CAPACITY & SEXUAL RELATIONS: A RADICAL RE-ASSESSMENT

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A recent decision by the Court of Appeal in A Local Authority v JB [2020] EWCA Civ 735 has led to a radical re-assessment of the way in which courts should assess capacity and sexual relations in future cases.

Introduction

Assessments of capacity and sexual relations have long been notoriously tricky. S.27 of the MCA 2005 prohibits the court from consenting to sex on an individual's behalf and this has led to a general reluctance to look at the question of capacity around sexual relations in the context of individual relationships, with the court emphasising in numerous cases that the approach should be issue-specific rather than person-specific. As a consequence, the stakes in such cases could not be higher; either P has capacity and is free to enjoy sex with partners of his or her choosing or P does not, with the result that measures will be put in place to prevent P from enjoying one of the most basic and fundamental aspects of human life.

It is therefore understandable that the court has sought, over the years, to keep the test as simple as possible by limiting the list of factors that P needs to be able to understand, retain, use and weigh in order for the court to be satisfied that s/he has capacity in this important area. In doing so, the court has sought to strike an uneasy balance between the autonomy of disabled individuals on the one hand and, on the other, the need to protect those same individuals, many of whom are particularly vulnerable to exploitation, from harm. The earlier authorities introduced a fairly basic test which provided that a capacitous individual ought to be able to show an understanding of the following:

1. The nature and character of sexual intercourse, including the mechanics of the act.
2. That a reasonably foreseeable consequence of sex between a man and a woman is that the woman will become pregnant.
3. That there are health risks involved, particularly sexually transmitted infections and that the risk of infection can be reduced by the taking of precautions such as using a condom.
4. That P's own participation is voluntary and s/he is free to choose whether to have to sex.

Having acknowledged that the ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity, the logical next question was whether the test should also include an understanding of the other partner's consent. However, up until the decision in *JB* the court had consistently declined the invitation to extend the test to include the fact that the other person engaged in sexual activity must be able to, and does in fact, from their words and conduct, consent to such activity. Instead, in a string of earlier decisions (*Local Authority X v MM and another* [2007] EWHC 2003 (Fam), *D Borough Council v B* [2011] EWHC 101 (Fam), *Re TZ* [2013] EWHC 2322 *London Borough of Tower Hamlets v TB* [2014] EWCOP 53) several High Court judges emphasised (often in obiter remarks) that when addressing the question of capacity to consent to sexual relations the court was not assessing individual relationships; the test was issue-specific, not person-specific.

The Facts

The case of JB concerned a 36-year-old man who had a complex diagnosis of autism combined with impaired cognition. JB showed marked problems in a number of areas, including adaptive functioning and social interactions which meant he had a very limited understanding of the emotional state or intentions of others. He had consistently demonstrated disinhibited behaviour towards women and showed a tendency to make advances towards them that were sexualised or otherwise inappropriate. Indeed, there was a reference to a potential sexual assault on a woman in his history which the police had declined to pursue. He was living in a supported residential placement and was subject to a comprehensive care plan which imposed significant restrictions on his access to the local community, his contact with third parties and his access to social media and the internet. These restrictions had been imposed to prevent the man from behaving in a sexually inappropriate manner towards women.

The local authority applied to the Court of Protection seeking declarations as to JB's capacity in various matters. A single joint expert instructed to assess JB's capacity to consent to sexual relations indicated that he struggled to understand the concept of consent, defining consent as "one party allowing the other party to have sex without the other party complaining". He thought that a woman who had got drunk at a party and had sex with a man was "fair game" for anyone else and was visibly shaken at the idea that a partner would be able to withdraw consent. The expert was clear that JB's ability to understand or weigh highly pertinent factors, in particular the need for the consent of others, in ensuring he engaged in lawful sexual activity was limited. She concluded that, should the test for capacity encompass an understanding of the consent of others, JB would not have capacity. However, applying the test established in the authorities, which did not require an understanding of the other person's consent, she indicated that JB did have the ability to consent to sexual relations. The local authority contended that the information relevant for the purposes of assessing capacity to consent to sexual relations should include an understanding of the other person's consent. If the test were so extended, based on this single factor alone JB would fail but were it to remain

limited to the four matters set out above, he would not. The consequences for JB were therefore highly significant.

The Decision at First Instance

At first instance, Mrs Justice Roberts held that an awareness of one's own consent and the knowledge that one could consent, or refuse, to participate in sexual relations with another person was fundamental to establishing the existence of capacity. She pointed out that this principle had been established in a number of authorities including *B (By Her Litigation Friend, the Official Receiver) v A Local Authority* [2019] EWCA Civ 913, [2019] COPLR 347, *London Borough of Tower Hamlets v TB (By Her Litigation Friend the Official Solicitor) and SA* [2014] EWCOP 53, [2015] COPLR 87, and *London Borough of Southwark v KA (Capacity to Marry)* [2016] EWCOP 20.

However, to argue that a full and complete understanding of the other party's consent to the proposed sexual activity (in terms recognised by the criminal law) was an essential component of capacity to have sexual relations was to confuse the nature or character of a sexual act with its lawfulness. Very great care was needed before imposing on the potentially incapacitous the need to understand quasi-criminal principles and the potential for consent to be withdrawn by the other party at any stage. In Mrs Justice Robert's view, it would set the bar too high and would potentially deprive the incapacitous of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for the incapacitous person or for any victim of non-consensual sex when those consequences were viewed through the prism of the criminal law. Mrs Justice Roberts repeated the observation in earlier cases that decision-making in this context was 'largely visceral rather than cerebral, owing more to instinct and emotion than to analysis'. To expand the test in the manner suggested by the local authority would therefore be to impose on the incapacitous a burden which a capacitous individual may not share and may well be unlikely to discharge.

