to meaningfully participate in one's trial" (Ref. 7, p 25). The intervener went on to point out that these elements focus on intellectual capacity and suggest a case-specific inquiry into fitness that considers such factors as the complexity of the trial, whether counsel represents the accused, the anticipated length of the trial, and whether there are co-accused. The respondent for the prosecution, while joining the other parties on the inadequacies of the Taylor test questions, stressed the importance of the accused being meaningfully present and able to meaningfully participate in a trial. The respondent continues, rather eloquently, by reaffirming the Taylor test questions are not on their own a freestanding test but "values infusing and giving life to the statutory s. 2 definition of unfit to stand trial" (Ref. 7, p 26).

The Decision

The Court of Appeal, in its decision, began by stating that, although it recounts the submissions of *amicus* regarding the limited cognitive capacity test in the *Taylor* decision, it is wrong to say the court adopted this test (Ref. 7, p 28), contrary to the prevailing belief for the last 30 years. The court determined that assessment of fitness to stand trial should include an assessment of whether the accused can conduct a defense and instruct counsel, as evidenced by an ability to recount the necessary facts in such a way that counsel can properly present the events. Whether defendants have a trusting relationship with counsel, cooperate with counsel, or make decisions in their own best interests is not relevant.

In deciding the course of his own defense, Mr. Bharwani concurred that acting in opposition to one's best interests does not render an accused unfit to stand trial. The respondent considered that the limited cognitive capacity test is the correct standard in Canadian law but continued to say the simple Taylor test questions do not represent this. The respondent submitted that the law should make allowances for an accused who is not capable of following the evidence, communicating rationally with counsel, or giving responsive evidence. The court concluded that the accused must have sufficient mental fitness to meaningfully participate in the proceedings while fulfilling the principle of fundamental justice to be tried without unreasonable delay. The respondent concluded that adopting too high a threshold would result in an increased number of cases in which the accused was found unfit to stand trial, thereby creating undue delays in proceedings.

With respect to the limited cognitive capacity test, the Court of Appeal in *Bharwani* concluded that this test strikes an effective balance between ensuring that unfit accused persons are not found guilty and their constitutional right to choose their own defense and have a trial within a reasonable time. As will be seen below, when using "limited cognitive capacity," they simply mean that defendants are not acting in their own best interests. They state that, if the court were to expect defendants to act in their best interests, they would have to adopt a higher threshold of analytic capacity, which has historically been rejected by the Ontario courts. They concluded that the trial judge erred in adopting the analytic capacity test, which establishes too high a threshold for finding defendants fit to stand trial by requiring that they be capable of making rational decisions to their benefit. Taken overall, the court distilled the term "analytic capacity" as meaning "acting in their best interests." Again, the court asserts the limited cognitive capacity test is the correct standard in Canadian law, even though they stated, as we note above, that the court did not adopt it and that delusions do not make an accused unfit unless they distort the accused's rudimentary understanding of the judicial process. They also did not distinguish between individuals

who may be diagnosed with a psychotic illness and are experiencing delusions about what might happen to them and those simply making bad decisions, which, the court notes, happens every day.

The decision in *Bharwani* affirms what the court considers the key takeaway from *Taylor* (as we have noted and contrary to what most understood from the case), which is that the proper parameters of the fitness test are the above-noted criteria from the new § 2 of the Criminal Code and that the third branch, the ability to communicate with counsel, requires communicating rationally. Again, we note that this concept is contrary to what others understood from *Taylor*.

The court in *Bharwani* addressed whether to overturn the limited cognitive capacity test and introduce analytic capacity into the fitness test so that accused persons must have the ability to "make rational decisions in their best interests to be fit" (Ref. 7, p 125). The court stressed the importance of being able to communicate rationally with counsel, further noting that self-represented accused individuals must also be able to communicate with the court. Despite the accused being paranoid and expressing mistrust of *amicus curiae*, the appeal was dismissed. The court found no error in the lower court's determination that the accused was fit and found that consideration must be given to whether the accused can converse or communicate rationally. Much of this argument hinges on the definition given to the word "rational." The *Canadian Oxford English Dictionary*[14] defines rational as "Of or based on reasoning or reason; sensible, sane, moderate."

