**Mental Capacity, Intimate**

**Relationships and**

**Safeguarding Adults:**

**Frontline Briefing**

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**Frontline**

**Briefing**



# 1. Introduction

This briefing explores the law in the context of supporting adults who may be experiencing abuse or neglect in emotionally or physically close relationships can present practitioners with complex ethical and decision-making challenges. This practice tool explores the law in the context of supporting adults who have care and support needs with intimate relationships, where there are also concerns about abuse or neglect. The resource will support practitioners to navigate these situations, using a legal framework, and through a detailed case study.

The briefing focuses predominantly on the***Mental Capacity Act (MCA) 2005*** as the key piece of legislation underpinning this area that practitioners need to understand when supporting people with the broader aspects of interpersonal and intimate relationships as well as sex. It also considers the intersection between the MCA and criminal law, particularly the ***Sexual Offences Act 2003*** and the ***Serious Crime Act 2015***, the role of the inherent jurisdiction, and domestic abuse powers. There are many facets of professional practice that are important in supporting adults to have intimate relationships, some of these are covered in the following resources: ***Supporting adults with learning disabilities to have positive sexual relationships: Frontline Briefing (2017), Sexual exploitation and mental health: Frontline Briefing (2018)*** and ***Mental Capacity Act 2005 decision-making – care, support and treatment: Practice Tool (2021).***

Readers will build legal literacy and confidence in understanding how the law applies in these situations and the way in which drawing on case law can aid practitioner knowledge and understanding. As such, this guidance will cover:

**>** Use of reflective questions and activities designed to stimulate critical thinking about complex issues in this area of practice.

**>** An introduction to the MCA and its key provisions.

**>** How the MCA applies to situations where there are complex or abusive interpersonal relationships.

**>** Exploration of the intersections between the MCA and the ***Sexual Offences Act 2003, the Serious Crime Act 2015*** and the ***Domestic Abuse Act 2021***.

**>** Discussion of the responsibilities that individual practitioners, including social workers and occupational therapists, have in carrying out practice in this area.

**>** Exploration of legal cases to support practitioners to understand the law and how it applies to practice.

**>** Use of reflective questions and activities designed to stimulate critical thinking about complex issues in this area of practice.

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# 2. Setting the context

Intimate relationships are relationships with another person or people that involve an element of closeness. This might be emotional closeness, such as feelings of love or trust, or some element of physical closeness, such as touching, holding hands, or hugging. Some intimate relationships may also involve a sexual relationship, however not all do. Intimate relationships are an important part of life for many people but may be particularly important for those with disabilities who have historically been denied the right to have them, such as people with learning disabilities (Rushbrooke et al., 2014). In addition to this, the right to a private and family life, which encompasses intimate relationships, is also a right protected by the ***European Convention on Human Rights, Article 8.***

While intimate relationships are important, they can also be complex and multifaceted. As the Care and Support Statutory Guidance says, sometimes these relationships can be abusive, and involve physical, emotional, financial or sexual abuse, or neglect (Department of Health and Social Care, 2022, para. 14.17). A core aim of adult safeguarding where there is abuse and neglect is to ‘safeguard adults in a way that supports them in making choices and having control about how they want to live, and promoting an approach that concentrates on improving life for the adults concerned’ (Department of Health and Social Care, 2022, para. 14.11).

Practitioners working with adults with care and support needs, and supporting them with intimate relationships, will need a good understanding of the MCA. There may be questions about a person’s capacity to make different decisions as part of that relationship, particularly where it appears that aspects of a relationship may be abusive. For example, intimate relationships can involve issues under the MCA about decisions such as contact, residence, use of the internet and social media, sexual relations, and decisions about care and support, among other things. Moreover, some of these aspects can cross into criminal law, particularly where nonconsensual sexual relationships, sexual abuse, or other criminal exploitation is involved.

Autonomy and consent are fundamental principles in health and social care. Everyone ‘of sound mind’ ***(Re F* [1990] 2 AC 1 at p.4*)*** has the right to give or withhold their consent to, for example, medical treatment, a deprivation of liberty, or a sexual relationship. However, the MCA is the civil law framework that should be used to establish whether a person has the capacity to decide whether to give or withhold that consent. The MCA is important not only as a piece of legislation which aims to maximise a person’s autonomy and right to make their own decisions, but also operates as a defence for practitioners to any allegations of unlawful actions in either civil or criminal law ***(MCA, Section 5)***, but only where the MCA itself has been followed properly ***(Essex County Council v RF* [2015] EWCOP 1)**.

