
CANADA / JUDGMENT

R. v. Miller

2011 BCSC 1292

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Supreme Court of British Columbia

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2011 BCSC 1292 R. v. Miller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Miller,

2011 BCSC 1292

Date: 20110928

Docket: 57154

Registry: Chilliwack

Regina

v.

David George Miller

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment on Fitness Application

Counsel for the Crown:

H.B. Waldock

Counsel for the Accused:

P.S. McMurray

Place and Date of Hearing:

Chilliwack, B.C.

September 1, 2011

Place and Date of Judgment:

Chilliwack, B.C.

September 28, 2011

BACKGROUND AND NATURE OF THE APPLICATION

- [1] Mr. Miller is charged with one count of second degree murder in the death of his wife.
- [2] Mr. Miller suffers from Huntington's Disease, a progressive and terminal genetic neurological disorder that affects both his physical and mental capacity. He has had that disease for at least eight years.
- [3] It is common ground that at Christmas time of 2006, Mr. Miller was hospitalized because of the effects of his disease. On Christmas Day, he went home on a day pass. The following day, December 26, 2006, Mr. Miller left the hospital and went to his home. At some point, Mr. Miller took a knife from the kitchen and went into his wife's bedroom where he stabbed her to death. He told his daughter what he had done and told her to call the police. Mr. Miller then sat on the deck outside the house and waited for the police to arrive.
- [4] Mr. Miller's state of mind at the time of the killing is a key issue in this case: was he was suffering from a mental disorder so as to be exempt from criminal liability and/or did he have the necessary intent to establish a conviction for murder?
- [5] Mr. Miller initially elected to be tried by a judge with a jury, but has now re-elected to be tried by judge alone. No trial date is currently set.
- [6] The defence applies under s. 672.23, seeking a determination that Mr. Miller is unfit to stand trial on account of the mental effects of his illness.
- [7] The Crown takes no position as to whether Mr. Miller is or is not fit to stand trial on this charge. The Crown's position was limited to making submissions as to the nature of the legal test to be applied in determining the issue.

THE STATUTORY PROVISIONS AND LEGAL TEST

- [8] Sections 672.22 - 23 of the Criminal Code of Canada, R.S.C. 1985, c. C-46, set out how and when the issue of fitness to stand trial may arise and the procedure by which the issue is to be determined. Those provisions read as follows:

672.22 An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

672.23 (1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.

(2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial.

[9] Under s. 672.27, where the accused has elected to be tried by a judge alone, the court is to try the issue of fitness.

[10] The meaning of "unfit to stand trial" is set out in s. 2 of the Criminal Code as follows:

"unfit to stand trial" means unable on account of mental disorder to conduct a defence 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;

[11] Thus, the foundation for unfitness to stand trial is the existence of a mental disorder that renders the accused unable to conduct a defence or instruct counsel. Mental disorder is defined in s. 2 as "a disease of the mind". In *R. v. Cooper*, [1980] 1 S.C.R. 1149 [Cooper], at para. 8, Dickson J. described what the law requires to establish a "disease of the mind":

8 In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

[12] In *R. v. Taylor* (1992), 77 C.C.C. (3d) 551, [1992] O.J. No. 2394 (Ont. C.A.) [Taylor], the Ontario Court of Appeal adopted a test of fitness that was based on a "limited cognitive capacity" to understand the process and to communicate with counsel.

[13] In *Taylor*, the accused, who happened to be a lawyer, suffered from paranoid schizophrenia and was unable to distinguish fantasy from reality. At a fitness hearing, one of the medical experts said that the accused was:

... "technically fit" in the sense that he is articulate and bright and that he understands the judicial process and the role of the various players in the process. However, he would not be able to instruct counsel in a manner that would be in his best interests and that he would, in fact, resist the assistance of counsel altogether. (para. 22)

[14] The hearing judge ruled that the accused:

... can communicate with counsel to the extent that he can speak to counsel, and do so in an articulate manner, however, it is abundantly clear from the opinion of the psychiatrists before me and from the conduct of the accused person during various appearance that have led up to this hearing and at this hearing, and in his evidence given before me, that his delusions are so pervasive and irrational that he is, unlike the accused in *R. v. Trecroce* not merely capable of

disagreeing with counsel whom he might instruct as to how the case should be conducted, but unable to perceive his own best interests and how those interests should be addressed in the conduct of a trial.

