

Learning from Safeguarding Adults Reviews (SARs) about the use of the Mental Capacity Act 2005 in Adult Safeguarding?

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Session outline

- Intro – Robyn – 5 mins
- Overview of the findings of SARs locally and nationally relating to application of the MCA and executive functioning – Ric – 20 mins
- Brief look at what the law says in relation to the MCA and executive dysfunction – Circe – 20 mins
- Overview of what executive dysfunction means from a medical perspective and best practice in this area – Nial Moore – 20 mins
- Respond to any questions – All – 10 mins

Learning re MCA from SARs – 2nd analysis of Safeguarding Adult Reviews: April 2019 - March 2023

- Application of MCA second most prevalent shortcoming – 58% of SARs
- Not all bad – many positive examples of practice were reported which helped safeguard individuals, e.g by ensuring emergency medical treatment in best interests.
- However, determinations (assumptions?) that an individual had mental capacity sometimes meant that services 'walked away' without further consideration of their ability to keep themselves safe.
- Two distinct themes arose:
 - (i) situations in which consideration of mental capacity was absent, and
 - (ii) situations in which capacity was considered but poorly addressed.

Mental capacity receiving insufficient attention

- SAR reports often noted that capacity assessments had not taken place in circumstances where they should have.
- Knowledge of mental capacity in some agencies was variable. Lack of awareness and/or confidence.
- Disputes and confusion around which agency or practitioner was decision maker evident.
- Failure to recognise impact of acquired brain injury or developing conditions such as dementia on people's capacity to make decisions.
- Failure to recognise the impact of substance use in terms of fluctuating capacity.
- Undue reliance on the presumption of capacity.
- Some practitioners wrongly believed people have "*a right to make unwise decisions*".
- A range of risk-taking behaviours (self-neglect, drug use, sex work, alcohol dependency) attributed to lifestyle choice.
- Making global statements on mental capacity or assuming a lack of capacity without an assessment.
- Failure to recognise the role of executive functioning in decision-making.
- Insufficient attention to the impact of coercion and control on an individual's decision-making and ability to freely express their wishes.

Mental capacity considered but poorly addressed

- Assessing capacity is becoming increasingly complex, practitioners need to take account of factors such as fluctuating capacity and executive functioning.
- A lack of consideration given to the impact on capacity of cognitive impairment, trauma, mental health, substance use and coercive control.
- Assessing capacity focussed on a discussion about the decision (for example in terms of keeping themselves safe), without full consideration of their ability to carry that out when they needed to do so – a crucial part of “using or weighing” information.
- Examples where a capacity assessment was undertaken, but subsequent best interest’s decisions were insufficient or absent.
- Lack of legal literacy and confusion relating to the validity of Lasting Power of Attorney and Advance Decisions.
- Lack of understanding of s.44 MCA 2005 (criminal offence of ill-treatment or wilful neglect of a person lacking capacity) and relationship with s.42 Care Act 2014

Some quotes from SARS on executive functioning and fluctuating capacity...

*“Rather than presume X's mental capacity to make specific decisions, **the concept of executive capacity needed to be understood** and how X's adverse **childhood experiences, trauma and ‘enmeshed’ situations** affected her decision making.”*

*“There was **a need to understand the impact that X's health conditions, alcohol dependence and prior head injuries had on his motivation and executive capacity.** On occasion he was told to 'just stop drinking'.”*

*“All three individuals were assumed to have mental capacity to make decisions and choices, **their choices appear to have been seen more as lifestyle choices and the context of these not fully understood. The influence of alcohol use was not explored, nor that of brain damage. How addiction or brain damage affected 'executive function' was not considered. The impact of the coercion of others on decision making was not understood.**”*

“Fluctuating capacity was considered but lack of understanding in the interpretation of X's differing presentation meant that its implications were not understood and professionals ended up disagreeing about the extent of the issues and threat posed.”

MCA SAR
thematic review
from South West
ADASS 2023 – 10
main
recommendations

1. Improved collaboration through networks to support the embedding of improved Mental Capacity practice
2. Training for LAs to cover the themes such as executive function , fluctuating capacity, working with unwise decision making, including self-neglect and substance misuse.
3. Mental Capacity, including executive function and fluctuating capacity, to be a regular subject for professional development and supervision discussions.
4. Professional curiosity to be included in mental capacity training
5. Multi-disciplinary meetings and teams to ensure mental capacity is considered and information shared and recorded.
6. All health and social care staff should be competent and confident to complete a mental capacity assessment within their area of expertise OR know someone who is available to complete an assessment
7. Practitioners should be encouraged to record their evidence base for decisions around mental capacity even if assuming capacity. Recording of decisions around mental capacity should also include consideration of executive function.
8. For agencies to assure themselves that their safeguarding enquiry protocols and forms prompt for consideration of mental capacity and that this is embedded into safeguarding and induction training. Mental capacity considerations should be a featured consideration of any safeguarding enquiry, including impact of coercion.
9. For agencies to assure themselves that mental capacity is a consideration in all change of locations for the individual. This includes hospital admission and discharge.
10. For care providers to be assured that care home, supported living service, domiciliary and other community support managers can recognise a deprivation of liberty and know the steps that need to be taken in respect to referring for authorisation, mental capacity and best interests and the local means to do so.

Local thematic review on self-neglect - Stan, Charlotte, and Philip from 2023

- Considers three people's deaths involving serious self-neglect.
- Stan, died on 11th June 2021 in hospital aged 54. Admitted to hospital on 9th June from his own home in a "terrible state of self-neglect." He was emaciated, with significant malnutrition. Safeguarding concerns were raised by Paramedics. Stan's flat was noted as full of rat droppings, faecal matter, no in date food, mould and old urine bottles.
- Charlotte died on 2nd July 2021 in hospital. She was 71 and White British. Charlotte had been admitted from her own home in a "terrible state of self-neglect." Charlotte had been living in her bedroom as she was unwell. One of her sons had called the GP who had then summoned an ambulance. When Paramedics arrived they found Charlotte to be covered in maggots, faeces and urine; she had been unable to get to the bathroom. On arrival to hospital she was found to be unwell with possible underlying malignancy and sepsis, chronic obstructive pulmonary disease and fluid filled legs (oedema). She was noted to be covered in faeces with multiple severe pressure ulcers.
- Philip was admitted into hospital on 11th November 2021. He was found by a Social Worker and Paramedics on a bedroom floor, access to the property having been facilitated by the Fire and Rescue Service (FRS). It is unclear how long he had been lying there but he was surrounded by urine and faeces, and he was jaundiced. It is not clear why he could not get up. The SAR referral from University Hospitals Bristol and Weston NHS Foundation Trust (UHBW) records the presence of fleas and maggots when he was admitted and observes that he was alcohol-dependent, sometimes consuming 20 units daily. He had a grade 3 pressure sore to his sacrum and was described as a vulnerable adult with increased alcohol intake. By 14th November Consultants agreed that it was appropriate to place Philip on an end of life pathway. He died later that day.

Findings from local thematic review

- In respect of mental capacity, the review explored:
 - How mental capacity assessments are executed
 - Frontline staff's understanding of executive functioning
 - Who was best placed to undertake mental capacity assessments
 - Whether assumptions were made about their capacity to be in control of their own care and support.
 - Whether the support of an advocate was offered.
 - How professionals in all relevant settings apply and understand the Mental Capacity Act.
 - Review of how the adult safeguarding and care management systems in North Somerset understand and support the application of the Mental Capacity Act.
- Some issues were highlighted in respect of application of the MCA, including legal literacy of those involved, and missed opportunities in terms of involving an advocate and referring to the Court of Protection.
- The following recommendations relevant to the MCA were made:
 - NSSAB should consider commissioning a multi-agency case audit of mental capacity assessments, focusing particularly on self-neglect, on executive functioning and on understanding of the five principles within the Mental Capacity Act 2005, and agreeing an action plan once the findings are known.
 - NSSAB should consider commissioning multi-agency training on legal literacy.

