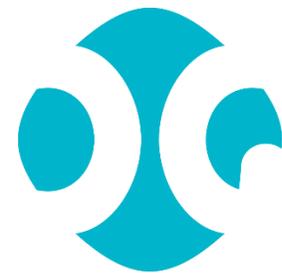


Sex, Relationships and the Court of Protection

11 October 2021



DGLLEGAL
Services for Lawyers

Presenters

Helen Curtis | Barrister | Garden Court Chambers, London and Garden Court North Chambers, Manchester

Helen's legal practice focuses on the liberty of the subject, particularly in areas of mental health and the Court of Protection. She is also an approved mediator with the Court of Protection Pilot Mediation Scheme.

Ben McCormack | Barrister | Garden Court North Chambers

Ben specialises in cases in the Court of Protection, acting for disabled people and their families in a range of disputes about people's housing, support and personal relationships.

Agenda

- Welcome and Introduction
- Helen Curtis – Sex and the test for capacity to ‘engage’ in it
- Ben McCormack – Fitting that test in with the court’s management of contact and relationships in P’s best interests – and what happens when sex is paid for?

JB (Capacity: Consent to sexual relations and contact with others) [2019] EWCOP 39

- First instance – 36 year old man complex diagnosis of autistic spectrum disorder and impaired cognition - whether in order to have capacity to consent to sexual relations he must understand that the other person must consent? No, not part of the information relevant to the decision
- Binary outcome. To argue a full and complete understanding of consent (in terms recognised by criminal law) is an essential component of capacity to have sexual relations is to confuse the nature or character of a sexual act with its lawfulness (para 78)
- HELD: JB could not understand that fact – but this did not mean he lacked capacity to consent. Not information relevant to the decision for the purposes of s.3(1) MCA. To include it imposes too high a test
- JB found to have capacity to consent to sexual relations according to the test as generally understood (mechanics of the act, health risks involved, risk of pregnancy and sexually transmitted disease)

JB (Capacity: Consent to sexual relations and contact with others) [2019] EWCOP 39 (cont'd)

- In neither *B v A Local Authority* nor *NB* was the consent of others ruled out as part of the relevant information.
- Ability to use and weigh information remains relevant to a capacity assessment for sexual activity it should not involve a refined or nuanced analysis which would not typically inform any decision to consent made by a capacitous individual
- To require JB to demonstrate a full appreciation of both his own and a partner's initial and ongoing consent through the course of sexual activity would be to impose on him a burden which a capacitous individual may not share and may well be unlikely to discharge

Re JB [2020] EWCA Civ 735

- Local Authority appealed – said Roberts J was wrong to exclude the other party’s consent from the information relevant to the test of capacity to consent
- Question for CA - Does a person in order to have capacity to decide to have sexual relations with another person, need to understand that the other person must at all times be consenting to sexual relations?
- Code: important to balance people’s right to make a decision with their right to safety and protection when they can’t make decisions to protect themselves (2.4)
- Evidence was JB did not understand the other person involved in sexual activity must be able to consent at the outset and at all points during the activity
- Information relevant to the decision within s.3(1) MCA – see para 100
- Court of Appeal re-framed the test from capacity to consent to sexual relations to capacity to engage in sexual relations

Re JB [2020] EWCA Civ 735 (cont'd)

- “The MCA and the Court of Protection do not exist in a vacuum. They are part of a system of law and justice in which it is recognised that sexual relations between two people can only take place with the full and ongoing consent of both parties” (para 98)
- The information relevant to a decision may include ‘the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout’ (para 100)
- “What is needed is an understanding that you should only have sex with someone who is able to consent and gives and maintains consent throughout. The protection given by such a requirement is not confined to the criminal legal consequences. It protects both participants from serious harm” (para 107)

AMDC v AG and CI [2021] EWCOP 5

- AG – 69 year old woman with frontal lobe dementia residing at care home with feelings for CI
- Initially interim declaration that AG lacked capacity for all decisions and contact with CI was supervised and monitored
- Poole J accepted new expert evidence that AG had capacity to decide whether to engage in sexual relations and had capacity to decide with whom she has contact and lacked capacity to make decision to marry
- Proceedings and a poor initial expert report caused delay to AG and CI being allowed to spend private time together
- Local Authority to withdraw Safeguarding Adults protection plan

HD (Capacity to engage in sexual relations) [2021] EWCOP 15

- Cobb J – HD, 29 year old woman with learning disability of mild severity, about to move to supported living
- HD started seeing Y, man of whom HD's family disapproved – he was described as a 'very high-risk sex offender'. Relationship ended. HD began relationship with Z
- Case of *JB* marks an 'evolution'. Test remains act and not person specific. HD demonstrated clear understanding of the mechanics of the act of sex, the fact it could lead to pregnancy or STI and the different forms of contraception - but while HD understands the need for a sexual partner to consent to engage in sexual relations, she cannot currently understand the need for a sexual partner to have capacity to consent to sexual relations
- HD lacked capacity to engage in sexual relations

Re DY [2021] EWCOP 28

- DY – 18 years old. Two chromosomal duplicities, fetal alcohol spectrum disorder and a moderate learning disability and developmental trauma disorder
- DY in relationship with AB. Relevant information (*JB* para 100. Supreme Court had granted permission to appeal *JB*) does not include any moral or emotional aspect beyond requirement for mutual consent
- DY understood the mechanics of the act, risk of pregnancy and STI and that she could say no if she did not want to have sex. In relationship with AB, DY had capacity to decide to engage in sexual relations. Problem was she could not conceive of not being in that relationship – couldn't consider the decision in the abstract
- When unsettled or in unfamiliar situation DY may lose capacity
- Knowles J – rejected application for prospective declaration for future time when she may not be in settled relationship