The court provided guidance on the meaning of "rationally communicate," suggesting the accused must be able to understand relevant information, apply that information in the context of decision-making, and intelligibly communicate with counsel or the court (Ref. 7, p 92). In much of the discourse in both decisions, however, it seems the Court of Appeal defines rational analysis as acting in one's best interests.

In *Adam*,[13] Judge Trotter raised concerns with the accused's fundamental deficits in communication, which called into question his understanding of the nature and object of the proceedings. This comes closer to the *Oxford English Dictionary* (*OED*) definition of a rational person, which is consistent with the more common psychiatric understanding of a person with delusions and disorder of the form of thought, which might render a person unfit to stand trial. This line of thinking draws the discourse away from whether defendants are acting in their best interests, which dominated the previous discourse. The court seems clear in rejecting "acting in one's best interests" as part of the definition of fitness. Their use of analytic capacity and rationality as synonymous with this best interests standard confuses the matter.

Mr. Bharwani argued that *Taylor* set the bar too low for finding a person fit. He claimed various pieces of evidence support the criticism and suggested that *Taylor* wrongly rejected the analytic capacity test (the capacity for rational decision-making concerning one's best interests). Mr. Bharwani also submitted that rationality also included a consideration of whether a defendant could meaningfully participate in his trial by defending himself. The autonomy of accused individuals and the principles of fundamental justice (as seen under § 7 of the *Charter of Rights and Freedoms*)[15] are foundational in the Canadian judicial system. The court reasons that accused people without a mental disorder might make poor or unwise decisions not in their best interests, such as representing themselves; thus, accused people with mental health challenges also maintain the right to make decisions that are not sensible or wise.

In *Bharwani,* the court notes that, in Canada, the prosecutorial system requires Crown counsel to act as judicial officers and state trial judges are obliged to assist self-represented accused individuals, including those living with mental illness. They state that, in cases involving self-represented accused individuals with mental disorders, the appointment of *amicus* represents another protection. *Amicus* acts as a friend of the court and protects the accused's interests. It is common in Canadian courts for the judge to appoint a lawyer as *amicus curiae*. This lawyer is usually experienced in dealing with defendants who have mental disorder and will meet the defendant, and have standing in court, to help to ensure that the rights of the defendant are protected. In this case, this included, among other things, cross-examining the psychiatric experts with the assent of the defendant. The *Bharwani* court concluded there is significant support for accused people with mental illness.

The court makes another point regarding the importance of harmonization in law, emphasizing a common standard of competency across different aspects of criminal proceedings. They give as example the case of *Whittle*,[10] discussed above,

which involves an assessment of capacity regarding the voluntariness of statements, right to counsel, and right to silence. Similarly, they discuss the reported number of cases that have rejected the analytic capacity test in the context of a guilty plea, though they agree that "harmonizing bad law is a bad objective" (Ref. 7, p 164). Because *Whittle* is a Supreme Court of Canada decision, they state it is "persuasive, if not binding authority, on this court" (Ref. 7, p 164).

A lot of tautology is at play here. The *Whittle* decision relies heavily on *Taylor* (Ref. 2, p 934, 941), and *Bharwani* is persuaded or bound by *Whittle*. Yet it is clear from the opening pages of *Bharwani* that the Court of Appeal considered "the first takeaway from *Taylor*" (Ref. 2, p 86) is that we look to the § 2 definition enunciated in the Criminal Code. It is clear from the defendant, intervener, and respondent submissions and commentary[3,4,11] that the judicial and forensic psychiatric community understood the *Taylor* decision to mean that a simple inquiry into the rudimentary understanding of the accused via the "Taylor test questions" provided the requisite assessment for determining whether an accused is unfit to stand trial. Because *Taylor* was apparently so widely misinterpreted, harmonizing the law regarding defendants who are mentally ill at various stages of the criminal justice system could lead to unfortunate consequences and decisions. Additionally, in *Bharwani,* the court introduces a higher level of capacity to make decisions analogous to, or harmonizing with, mental health law on the capacity to give informed consent to treatment, which defines capacity as having the constituents necessary to make an informed decision. This seems to contradict the harmonization argument.

