Neutral Citation Number: [2019] EWCOP 39

Case No: 13059833

IN THE COURT OF PROTECTION

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/09/2019

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

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Between :

A LOCAL AUTHORITY **Applicant**

- and –

JB **Respondent**

((By his litigation friend, the Official Solicitor)

(Capacity: Consent to Sexual Relations and Contact with Others)

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Mr Vikram Sachdeva QC (instructed by **the Local Authority**) for the Applicant
Mr Parishil Patel QC and Mr Ian Brownhill (instructed by **the Official Solicitor**) for the Respondent

Hearing date: 15 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

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Mrs Justice Roberts :

1. JB is a young man who is now 36 years old. Since May 2014 he has been living in a supported residential placement where he is subject to a comprehensive care plan which imposes significant limitations on his ability to function independently. In particular, there are restrictions on his access to the local community where he lives, his contact with third parties, and his access to social media and the internet.

2. JB has a complex diagnosis of autism combined with impaired cognition. He lacks capacity to conduct these proceedings and is represented by his litigation friend, the Official Solicitor.

3. The restrictions on JB's ability to socialise freely with whomever he chooses have been imposed primarily in order to prevent him from behaving in a sexually inappropriate manner towards women. The primary thrust of the evidence is that JB lacks the insight or ability to communicate appropriately with women to whom he is attracted. On occasions his advances have lacked appropriate social inhibition and, whilst he has never been charged with (let alone convicted of) any criminal offence, there is a concern that his behaviour, if unrestrained, may result in his exposure to the criminal justice system and risk to potentially vulnerable females.

4. Throughout the course of this litigation, JB has made it very plain that he desperately wants to find a girlfriend with whom he can develop and maintain a relationship. He is anxious to have a sexual partner and believes that the current restrictions represent an unfair and unwarranted interference in his basic rights to a private and family life. Those rights are, of course, reflected in Article 8 of the European Convention on Human Rights which confirms the respect given to autonomy in matters of private life. It is accepted that JB's current needs make it unlikely that he will be able to live independently without support in the context of a future family life with a partner of his choice. The principal issue at this stage is whether he has capacity to consent to sexual relations.

5. There are other aspects of JB's care plan which will be subjected to judicial scrutiny on a best interests basis in a forthcoming hearing which has been listed later this year in October (2019). This hearing was originally listed as a split hearing to deal with several issues of law in relation to a raft of declarations sought by the parties in relation to JB's capacity to make decisions about different aspects of his care. Many of those issues have now fallen away on the basis of agreement in relation to the legal tests which fall to be applied. The principal issue which I am asked to determine relates to what is said by both parties to this litigation to be a lacuna in the existing law in relation to the test for capacity to consent to sexual relations. Notwithstanding the plethora of authority on the subject, including the very recent judgments of the Court of Appeal in *B (by her litigation friend, the Official Solicitor) v A Local Authority* [2019] EWCA Civ 913 and Hayden J in *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27, the local authority contends that there remains "a hard-edged legal question" in relation to what information is relevant for the purposes of assessing the issue of capacity to consent to sexual relations.

6. Distilled to its essence, the question which it is said remains unanswered is this: does the "information relevant to the decision" within section 3(1) of the Mental Capacity

Act 2005 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 ?

7. In his written submissions, Mr Sachdeva QC for the local authority framed his central argument in this way:

> "The critical point is that, unless an understanding that the other person must be able to and must in fact consent is required for capacity in relation to sex, the criminal law would not be sufficient to protect P; and that, if the criminal law is left to regulate such conduct, it will mean that sexual offences will be committed by incapacitated people (assuming they have criminal responsibility) before the law will intervene to prevent such damaging conduct by the imposition of criminal restrictions. To permit such a situation to continue would be a derogation of responsibility by the Court of Protection. Also, criminal law would only impose a time-limited level of restriction in any event. It will be appreciated that, for people like JB, understanding that the other party must be able to and must in fact consent is a highly relevant factor to protect him from committing a criminal offence for which he could be imprisoned or, more likely, hospitalised under the MHA in circumstances where, due to his mental impairment, he cannot comprehend or acknowledge the concept of consent."

8. At the time I heard submissions on 15 July 2019, Mr Justice Hayden had yet to hand down his judgment in *London Borough of Tower Hamlets v NB and AU*. That judgment was published on the following day. I had given counsel permission to file short supplemental written submissions from the foot of that judgment. On behalf of the local authority, Mr Sachdeva contends that, because of the underlying factual matrix in that case, nothing in his Lordship's judgment has relevance to the question before this court.

9. Mr Sachdeva maintains that there is still no binding authority on whether the section 3(1) information includes an understanding that, absent ongoing and continuing consent, sexual relations with another person is liable to breach the criminal law.

10. By contrast, Mr Patel submits that Hayden J's judgment strongly supports the approach which the Official Solicitor urges this court to take. He relies on that judgment for an extraction of three key principles:-

    (i) any assessment of a person's capacity to consent to sexual relations must be considered through the lens of sexual contact being a fundamental human right;

    (ii) "conceptual silos" in which certain categories of person are to be placed are to be avoided;

    (iii) the concepts of capacity to consent to sexual relations in the civil law and criminal law are distinct.

11. On behalf of the Official Solicitor it is contended that the approach adopted by the local authority in relation to an expanded test for capacity to consent to sexual relations amounts to an impermissible attempt to raise the bar so as to incorporate into the section 3(1) "information" a requirement that those who are alleged to pose a risk

of sexual offending must acquire a sufficient understanding of the criminal law before he or she can be found to have capacity to consent to sexual relations.

12. Such a test would inevitably involve potentially sophisticated aspects of domestic criminal law including:

    (i) that the other person may refuse to consent to sexual contact;

    (ii) that the other person may withdraw his or her consent to sexual contact at any stage of sexual activity;

    (iii) that the other person cannot consent to sex if he or she is underage; and

    (iv) that the other person may not be able to consent to sex because of an assessment that he or she lacks capacity to give such consent.

13. The Official Solicitor submits that if capacity to consent to sexual relations is only established in circumstances where a potentially incapacitous individual can demonstrate an understanding of, with the ability to retain, use and weigh, these multiple elements of consent, the test becomes overburdened with unnecessary technicalities. It would raise the bar from the deliberately low level at which it has been set in order to avoid discriminating against vulnerable adults with learning disabilities and other cognitive challenges who, despite those challenges, should be entitled nevertheless to exercise one of the most basic and instinctive functions of a human existence. As a matter of policy, the Official Solicitor submits that the Mental Capacity Act 2005 cannot, and should not, be used as the means of imposing on a protected party restrictions which are designed either to avoid the risk of criminal offending or for the protection of the public at large. Whilst these may well be proper considerations in the context of a best interests decision for such a party, including JB, they should not feature as an integral and essential element of the test for capacity per se in the arena of sexual relations. The fundamental submission made on behalf of the Official Solicitor is that the consent of others is not relevant to the question of whether JB, or any other protected party, has capacity to consent to sexual relations.

14. These issues are closely allied to another aspect of JB's care: whether he has capacity to identify or determine whether an individual with whom he may wish to have sexual relations is safe and, if not, whether he has capacity to make decisions as to the support he is likely to require when having contact with a proposed sexual partner. In this context, I have been asked to consider whether the decision of Baker J (as he then was) in *A Local Authority v TZ* [2014] EWCOP 973 can be applied outside of the factual matrix of that particular case.

The legal framework and the issue of consent: the perceived lacuna

15. The legal framework in this area of the law has been set out with admirable and characteristic clarity by Hayden J in paragraphs 17 to 37 of *London Borough of Tower Hamlets v NB and AU*. In that judgment, his Lordship distilled from the jurisprudence the following principles which resonate with this case and the issues which I have to determine.