A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (AP) (Appellant) – Supreme Court

- Heard on 15 July 2021
- To have capacity to decide to have sexual relations with another person, does a person need to understand that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity?
- Before CA no-one had included P's need to understand partner's consent
- JB has argued that CA departed from language and purpose of MCA when it made interim declarations

A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (AP) (Appellant) – Supreme Court (cont'd)

- Not raise the bar impermissibly high so as to discriminate against JB
- Secure a workable straightforward test which can be clearly applied respecting rights of learning disabled while protecting P and wider public
- P's sexual partner's consent is not relevant information
- Local Authority maintained that the consent of the other party is relevant information for P
- Judgment awaited

Managing contact

Capacity to engage in sex but not to decide on contact

Concern – that a person’s sex life is effectively extinguished because it is determined it is not in her best interests to have ‘contact’ with anyone she wishes to have sex with

In *Manchester CC v LC* [2018] EWCOP 30 Hayden J said the question was “whether the measures put in place to protect LC in those areas where she lacks capacity may legitimately impinge on her autonomy in those areas where her capacity is established...”

Such cases should be referred to a high court judge

Contact with whom?

PC v York [2014] Fam 10

“Some ... decisions, for example whether P should have contact with a particular individual, may be person specific”

Must every capacity assessment relating to ‘contact’ be able to identify a specific individual?

What are the difficulties with so doing?

Contact... with others?

Many cases involve this being asked as the question. Justifiable on a pragmatic basis because P might have contact with all sorts of different people in all sorts of circumstances.

In such cases the courts can be prepared to consider that an assessment of capacity can properly focus on P's capacity to decide on her contact 'with others'.

There is too an argument that this avoids impermissible factors - such as the undue influence of a specific person - polluting the s2/3 MCA 2005 test

Contact with different people?

Re SF [2020] EWCOP 15 (Cobb J) is a good example of the court following some quite specific evidence and making different declarations about capacity as a result.

The court found that SF *had* the capacity to make decisions as to her contact with her husband. But she *lacked* the capacity to make decisions as to her contact with others more generally. This was a function of the way her mental impairment worked on her memory.

Is 'contact' really the matter requiring a decision

Re TZ (no 2) [2014] EWCOP 973 (Baker J)

What is the specific factual context in which a decision was required? TZ wanted to have casual sexual relationships, with as yet unidentifiable people. The right question was not whether he had the capacity to make decisions as to his contact 'with others'. Rather it was:

- (1) Whether he had the capacity to decide whether a prospective sexual partner was 'safe'
- (2) Whether he had the capacity to decide on the support he would need whilst having contact with such a partner?

Is the contact really internet/social media use?

Be astute to the facts of the case. Consider whether the facts indicate that there's a need to carry out a separate assessment of P's capacity to decide on her use of the internet/social media

Re A (internet and social media) [2019] EWCOP 2 (Cobb J) is the first case in which the court really got to grips with why this is important to consider, given how many personal relationships are essentially struck up and then conducted via social media or websites.

Paying for sex

In *Re AB* [2019] EWCOP 43 Keehan J the question was whether, if AB's carers took him to Amsterdam to allow him to visit sex workers there, they would be committing offences under ss39 and 53A Sexual Offences Act 2003

S39 makes it an offence for a carer of a person with mental disorder to 'cause' that person to have sexual activity. S53A creates a strict liability offence if a person uses the services of a sex worker who was being exploited.

Keehan J decided that such offences would be committed and thus that it was not in AB's best interests to have the sexual relationship he was looking for

Re C

In Re C [2021] EWCOP 25 Hayden J dealt with a slightly different case. There the evidence was that C had the capacity to engage in sexual relations and to decide about the contact he had with a sex worker. But he lacked the capacity to manage his finances and to use the internet. He wanted to visit a sex worker. But he would need carer assistance to deal with the search for a suitable sex worker online, and to manage the financial transaction.

The local authority and CCG were worried about the Sexual Offences Act 2003 issues that had arisen in AB, so the case came before the court...

Re C ... continued

On C's facts, Hayden J decided that C's carers would not be committing any SOA offences if they gave the kind of practical support and assistance that was outlined. In short he concluded that this would not be the carers 'causing' C to have sex with a sex worker.

And having that 'legality' question cleared out the way the court could go on to determine whether a finalised plan would operate in his best interests.

Except...

Re C - appeal

The Lord Chancellor had been joined as a party and appealed Hayden J to the Court of Appeal. Heard in July 2021 and decision still awaited...

Consequences?

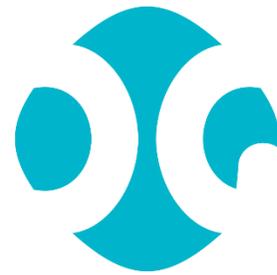
If Hayden J was wrong and carer assistance of that kind meant they inevitably committed an offence by 'causing' C to have sexual activity... then who else does this affect?

What about X and Y, married but in separate care homes, both with a mental disorder but both with the capacity to engage in sex. X's staff drive her each weekend to Y's home. They spend time together and sometimes have sex. Are X's carers 'causing' that sexual activity and thus committing a criminal offence under s39?!

Contact Details



T: 0161 817 6377
E: gcn@gcnchambers.co.uk
W: <https://gcnchambers.co.uk>



DGLELEGAL
Services for Lawyers

T: 01509 214 999
E: admin@dglegal.co.uk
W: <https://dglegal.co.uk>