In response

- MCA Knowledge and Skills Framework produced by SAB L&D subgroup.
- Improved training offer for LA staff, including advanced legal training which includes executive functioning and fluctuating capacity and legal literacy.
- Self-neglect week 2024 – series of multi-agency events including a session on MCA.
- Today's session.

BUT

- Have we done enough at a multi-agency level in respect of quality assurance and cross agency learning and development? More cross agency quality assurance overseen by the SAB is planned overseen by a new sub-group.
- What does the MCA training in your own organisations cover? Do you think it covers the areas outlined in this presentation sufficiently? If not, what else is needed?

Executive dysfunction and the Mental Capacity Act (MCA) 2005, legal perspectives

- Where it sits in existing legal framework of the Mental Capacity Act 2005
- Some key mental capacity case law that cites executive function / dysfunction

MCA assessment framework:

- Executive dysfunction isn't mentioned in the MCA 2005, can manifest in all areas of the assessment framework. **More likely** to be apparent in using & weighing arm of functional test (s3 MCA 2005):
- **Can the person:**
 - **Understand**
 - **Retain**
 - **Use and weigh**
 - **Communicate**

Using and weighing, understanding and executive dysfunction, case law A LA v AW (2020)

- **Executive function described as:**
- “...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life..”
- AW described as having many skills – “can appear very able and without further examination would commonly appear more able than he is. This is due to his keenness to engage with others, relatively good self-presentation skills, verbal skills, and ability to learn phrases. ’

Warrington Borough Council v Y & Ors (2023) EWCOP27

- Case where 2 experts came to different conclusions as to the person's capacity regarding care and residence decision.
- **1 expert firm view was that person, 'Y' lacked capacity:**
- **'Y presented with Dysexecutive Syndrome, consequent on traumatic brain injury...that those with frontal lobe damage can perform well in interview and test settings, despite marked impairments in everyday life.'**
- 2nd expert firm view person had capacity.

Continued....

- **Outcome was that Y lacked capacity. Judge's comments:**
- “Dr Todd considers that Y has cognitive, emotional and behavioural manifestations which are not confined to periods of heightened arousal but are **pervasive and reductive of capacity for problem solving. ..**
- The consequence, Dr Todd contends, is **to impair the ability to think consequentially and ultimately, to be able satisfactorily to understand, retain or weigh information** in order to make a decision about care needs and accommodation.”

TB v KB and LH (Capacity to Conduct Proceedings) [2019] EWCOP 14

- **Case where executive dysfunction impact upon using and weighing arm of MCA assessment framework accepted:**
- *“People with **executive functioning deficits** and deficits in their short-term memory may be okay, but they may have **difficulty in electing the right bits of information and using them in the right context**. There are glaringly obvious occasions when [P] **has not been able to bring to mind information that it is important to know in the moment to make the relevant decision**.”*

A Local Authority v H [2023] EWCOP 4

- **“The executive dysfunction is "characterised as difficulties with the higher order cognitive functions affecting impulse and behavioural control, planning, abstract thinking, flexibility and disruptions in task-oriented behaviour.”**
- **Although not explicitly described in the MCA 2005, executive dysfunction has been described in numerous complex cases in the courts. Executive dysfunction is a symptom / result of cognitive impairment and could be a factor in a person not meeting elements of the legal framework of the assessment of capacity (s2-3 MCA 2005) – this is the legal test that is applied.**

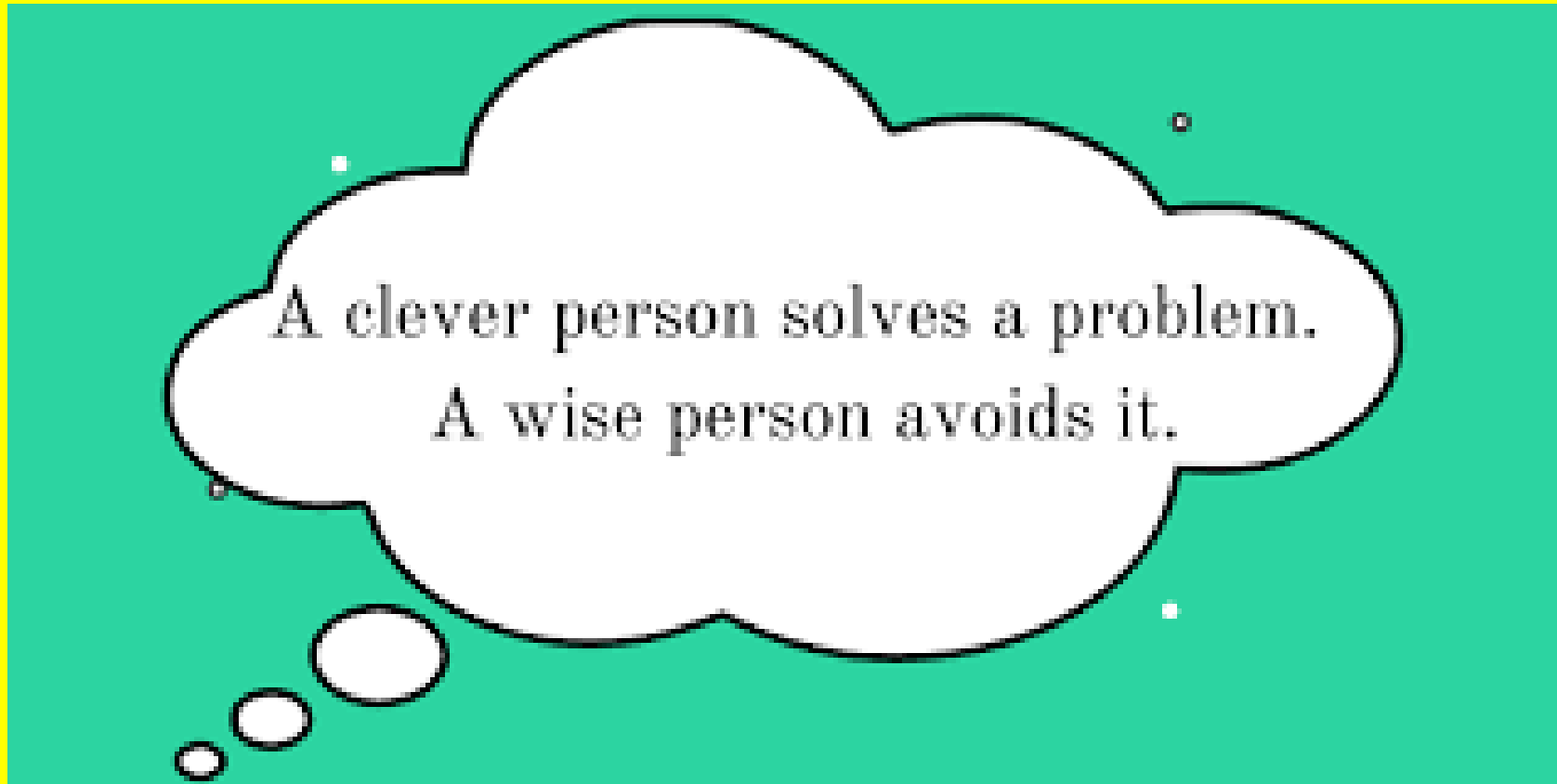
Resources

- **Case law looked at today, links provided in notes sections**
- [Adult Social Care - Capacity - executive function - All Documents](#) (for internal NSC staff only)
- [executive-function-practice-guidance-final.pdf](#)
- [Executive functioning and the Mental Capacity Act 2005: points for practice - Community Care](#)
- [Assessing capacity - SCIE](#)
- [Flashpoints - Capacity guide](#)
- [Executive dysfunction | Headway](#)

Assessing Mental Capacity



Avoid successful challenge

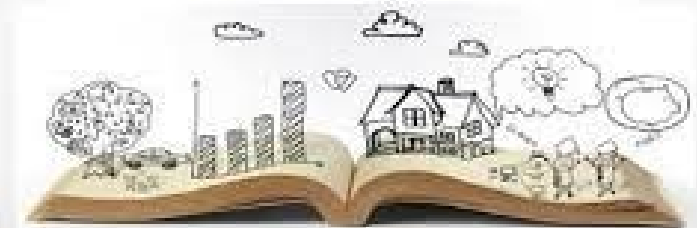


Avoiding successful challenge...

