

The Supreme Court of Canada Clarifies the Interpretation of the Insanity Defense in *R v. Bharwani*

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In Canada, the insanity defense is outlined in both legislation and judicial case law and finds original basis in M’Naughten’s case. Federal jurisprudence in Canada has addressed the second and more complicated branch of the not criminally responsible on account of mental disorder (NCRMD) test on wrongfulness, yet legal ambiguity persists in provincial courts. A recent Supreme Court of Canada decision, *R v. Bharwani*, adds clarity. Finding agreement on the primary matter of fitness, the Court’s dissenting opinion, delivered by two of its esteemed jurists and joined by a third, casts aside the *obiter dictum* of the court of appeal on NCRMD and was unrefuted by the majority. Thus, *Bharwani* resists easy classification as to its jurisprudential authority. We review the relevant case law and consider application of hybrid authority to the NCRMD portion of the *Bharwani* dissent.

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In Canada, the presumption is that every individual is criminally responsible for unlawful acts or omissions. Exceptions have been carved out of this basic position in cases wherein mental disorder renders the accused unable to appreciate the nature or quality of the act or omission or to know that it was wrong. For an accused to successfully engage the not criminally responsible on account of mental disorder (NCRMD) defense in Canada, it must be proven on the balance of probabilities standard. The burden of proof lies with the party who raised the defense.¹ Importantly, the NCRMD test is backward-looking in that it interrogates the relevant facts as they were at the material time of the crime. The general parameters of the NCRMD defense in Canada reflect the historical standard set in M’Naughten’s case.² In Canada, the forensic expert is often relied upon to provide psychiatric evidence as to the viability of an NCRMD pathway, although the test is applied by the trier of fact.

The NCRMD test has been conceived of as having two branches as dictated by the statutory provisions in Section 16 of the Criminal Code of Canada, enacted in its current form in 1992, replacing the previous insanity defense.¹ A mental disorder must be present and causally linked to the defect in appreciation that caused failure in either branch, as outlined in Table 1.³⁻⁵ The test has evolved over the course of the last half-century, becoming relevant to novel considerations of responsibility.⁶⁻¹¹

The case law related to the second branch, which imports a capacity threshold, is reviewed in Table 2.^{1,2,4,5,12,13} The ruling authority on the wrongfulness branch of the NCRMD test is the Supreme Court of Canada’s holding in *R v. Oommen*.⁵ In the three decades since *Oommen*, the Supreme Court has not opined further on this specific facet of the test, but interpretation of the ruling has become an active area of case law in provincial courts in the last decade.¹⁴⁻¹⁷ As Welsh describes, there is an “emerging divide in the application of section 16 and *Oommen* among Canadian courts that narrows the class of accuseds who may succeed in raising the defense” (Ref. 18, p 98). As to those specifics, the Ontario Court of Appeal in *R v. Dobson* and *R v. Bharwani* opined on the proper application of *Oommen*’s controlling authority in 2018 and 2023, respectively.^{16,17}

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Interpretation of Insanity Defense in *R v. Bharwani*

Table 1 The NCRMD Test Branches as Accepted in Canadian Case Law and Forensic Psychiatric Practice

Test Branch	Nature and Quality	Wrongfulness
Standard	The defense involves the accused's ability to link action to consequence; psychiatric symptoms must render the accused unable to appreciate the nature or quality of the act or omission. ³	The defense involves the accused's knowledge of wrongfulness, which has been clarified as meaning both legally and morally wrong ^{4,5} ; an accused must lack the capacity to know right and wrong in an abstract sense or lack the ability to apply the knowledge of wrongfulness in a rational way to the criminal act in question.
Example	If, while in a state of psychosis, an accused threw a newborn off of a balcony driven by the delusional belief that the baby was really an angel requiring help learning to fly, an NCRMD defense may be available.	If, during a manic episode, an accused shoots and kills a colleague based on the delusional belief that the colleague was going to imminently kill him, an NCRMD defense may be available.

Table 2 Moral Wrongfulness in Canadian Case Law

Decision/Law	Holding/Statute
s. 16 of the Criminal Code (as amended by S.C. 1991, c.43, s.2)	16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. ¹
<i>M'Naughten Rules</i> (1843)	An accused is culpable unless at the material time of the crime the individual was in a state of mind such that the person did not know what the person was doing when committing the act or that the person knew what the person was doing but did not know that it was wrong. ²
<i>R v. Chaulk</i> (1990)	Wrongfulness means either "legal or moral" wrongfulness; broadening of cognitive test to include moral wrongfulness ⁴
<i>R v. Ratti</i> (1991)	Causal delusions do not equate to NCRMD; the accused is culpable if the person is capable of knowing the act, in its circumstances, would have been "morally condemned by reasonable members of society"; symptoms of a mental disorder that motivate the accused do not equate to a finding of NCRMD (Ref. 12, p 80).
<i>R v. Oommen</i> (1994)	Articulated the notion of rational perception and the need for an accused to be able to apply knowledge of wrongfulness in the circumstance, in addition to the intellectual ability to know right from wrong in an abstract sense ⁵
<i>R v. Bharwani</i> (2025) (dissent) ^a	Endorsed the standard set in <i>Oommen</i> ; an accused is NCRMD if compulsion caused by a mental disorder prevented rational and conscious application of moral knowledge of wrongfulness at the time of the crime (including knowledge that society would view the criminal act as wrong) ¹³

^a The majority in *Bharwani* did not address the question of NCRMD, and the Court's commentary was thus limited to the nonbinding but persuasive interpretation of the dissent.

