

Change in the law concerning capacity to engage in sexual relations – JB

1. This month the Court of Appeal handed down judgment in *A Local Authority v JB* [2020] EWCA Civ 735. The decision was given by Baker LJ with whom Sir Andrew McFarlane, the President of the Court of Protection, and Singh LJ agreed.
2. Roberts J had made a declaration that JB had capacity to consent to sexual relations, in which he dearly wanted to engage. The problem was that he did (or might not) understand the importance of his partner's consent to sex. There was therefore a serious risk that JB might commit sexual assault or rape. The local authority appealed.
3. JB suffered from severe epilepsy and Asperger's Syndrome with deficits in adaptive functioning and social interactions. JB had a history of inappropriate behaviour with women.
4. Important aspects of JB's lack of understanding relate to the right of his partner to withdraw consent at any time and the ability of a person who is intoxicated to give proper consent.
5. The issue of the test for the capacity to engage in sexual relations is an important and difficult one because of the wish to promote P's autonomy and live a fully sexual life on the one hand and the need to protect P from exploitation on the other. In this case there was also the issue of protecting P from causing serious harm to others and being convicted of a serious offence.
6. The issue for the Court of Appeal was whether the "information relevant to the decision" within section 3(1) of the Mental Capacity Act 2005 may include the requirement that the other person must have capacity to consent to sexual activity and must in fact consent before and throughout the sexual activity, in addition to:
 - a. the sexual nature and character of the act of sexual intercourse;
 - b. the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

- c. that a reasonably foreseeable consequence of intercourse between a man and a woman is that the woman will become pregnant;
- d. 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 taking precautions such as the use of a condom.

All of which other information JB perfectly well understood, could retain and use and weigh appropriately.

- 7. The Court of Appeal, perhaps unsurprisingly, held that is necessary to be able to understand the need for a partner's consent. As counsel for the local authority noted, whether or not the other person consents is usually a decisive factor in deciding whether or not to proceed with sexual relations. Just because some sexual relations happen without consent does not mean that understanding the need for consent is not necessary.
- 8. Roberts J had suggested that JB should be entitled to make mistakes just as others often do. However, the difference might be said to be that others are capable of understanding that they are making a mistake whereas JB was not, or at least might not, be able to.
- 9. The test that the Court of Appeal adumbrated does raise the bar for sexual relations, and also consequently for the linked test for marriage, although not by a substantial amount.
- 10. As the evidence on capacity had not been fully tested because of a misunderstanding by Roberts J of what the law required, the Court of Appeal could not make final declarations as to JB's capacity and remitted the decision so that the evidence could be explored.
- 11. The Court of Appeal relayed the now quite tortuous history of the cases on sexual relations. There is currently a tension between an act specific test or a status specific

test and the potential need for the “tailoring” of the test for a specific subject or partner.

For example:

- a. is it necessary to understand that a partner may fall pregnant if in fact because of age or medical condition there is no real risk of that happening?
 - b. is it necessary to understand sex involves health risks if P has just one healthy partner as part of a stable marriage or long-term relationship?
12. The Court of Appeal recognised the difficulties in the law in this area but declined to address them as they were not relevant to JB’s case. The Court of Appeal specifically addressed the problems in the case law which have arisen from *obiter dicta* in decisions in this area.
13. The Court of Appeal’s criticism of *obiter dicta* might be a point which could support the suggestion that, for example, the *obiter* suggestion in *Mundell v P* [2019] EWCOP 50 that it is not necessary to have capacity to consent to marry to be able understand that the core of marriage is to love one another and live together.
14. It is clear these areas will require further detailed examination by the higher courts.

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