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Notwithstanding its importance, research from Safeguarding Adults Reviews and beyond

(Hollomotz & The Speakup Committee, 2009; House of Lords Select Committee, 2014; PrestonShoot et al., 2020) has often shown issues in the interpretation and application of the MCA, in particular:

**> Risk aversion and paternalistic attitudes towards sexual relationships.**

**> Poor quality capacity assessments or not undertaking capacity assessments where they may be called for.**

**> A person’s voice not being well heard during best interests decision-making.**

**> Failures in properly implementing the key principles contained in the MCA, such as the ‘least restrictive alternative’.**

In the context of intimate relationships, it can often be challenging to navigate the legal framework and decide whether a person lacks capacity to make certain decisions, and if so, what decision should be made in their best interests taking into consideration the person’s wishes, feelings, values, and beliefs, as well as the views of anyone around them. This is compounded by the rapidly evolving nature of the law in this area following legislative changes such as the ***Mental Capacity (Amendment) Act 2019***, and case law from the courts which interpret the legislation.

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**3. What are the key aspects of the *Mental Capacity Act 2005* ?**

Before considering how the law might apply through a fictionalised case study, it is first important to outline the key legal parameters and principles of the MCA. The main provisions of the legislation generally fall into three areas: the principles, capacity assessment, and best interests.

# A. The principles

These are outlined in section 1 and underpin all actions or application of the MCA. These are outlined below, together with questions that a proper application of each of these principles should prompt.

***"A person must be*** Has it been

**Principle 1 *assumed to have capacity*** established that ***unless it is established*** the person lacks ***that they lack capacity."*** capacity?

***"A person is not to be treated*** What steps have been ***as unable to decide unless*** taken to help the person decide?

**Principle 2 *all practicable steps to help*** Are there any further practical ***them to do so have been*** steps that could be taken ***taken without success."*** to support the person?

What is the possible

***"A person is not to be treated*** outcome of the decision

**Principle 3 *as unable to decide merely*** they want to make?

***because they makes an unwise*** An unwise decision cannot

***decision."*** be the sole basis on which a

lack of capacity is found.

***"Anything done, or any***

***decision made, for or on*** If the person does

**Principle 4 *behalf of a person who lacks*** lack mental capacity, ***capacity must be done, or*** what is in their best ***made, in their best interests."*** interests?

***"Before any decision is made,***

***regard must be had as to*** What is the least

**Principle 5 *whether there is something*** restrictive alternative

***that can be done that is less*** that is also in their best ***restrictive of the person's*** interests?

***rights and freedoms."***

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# B. Capacity assessment

The MCA provides the legal framework to assess a person’s mental capacity to make a particular decision at a particular time. Mental capacity is both time and decision specific. This can often mean multiple capacity assessments are needed across many different decisions and on several occasions.

There are also important safeguards within this aspect of the MCA, and through its interpretation in key case law. These safeguards, together with the principles outlined above and a proper application of sections 2-3, are important for ensuring that people who do retain mental capacity to make decisions are not routinely found to lack it, and vice versa; that those who do lack mental capacity to make a decision have appropriate support and decisions made on their behalf are in their best interests.

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| **6**  **Assessing capacity**  Is the person unable to make the  decision in question? Are they unable  to do any one of the following:  **Section 3(1)**  a) Are they unable to understand  (  information relevant to the decision in  question?  b) Are they unable to retain that  (  information?  c) Are they unable to use and weigh  (  that information to reach a decision?  (  d) Are they unable to communicate  their decision? | |  | | --- | |  | | **Safeguards** | | Their ability to make each decision must be considered separately. A lack of capacity cannot be established simply because of a person’s age, appearance, or their behaviour **(MCA, S.2(3)).** | | It is important to assess their understanding of information that is relevant to each particular decision. The information relevant to a decision about medical treatment, for example, will be different to information that is relevant to a decision about sexual relationships. | | It does not matter if they can only retain the information for a short time **(MCA, S.3(3)).** | | It does not matter that they attach their own values to the weight they give to the information **(*Kings College NHS Foundation Trust v C* [2015] EWCOP 80).** | | The person must be given the opportunity to communicate in the way that they are best able to. | |

Causative nexus:

What is the cause of them being unable to make this decision at this time?

This must be because of an impairment or disturbance in the functioning of their mind

or brain, either temporary or permanent **(MCA, S.2(1)); for example, dementia, a learning**

**disability, or an acquired brain injury (Department for Constitutional Affairs, 2007, para 4.12)**.

This requirement also acts as a safeguard by ensuring that only those who are unable to make a decision because of their impairment or disturbance in the functioning of the mind or brain are deemed to lack capacity. It is not enough that the inability to decide is simply ‘related’ to the impairment or disturbance, it must be because of it **(*PC v City***

***of York Council* [2013] EWCA Civ 478; *A Local Authority v JB* [2021] UKSC 52).**  This causal link must be clearly evidenced.

