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Capacity to engage in sexual relations

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The Mental Capacity Act 2005: a summary

- See s.1 of the MCA 2005 for the statutory principles
- See s.2 for definition of lack of capacity
- See s.3 for functional test: if a person cannot do any of the following: understand, retain, use or weigh the relevant information or communicate the decision, then he lacks capacity in relation to that decision
- N.B. A best interests declaration and/or decision cannot be made on behalf of P in relation to sex: see s.27 (1) MCA 2005

Act v person specific approach

- Capacity to have sex act and not person specific
- Parallel with capacity to marry: see *Sheffield City Council v E* [2005] Fam 326 at para 85 and *X City Council v MB and others* [2006] EWHC 168 (Fam) paras 74, 84 and 86
- Possession of capacity (general) distinct from the exercise of it by the giving or withholding of consent in any particular case (specific)
- Pragmatism and policy: see Alan in *D v Borough Council v B* [2011] EWHC 101 (Fam)

Re MM; Local Authority X v MM and another [2007] EWHC 2003 (Fam)

86. *When considering capacity to marry, the question is whether X has capacity to marry, not whether she has capacity to marry Y rather than Z. The question of capacity to marry has never been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse... In my judgment, the same goes, and for much the same reasons, in relation to capacity to consent to sexual relations. **The question is issue specific, both in the general sense and... in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is, in my judgment, a question directed to the nature of the activity rather than to the identity of the sexual partner.***

87. *... So capacity to consent to sexual intercourse depends upon a person having sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, to have the capacity to choose whether or not to engage in it... It does not depend upon an understanding of the consequences of sexual intercourse with a particular person. **Put shortly, capacity to consent to sexual relations is issue specific; it is not person (partner) specific.***

***R v Cooper* [2009] UKHL 42**

27. *My Lords, it is difficult to think of an activity which is more person- and situation-specific than sexual relations. **One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.** Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of [ECHR]. The object of the 2003 Act was to get away from the previous ‘status’-based approach which assumed that all ‘defectives’ lacked capacity, and thus deny them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways.*

D v Borough Council v B

35. *In my view the analogy drawn by Munby J with capacity to marry is faultless and is impossible to challenge successfully. Of course Baroness Hale is right to say... ‘it is difficult to think of an activity which is more person- and situation- specific than sexual relations’ but the same is true (if not truer) of marriage. But it does not follow the capacity to marry is spouse- as opposed to status-specific. Far from it. **I do think, with the greatest possible respect, that there has been a conflation of capacity to consent to sex and the exercise of that capacity.** There is also a very considerable practical problem in allowing a partner-specific dimension into the test. Consider this case. **Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her?***

What is the information relevant to the decision?

- Need for “*sufficient rudimentary knowledge of what the act comprises and its sexual character*”: *X City Council v MB*
- That there are health risks involved (including STIs and pregnancy if vaginal)
- That the person has a choice and they can refuse
- That condoms will reduce the risk of contracting an STI



The importance of consent

- Sex is “*psychologically a big deal*”: the understanding that we have a choice differentiates us from the animal kingdom (see Mostyn J in *London Borough of Tower Hamlets v TB* [2014] EWCOP 53 at para 40).
- In *Southwark LBC v KA* [2016] EWCOP 20 at paras 52-53, Parker J considered that consent not part of the ‘information’ test as to the nature of the act or its foreseeable consequences but rather went to the root of capacity itself. See also *B v A Local Authority* [2019] 3 WLR 685 at para 51. However cf. *Re JB* [2020] EWCA Civ 735 at paras 92 and 94.

What about contraception?

- In *B v A Local Authority*, the CA held that understanding of condom use was part of the relevant information and disapproved *Southwark LBC v KA* on this point.
- Will understanding of condom use/contraception re pregnancy and STIs always be necessary for a finding of capacity?



Using and weighing: does rationality have a role to play in sexual decision making?

- *A Local Authority v H* [2012] EWHC 49 (COP): using and weighing information difficult concept in this area because sexual choices generally made more by emotional drive and instinct than by rational choice
- *A Local Authority v TZ* [2013] EWHC 2322 (COP): *“impulsivity is a component in most sexual behaviour. Human society would be very different if such choices were made the morning after rather than the night before”* (para 53).
- *London Borough of Tower Hamlets v NB and another* [2019] EWCOP 27: instinct and emotion *“central to sexual impulse”* and failure to recognise this could risk discrimination against P (para 29).

Consideration by the Court of Appeal

IM v LM [2014] EWCA Civ 37

- Confirmation of act as opposed to person specific test
- Distinction between criminal law and civil law: criminal law bites *retrospectively* whereas civil law is *prospective*
- Endorsed approach of Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam) re practical limit on what needed to be envisaged as part of reasonably foreseeable consequences. The notional decision making process should not become divorced from that exercised by persons of full capacity: “*that process... is largely visceral rather than cerebral, owing more to instinct and emotion than to analysis*” (para 80).

London Borough of Tower Hamlets v NB part 1: controversy in the press

Law

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Harriet Hall | @Harri_Grace

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***London Borough of Tower Hamlets v NB* part 2: tailoring**

- Risk of “*conceptual silos*”
- The test requires “*incorporation of P’s circumstances and characteristics*”: while the test is “issue specific”, in the sense that the key criteria are objective, “*there will, on occasions, be a subjective or person specific context to its application*” (para 48). E.g. same sex relationships no need to consider risk of pregnancy
- *York City Council v C* [2014] Fam 10: the statutory test is decision specific rather than “person” or “act” specific – see s.3 (1) (a) MCA 2005

More recent developments: whose consent?

- Does a person need to understand that their sexual partner must at all times be consenting as part of the information relevant to the decision?
- *Re JB* [2020] EWCA Civ 735: the capacity in issue was P's capacity *to decide to engage in sexual relations*. When the "decision" was expressed in those terms, the information relevant to the decision "inevitably" included the fact that P's sexual partner was able to and did consent.

So what is the state of the law now?



Wider lessons?



Other jurisdictions: Jersey case study

- Capacity and Self Determination (Jersey) Law 2016
- *In the matter of C* [2020] JRC 150A



In summary...

Any questions?





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