

## REVIEW ARTICLE

# A review of patient-level factors related to the assessment of fitness to stand trial in Canada

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*Under Canadian law, when the issue of fitness to stand trial is raised, a medical professional completes an assessment and provides an opinion of fitness. The Criminal Code does not mandate a specific form of fitness assessment, and in the last fifty years, a number of unstructured and structured measures have been created for clinicians' use. In the last three decades, a multitude of studies have been conducted in the assessment of fitness to stand trial in an attempt to provide a clearer picture of which patient-level factors influence a clinician's finding of fitness. Previous conclusions on the influence of demographic, psychiatric, criminal, and psycholegal factors have ranged heavily, and research on fitness determinations in Canada is minimal. The purpose of this review is to consolidate the numerous studies to provide an understanding of where future research should be focused so that reliable and valid fitness determinations can be made. Future research should focus on mirroring the unstructured assessments used by clinicians in their studies and then measuring the influence of patient-level factors. Most notably, research should focus on psycholegal factors and their influence on the determination of fitness under the applicable legal standards for fitness across the world.*

### Key words

*Fitness to Stand Trial, Assessment, Competency to Stand Trial, Criminal Code of Canada, Patient-Level Factors*

### Introduction

The development of fitness to stand trial as a legal standard in Canada began with the seminal case of *R. v. Pritchard* (1836), which affirmed that an individual must be

both physically and mentally present if adjudication is to take place against that person [1]. The 1892 version of the Criminal Code of Canada provided that no person who was unfit to stand trial (UST) as a result of a disease of the mind could be convicted, and instead, these individuals were subjected to hospitalization and institutionalization for indeterminate periods of time [2]. This Criminal Code and its provisions with respect to mental disorder remained unchanged until the Supreme Court of Canada allowed the appeal of *R. v. Swain* (1991). The majority of the Court held that the automatic detention of a person found Not Guilty by Reason of Insanity (NGRI) was unconstitutional on the grounds that the detention violated the accused's section 7 and section 9 rights under the Canadian Charter of Rights and Freedoms, which hold the right to life, liberty, and security (s. 7) and the right to not be arbitrarily detained (s. 9) [3]. The precedent this decision set for criminal responsibility led to the publishing of Bill C-30 in 1992, which steered the development of Part XX.1 of the Criminal Code. This Part now deals specifically with mental disorder provisions and explicitly identifies the three criteria that are relevant to fitness to stand trial. Those three criteria are ability to understand the nature and object of the proceedings, ability to understand the consequences of the proceedings, and ability to communicate with counsel [4]. The following review will be conducted in two parts. The first section will provide an overview of the various forms of fitness assessments created and a brief explanation of what each form of assessment is focused on, following which the second section will delineate the numerous studies that have evaluated which patient-level factors are predictive of a

finding of fitness.

### **Assessment of Fitness to Stand Trial**

Under section 672.11, once the issue of fitness is raised, an Assessment Order to evaluate fitness is completed [4]. This assessment can be conducted in hospital, in a detention centre, or in court and the assessment can be completed over a video-link network or in person. As per the Criminal Code, the assessment is undertaken by a medical professional, usually a psychiatrist. Upon completion of the Assessment Order, the assessing clinician will provide an opinion and prepare a report that is presented in court, whereby the Judge will then issue a decision regarding the accused's fitness. If the accused is fit to stand trial (FST), the court proceedings resume, but if the accused is UST, then the accused enters the forensic mental health system. Since the early 1960s, a variety of instruments and interviews have been developed specifically for fitness assessment, which include questionnaires, checklists, semi-structured interview-based instruments, standardized tests, and unstructured clinician judgment.