In this case I must distinguish it from the judgment I have just referred to in that I am content that the accused person in this case is not capable to rationally instruct counsel, or rationally conduct case or rationally communicate with counsel because of this mental disorder. (para. 26).

[15] On appeal, amicus curiae argued that the hearing judge erred in applying a standard that was based on whether or not the accused is able to act in his own best interests. The court described the test as propounded by amicus curiae, at para. 44, as follows:

44 Under the "limited cognitive capacity" test propounded by the amicus curiae, the presence of delusions do not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. It is submitted that under this test, a court's assessment of an accused's ability to conduct a defence and to communicate and instruct counsel is limited to an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests. The amicus curiae relies on this court's decision in Reference re R. v. Gorecki (No.1) (1976), 14 O.R. (2d), 212, 32 C.C.C. (2d) 129 and R. v. Trecroce (1980), 55 C.C.C. (2d) 202.

[16] The respondent Crown submitted that while the "limited cognitive capacity" test was correct, the law should make allowance for cases where the accused's mental disorder is so "potent and extensive that it cannot be said that the person is capable of following the evidence, communicating rationally with counsel, or giving evidence which is responsive to the case for the Crown". The respondent submitted that because the accused suffered from delusions so pervasive and irrational that he was "unable to perceive his own best interests and how those interests should be addressed in the course of a trial" that he should be found unfit.

[17] The Court rejected the respondent's submission and re-affirmed the "limited cognitive capacity" test without requiring that the accused be able to make rational decisions beneficial to him.

[18] In R. v. Whittle, [1994] S.C.J. No. 69, the Supreme Court of Canada was concerned with the cognitive capacity that is required in making choices under the confessions rule. The court concluded that the standard that applies is the same as that which applies to the issue of fitness to stand trial and adopted the limited capacity test set out in Taylor. Under that test, it is not necessary that an accused "be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests" (Whittle at para. 32).

[19] Because Taylor held that s. 2 of the Criminal Code codified the common-law test, it may be appropriate to consider decisions that predate the codification. In *R. v. Steele*, (1991), 63 C.C.C. (3d) 149 at 181(Que. C.A.), Fish J.A. (as he then was) articulated the common-law test under the former s. 615, as follows:

An accused is incapable of conducting the defence, within the meaning of s. 615 of the Criminal Code, if he or she:

- a) cannot distinguish between available pleas;
- b) does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;
- c) does not understand the personal import of the proceedings;
- d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
- e) is unable to take the stand, if necessary.

[20] In *R. v. Morrissey*, 2007 ONCA 770, [Morrissey] the Ontario Court of Appeal held that testimonial competency within the meaning of s. 16 of the Canada Evidence Act, R.S.C. 1985, c. E-10, s. 16, is not a component of the test of fitness to stand trial. In *Morrissey*, the accused, who was charged with murder in the killing of his ex-girlfriend, suffered from a mental disorder resulting from a brain injury, which rendered him unable to remember the events surrounding the victim's death. The accused argued that his amnesia resulted in a lack of testimonial competency and that his testimonial incompetence rendered him unfit to stand trial. In rejecting that argument, the Court of Appeal said at paras. 25-27:

25 "Testimonial competence" is not a component of that definition. Rather, the ability to "communicate with counsel" is. Although one of the elements of testimonial competence is the ability "to communicate the evidence", communicating the evidence and communicating with counsel are not necessarily the same things. Moreover, testimonial competence and fitness for trial are different, albeit related, concepts, and are founded upon different rationales. In my view, therefore, although factors relating to an accused person's ability to testify may be relevant to the fitness inquiry - as, indeed, the trial judge instructed the jury in this case - the testimonial competence of the accused, as contemplated at common law and pursuant to s. 16 of the Canada Evidence Act, is not a condition precedent to the accused being declared fit to stand trial. I say this for the following additional reasons.

26 There is no dispute in this case that the appellant suffers from a mental disorder resulting from his brain injury. ... At issue, fundamentally, is whether the criterion that the appellant be able to "communicate with counsel" necessarily encompasses the standard that he be competent to testify and, in particular, that he be competent to testify about the critical events of the homicide and to relate them to his lawyer. In my view, it does not.

