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| Suggested template to guide Mental Capacity Act (2005) assessments with people who have a brain injury (including stroke) or other neurological condition *Developed in accordance with the NICE guidance on decision making and mental capacity (2018)[[1]](#footnote-1)* This aim of this template is to provide a step-by-step guide to assessors in the following scenarios:1. When the assessor does not know the person well.
2. When the assessor has only limited experience of working with people who have a brain injury or other neurological condition.
3. When the assessor is unfamiliar with the ‘frontal lobe paradox’[[2]](#footnote-2) (Walsh, 1985) otherwise known as the ‘knowing doing dissociation’ (Teuber, 1964).
 |
| Name of person & DOB: |  Date of birth:  |
| NHS or NI number:  |  |
| Date and time of assessment:  | Date: Time:  |
| Name of professional/s present and designation: |  |
| Decision to be made:  |   |
| Information relevant for this assessment:  |
| Does the person have any difficulties with communication? If so, please detail what steps you have taken to support their ability to communicate during the assessment. |  |
| Did the person opt to be accompanied by a ‘significant and trusted’ individual during the assessment? | Name: Relationship to the person:  |
| Yes [ ]  | No [ ]  |
| If ‘yes’, please list their name and relationship to the person. |
| In the functional aspect of this template, you are asked to consult with one or more individuals who have observed the person’s functioning/ decision making ability[[3]](#footnote-3) in everyday life. Please list the name of the individual/s and state their relationship to the person. | Name: Relationship to the person:Name: Relationship to the person:Name: Relationship to the person: |

# Information relevant for the decision

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| **Two stage legal test (stage one):** Is there an impairment of or disturbance in the functioning of the person’s mind or brain? | Yes [ ]  | No [ ]  |
| Please state the condition that gives rise to concerns regarding the person’s mental capacity to consent to the decision (i.e. TBI, encephalitis, multiple sclerosis).  |  |
| Please state the date of diagnosis:If there is no formal diagnosis how long do others (professionals, family/ supporters) believe that the person has experienced the condition?  | Date of diagnosis: Length of time affected by condition:  |
| Does the person accept that they have the condition?  | Yes [ ]  | No [ ]  |
| If so, how long do they believe that they have been affected/ impaired by the condition? (people with neurological conditions such as MS, Parkinson’s Disease or brain tumours may notice symptoms years before formal diagnosis). |  |
| What tasks or activities is the person able to complete independently? (i.e. without support) |  |
| What type of support do others (professionals, family/ supporters) believe the person requires and for what tasks/ activities? |  |
| Who would provide this support? |  |
| Does the person require this support on a temporary or long term basis?  | Temporary [ ]  | Long term basis [ ]  |
| Has the person been given information about the support that others believe that they require?  | Yes [ ]  | No [ ]  |
| If so, please state when and by whom. |  |
| What do others (professionals, family/supporters) believe would happen if the support was not provided by agencies or declined by the person? Please detail any risks associated with this.[[4]](#footnote-4)  |  |
| It is helpful to consider the issue of insight during the course of the assessment. The importance of this is underscored by Keen et al. (2019). |  *‘Another common area of difficulty is where a person with an acquired brain injury gives superficially coherent answers to questions, but it is clear from their actions that they are unable to carry into effect the intentions expressed in those answers (in other words, their so-called executive function is impaired). It can be very difficult in such cases to identify whether the person in fact lacks capacity within the meaning of the MCA 2005, but* ***a key question can be whether they are aware of their own deficits – in other words, whether they are able to use and weigh (or understand) the fact that there is a mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations****. Failing to carry out a sufficiently detailed capacity assessment in such situations can expose the person to substantial risks’* (Ruck Keene et al., 2019, p.9). Awareness refers to the ability to ‘perceive and acknowledge disturbances in all areas of one’s functioning, including physical, emotional, cognitive and interpersonal functioning as well as activities of daily living (Mateer, Sira & O’Connell, 2005, p.66).  |

