Best Practices in the Evaluation of Fitness to Stand Trial

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Director of Education & Training, CONCEPT
Today

- Overview of legal context
- Overview of forensic mental health concepts
- Overview of Fitness Assessment Instruments
- Using a Rational Decision making model for fitness
- Overview of fitness evaluation reports
The Legal Context
Rationale for Fitness Doctrine

• Protect the accuracy of the proceedings
  – ensuring defendant can give appropriate assistance

• Protect the right of the defendant to due process
  – opportunity to choose and assist legal counsel, confront accusers, and testify on own behalf

• Protect the dignity and integrity of the proceedings
  – State and public interest in fair, reliable proceedings
Historical Context

Writing in the 18th century, Sir William Blackstone wrote:

If a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought.

And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced;

and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

Blackstone commentaries
Legal Standards

• Early standards for competency set out in the U.S. in Youtsey (1899)
  – traced standards from English Common Law
  – referenced Frith’s case, R. v. Berry
  – functional capacity interpretation, R. v. Pritchard

• Constitutional standard for competency was set out by U.S. Supreme Court in Dusky in 1960

• Further elaboration of the standard came in subsequent cases
It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him (p. 402)
Minimal Criteria for Competence

- **Dusky (1960)**
  - Defendant doesn’t have to be perfectly competent
    - Only *legally* sufficient abilities are required
    - May vary with legal demands of case
  - Distinguished from insanity evaluation
    - Assessment of present (& ST future) abilities
    - Consider trajectory with and without treatment
  - *Functional legal abilities* are of primary importance
    - Psychosis $\neq$ incompetence
    - Ability $\neq$ willingness
A Few Competency Standards
Florida

• Set out specific factors that must be considered in determining whether this standard is met, including:
  – Capacity to appreciate charges or allegations
  – Capacity to appreciate the range and nature of possible penalties which may be imposed
  – Capacity to understand the adversary nature of the legal process
  – Capacity to disclose to attorney facts pertinent to the proceedings
  – Capacity to manifest appropriate courtroom behavior
  – Capacity to testify relevantly
Utah

• Requires that evaluators consider the issue of malingering
• Requires evaluation of a D’s present capacity to:
  – Comprehend or appreciate the charges or allegations
  – Disclose to counsel pertinent facts events, and states of mind
  – Comprehend and appreciate range and nature of possible penalties
  – Engage in reasoned choice of legal strategies and options
  – Understand the adversary nature of the proceedings
  – Manifest appropriate courtroom behavior
  – Testify relevantly, if applicable
A defendant is considered unfit to stand trial if he or she is 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. In particular, unable on account of mental disorder to:

- (a) understand the nature and object of the proceedings
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.
...whether (the defendant) is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense—to know that he might challenge [any jurors] to whom he may object—and to comprehend the details of the evidence. ...If you think that there is no certain mode of communicating the details of the trial to the prisoner, so as he can clearly understand them, and be able properly to make his defense to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters.
Australia (Victoria)
*Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*

(1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be—

(a) unable to understand the nature of the charge; or
(b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
(c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
(d) unable to follow the course of the trial; or
(e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
(f) unable to give instructions to his or her legal practitioner.

(2) A person is not unfit to stand trial only because he or she is suffering from memory loss.
A person is mentally unfit to stand trial if the person’s mental processes are so disordered or impaired that the person is “unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.
R. v. Presser (1958) criteria

(1) to be able to understand the charge;
(2) to be able to plead to the charge and to exercise a right of challenge;
(3) to understand generally the nature of the proceeding, i.e., that it is an inquiry as to whether the defendant did what he or she is charged with;
(4) to be able to follow and understand the course of the court proceedings in a general sense;
(5) to be able to understand the substantial effect of any prosecution evidence, and to make a defence or answer the charge; and
(6) have sufficient capacity to decide on a defence and to make their version of the facts known to the court and counsel.
Section 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas)

A person is unfit to stand trial for an offence if, because the person’s mental processes are disordered or impaired or for any other reason, the person is unable to understand the nature of the charge; or plead to the charge or to exercise the right of challenge; or understand the nature of the proceedings; or follow the course of the proceedings; or make a defence or answer the charge.
‘unfit to stand trial’, in relation to a defendant,— (a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and

(b) includes a defendant who, due to mental impairment, is unable— (i) to plead: (ii) to adequately understand the nature or purpose or possible consequences of the proceedings: (iii) to communicate adequately with counsel for the purposes of conducting a defence.
A Final Note Regarding Standards

• Controlling case law must guide the review of competence inquiries at the trial level
• “Understanding competence to stand trial requires understanding all currently applicable law and is beyond any one basic local statutory source” (Philipsborn)
  – State statutes have not kept up (so don’t stop there)
Forensic Mental Health Concepts
Steps in Opinion Formation

1. Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis)
2. Evaluate relevant psycholegal abilities and deficits (Understanding, Appreciation, Reasoning, Decision Making, Consulting/Assisting)
3. Determine whether there is a causal connection between any noted deficits and mental disorder/cognitive impairment (nexus)
4. Specify how these deficits might impact functioning (functional deficits) at trial (or for proceeding to next stage)
Prerequisites for Unfitness

- Mental Illness
- Mental Disease or Defect
- Cognitive Impairment

Spoiler Alert: This all comes down to symptoms
Psychiatric Diagnosis & Symptoms

• Formal thought disorder / Disorganized thinking
  – Loose associations, tangentiality, incoherence, word salad
  – May interfere with ability to give coherent, relevant instructions to attorney; capacity to provide testimony; understand evidence or what witnesses are saying

CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Concentration deficits
  – May result from severe anxiety, depression, (hypo)mania, organic brain dysfunction, severe ADHD
  – May interfere with ability to follow court process or instruct counsel as case unfolds; consult with counsel; engage in decision making

CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Rate of thinking
  – Profound slowing or increase rate of thinking (e.g., flight of ideas)
  – May interfere with ability to focus attention or make decisions

CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Delusions or hallucinations
  – False ideas or hallucinatory experiences may interfere with ability to think clearly and logically in areas relevant to $FST$
  – May impact ability to participate in trial strategy; make rational decisions; provide relevant and rational information to attorney

CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Memory deficits
  – Amnesia not a *de facto* basis for incompetence
  – Memory deficits must affect the ability to consult with and assist lawyer or the ability to testify on one’s own behalf

CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

- Intellectual/Developmental disability
  - Also not a *de facto* basis for incompetence
  - Intellectual disability must be related to an inability to function in the legal context
  - May interfere with ability to understand the charges and/or legal procedures; decision making ability; ability to participate meaningfully in defense

CONSIDER CONTEXT
Psycholegal Abilities
Fitness-Relevant Abilities

- Understanding
- Appreciation
- Reasoning
- Consulting/Assisting
- Decision-making
Understanding

- Legal proceedings, strategies, and plea options
- Roles of key participants within the legal process
  - Defense counsel, prosecutor, judge, jury, etc.
- Current charges
- Elements of an offense
- Consequences of conviction
- Rights waived in making a guilty plea
Appreciation

- Likelihood of being found guilty
- Consequences of being convicted
  - Range & nature of possible penalties and how they affect D)
- Appraisal of available legal defense and their likely outcomes
- Appraisal of whether or not to testify
- Make rational case-specific decisions
Reasoning

• Distinguish more relevant from less relevant information
• Seek out relevant information
• Weigh and evaluate various legal options and their consequences
• Make comparisons
• Provide reality-based justification for making particular case-specific decisions or conclusions
Assisting/Consulting

- Consult with counsel
- Relate to the lawyer
- Plan legal strategy
- Engage in own defense
- Challenge witnesses
- Testify relevantly
- Manage courtroom behavior
Decision Making

- Consider alternatives
- Weigh options
- Make crucial legal decisions
  - whether to accept the plea agreement or proceed to trial, which plea to enter and which steps to take, e.g., testifying or calling witnesses at trial
- Myriad smaller decisions throughout the course of the proceeding
Functional & Contextual Nature of FST
Case law & legal statute have attempted to elaborate on the specific abilities required for competency

- Some jurisdictions have developed articulated standards for FST
- Fitness is an open-textured construct (not a bright line construct); not defined by a fixed set of criteria since it is contextual in nature
“Mere presence of severe disturbance is only a threshold issue—it must be further demonstrated that such severe disturbance in this defendant, facing these charges, in light of existing evidence, anticipating the substantial effort of a particular attorney with a relationship of known characteristics, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.” (Golding & Roesch, 1988, p. 79)
Context Matters

• Fitness cannot really be assessed independent of the context of the case
  – Need to find out as much as possible about what is expected of the defendant for his/her particular case

• Evaluator’s role is to describe for the court the degree of congruence/incongruence between the defendant’s functional abilities and the abilities required of the defendant to proceed with his/her case

- Describes cases wherein the evaluators’ opinions were not taken into consideration because they did not address the fitness criteria (*Presser* criteria); underscores necessity of evaluating within the context of the case.
Grisso on Functional Assessment

“A decision about legal competence is in part a statement about congruency or incongruency between (a) the extent of a person’s functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case. Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for competence decisions.” (Grisso, 2003, pp. 32-33)
Observed Interactions with Counsel

- Functional evaluation allows for extrapolation from the evaluation context to the trial context
- Best to directly observe interactions between defendant and attorney
  - When this is not possible, extrapolate from evaluator-defendant interactions

  - Useful content for observed discussions:
    - Legal defenses
    - Possible strategies
    - Defendant’s version of events
Zapf & Roesch (2009)

- Learn about what is required of the defendant during the legal proceedings
- Assess the defendant’s functional abilities in the context of his/her specific case demands
- Consider the relationship between the defendant’s symptoms and functional abilities
- Specify how the required psycholegal abilities are impaired by the functional deficits
Grisso (2003): Trial Demands

• To evaluate FST within the context of the specific defendant’s case, evaluators must be knowledgeable regarding:
  – complexity and multiplicity of charges
  – particular events associated with the alleged offense
  – range of possible penalties for this alleged offense, and probabilities of their occurrence
  – range and types of evidence available to counsel without defendant’s report
  – simplicity or complexity of the legal defenses available
  – necessity for defendant’s own testimony at trial
  – probable length of trial
  – probable complexity of trial (e.g., types and number of witnesses)
  – potential of trial to arouse emotion
  – sources of social support for defendant during trial process
Philipsborn (2004): Godinez & Cooper

- The list of tasks that a defendant might be called upon to make (relying on *dicta* from leading cases, which, he argues, would hold more weight with a judge than secondary sources); arguably all of these matters are either covered or closely related to the decision-making elements described in the most recent competence-related cases (see p. 428)
  - What is the spectrum of defenses available in this particular case?
  - How will the defenses be presented, and which witnesses will be involved?
  - How could the prosecution’s cross-examination, or rebuttal, influence the guilt and penalty phase outcomes?
• “It is both interesting and somewhat alarming to note that some leading secondary sources omit discussion of how a competence examination is to be undertaken if the expert has incomplete knowledge of the breadth of defenses to the charges, possible penalty phase mitigating and aggravating circumstances, or how these might be presented in the case at issue. This kind of practical knowledge would appear to be necessary.”
Philipsborn (2004)

