Neutral Citation Number: [2019] EWCOP 64

Case No: 13455549

IN THE COURT OF PROTECTION

Leicester Family Court
90 Wellington Street
Leicester, LE1 6HG

Date: 29/11/2019

Before:

HER HONOUR JUDGE GEORGE
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:

Leicester City Council	**Applicant**
- and -	
MPZ (by her litigation friend the Official Solicitor)	**Respondent**

- -
- -

Katharine Scott (instructed by **In House Local Authority Legal**) for the **Applicant**
Simon Burrows (instructed by **MJC Law**) for the **Respondent**

Hearing dates: 21 and 22 November 2019

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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.

.....

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.

Her Honour Judge George:

1 This is an application brought by Leicester City Council represented by Ms Scott, for orders in respect of MPZ, or Mary (not her real name, or initials).

2 This matter comes before the court for decisions under the Mental Capacity Act 2005 (MCA) as to whether Mary lacks capacity to make various decisions, and/or for determination as to whether Mary is a vulnerable adult in respect of whom the court should consider making orders to protect her pursuant to its Inherent Jurisdiction.

3 Mary is represented by Mr Burrows who is instructed by the Official Solicitor as Mary's litigation friend.

4 Mary is a 31 year old woman with a learning disability associated with a history of social and functional skills impairment and significant cognitive impairments. Dr Lawson, who has provided two reports in these proceedings, has diagnosed Mary as suffering from two types of personality disorder: Emotionally Unstable Personality Disorder and Dependent Personality Disorder.

5 This application is for the court to determine whether Mary lacks the capacity within the meaning of the Mental Capacity Act to conduct this litigation, make decisions about her residence, care, contact, access to social media and the internet, to enter and surrender a tenancy and to consent to sexual relations. In the event that she has MCA capacity in any of these domains, the Court is asked to consider whether it should make orders under the Inherent Jurisdiction.

6 Mary lives in a supported living placement. The applicant has significant concerns about Mary's safety and welfare and the risk certain individuals with whom she chooses to form relationships pose to her. On 5 July 2019, I made injunctions against Jim (not his real name) a man with whom she has had a sexual relationship for some time, and Bob (not his real name), an associate of Jim's, preventing them both from having any contact with her. The latter order against Bob was subsequently discharged. Jim has been given the opportunity to file evidence and contest the injunctive orders, but has not done so.

7 I have read the evidence in the bundle and the skeleton arguments of both parties as well as hearing oral submissions from both and a written closing submission from Mr Burrows. I also heard oral evidence from Dr Lawson, Consultant Psychiatrist.

8 The test for deciding whether a person has capacity to make a decision is set out in the Mental Capacity Act 2005. Section 1 sets out the general principles and the presumption of capacity, namely that a person is presumed to have capacity unless it is established that he or she lacks capacity (section 1(2)).

9 Sections 2 and 3 define the circumstances in which a person lacks capacity. Section 2(1) provides:

> *"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."

10 A person can only lack MCA capacity if he or she has an impairment of, or disturbance in the functioning of the mind or brain as a consequence of which they are unable to make decisions. Capacity decisions are specific to the time that the determination is required.

11 Section 2(4) of the MCA requires questions as to the lack of capacity to be decided on the balance of probabilities and the burden falls on the person asserting the lack of capacity. In this case that is the local authority. The burden of proof is the civil standard.

12 Section 3(1) of the MCA provides that a person is unable to make a decision in relation to some matter if he or she is unable to understand, retain or use or weigh the information relevant to that decision, or is unable to communicate the decision.

13 Section 3(2) of the MCA provides that the information relevant to the decision is required to be presented to the person in a way that is appropriate to his or her circumstances.