**The functional test**

The functional test dictates that the person is unable to make a decision if they cannot:
1. Understand information about the decision to be made
2. Retain that information in their mind
3. Use or weigh-up the information as part of the decision process
4. Communicate their decision

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| **Question**  | **Person’s response** | **Response/ opinion given by one or more individuals who have observed the person’s functioning/ decision making ability[[5]](#footnote-5) in community activities/ real-life settings.** |
| 1. **Insight into reason for admission**

**to hospital/ rehab (if inpatient) or referral to community service**Broad, open **curious approach** (to avoid priming). *Please can you tell me what happened to you that led to you being admitted/ referred?*  |  |  |
| 1. **Insight into the diagnosis of stroke[[6]](#footnote-6)/**

**brain injury or neurological condition***Please can you briefly tell me about the impact that your stroke/ brain injury/ neurological condition\* has had on your everyday life.* *Has your stroke/ brain injury/ neurological condition caused any lasting damage to your brain? Is it mild, moderate or severe?*\* please delete as required |  |  |
| 1. **Insight into physical consequences**

*Did your stroke/ brain injury/ neurological condition cause you any physical problems?*  |  |  |
| 1. **Insight into cognitive consequences**

*Did your stroke/ brain injury/ neurological condition lead to any problems with your thinking skills?\** Then say; *please try to remember that I have asked you about* ***your thinking skills****.* \*NB: use the following section to explore insight into cognitive difficulties that you have observed or been made aware of by others.  |  |  |
| **5) Specific questions if required to probe insight: amend according to person’s cognitive profile.** *People who have had your type of stroke/ brain injury/ neurological condition often experience difficulties with their thinking skills.* *I should like to know if you have noticed problems in a few specific areas.* *I would anticipate that you may experience difficulties* ***processing new information****- you might find that you are somewhat slower to understand the ‘gist’ of new information at the moment, when compared to how you were prior to the onset of your stroke/ brain injury/ neurological condition. Is this true for you?**People with your type of stroke/ brain injury/ neurological condition often report* ***problems with their attention****. In particular, they might find it difficult to focus on one task for a long period of time/ to divide their attention between two tasks/ and/ or to shift their attention between tasks\*. Have you experienced any of these difficulties recently?**It is quite common for people to experience* ***problems with their memory****- i.e. remembering conversations, information they have read, new routes, etc. Is this the case for you?**Difficulties* ***with problem solving- i.e. working out the best solution in the moment*** *are also quite commonly associated with your particular stroke/ brain injury/ neurological condition. Have you noticed any problems in this area?**Please add scenarios to gauge insight into other cognitive difficulties if required (i.e. if noticed during functional tasks).* \* please delete as required |  |  |
| 1. **Insight into neurobehavioural**

**markers of brain damage including changes in social cognition:** *I am going to turn now to think about your reactions and responses to events. Do you think that you may at times act differently now as a consequence of your stroke/ brain injury/ neurological condition?**How about the way in which you interact with others? Are there times when you might respond differently towards others now?* *Some people find that they are less concerned about what others think of them following a stroke/ brain injury/ neurological condition. They may say things that others could view as blunt or even embarrassing. Is this true for you?*If the person denies problems that you are aware of, encourage reflection by asking:“What would others say?” Have others told you that they have noticed a change in any of these areas?  |  |  |
| 1. **In vivo memory assessment**

Can you tell me what we spoke about a moment ago? If the person does not respond then give the following prompt:*I asked you to remember that I had spoken to you about this.*  |  |  |
| 1. **Insight into functional consequences/**

**ability to resume previous activities.***Have any aspects of your independence been affected by your stroke/ brain injury/ neurological condition?* |  |  |
| 1. **Implications for support/ care needs**

**upon discharge** *Do you need any help from others now with any aspects of your daily living?* If person says no give prompts*:* * *Washing and dressing*
* *Walking around indoors. Getting to the toilet.*
* *Walking around outside- balance, road safety.*
* *Buying food from a supermarket*
* *Cooking/ preparing food*
* *Remembering appointments*
* *Transport*- *getting to appointments*
* *Remembering to take your medication*
* *Participating in social/ community activities*
* *Housework*
* *Laundry*
* *Managing your finances*
 |  |  |
| 1. **Ability to recognise/ anticipate risk in**