In *Bharwani*, the court adopted the more narrow view of *Oommen* as interpreted in *Dobson*.

In *Dobson*, the court directly interpreted and applied its reasoning to the case and matters laid before it.¹⁶ Conversely, in *Bharwani*, the court of appeal provided only *obiter dictum* (nonbinding judicial commentary) on the matter of NCRMD.¹⁷ Based on the apparent confusion as to the proper application of the test, the resulting legal landscape related to NCRMD in Canada has come under criticism.¹⁹ Further, jurisprudential contradiction at the appellate level has left superior courts to have to choose between appellate authorities in recent years, a tension highlighted explicitly in their own reasons.¹⁴ The discrepancies evident in recent case law on the interpretation of the NCRMD test on wrongfulness imply that a lack of consensus on the test's proper application has led to an erosion of the protections outlined in *Oommen* in at least some cases. In response,

legal scholars drafted legislation aimed at resolving *Oommen*'s conflicting interpretations and any ongoing jurisprudential drift away from the decision.¹⁸

In this context, the Supreme Court of Canada granted appeal in *Bharwani* in 2024, hearing oral arguments that autumn and rendering its decision in late July 2025. *Bharwani* is a case associated with the fitness test, but the potential for a declaration on NCRMD was expected in legal and psychiatric circles because the leave for appeal was granted, which drove significant speculation in the months leading up to the decision.²⁰ Although reaching a unanimous 9-0 decision on the question of fitness (outside the scope of this article), the court split 6-3 on two other matters. In addition to the interpretation of the fitness test, the appeal in *Bharwani* turned on two pieces of fresh evidence tendered by the accused, namely transcripts of testimony impugning the professional competence of one of the first three

trial experts in the case and the competing evidence of a postverdict expert later called by the Crown. The majority in *Bharwani* decided against admitting the first piece of fresh evidence. Further, unlike the dissent, the majority chose not to address the second piece of fresh evidence nor the downstream NCRMD analysis it was gatekeeping.¹³

Although important, examining the first of these matters (*i.e.*, professional competence, note-taking, and report preparation practices) is beyond the scope of this article. Interested readers are redirected to the Supreme Court of Canada's decision in *Bharwani*¹³ for more on the topic of professional credibility.

Because the majority opinion did not address the NCRMD question, the court's only commentary on this matter came from the dissent. The minority opinion stated it would have cast aside the lower court of appeal's decision in *Dobson*, and thus *Bharwani*, on the meaning of moral wrongfulness. The dissenting jurists asserted that the court of appeal in *Dobson* impermissibly narrowed the NCRMD test as was previously settled in *Oommen* and therefore identified inconsistencies between the *Dobson* interpretation and binding precedent. The dissent thus highlighted a recent pattern of inconsistent application of *Oommen*, with some courts stressing background awareness of wrongfulness while underweighting the importance of the capacity to apply that awareness.¹⁵⁻¹⁷ The Supreme Court's minority addressed this jurisprudential drift by refocusing the NCRMD test on conscious application of background knowledge. Here, we review the case law and the dissenting opinion in *Bharwani*, importing the concept of hybrid authority to help frame this novel decision's impact on legal and forensic practice.

The Hybrid Authority of a Dissenting Opinion

In remarks delivered in 2010 in Ontario, Chief Justice Beverley McLachlin, at an advanced judgment writing seminar, said the following:

Judges have to decide cases. Unfortunately they also have to write. Which is why we are gathered here tonight. The judge's life is a life of struggle — the struggle to decide fairly between contending parties and positions; and the struggle to explain the reasons for that decision. . . . The two struggles are interrelated, part of the single indissoluble activity of judging. Should scientists ever decide to map the judicial brain, I am confident that it would not reveal one part of the frontal cortex outlined in red for "decision-making" and another outlined in green for "judgment writing." Through writing and rewriting judges arrive at the right decision. Errors are revealed. Fallacies are exposed. Judges sometimes

say of a result they thought they would get to: "It won't write." The process of articulating the reasoning has changed the result (Ref. 21, p 1).

Although Chief Justice McLachlin did not speak directly to the point, one may reasonably infer that her benchmark for what would and would not write applies to both the majority opinion and its dissent. A dissent, by definition, requires a majority to which to respond. There are, of course, many examples illustrative of the power of dissent in law, including perhaps most notably Justice John Marshall Harlan's lone dissent in *Plessy v. Ferguson*,²² a dissent whose reasons and spirit would prevail six decades later in the seminal ruling *Brown v. Board of Education*.²³

In a 2024 article regarding jurisprudential dissent, Christina Frohock argues that the dissenting opinion exists as a hybrid category of legal authority, best thought of as nestled somewhere between primary and secondary authority, belonging wholly to neither.²⁴ Primary authority refers to the ruling law at any given time, made either from statute or judicial review and subsequent case law. As Frohock notes, "Secondary authority lies outside the tiers and constitutes everything else, that is, every source that is not the law" (Ref. 24, p 975). This leads to questioning, if primary authority is the law and secondary authority is everything else, where the dissenting opinion, as a feature of legal scholarship and authority, falls.