• Indicates that some court decisions suggest that it is incumbent on defense counsel to seek out the expert to relay this pertinent and relevant information about the case and abilities required of the accused, rather than wait for the expert to seek out defense counsel on these matters

• *Duhon*: “one of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would go into the defense of a case”
  
  – Expert and lawyer need to work together to ensure that the expert has a full understanding of the case and the abilities to be evaluated in the particular defendant
“Since the defense attorney is the only one who knows what will be required of the defendant for the particular case, it is important to speak with him (or request information in writing) to gain an understanding of the complexities of the case and the requirements of the defendant in participating or assisting in her defense. This is particularly important given that the evaluation of a defendant’s competence to proceed should be conducted in a contextualized manner...a functional assessment of competency requires that the evaluation take into account the specific demands of the case.” (Zapf & Roesch, 2009, p. 90)
“Collecting evaluation data from the defense attorney is an important component of CST evaluations with juveniles. [They provide a list of information that defense attorney can supply.] Whenever possible, communicating with defense counsel to collect this information should occur at the outset of the evaluation to inform the meeting with the defendant.” (Kruh & Grisso, 2009)
Appendix A

Attorney CST Questionnaire*  

TO (Client's Attorney): ________________________________________________________________  
FROM (Evaluator): ______________________________________  
DATE: ______________  

Your client, _________________________, (Docket # _____________) has been referred to me for evaluation of competency to stand trial. I would greatly appreciate your completion of the following form, which will provide valuable assistance in conducting this evaluation. Please do not hesitate to phone me if you have any questions. My contact information is as follows:

Telephone _____________ FAX __________________ Email ____________________________________________
Agency & Address: _______________________________________________________________________________________

Who brought your client’s competency to the attention of the court?
☐ Myself ☐ Prosecuting Attorney ☐ Court’s own motion ☐ Probation officer
☐ Detention Staff ☐ Arresting officers ☐ Client’s family ☐ Other: _______________________

What factors, if any, contributed to the perceived need for a competency evaluation?

Check all that apply  Describe factors checked
☐ History of mental illness
☐ History of psychiatric medication
☐ History of psychiatric hospitalization
☐ History of counseling/therapy
☐ History of mental retardation
☐ Difficulty communicating with client
☐ Client’s unusual behavior
☐ Other

One aspect of competency is the client’s understanding of the charges and the associated possible dispositions. To assist me in evaluating this, please describe:

The charges against your client: __________________________________________________________

The nature of the dispositions that your client might face, given these charges and your client’s past record: __________________________

Please describe any collateral consequences or added stressors in the client’s life that I should consider when interacting with this client:

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

__________________________________________________________________________________________________

* This form represents a slight modification of an adaptation by Grisso (2005) to the original form developed by Kruh, Sullivan, & Dunham (2001). Permission from both Tom Grisso and Ivan Kruh was obtained to include this form as an appendix.


Another aspect of competency is the client’s ability to assist counsel and to manage the attorney-client relationship in a way that does not detract from the opportunity to develop the defense. Below, please indicate any factors that you have seen detract from these objectives and describe how.

<table>
<thead>
<tr>
<th>Check all that apply</th>
<th>Describe factors checked</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Easily confused</td>
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<tr>
<td>□ Detached or indifferent</td>
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<tr>
<td>□ Depressed</td>
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<tr>
<td>□ Hostile, aggressive, defiant</td>
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<tr>
<td>□ Inattentive or distracted</td>
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<tr>
<td>□ Immature or childlike</td>
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<tr>
<td>□ Difficulty communicating things</td>
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<tr>
<td>□ Difficulty understanding you</td>
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<tr>
<td>□ Difficulty retaining information</td>
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<tr>
<td>□ Disorganized speech</td>
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<tr>
<td>□ Peculiar/Odd statements or beliefs</td>
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<td>□ Seeing/Hearing things not present</td>
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<td>□ Very bizarre behavior</td>
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<tr>
<td>□ Other</td>
<td></td>
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<tr>
<td>□ Have observed nothing detracting from attorney-client interaction</td>
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</tr>
</tbody>
</table>

Competency is in part a comparison of the client’s abilities to the demands of his or her case. Please describe the likelihood of the following demands for this client’s case (circle one response for each).

1. Is likely to have to make a decision about a plea agreement
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

2. Evidence against client is unclear and the defense largely depends on the client’s ability to provide information
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

3. Case will involve many adverse witnesses
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

4. Client will need to testify in the case
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

5. The pre-adjudication process will be lengthy
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

6. The adjudication hearing will be lengthy
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

7. The adjudication hearing will be complex (e.g., difficult to follow, complicated evidence)
   - No
   - Unlikely
   - Don’t know
   - Likely
   - Definitely

Thank you for this information. Please do not hesitate to contact me if you have any questions.
Fitness Assessment Instruments
Fitness Assessment Instruments

• Provide structure
• Improve communication in legal settings
• Facilitate research / improvements in knowledge
• Standardize the assessment process
• Reduction of error and bias
• Meaningful comparisons across time
• Facilitate normative data & comparisons
Evidence-Based Practice


– Integration of clinical interviews w/ standardized measures
  • Embraced by AAPL Guidelines & Best Practices in CST Evaluation
– “Evidence-based practice cannot be achieved without standardization” (p. 453)