- Contemporaneous
 - Note taking, including verbatim examples
 - Dual discipline assessment
- Challenge self-report with functional assessments and collateral history
- Narrative style, evidential content, inevitable conclusions



NARRATIVE WRITING



Balance of probabilities



Mental Capacity Act 2005

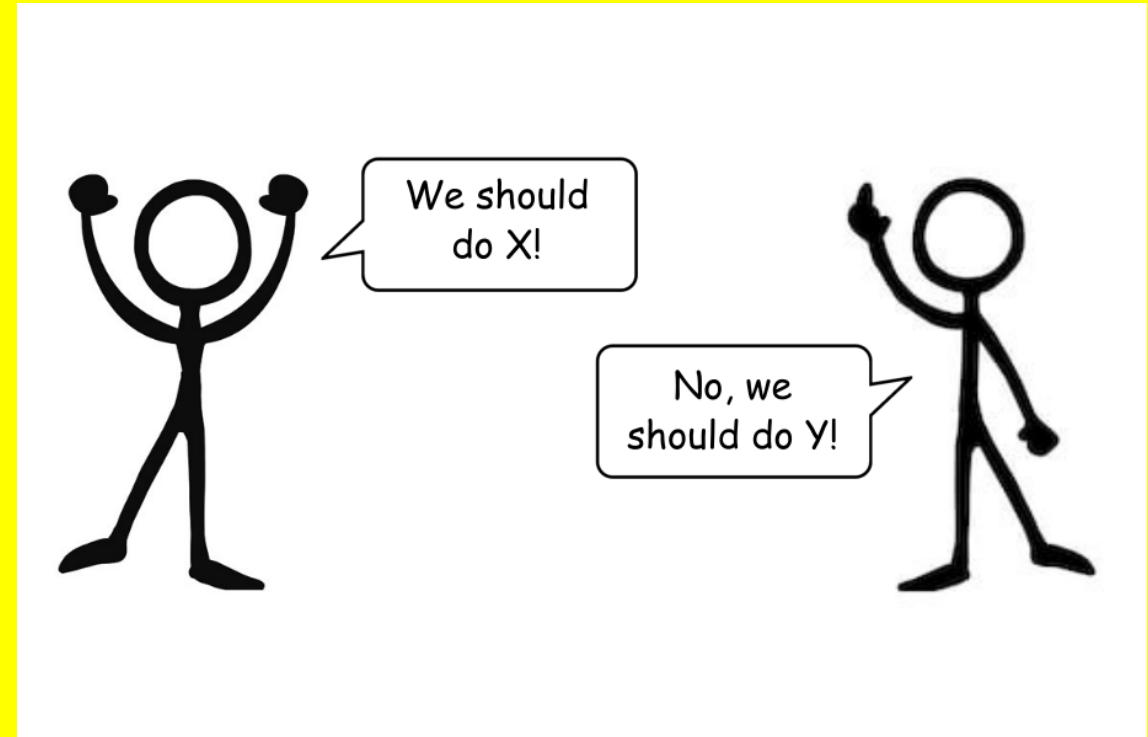
- ‘A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain.’

MCA Principles

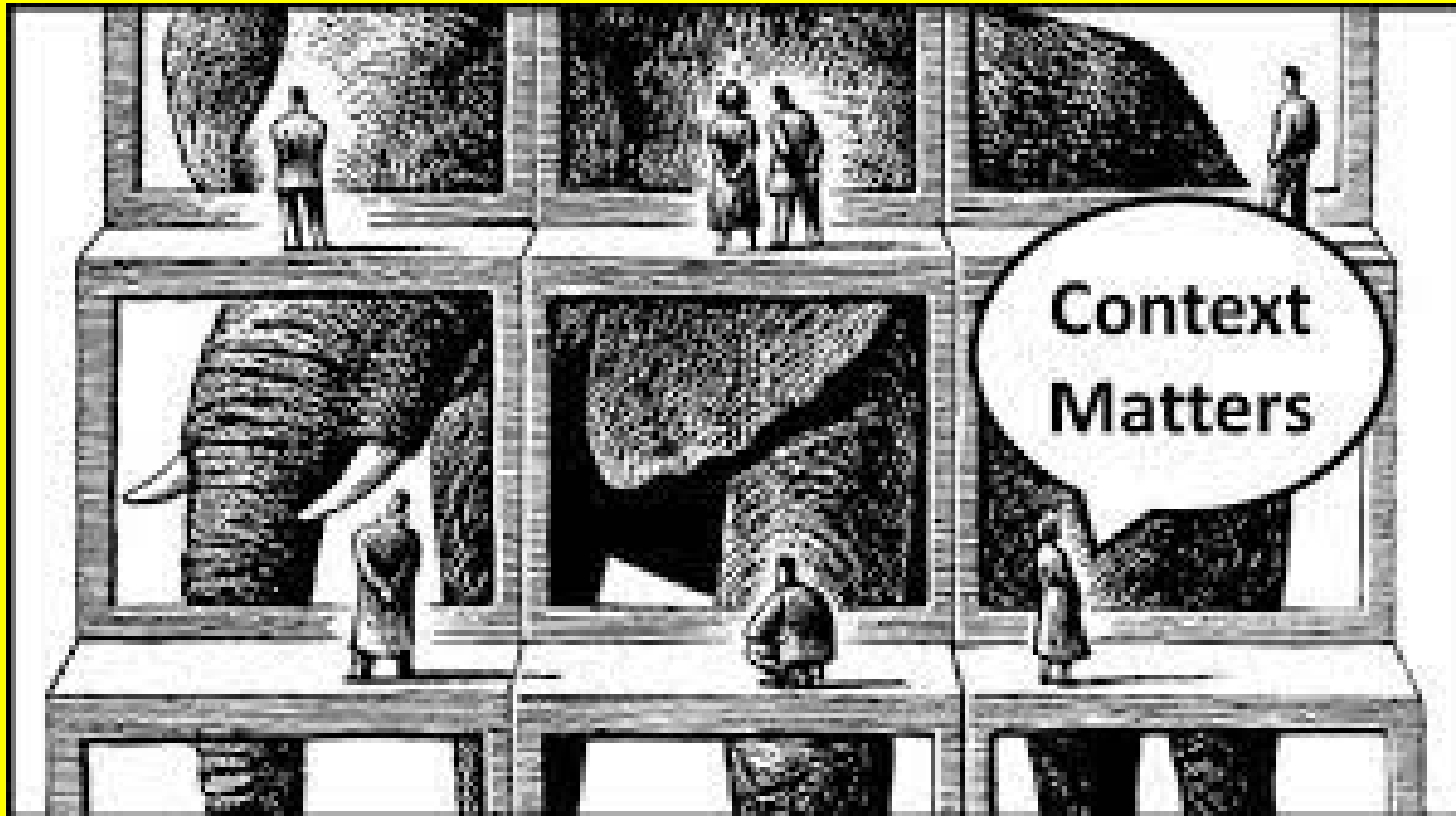
- Presumption of capacity
- Support and enable
- Unwise Decisions
- Apply Best Interests
- Least restrictive option

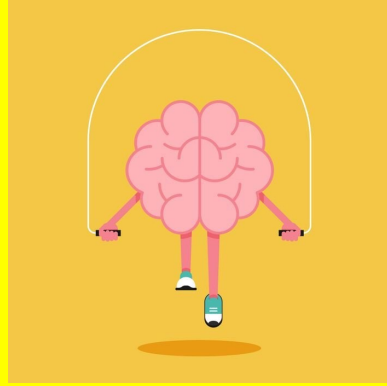


Why do professionals disagree



Look at the whole jigsaw puzzle





Frontal Lobe Paradox

- Some patients with prefrontal cortex (PFC) damage may appear proficient within clinical interviews and perform normally on traditional office-based assessments.
- Despite this they may exhibit marked limitations within the domain of adaptive functioning in day to day life.
- This is referred to as the ‘frontal lobe paradox’ or the ‘knowing/doing dissociation’.