Frohock argues that "A dissenting judge has a pen dipped in hybrid ink" (Ref. 24, p 977). Written in the same robes and from the same chambers as the majority opinion, the dissenting opinion carries with it high judicial fortitude, thoughtfulness, and contemplation. Dissenting opinions shape public debate, fuel academic interest, and often affect future interpretations of the law. The dissent thus serves a secondary authority role in its commentary and, in almost every instance, as a critique and disagreement with the majority and therefore the law. Frohock uses the analogy of quantum superposition (*i.e.*, the quantum mechanical premise that two states may exist at once until observed) to argue that the dissent is the "Schrödinger's cat of authorities: both the law and not the law simultaneously" (Ref. 24, p 965). Finally, she highlights the views of various American judicial elite on the dissenting opinion. The late Justice Antonin Scalia said that dissents "can have a character and flair ordinarily denied to majority opinions" (Ref. 24, p 1002). Justice Elena Kagan was quoted as saying that, in dissents, she writes in "a kind of informal way" (Ref. 24, p 1001). But the

views of esteemed jurists vary on treatment of this matter.^{26,27} According to the Chief Justice of Australia, dissenting opinions should be rare and focused, only to be deployed in landmark rulings and never toiled to wade into politics or to involve dramatization.²⁸

Case Law on the Second Branch of the Test

R v. Oommen (Supreme Court of Canada, 1994)

Facts of the Case

Mathew Oommen was a 39-year-old taxicab driver with long-standing psychosis.^{5,29} After several hospital admissions, he developed the conspiratorial belief that he would be assassinated. On the night of the offense, in the context of his paranoia, Mr. Oommen came to believe that his residence was being surrounded by nefarious actors and that his roommate, 15-year-old Gina Lynn Beaton, had been recruited to kill him. In an incidental act of mischief, someone rang doorbells throughout the building, which Mr. Oommen took as a sign directing his roommate to execute the plan against him. As she lay asleep, he shot her between nine and 13 times with a .22 caliber semiautomatic rifle. He believed she was pretending to sleep when he killed her and that he would have been killed if he did not act to preempt his own murder.⁵

Mr. Oommen was charged with second-degree murder, and at trial, the court rejected the defense of NCRMD. The judge, ruling that Mr. Oommen had the general capacity to discern what he had done was wrong, found him guilty. The provincial court of appeal ordered a new trial, holding that the trial judge had erred in his interpretation of the statute related to wrongfulness.^{5,29} The government appealed to the Supreme Court of Canada, who rejected the appeal, confirmed the order directing a new trial, and elucidated the meaning of moral wrongfulness.⁵

The Decision

Justice Beverley McLachlin (as she then was) reasoned: “The evidence disclosed no rational motive for the killing. To understand it, we must delve into the disordered workings of Mr. Oommen’s mind” (Ref. 5, p 509).

The majority in *Oommen* stated its view on the general capacity to know wrong as a potential threshold.

A review of the history of our insanity provision and the cases indicates that the inquiry focuses not on general capacity to know right from wrong, but rather on the

ability to know that a particular act was wrong in the circumstances. The accused must possess the intellectual ability to know right from wrong in an abstract sense. But he or she must also possess the ability to apply that knowledge in a rational way to the alleged criminal act (Ref. 5, p 516).

The court went on to outline its influential reasons as to the need for rationality. “The crux of the inquiry [under s. 16(1)] is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not” (Ref. 5, p 518). As to the threshold test of capacity to know the act was wrong, Justice McLachlin spelled out the relevant evidence in support of Mr. Oommen being NCRMD. This included evidence that the accused believed he was in imminent danger of being killed by the victim and therefore believed killing her first was justified. “This delusion would have deprived the accused of the ability to know that his act was wrong; in his eyes, it was right” (Ref. 5, p 522-523). Interestingly, Justice McLachlin left open the possibility that the second reason in Mr. Oommen’s case may have been tantamount to the first. Here, she highlighted evidence that the accused’s mental state was “so disordered” that he was unable to rationally consider whether the act was right or wrong in the way a “normal person” would. The case law delineating the test for moral wrongfulness in *Oommen* reigned unfettered for a quarter century up until a series of controversial appellate court decisions.

R v. Dobson (2018)

Facts of the Case

Mark Dobson engaged in a suicide pact with his girlfriend and a third party under the belief that their souls would travel to a divine world.¹⁶ He reported that the logistics of the act were given to him by Satanic beings. At trial, the experts agreed that Mr. Dobson passed the first branch of the NCRMD test but disagreed as to whether he knew the act was morally wrong. The trial judge ruled Mr. Dobson had a mental disorder but that an NCRMD pathway was not available given his knowledge of moral wrongfulness at the material time.³⁰ The case was thereafter granted leave for appeal in Ontario.