– Using reliable & valid measures is the most direct and empirically-defensible method of achieving standardization
  • Systematize evaluation of key points, reduces subjectivity in recording FST-related info, provides normative comparisons, allows for demonstration of IRR for observations and findings
Fitness Assessment Instruments

• Idiographic
  – IFI-R (Golding, 1993)
  – FIT-R (Roesch, Zapf, & Eaves, 2006)

• Nomothetic
  – MacCAT-CA (Poythress et al., 1999)
  – ECST-R (Rogers, Tillbrook, & Sewell, 2004)

• Special Populations
  – CAST*MR (Everington & Luckasson, 1992)
CST

- Lipsett, Lelos, & McGarry (1971)
- 22-item sentence completion task
  - Each item scored competent, questionable, incompetent
- Developed to be used as a screen to identify those who needed further evaluation (cutoff = 20)
- Penalizes defendants for cynicism in responses
CAI

- Developed by Louis McGarry and colleagues in late 60s
- Semi-structured interview used to score 13 items
- Taps into various legal abilities
- A 5-point scales is used for each item
  - Total incapacity to no incapacity
GCCT

- Wildman and colleagues (1978)
- Mississippi State Hospital Revision
- 3 factors have been identified:
  - Courtroom Layout
  - General Legal Knowledge
  - Specific Legal Knowledge
- Does not address decisional abilities
IFI-R

- Golding, Roesch, & Schreiber (1984); Golding (1993)
- Originally developed to be completed by mental health and legal professionals working together
- IFI-R consists of 31 specific abilities divided into 11 global domains
- Provides detailed guidance for evaluators regarding various issues to be considered
FIT-R

- Roesch, Zapf, Eaves, & Webster (1998); Roesch, Zapf, & Eaves (2006)
- 16 areas of inquiries; multiple questions in each area
- 3 sections
  - Understanding nature/object of proceedings (factual und.)
  - Understanding possible consequences (rational und/apprec)
  - Communicate with counsel (assisting/decisional ability)
- Good interrater reliability; functions well as a screening tool
MacCAT-CA

- Hoge, Bonnie, Poythress, & Monahan (1999)
- 22 items broken into 3 sections; vignette methodology
  - Understanding
  - Reasoning
  - Appreciation
- Standardized administration / criterion-based scoring
- Normative sample: 729 felony defendants in 8 states
- Sound psychometric properties
ECST-R

- Rogers, Tillbrook, & Sewell (2004)
- Contains both structured & semi-structured components
- 18 items yielding scores on 4 competence-related scales
  - Factual Understanding, Rational Understanding, Consult with Counsel, Overall Rational Ability
- 28 items yielding scores on 5 response style scales
  - Realistic, Psychotic, Nonpsychotic, Impairment, Both Psychotic and Nonpsychotic
- High internal consistency and good interrater reliability
CAST-MR

• Everington (1990)
• 50 questions presented orally
  – 25 MC questions on understanding basic legal concepts
  – 15 MC questions on skills to assist defense
  – 10 open ended questions on relevant circumstances of offense
• May set too low a bar for competency
Australia-specific Instruments

- ???
- FIT-R can be adapted (Dr. Andrew Carroll, Victoria)
- MacCAT-FP has shown promise in England/Wales
  - Could be adapted for use in Australia but need normative data
## Factual Understanding

<table>
<thead>
<tr>
<th>FIT-R</th>
<th>ECST-R</th>
<th>MacCAT-CA</th>
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</thead>
<tbody>
<tr>
<td>Arrest process (police, Miranda, jail)</td>
<td>Role of a judge</td>
<td>Role of defense attorney and prosecutor</td>
</tr>
<tr>
<td>Nature and severity of current charges</td>
<td>Role of the prosecutor</td>
<td>Behavioral and mental elements of serious offense</td>
</tr>
<tr>
<td>Role of key participants (judge, jury, prosecutor, defense counsel, witness…)</td>
<td>Role of the defense counsel</td>
<td>Elements of a less serious offense</td>
</tr>
<tr>
<td>Legal process (evidence, oath, standard of proof)</td>
<td>Role of the jury</td>
<td>Role of jury</td>
</tr>
<tr>
<td>Pleas (guilty, not guilty)</td>
<td>Criminal charges</td>
<td>Responsibilities of the judge at a jury trial</td>
</tr>
<tr>
<td>Court procedure (testify (direct, cross), enter plea)</td>
<td></td>
<td>Sentencing as a function of offense severity</td>
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<td>Process of a guilty plea</td>
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<td></td>
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<td>Rights waived in pleading guilty</td>
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</tbody>
</table>
## Rational Understanding

<table>
<thead>
<tr>
<th>FIT-R</th>
<th>ECST-R</th>
<th>MacCAT-CA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appreciation of range and nature of possible penalties</td>
<td>Personal awareness</td>
<td>Likelihood of a fair trial</td>
</tr>
<tr>
<td>Appraisal of available legal defenses</td>
<td>Investment in the outcome of the trial</td>
<td>Beliefs about being helped by lawyer</td>
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<tr>
<td>Appraisal of likely outcome</td>
<td>Understanding of the adversarial process</td>
<td>Beliefs about whether to disclose information</td>
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<td>Rational participation</td>
<td>Beliefs about likelihood of being found guilty</td>
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<td>Self-defeating motivation</td>
<td>Beliefs about likelihood of being punished if guilty</td>
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<td>Beliefs about whether to accept a plea bargain</td>
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</table>
## Consult/Assist Counsel