MCA 2005 assessments: Why everyone needs to know about the frontal lobe paradox. Melanie George and Sam Gilbert .The Neuropsychologist May 2018

Face value assessments

- There can be a superficiality to MCA assessments looking solely at ‘decision making capacity’
- People with PFC damage demonstrate impairment more so outside standard interviews
- Preservation of language and verbal reasoning may mask executive and adaptive problems
- PFC pts frequently over estimate their own adaptive skills
- Abstract descriptions, but failure to apply in practice



Characteristics of FLP



- Performance on traditional neuropsychological tests of intelligence and memory is relatively unaffected...
- ...but demonstrate problems with multi-tasking, and with complex behavioural organisation in non-routine situations...
- ...and show deficits in goal-based initiatives, plus under-performance in ill-structured tasks...
- ...with impaired self-initiation, without external cueing

Executive skills

- Working memory *Ability to hold and manipulate information to complete a task*
- Inhibitory control *Ability to control impulses, stay on task, suppress distractions*
- Cognitive flexibility *Capacity to adapt to changing circumstances, switch between tasks, consider different perspectives*

Hiding in plain sight

- Functional impairments may be less apparent within the structure and routine of hospital, care home or rehab unit
- The skills of observers may be significantly less than that required to pick up on these contradictions





...’the only trouble is...’



- Lack of insight results in failure to employ compensatory strategies
- Short test processes may fail to detect problems with long-term rule maintenance
- Testing may fail to elicit the greater effort required
- Testing does not evaluate social cognition (storing, processing and using info re other people)

Assessment pitfalls



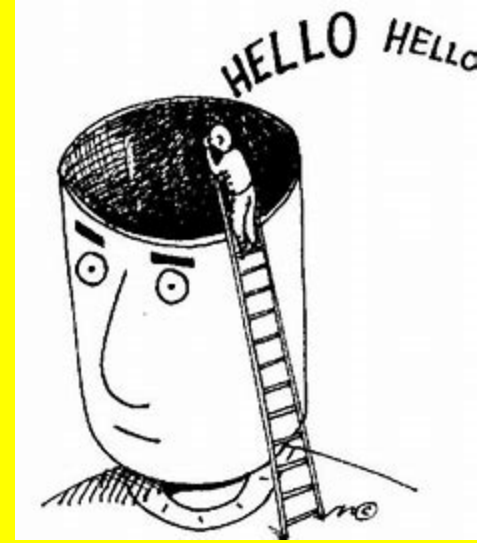
- It is ‘unwise, even negligent, to form opinions on how test performance is likely to represent everyday behaviour, without carefully interviewing those with direct experience of the person’s real-world behaviour over a period of time’ Wood and Bigler 2017
- Interview testing assesses **stated intentions** rather than **actual functioning**, resulting in a false façade of competency

Interprofessional schism

- LA ‘decision maker’ suspicion about advice: “Don’t take patient self-report at face value”.
- Perception of ‘medical model’ “over-protectiveness”.
- “Least restrictive” mantra may overlook lack of awareness and metacognitive skills (monitoring learning)



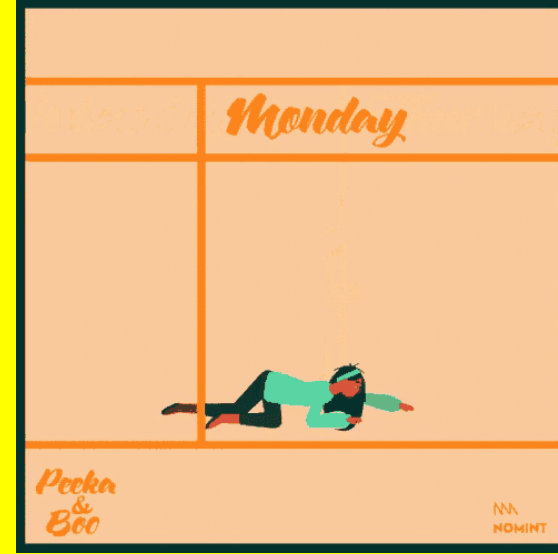
Case example - Anosognosia



- Lack of insight – a symptom of many severe mental illnesses, impairing P's ability to understand or perceive their illness or needs
- P with severe diabetes with impaired hypoglycaemic awareness and poor control, but preserved language skills
- Battle re safe discharge

What to do...

- Check congruence between P's self report and everyday performance
- Seek collateral info from functional assessments (OT) and other informants



Collateral history and its pitfalls

- ‘Independent’ informants vs. vested interests



Situational context is king!

- Evidence of competencies





9/17/2025



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DEHU SAFETY

1. Read all of the instructions carefully.
2. Disconnect the power supply before working on the unit.
3. Wear and use proper safety equipment.
4. Take great care to avoid fire.

SERVICE INFORMATION

| Specification | Value |
|----------------|-------|
| Fleet number | |
| Description | |
| Date serviced | |
| Voltage | |
| Phase | |
| Engine fuel | |
| Blower fuel | |
| Engine speed | |
| Output voltage | |
| Output power | |
| Gas oil | |
| LPG | |

Safety instructions

- Disconnect the power supply before working on the unit.
- Wear and use proper safety equipment.
- Take great care to avoid fire.