The Court of Appeal Decision

The court of appeal addressed several concerns, terming the NCRMD component of the appeal in the following way: “Did the trial judge err in his interpretation of ‘knowing that it was wrong’ in

s. 16(1)?” (Ref. 16, para 2).¹⁶ Writing for a unanimous majority in *Dobson*, Judge of Appeal Doherty highlighted five different passages from *Oommen*, two submitted by the accused and three submitted by the Crown. In brief, Mr. Dobson relied upon Justice McLachlin’s sentiments about the need for the capacity for rational perception and hence rational choice. The Crown relied upon passages related to the ordinary person’s standard and a psychopathy exception that had been denied by *Oommen* as a viable NCRMD pathway. The court of appeal quoted from *Ratti*,¹² a Supreme Court case that built on the meaning of wrong after its seminal decision in *Chaulk*:⁴ “It is not sufficient to decide that the appellant’s act was a result of his delusion. Even if the act was motivated by the delusion, the appellant will be convicted if he was capable of knowing, despite such delusion, that the act in the particular circumstances would have been morally condemned by reasonable members of society” (Ref. 12, p 80).

The court of appeal upheld the trial judge’s verdict and interpretation of the test for moral wrongfulness. Judge of Appeal Doherty explained his view that wrong meant moral wrongfulness judged against society’s standards, not those belonging to the accused’s own moral code. The reasoning was supported by the acknowledgment of evidence that Mr. Dobson knew society would judge his act as wrong. The decision relied on the trial judge’s interpretation of Section 16, “his capacity to know how others in the community would assess the morality of his acts” (Ref 30, para. 163). Importantly, the court also reflected the reasoning of the trial judge, who wrote that it was “difficult to see” how someone who appreciated the nature and quality of an act, and who knew it was legally wrong, would be incapable of knowing the same act was morally wrong in the eyes of society.³⁰

Response to Dobson

The decision garnered attention because it appeared to conflate legal wrongfulness with moral wrongfulness and perhaps even the first and second branches of the test. Confusion soon ensued, with several conflicting court decisions developing.^{14,15,17} Prior to the *Bharwani* matter reaching the court of appeal, Justice Molloy, presiding over the high-profile NCRMD case *Minassian*,¹⁴ refused to recognize *Dobson*’s authority, asserting it was overtly inconsistent with *Oommen*. Molloy summarized the legal landscape in the court of appeal:

If one line of decisions is consistent with the Supreme Court of Canada’s jurisprudence, and one is not, I must follow the decision of the Supreme Court of Canada and the appellate decisions that follow it. I am persuaded by counsel that *Dobson* is not correct in its interpretation of *Oommen* and, further, that other decisions of the Ontario Court of Appeal are inconsistent with the position taken in *Dobson*. Accordingly, with the greatest of respect for the court in *Dobson*, I have decided that I will not apply their reasoning in this case, to the extent they depart from *Oommen* (Ref. 14, para. 61).

R v. Bharwani (2023)

Facts of the Case

Matthew Adam Bharwani experienced symptoms of psychosis for several years.^{13,17,31} His clinical interactions dated back to at least his adolescence. In the months leading up to the offense, he frequented walk-in clinics, repeatedly complaining of several unusual experiences involving “obsessions,” “symmetry,” and a loss of control.^{13,17} He was referred to an outpatient psychiatrist, but before that appointment, he killed Nyumai Caroline Mkurazhizha, his 23-year-old female roommate. As she exited a shower, he struck her with a fireplace poker and then strangled her to death. He later called police and confessed to the crime.^{13,17,31}

Mr. Bharwani’s court proceedings were particularly complex. He was engaged in assessments of both fitness to stand trial and criminal responsibility on several occasions, and he elected to self-represent. For a review of the fitness arm of Mr. Bharwani’s case, see the Supreme Court’s majority opinion in *Bharwani*,¹³ Eid and colleagues,³² and Curry and Quinn.³³ He was tried before a jury. Three forensic experts testified about criminal responsibility. Two opined that he had a viable NCRMD pathway, whereas a third opined that the pathway was not available.¹⁷ The jury found Mr. Bharwani criminally responsible and guilty of first-degree murder. Two experts were subsequently retained to assess NCRMD postverdict, laying the groundwork for appeal.¹⁷

The Court of Appeal Decision

The court of appeal heard evidence as to the potential inclusion of postverdict testimony from two additional experts and opined on their NCRMD analysis.¹⁷ The additional experts were retained by the defense and Crown. Central to the appeal, and the postverdict NCRMD assessments, was the matter of professional bias on the part of the Crown’s original

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Table 3 Legal Interpretation of the Fitness Test and the Moral Wrongfulness Branch of the NCRMD Test as per the Supreme Court of Canada’s Decision in *R v. Bharwani*

