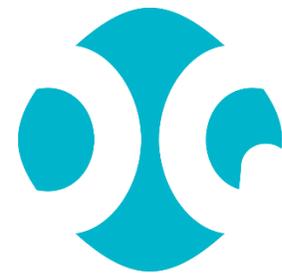


Sex, Relationships and the Court of Protection

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Presenters

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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 a mediator with experience of 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 following Supreme Court’s decision in *JB*
- 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, severe epilepsy, complex diagnosis of autistic spectrum disorder and impaired cognition (not LD) - in order to have capacity to consent to sexual relations the fact that the other person must consent is **not** part of the **information relevant** to the decision
- 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
- 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
- **It is information relevant to the decision** within s.3(1) MCA – [para 100]
- Court of Appeal re-framed the test from capacity to consent to sexual relations to capacity to engage in sexual relations

A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (Appellant) [2021] UKSC 52

- The Supreme Court essentially agreed with the Court of Appeal – the consent of the other person is **relevant information** to the decision to be made by the court
- The test in relation to whether P has capacity to have sexual relations has widened the ambit of consent from 'does P have *capacity to consent* to sexual relations' to 'does P have *capacity to engage* in sexual relations'
- The crucial additional element for 'engage in' is that P needs to be able to understand that 'the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity' [para 98]

'Society'

- Court of Appeal: “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 Supreme Court said, “The fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity applies to everyone in society” [para 120]
- The MCA then being considered as not just empowering and protecting P but considering the protection of others

Civil and criminal

- “the difference in definition of capacity in the civil and criminal jurisprudence is a difference without distinction” No! There are differences
- SC: ‘I agree that the clarification of the test for capacity under the MCA creates a difference with the criminal law in the context of the offences created by sections 30-33 SOA. That difference is not impermissible, however, because it is capable of being identified and accommodated in any criminal trial’ [para 111]

A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (Appellant) [2021] UKSC 52

- Dr Thrift: “If a woman gets drunk at a party and has sex with a man there, is she fair game for anyone else?” JB: “I’d say she was fair game yes. Especially if she’s done it with one person. Yes if she drinks enough she’s bound to do it with the second one too.”
- **Information relevant to that decision** includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. Under section 3(1)(a) MCA JB should be able to understand that information and under section 3(1)(c) MCA JB he should be able to use or to weigh it as part of the decision-making process

The Test now

“... the information relevant to the decision [to engage in sexual relations] **may** include the following:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
- (2) the fact 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;
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.” (Emphasis added) [84]

Elevated test?

- Paragraph 4.19 of the Mental Capacity Act 2005 Code of Practice provides:
- “If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision.”
- ‘the concepts are not too nebulous or refined, nor do they amount to an elevated abstract test’ [95]
- Tailor the relevant information to specific facts (eg same sex relationships or relationships where no conception medically possible – remove pregnancy)

Practicalities (1)

- Decision or person specific? Ordinarily generic but a person specific approach may be required where there is:
‘a couple who have been in a longstanding relationship where one of them develops dementia or sustains a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds’
[71]
- Flexibility? How will a person specific approach apply? Revisit previous capacity assessments eg *HD*?

Practicalities (2)

- Support P to gain capacity
- Ensure any interference with P's Article 8 rights is proportionate and justifiable [118]
- Education [paras 42 – 46) What sex education has P had? Issues of consent covered?
- JB's therapy and psycho-education – 'progressing well' – remitted back to Roberts J
- Resources – who does the assessment?
- Online – social interactions – contact

Impact

- Aim is always not to raise the bar impermissibly high so as to discriminate
- Tension between empowerment/autonomy and protection of vulnerable persons in real situations.
- JB's understanding of the concept of consent was such that he posed a risk of sexual assault towards women and girls.
- Will P – who may be or perceived to be a risk to others – be afforded an opportunity to develop/gain the capacity to engage in sexual relations? Will P be assessed as lacking capacity on the basis of actions which *may* take place in the future?

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.