The Court of Appeal Decision

In a comprehensive judgment, Lord Justice Baker opened with the observation that the court was required to weigh three core principles of public interest when considering the issue of sexual capacity for those with impaired cognition:

'**4.** The first is the principle of autonomy. This principle lies at the heart of the Mental Capacity Act 2005 and the case law under that Act. It underpins the purpose of the UN Convention on the Rights of Persons with Disabilities 2006, as defined in article 1:

> "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

5. The second is the principle that vulnerable people in society must be protected …. Striking a balance between the first and second principles is often the most important aspect of decision making in the Court of Protection. The Mental Capacity Act Code of Practice expresses this in simple terms (at para 2.4):

> "it is important to balance people's right to make a decision with their right to safety and protections when they can't make decisions to protect themselves".

6. [The] third principle, that arises in this case, is that the Mental Capacity Act and the Court of Protection does not exist in a vacuum; they exist as part of a wider system of law and justice. Sexual relations between two people can only take place with the full and ongoing consent of both parties. This principle which has acquired greater recognition in recent years within society at large and within the justice system. The Court of Protection is concerned first and foremost with the individual who is the subject of the proceedings "P". But as part of the wider system for the administration of justice, it must adhere to general principles of law. Furthermore, as a public authority, the Court of Protection has an obligation under S.6 of the Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, as set out in Sch.1 to the Act. Within the court, that obligation usually arises when considering the human rights of P, but it also extends to the rights of others'.

With those three principles in mind, Lord Justice Baker went on to explore the relevant statutory provisions of the MCA 2005 and to detail the development of the case law on the issue of capacity and sexual relations, including that predating the implementation of the MCA 2005. Lord Justice Baker noted that in the earliest case cited, *X City Council v MB and others* [2006] EWHC 168 (Fam), Munby J asked not only whether P had the capacity to consent to sexual relations but also whether P had the ability to choose whether or not to engage in sexual activity. Yet, the latter question had been lost in subsequent cases, which defined the question in terms only of whether P had the capacity to consent to sexual relations. Lord Justice Baker held that such an approach was of little assistance in a case such as this, where it was JB who wished to initiate sexual relations with women, since it invited the court to consider a different question namely, whether P could agree to sexual relations proposed by someone else. The capacity in issue in the present case was not P's capacity to consent to sexual relations but his 'capacity to decide to engage in sexual relations'. In Lord Justice Baker's judgment 'this is how the question of capacity with regard to sexual relations should normally be assessed in most cases'.

With the question reframed in that way, the information relevant to the decision inevitably included the fact that 'any person with whom P engages in sexual relations must be able to consent to such activity and [must] in fact consent to it'. Lord Justice Baker recognised that this was moving on from the previous case law but noted that the scope of information considered relevant when determining an individual's capacity to consent to sexual relations had developed and become more comprehensive over time. That development had merely 'continued in this case'.

In summary, Lord Justice Baker concluded, 'when considering whether, as a result of an impairment of, or disturbance in the functioning of the mind or brain, a person is unable to understand, retain, use or weigh information relevant to a decision whether to engage in sexual relations, the information relevant to the decision may include the following:

i. The sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

ii. 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;

iii. The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

iv. That a reasonably foreseeable consequence of sexual intercourse between a man and a woman is that the woman will become pregnant;

v. 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."

Lord Justice Baker accordingly found himself unable to endorse the approach taken by Mrs Justice Roberts at first instance. He found that she had been heavily influenced by the dicta in earlier cases which had led her to interpret the issues before her 'through the prism of criminal law'. He also rejected the view that capacitous people might have difficulty understanding that you should only have sex with someone who is able to consent and who gives and maintains consent. To Lord Justice Baker's mind this did not 'require a "refined or nuanced analysis"'. What was in question was not whether P understood that a particular partner was consenting on a particular occasion but that P was capable of understanding, as a matter of principle, that a partner should have capacity to consent and should in fact consent to any sexual activity.

Accordingly, Lord Justice Baker set aside the declaration that JB had the capacity to consent to sexual relations and remitted the matter to Mrs Justice Roberts for reconsideration in the light of the Court of Appeal's judgment. In view of the evidence set out in the judgment, however, a finding that JB lacks capacity to decide to engage in sexual relations seems inevitable.

The Implications

The decision in *A Local Authority v JB* [2020] EWCA Civ 735 provides welcome clarity in this complex area. It is notable for recognising the autonomy of P as a sexual being and an initiator of sexual relations. By reframing the question to look at P's capacity to decide to engage in sexual relations it logically follows that P must have an understanding of whether the other person wishes to participate. In practical terms, it will be interesting to see whether changes to the way capacity is assessed on the ground result in changed outcomes for large numbers of individuals affected by the decision. One can certainly see the potential for the decision ushering in a more conservative and risk averse approach to assessments of capacity. An important issue which the judgment does not address, however, is the question of whether the information relevant to the decision of whether to engage in sexual relations must always include all of the matters identified in the judgment or whether a more flexible approach tailored to the individual in question should be preferred. This is an issue raised in numerous recent cases, notably the recent case of *NB v Tower Hamlets and another* [2019] EWCOP 17, and many had hoped that the Court of Appeal would use the opportunity to provide some welcome clarity. That was not to be since the Court of Appeal took the view that it would be prudent to refrain from commenting on the issue without hearing full argument but the decision is unlikely to be the last word. The case of *B (by her litigation friend the OS) v A Local Authority* [2019] EWCA Civ 913 concerning a vulnerable woman's capacity to consent to sexual relations is under appeal to the Supreme Court and it seems likely that this decision may head that way as well.