Legal Interpretation	Majority (Bharwani 2025)	Minority (Bharwani 2025)
Fitness to stand trial (competency)	A unanimous majority (9-0) upheld prior appeals court rulings in <i>Bharwani</i> ¹⁷ and <i>Taylor</i> ³⁴ as to the proper interpretation of the fitness test. In general, the decision endorsed a fuller interpretation of the statute and the Ontario Court of Appeal’s decision, confirming the importance of “meaningful participation” and the nature of appropriate communication with counsel. In summary: At the time of a decision related to a defense, an accused must not be overwhelmed by mental disordered symptoms Accused must have a reality-based understanding of the nature and object of the proceedings and at the time of a decision related to a defense An accused must be able to intelligibly communicate decisions to the court or counsel Fitness may fluctuate, and nonetheless, the accused can be overall fit (<i>i.e.</i> , as per the court, not every fluctuation necessarily demands a new fitness inquiry) There is one fitness test, regardless of whether the accused is self-represented or not	NA
NCRMD (insanity)	Declined to offer opinion or <i>obiter dictum</i>	Reinterpreted the moral wrongfulness test by endorsing and elaborating on the standard set in <i>R v. Oommen</i>

expert witness (the only witness to opine that Mr. Bharwani was not NCRMD). Both postverdict experts concurred with the other two trial experts in rendering opinions that favored an NCRMD defense. The court refused to admit the fresh evidence in relation to the professional bias problem, ruling that its inclusion would not materially change the impact of the evidence heard at trial.¹⁷ In its reasoning, the court explicitly highlighted the wisdom found by paying deference to the trial process, the jury’s verdict, and thus the principle of finality in the law. Despite refusing to admit the fresh evidence and the NCRMD interpretation it was gatekeeping, the court went further, rendering *obiter dictum* on the proper interpretation of the moral wrongfulness test. Specifically, the court highlighted the NCRMD opinion of the Crown’s postverdict expert as misaligned with the law, instead adopting *Dobson*’s analysis.

R v. Bharwani (Supreme Court of Canada, 2025)

The Majority Opinion

A summary of the court’s decisions on fitness and criminal responsibility is found in Table 3.^{17,34} On the remaining concern laid before the court, namely the decision to admit the fresh evidence, and the topic of the credibility of a specific expert witness, the majority upheld the court of appeal’s decision. Justice O’Bonsawin, writing for the 6-3 majority on the matter, declined to offer any opinion or *obiter*

dictum on the NCRMD analysis. “Nonetheless, the Court of Appeal provided an additional reason to dismiss the motion to adduce fresh evidence, stating that ‘[the expert’s] opinion on NCR[MD] does not align with the law.’ As it is unnecessary to address this *obiter dictum* to resolve the present appeal, I decline to comment on this issue” (Ref. 13, para. 113).

The Dissenting Opinion

At the outset of the minority opinion, Justices Karakatsanis and Martin were clear that they agreed with the majority’s holding regarding the fitness test. The dissent then asserted that the court of appeal in *Bharwani* was wrong in its assessment that the Crown’s postverdict expert delivered opinion inconsistent with the legal test for moral wrongfulness as set out in *Oommen*.

The lower court in *Bharwani* relied on *Dobson* to substantiate its holding that “an accused is not NCRMD if they knew that society regarded their actions as morally wrong yet proceeded to commit the actions anyway” (Ref. 17, p 85-86). *Dobson* was even more direct in stating that, even if an accused was subsumed by a forced-choice scenario on account of mental disorder symptoms, the person was still not NCRMD. The Supreme Court’s dissent in *Bharwani* disagreed: “punishing a person who cannot rationally apply their knowledge to consciously choose whether to commit criminal acts is fundamentally unjust” (Ref. 13, para. 212). In

reviewing the general capacity standard referenced in *Oommen*, the minority in *Bharwani* reflected on the prior court's reasons: "An accused is NCRMD if they committed a crime due to feelings of compulsion caused by a mental disorder, provided the compulsion prevented them from rationally applying any knowledge that their criminal acts were morally wrong" (Ref. 13, para. 214).

In summarizing their view, the dissenting jurists in *Bharwani* noted that an accused whose mental disorder "made the choice to commit those acts appear more attractive or imperative" (Ref. 13, para. 221) was not enough. The accused, they asserted, "must go further and show that their mental disorder made them feel entirely forced or obligated to commit a criminal act, such that they lacked the capacity to apply their knowledge and choose not to act" (Ref. 13, para. 221). The court makes the concerns about *Dobson* raised in *Minassian* explicit: "It follows that *Dobson* impermissibly narrowed *Oommen* to the extent that it effectively reads out the capacity to choose to act, where an accused is incapable of consciously applying their knowledge that society would view their criminal act as morally wrong" (Ref. 13, para. 222).

Discussion

At the center of the tension related to the moral wrongfulness test in the NCRMD case law is how best to acknowledge the moral standards of reasonable members of society as well as the functional impact of the most severe symptoms of mental disorder. *Oommen* had centered on whether the accused had the capacity to apply knowledge of moral wrongfulness in the moment or was compelled to act without room left for a semblance of choice. According to *Minassian* (a case parting ways with *Dobson*), four principles flowed from *Oommen*, including the focus on not only intellectual knowledge but also capacity, maintenance of the ordinary person's standard for wrongfulness in that context, acknowledgment that having the requisite knowledge is not possible if the accused lacks the capacity for rational perception and choice, and finally the fact that *Oommen* did not carve out an exception for devious moral codes (*i.e.*, those of the psychopath).¹⁴

Conversely, according to *Dobson*, as per the court of appeal in *Bharwani*, "an accused is not NCRMD if they knew that society regarded their actions as morally wrong yet proceeded to commit the actions anyway" (Ref. 17, para. 264). Importantly, according

to the court in *Dobson*, this is true "even if" the accused "believed that he had no choice but to act, or that his acts were justified" (Ref. 16, para. 24). But, following *Oommen* and the principles elucidated in *Minassian*, if the accused, because of delusional beliefs related to a mental disorder, had "no choice but to act," then it can be argued that the person was unable to apply knowledge of wrongfulness. It is here where the cases of Mr. Oommen and arguably Mr. Bharwani deviate from the case where actions flow from psychopathy, where decisions to "commit the actions anyway" are conscious and common, and where NCRMD is unavailable.