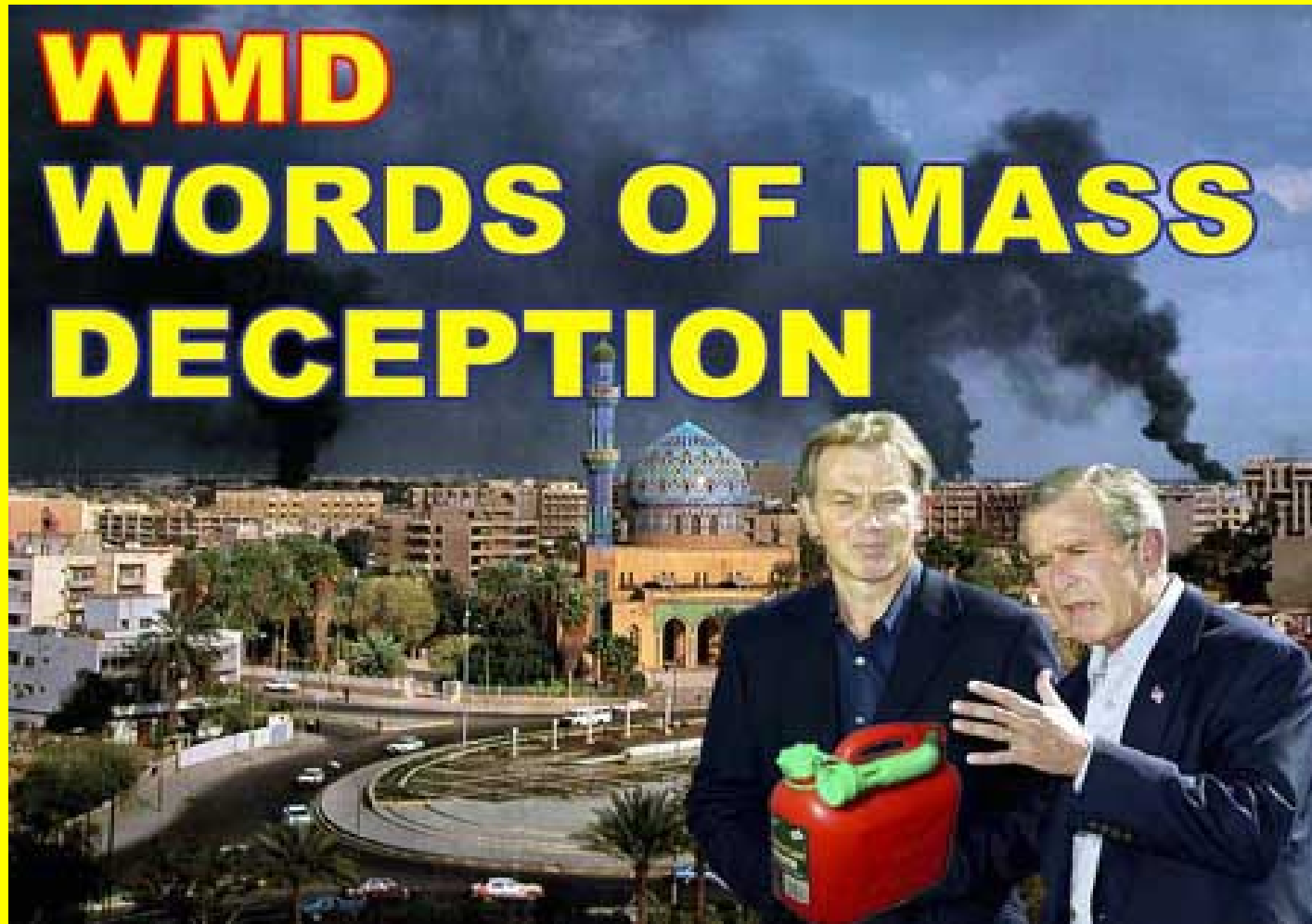
ALIDE PLANT

SALES - SERVICES
(0117) 9561813
(01225) 395404



Dr Niall Moore - Understanding Executive skills in the assessment of Mental Capacity

Hospitals are good for your health...

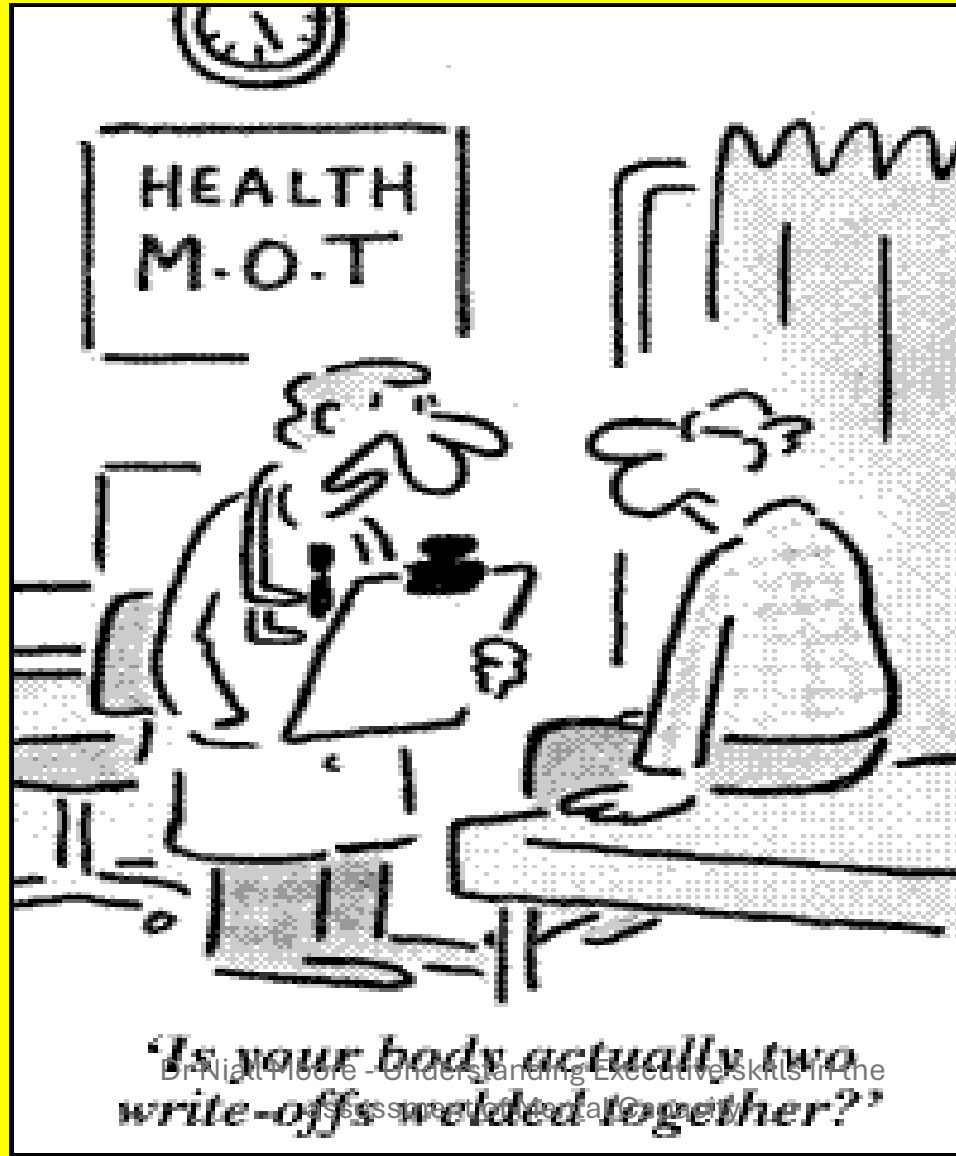


Dementia: Pathway to Chaos

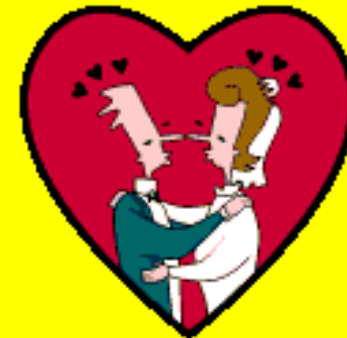
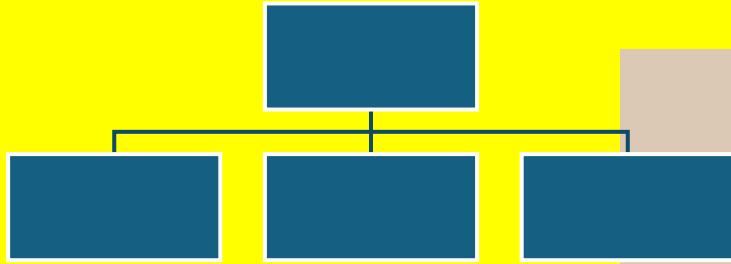
- History unknown
- Observed for deficits
- Shunted about
- Poisoned with drugs
- Ignored
- Treated as a nuisance
- Assumed to be incompetent
- Loss of skills