Conclusion

In conclusion, in *Bharwani*, the court clarified the principles that should inform all fitness assessments as follows. There is one fitness test for all accused, whether represented by counsel or not. This test is applied contextually. The test for fitness is set out in the statutory definition of "unfit to stand trial" in the Criminal Code. The accused is unfit to stand trial on account of mental disorder if the accused is unable to conduct a defense or instruct counsel to do so.

The purpose of the § 2 fitness test is to ensure the accused can be meaningfully present and meaningfully participate in the trial. These touchstones inform a purposive interpretation and application of the fitness test and do not themselves constitute a standalone test.

The Taylor test questions are not a sufficient surrogate for assessing fitness but are helpful in providing insights into an accused's abilities in relation to the § 2 criteria. Applying the fitness test is more nuanced than the questions recognize. The accused must have a reality-based understanding of the nature, object, and possible consequences of the proceedings.

The accused must have the ability to make decisions. This involves the ability to understand available options, select from those options, understand the basic consequences arising from these options, and intelligibly communicate to counsel or the court the decision arrived upon. Defendants need not have the capacity to engage in analytic thinking to be deemed capable of making decisions in their best interests (Ref. 7, p 57–8). In *Bharwani*, the court concluded that the trial court did not err in finding the accused fit.

Bharwani serves as an addendum and elucidation to the prevailing case, *Taylor*, which has directed the courts and, by extension, forensic psychiatrists in the inquiry into whether an accused person is unfit to stand trial in Canada. The test that most of the community understood from *Taylor* attracted significant criticism in that it appeared to require only a minimum standard for fitness, referred to as a "limited cognitive capacity test."

The court in *Bharwani* made it clear that a simple inquiry into the functions of the courtroom, referred to as the Taylor test questions, is not sufficient for assessing fitness and, further, a fitness test should be applied contextually, bearing in mind the nuances of the case. One aspect of this is whether the accused is represented or self-represented, which should be considered as part of the context. The court emphasizes consideration of whether the accused can be meaningfully present and meaningfully participate in that trial. An inquiry into the function of the courtroom and the terms "meaningful presence" and "participation" informs an interpretation and application of the criteria set out in § 2 of the Criminal Code. The court clearly states that the accused must have a reality-based understanding of the nature, object, and possible consequences of the proceedings.

Apart from clarifying the misunderstandings from *Taylor* (summarized above), the court adds that the fitness test also tests decision-making capacity. The criteria for capacity are explained by the court as

being analogous to those enunciated in many provincial health care acts governing the capacity to make various decisions, including giving informed consent to medical treatment. This capacity involves the ability to understand available options, select from these options, understand the consequences arising from each of the options, and intelligibly communicate either to counsel or the court the consequences of that decision.

One consistency with *Taylor* was affirming that defendants need not make decisions that are in their best interests. In placing this concept in the setting of a nuanced and contextual inquiry into the criteria enunciated in § 2 of the Code, introducing the idea of the accused's capacity to make decisions that may be affected by a mental disorder, the assessment becomes more meaningful to forensic psychiatrists.

Forensic psychiatrists and other functionaries in the courtroom have always felt that a more nuanced assessment, including the ability to communicate with both counsel and, if self-represented, the court, and the ability to meaningfully participate, should be part of a fitness assessment. The *Bharwani* decision clarifies that the forensic psychiatrist would explain how a mental disorder affects the accused's capacity to decide, conduct a defense or instruct counsel to do so, understand the nature or object of the proceedings and possible consequences, and communicate with counsel. This inquiry will be in the context of whether the accused can meaningfully participate in the trial and communicate intelligibly with counsel. The investigation will be nuanced and contextual, guided by the complexity of the case and any future proceedings, the severity of the charges, whether they are self-represented, the anticipated length of the trial, and any other relevant considerations.

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