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# C. Best interests

If a person does lack mental capacity to make a particular decision at a particular time under the MCA, then the Act also provides the legal framework for deciding what would be in a person’s best interests. Of particular relevance in intimate relationships is section 27 of the MCA. Under section 27, if a person lacks capacity to make decisions about sexual relationships, then a best interests decision cannot be made on their behalf consenting to that sexual relationship. To allow this would effectively be authorising the commission of a criminal offence, given that sexual relations with someone who lacks capacity is an offence under the ***Sexual Offences Act 2003***.

For decisions that can be made in a person’s best interests, section 4 includes the important things that must be taken into consideration when making a best interests decision:

A best interests determination must not be made merely on the basis of the person’s age or appearance, or an aspect of their behaviour which

**S.4(1)** might lead to unjustified assumptions about what is in their best interests.

Will the person regain mental capacity to make the decision, and if so, when? Is this a decision that could be postponed until the person **S.4(3)** regains capacity?

Has the person been permitted and encouraged to participate in the best interests decision-making? The Act requires the person to be

**S.4(4)** encouraged to participate in the decision-making as much as possible.

Where the determination relates to life-sustaining treatment practitioners must not be motivated by a desire to bring about his death.

**S.4(5)** This will be less relevant in the types of situations covered by this briefing.

What are the person’s past and present wishes, feelings, values, and beliefs? What beliefs or other factors would be likely to influence their decision if they had capacity? The weight attached to these in the decision-making **S.4(6)** process will be case and fact specific ***(ITW v Z [2009]* EWHC 2525 (Fam))**.

Have all relevant persons been consulted? These include:

**>** anyone named by the person who lacks capacity

**>** anyone engaged in caring for the person who lacks capacity

**S.4(7) >** a donee of a Lasting Power of Attorney, if there is one **>** any deputy appointed by the Court of Protection.

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## 4. Applying the *Mental Capacity Act 2005* in practice

This briefing uses a fictional case study to explore the application of the MCA in practice in the context of intimate relationships, outlined below:

**At the age of 19, Sami met and began a relationship with Jake, who has prior convictions for sexual offences and assault, and she moved in with him some months later. As a child, Sami was diagnosed with a learning disability which impacts her social and functional skills. In her late teens, she was provided with care and support by her local authority to support her independence in the community and was also supported and cared for by her parents throughout her childhood.**

**Not long after meeting Jake she moved in to his flat to live with him and began to increasingly disengage from her support workers and her parents. She has repeatedly told one of her support workers, Danielle, that Jake provides all the care she needs, and that she does not need to leave the house or have any support in the community. She has also told her social worker, Amina, that although Jake is not always nice to her, she does not want to live without him.**

**In recent months Sami has also presented at A&E several times with injuries that those treating her thought may be consistent with domestic violence, self-neglect, and possible sexual abuse. Sami has also been supported for many years by a learning disability nurse, Freya, who she gets on particularly well with. She has recently confided in Freya that sometimes she does not feel like having sex with Jake, but he makes her have sex with him anyway. When Freya suggests that this might be abusive, Sami gets angry and says that ‘letting their boyfriends to have sex with them is just what girlfriends should do’.**

Particular attention might be given to the following before considering a more formalised capacity assessment about any area of Sami’s decision-making. Principle 2 of the MCA requires that all practicable steps have been taken to help Sami make a decision first, and the following

suggestions may assist with this.

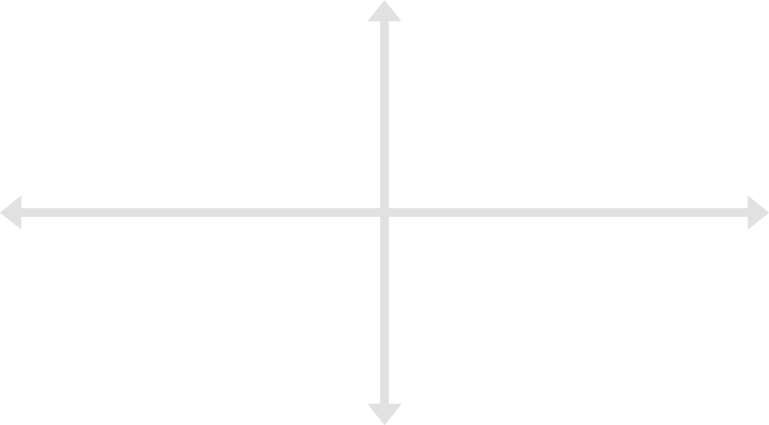
Is it possible to speak with Sami alone to gather more information about their relationship?

Is there any threat of immediate harm to Sami, and does this require any police involvement?

Would Sami benefit from the input of an Independent Domestic Violence Adviser to explain her options to her and support her?

