

## 01 What is Executive Capacity?

The Mental Capacity Act states that to have mental capacity for a specific decision at a specific time, a person must be able to **understand** the information relevant to the decision (*including the reasonably foreseeable consequences of making or not making the decision at all*); and **retain** that information (*long enough to make the decision*); and **use or weigh** that information (*as part of the process of making the decision*); and **communicate** the decision (*whether by talking, using sign language or any other means*).

Executive Capacity is about the ability to use or weigh information. The Code of Practice (para 4.21) notes: 'For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. A person must accept the information and take it into account.'

A person may appear to be able to weigh facts while sitting in an interview setting but if they do not transfer those facts to real life situations in every day life (executing the plan) they may lack mental capacity.

### Information

### Case Law

WBC v Z [2016] EWCOP 4,  
MHLO 27 – Bailii – Young woman with Autism.

**Learning from Tragedies** (July 2019) an analysis of alcohol-related Safeguarding Adults Reviews.

**Fluctuating Capacity and Impulsiveness in acquired brain injury:** the dilemma of "unwise" decisions under the Mental Capacity Act – Chris Lennard – 29/03/2016

Also:

[www.39Essex.com](http://www.39Essex.com)

[www.edgetrainingandconsultancy.com](http://www.edgetrainingandconsultancy.com)

### The problem with

### interview-based assessments

The problem with this approach is that the difficulties experienced by people with prefrontal cortex (PFC) damage manifest themselves more clearly outside an interview setting. Decrements in executive and adaptive functioning are often masked by preserved language and verbal reasoning skills, so that in individual may appear remarkably unimpaired. Lack of insight. People with PFC damage may grossly overestimate their adaptive skills and consequently, underestimate their need for support or supervision. Williams and Wood (2017) highlight that these individuals are typically 'able to describe what they should be doing in logical terms when asked in the abstract, but in practice, fail to use this knowledge to guide their actions. Put another way, they are good in theory but poor in practice. (Melanie George & Sam Gilbert).

## 02 What might impact on a person's ability to use and weigh information in making a decision?

**Phobia or fear** - for example MB (Caesarean Section) [1997] EWCA Civ. 1361, a pregnant woman with a needle phobia refused anaesthetic necessary for a C section. The court ruled that at the point of treatment her phobia overwhelmed her, and she was unable to use and weigh relevant information to that particular treatment.

**Compulsive Disorders** – such as Anorexia Nervosa. E.g. The NHS Trust v L and Ors [2012] EWHC 2742 (COP) where the judge stated, 'Ms L's judgement is critically impaired by a profound and illogical fear of weight gain.' Other compulsive conditions such as Autism, Prada Willi, OCD and Hoarding may prompt consideration that a person lacks executive capacity when the individual continues to put themselves at risk.

**Delusion (misperception of reality), Brain Injury ...**

### FACTSHEETS

**About the Brain** – a brief lay person's guide to how a person may be affected by brain damage which may interrupt cognitive functioning.

**Executive Dysfunction after Brain Injury** – provides information about what executive function is. The diagnosis does not have to be acquired brain injury and can relate to congenital brain damage or other diagnosis. This describes facets of behaviour which may indicate that a person lacks capacity to function due to Executive Capacity issues.

[www.headway.org.uk](http://www.headway.org.uk)

**Why Everyone Needs to know about the frontal lobe paradox – Melanie George and Sam Gilbert, The Neuropsychologists, 5, 59-66, 2018.**

*'Patients with frontal lobe damage can perform well in interview and test settings despite marked impairments in everyday life. This is known as the 'frontal lobe paradox (Walsh 1085) or the 'knowing doing dissociation' (Teuber, 1964).' Failing to take account of this when conducting Mental Capacity Act assessments can result in disastrous consequences for patients.'*

## 7 Minute Briefing Executive Capacity

### Assessing

It is important to interview those with direct experience of the person's real-world behaviour over a period of time, such as family, friends, social networks and other professionals. Explore previous records around risk and unusual behaviour. Be curious about emerging patterns. There may be regular involvement of other services such as fire service, ambulance services, domiciliary services who have identified patterns of risky behaviour or events. Collecting evidence from wider sources other than interview is essential in exploring executive functioning.