[21] The Court referred to Taylor and Whittle and concluded that the limited cognitive capacity test does not set a high threshold, saying at para. 27:

27 ... It requires only a relatively rudimentary understanding of the judicial process - sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard. It is in that sense that the accused must be able "to communicate with counsel" and relate the facts concerning the offence.

[22] With regard to the ability of the accused to relate the facts concerning the offence, the Court said at para. 29:

29 ... [T]he concept that the accused must be able to recount "the necessary facts relating to the offence in such a way that counsel can then properly present a defence" must be interpreted in a purposive and functional manner, in my view. It is intended to refer more broadly to the accused person's ability to recount the facts generally relating to the offence or offences with which he or she has been charged. It is not intended to narrow the inquiry solely to the ability to relate the immediate facts pertaining to the particular incident giving rise to the crime (e.g., the immediate events surrounding the actual shooting in this case). This makes sense, since the thrust of the concept of unfitness to stand trial is that the accused is unable to conduct a defence or to instruct counsel to do so. The ability to communicate with counsel in the context of a fitness inquiry speaks to the ability to seek and receive legal advice. An inability to recount the facts immediately connected with the event giving rise to the charges is not the same as an inability to communicate with counsel in a way that permits an accused to seek and receive effective legal advice. Moreover, there are instances where an accused may wish to - or may be able to do nothing but - formulate a defence based on the contention that he or she is unable to remember the events in question.

[23] The Court noted that neither R. v. Gorecki (No.1) (1976), 14 O.R. (2d), 212, 32 C.C.C. (2d) 129 nor R. v. Trecroce (1980), 55 C.C.C. (2d) 202, which the court in Taylor relied on as establishing the proper test, suggests that an accused person's ability to relate the immediate events surrounding the actual crime is a prerequisite to a finding of fitness to stand trial and concluded at para. 34:

34 ... I am not persuaded that an accused person's inability to relate to counsel the immediate events surrounding the homicide necessarily leads to the conclusion that he or she is unfit to stand trial.

[24] The Court concluded that the "limited cognitive capacity" test strikes an effective balance between the objectives of the fitness rules and the right of the accused to choose his own defence and have trial within a reasonable time. At para. 36, the court described the touchstones of the fitness inquiry:

36 An accused must be mentally fit to stand trial in order to ensure that the trial meets minimum standards of fairness and accords with principles of fundamental justice such as the right to be present at one's own trial and the right to make full answer and defence: see *R. v. Steele* (1991), 63 C.C.C. (3d) 149 (Que. C.A.) at pp. 172-173 and 181; *R. v. Roberts* (1975), 24 C.C.C. (2d) 539 (B.C.C.A.). Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.

[25] While the accused's memory of the events surrounding the offence may be relevant to fitness, it is clearly not decisive. At para. 40, the court stated:

40 ... [W]hile the inability of a person to recall or testify about the immediate events surrounding a crime may be a factor to be weighed in determining whether the Crown has met its onus of establishing guilt beyond a reasonable doubt, amnesia has never been considered, by itself, to be a basis for declaring the accused unfit for trial or for relief from prosecution or conviction.

THE EVIDENCE

[26] On June 10, 2011, Dr. Marcel Hediger, a psychiatrist with the Forensic Psychiatric Services Commission of B.C., conducted a fitness assessment of Mr. Miller pursuant to an order of this Court. Dr. Hediger noted that Mr. Miller was unwilling to discuss events leading up to the charge he is facing because the matter is still before the Court.

[27] With regard to Mr. Miller's understanding of the process, Dr. Hediger stated on page 3 of his June 10, 2011 assessment report:

Upon evaluation, Mr. Miller was aware that he was facing a charge and correctly identified the charge. Mr. Miller was able to describe the role of the Court as deciding whether an accused is guilty of a crime. Mr. Miller was also able to describe the role of the Judge as the person who decides if someone is guilty. Mr. Miller described the Defense counsel as the person who helps him, and the Crown prosecutor as the person who "litigates against me". Mr. Miller demonstrated an understanding of taking an oath in Court as being a promise to tell the truth. Mr. Miller understood that entering a plea meant that he was saying if he felt he was guilty or innocent of the crime with which he has been charged. Mr. Miller indicated that he knew the potential negative consequences of the current legal proceedings as including jail time or Probation. Mr. Miller indicated that he has a lawyer and that he is very comfortable with working with his lawyer. Mr. Miller indicated that he would be willing to discuss his case with his lawyer and instruct his lawyer.