(i) The central tenet of the Mental Capacity Act 2005 requires the focus of assessment of capacity to be centred upon an evaluation of the particular individual and a specific decision. That assessment must be based upon an individual's ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general (paragraph 18).

(ii) It is important to recognise and acknowledge that, in this interpersonal context, relationships are driven as much by instinct and emotion as by rational choice. This "fundamental aspect of our humanity" is common to all regardless of whether an individual suffers from some impairment of the mind (paragraph 28). In this important judicial signpost, Hayden J was recognising and acknowledging the important point which had been made by Sir Brian Leveson P in *IM v LM and Others (sub nom Re M (An Adult))* [2014] EWCA Civ 37, [2015] Fam 61, [2014] 3 All ER 491, [2014] 3 WLR 409 some four years earlier when he confirmed the court's view that the process of decision-making in relation to sexual relations – even in the case of persons of full capacity – is "largely visceral rather than cerebral, owing more to instinct and emotion than to analysis": see paragraph 80.

(iii) To impose a test in relation to capacity to consent to sexual relations which assumes in the decision maker a rationality which, in this context, may well be "entirely artificial" is to ignore the fact that instinct and emotion are very often intrinsic to the act itself (paragraph 29).

(iv) As confirmed by the Court of Appeal in *IM v LM and Others* (per Sir Brian Leveson), "the extent to which, on the facts of any individual case, there is a need either for a sophisticated, or for a more straightforward evaluation of any of the[se] four elements *[i.e. the s 3(1) MCA 2005 functions of understanding information relevant to the decision; retaining that information; using or weighing that information as part of the process of making the decision; and/or communication his decision]* will in the natural course of events vary from case to case and topic to topic (paragraph 32).

(v) It is important to bear in mind that depriving an individual of a sexual life in circumstances where he or she may be able to consent to it with a particular partner is to deprive that individual of a fundamental human right in circumstances where there is true consent and mutual desire (paragraph 41). A finding that an individual lacks capacity to consent to sexual relations strips the court of any power to sanction a sexual relationship between that individual in all circumstances save where capacity is regained: section 27 MCA 2005 (paragraph 34).

(vi) The issue of capacity in relation to a wide range of personal decisions is always one for judicial, and not expert, evaluation, albeit that such evaluation takes place against a broad canvas of evidence (including expert evidence) (paragraph 42).

(vii) Courts at first instance and at appellate level have repeatedly emphasised that tests in relation to capacity must be applied with the focus directed on the individual characteristics and circumstances of a protected party: (most

recently) *B v A Local Authority* (per Sir Terence Etherton MR) (paragraph 43).

(viii) Whilst there is a public interest in the capacity test in any particular domain being formulated in relatively simple terms for ease of application, there is a countervailing public interest in ensuring that a test is both fair and *"most likely to facilitate the rights of the incapacitous"*. *"….[T]he tests require the incorporation of P's circumstances and characteristics*. *Whilst the test can rightly be characterised as 'issue specific" in the sense that the key criteria will inevitably be objective, there will, on occasions, be a subjective or person specific context to its application"*, such approach being wholly consistent with the approach endorsed by Sir Terence Etherton MR in *B v A Local Authority* (paragraph 48).

(ix) The applicable criteria in evaluating capacity to consent must be anchored firmly to the clear framework of ss 1 to 3 of the MCA 2005. The individual tests are not binding and are to be regarded as guidance *'to be expanded or contracted'* to the facts of the particular case. They must be construed purposively so as to promote a protected party's autonomy and his or her vulnerability (paragraph 51).

(x) In terms of risk evaluation, the purpose of the MCA 2005 is not to provide some absolute protection whereby an individual is excluded entirely from future harm. Any such evaluation can only be undertaken on the basis of known facts. *"It is not the objective of the MCA to pamper or to nursemaid the incapacitous, rather it is to provide the fullest experience of life and with all its vicissitudes. This must be kept in focus when identifying the appropriate criteria for assessing capacity; it is not to be regarded as applicable only to a consideration of best interests"* (paragraph 56).

(xi) In terms of the interrelationship between criminal and civil law, there is a danger in assuming that the concepts of consent underpinning the criminal law are transferable to issues of capacity under the MCA 2005. Criminal courts and the Court of Protection are engaged in different issues involving separate consideration of social policy and personal autonomy. *"In the context of criminal law the test to be applied is a retrospective assessment of whether consent was truly given. In the Court of Protection, the assessment is prospective, contemplating assessment of capacity to consent with both specific individuals and generally"* (paragraphs 61 and 62).

16. In the context of the local authority's submissions in relation to the need to factor in a protective element to the capacity test for sexual relations, it seems to me that nothing in Hayden J's recent judgment has displaced or diluted the import of the Court of Appeal's warning about the potential adverse consequences of expanding the test to impermissible limits in circumstances where to do so would introduce an unfair and discriminatory test for any protected party seeking to express his or her individual humanity in the basic and fundamental act of sexual intercourse. Having remarked upon the essentially "visceral rather than cerebral" nature of the decision, the following passages appear at paragraphs 81 and 82 of Sir Brian Leveson's judgment *IM v LM*:

> "81. It is for that reason also that the ability to use and weigh information is unlikely to loom large in the evaluation of capacity to consent to sexual relations. It is not an irrelevant consideration: indeed (as we have emphasised) the statute mandates that it be taken into account, but the notional process of using and weighing information attributed to the protected person should not involve a refined analysis of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity. That is the point which Munby J was seeing to make in *X City Council v MB* [2006] 2 FLR 968, para 84… It is precisely this point which Hedley J was driving in *A NHS Trust v P* [2013] EWHC 50 (Fam) at [10] when he observed that
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> > "the intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do."
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> 82. We agree. Perhaps yet another way of expressing the same point is to suggest that the information typically, and we stress typically, regarded by persons of full capacity as relevant to the decision whether to consent to sexual relations is relatively limited. The temptation to expand that field of information in an attempt to simulate more widely informed decision-making is likely to lead to what Bodey J rightly identified as both paternalism and a derogation from personal autonomy."

17. I recognise and accept that the facts of the case with which Hayden J was dealing in *London Borough of Tower Hamlets v NB and AU* were, and are, very different from those which confront the court in this case. That case concerned a married couple who had enjoyed what appears to have been a close and loving relationship which was essentially monogamous over the course of twenty-five years or more. The wife became a protected party in the context of the litigation which flowed from concerns about her capacity to consent to ongoing sexual relations with her husband. Hayden J found that all the evidence pointed to her having retained capacity to give such consent. The capacity assessment in that case was undoubtedly driven in part by its particular factual matrix. In this case, JB has a very strong desire to have sexual intercourse with a woman or women who, as yet, remain unidentified. Much of the focus of the local authority's argument in relation to an expanded test for capacity has been on the protective aspects of such a test. The protective reach or ambit of its proposed extension goes not only to JB himself (in terms of reducing, if not eliminating, the risk of a criminal prosecution for assault or, at worst, rape) but to the wider protection of potential victims of any such assault.

The statutory principles

18. Section 1 of the MCA 2005 provides as follows:

> *"The principles*
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

19. Section 2 provides that:

"People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to – (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities."

20. By section 3, it is provided:

"Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable – (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of – (a) deciding one way or another, or (b) failing to make the decision."

21. It is now established law that the issue of capacity to consent to sexual relations 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. Thus, the question is directed to the nature of the activity rather than to the identity of the sexual partner: see *In re MM* [2009] 1 FLR 443 per Munby J and *IM v LM* at paragraph 79 (per Sir Brian Leveson P). As the Court of Appeal has very recently confirmed in *B v A Local Authority*, the test is general and issue specific, rather than person or event specific (see paragraph 49).