Does Sami require any sort of advocacy, either an Independent Mental Capacity Advocate or under section 68 of the ***Care Act 2014*** given that there are safeguarding concerns?

Does Sami have any professionals, family members, or friends, who she has particularly good relationships with that could be a source of support for her (such as Freya), and how might their input be facilitated?



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**a. Why is the**

***Mental Capacity Act 2005***

**being considered?**

If there are still concerns about Sami’s capacity to make decisions after exploring all the alternative options to support her to make decisions (principle 2), then it is important to first ask why a capacity assessment is necessary.

This requires a consideration of two questions:

1. **What: In relation to which decisions do we think a capacity assessment might be needed?**
2. **Why: What are the grounds on which to suspect Sami may lack capacity?**

For example, in the above scenario, there may be concerns as to whether Sami has capacity to make decisions about her care and support (Q1) because her decision to refuse this would leave her in a situation which might cause her emotional and physical harm, and there may be questions as to whether Sami understands these implications of refusing care (Q2). The grounds for a capacity assessment can therefore often be seen as something that may result in harm to them or to another person, or a decision that diverges from professional opinion, which is usually what generates questions about a person’s mental capacity (Kong and Ruck Keene, 2018, p.99). **Under principle 3 of the MCA, this does not mean that a person who makes a decision that might result in some sort of harm automatically lacks capacity to make that decision, but it might prompt a fuller consideration as to whether they have the capacity to make that decision.** Although it involved a case involving family relations rather than an intimate relationship, the case of *Southendon-Sea Borough Council v Meyers* is a good example of this point.

***Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam)*.*** This case involved Mr Meyers, who was living with his son. Mr Meyers had multiple physical conditions such as blindness and diabetes and required day-to-day care. There was evidence, however, that his son was controlling and neglectful towards his father. A social worker found Mr Meyers one day in circumstances that amounted to severe neglect. He was also dehydrated and had a urinary tract infection. At that time, he lacked capacity to make decisions about his residence and care because of the effects of his dehydration and infection which were causing him confusion. He was moved, temporarily, to a care home. However once he regained capacity at the care home he asked to move back home to live with his son. This decision to return to live with his son prompted a further mental capacity assessment about his capacity to decide about his residence. The psychiatrist who carried out this capacity assessment found that Mr Meyers understood all the relevant information, and was aware of the risks of continuing to live with his son back in his own home ***(A Local Authority v BF* [2018] EWCA Civ 2962 at para.15)**. The important aspect here is that the decision to return home to neglectful conditions and to live with his son were seen as unwise decisions, which then merited further investigation with a full capacity assessment.

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An unwise decision could therefore be evidence that a person may not have capacity to make the decision, and might be the reason as to why a full capacity assessment, exploring all the aspects in 3b above, is needed. Evidence ***(House of Lords Select Committee, 2014; Braye et al., 2020; Martineau et al., 2019)*** shows that assumptions are often made that there is a standalone right to make unwise decisions, and that these are considered ‘lifestyle choices’. This is often then used as a justification for failing to intervene, or failing to consider whether the person lacks capacity to make a decision. An apparently unwise decision should, instead, invoke professional curiosity ***(Thacker et al.,, 2019)*** about a person’s circumstances and their ability to make the decision. The Research in Practice Strategic Briefing ***(Thacker et al., 2020)*** on professional curiosity outlines in more detail how the different aspects of professional curiosity on both an individual level, and on a systematic organisational level, come together.

Under principle 3 of the MCA it is also important to remember, however, that an unwise decision cannot be the sole basis on which a lack of capacity is found. Sami cannot be deemed to lack capacity to make decisions about her care and support simply because she is making an apparently unwise decision to refuse it. Likewise, she cannot be deemed to lack capacity to make decisions about her contact and relationship with Jake simply because this is an abusive relationship, and therefore an apparently unwise decision. A full capacity assessment is needed to explore whether she lacks mental capacity to make each decision.

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**b. Why are you assessing Sami’s capacity to make**

**decisions about?**

Decision-making capacity under the MCA is both time and decision specific, so before embarking on any capacity assessment it may be useful to think of the different decisions that may need to be assessed, and when you might assess them so as to maximise their participation and ability to understand things. For example, it is often the case that people living with dementia may find it easier to understand things earlier rather than later in the day (Alzheimer’s Society, undated; Boyle, 2013), or that virtual ways of conducting assessments may work well for adults who are in domestically abusive relationships (Caridade et al, 2021) or in assessments with adults with Autism or ADHD (Adamou et al, 2021). There are also a number of practicalities to consider as to how the capacity assessment might take place in such a way as to maximise a person’s capacity (Manthorpe et al., 2009; Brown and Marchant, 2013; Harding and Taşcıoğlu, 2018; Pritchard-Jones et al., 2021).