Bharwani's dissent makes this point using instructive clinical language, suggesting that, once a certain level of symptomatic burden is present, an accused becomes incapable of consciously applying moral knowledge, even where it is apparent. Aside from, for example, a delusion that itself distorts what an accused may perceive the public as perceiving as moral behavior (*i.e.*, a delusion that anyone who kills another is moral and will be saved), the *Bharwani* dissent makes a third avenue or branch for NCRMD more explicit than did *Oommen* (Fig. 1). Put another way, overwhelming symptoms in the moment may push rationality out of reach and therefore the ability to operationalize any moral knowledge that might be dormant but present in the mind of the accused. It is thus the transient nature of the symptoms of mental disorder, their degree of severity, and their temporal overlap with the act or omission which lays the base for an NCRMD defense in such cases.

Here, a note on the court's use of the word compulsion is necessary. Compulsion and instances approaching a forced-choice scenario may bring the so-called irresistible impulse test to mind. This test refers to a historical conceptualization of the insanity defense fundamentally based on volition. Under this view, an accused must show that a mental disorder made it impossible to resist the impulse to commit a criminal act or omission. In Canada, a standalone volitional test for insanity has been consistently rejected by the Supreme Court from *Chaulk* to *Ratti* through to *Oommen*. In the *Oommen* decision, the word compulsion is not found, but the decision references the trial judge's finding that the accused was compelled to act in accordance with the mental disorder.

The dissent in *Bharwani* approaches the topic thoughtfully, endorsing the Supreme Court's longstanding recognition that "claims of irresistible

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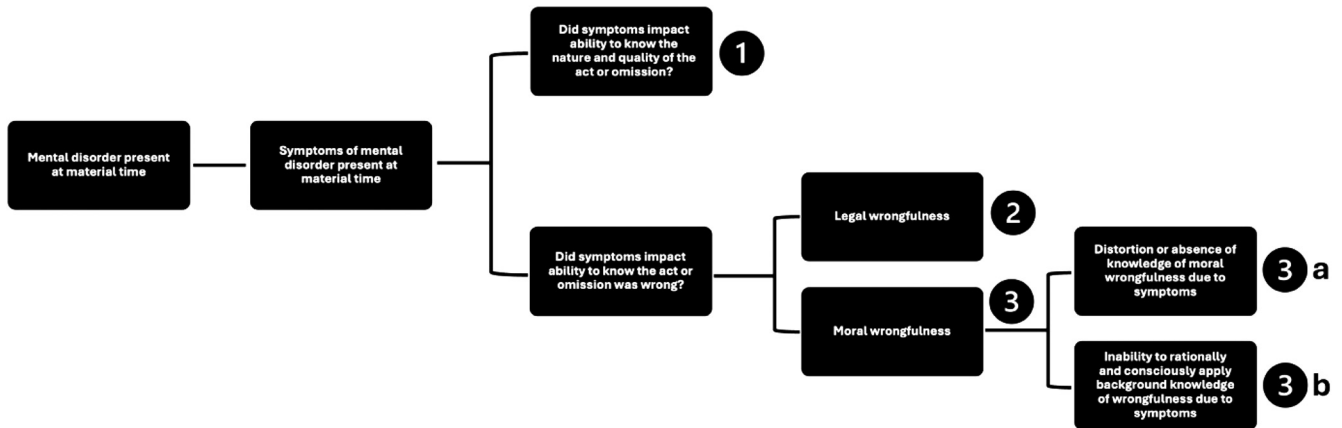


Figure 1. The NCRMD analysis in Canada. Traditionally conceived of as having two branches (nature and quality of act or omission and knowledge of wrongfulness), the evolving case law substantiates a series of distinct pathways to NCRMD, including those wherein both legal and moral wrongfulness are present but cannot be applied consciously because of compulsion and symptom burden. 1 = nature and quality; 2 = legal wrongfulness; 3a = distorted/absent knowledge of moral wrongfulness because of mental disorder; 3b = lack of ability to consciously or rationally apply knowledge or moral wrongfulness because of mental disorder.

impulses can support an NCR defense” (Ref. 13, para. 218). They go on, however, to reflect *Oommen*, asserting that the legal test for a verdict of NCR involves the capacity to understand but also the capacity to apply that understanding. Taken together, the NCRMD test thus ultimately remains a cognitive capacity test. Compulsion to complete an act or omission may be present but only invites an NCRMD defense if that compulsion prevents rational application of knowledge that the act or omission was morally wrong (Ref. 19, para. 214). Compulsion under this view serves only as evidence that may be used to support a verdict of NCRMD.