Unstructured clinical assessments of fitness can be described as unstructured interviews that are open-ended and allow for rapport to be established between the individual and the clinician. Generally, the format of the interview begins with an introduction on the part of the clinician and the rest of the assessment team, an explanation of the purpose of the assessment, a caution concerning the limits of confidentiality, and the accused's right to refuse. Next, a set of open-ended questions are asked that focus on orientation to time and place, the individual's mental status including their mood, cognition, and psychosis, and the individual's understanding of the court. The Mental Status Examination is useful in that the presence of symptoms, while not sufficient for a finding of unfitness, can inform predictions about how psychiatric symptoms may affect the accused's state of mental fitness. This examination also attempts to clarify if there is a mental illness present, and the clinician may inquire about previous admissions or medication usage, so

as to guide conclusions and recommendations about potential fitness restoration. Unstructured assessment also allows the assessor to evaluate the accused's capacity for rapport, communication, and comprehension, which can then be extrapolated to the fitness criteria. Finally, the examiner assesses the individual's understanding regarding court proceedings, with questions that probe about the roles of key professionals in court (e.g. Judge, Crown Attorney, and Defence lawyer), the individual's knowledge of the charges and description of events, definition of pleas available, and understanding of possible outcomes and legal terms such as oath and perjury. Table 1 describes these seven psycholegal abilities evaluated by clinicians to assess fitness. Another benefit of the unstructured interview is that the clinician can go beyond simply what the individual knows at the present time but can assess the individual's ability to learn. By repeating questions or providing some education, the clinician can further assess the influence of any current mental illness on the individual's ability to work with counsel, to remain focused and maintain information related to proceedings, and to understand and appreciate their own legal situation.

In practice, Borum and Grisso found that only 36% of psychologists and 11% of psychiatrists use standardized fitness assessments in their evaluations, indicating that the majority of fitness assessments are conducted in an unstructured manner [5]. However, almost all of the previous research has compared group-level differences between those found FST and those found UST based on some form of structured fitness assessment to evaluate fitness. This state of the research has resulted in a gap between empirical study and clinical practice, exacerbated by the fact that many findings tend to be contradictory and sample-dependent. Problems with study design also impact this area of study with methodological issues such as sample bias, referral bias, or insufficient statistical power. An additional concern is that a number of these earlier studies may or may not reflect the law of a particular country, or the most recent revisions or

cases applied in legal practice. In general, the factors evaluated across all these studies consisted of demographic variables, psychiatric variables, criminal variables, and psycholegal variables. However, very few studies have looked at the effect of individual factors on the spe-

cific criteria for fitness to stand trial. To date, there is still a lack of consensus on exactly which variables are related to, and inform, findings of fitness, but furthermore, which variables are related to the specific criteria that opine fitness [6].

Table 1: *Psycholegal Abilities Related to Fitness to Stand Trial*

Ability	Description
Knowledge of Charges	Tests the accused's knowledge of index offence. The charge will be explained by the psychiatrist if the accused doesn't know, at which point the psychiatrist will ask the question again later in the assessment to test knowledge.
Description of Events	Ascertains the ability of the accused to describe events surrounding index offence. This may include questions about interactions with the police, the environment at the location of the offence, and the accused's description of the events leading up to the offence.
Identification of Roles	Relates to the accused's ability to identify key professionals in a courtroom. This includes the Judge, the Defense lawyer, and the Crown Attorney (or prosecution).
Description of Roles	Tests the accused's understanding of the expectations and roles of each person in the courtroom.
Definition of Pleas	Measures the accused's ability to define and distinguish between available pleas.
Understanding Outcomes	Relates to the accused's knowledge of consequences of pleas explained previously.
Definition of Legal Terms	Assesses the accused's ability to define legal terms such as oath and perjury.

## Factors Influencing Fitness to Stand Trial

In the last three decades, a number of studies have evaluated which patient-level factors are predictive of a finding of fitness, focusing on demographic factors, psychiatric factors, criminal factors, and psycholegal factors in an accused's life. The following section provides an overview of the research conducted to date on the various patient-level factors.

### *Demographic Factors*

Overall, the research with respect to demographic variables is unclear. It is also difficult research to interpret, as demographic variables are known to correlate with other variables such as the presence of a psychotic disorder diagnosis. For example, severity of a diagnosis can influence a person's ability to maintain employment, which can impact demographic variables such as financial income, home configuration, and marital status. Steadman compared UST males with the general population, and found

their profile to be one of average education, limited job skills, few community ties to family and employment settings, and unmarried status [7]. Reich and Wells later found lower levels of education and confirmed the higher rates of unmarried men found in UST populations as per Steadman [8]. This was also one of the first studies to recognize that UST defendants were more likely to be Black or of African descent. Rogers, Gillis, McMain, and Dickens later concluded that those found UST were more likely to be older, in transient living situations, and better educated [9]. These findings are clearly in contradiction to the previous findings. In their study, Rogers et al also focused on gender and concluded that females were more likely to be found UST [9]. However, this finding may have been due to the majority of the sample being female. In general, more males are in conflict with the law than females, and data suggest that more males may be referred for fitness assessments.