14 What constitutes the 'relevant information' includes the reasonably foreseeable consequences of making or failing to make the decision at hand. I have been referred to the Court of Appeal case of *B v A Local Authority* [2019] EWCA Civ 913. This is an appeal against the first instance decision of Mr Justice Cobb. In that judgment the Court of Appeal made it clear that Courts must guard against analysing different capacity decisions as self-contained silos, in order to avoid the Court reaching irreconcilable conclusions on a person's decision-making capacity. This case is also helpful as the Court of Appeal cites with approval a number of formulations from the first instance judgment of Mr Justice Cobb as to the matters a person needs to consider when making decisions about their residence, care, contact, accessing social media and the internet and consenting to sexual relations. These are set out at paragraph 19 of Ms Scott's skeleton argument as follows:

Capacity to decide on residence

The Court of Appeal approved Mr Justice Cobb's formulation at first instance:

"i) what the two options are, including information about what they are, what sort of property they are and what sort of facilities they have;

ii) in broad terms, what sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist);

iii) the difference between living somewhere and visiting it;

iv) what activities P would be able to do if he lived in each place;

v) whether and how he would be able to see his family and friends if he lived in each place;

vi) in relation to the proposed placement, that he would need to pay money to live there, which would be dealt with by his appointee, that he would need to pay bills, which would be dealt with by his appointee, and that there is an agreement that he has to comply with the relevant lists of "do's" and "don'ts", otherwise he will not be able to remain living at the placement;

vii) who he would be living with at each placement;

viii) what sort of care he would receive in each placement in broad terms, in other words, that he would receive similar support in the proposed placement to the support he currently receives, and any differences if he were to live at home; and

ix) the risk that his father might not want to see him if P chooses to live in the new placement."

Capacity to decide on care

The Court of Appeal again approved Mr Justice Cobb's formulation at first instance:

i) what areas she needs support with;

ii) what sort of support she needs;

iii) who will be providing her with support;

iv) what would happen if she did not have any support or she refused it and,

v) carers might not always treat her properly and that she can complain if she is not happy about her care."

Capacity to decide on contact

Mr Justice Cobb's formulation, in the terms set out below was approved:

i) Who they are, and in broad terms the nature of her relationship with them;

ii) What sort of contact she could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker;

iii) The positive and negative aspects of having contact with each person. Theis J added "This will necessarily and inevitably be influenced by [P]'s evaluations. His evaluations will only be irrelevant if they are based on demonstrably false beliefs. For example, if he believed that a person had assaulted him when they had not. But [P]'s present evaluation of the positive and negative aspects of contact will not be the only relevant information. His past pleasant experience of contact with his father will also be relevant and he may need to be reminded of them as part of the assessment of capacity";

iv) What might be the impact of deciding to have or not to have contact of a particular sort with a particular person;

v) Family are in a different category; what a family relationship is."

Capacity to decide on social media

Mr Justice Cobb's formulation in this domain was approved:

"i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;

ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites;

iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended;

iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;

v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;

vi) 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."

Capacity to consent to sexual relations

Finally. the Court of Appeal again approved Mr Justice Cobb's formulation:

"i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;

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."

15 In ***Re SA*** [2005] EWHC 2942 (Fam) the High Court determined that it can exercise its inherent jurisdiction in relation to vulnerable adults. Ms Scott's skeleton argument summarises the legal principles as articulated by Lord Justice Baker in *A Local Authority v BF* [2018] EWCA Civ 2962 at paragraphs 22 and 23 – which is a helpful reminder of the factors the Court must consider:

22 (1) The inherent jurisdiction of the High Court for the protection of vulnerable and incapacity adults remains available notwithstanding the implementation of the Mental Capacity Act 2005: *Re DL* per McFarlane LJ (as he then was) at [52] et seq and Davis LJ at [70] et seq. In the memorable phrase first deployed by Lord Donaldson in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, it is "the great safety net".

(2) The jurisdiction extends to protecting vulnerable persons who do not fall within the categories of those covered by the Mental Capacity Act 2005: see, for example, *Re DL* itself and *London Borough of Wandsworth v M & Ors* [2018] 1 FLR 919; [2017] EWHC 2435 Fam, and further to providing additional protection to adults lacking capacity within the meaning of the Mental Capacity Act 2005 when the remedy sought does not fall within those provided in the Act: see, for example, *City of Westminster v IC* [2008] EWCA Civ 198 and *NHS Trust v Dr A* [2013] EWHC 2442 COP

(3) As to the definition of vulnerability in these cases, the picture is comprehensively outlined in the judgment of Munby J in *Re SA* at paragraphs 77 and 78:

> *77 "It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*
>
> *78. I should elaborate this a little:*
> *i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in Re C (Mental Patient: Contact) [1993] 1 FLR 940. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.*
>
> *ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in In re T (Adult: Refusal of Treatment) [1993] Fam 95, where a vulnerable adult's capacity or*

will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add ... that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.

iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others."

