

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Tracy Xu

Before Justice Richard D. Schneider

Heard on March 30, 2007

Reasons for Judgment released on April 18, 2007

Ms. M. C. Creal for the Crown
Mr. C. Hynes for the accused

SCHNEIDER J.:

[1] Ms. Xu has returned to court after the completion of a 60 day Treatment Order made pursuant to the provisions of s. 672.58 of the *Criminal Code*. It was the opinion of Dr. DeFreitas, the author of the report returned to court with Ms. Xu, that she was presently fit to stand trial within the meaning of s. 2 of the *Criminal Code*.¹

[2] It appears that Ms. Xu's difficulties began in 1998 when she was involved in a serious motor vehicle accident. Since that time she has allegedly made hundreds of phone calls to the complainant which were nonsensical and rambling. She has been cautioned by the police but her behaviour is alleged to have persisted resulting in the charges before the court. She has been diagnosed with a 'psychotic disorder not otherwise specified'. She has suffered from a very complex delusional system involving an insurance company, as well as the governments of Canada and China which she believed were conspiring to prevent her from receiving her settlement money from the motor vehicle accident. Her delusional thinking has remained essentially unresponsive to psychopharmacological treatment. Her persecutory delusions have incorporated her ACT team and other medical personnel. She has the fixed false belief that people are tapping her phones. More recently she has been diagnosed with a 'paranoid psychotic illness' which would continue to progress and fluctuate. She has no insight into her medical condition and has been largely uncooperative with treatment. While she has completed the 60day Treatment Order, the persecutory paranoid delusions persist.

[3] While the complex delusional system persists unabated it was nevertheless the opinion of Dr. DeFreitas that Ms. Xu was fit to stand trial. At the time of her last interview Ms. Xu was able to articulate the basic concepts traditionally seen as demonstrating a rudimentary factual understanding of an accused's legal predicament as set out in *R. v. Taylor* [1992], O.J. No. 2398 (Ont.C.A). This test has been referred to as the 'limited cognitive capacity test'.

[4] Prior to the re-trial of the issue of fitness to stand trial Ms. Xu was re-examined by

Dr. Wilkie at the Mental Health Court. Dr. Wilkie agreed with Dr. DeFreitas with respect to Ms. Xu's basic understanding of the mechanics of the legal process and the fact that she is facing certain allegations. She appears to understand the nature and object of the proceedings and their possible consequences (s.2 (a), (b)). Accordingly, a fitness hearing was held with Dr. DeFreitas' report filed and Ms. Xu was found on a balance of probabilities to be fit to stand trial.

[5] With Ms. Xu's verdict of 'fit to stand trial' she commenced a bail hearing before this court. It was during this hearing that the matter of Ms. Xu's fitness to stand trial had to be re-visited. Dr. Wilkie was present in court and able to observe Ms. Xu's behaviour. With these further observations, it was Dr. Wilkie's revised opinion that Ms. Xu was unfit to stand trial notwithstanding her 'rudimentary factual understanding of her legal predicament'. It was apparent that Ms. Xu's delusional thinking incorporated a broad range of participants including the police. Ms. Xu was, as a result of her delusional thinking, unable to communicate with counsel (s.2(c)). While she is able to speak intelligibly, her unwillingness to engage in any sort of interaction with counsel is not volitional but driven by her mental disorder. Her reason for discarding counsel is so that she can demonstrate to the court that she is not mentally ill. In other words, she is using the court process as a vehicle for the demonstration of her sanity.

[6] Her presentation is remarkably similar to that of Mr. Taylor in *R.v.Taylor*. Dr. Wilkie described Ms. Xu as follows:

".....While she was able to answer her questions with regard to knowing her charges, the pleas available to her and the consequences of those pleas, the roles of the various officers of the court, an oath, and perjury, my concern initially, was that Ms. Xu indicated that she wanted to rep-

resent herself at the trial and that was part of the reason why she was not communicating with her lawyer.”

“.....However, after observing her in court, it appears that it is not simply the decision that she’s had not to have a lawyer which precludes some of that communication.”

“.....My second concern is that Ms. Xu has indicated that part of the reason that she does not want a lawyer is that she can communicate directly with the judge, and my concern with regard to that is that I believe that its her lack of insight into her mental disorder which is impacting that decision and that she wants to prove to the judge that she does not have a mental illness and that is her sole purpose in wanting to communicate directly with the judge and therefore, that singular goal may preclude her from participating fully in the trial process.”

“.....My opinion is that her primary objective is to communicate with the judge about her lack of having a mental disorder and some of her delusional material.”

[7] In *Taylor* the clinical opinions were essentially the same and exemplified by the following excerpt:

“His thinking and rambling is disjointed and at times thoroughly irrational. He is sufficiently distrustful of other people that he has not been able to obtain legal representation at any time that has been satisfactory to him. He believes that everyone has been conspiring against him and every lawyer he has been involved with has tried to make things worse for him rather than better. Unfortunately, his paranoid condition has not been treated and not improved and he is not likely in the foreseeable future to be able to deal with a lawyer in any reasonable way.”

[8] In *Taylor* the court, in respect of the issue of an accused’s ability to communicate with counsel, articulated a ‘limited cognitive capacity test’. At the risk of over-simplification, a distillation of the decision is that in order to be fit to stand trial an accused need only have a rudimentary factual understanding of his/her legal predicament. It is not necessary that the accused have a ‘rational’ understanding of his legal predicament or be able to act in his ‘own best interests’.

[9] The court in *Taylor* felt that this standard struck ‘an effective balance’ between the objectives of the fitness rules and the right of the accused to choose his own defence and have a trial within a reasonable time. While expediency must be considered in setting the fitness standard, it may be the case that the ‘right to choose’ is a rather empty right where the accused does not have a rational understanding of his legal predicament; where choice is not rational choice. The right to choose must be read as ‘rational choice’ otherwise, from a protection perspective, it is a ‘right’ of questionable worth. Against the concern for expediency is the rationale for the rules in the first place. Principally, the rules are in place to ensure that an accused who is ill-equipped as a result of mental disorder is not subject to the prosecution machinery of the state. The rules are to protect the accused. They operate to hold the prosecution in abeyance until the accused is fit to respond.

[10] The Canadian Oxford Dictionary defines ‘rational’ as follows: **1** of or based on reasoning or reason, **2** sensible, sane, moderate; not foolish or absurd or extreme, **3** endowed with reason, reasoning. ‘Irrational’ is defined as follows: **1** illogical; unreasonable, **2** not capable of reasoning, **3** not rational. Ms. Xu’s pervasive paranoid delusional thinking has very clearly rendered her irrational. Ms. Xu becomes fixated upon irrelevancies that are a direct product of her mental illness. And, while she has a rudimentary factual understanding of her legal predicament and therefore against the ‘limited cognitive capacity test’ would be fit to stand trial, she is not able to proceed. She is not able to conduct her own defence. She is not governable by the court. She is motivated by her mental disorder to behave within the process in a manner that is not consistent with its objectives. At the same time she is unable to

instruct counsel to act on her behalf because she wishes to speak for herself in order to demonstrate her sanity. She is in my view, as a result of her mental disorder, not able to adequately respond to the state's prosecution and should be protected from that process by the fitness rules. To my mind her lack of a rational understanding of her legal predicament has rendered her unfit to stand trial and should engage the fitness rules. The limited cognitive capacity test as articulated in *Taylor* fails to adequately protect Ms. Xu. The fitness rules must have as a central requirement a rational understanding of one's legal predicament.

Released: April 18, 2007

Signed: Justice Richard D. Schneider