Nicholson and Kugler corroborated the previous findings of Steadman and Reich and Wells, and found that Caucasian individuals were less likely to be found UST, and single individuals were more likely to be found UST [7,8,10]. Two-thirds of those UST did not have steady employment, and the average level of education was less than ten years. Most recently, a study conducted in Hawaii found a significant race bias influencing fitness determinations such that Native Hawaiian (Asian) populations were more likely to be found UST than other populations; lending support to previous findings of race bias in said determinations [11].

Interestingly, it is also noted that some studies have found no relationship between demographic characteristics and fitness findings [12–14]. With respect to demographic factors and specific deficits on criteria for fitness to stand trial, Gay et al. confirmed the age-related findings of Rogers et al. within those found FST and those found UST, such that those who were found UST were more likely to be older, but did not find any relationship between demographic factors and deficits on the relevant criteria [6,9].

### *Psychiatric Factors*

One of the earliest and most seminal findings for the influence of psychiatric factors on determinations of fitness comes from Hart and Hare [12]. Most recent research has thus shifted its focus away from disorders to specific symptomatology. Across all studies, research has found that the majority of UST accused have a history of psychiatric hospitalization, including more previous psychiatric admissions. Those with previous psychiatric hospitalization were found to be twice as likely to be UST compared to their never-hospitalized counterparts [15]. Those found UST are also more likely to be taking psychotropic medication, and one study found a significant relationship between findings of UST and medication non-compliance [16]. UST accused are also more likely to have a psychotic diagnosis (e.g. schizophrenia) or psychotic symptoms [6–8,10,15,17,18]. Those with a psychiatric diagnosis are five times more likely to be found UST, and in

those with a psychotic illness specifically, the liability jumps to an eight-fold increase [6,17,19]. Regarding non-psychotic disorders, those with bipolar disorder are more likely to be impaired on psycholegal abilities than those with depression [20], such that the presence of affective disorders correlated with impairment on understanding the possible consequences of the proceedings. Finally, substance abuse disorders were not highly predictive of determinations of UST [9,17,21].

With respect to psychotic symptoms, research shows that symptoms of disorientation, delusions, and hallucinations are more profound in UST individuals [6,22]. Furthermore, legal impairment, as measured by the Fitness Interview Test (FIT) and the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA), was found to be correlated with both psychotic disorders and the presence of psychotic symptoms [19]. Rosenfeld and Wall also concluded that hallucinations, paranoia, and delusions were all related to the individual's inability to communicate with counsel, and disorientation was associated with misunderstanding of the legal proceedings (as measured by the MacCAT-CA) [14]. Other symptoms such as anxiety, hostility, or withdrawal are not generally found to be correlated with findings of UST, but some studies are starting to show that depressive symptoms and addiction withdrawal symptoms are associated with deficits on understanding the nature and object of the proceedings [19].

Intellectual disability seems to show little to no correlation with findings of fitness [10,14]. Only one study showed an association between significant intellectual impairment (i.e. an IQ score below 70) and findings of unfitness [23]. More research has started to emerge with respect to cognitive factors, such as verbal knowledge and working memory on findings of fitness [19]. Some recent research has found that IQ is a significant predictor of understanding the nature and object of the proceedings in psychotic defendants [20]. Cognitive abilities such as executive functioning, working memory, attention, and processing speed are found to be impli-

cated in understanding the proceedings as measured by the MacCAT-CA, but less so in appreciating one's own legal situation [24]. Comparatively, attention was found to be important across all areas of competency [24]. Furthermore, the authors found more variance in MacCAT-CA scores was accounted for by psychiatric and cognitive symptoms together, than when considering psychiatric symptoms alone; indicating a potential interaction or a moderating effect of psychosis on cognitive ability.