At paragraph 82 he added this:

"In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive."

(4) Insofar as such actions infringe with rights under Article 8 of the Human Rights Convention, the interference may be justified to protect the health of the individual but only if they are necessary and proportionate: see *Re DL*, Mcfarlane LJ at [86] and Davis LJ at [76].

……

(9) As explained by Munby J in *Re SA*, the inherent jurisdiction in this context is exercisable not merely where a vulnerable adult is but also where he is reasonably believed to be incapacitated. Munby J added:

"... it has long been recognised that the jurisdiction is exercisable on an interim basis 'while proper inquiries are made' and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention. That principle must apply whether the suggested incapacity is based on mental disorder or some other factor capable of engaging the jurisdiction." (Paragraph 80)

See also *Re SK* [2004] EWHC 3202 Fam; [2005] 2 FLR 230 and *London Borough of Wandsworth (Supra)* at [84]-[86]. But, as McFarlane LJ pointed out in *Re DL* at [68]:

"Whilst such interim provision may be of benefit in any given case, it does not represent the totality of the High Court's inherent powers."

(10) In exercising its powers as set out above, the court must attach due weight to the individual's personal autonomy. The court must, furthermore, be careful to avoid the so-called protective imperative to which I first referred in the case of *CC v KK* [2012] EWHC 2136 (COP) at [25].

23 For present purposes, the important points from that summary are as follows.

(a) The inherent jurisdiction may be deployed for the protection of vulnerable adults.

(b) In some cases, a vulnerable adult may not be incapacitated within the meaning of the 2005 Act, but may nevertheless be protected under the inherent jurisdiction.

(c) In some of those cases, capacitous individuals may be of unsound mind within the meaning of Article 5(1)(e) of the Convention.

(d) In exercising its powers under the inherent jurisdiction in those circumstances, the court is bound by ECHR and the case law under the Convention, and must only impose orders that are necessary and proportionate and at all times have proper regard to the personal autonomy of the individual.

(e) In certain circumstances, it may be appropriate for a court to take or maintain interim protective measures while carrying out all necessary investigations.

16 I now turn to the evidence. I have a number of capacity assessments undertaken by Ms Clark, the social worker who has known Mary for quite some time. Those assessments were undertaken in 2019 and deal with Mary's capacity to make decisions about residence, care, use of social media, consenting to sexual relations and contact. I am grateful to Ms Scott for setting out in her skeleton, a summary of those assessments and headline findings as follows:

The assessment on residence and care:

a. Mary is able to understand different types of accommodation.
b. Mary does understand that she needs support to ensure that her care and treatment needs are met.
c. She does not understand the risks to her health and wellbeing if she does not receive support. In particular she does not understand that she is extremely vulnerable to being exploited and abused for which she needs support to protect her.
d. She does not understand the risk to her of being the victim of serious abuse if she were to choose to live in accommodation without any overnight support (as she has been in the past).

e. She does not understand the risk to her health in refusing to register with a GP and instead allowing Jim (who does not have any medical training) to provide medical treatment to her.
f. Accordingly, Mary lacks the capacity to make decisions about her care and residence.

The assessment of Mary's capacity to make decisions about social media:

(a) Mary's history of being subjected to prolonged childhood abuse is noted to have had a considerable effect on her functioning and in particular in her being able to identify and measure risks
(b) Mary trusts her online 'friends' because she has chatted to them for a long time and they look nice.
(c) Her understanding of how the internet works is extremely limited.
(d) Mary is unable to assess that there is any risk in allowing known sex offenders to access the internet using her device rather than their own. She does not understand that she may be committing a criminal offence in doing this.
(e) Mary is unable to understand that there is any risk to her from her use of social media and the internet. In particular she does not understand that there is a risk to her in providing her associates (who are sex offenders) with the passwords to her Facebook accounts and that in doing so she may be committing a criminal offence.
(f) Mary lacks the ability to retain the information about the risks that on-line activity can create, despite being given this information in the safety of a psychology session.
(g) Accordingly, Mary lacks the capacity to decide to use social media.