<table>
<thead>
<tr>
<th>FIT-R</th>
<th>ECST-R</th>
<th>MacCAT-CA</th>
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<tbody>
<tr>
<td>Capacity to communicate facts to lawyer</td>
<td>Expectations about the case and defense counsel</td>
<td>Evidence suggesting self-defense</td>
</tr>
<tr>
<td>Capacity to relate to lawyer</td>
<td>Ability to participate in one's defense</td>
<td>Evidence related to criminal intent</td>
</tr>
<tr>
<td>Capacity to plan legal strategy</td>
<td>Ability to communicate coherently</td>
<td>Evidence for provocation</td>
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<tr>
<td>Capacity to engage in own defense</td>
<td>Capacity to make decisions</td>
<td>Motivations for one’s behavior</td>
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<tr>
<td>Capacity to challenge prosecution witnesses</td>
<td></td>
<td>Potential impact of alcohol on behavior</td>
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<td>Capacity to testify relevantly</td>
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<td>Capacity to identify info that might inform plea</td>
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<td>Capacity to manage courtroom behavior</td>
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<td>Capacity to identity costs/benefits of a legal choice</td>
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<td>Capacity to compare legal options</td>
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Functional Abilities

Understand

- General information about the arrest process
- General information about court proceedings
- Charges and allegations
- Consequences of conviction
- Roles and functions of key courtroom personnel
- Various pleas and verdicts
- Rights waived in making a guilty plea
Functional Abilities
Assist (Appreciation/Rational Understanding; Reasoning; Decision-making)

• Appraisal of the likelihood of being found guilty
• Appraisal of the consequences of being convicted
  – range and nature of possible penalties and how they will affect the defendant
• Appraisal of the available legal defenses and their likely outcomes
• Appraisal of whether or not to testify
• Ability to make rational decisions regarding his or her specific case
• Relate to his or her lawyer
• Ability to assist in planning legal strategy
• Ability to challenge witnesses, testify relevantly, and manage courtroom behavior
<table>
<thead>
<tr>
<th>Domain</th>
<th>Subdomain</th>
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| Capacity to understand the arrest process | Ability to provide an account of police behavior at the time of arrest  
Comprehension of the  *Miranda* warning  
Confession behavior (influence of mental disorder, suggestibility, and so forth on confession) |
| Capacity to comprehend and appreciate the charges or allegations | Factual knowledge of the charges (ability to report charge label)  
Understanding of the behaviors to which the charges refer  
Comprehension of the police version of events  
Understanding of the severity of the charges |
| Capacity to disclose to counsel pertinent facts, events, and states of mind | Ability to provide a reasonable account of one’s behavior around the time of the alleged offense  
Ability to provide information about one’s state of mind around the time of the alleged offense  
Ability to provide an account of the behavior of relevant others around the time of the alleged offense |
| Capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings | Knowledge of penalties that could be imposed (e.g., knowledge of the relevant sentence label associated with the charge, such as “5 to life”)  
Comprehension of the seriousness of the charges and potential sentences |
| Capacity to appreciate the likely outcome of the proceedings | Capacity to provide a realistic appraisal of the likelihood of being convicted  
Understanding of the finality of the court’s decision and the authority of the court |
| Basis knowledge of legal strategies and options | Understanding of the meaning of alternative pleas (e.g., guilty, not guilty, NGRI, GBMI, *nolo contendere*, as applicable)  
Knowledge of the plea bargaining process |
| Capacity to engage in reasoned choice of legal strategies and options (decision-making) | Capacity to comprehend legal advice  
Capacity to participate in planning a defense strategy  
Ability to deal appropriately with disagreements with counsel  
Plausible appraisal of likely outcome (e.g., likely disposition for one’s own case)  
Comprehension of the implications of a guilty plea or plea bargain (i.e., the rights waived on entering a plea of guilty)  
Comprehension of the implications of proceeding *pro se* (e.g., the rights waived and the ramifications of the waiver)  
Capacity to make a reasoned choice about defense options (e.g., trial strategy, guilty plea, plea bargain, proceeding *pro se*, pleading insanity) without distortion attributable to mental illness (an ability to rationally apply knowledge to one’s own case and make decisions) |
| Capacity to understand the adversary nature of the proceedings | Understanding of the roles of courtroom personnel (i.e., judge, jury, prosecutor)  
Understanding of courtroom procedure (the basic sequence of trial events)  
Understanding of legal procedure (types of information that can be used as evidence, what is meant by an oath/pledge, how certain a judge or jury has to be to find one guilty |
|---|---|
| Capacity to manifest appropriate courtroom behavior | Appreciation of appropriate courtroom behavior  
Capacity to manage one’s emotions and behavior in the courtroom  
Capacity to track events as they unfold (not attributable to the effects of medication)  
Capacity to challenge witnesses (i.e., recognize distortions in witness testimony) |
| Capacity to participate in trial | Capacity to manage one’s emotional or communication difficulties  
Capacity to track oral questions and respond appropriately |
| Capacity to testify relevantly | Recognition that counsel is an ally  
Appreciation of the attorney-client privilege  
Confidence in and trust in one’s counsel  
Confidence in attorneys in general  
Particular relationship variables that may interfere with the specific attorney-client relationship (i.e., attorney skill in working with the client; problematic socioeconomic or demographic differences between counsel and client) |
| Relationship with counsel | Capacity to track proceedings given sedation level on current medication  
Potentially detrimental effects of medication on the defendant’s courtroom demeanor |
| Medication effects on CST | * Adapted mainly from the work of Jennifer Skeem and colleagues (Skeem & Golding, 1998; Skeem, Golding, & Emke-Francis, 2004; Skeem, Golding, Cohn, & Berge, 1998) but with additions made from the *Fitness Interview Test – Revised* (Roesch, Zapf, & Eaves, 2006).
Advanced Formulation
Grey-Area Cases