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

Section 39 Sexual Offences Act 2003

39 Care workers: causing or inciting sexual activity

(1) A person (A) commits an offence if—

- (a) he intentionally causes or incites another person (B) to engage in an activity,
- (b) the activity is sexual,
- (c) B has a mental disorder,
- (d) A knows or could reasonably be expected to know that B has a mental disorder, and
- (e) A is involved in B's care in a way that falls within section 42.

Found at trial 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.

Hayden J - C's carers would *not* be committing any s39 offence if they gave the kind of practical support and assistance that was outlined. They would not be 'causing' C to have sex with a sex worker.

Court of Appeal disagreed...

Who's causing what?

Lord Burnett LCJ at §49:

*It follows that in my opinion the words "causes or incites" found in section 39 of the 2003 Act carry their ordinary meaning and do not import the qualifications identified by the judge which led him to conclude that the arrangements contemplated for C to engage with a sex worker would necessarily not result in criminal liability under section 39 of the 2003 Act. The litmus test for causation is that identified in the authorities. **Do the acts in question create the circumstances in which something might happen, or do they cause it in a legal sense? Applying the approach of the Supreme Court in Hughes the care workers would clearly be at risk of committing a criminal offence contrary to section 39 of the 2003. By contrast care workers who arrange contact between a mentally disordered person and spouse or partner aware that sexual activity may take place would more naturally be creating the circumstances for that activity rather than causing it in a legal sense.***

Problems

A focus on the nature of the sexual relations being proposed (ie that it would be paid for) rather than the degree of actual support being provided?

Thus a concern that many other more 'benign' situations (a young person with LD being helped to meet people for nights out and perhaps sexual relations; a married couple with care needs living apart but being helped to get together for sex) may fall foul of the CoA's guidance, despite the court being keen to say that was not its intention.

The future – ‘sex work’ cases

Consider

- Does P actually want this?.
- What decisions P *is* able to make and what s/he cannot (relevant to the subject matter).
- Consider what arrangements would have to be made, who would be involved in the making of them, and in particular:
 - would any support etc would be coming from someone within [s42 SOA 2003](#) (ie a ‘carer’ as defined in that Act – v broad definition)?
 - does the amount of support equate to ‘causing’ the resultant sexual activity for the purposes of [s39 SOA 2003](#) – see [C \[2021\]](#) at §49.
- Best interests considerations: safety of P and the sex worker, effects and consequences to P in other areas of their life (such as relationships with family etc), the risk of other criminal offences such as [s53A SOA 2003](#) (a strict liability offence falling on anyone who arranges sexual activity where the sex worker turns out to be the victim of exploitation) and how to manage that risk - if indeed it can be at all.

S42 Sexual Offences Act 2003

– carers definition

- (4) This subsection applies if A—
 - (a) is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and
 - (b) as such, has had or is likely to have regular face to face contact with B.

s53A Sexual Offences Act 2003— exploitation offence

- (1) A person (A) commits an offence if—
 - (a) A makes or promises payment for the sexual services of a prostitute (B),
 - (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
 - (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

Simpler cases?

If P has a long standing relationship and arrangement with a sex worker, and all the deputy does is allocate money to be spent on that, without much more, could it really be said that such steps were *causative* of the sexual relationship at all?

Paid for or not...

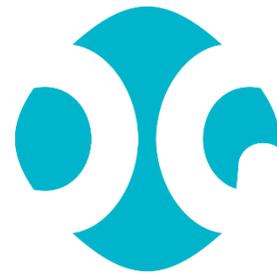
When will 'a bit of help' become 'causing'? For example

- Can carers drive a wife to see her husband when they live apart, when everyone knows this is for a visit where sex is anticipated? What if she lacks the capacity to decide on the contact she has with him/others?
- Could carers take practical steps to hoist P into position in a bed, prior to P's sexual partner arriving to visit? Is that just 'setting the scene'? Or something beyond that?
- Can carers when making BI decisions re contact safely make a decision that P can have a relationship they anticipate would be sexual with one person, but not with another? Are they simply 'creating circumstances' where sex might occur? How causative are the carers' actions of any sexual relationship that results?

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