The evolution/development of the test in relation to consent to sexual relations

22. I do not propose in this judgment to revisit the essential roadmap which Hayden J has laid out in the *Tower Hamlets* case. It is a comprehensive analysis with which I respectfully agree.

23. However, it seems to me that these are some important milestones.

24. Following the development of the jurisprudence by Munby J in *X City Council v MB, NM and MAB* [2006] 2 FLR 968 and *Local Authority X v MM* [2007] EWHC 2003 (Fam), it was clear that the essential elements of the test were (i) sufficient knowledge and understanding of the (sexual) nature and character of the act of intercourse; (ii) the reasonably foreseeable consequences of sexual intercourse; and (iii) the capacity to choose whether or not engage in it (i.e. whether to give or withhold consent to sexual intercourse). As Munby J made plain in the latter case, an understanding of the consequences of sexual intercourse with a particular person formed no part of the capacity test. It was purely an issue specific test, and not a person (partner) specific test.

25. In *D Borough Council v B* [2011] EWHC 101 (Fam), [2012] Fam 36, [2011] 2 FLR 72, Mostyn J formulated the issue of informed consent in this way:

"39. So the question that I have to answer is this: in order to be able to consent to sex does a person need to have a proper and full(ish) awareness and understanding that sex should only be done by people over 16, and that it should be consensual ? It is not an answer to the question to observe that sex with minors, and non-consensual sex, are horrible peversions. There are plenty of paedophiles out there who through warped ideology actually believe that it is morally acceptable to have sex with children. Equally, the prisons have numerous rapists within their walls. But paedophiles and rapists have the capacity to consent to sex.

40. [Counsel for the local authority] says that this argument is over-intellectual. We are dealing here, he says, with mentally incapacitated people, who in terms of section 2(1) of the Mental Capacity Act 2005 are suffering impairment of, or a disturbance in the functioning of, the mind or brain. We are not talking about

> peverts who obviously have the capacity to consent to sex. This is true enough, but I believe that to import these knowledge requirements into the capacity test elevates it to a level considerably above the very simple and low level test propounded by Munby J namely "sufficient rudimentary knowledge of what the act comprises and of its sexual character": *X City Council v MB* [2006] 2 FLR 968 , para 74.
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> 41. In his evidence Dr Hall emphasised that the need for consent is one of the very first messages that is conveyed to people with learning disabilities who are being taught about sex. Nothing I say is intended to diminish that obviously vital message. *There is a difference, however, between the teaching of what is right and wrong in the pursuit of sex, and what level of understanding and intelligence is needed to be capable of consenting to it*." (my emphasis)

26. His Lordship concluded that the 'relevant information' should be set at a sufficiently simple and rudimentary level consistent with the equivalent low level of the test for capacity to marry. He framed the test in this way:

> "42. I therefore conclude that the capacity to consent to sex remains act-specific and requires an understanding and awareness of: the mechanics of the act; that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infection; that sex between a man and a woman may result in the woman becoming pregnant."

27. On behalf of the local authority in this case, Mr Sachdeva makes the point that those attracting criminal sanctions in the scenarios posed by Mostyn J above had both the *capacity* to decide to act as they did and also, no doubt, the intention or knowledge of wrongdoing which would constitute the necessary mens rea to expose them to the full rigours of the criminal law. He urges caution before using this decision as a platform for dispensing with the need to incorporate into a capacity test in this domain and/or the relevant information referred to in section 3(1)(a) a requirement that a protected party must understand the importance of consent freely given by *both* parties who engage in sexual activities.

28. Some four years after his decision in *D Borough Council v B*, Mostyn J had cause to revisit his conclusions in relation to consent and specifically whether the relevant information in relation to capacity should include as a separate element an awareness on the part of the protected party that lawful sex requires the consent of both/all parties and that consent can be withdrawn at any time.

29. The context for that review was a case in which the issue to be determined was whether or not it was in the best interests of a 41 year old woman with a learning disability (and the mother of four children) to continue to live under the same roof as her husband in circumstances where there were several established incidents of domestic violence. In *Tower Hamlets London Borough Council v TB* [2014] EWCOP 53, [2015] 2FCR 264, it was accepted that TB lacked capacity to make decisions concerning her residence, care and her contact with her husband. One of the specific matters which the judge was asked to consider was whether she had the capacity to consent to sex. The Official Solicitor, on TB's behalf, accepted that being able to say yes or no to sexual relations was part of the weighing process under section 3(1)(c) of

the MCA 2005 and that this was made explicit by the terms of section 3(4)(a) (i.e. the reasonably foreseeable consequences of deciding one way or the other).

30. In paragraph 37 of his judgment, Mostyn J defined the question before him in these terms: *whether the relevant information should include as a separate element an awareness that lawful sex requires the consent of all parties* [my emphasis] *and that that consent can be withdrawn at any time.* The judge reminded himself that in his earlier decision in *D Borough Council v B* he had accepted at para [35] the need to draw a distinction between the capacity to consent to sex and the exercise of that capacity, the latter being the product of both an existing capacity and the exercise of free will.

31. For the purposes of his conclusion that he had been wrong before and that the OS was wrong in this case, Mostyn J was "convincingly persuaded" by a passage from a decision of Hedley J in *A Local Authority v H* [2012] EWCOP 49 who spoke about the element of choice and its emotional component in this way:

> " …. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test ? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse ? That seems to me to be an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component." (paragraph 25)

32. Mostyn J regarded that as entirely persuasive in relation to the principle that "sex between humans must involve more than mere animalistic coupling. It is psychologically a big deal, to use the vernacular" (paragraph 40). He found that Hedley J's formulation captured perfectly why and how the extra ingredient of consent should be defined as part of the capacity test.

33. Thus, his Lordship concluded (paragraph 41) that when determining the issue of sexual capacity under the MCA 2005 the relevant information referred to in section 3(1)(a) "comprises an awareness of the following elements on the part of P [my emphasis]:

> (i) the mechanics of the act;
>
> (ii) that there are health risks involved (including pregnancy); and
>
> (iii) that he or she has a choice and can refuse."

34. On behalf of the Official Solicitor, Mr Patel has construed this passage as a requirement on the part of P that he or she has a clear understanding of his or her own choice whether or not to take part in sexual activity, not that such understanding must extend to a parallel choice to be made by his or her intended partner. Mr Sachdeva places a different construction on this passage of his Lordship's judgment. He submits that Mostyn J was indeed intending to introduce a requirement that P himself must understand and appreciate as part of the relevant information for the purposes of

capacity in this context the need for full consent to the sexual activity on the part of his proposed partner.

35. For my part, I have some doubt whether that was indeed what his Lordship intended. It seems to me that what Mostyn J was developing was the point that sexual activity between partners was fundamentally a consensual act. In adopting the approach of Hedley J in *A Local Authority v H* he was stressing the need for P to understand that there was a choice to be exercised and a decision to be made as to whether or not to consent to sexual relations. There is no suggestion in the simple test formulated by Hedley J that an understanding of this choice extended beyond the contemplation of the person whose capacity is in question. In other words, P's own subjective choice was an important factor which must be factored into an assessment of capacity over and above a basic understanding of the mechanics of the act of intercourse itself.