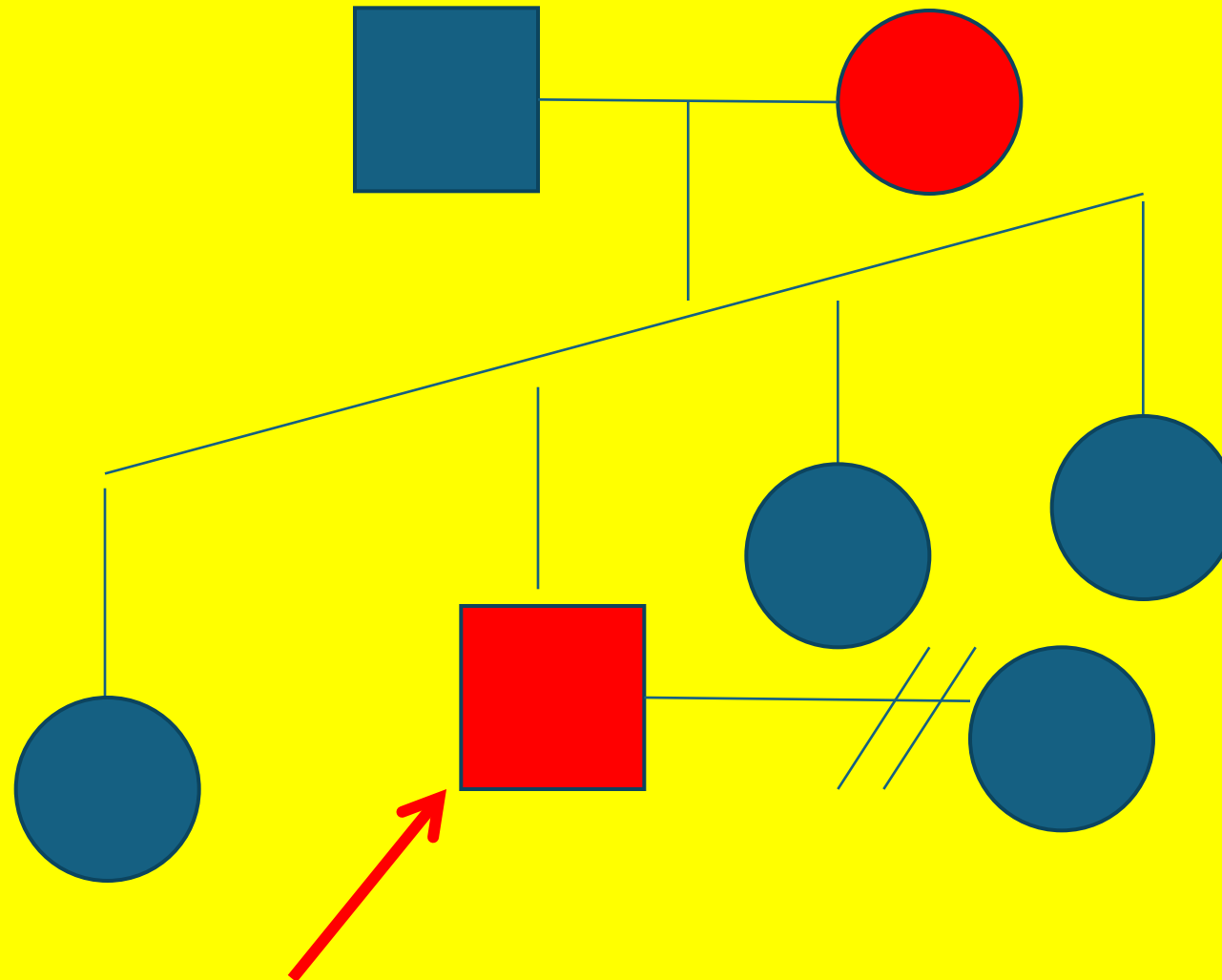
Bit part Medicine



Taking a Psychiatric History



Family Tree



Mental State Examination

- Appearance and behaviour
- Speech form and content
- Mood
- Abnormal perceptions
- Cognition



Assessing technical competencies



Primary domains of cognition

- Learning and Memory
- Language
- Executive Function
- Complex Attention
- Perceptual-Motor Function
- Social Cognition

Primary domains of cognition

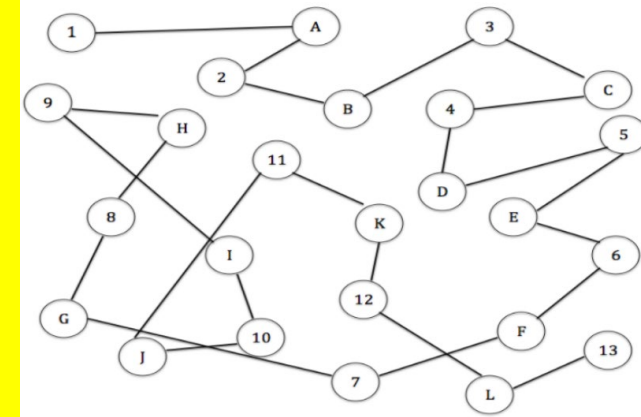
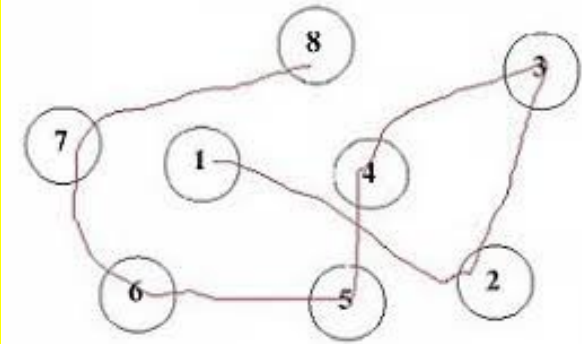
- Learning and Memory
 - *Acquiring, Recalling, events, general*
- Language
 - *Comprehension, expression, concepts*
- Executive Function
 - *Planning, problem-solving, abstract, reasoning, switching, inhibition*
- Complex Attention *Sustain, concentrate divide, process*
- Perceptual-Motor Function
 - *co-ordination of sensory info and actions*
- Social Cognition
 - *Interpret social cues, facial recognition, body language*

Domains of usually focussed on

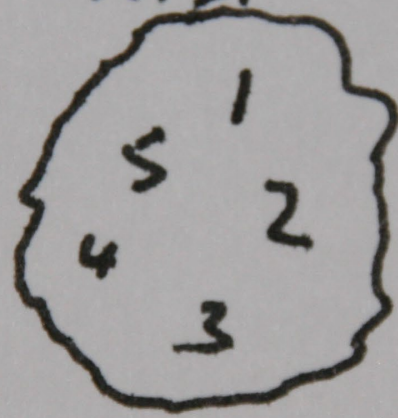
- Comprehension
- Registration
- Retention
- Recall
- Remote Memory
- Semantic fluency - naming