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| **12**  Where?  Who?  What? | |  |  | | --- | --- | | **>** | Where and how will the capacity assessment take place? Will it be a virtual assessment or a face-to-face assessment, and how will this be decided? | | **>** | How will it be possible to explore her mental capacity to make a particular decision if it is difficult to speak to her alone or away from Jake? | | **>** | Are there any opportunities where Sami might be able to speak more freely, for example, during medical treatment, or times when Jake might be out? | |
| |  |  | | --- | --- | | **>** | Do any of the professionals involved with Sami have a particularly strong relationship with her and with whom she might feel more able to talk openly? This may be more important in situations where a person’s capacity to make decisions that involve their intimate relationships is being assessed. | | **>** | Are there any people who Sami might want to support her during a capacity assessment. For example, a family member, friend, or professional? Conversely, is there anyone who she specifically might not want present, because it might make her feel uncomfortable or less likely to talk freely? For example, there might be cultural reasons as to why Sami does not want her family involved. | | **>** | Is any other specialist involvement in the capacity assessment needed, for example, input from a psychiatrist, or psychologist to determine if the person does have a ‘disturbance in the functioning of the mind or brain’, or whether the inability to understand is because of that impairment? | |
| |  |  | | --- | --- | | **>** | Are there particular aspects of the elements in section 2-3 that need to be explored in more detail based on Sami’s circumstances? Some of these aspects may be more relevant than others. For example, it may be less important on the facts to assess Sami’s ability to communicate her decision under section 3(1)(d). | | **>** | Are there any cultural or other factors specific to Sami’s situation that need to be taken into consideration. For example, any religious or aspects of her ethnicity? It may be that taking these into account can help Sami feel more comfortable during a capacity assessment. | |

This chart explores how sections 2-3 of the ***Mental Capacity Act 2005*** might operate in more detail in relation to Sami’s capacity to make decisions about care, contact with Jake, and sexual relationships, for example. There are other areas of Sami’s capacity that might also need to be explored in due course, such as decisions about her residence, but this chart focuses only on care, contact, and sex.

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| **Is Sami able to make a decision about her care and support?** | | **Is Sami able to make decisions about her contact with Jake?** | **Is Sami able to make a decision about engaging in sexual relationships?** |
| ***GP***  **>**  **>**  **>** | **S. 3(1)(a): Does she understand the information relevant to this decision?**  Following ***A Local Authority v***  **[2020] EWCOP 56**, This will include:  What areas Sami needs support with: for example, her social and functional skills, going out and about.  What sort of support she needs: for example, support to go out, to help her with routine activities such as eating, drinking, cleaning, generally looking after herself?  Who will provide this support for her, for example, a support worker, carer, or Jake? Even though she says Jake provides all the care she needs, as part of this piece of information practitioners also need to explore whether Jake does in fact provide any care for her, and if he does not, whether she understands this. | **S. 3(1)(a): Does she understand the information relevant to this decision?**  The key case which establishes what relevant information is for contact with another person is ***PC v City of York Council [2013] EWCA Civ 478***. Decisions about contact can take into consideration personspecific factors. That is, the decision to have contact with anyone is always specific to the person with which they want to have contact, and mental capacity is therefore also specific to the decision to have contact with that person. In light of this, it is Sami’s decision to have contact with Jake which should be assessed.  What is the nature of the relationship between Sami and Jake? I.e. that it is an intimate relationship, as opposed to a familial one.  The type of contact Sami could have with Jake. | **S. 3(1)(a): Does she understand the information relevant to this decision?**  The Supreme Court has recently elaborated on what is relevant information for the purposes of assessing a person’s capacity to make decisions about engaging in sexual relationships ***(A Local Authority v JB* [2021] UKSC 52).**  **This includes:**  **>** The sexual nature and character of sexual intercourse, including its mechanics.  **>** That the other person (in this case, Jake) must have the ability to consent to the sexual activity, and must in fact consent before and throughout the sexual activity.  **>** That Sami herself can say yes or no to having a sexual relationship and can decide whether to give consent or not. |