36. That approach flowed from Hedley J's consideration of whether or not it was possible to formulate a single test for both the criminal and civil law. He said:

> "21. It is of course important to remember that possession of capacity is quite distinct from the exercise of it by the giving or withholding of consent. Experience in the family courts tends to suggest that in the exercise of capacity humanity is all too often capable of misguided decision-making and even downright folly. That of itself tells one nothing of capacity itself which requires a quite separate consideration.
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> 22. These issues, moreover, resonate both in criminal and in civil law. It is of course highly desirable that there should be no unnecessary inconsistency between them. However, capacity arises in different contexts. In the criminal law it arises most commonly in respect of a single incident and a particular person where the need to distinguish between capacity and consent may have no significance on the facts. In a case such as the present, however, capacity has to be decided in isolation from any specific circumstances of sexual activity as the purpose of the capacity inquiry is to justify the prevention of any such circumstances arising. There is of course no absolute distinction between capacity in civil and capacity in criminal law, it is merely that they fall to be considered in very different contexts and often, perhaps, for different purposes."
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> Later, at paragraph 26, Hedley J reached this conclusion:
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> "… The focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of this court, however, has to be effective to work on a wider canvas."

37. That was certainly the approach adopted by the Court of Appeal in *IM v LM*. At paragraph 48 of his judgment, Sir Brian Leveson said this of Mostyn J's earlier judgment in *D Borough Council v B* and that of Hedley J in *A Local Authority v H*:

> "48. In our judgment, the distinction drawn by Mostyn J and Hedley J is extremely important and sight of it must not be lost. The criminal law bites only retrospectively. Has this conduct, in these circumstances and with the knowledge or understanding of these participants, contravened the law ? In the context of section 30 of the 2003 Act, provided the inability to refuse is because of or for a

> reason related to mental disorder, it does not matter whether it is because he or she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason. The civil law requires prospective assessment in the light of the particular circumstances of the affected individual. The criminal law does not only protect those whom the courts have declared lack capacity."

38. In the view of the Court of Appeal as expressed in *IM v LM*, labels attached to decisions in the field of mental capacity (such as "person specific", "act specific", "situation specific" and "issue specific"), whilst superficially attractive, had disguised the wide base of the statutory test enshrined in the 2005 Act. That test was designed to apply to the question of an individual's capacity across a broad range of areas.

39. Thus, what flowed from their Lordships' judgment in that case was specific endorsement of the distinction which had been drawn between a person's general capacity to give or withhold consent to sexual relations (by its nature from the perspective of the Court of Protection a forward-looking focus) and the "person specific, time and place specific, occasion when that capacity is actually deployed and consent is either given or withheld" (i.e. the focus of the criminal law) (see paragraph 75). This analysis is what drives the evaluation of capacity to consent to sexual relations. As the Court of Appeal has confirmed, the notional process of using and weighing information should not, in the context of a protected person, involve "a refined analysis of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity" (paragraph 81). Furthermore, the court cautioned against a temptation to expand that field of information "in an attempt to simulate more widely informed decision-making": that approach was likely to lead to precisely the derogation from personal autonomy which the 2005 Act had sought to avoid.

40. That was where the law stood when Cobb J considered the issue of capacity in *B v A Local Authority* reported at first instance as [2019] EWCOP 3. In that case his Lordship concluded that the information relevant to decision making in this context included the following:-

> "i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;
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> ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;
>
> iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse;
>
> iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;
>
> v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom" (paragraph 43).

41. One of the grounds of the subsequent appeal by the Official Solicitor was that Cobb J had erred in his formulation of the relevant information which B needed to

understand, retain and weigh in order to have the capacity to consent to sexual relations by importing limb (iii) (right to say no). There is nothing in Cobb J's judgment at first instance to suggest that he was proposing an expansion of the information into the realms of any need for knowledge of parallel consent on the part of a prospective partner. In considering the competing issues of social policy in play in these difficult decisions, Sir Terence Etherton, MR stressed once again the need to avoid discriminating against persons suffering from a mental disability by imposing too high a test of capacity: *B (by her litigation friend, the Official Solicitor) v A Local Authority* at paragraph 37.

42. That the courts have been prepared to expand the list of relevant information incrementally and with careful judicial scrutiny is clear from that judgment (paragraph 47) in which the Court of Appeal cited with approval the decisions in *Re MAB* [2006] EWHC 168 (Fam) at [68]ff and *D Borough Council v B* [2011] EWCOP 101 .

43. In relation to the merits of the appeal against the inclusion in the list of information of the right to say no, the Court of Appeal noted that this element of the test was then "a live matter" which was actively under consideration by Hayden J in the *Tower Hamlets* case to which I have already referred. For this reason, the judgment delivered in the Court of Appeal does not advance the matter:

> "…. The argument before Hayden J in London Borough of Tower Hamlets v NB was presumably that the conclusion in IM does not preclude the tailoring of relevant information to accommodate the individual characteristics of the person being assessed. We heard no arguments on these points and do not need to decide them on the present appeals since it was not contended by the OS that anything in Cobb J's guideline was inapplicable because of B's personal characteristics. The criticism of the OS is that parts (iii), (iv) and (v) in their present form are inapposite in all cases." (see paragraph 49)

44. The judgment continues in these terms:

> "51. We understood Mr Karim to submit that part (iii) of Cobb J's list confuses the relevant information for determining the capacity to consent to sexual relations with the actual decision whether or not to give consent. This does not seem to us to be a point of any substance on the correctness of Cobb J's decision that B lacked capacity to consent to sexual relations. Mr Karim referred us to the observation of Parker J in The London Borough of Southwark v KA [2016] EWCOP 20 at [52] that "consent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself". Her point, **which is plainly correct**, was that awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information. As she elaborated at [53]:
>
> > "**The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity**: in other words that "P knows that she/he has a choice and can refuse"."[my emphasis]

45. As the Court acknowledged, this was the same point which had been made by Mostyn J in *The London Borough of Tower Hamlets v TB* [2014] EWCOP 53 at [39] to [41].

46. In my judgment, it resonates precisely with what Sir Brian Leveson P said in paragraph 81 of his judgment in *IM v LM* which I have set out in paragraph 16 above.

47. Further, in relation to the issue of consent itself which lies at the heart of an evaluation of capacity, it seems to me that the point is entirely on all fours with what Hayden J said in paragraph 48 of his judgment in *London Borough of Tower Hamlets v NB* :

> "At the risk of labouring the point further, I am emphasising that the tests require the incorporation of P's circumstances and characteristics. Whilst the test can be rightly characterised as *'issue specific'*, in the sense that the key criteria will inevitably be objective, there will, on occasions, be a subjective or person specific context to its application."

48. In my judgment, 'consent' as a concept integral to capacity in this domain is one such 'key criteria' which will inevitably fall to be assessed on an objective basis ('Does P understand that he or she can say no ?') albeit adopting Hayden J's approach of a purposive construction which both promotes P's autonomy and protects his or her vulnerability. As Hayden J said in paragraph 54 of his judgment, other considerations are readily susceptible to a more tailored, pragmatic and/or flexible approach. For example,

> "54. That there is no need to evaluate an understanding of pregnancy when assessing consent to sexual relations in same sex relationships or with women who are infertile or post-menopausal strikes me as redundant of any contrary argument. Nor, with respect to what has been advanced in this case, can it ever be right to assess capacity on a wholly artificial premise which can have no bearing at all on P's individual decision taking. It is inconsistent with the philosophy of the MCA 2005. Further, it is entirely irreconcilable with the Act's defining principle in Sec. 1(2) … *'a person must be assumed to have capacity unless it is established that he lacks capacity'*."

49. That said, as Hayden J acknowledged, this is not to conflate the test of consent with a *'person specific'* test. To do so would be both impractical and unworkable. The two are fundamentally different. I agree with Hayden J that what is required in terms of an assessment of capacity to consent to sexual relations is an application of the *'act specific test'* applied in such a way as to promote P's opportunity to achieve capacity. As his Lordship said, *"This… is nothing less than a statutory imperative. It cannot be compromised."* (paragraph 60) and see paragraph 79 *In re M (An Adult)* per Sir Brian Leveson P.