- Vast majority of cases are clear-cut
  - Small proportion of cases are grey-area
- We currently lack a coherent model for formulating grey-area cases
- Contextual issues are always important
  - Key in grey-area cases
- Functional abilities are the basis for opinions
- Symptom-level focus important for pathology
Rational Decision Making

• Crux of competency/capacity (of all types)
  – Various criminal competencies
  – Medical treatment / treatment refusal
  – Research participation
  – Informed consent
  – End of life decision making
    • Physician assisted suicide (Oregon)
  – Various capacities for older adults
    • Testamentary, financial, contractual, etc.
Common Abilities

• Various literatures in all the relevant areas show incredible consistency with respect to the abilities implicated in competency
  – Criminal competencies literatures lag behind
  – Typically do not draw from other literatures; lack the breadth of understanding that is possible by doing so

• A broader understanding of these various literatures is key to being able to conceptualize grey-area cases
Rational Decision Making Model

• UNDERSTANDING
• APPRECIATION
• REASONING
• COMMUNICATING A CHOICE / DECISION

• Each of these abilities is directly implicated in rational decision making
• Rational decisionmaking provides a model for the conceptualization and assessment of fitness
  – see Scott (2007) for discussion of this in Queensland
Rational Decision-Making Approach

• Fitness standards embraces a requirement of “decisional competence”
  – Ability to make, communicate, and implement minimally rational and self-protective choices within the unique context of the criminal case

• Fine-grained analysis of fitness will seek to articulate precisely where in the decision-making process the D has gone astray and explain why those defects implicate the ability to represent one’s own interests within a criminal proceeding
Decision-Making Processes

• The components of the decision-making process include:
  – Understanding the relevant information
    • Including accurate perception of the information
  – Assessing the information and forming appropriate beliefs about it with respect to personal involvement
  – Reasoning about the information so as to engage in a logical process of weighing options in light of personally relevant goals
  – Expressing conclusions to others in a coherent and consistent manner

• Cognition or Emotion can impact any of these component processes
Emotion and Cognition

• Current emphasis on the role of cognition
• Predominately cognitive approach is likely to miss or discount the impact of emotion
• Courts have reasoned about the role of psychoses or thought disorders in disrupting rational decision-making processes
  – Inaccurate perception = inaccurate understanding
  – Accurate understanding is necessary, but not sufficient, for competent decision-making
Emotion and Decision-Making

• Emotion represents an important mechanism for the perception and processing of information
• Emotion affects the perceived value, personal relevance, or attractiveness of the information being processed, and therefore will shape motivation and goals
• Emotion can have a significant influence on each part of the decision-making process
Emotion and Decision-Making

• Understanding / Perception
  – Emotion can influence which stimuli are perceived as well as how they are perceived (attention)
    • Emotionally salient stimuli are attended to disproportionately
    • Extremes of emotion influence perceptual recall
  – Different emotional states are associated with distinct information-processing modes
    • “sad mood” process information more slowly but perhaps more accurately; “happy mood” process more quickly but with a lower level of accuracy
Emotion and Decision-Making

- Appreciation
  - Appraisal and appreciation are interdependent aspects of understanding that concern awareness of personal significance
  - Appraisal involves “lightning-fast” judgment as to whether and how a particular stimuli matters to one’s well-being and goals, which then shapes information processing
  - Appraisal leads to emotional reactions to personally relevant stimuli
  - Appraisal and the attending emotion contribute heavily to one’s decision making (personal relevance and consequences)
  - Hope, fear or other emotional reactions to relevant info guide personally consequential decision-making
Emotion and Decision-Making

• Reasoning
  – Emotion’s influence on reasoning is highly contextual
    • Persons in a positive mood disproportionately draw inferences consistent with maintenance of positive mood
    • Persons exposed to negative feelings will generally report increased (and inaccurate) estimations of the likelihood of future events (although unrelated) that may provoke the same negative feeling
Emotion and Decision-Making

• Choice
  – Emotions can profoundly influence choice
    • Feeling states predispose individuals to particular behavioral responses
      – Anger highly associated with risk-taking and aggression
      – Fear is associated with risk avoidance and escape
      – Disgust associated with avoidance and withdrawal
    • Some emotional experiences are nearly automatic responses to certain types of stimuli and the behaviors are difficult to override cognitively (fear w/ fight, flight)
    • Extreme emotional instability causes inability to maintain consistent choice preference
Clinical Depression / Mania

- Symptoms of clinical depression/mania can impair the accurate perception and processing of decision-relevant information, derail formation of self-protective motivation, and impair stable, self-interested choice.

- Understanding / Perception
  - Severely depressed may focus so disproportionately on mood-congruent stimuli as to neglect important contrary info.
  - Manic persons highly distractible and unable to distinguish between relevant and irrelevant stimuli and thoughts.