[28] Dr. Hediger's findings and opinions are summarized in the assessment report at page 4 as follows:

Mr. Miller has a historical diagnosis of Huntington's Dementia and a historical diagnosis of Psychosis, secondary to Huntington's Dementia. During his admission to the Forensic Psychiatric Hospital however there was no evidence of an active psychotic disorder including delusions or hallucinations and there was also no evidence of an active mood disorder. Mr. Miller did present

with some evidence of memory disturbances although a thorough assessment of this was not possible due to Mr. Miller not being willing to complete the formal assessments. That said, Mr. Miller adapted well to the ward routine and his behaviour throughout his stay at the Forensic Psychiatric Hospital was settled. Mr. Miller denied any active thoughts of suicide or plans of suicide, thoughts of self-harm, or thoughts of violence aimed any individual or group of individuals. Mr. Miller was compliant with his medications and was willing to continue with psychiatric follow-up and to continue with his medications. As such, Mr. Miller did not meet the criteria for certification under the British Columbia Mental Health Act and has been discharged from the Forensic Psychiatric Hospital. ...

Regarding the assessment to determine whether the accused is unfit to stand trial, based on his assessment during this period, it is my respectful opinion that Mr. Miller does not meet the criteria for a finding of being unfit to stand trial as articulated in the Criminal Code and subsequent related legal decisions.

[29] After this initial assessment, upon application by defence, Mr. Miller was sent for further assessments with regard to the cognitive deficits resulting from his Huntington's Dementia. He was assessed, on June 27, 2011, by Dr. Lynn Raymond, a neurologist at the Huntington Disease (HD) Medical Clinic at UBC Hospital. He was also assessed, on July 12, 2011, by Dr. Alexander Goumeniouk, a psychiatrist also at the Huntington Disease Medical Clinic.

[30] Dr. Raymond's assessment was as follows:

David Miller is stage II of Huntington disease with an estimated total functional capacity (TFC) of 8/13. This TFC score is 3 points lower compared to 2008, which is a significant drop over this period of time. So, he has had significant progression over the past three years. Although, his motor exam is relatively preserved in terms of balance and fine motor coordination, his speech is quite difficult to understand. Moreover, on basic cognitive testing, he performed poorly. He has great difficulty remembering what [he] has just heard, to the point where he cannot even repeat the phrase "No ifs, ands or buts" correctly. He is confused about the year, not just the date of the month. He is completely unable to perform a test of attention, such as spelling world backwards or serial subtraction of 7s, indicating that his attention and concentration is significantly impaired. It is also noteworthy that David himself denies any difficulty with short-term memory, in spite of his obvious deficits on objective testing.

David Miller has had a history of more cognitive impairment than is generally expected at his stage of Huntington disease. This has progressed. This will not improve but can only get worse over time. I do not believe he is able to make good judgments, or follow instructions, or answer questions about his functional capacity accurately. One example was his response to my question about his speech, to which he answered that his speech was just fine.

[31] Dr. Goumeniouk related the results of his mental state examination of Mr. Miller as follows:

In terms of today's mental state examination, David presented as an alert, cooperative individual who had lost significant weight (which he attributed to no longer drinking beer) and who was in no acute distress. He had occasional abnormal involuntary movements that were mostly fidgety in nature. These settled quickly during the interview. He stated that his mood was good and his affect appeared relatively bright. He stated he was remorseful for his actions in December 2009 and stated that he "misses Sue." His stream of mental activity as inferred from his speech was relatively normal if somewhat staccato. There was no latency of response. He stated his energy level was good as was his appetite. He denied any new anxieties or obsessive-compulsive thoughts or behaviors. He denied any current paranoid ideation, but stated he did recall what that was like in the past. He denied any perceptual disturbances and was quite adamant about this. Thus, to the extent of the accessibility I was granted with regard to David's mental state, he was apparently free from psychotic and delusional phenomena at this time.