In response to the *Bharwani* dissent, some have suggested that, although minority decisions are not controlling, they are arguably persuasive, especially when not expressly refuted by the majority.¹⁹ Given the developing concerns, some legal writers in Canada have gone so far as to refer to the NCRMD judicial landscape as contradictory in its application in cases interpreting moral wrongfulness.^{14,16–19} Until *Bharwani*, jurists, like the one presiding over *Minassian*, were left with a slew of appeals court decisions to choose from in their interpretation of the test.

Returning to Frohock’s discussion of the hybrid authority of the dissenting opinion, her commentary is of interest to the forensic psychiatrist maneuvering between the legal and the medical. As well, the theory of hybrid authority carries weight all on its own, that is to say, in the traditional case of a dissenting opinion wherein the minority is disagreeing with the law as delivered by the majority. But in the case

of *Bharwani*, the situation is even more novel than that of traditional dissent. By resisting the conventional and expected majority-minority dynamic, *Bharwani* renders conclusions as to its potential impact somewhat more difficult to immediately discern.

Still, as England and Clark write, “Dissenting judges calculate how much effort to put into a dissenting opinion with an expectation that their work can probabilistically affect how the law is applied in the future” (Ref. 35, p 1). The situation in *Bharwani* is more complicated, as the NCRMD concern raised has itself been adjudicated by the Supreme Court.

The reasons delivered by Justice McLachlin in *Oommen*, according to the implication of the minority in *Bharwani*, now appear clearer in light of the balance of three decades of case law. *Dobson* may refer to the potential different readings of *Oommen*, but the dissenting opinion in *Bharwani* finds this line of argument unpersuasive. In reiterating the clear language of *Oommen*, the Supreme Court’s dissent endorses its court’s own authoritative precedent and how best to weight its words. In reiterating the application of the legal test by the Crown’s postverdict expert in *Bharwani* and in characterizing the lower court as “impermissibly narrowing” *Oommen*, the dissent asserts itself as a dynamic influence in the growing and changing case law on this question. The role of the dissent in this context carries a novelty with it, even though uncertainty persists as to how courts will treat *Bharwani*’s interpretation of *Oommen* in the future.

Implications for Forensic Practice

The cogency of the reasoning of the Supreme Court's dissent is apparent and at direct odds with *Dobson*. The question now is whether the hybrid authority in *Bharwani* meaningfully changes anything for the forensic expert in relation to the NCRMD analysis. As reviewed, the authoritative case law has not changed, although the dissent does color the boundaries of the test's application, and is likely the most nuanced treatment of the moral wrongfulness test in Canada since *Oommen*.

There are several potential takeaways related to forensic practice. First, the application of the NCRMD test is further clarified for practitioners. If the facts of an individual case do not fit with an analysis under the nature and quality branch of the test, analysis under the *Oommen* standard should be sought to assess the applicability of the second branch. Under this analysis, abstract intellectual knowledge related to wrongfulness is relevant, but so too is the capacity to rationally or consciously apply that knowledge. The dissent provided further guidance as to the potential evidentiary relevance of behavior compelled by severe symptoms of mental disorder in the NCRMD analysis. Here, the minority in *Bharwani* reproduced the testimony of the Crown's postverdict expert in its reasons ("he was unable to apply his understanding of moral wrongfulness to his actions at the material time because of the intensity of his psychotic symptoms") before explicitly endorsing the expert's analysis as in keeping with the law (Ref. 13, para. 223). Despite the use of "compulsion," the dissent remains consistent with previous majority opinions in its rejection of a volitional test. The authoritative case law in *Oommen*, and now the dissent in *Bharwani*, together give further confidence to the practicing forensic psychiatrist as to the jurisprudential soundness of the approach.³⁶ As per the holding in *Oommen*, and the testimony of the Crown's postverdict expert in *Bharwani*, an accused may hold background knowledge of moral wrongfulness yet still be unable to apply that knowledge at the material time because of intense symptom burden.

Conclusion

In *R v. Bharwani*, the Supreme Court of Canada interpreted the fitness to stand trial test for the first time. A fascinating secondary narrative to the court's decision included its dissenting opinion on the moral

wrongfulness prong of the NCRMD test. In particular, the minority responded forcefully to a confusing slew of court of appeal cases questioning the case law as dictated in *Oommen*. Ultimately left unrefuted by the majority in *Bharwani*, the dissenting opinion aims to clarify the proper application of the test, relying on its own ruling in *Oommen* and validating the style of application of the test by the Crown's postverdict expert. According to the dissenting jurists, the lower court in *Dobson* acted impermissibly in reading out the capacity threshold test outlined in *Oommen*. Despite uncertainty as to what the impact of *Bharwani* will be, for the time being, forensic psychiatrists ought to feel fortified in applying the standard set forth by the Crown's postverdict expert in *Bharwani*, a standard codified in law, then clarified by *Oommen*, and now endorsed by an unanswered third of the country's highest court.