Most recently, a study conducted by Gay and colleagues assessed the relationship between psychiatric symptoms and deficits on specific psycholegal criteria [6]. It is one of the first studies to look at specific clinical variables and their relationship to impairment on the prongs of fitness as outlined by Dusky, the American fitness standard [25]. Gay et al. concluded that impaired mental health status, psychotic symptoms, and intellectual disability predicted success on the three fitness-specific prongs [6]. Impaired mental status was associated with all three Dusky prongs, namely, factual understanding of the proceedings (the American equivalent of understanding the nature and object of the proceedings), rational understanding of the proceedings (the American equivalent of understanding the consequences of the proceedings), and ability to communicate with counsel. Delusions were associated with impairment on rational understanding and with impairment on communication with counsel, and intellectual disability and thought disorganization were associated with impairment on factual understanding [6].

### *Criminal Factors*

The research with respect to criminal factors (e.g. severity of crime, previous incarceration, etc.) has been contradictory. Most recently, a study published by Schreiber et al. compared offender and offence characteristics of those found UST against general offenders, and it found that those who were determined UST used weapons more often and had a history of prior arrests [21]. Although the results contradict Cooper and Zapf, who found no

correlation between findings of UST and previous criminal history, the results are consistent with Nicholson and Kugler [10,17]. When considering offence type, early studies found correlations between the nature of the index offence and the fitness determination [10]. Some studies have supported the notion that violent crimes are more likely committed by defendants found UST [7,10,26], whereas other studies have found the opposite result, such that those who were charged with a nonviolent or property crime were twice as likely to be found UST [9,17,27]. Adding to the confusion, some studies have found no correlation of any kind with any criminal variables and fitness [6,9,28].

### *Psycholegal Factors*

The research with respect to psycholegal factors and their influence on opinions of fitness to stand trial is inconsistent and limited. In part, this variability comes from the differences in measuring psycholegal abilities, which are decided by the jurisdiction in which the research is being conducted. As discussed above, there are a multitude of methods regarding how fitness can be assessed. The standardized forensic assessment instruments discussed may use vignettes or sentence completion tasks to test psycholegal ability, whereas during an unstructured interview, a clinician may pose a set of open-ended and closed-ended questions to measure psycholegal ability.

With respect to standardized testing, it is highly supported that successful performance on any of the validated tests is indicative of fitness [10,28,29]. However, as discussed previously, since standardized assessments are not preferentially used by clinicians [5], the rationale for the present study's methodology stems from this gap between what methods are used in fitness assessment research and those actually used in clinical practice.

### **Conclusion**

The current review attempted to consolidate the last few decades of research conducted in the area of fitness assessment to provide a clearer understanding of how fitness determinations are being

made by clinicians. What is certain from the myriad of studies conducted on types of assessments used in practice and those relating to factors relevant to fitness determinations is that there is a gap between empirical study and clinical practice because there is not only a lack of consensus on which variables inform fitness determinations, but there is no recent research on those variables as they are currently assessed by clinicians: in an unstructured manner. The majority of studies relating to demographic factors that have found a correlation were unclear, and more recent studies have found almost no correlations, except for those who are older being more likely to be found UST. The most consensus on this topic has been found on research relating to psychiatric factors, where it is fairly clear that the majority of those found UST have a history of psychiatric symptoms or diagnoses; however, research is still minimal in the area of intellectual disability and cognitive abilities. The research with respect to criminal factors is as unclear as it is with respect to demographic factors. However, of all the patient-level factors assessed in the last thirty years, it is most concerning that very minimal research (with no research occurring in Canada) has been conducted on the influence of the accused's psycholegal

abilities as measured by clinicians in an unstructured manner on fitness determinations. As research is minimal in Canada, future studies should undertake to evaluate the use of fitness assessment and the influence of the various patient-level factors on fitness determinations as defined in Canadian law. However, studies should be conducted worldwide on how patient-level factors influence fitness determinations according to that country's legal standard, and in addition, studies should attempt to understand how those legal standards are measured and evaluated in the form of psycholegal abilities.

Conflict of Interest: none

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