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| **>** What would happen without this support? This may be a particularly important aspect of relevant information to discuss with Sami, because it is at the heart of the decision she wants to make. For example, it might be beneficial to explore how and to what extent Jake does care for her, and to what extent this might change if their relationship ended or they had less contact. Does she understand the implications this might have for her care?  **>** That her carers may not always treat her properly, and how she might make a complaint. This might be less relevant in Sami’s situation.  Information relevant to this decision does not include things such as:  **>** Why having a support worker is important to go out and about in the community.  **>** The importance of regular access to the local community to build and maintain her confidence and independence.  **>** The importance of developing relationships with others outside of those she has with Jake in her home.  **>** Even if these are important, they are not relevant information for the purposes of Sami’s decision. | What the positive and negatives are to contact with Jake. Has Sami had particularly good or bad experiences in her relationship with Jake previously?  Does Jake have any previous criminal convictions which might be relevant to her decision? For example, we know that he has previous criminal convictions for sexual offences and assault. Does Sami know about these, and does she understand what these mean? Does she understand the risk of abuse that Jake presents (of which there does appear to be some evidence, such as the evidence of domestic violence and sexual abuse)?  It can be difficult to balance the extent to which values should come into a capacity assessment in Sami’s circumstances. To conclude that she does not have the capacity to make decisions about contact with Jake because he is abusive towards her would be contrary to principle 3. It would be assuming that she lacks capacity to decide to have contact with Jake simply because she is making what seems like an unwise decision to stay with him.  However, it is important to establish whether Sami fully understands the relevant information about contact with Jake, and part of that relevant information is that he is abusive towards her. Moreover, does she understand that if she did not have contact with Jake, this abuse would stop? | **>** | That pregnancy is a reasonably foreseeable consequence of sexual intercourse between Sami and Jake. |

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|  | Secondly, it is also important not to consider this aspect of decision-making capacity in a ‘silo’ from Sami’s capacity to make decisions about her care ***(B v A Local Authority* [2019] EWCA Civ 913)**. Sami believes that if she refuses care and support, that Jake will take care of her. If she is found to lack capacity to make decisions about contact with Jake, for example, and a best interests decision is made to restrict contact, then this will have implications for any assessment of her capacity to make decisions about care given that Jake will not be able to provide as much care. Sami needs to know all the options beforehand in order to assess whether she is able to use and weigh those options ***(CC v KK* [2012] EWCOP 2136)**. |  |

**S.3(1)(b): Can she retain this information for an appropriate period of time, even if this is only a short period of time?**

It is mentioned that Sami has a learning disability which might impact her social and functional skills so this question may be less of a concern than, for example, a person with an impairment which affects their memory such as dementia, but it should nonetheless be explored and evidenced properly that she can or cannot.

**S.3(1)(c): Is Sami able to use or weigh the information above?**

It is not necessary for Sami to use and weigh every part of the information, merely the salient ones. She may not be able to use and weigh all the information but she may be able to use and weigh enough to make a capacitous decision.

It is also important not to make a judgment here as to whether Sami is making an unwise decision. If she is able to use and weigh the salient factors, it does not matter if she is putting her own weight or outlook on those aspects.

*“…a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process”* ***(Kings College NHS Foundation Trust v C* [2015] EWCOP 80 at para.38).**

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| She may be able to understand what would happen without care, for example, that she would not be able to go out of the house as much, or that she would be unable to look after her day-to-day needs herself, but she might not place too much weight on wanting to go out or she might place more weight on wanting to stay at home with Jake. | She may be able to understand that Jake is abusive, and that he has a history of criminal convictions, but she may not place any weight on these facts. The facts above indicate that she may understand this given that she acknowledges that he is not always nice to her, but she also goes on to say that she does not want to live without him, indicating that she may not give much weight to the fact that he isn’t always nice to her.  If, on the other hand, she does not believe or accept as true the fact that Jake is abusive or has criminal convictions, then this may be evidence that she is not able to use and weigh that information, precisely because she does not believe it in the first place ***(Re MM* [2007] EWHC 2003 at para.81*; Leicester City Council v MPZ* [2019] EWCOP 64)*.*** | She may be able to understand that she does have the right to say no to Jake when she does not feel like it, and by making her have sex when she does not want to Jake is committing a criminal offence.  If she cannot understand that she has the right to say no, or if she does not believe the information given to her (for example, that Jake is committing a criminal offence when he continues to try to have sex with her), then this might indicate that she is unable to use and weigh the information relevant to the decision to have sex with Jake ***(Leicester City Council v MPZ* [2019] EWCOP 64)*.*** |

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**S.3(1)(d): Can Sami communicate her decision?**

This is a provision that is less likely to apply to Sami on the facts. It is often only applicable to people with disabilities which affect their ability to communicate, such as those who may be unconscious. A person should usually be able to communicate their decision as long as they are given appropriate ways to do so and their decision is properly understood and recorded.

One consideration, however, might be how Sami can be encouraged to communicate in a way that feels comfortable for her. For example, what language does she feel most comfortable

**If she is unable to make a decision, is this because of her learning disability?**

It is not enough that her learning disability ‘significantly relate[s]’ to her inability to make the decision. Her inability to make a decision must be because of her learning disability ***(PC v City of York Council* [2013] EWCA Civ 478).**

This is where expert input from a psychiatrist or psychologist may be required, and a final determination from the Court of Protection ***(Leicester City Council v MPZ* [2019] EWCOP 64)*.*** conversing in?