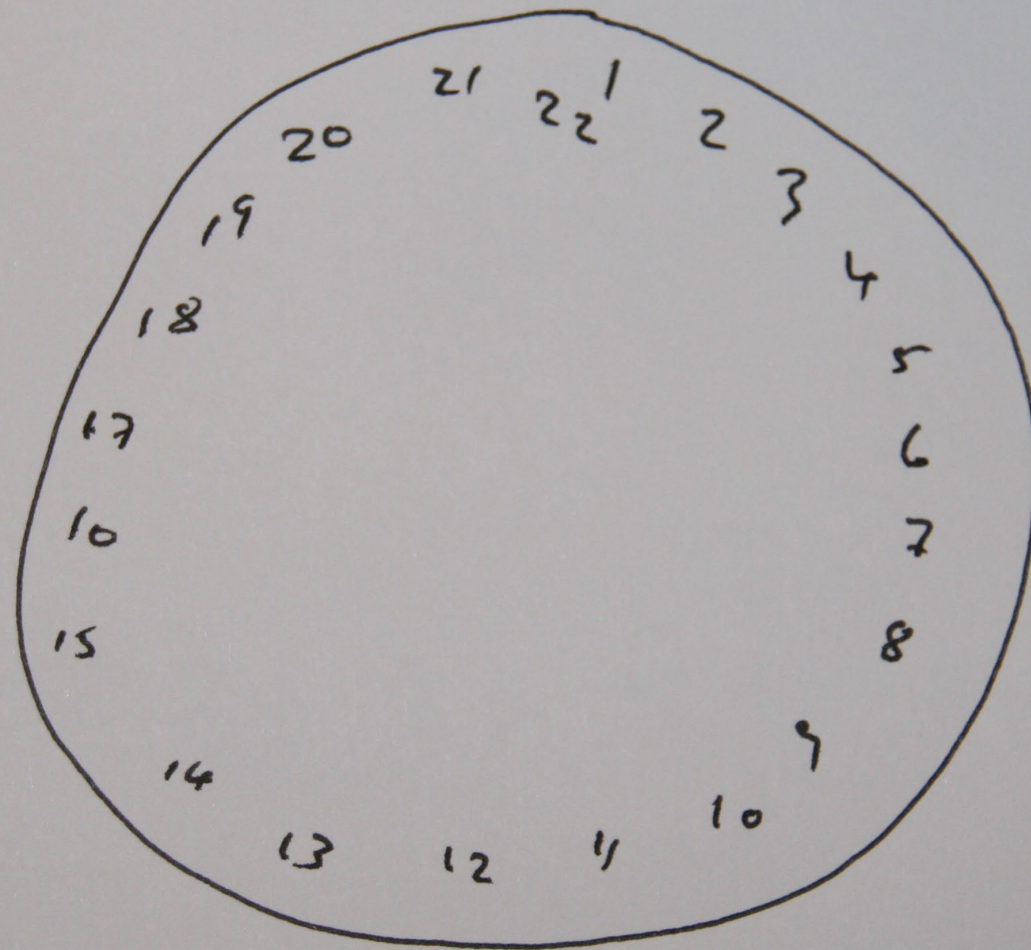
Praxis, Processing, Switching set

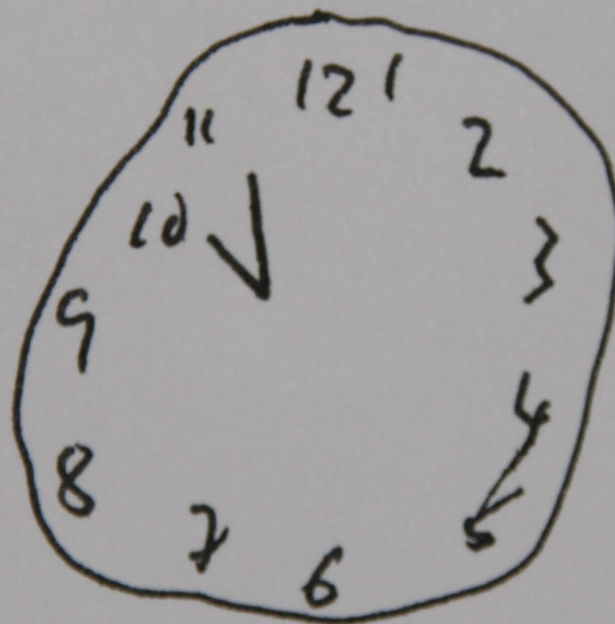
- Clock drawing – concept, spatial organisation, sequence, abstract representation
- Trails A – ability to follow simple instruction
- Trails B – shifting cognitive set

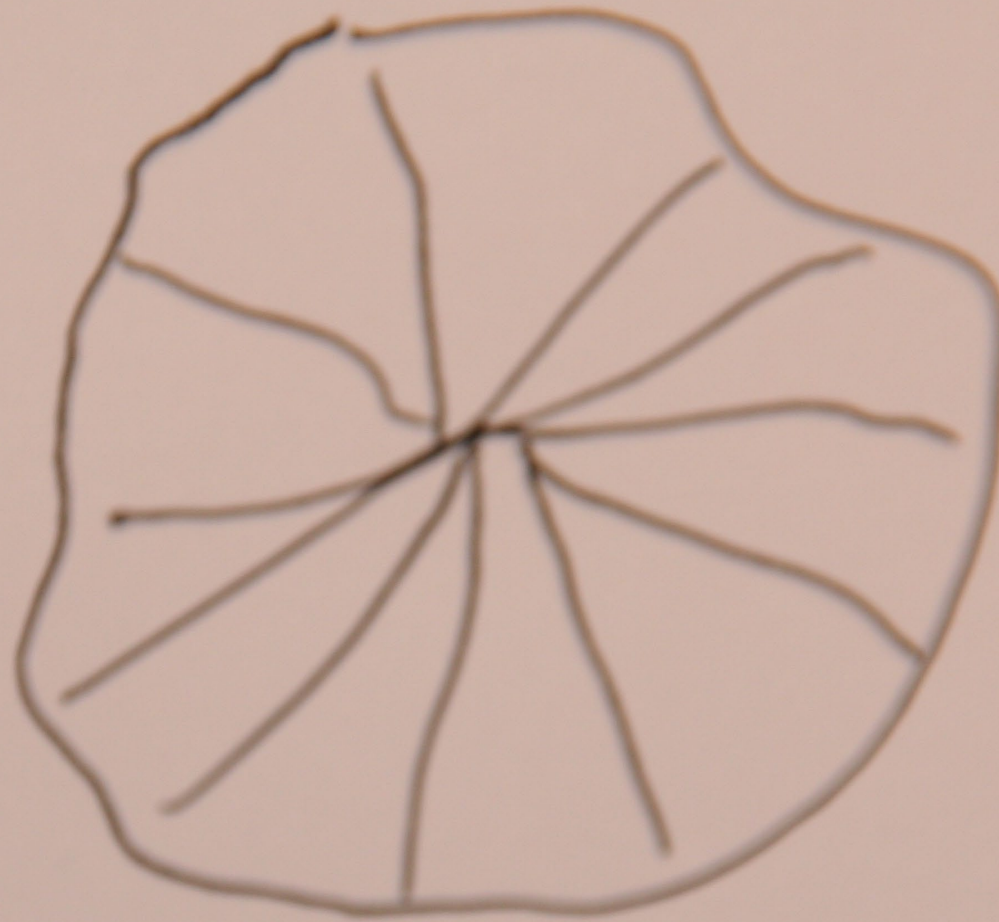


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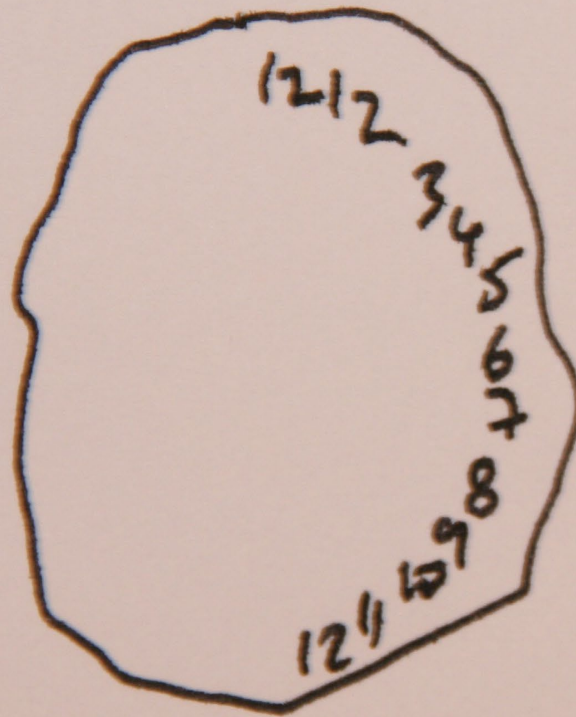








C O L K



How to assess Capacity

- Tests specific to issue
- Explore ability to paraphrase
- Check whether applied to own situation
- Note fluctuating capacity
- Write down what was said and conclusion