- Appreciation
  - Depression appears to significantly derail normal appreciation, preventing formation of self-interested motivation.
  - Severely depressed persons may be capable of accurately grasping the factual parameters of the situation but simply not care about the correct course of action or their personal well-being (or may want to engage in risks, self-harm).
Clinical Depression / Mania

• Reasoning
  – Manic persons prone to overestimate wildly their personal abilities and chances of success in difficult situations; prone to impulsive and imprudent choices

• Choice
  – Extreme lability of affect associated with mania can also occasion frequent and dramatic changes of course, obviating decision-making consistency
Brain Damage / Injury

- Neurological defects can impair perception, processing, and expression of emotion in a manner that appears to disrupt rational decision-making (general lack of emotion); persistent inability to make self-protective choices in situations of risk to one’s own thriving, despite retention of cognitive capacity

- It is now widely accepted that brain damage affecting emotional perception, processing, and expression—particularly damage to the frontal cortices—is correlated with diminished rationality, particularly in the realm of highly personal decision-making (‘Gage matrix’)

- Such persons may exhibit intact cognitive abilities and yet be incapable of the kind of high-stakes, highly personal decision-making required of criminal defendants (this inability will present with severe impairment in the ability to experience and express emotion)
Evaluation Model

• Consider relevant cognitive & emotional issues
  – Excesses, deficits, impairment (focus on symptoms)

• Consider relevant decisions to made within the context of the case
  – Typical defendant-driven decisions (whether to demand a jury trial, represent oneself, testify on one’s own behalf, be present at trial, plead guilty); Specific case-relevant decisions (per defense counsel)
Evaluation Model

• Consider the impact of both cognitive and emotional issues (symptoms) with respect to each component of the decision-making process
  – Understanding/Perception, Appreciation, Reasoning, Choice

• Before the defendant is found unfit on the basis of a flaw at any decision-making juncture, an examiner or court should be able to articulate the origin of that fault and explain how it is thought to disrupt rationality
Interpretation
Interpretation

"For clinical information to be relevant in addressing legal questions of competence, examiners must present the logic that links these observations to the specific abilities and capacities with which the law is concerned.” - Grisso, 2003
Functional / Contextual Evaluation

“A decision about legal competence is in part a statement about congruency or incongruency between (a) the extent of a person's functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case. Thus, an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for the legal competence decisions.” –Grisso, 2003
Interpretation

1. Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis – mental disorder or cognitive deficit)

2. Determine whether competence-related deficits exist (Understanding, Appreciation, Reasoning, Decision Making, Consulting, Assisting)

3. Determine whether there is a causal connection between any noted deficits (2) and mental disorder/cognitive impairment (1)

4. Specify how these deficits might impact functioning at trial (or for proceeding to next stage)
Step 1: Determine Mental Disorder

- Consult available statutes, guidelines, and case law
- Symptoms are the key to the linkage/causal attribution
- Observed symptomatic behaviors form the basis for inferences re: whether/extent these result in deficits
- Response style must be considered/ ruled out
- Be alert to inconsistencies
Response Style

• Work to gather data and make a determination
• Watch for inconsistencies
  – self-report data & third-party data
  – between different portions of the interview
  – between ”content” and “process”
• Response style should guide weight & reliability of data
Step 2. Determine Psycholegal Deficits

- Understanding, Appreciation, Reasoning
  - Factual understanding, rational understanding, reasoning
- Factual understanding best viewed as a threshold question
- Also consider decision making, assisting counsel, consulting / communicating
Factual Understanding

• Must demonstrate the ability to factually understand general, legally relevant information
  – Arrest process
  – Key participants
  – Current charges
  – Elements of the offense
  – General consequences of conviction
  – Rights waived in making guilty plea
• Must demonstrate the ability to apply general, legally-relevant information to his own specific case in a rational manner
  – Likelihood of being found guilty
  – Consequences of conviction
  – Appraisal of legal defenses and their likely outcomes
  – Appraisal of whether or not to testify
  – Make rational decisions about the case
Reasoning

• Must be able to consider and weigh relevant information in a rational, reality-based manner undistorted by pathology
  – Distinguish more relevant from less relevant information
  – Weight and evaluate various legal options and consequences
  – Make appropriate comparisons
  – Provide reality-based justifications for a particular decision
Consult / Assist Counsel

• Must have the ability to reason and to communicate coherently to consult with / assist counsel
  – relate to counsel
  – assist in planning legal strategies
  – engage in own defense
  – challenge witnesses
  – testify relevantly
  – manage courtroom behavior
Decision Making

• Incorporate within other fitness-related abilities
  – Appreciate, reason, assist counsel
• Should be explicitly addressed in evaluation and report
• Deficits in decision making should be described in terms of their impact on D’s ability to appreciate, reason, and/or assist counsel
Step 3. Determine Whether Casual Connection

- Establish the linkage between noted deficits (Step 2) and mental disorder / cognitive impairment (Step 1)
- Consider alternate explanations for deficits and conduct hypothesis testing
  - Situational (sleep, nutrition); Personal (lack of education, lack of experience); Response style
- Causal attributions for any noted deficits and the logic and inferences of the evaluator in arriving at the causal attribution should be described for the court
Consider Interaction

- Person x Situation interaction
- 2 ways to remedy deficits
  - Change the person (incompetent; restore capacity)
  - Change the situation (change demands/characteristics of case)
Prescriptive Remediation

• Be aware of the jurisdictional requirements for reports
• Specific functional deficits, treatment history, and previous response to treatment must be considered in restorability opinions
• Remediation strategies or interventions should be outlined
• Prescriptive remediation for reducing incongruence
  – Provide information on how best to manage functional deficits
  – Remediation can mean a change in person or situation
Step 4. Specify How Deficits Affect Functioning