If it cannot be said with any certainty that her inability to make a decision is because of her learning disability, then no action can lawfully be taken under the MCA. There may be other options – see section 4e below. These are likely to require an application to court if one has not already been made for final decisions as to Sami’s capacity.

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**c. What if Sami does lack the capacity to make a decision**

**about her care, or about her contact with Jake?**

If, following a capacity assessment, it is reasonably believed that Sami lacks capacity to make a decision about care and contact with Jake, then the MCA requires a best interests decision. A best interests decision can only be made about decisions that Sami lacks capacity to make. For example, if she lacks capacity to make decisions about refusing her care and support, but retains capacity to make decisions about contact with Jake, then best interests decisions can only be made about the former, not the latter. This might sometimes lead to outcomes that are difficult to reconcile. For example, a person could retain capacity to make decisions about engaging in a sexual relationship with someone, but not to make decisions about contact with them:

***A Local Authority v AW* [2020] EWCOP 24***involved AW, a 35-year-old man who enjoys using sexual websites, dating sites, and chat rooms, both to watch sexual acts and also to meet other men, and who wanted a boyfriend. Notwithstanding his ability to appear highly capable, AW is said to be ‘socially vulnerable’, particularly in his sexual relationships and use of the internet because of his Autism and learning disabilities. AW himself had been assaulted, at least one of these being a sexual assault, and had put himself at considerable risk through meeting up with men he had met on the internet. Moreover, AW had engaged in inappropriate and criminal behaviour; he had assaulted a minor, had assaulted staff at his care home, and there were also allegations that he had behaved inappropriately towards women including being aggressive, and following another woman home. AW lacked capacity in relation to making decisions regarding contact with other people, using social media and the internet, but had capacity in relation to consenting to sexual relations:*

*“This suite of conclusions reflects a potential anomaly… namely [that AW has] the decision making facility to embark on sexual relations whilst, at the same time, he is not able to judge with whom it is safe to have those relations” (Para.28).*

The best interests care package proposed a solution to this anomaly by agreeing that a personspecific contact risk assessment would be undertaken to establish whether AW had the capacity to have contact with any individuals with whom he wished to embark on a sexual relationship, and a specific support plan drawn up as appropriate where that was the case. Cobb J also stressed that such an approach should not mean that the role of the local authority is to ‘vet’ his potential sexual partners. The evidence presented to the court was that the local authority, AW’s support workers, and his current residential placement were all incredibly supportive of AW’s needs, and had agreed a care plan that genuinely sought to balance between protecting AW while also respecting his privacy and autonomy.

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The chart outlining the various relevant considerations in best interests decisions as they might apply to Sami’s situation is outlined below. However, under principle 5, the starting point should always be the least restrictive alternative that is also in her best interests. For example, if she lacks capacity to make decisions about contact with Jake, is it still possible for them to have some contact?

A best interests determination must not be made merely on the basis of Sami’s age or any aspect of her appearance that might lead to

**S.4(1)** unjustified assumptions about what is in her best interests. This might also include any cultural or religious factors that are specific to Sami.

Is there evidence that Sami, with appropriate support, might regain the capacity to make decisions on this particular issue in the future? If so, this is also an indication that a further capacity assessment will be needed at

**S.4(3)** a later date **(*CH v A Metropolitan Council* [2017] EWCOP 12 )**

Has Sami been permitted and encouraged to participate in the best interests decision-making about either her care or contact with Jake? If

**S.4(4)** so, how: invited to relevant meetings, asked directly, given an advocate? This should also always be recorded, as part of good decision-making

practice (Williams et al, 2011).

What are Sami’s past and present wishes, feelings, values, and beliefs about either her care or contact with Jake, and have these been recorded? For example, she may want contact with Jake to continue, so

**S.4(6)** this should be considered and attempted, rather than ceasing contact entirely ***(Local Authority X v MM and KM*****[2007] EWHC 2003 (Fam).**

Have all relevant persons been consulted?

These include:

Anyone named by Sami: For example, her family, or Jake. The latter may be more difficult if the best interests decision is about contact with Jake, but remains a relevant factor to consider. It may be that less weight is attached to his views, however.

**S.4(7)** Anyone engaged in caring for Sami: Does she have any family, friends, or support workers that she still works with who may be consulted? Likewise, from the facts it may be that Jake provides some care, but, again, his views may be more difficult if she lacks capacity to make decisions about contact with Jake.