Discussion and analysis

Should the need to understand the voluntary nature of sexual activities extend to an understanding of full consent from sexual partners ?

50. In this case there has already been a capacity assessment of JB. The single joint expert[1] instructed by the parties has indicated that JB has the ability to consent to

[1] Dr Thrift, Chartered Consultant Clinical Psychologist; addendum report dated 26 September 2018 [2/F:225]

sexual relations albeit that he does not understand or weigh "highly pertinent factors in ensuring he engages in lawful sexual activity".

51. It is important to bear in mind that at the time when this expert was instructed, she was asked to provide an opinion on the basis of a legal test which was general and issue-specific but which did not include consent per se. The original letter of instruction which was sent to the expert was dated 4 May 2018. Cobb J's formulation of the amended test (as considered by the Court of Appeal in *B v A Local Authority*) was not handed down until February 2019. Thus, when in June 2018 she prepared her original report in relation to JB's capacity to consent to sexual relation, Dr Thrift concluded that "despite the capacity test for sexual relations being low, [JB] does not understand and therefore weigh highly pertinent factors in relation to having consenting sexual relations" [2/F:155].

52. When she was subsequently challenged in relation to her initial conclusions on the basis of a conflation of the legal test then prevailing[2] and aspects of risk and consent, Dr Thrift changed her conclusion and assessed JB as capacitous in relation to his ability to consent to sexual relations.

53. Subsequently, in June this year (2019), Dr Jillian Peters (a clinical psychologist) prepared a report in relation to risk management in which she concluded that JB represented a moderate risk of sexual offending to women. Her report included the following passage (para 6.2.1):

> "Based on descriptions of his previous and ongoing behaviours, this is most likely to take the form of sexual harassment through the form of repeated, unwanted sexually explicit messages to females whose numbers he has obtained or whom he contacts through social media or dating sites. [JB] has also been observed to have limited social boundaries around women, particularly those who are vulnerable but also women in pubs or clubs whom he has approached whilst dancing. Additionally he acknowledges not being able to judge women's reactions to him and that he is unwilling to directly ask for clarification of these issues. In these and similar situations the risk is of [JB] sexually touching these women without consent. In terms of vulnerable women who do not have the capacity to consent to sexual relations, there is a risk of [JB] not recognising or respecting this fact, resulting in the potential for rape to occur."

54. I include these paragraphs to give contour and context to the legal issues which I have been asked to address in the first stage of this split hearing. For present purposes I am dealing only with the legal issues arising and for these purposes I return to where we are now in the light of the Court of Appeal having declined to address these specific arguments in relation to consent on the basis the matter was then pending before Hayden J. On behalf of the Official Solicitor, Mr Patel submits that the Court of Appeal's general analysis amounts to an implicit endorsement of Cobb J's formulation of the relevant information necessary for the purposes of informed consent.

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[2] i.e. an understanding of (i) the mechanics of the act; (ii) the health risks involved; and (iii) the risk of pregnancy in heterosexual sex

55. A plain reading of paragraph (iii) of Cobb J's formulation in *B v A Local Authority* suggests that, as Mostyn J had done before him, his Lordship was directing his focus on *the protected party's* understanding of his or her ability to choose whether to give or withhold consent to participation in sexual relations with another party. In my judgment it is important in this context to bear in mind Cobb J's reference in paragraph (i) to the need for an individual to understand not only the sexual nature of the act of sexual intercourse but also its essential *character*. Just as Hedley J had stressed in *A Local Authority v H* some seven years before, the test for capacity in this ultimate act of self-giving (as it was described) requires the court to ask, *'Does the person whose capacity is in question understand that they do have a choice and that they can refuse ?'* (paragraph 39) (my emphasis).

56. Both counsel for the local authority and for the Official Solicitor accept that JB's own understanding of the need for consent is fundamental to the issue of his capacity to have sexual relations. The issue between them as posed by Mr Patel on behalf of the Official Solicitor is whether or not the test should be extended to incorporate what is essentially an understanding of the extent to which non-consensual sexual relations may be a violation of the criminal law. In addition to his principal submission (set out above in paragraph 7 of my judgment), Mr Sachdeva for the local authority puts his argument on a slightly more nuanced basis:

> "…[T]he risks posed by a young adult who is very interested in sex but has no understanding of the need for the other person to consent is plainly a live issue in tis case, unlike the academic risks in the NB case. Further, as a matter of policy, that type of risk can never be irrelevant, for there will always be a potential victim of a criminal offence who deserves protection, not just by the criminal law when the risk has eventuated, but P should also be protected from the adverse consequences of such acts by mental capacity law."
>
> "It is not a question of P understanding the criminal law; more that P must understand that the other person must consent as a matter of fact, from their words and conduct….. Far from discriminating against P if the "relevant information" is held to include an appreciation that the other must consent, it would discriminate against P if he was permitted to have sex with people absent any understanding that the other must consent, for it would deprive him of the protection which the law should give him against the obvious adverse and serious consequences of behaving in such a way."

57. As is clear from my analysis of previous decisions on this point, it appears that this aspect has only been considered in two reported cases. In *D Borough Council v B* (see paragraph 25 above), Mostyn J had considered the attempt by the SJE in that case to introduce greater specificity into the relatively simple test proposed by Munby J which then reflected the appropriate level of capacity required. Part of the refinement which that expert had proposed was an additional requirement that "both (or all) parties to the act need to consent to it" (para 23). In that case, counsel for the local authority had argued that a new general test should properly include a partner-specific dimension which required an individual to understand the reasonably foreseeable consequences of having sex with someone else. For these purposes, it was argued that regard must also be had to the characteristics and personality of the other person which must also be factored into the test (paragraph 27).

58. The traction for a partner-specific dimension had gathered some momentum from dicta emanating from a decision of the House of Lords in *R v Cooper (Gary Anthony)* [2009] 1 WLR 1786. In that case, Baroness Hale of Richmond had said this at paragraph 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 the European Convention for the Protection of Human Rights and Fundamental Freedoms. The object of the Sexual Offences Act 2003 was to get away from the previous 'status'-based approach which assumed that all 'defectives' lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways."

59. That was an approach which was rejected by the Court of Appeal for the purposes of the MCA 2005 in *IM v LM*.

60. Mostyn J considered the extent to which Roderic Wood J had attempted to build a bridge between the two viewpoints. In *D County Council v LS* [2010] Med LR 499, he had expressed the following view:

> "[42] These types of impediment which affect mental functioning to the extent of undermining the ability to make a capacitous decision must be carefully distinguished from a person's specific features which do *not* undermine capacity in the same way. Another person's view of the suitability of a particular sexual partner for the person whose capacity is being considered is irrelevant to the determination of whether or not that person has capacity. To take account of such a feature in determining capacity would be risking the importation of 'best interests', and runs directly counter to section 1(4) of the 2005 Act ('a person is not to be treated as unable to make a decision merely because he makes an unwise decision'). Furthermore, as Baroness Hale pointed out in *R v Cooper (Gary Anthony*), to apply such a consideration to the determination of capacity would be … a gross failure to respect a person's autonomy, protected by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in relation to one of the most intimate and personal aspects of their private life."