**relation to the decision to be made.**For example, if the decision to be made is about returning home ask them the following*-**“Imagine the following hypothetical scenario- you are going to return home tomorrow*. *You are going to be left completely alone- with no help from others. Would there be any risks associated with this?”* If person responds “no”, give prompts*:* * *Washing and dressing* ***(i.e. self-neglect)***
* *Walking around. Getting to the toilet* ***(i.e. falls).***
* *Walking around outside* ***(falls, car accidents arising from poor road safety).***
* *Buying food from a supermarket* ***(nutritional needs)***
* *Cooking/ preparing food and drinks* ***(fluid and nutritional needs).***
* *Remembering appointments and getting to appointments* ***(medical or mental health; treatment/ prevention).***
* *Remembering to take your medication* ***(medical or mental health; treatment/ prevention)***
* *Joining in with social/ community activities* ***(social isolation)***
* *Managing your finances* ***(financial exploitation, financial hardship, self-neglect, homelessness etc).***

If person still says no- ask “*What would others say?” Have others told you that they have noticed a change in your abilities in any of these areas?*  |  |  |
| 1. **Cost/ benefit analysis**

**related to the decision to be made** i.e. if the decision to be made is around discharge destination ask the person to weigh up the advantages and disadvantages of the following options: 1) Home 2) Home with supervision 3) Supported living/ warded controlled4) Residential care. Prompt the person to identify any risks associated with each option.  |  |   |
| 1. **Person’s retention of information**

*Can I take you back to the start of this conversation (****10/15 minutes prior****). Can you remember what I/ xxx talked to you about?* If person responds with “no”, give additional general cue to determine if cognitive support aids retention. i.e. *We started off chatting about your visit home last weekend.* *Do you remember what xxx talked to you about* ***a few minutes*** *ago?* *Self-monitoring. You appear to have found it difficult to recall information from our conversation today. Why do you think this is?*  |  |  |
| 1. **Additional notes re presentation**

How was xxxxx today? (Fatigued, alert, upbeat, low, frustrated?) Please provide brief details.  |  |
| 1. **Two stage legal test (stage two):**

Regarding the impairment of or disturbance in the functioning of the person’s mind or brain; Is the impairment or disturbance sufficient that the person lacks the capacity to make the particular decision? | Yes [ ]  | No [ ]  |
| 1. **Outcome**

If the outcome of the assessment is that the person lacks capacity, the practitioner should clearly document the reasons for this (NICE, 2018, p. 24)**.** |  |

This template was produced by Dr Melanie George, Consultant Neuropsychologist, Kent Clinical Neuropsychology Service, Kent and Medway, NHS and Social Care Partnership Trust (KMPT).

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1. Citation: this template is discussed in: George, M., & Gilbert, S. (2018) *Mental Capacity Act (2005) assessments: why everyone needs to know about the frontal lobe paradox.* The Neuropsychologist, 5, 55-66. [↑](#footnote-ref-1)
2. People with damage to the frontal lobes of their brains and associated areas may over-estimate their adaptive functioning. Comparing their self-report with their performance in everyday life provides an indication of their levels of anticipatory ‘online’ awareness. [↑](#footnote-ref-2)
3. The person’s self-report should be compared with their observed functional performance in everyday life. This evidence can be provided by an OT or other clinician and/ or family member/ supporter (Nice, 2018, p.23). [↑](#footnote-ref-3)
4. In many cases, it is helpful to complete a multidisciplinary risk assessment. Please see embedded example document. [↑](#footnote-ref-4)
5. The person’s self-report should be compared with their observed functional performance in everyday life. This evidence can be provided by an OT or other clinician and/ or family member/ supporter (Nice, 2018, p.23). [↑](#footnote-ref-5)
6. Awareness of deficit: Is it online awareness? Is the person able to make *use* of his or her awareness in the context of the deliberating? (Owen et al., 2015). [↑](#footnote-ref-6)