Although the *Bharwani* dissent is unlikely to be the last word on the NCRMD debate in Canada, it is perhaps the most unique and pointed nonbinding authority on the matter in three decades. Beyond the legal precedent it reinforces, it may be seen as a defense of the rights of NCRMD accused in Canada. In this way, it pushes back on a growing erosion of the protections outlined in *Oommen* for those involved with mental disordered crime. Forensic practitioners may consider making acquaintance with the NCRMD analysis of the Crown's postverdict expert, its reflection of *Oommen*, and the Supreme Court of Canada's thorough reasons for its nonbinding but persuasive dissent in *Bharwani*.

References

1. Canada Criminal Code, R.S.C., (1985), c C-46, s 16
2. M'Naughten's Case, [1843] 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L.)
3. Kjeldsen v. The Queen, [1981] 2 S.C.R. 617 (Can.)
4. R. v. Chaulk, [1990] 3 S.C.R. 1303 (Can.)
5. R. v. Oommen, [1994] 2 S.C.R. 507 (Can.)
6. R. v. Daviault, [1994] 3 S.C.R. 63 (Can.)
7. R. v. Brown, [2022] 1 S.C.R. 374 (Can.)
8. Glancy GD, Bradford JM, Fedak L. A comparison of R. v. Stone with R. v. Parks: Two cases of automatism. J Am Acad Psychiatry Law. 2002 Dec; 30(4):541-7
9. Bouchard-Lebrun v. R., [2011] 3 S.C.R. 575 (Can.)
10. Watts J. Updating toxic psychosis into 21st-century Canadian: Bouchard-Lebrun v. R. J Am Acad Psychiatry Law. 2013 Sep; 41(3):374-81
11. R. v. Simpson, [1977] ONCA 1142 (Can.)
12. R. v. Ratti, [1991] 1 S.C.R. 68 (Can.)
13. R. v. Bharwani, [2025] S.C.C. 26 (Can.)
14. R. v. Minassian, [2021] ONSC 1258 (Can.)
15. R. v. Mann, [2019] ONSC 1949, 155 W.C.B. (2d) 66. (Can.)

Interpretation of Insanity Defense in *R v. Bharwani*

16. *R. v. Dobson*, [2018] ONCA 589 (Can.)
17. *R. v. Bharwani*, [2023] ONCA 203 (Can.)
18. Welsh N. The defence of mental disorder: A divergence in the application of *R v Oommen* among Canadian courts and the need for reform. *Appeal*. 2024 May; 29:98–122
19. Schmitz C. SCC gives its first interpretation of ‘unfit to stand trial’ and capacity to ‘conduct a defence’ [Internet]; 2025. Available from: <https://www.law360.ca/ca/articles/2369646>. Accessed July 27, 2025
20. Kelly E, Capozzi J, Kravtsenyuk M. *R v. Bharwani* update: Fitness to stand trial, NCR, expert evidence – Where will we be by May 2025? Presented at: Canadian Academy of Psychiatry and the Law 29th Annual Conference; 2025 May 4-7; Montreal, Quebec, Canada
21. McLachlin B. Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada: NJI and CIAJ Advanced Judgment Writing Seminar [Internet]; 2010. Available from: https://ciaj-icaj.ca/wp-content/uploads/podcasts/2020/11/podcast1b_16may10-nji-ciaj-judgment-writing-course-copy.pdf. Accessed August 16, 2025
22. *Plessy v. Ferguson*, 163 U.S. 537 (1896)
23. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)
24. Frohock C. Schrodinger’s dissent: The hybrid authority of a dissenting opinion. *Marq L Rev*. 2024; 107(4):963–1004
25. Schrödinger E. Die gegenwärtige Situation in der Quantenmechanik. *Naturwissenschaften*. 1935; 23:807–12, 823–828, 844–849
26. Scalia A. The dissenting opinion. *J Sup Ct Hist*. 1994 December; 19(1):33–44
27. Ginsburg RB. The role of dissenting opinions. *Minn L Rev*. 2010; 95:1
28. Gans J. The great assenters [Internet]; 2018. Available from: <https://insidestory.org.au/the-great-assenters/>. Accessed August 17, 2025
29. Glancy G, Regehr C. *Canadian Landmark Cases in Forensic Mental Health*. Toronto, Ontario, Canada: University of Toronto Press; 2020
30. *R. v. Dobson*, [2015] ONSC 2865, 327 C.C.C. (Can.)
31. *R. v. Bharwani*, [2017] ONSC 649 (Can.)
32. Eid L, Ali A, Senko L, Glancy G. A review of the interpretation of the Canadian test for fitness to stand trial. *J Am Acad Psychiatry Law*. 2024 Dec; 52(4):470–6
33. Curry D, Quinn J. The Supreme Court of Canada interprets the fitness to stand trial test in *R. v. Bharwani*. *J Forensic Sci*. 2025 Nov 18. doi: 10.1111/1556-4029.70228. Online ahead of print
34. *R. v. Taylor (DRM)* [1992], 59 O.A.C. 43 (Can.)
35. England S, Clark TS. Minority will? A model of influential dissenting opinions. *J Theor Polit*. 2025; 38(1):56–84
36. Dietz P. The quest for excellence in forensic psychiatry. *J Am Acad Psychiatry Law*. 1996 Jun; 24(2):153–63