61. In paragraph 38 of Mostyn J's judgment in *D Borough Council v D*, he records the opposition of Mr Sachdeva (instructed in that case by the Official Solicitor on behalf of D) to the inclusion of a requirement that "both (or all) parties to the act need to consent to it". The argument being advanced in that case was that the inclusion of requirements (a) that P must understand the need for both parties to be over the age of 16 (and thus must have the ability to distinguish between adults and children in the eyes of the law), and (b) that both or all parties must consent to the sexual activity in question went beyond factors which the law had previously recognised as being necessary elements of capacity to consent to sexual relations. Mr Sachdeva now seeks to persuade this court that, for all the arguments he has advanced in his written and oral submissions, the time has come to expand the parameters of the capacity test

in this domain. Furthermore, he submits that such an expansion should now incorporate both elements set out above in (a) and (b). In so doing, he accepts that the bar will inevitably be raised in terms of capacity.

62. As we know, Mostyn J was prepared in *D Borough Council v B* to introduce the element of consent on the part of P to the information required for the purposes of section 3(1)(a). His Lordship rejected the invitation to go further notwithstanding "that obviously vital message" in the context of the need to teach people with learning difficulties what is right and wrong in the pursuit of sexual relations.

63. Five years after that decision, the issue resurfaced in *London Borough of Southwark v KA & Others* [2016] EWCOP 20. Parker J took the view in that case that consent was not part of the 'relevant information' as to the nature of the act or its foreseeable consequences but was something which went "to the root of capacity itself". Whilst "the ability to understand the concept of and the necessity [for] one's own consent is fundamental to having capacity: in other words that P "knows that she/he has a choice and can refuse", Parker J had some doubt about whether the consent of the other party was fundamental to P's own capacity to have sexual relations: see paragraphs 53 and 54. She said this:

> "56. Since it is all too possible for sexual contact to take place, and does take place, without consent the necessity for the consent of a partner does not obviously form part of the capacity test, particularly since the issue of consent in the criminal law can give rise to complex debate as to mens rea, particularly in cases of apparent consent or lack of explicit communication of consent."

As I have already made clear in paragraph 44 of my judgment, this passage was specifically endorsed by the full Court of Appeal in the very recent decision in *B v A Local Authority* (and see below).

64. Parker J did not need to make a specific decision about the ambit of the capacity test in that case because she found that KA both understood and retained an understanding of the necessity for consent of both himself and any potential partner. That understanding flowed, as the judge records, from a programme of careful education about the need for consent.

65. These are conceptually difficult areas as is clear from previous judicial comment in many of the authorities to which I have referred above.

66. In this context, I come back to the basic principles recently approved and restated by Sir Terence Etherton, MR in the unanimous judgment of the Court of Appeal in *B v A Local Authority*. I bear in mind that that judgment was handed down only a month before I heard argument in this case. In terms of the legal framework set out in the MCA 2005, I collect from that judgment the following principles of law:-

(i) a person is presumed to have capacity unless it is established that he or she lacks capacity (section 1(2));

(ii) he or she is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success (section 1(3));

(iii) he or she is not to be treated as lacking capacity merely because his or her decision is unwise (section 1(4));

(iv) a lack of capacity in relation to a particular subject matter or domain arises in circumstances where, at the material time, a person is unable to make a decision for himself or herself because of an impairment of, or a disturbance in the functioning of, the mind or brain (section 2(1));

(iv) capacity determinations are specific to particular matters which arise for decision at the time a determination is required and are resolved on the balance of probabilities (section 2(4)). Thus if a local authority or other public body or third party alleges that a person lacks capacity to make a particular decision, it is for that body, entity or person to prove that fact on the basis of the ordinary civil standard;

(v) the ability of a person to make a decision depends upon his or her ability to understand, retain or use or weigh the information relevant to that decision and to communicate that decision (section 3(1)). That information has to be presented to the person in a way that is appropriate to his or her circumstances (section 3(2)) but a person may be capacitous in relation to a particular decision even if he/she can only retain that information for a short period of time (section 3(3));

(vi) the definition or content of 'relevant information' for these purposes will depend on the nature of the decision to be made but will include the reasonably foreseeable consequences of making that decision or failing to make that decision (section 3(4));

(vii) if a person is found to lack capacity, a decision taken on his or her behalf by the court or someone else must be in the person's best interests taking account of all his or her relevant circumstances including certain mandatory requirements listed in section 4 of the MCA 2005.

67. Whilst recognising that what comprises 'relevant information' for determining a person's capacity to consent to sexual relations has developed and become more comprehensive over time, nothing in the judgment of the Court of Appeal in *B v A Local Authority* has explicitly cast doubt on the integrity or soundness of the formulation by Cobb J of the information relevant to making decisions in this area. The grounds for that appeal related to the judge's reasoning in terms of outcome and not to his restatement of the governing principles of law.

68. In paragraph 51, the Master of the Rolls confirmed that Parker J (and Mostyn J before her) had been right to make the point that "consent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself" (para [53] *London Borough of Southwark v KA*). Thus, the Court of Appeal has now confirmed in its judgment that the issue of a person's consent to sexual relations goes beyond a mere point of information: an awareness of one's own consent and the knowledge that he or she can consent, or refuse, to participate in sexual relations with another person or persons is fundamental to *establishing the existence of* capacity and not merely to exercising that capacity (see paragraph 51). In that respect, the reasoning of both Mostyn J in *London Borough of Tower Hamlets v*

TB and Parker J in *London Borough of Southwark v KA* has been upheld and confirmed.

69. The point was regarded as "an entirely arid one" for the purpose of *B v A Local Authority* because the expert evidence before the court made it clear that B understood perfectly well that consent could be refused and that to have sexual relations without consent amounted to rape. Thus, whilst neither the Court of Appeal in *B v A Local Authority* nor, subsequently, Hayden J in *London Borough of Tower Hamlets v NB and Others* has provided specific guidance as to a permissible expansion of the test and/or the information required, neither has expressly ruled out the consent of others as a step too far.

70. The point addressed subsequently by Hayden J in *London Borough of Tower Hamlets v NB and AU* was that the statutory criteria set out in ss 1 to 3 of the MCA 2005 are the bedrock in which the individual tests are rooted. Those tests are to be regarded as general guidance *'to be expanded or contracted'* to the facts of the particular case. In the case of NB where there was unlikely to be an issue as to the protected party having sexual relations with anyone other than her husband in the context of a long and monogamous marriage, issues relating to an understanding of pregnancy and sexually transmitted infections carried little, if any, particular weight given the context of her particular circumstances.

71. The issue in this case is more fundamental in that the local authority seeks to expand the established test of capacity to consent to sexual relations into an elevated test of more general application.

72. As Hayden J and judges before him in both first instance and appellate courts have stressed, one of the purposes of Parliament in enacting the MCA 2005 was to facilitate the rights of the incapacitous so as to provide each potentially incapacitous individual human being with "the fullest experience of life … with all its vicissitudes". As his Lordship stressed, this principle must be kept clearly in focus when identifying the appropriate criteria for assessing capacity and must not be regarded as applicable only to a consideration of best interests: see paragraph 56.

73. It is important to bear in mind, too, that, as the law currently stands, the fact that an individual may be held to be capacitous in relation to the decision to have sexual relations with others may not preclude a subsequent 'best interests' decision that he or she lacks capacity to decide whether a particular sexual partner with whom sexual activity is contemplated is a 'safe' partner. In this context, the protected party may well need considerable assistance to achieve capacity in terms of a sufficient understanding of the support he or she requires when having contact with such a proposed sexual partner: see *A Local Authority v TZ* [2013] EWCOP 2322 and *A Local Authority v TZ (No.2)* [2014] EWCOP 973 per Baker J (as he then was). I shall need to return to these authorities shortly.