- Specify the link between any noted psycholegal deficits (Factual Understanding, Rational Understanding/Appreciation, Reasoning, Decision Making, Assisting) and how this might impact the defendant’s functioning at trial (or next stage of proceedings)
Bases for Opinion

- Substantiate any opinions / conclusions reached
- Multiple sources of converging data
- Attribute appropriate weight for each piece of data
- Distinguishing between fact, inference, and opinion
- Take legal decision maker through your logic and reasoning in arriving at conclusions/opinions
Report Writing
“the examiner’s task is to describe as clearly and accurately as possible that which the defendant knows, understands, believes, or can do”--that is, his or her functional abilities (Grisso, 2003, p. 38)
Importance of the Forensic Report

• Documents important information
  – Professional record documenting an evaluation took place
  – Finding and limitations of the data, data sources, etc

• Forces the evaluator to impose organization on the data gathered
  – Allows the clinician to prepare and rehearse the essence of any testimony to be given (direct, cross)

• Forces the evaluator to commit to an opinion

• Permits disposition without formal proceedings
  – Well written report allows for stipulation by the court
The Written Report

- Purpose
- Nature
  - Scope & focus
  - Clarity
  - Relevance
  - Informative
  - Defensible
Report Writing

- Plain language; avoid technical jargon
- Attribute information to its source
- Indicate clearly info that was sought but not forthcoming
- Use headings; parallel FST criteria
- Conditional opinions when necessary
- Prescriptive remediation
- Ensure that all statutory requirements are met
  - When opinion IST--treatment, prognosis, etc
Contents

• Relevant Case & Referral Information
• Notification
• Summary of Alleged Offense(s)
• Data Sources
• Background Information
• Clinical Assessment
• Forensic Assessment
• Summary & Recommendations
Forensic Assessment

- Description of competence-related abilities / deficits
- Cause of deficits
- Impact of symptoms on performance/participation
- Prescriptive remediation
- Conclusions or opinions
- Restorability
Casual Connection: Describe the Linkages

- Mental disorder -> psycholegal deficits
- Psycholegal deficits -> performance/participation at trial
Research Findings

• 90% of respondents agreed that detailing the link between MI and deficits was essential or recommended (Borum & Grisso, 1996)

• 27% of reports provided an explanation regarding how the defendant’s mental illness influenced his or her abilities/deficits (Robbins, Waters, & Herbert, 1997)

• 10% of competency evaluation reports reviewed provided an explanation regarding how the defendant’s psychopathology compromised his or her abilities (Skeem, Golding, Cohn, & Berge, 1998)
Linkages

- Evaluators need to describe how a defendant’s deficits will impact his/her abilities at trial
  - describe linkage between causal factor & psycholegal deficits
  - describe linkage between psycholegal deficits & functional abilities

- The degree of congruence/incongruence between functional abilities and required abilities should be clearly described
  - This is where evaluators may need to go beyond articulated standards
  - Context matters / context will dictate required abilities

- Conditional statements are appropriate
Research Findings

• The link between functional abilities and required abilities is rarely addressed in competency evaluation reports

• 12% of reports delineated the congruence between the defendant’s abilities and his/her case context (Skeem, Golding, Cohn, & Berge, 1998)

• 0% of reports delineated the congruence between the defendant’s abilities and his/her case context (Robbins, Waters, & Herbert, 1997)

• This is always important but especially when an opinion on the “ultimate issue” is not given
Decision making abilities

- Rarely addressed in evaluation reports
  - How often are they addressed in the actual evaluation???

- Of seven functional abilities, only the defendant’s understanding of the charge was described in the majority of reports (LaFortune & Nicholson, 1995)
  - Contextually relevant, decisional abilities—such as appreciation of the plea bargaining process—were rarely addressed

- Certain abilities important and relevant to competency to stand trial—such as decision making abilities—were rarely addressed by evaluators in their reports (Skeem, Golding, Cohn, & Berge, 1998)
Substantiating Conclusions

• All opinions and conclusions need to be substantiated
  – Data, source of data, inferences about the data need to be clearly described for the court
  – Delineate the logic and rationale behind any conclusion
• The evaluator’s role is not to make a determination regarding fitness
  – Legal issue; “ultimate issue” issue
• “The examiner’s task is to describe as clearly and accurately as possible that which the defendant knows, understands, believes, or can do” (Grisso, 2003, p. 38).
• Delineate everything and leave it to the court to make the decision
  – Even when an ultimate opinion is provided
Reports to Court

• Courts rely *heavily* on evaluators’ reports
• Research indicates a high rate of agreement between legal decisions and evaluator opinions
  – > 90% agreement (Reich & Tookey, 1986)
  – 95% agreement (Hart & Hare, 1992)
  – 99.6% agreement (Cox & Zapf, 2004)

• Anecdotal evidence
  – “Just tell me whether he’s competent or not”
Common Report Deficiencies

• Lack of substantiation of conclusions

• Rarely address the causal connection between MI (symptoms) and deficits

• Almost never address the degree of congruence between functional abilities and abilities required to proceed

• Rarely address decision-making abilities

• Prescriptive remediation
  – Even when statutorily required (Zapf et al., 2004)
10 Common Errors / Shortcomings

- Opinions without sufficient explanations (53%)
- Forensic purpose unclear (53%)
- Organization problems (36%)
- Irrelevant data or opinions (31%)
- Failure to consider alternative hypotheses (30%)
- Inadequate data (28%)
- Data and interpretation mixed (26%)
- Over-reliance on single source of data (22%)
- Language problems (19%)
- Improper test uses (15%)
Australian Commentary


Australian Research


New Zealand


THANK YOU!

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