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**4**

**c. What if Sami does lack the capacity to make a decision**

**about her care, or about her contact with Jake?**

Concluding that a person lacks capacity to make decisions about sexual relationships has different consequences to many other types of decisions. Section 27 of the MCA means that if someone does lack capacity to make decisions about sex, they cannot have sex lawfully (at least until they have regained capacity to make that decision). Under section 27 nobody can make a best interests decision that they should have sex, and it would be a criminal offence under the ***Sexual Offences Act 2003*** for anybody to have sexual relations with them. Given the gravity of these consequences, where there is any doubt about Sami’s capacity to make decisions about engaging in sexual relationships it is good practice to seek a declaration from the Court of Protection on this. At the very least, there are three main things that practitioners should be aware of are (39 Essex Chambers, undated):

**Information**

**must be tailored**

**to Sami's**

**circumstances.**

**Importance of support**

**in section 1(3) of the**

**MCA.**

**The consequences**

**of finding that Sami**

**lacks capacity to make**

**decisions about sex.**

In relation to section 1(3) and the importance of support, one of the questions that practitioners might ask is whether there is a possibility of Sami regaining capacity to make decisions about sex, and whether she has been provided with all practicable support to help her make this decision?

**For example, might sexual education help her understand more about consent in sexual relationships, and that she can say no** ***(CH v A Metropolitan Council* [2017] EWCOP 12)**?

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**4**

**d. What other legal frameworks might apply?**

Sami’s situation is complex, and it is likely that practitioners working with Sami would need to seek legal advice at an early stage, and given the implications of a finding that she lacks capacity, it might be that a final decision should be sought from the Court of Protection both as to her capacity on all decisions, and her best interests if she does lack capacity for particular decisions. However, alongside the **MCA**, there are also other considerations to bear

in mind arising from other legislation.

There might be a range of powers available for

Sami including Domestic Violence Protection Notice/Order, only if Jake has been arrested but not charged.

The ***Domestic Abuse Act 2021*** provides a stronger range of powers, including a Domestic Abuse Protection Notice or Order. A DAPN must be granted by the

police, while an DAPO must be granted by the Family Court, but **Domestic** a third party could apply for the

latter on Sami's behalf. Breach **Abuse** of either is a criminal offence. **Provisions**

We are told that Sami has **Section 11** refused care and support. ***Care Act***

However, if she also refuses a needs assessment, then section ***2014***

11 of the ***Care Act 2014*** applies.

This means a needs assessment should still be carried out if Sami lacks capacity to refuse the needs assessment or if she is experiencing or at risk of abuse.

If Sami does not lack capacity under the **MCA**, but there are concerns that she is otherwise 'vulnerable' because of coercion or undue influence, by Jake, for example, then a more appropriate route might be to seek orders from the High Court under its inherent jurisdiction instead.

These can sometimes be sought as an alternative during **Inherent** an application to the Court

**Jurisdiction** of Protection for decisions as to capacity or best interests.

There are a number of

**Criminal** criminal offences that may

**Law** need investigating here,

including coercive or controlling

behaviour by Jake under **s.76**

**of the *Serious Crime Act 2015***, as

amended by **s.68 of the *Domestic Abuse Act 2021.***

Possible offences under the ***Sexual Offences Act 2003***, for example, where Jake makes Sami have sex even when she doesn’t want to.

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### Reflective Questions

1. How might you work with an individual where you suspect that there may be abuse or neglect in their intimate relationship? What might a ‘facilitative’ or ‘supportive’ approach mean in such circumstances?
2. What might be the cultural or societal barriers to a person discussing their intimate relationships either as part of a capacity assessment or otherwise, and how might you overcome these?
3. If there are concerns about abuse in a person’s relationship, what types of services or support mechanisms should you consider before or alongside the ***Mental Capacity Act 2005***? Are you aware of how these support mechanisms can be provided through your organisation, or another organisation?
4. How confident do you feel in being able to identify the types of situations that might give rise to concerns about a person’s mental capacity to make particular decisions connected with their intimate relationships?
5. If you feel that a mental capacity assessment might be needed in relation to a person’s ability to make decisions about aspects of their intimate relationship, what steps might you take to prepare for a capacity assessment?
6. How confident do you feel in knowing what information you might need to discuss with the person during the capacity assessment?
7. What factors do you need to take into consideration when making best interests decisions? What structures and procedures does your organisation have in place to support with making best interests decisions?
8. How confident do you feel knowing when to escalate any concerns you have about abuse or neglect in intimate relationships, or when an application to the Court of Protection might be needed in such circumstances?

**Research in Practice Resources**

**Mental Capacity Act 2005 decision-making – care, support and treatment: Practice Tool (2021)**

**Supporting adults with learning disabilities to have positive sexual relationships: Frontline Briefing (2017)**

**The inherent jurisdiction of the High Court: Practice Guidance (2020)**

**Professional curiosity in safeguarding adults: Strategic Briefing (2020)**

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The Granary Dartington Hall

Totnes Devon TQ9 6EE

tel 01803 869753

email ask@researchinpractice.org.uk

**Author:**

Laura Pritchard-

Jones

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