74. Mr Sachdeva seeks to advance his argument for an expanded test by analogy with Cobb J's recent decision in *Re A (An Adult)* [2019] EWCOP 2, [2019] 3 WLR 59. That decision concerned an individual's capacity to use the internet and social media. Concerns about A's very low level of literacy and poor written communication skills severely impaired his ability to navigate the internet safely. There were further concerns about his ability to read or understand warnings regarding content and

safety. The police had expressed concerns that A's potential, wittingly or unwittingly, to make contact online with sexual predators or sex offenders exposed him to the risk of abuse and the potential to infringe criminal law by becoming a perpetrator of offences concerning images he might post on the internet.

75. In defining the scope of the information which A needed to weigh and use for the purposes of section 3(1) in the context of his use of social media, Cobb J included the possibility that "if you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime": see paragraph 28(vi). His Lordship made it clear that this formulation was not intended to represent a statement of the criminal law but was designed to reflect the importance (which a capacitous person would understand) of not searching out this type of material. It was important that a person should know "that entering into this territory is extremely risky and may easily lead a person into a form of offending": see paragraph 29.

76. That guidance in relation to the information referable to decisions in relation to social media and internet use provides the platform for Mr Sachdeva's submission that if exposure to potential criminal sanctions is relevant for consent to the use of social media and the internet, so, too, should the test for capacity to consent to sexual relations include an appreciation of committing an offence where there is an absence of consent on the part of a sexual partner.

77. In my judgment, Mr Patel is right when he submits that the fundamental nature of a decision to use the internet and/or social media is different from a decision to engage in sexual relations. First and foremost, the former is part and parcel of a voluntary engagement in ever-increasing technological advances harnessed by modern society for a number of reasons, both good and bad, in the experience of day to day life in the 21st century. The latter is a primal expression of our humanity and existence as sexual beings. It is an essential part of our basic DNA as reproductive human beings. As Hayden J and, before him, Sir Brian Leveson P have confirmed, sexual relations form a fundamental aspect of our humanity, common to all regardless of whether an individual suffers from some impairment of the mind. The whole process of decision-making in this context – even in the case of persons of full capacity – is "largely visceral rather than cerebral, owing more to instinct and emotion than to analysis".

78. This is one of the reasons why the court has no ability to interfere on a best interests basis in the case of a person who lacks capacity to engage in sexual relations. The outcome for P in this context is binary. If judged incapacitous because he or she has no comprehension that his or her consent is required before engaging in acts of a sexual nature, he or she is potentially consigned to celibate abstention unless capacity is established at some point in the future. In my judgment, to argue that a full and complete understanding of consent (in terms recognised by the 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.

79. Further, in this context it is important to distinguish between the individual (and different) concepts of *having* the mental capacity to consent to sexual relations and *exercising* that capacity. In this respect, I agree with the Official Solicitor that section 3 of the MCA 2005 is designed to determine what is often referred to as the 'functional test'. It does not look to outcome or to the fact that the absence of consent

from a sexual partner may expose P to the rigours of the criminal justice system. Had protection per se of the potentially incapacitous in this respect been a driving factor of the 2005 Act or its subsequent judicial interpretation, no doubt appropriate (but necessary) inroads could have been made into the non-paternalistic ethos of the legislation.

80. Distilled into its essence, it seems to me that P's own choice, and his appreciation of that choice and the opportunity to refuse to consent, is an integral element of the capacity decision itself. Knowledge of the other party's consent to the proposed sexual activity is certainly relevant to the choice which then confronts P as to whether or not he (or she) goes ahead with that activity and thus its essentially lawful or unlawful nature.

81. If these conceptual issues are difficult enough for the capacitous to grasp, it seems to me that very great care is needed before imposing on the potentially incapacitous the need to understand these quasi-criminal principles and the potential for consent to be withdrawn by the other party at any stage. In my judgment, importing into the test for capacity and/or the information which informs that test a requirement for an understanding of parallel and continuing consent in a sexual partner imposes a test which is set too high. I do not accept that it is appropriate to increase the bar for the potentially incapacitous and thus potentially deprive them of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for either P himself or for any victim of non-consensual sex when those consequences are viewed through the prism of the criminal law. Whilst the ability to use and weigh information remains relevant to a capacity assessment in the domain of sexual activity, it should not involve a refined or nuanced analysis which would not typically inform any decision to consent to sexual relations made by a fully capacitous individual. The law in this context strives to assist a potentially incapacitous individual to participate in the fullest experience of life. JB has already made it abundantly clear that he wishes his experience of life to include sexual relations and the ability to find a partner. To require him to demonstrate as an aspect of his fundamental capacity in this context a full appreciation of both his own and a partner's initial and ongoing consent throughout the course of that sexual activity would be to impose on him a burden which a capacitous individual may not share and may well be unlikely to discharge. It is true that knowledge of the absence of consent might expose either to the risk of criminal prosecution but in both cases each is entitled to make the same mistakes which all human beings can, and do, make in the course of a lifetime.

82. Nothing which I have said is intended to dilute or dispense with the critically important function or role which education about these matters has to play. It is essential that assistance and support is provided to any protected party whose capacity falls to be assessed in this area so as to encourage and support him or her to recognise the essentially consensual nature of sexual activity. That will inevitably involve an appreciation on the part of P that sexual activity without the other party's consent may well result in serious consequences in terms of what is considered acceptable behaviour. This is the fundamentally difficult balance which has to be struck between recognising on the one hand the right of every individual to personal dignity and self-determination and the need, on the other hand, to protect those individuals where their

own individual qualities or circumstances place them in a vulnerable situation: see *AMV v Finland (23.3.2017) ECrtHR Application No. 53251/13*.

83. This resonates clearly with the latest word from Hayden J, Vice-President of the Court of Protection. As he has so recently told us in *London Borough of Tower Hamlet v NB*, P's (JB's) circumstances and characteristics are relevant to a purposive construction of the capacity test so as to promote his personal autonomy and protect his essential vulnerability. That said, it is not part of the function of the Court of Protection to seek to exclude him in 'some absolute way' from future harm or exposure to aspects of the criminal law.

84. As to the practicalities of the above, I am not (and nor, I suspect, was Hayden J) seeking to overlay onto the established test for capacity to consent to sexual relations an approach which seeks to overlay on those established principles a 'partner-specific' approach. The local authority's argument in *Tower Hamlets v NB* was to this effect:

> "Whilst P may often be assessed as neither possessing, nor being likely to ever gain, capacity to consent to sexual relations when a general test is applied, P's characteristics / situation, will include include the intended sexual partner, who may well be more labile in temperament or circumstances and likely to require frequent re-assessment (in terms of the risks presented) if adequate safeguarding is to exist.
>
> Hence, were certain criteria to be excluded from the relevant information, P and their partner would need careful monitoring to ensure risks have not arisen that require reassessment including the previously excluded criteria.
>
> The domain of sexual relations is also more likely to require consideration of a number of third parties/partners over P's lifetime, either consecutively or concurrently and would significantly increase the number of assessments required, which by their very nature can constitute an intrusive examination of a sensitive area of any individual's life."

85. Hayden J saw these arguments as a conflation of a tailored and individual assessment in relation to capacity with a 'person specific' test. He warned against any assumption that the concepts of consent which underpin the criminal law can, or should be, transferable into the field of determining capacity in the Court of Protection. Each was addressing distinct and separate principles of social policy and personal autonomy: see paragraph 62.

86. Thus, whether the local authority is proposing to confine the expansion of the 'relevant information' into 'partner specific consent' only in cases where there is a solid reason for suspecting that P may pose a risk of future sexual offending or whether it is proposed as a principle of general application, I reject it as an unacceptable inroad into the court's ultimate objective which is to empower autonomous decision-making wherever that is an achievable objective in any individual case.