The assessment of Mary's capacity to make decisions about contact:

(i) Mary's inability to identify the risk that those who have subjected to her to serous abuse pose to her, means that she is unable to understand the foreseeable consequences of making a decision to see someone.
(j) Accordingly, Mary lacks the capacity to make decisions about contact.

The assessment of Mary's capacity to consent to sexual relations

a. Mary has difficulty in distinguishing between a consensual and a non-consensual sexual act, she therefore lacks an understanding that she can say no to sexual relationships.
b. This is compounded by the cognitive distortions she has about child abuse and sexual abuse, blaming the victim (including herself).
c. Mary believes that she will not get pregnant as she does not want a baby despite not using contraception.
d. Mary believes that you can tell whether a person has an STI by looking at them.
e. Mary is therefore assessed as lacking capacity to consent to sexual relations.

17 I also have the evidence of Dr Tubb, clinical psychologist who has worked with Mary since July 2018. The local authority does not rely on her assessment of capacity but it contains some background information on Mary which is set out in Ms Scott's skeleton argument in some detail as follows:

a. Mary reports that she had a difficult childhood which included regularly witnessing violence between her parents, being raped at the age of 11 by a friend of her father's and years of neglect.
b. Mary has had a number of relationships with men as an adult which she describes as being emotionally, physically and sexually abusive.
c. Mary has been in a relationship with Jim for several years and has been made aware of his history of offending.
d. Dr Tubb observes that Mary finds it difficult to recognise or name any of her emotional experiences and she is emotionally cut off from many of the more traumatic events in her life. Mary herself is worried that she may become overwhelmed if she allows herself to 'feel'.
e. Mary frequently blames herself for the abusive treatment she has received.
f. Mary became fearful if Dr Tubb labelled the treatment she received as negative and would often retract what she said appearing fearful of repercussions.
g. Dr Tubb observes that Mary's network of 'friends' have effectively brainwashed Mary into following their orders and feeling as though she has little way out. She further observes that Mary has lost any sense of who to trust and what is acceptable behaviour as a result of her emotions being invalidated for so long.
h. Due the absence of nurturing Mary is unable to recognise and manage her feelings, understand the boundaries in the world and develop a sense of identify and self-esteem.
i. Mary's low self-esteem and desperation to acquire some form of nurturing makes her very vulnerable if anyone shows her affection.

18 The Court directed a report from a jointly instructed consultant psychiatrist Dr Lawson. He provided a report dated 25 September 2019 and responses to some questions that were put to him in an addendum report dated 7 November 2019. That report and the answers to the questions formed the subject of the oral evidence before the Court. I set out the summary of those reports from Ms Scott's skeleton argument:

a. Mary has a mild learning disability associated with a confirmed history of complex trauma secondary to emotional deprivation and childhood sexual abuse. She exhibits social and functional skills impairment and significant cognitive impairments evidenced by low academic achievement
b. With respect to all the matters Dr Lawson was asked to assess his conclusion is that Mary has MCA capacity to make those decisions, but her capacity is vitiated by the undue influence of others

Dr Lawson's conclusions in his first report can be summarised as follows:

i. Mary has an impairment in the functioning of the mind or brain arising from her learning disability and history (from childhood) of social and functional skills impairment.
ii. Mary has the capacity within the meaning of the MCA to make all the decisions that he assessed.
iii. However, Mary is a vulnerable adult who is subject to undue influence and coercive control of others such that this impacts on her mind and actions

which vitiates Mary's ability to weigh information and express her true and genuine wishes.

iv. Mary is more likely to make decisions in order to meet the needs of others, including those who abuse her or exert undue and coercive influence on her.

v. Accordingly she '*lacks capacity to conduct the proceedings, not as a result of impairment or disturbance in the functioning of her mind or brain, but as a result of coercion or undue influence and possibly other disabling circumstances that involve her reasoning powers including her abnormal perception of relationships due to emotional and childhood abuse and trauma, her love and affection for men who show her attention in order to take advantage of her and abuse her, their reported behaviour of misinforming and deceiving her, including persuading her not to cooperate with professionals.*'

vi. It is unlikely she will change significantly in the future.