Task specific



Understand

- Perceive
- Comprehend



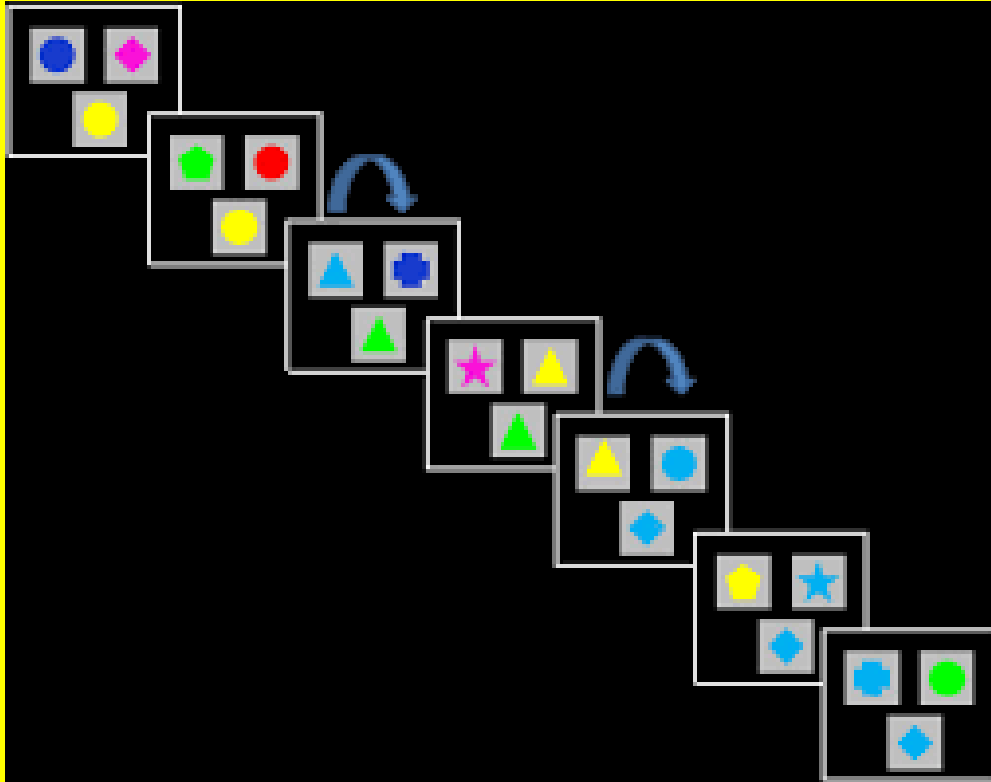
Retain

- For long enough...

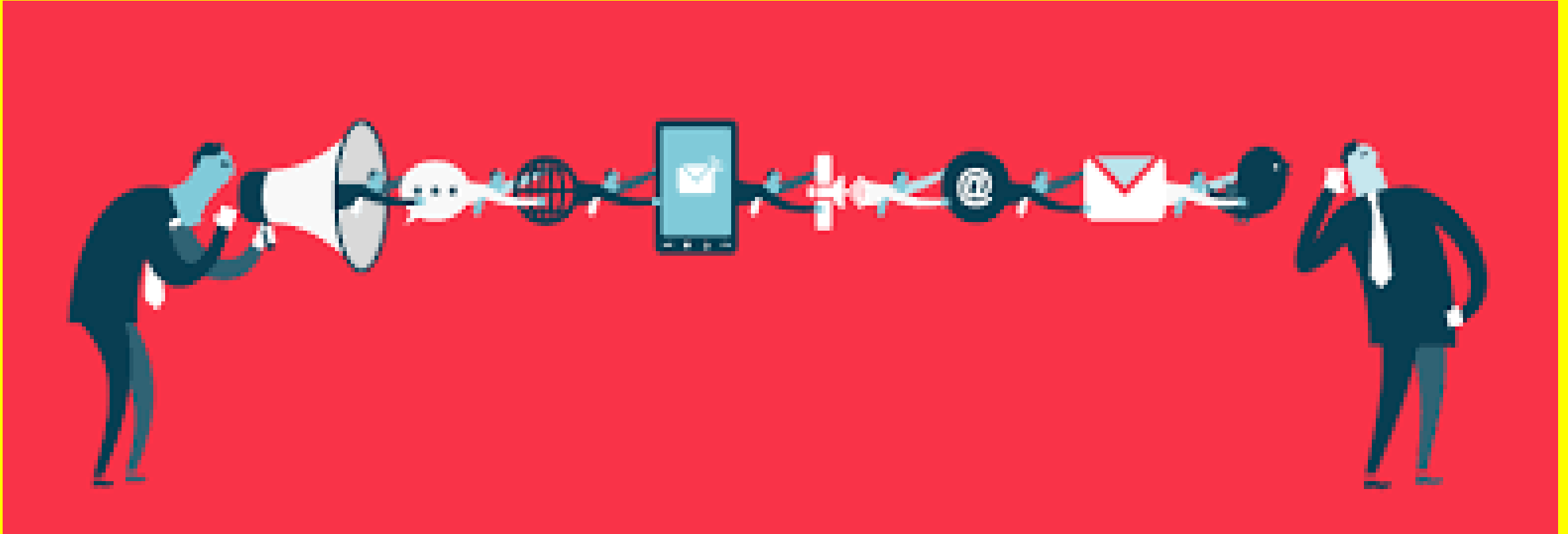


Weigh up

- On the one hand, and on the other...

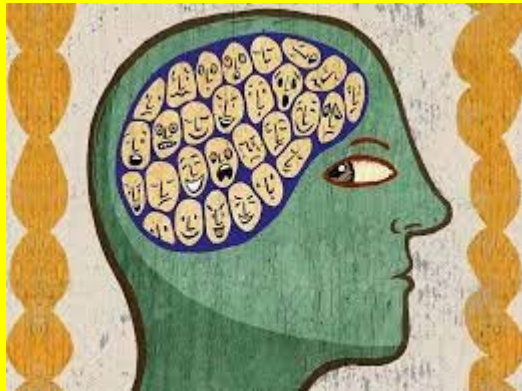


Communicate



Free from undue influence

- Internal



- External



Internal incompatibilities

- Confabulation
- Delusions pertinent to the subject matter



Capacity and Complexity

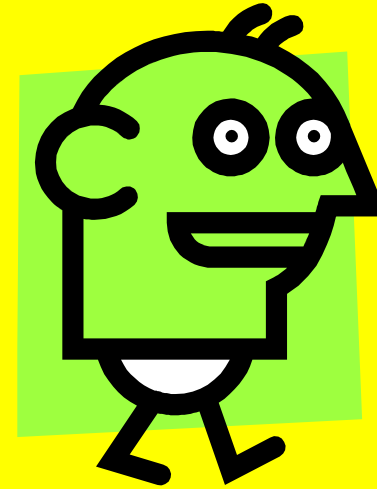


9/17/2023

Dr. Neal Moore: Understanding Executive skills in the
assessment of Mental Capacity

Capacity for what?

- To decide where to live
- To manage affairs
- To draw up a will
- To grant Lasting Power of Attorney
- To give consent to treatment
- To enter into marriage
- To testify



Case Example

- 18 yr old girl with spastic athetoid cerebral palsy post birth injury, autistic, ADHD, epilepsy
- Awarded significant damages
 - Testamentary capacity,
 - mxt of financial affairs
- 5 hour conjoint assessment with solicitor, with and without mother, at her home
- Unable to do much with hands, but can write and type with feet

Case Example contd.

- Aware of construct re Will, arbitrary assessment of likely lifespan of relatives, concrete analysis of own life expectancy
- Struggling with concept of relative proportions of large sums of money and difference between fixed sums and percentages
- Earning money with own Tik Tok channel
- Able to manage day to day sums, not large amounts
- Lacked Testamentary capacity but may improve with maturation
- Take account of wishes and family history

Avoiding the gilded cage...