87. My conclusion on the first issue posed by the local authority is this. For the purposes of determining the fundamental *capacity* of an individual in relation to sexual

relations, the information relevant to the decision for the purposes of section 3(1) of the MCA 2005 does not include information that, absent consent of a sexual partner, attempting sexual relations with another person is liable to breach the criminal law.

88. In terms of the purported risk of offending, it appears that Mr Sachdeva, on behalf of the local authority, now accepts that the Official Solicitor has accurately recorded in paragraphs 32 to 41 of her opening position document the extent to which that potential risk can be weighed as part of a best interests analysis. In essence, Mr Patel has argued that, whilst it is permissible to weigh the risk of P entering the criminal justice system and/or being the target of some form of vigilante violence as part of a best interests analysis, what is not permissible is the imposition of a restriction on his liberty in order to prevent the possibility of offending insofar as it purely risked harm to those other than P. In this context the protection of others falls squarely within the Mental Health Act 1983 as opposed to the MCA 2005. I did not hear detailed submissions on this aspect of matters which will doubtless occupy the court during the second stage of this split hearing in October this year. If these matters are agreed, they can doubtless be incorporated into any case management order which flows from this judgment.

89. In terms of the capacity tests in relation to JB's ability (i) to conduct these proceedings, (ii) in relation to residence[3], (iii) care[4] and (iv) the use of internet and social media[5], these are uncontroversial. I need say nothing further about these issues in this judgment.

90. However, one aspect remains for determination for the purposes of the forthcoming hearing in October.

What is the correct approach to dealing with issues of contact with others and the support which JB may need when he is in the company of someone to whom he feels sexually attracted ?

91. This is an aspect of the breadth of restrictions which are currently imposed on JB's ability to associate freely with whomsoever he wishes, and specifically with women to whom he is sexually attracted. These are essentially 'best interest' decisions. Dr Thrift concluded that JB lacked capacity as to the contact he had with women. When these proceedings were commenced, the local authority was seeking a declaration to that effect. Its position as the authority responsible for JB's care has now changed. It is conceded that in relation to contact with others, the test is act-specific and cannot be gender-specific. However, the local authority seeks to argue that the MCA 2005 can be used to restrict P from committing a criminal offence if P lacks capacity in relation to contact following the decision of Baker J's decision in *A Local Authority v P* [2018] EWCOP 10 at [65]. Furthermore, the local authority seeks a determination as to whether or not JB has capacity in relation to decisions about whether or not an individual with whom he may wish to have sexual relations is a safe partner. Aligned to this question is the extent to which he may need support in having contact with an individual whom he has identified as a possible sexual partner.

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[3] *LBX v K & L* [2013] EWHC 3230 (Fam), para [43] per Theis J as approved by the CA in *B v A Local Authority* [2019] EWCA Civ 913 at [20] and approved at [62]

[4] *LBX v K & L* (above) at [48] approved by the CA in *B v A Local Authority* at [22]

[5] *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2

92. In this context, the Official Solicitor contends the solution alighted on by Baker J in *TZ (No 2)* is unworkable in this case. Who, she asks, is to determine what safety means in this context and who is to identify whether the individual concerned is, in JB's eyes, a potential sexual partner ? The appropriate question which needs to be asked in the alternative on the Official Solicitor's behalf is whether JB is able to consent to support in relation to his potential relationships with women. To the extent that this support can be provided pursuant to the local authority's statutory duties under the Care Act 2014, then the question must be framed as a decision in relation to his general care needs.

93. In *A Local Authority v TZ (No. 2)*, Baker J (as he then was) had previously found TZ to be capacitous in relation to his ability to consent to and engage in sexual relations *(TZ (No. 1)*. He was a young man who had been exploited in the past as a teenager. There was in that case no assertion that TZ lacked capacity generally in relation to contact although there were then no named individuals in respect of whom he was expressing a wish for physical intimacy. Baker J identified the questions arising in this context as :

    (i) whether TZ had the capacity to make a decision whether or not an individual with whom he wished to have sexual relations was safe, and, if not,

    (ii) whether he had the capacity to make a decision as to the support he was likely to require when having contact with such an individual.

94. In that case, TZ had expressed a desire to meet other men with whom he might have sexual relations. I do not regard the gender distinction to have any relevance in this context. The principle here is that the court is entitled to intervene to protect a vulnerable adult from the risk of future harm such as future abuse or exploitation. The ability to intervene comes in circumstances where there is a real possibility, rather than a fanciful risk, of such harm: *Re MM (An Adult)* [2007] EWHC 2003 (Fam) per Munby J. As was recognised in that case, all of life involves risk albeit that the young, elderly and vulnerable are exposed to additional risks and risks they are less well equipped than others to cope with. Physical health and safety can sometimes be brought at too high a price and the emphasis must always be on sensible risk appraisal in order to achieve a vulnerable person's happiness. As the court asked itself, *"What good is it making someone safer if it merely makes them miserable ?"*.

95. As is apparent from paragraph 66 of Baker J's subsequent judgment in *A Local Authority v P*, TZ "concerned a young man who had the capacity to consent to [sexual] relations but lacked the capacity to make decisions about whether or not an individual with whom he may wish to have sexual relations was safe, or the capacity to make a decision as to the support he required when having contact with an individual with whom he may wish to have sexual relations".

96. Baker J held that, when delivering a plan to address TZ's lack of capacity to decide whether someone with whom he may wish to have sexual relations was safe, the principal focus should be on educating and empowering him to make these decisions: paragraph 57. Any provisions directed towards protecting him and restricting his contact should be framed as interim measures until the point was reached where he had sufficient skills to make these decisions himself. Thus, the mere fact that

someone has capacity to consent to sexual relations does not relieve a local authority of the obligation to put in place a robust care plan to protect that individual from future risk of harm.

97. In that case, Baker J had no difficulties in formulating detailed elements of what needed to appear in a care plan for TZ. These included (a) basic principles; (b) education and empowerment; (c) support; (d) intervention; (e) decision-making. Those elements were intended by the judge to provide the local authority with "some helpful guidance" in drawing up a final care plan. The detail would be a matter for the local authority support team in collaboration with TZ himself and the Official Solicitor as his litigation friend: see paragraph 87. Long-term decisions, such as whether or not it was in TZ's best interests to move out of his accommodation in order to cohabit with another man, were matters more appropriately decided by the court: paragraph 84.

98. I appreciate that in *TZ* the focus of the risk was on keeping *TZ himself* safe in the context of any capacitous decisions he might take in relation to whether his intended partner was 'safe' and/or in relation to support to make those decisions in relation to safety if he lacked capacity.

99. Here, in JB's case, the perceived risk is to the 'safety' of those women with whom he may attempt to have sexual relations. That risk flows from the present formulation of the law (which I have confirmed) that there is no requirement within information relevant to the decision within section 3(1) of the MCA 2005 that P must specifically understand that, absent consent, attempting sexual relations with another person is likely to breach the criminal law.

100. Bearing in mind, as I do, Hayden J's clear exhortation to stand back and look both realistically and subjectively at the limits and potential horizons of P's insight into and understanding of these issues in terms of promoting autonomous decision-making and the steps which can be taken to support and educate P in these respects, I can see no reason why Baker J's approach in *TZ (No. 2)* cannot be applied with necessary modifications to JB's case. To this extent I agree with the Official Solicitor that the relevant decision must focus on JB's capacity in relation to the support he will obviously need in relation to his future relationship(s) with women whether these are short-term or, as he himself hopes, longer term relationships which may ultimately lead to him finding a partner with whom he can share his life. At the present time, his aspirations may not be grounded in reality because of his particular vulnerabilities. It seems to me that it is not for this court now to determine whether or not his aspirations may ultimately be capable of realisation.