[32] With regard to testing of Mr. Miller's cognitive function, Dr. Goumeniouk stated:

I pursued a few other examination questions with him to see if I could elaborate further his cognitive state. He had refused to spell the word world backwards or do Serial Sevens. I tried to coax him into doing Serial 3 subtraction from 30. He started with 30 and said the next number was 7 and after some time, corrected himself and said no 37, then he said no 27. His next attempt to take away 3 yielded 26 and after a long pause 24. He was able to state 24 take away 3 was 21, but then said he was unable to take away 3 from 21. I also asked him for his birth date which he gave to me as the 12th of July, 1963. We have it in our records as January 1, 1958. My belief is that this latter number is correct. I asked him to interpret the proverbs a rolling stone gathers no moss or people in glass houses should not throw stones, and he was unable to make any interpretation of these.

[33] As a result of his examination, Dr. Goumeniouk concluded:

David Miller appears to not be depressed at this time and not be suffering from any ongoing psychosis. He states that he is remorseful for his actions and he expects to go to trial over this matter. In terms of Huntington disease, cognition is the area where we have the greatest difficulty making way to improving symptoms. David's cognition is clearly impaired and I will leave this to the forensic psychiatrists to determine whether it is impaired in a manner that would cause him to be able or not to direct counsel. I would, however, state that his cognition is not likely to improve and will only continue to deteriorate.

[34] Counsel for Mr. Miller referred to R. v. R.L.F., 2010 NBPC 35 as an example of a case where the limited cognitive capacity test was not satisfied. There, the accused person, a 15 year old boy suffered from Fetal Alcohol Syndrome, Attention Deficit Hyperactivity Disorder and Myoclonic Jerky Seizures. He operated at the level of a child of seven or eight years, had limited vocabulary and generally gave monosyllabic answers to questions. In reference to the limited cognitive capacity test, the court stated at para. 8:

8 While the accused must only have a rudimentary understanding of the judicial process, the right to make full answer and defence requires something more than mere physical presence at the trial.

[35] At para. 10, the Court concluded:

10 Given the clear limitations of R.L.F. in vocabulary, in conversing with strangers, and in comprehending abstract concepts such as guilt, innocence or motive, it is clear to me that he is incapable of participating in any meaningful way in the trial process including his inability to discuss options with counsel and to give or receive instructions through the course of the trial. I am therefore satisfied on a balance of probabilities that R.L.F. is unfit to stand trial.

[36] Insofar as the foregoing passage states that the accused must be able to comprehend abstract concepts and suggests that he must possess the ability to engage in analytical reasoning, it is my view, with respect, that it sets a higher standard than the limited cognitive capacity test provides.

DISCUSSION AND RULING

[37] It is common ground that Huntington's Disease is a mental disorder within the meaning of that term under the Criminal Code. The disease not only has significant physical effects; it also has serious and progressive effects on the cognitive function of the sufferer. It is clear from the evidence filed on this hearing that Mr. Miller has the disorder that that it has affected and will continue to affect his cognition.

[38] The issue is whether, by reason of Huntington's Dementia, Mr. Miller is unfit to stand trial.

[39] Having regard to the evidence, including the evidence of Dr. Hediger, I am not satisfied that Mr. Miller is unable, on account of mental disorder, to either (a) understand the nature or object of the proceedings or (b) understand the possible consequences of the proceedings.

[40] Mr. Miller understands that he is facing a charge that he murdered his wife. He understands that he is facing a trial to determine whether he is guilty of that offence and he understands that he faces serious potential negative consequences as a result of the proceedings. He appears to have a reasonably good understanding of the role of the various players in the judicial process, including the role his own lawyer will play.

[41] In my view, the real issue on this application concerns the third aspect of the test of fitness to stand trial, namely, whether Mr. Miller is unable, on account of the cognitive deficits that he suffers as a result of his Huntington's Dementia, to communicate with counsel to the extent and in the manner that is required in order that he can have a meaningful presence and meaningful participation at the trial and, therefore, have a fair trial.

[42] Counsel for Mr. Miller submits that Mr. Miller's cognitive impairment affects his ability to communicate with counsel and participate in the trial in a meaningful way in two respects. First, he submits that Mr. Miller's inability to communicate with his counsel and with

potential expert witnesses about his mental state and thinking processes at the time of the offence means that it will be very difficult, if not impossible, for witnesses to provide expert medical opinions about Mr. Miller's capacity to form the necessary intent to sustain a conviction for murder and his mental state at the time with regard to whether or not he should be found not criminally responsible due to a mental disorder.

- [43] Second, defence counsel submits that Mr. Miller's short term memory deficits render him unable to follow and retain, for any time, a sufficient grasp of the testimony that will permit him to have meaningful discussions with counsel about the case and the conduct of the defence.
- [44] With respect to the first submission made by counsel for Mr. Miller, counsel says that in his discussions with Mr. Miller in the past about the circumstances surrounding the offence he has been concerned about what appeared to be some delusional thought content.
- [45] However, when Dr. Hediger conducted his assessment, he did not detect any evidence of active psychotic disorder, including delusions or hallucinations. Mr. Miller was receiving medications to deal with the psychotic aspects of his disease, was apparently compliant with the medication and they appeared to be effective. There is no evidence that Mr. Miller was unable, as opposed to unwilling, to discuss the circumstances relating to the offence with Dr. Hediger. He made the conscious decision to not discuss those matters because of the charges he facing.
- [46] There is no evidence in the assessment reports that establish that Mr. Miller lacks the ability to recall the events surrounding the offence or that any recall that he has is the product of delusions or otherwise not based in reality. In any event, on the authorities that I have reviewed, it appears to me that lack of memory of the events surrounding the alleged offence is not sufficient to make a finding that Mr. Miller is unfit to stand trial.
- [47] The focus of the assessments by Dr. Raymond and Dr. Goumeniouk was on Mr. Miller's short term memory deficits and his lack of ability to make good judgments. However, I cannot equate an inability to make good judgments with unfitness. That would put the bar far higher than that which is reflected in the limited cognitive capacity test that I must apply.
- [48] In my view, it is Mr. Miller's lack of short term memory and the effect that it will have on his ability to process what he hears at trial and communicate with his counsel in a meaningful way during the trial that requires close consideration. Dr. Raymond noted that Mr. Miller's functional capacity has deteriorated significantly in the past three years and that it will continue to deteriorate. Mr. Miller appears to have almost no ability to recall and repeat simple phrases that he has just heard. He appears to have no appreciation of what day or what year it is. He cannot perform tasks requiring only very modest cognition.
- [49] Dr. Goumeniouk opined that Mr. Miller's cognition is clearly impaired, but he would leave it to the forensic psychiatrists to determine whether the impairment reaches to the level of unfitness. While that determination is obviously one that this court must make, Dr.

Goumeniouk's report is of limited assistance in allowing me to assess the true extent of Mr. Miller's cognitive impairment and its impact on Mr. Miller's ability to be present at his trial other than in body alone. I do not mean to fault Dr. Goumeniouk in any way; I simply comment on the limits of the expert evidence.

- [50] Mr. Miller's cognitive abilities are clearly limited and are continuing to diminish. Whether they have diminished below the rather rudimentary level that will permit him to communicate with his counsel is the question. While Mr. Miller could not correctly give his birth date and demonstrated an inability to know what day or year it was; and an inability to perform mental tasks such as subtracting by threes, spelling words backwards, interpreting proverbs, and repeating phrases. He does not appear to be completely devoid of comprehension or the ability to process verbal communication. He was able to respond appropriately to Dr. Hediger's enquiries about the court process. He was able to make a rational decision not to discuss the circumstances of the alleged offence with Dr. Hediger because of the existence of the charge. Even though Mr. Miller denied any difficulty with his speech when talking to Dr. Raymond, despite objective evidence to the contrary, it appears he was aware of the topic of discussion. Mr. Miller's expression of remorse to Dr. Goumeniouk would suggest at least a basic appreciation of past events and his current situation.
- [51] In my view, on the basis of the evidence on this hearing, I am unable to find on a balance of probabilities that Mr. Miller's level of cognitive functioning due to his Huntington's Dementia has dropped below the limited cognitive capacity that an accused must possess in order to communicate with his counsel. It may be that before this matter can be concluded Mr. Miller's cognitive capacity will fall to such a level that a finding of unfitness would be appropriate. The issue can be re-visited if counsel or the court believes that to be the case, but I am not satisfied at this time that Mr. Miller is unfit to stand trial.

"B.M. Joyce J."

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