Dr Lawson's second report can be summarised as follows:

i. Mary's adverse childhood experiences have caused significant and lasting adverse effects on her emotional and psychological development, affecting how she perceives, thinks and responds to situations within the restrictive and abnormal and distorted cognitive framework.

ii. The combination of childhood trauma, emotional deprivation and sexual abuse have caused Mary to develop Emotionally Unstable Personality Disorder (EUPD) and Dependent Personality Disorder (DPD). This amounts to an impairment in the functioning of the mind or brain.

iii. Her personality disorders impairs her ability to use and weigh information. She appears to be making unwise decisions when in fact 'her ability to make genuinely autonomous decisions' has been vitiated. Thus, her ability to make decisions is impaired by the psychopathology of the personality disorders.

iv. Mary's personality disorders impacts on her ability to assess the truth of information particularly when given to her by her abusers as a result of her emotional dependence on them. It will also cause her to minimise or reject the truth of information that is given to her by third parties' especially professionals involved in her care.

v. It also impacts on her ability to use or weigh information as it causes her to deny, dismiss or minimise information relevant to risks, especially when put to her by professionals as it challenges her pathological way of thinking. She may acknowledge the relevant information about risk but then dismiss it out of hand –i.e. pathological denial.

vi. The nature of Mary's impairment affects her ability to use relevant information, including the likelihood and severity of risks to her from abusive men, depending on where she resides, the care (support and supervisions) she is provided with and who she has contact with.

vii. Her low self-esteem and emotional reliance on abusive relationships has led to a situation that means she is helpless to break free from the cycle of abuse.

19 The Official Solicitor wanted to explore and test Dr Lawson's evidence to enable the Court to decide whether the Court should be exercising its powers pursuant to the MCA or under the High Court's inherent jurisdiction. As Mr Burrows points out, the jurisdiction between the two is of profound significance to Mary, particularly in relation to her ability to consent to sexual relations. As Sir Brian

Leveson made clear in the Court of Appeal case of ***Re M,*** if a declaration is made by the Court that a person lacks the capacity to consent to sexual relations, the relevant local authority must undertake the closest supervision of the person, to remove the chances of that person engaging in sex. That would effectively mean that Mary will have to be deprived of her liberty for many years to come, if not for the rest of her life.

20 The psychiatric issues are complex. It is not disputed that Mary has a learning disability. The reports of Dr Lawson establish that she has a disorder in the functioning of the mind or brain, by virtue of this and her two personality disorders. The evidence is that the latter are a product of her past experiences. I was provided with the ICD10 and DSM V definitions of personality disorders. Dr Lawson says that the effect of the personality disorders it to make Mary so fearful of disrupting the relationships that she has with others, that her ability to make decisions is vitiated so that she cannot make independent decisions. Therefore, it is his view that she lacks MCA capacity.

21 The Official Solicitor accepts that Mary is a vulnerable adult in respect of whom the Court could make orders under its inherent jurisdiction. The Official Solicitor also acknowledges that Mary has traits of a personality disorder. Mary has been subject to abuse and coercive control for most of her life and this has shaped her personality, so that she is now drawn to abusive and controlling men and she cannot help herself.

22 I am satisfied that Mary has an impairment of, or a disturbance in, the functioning of her mind or brain by reason of her learning disability and personality disorders. Although the personality disorders are significant, her learning disability is not of a degree to interfere with her ability to make decisions.

23 Section 3(1) of the MCA explains the steps in the decision-making process and Dr Lawson's evidence centred around this. He said Mary can understand the relevant information for all the domains he assessed, she can retain that information for long enough to make a decision and can communicate her decision. However, it is his view that Mary is not able to use or weigh the relevant information as her personality disorders prevent her from applying the information appropriately. This judgment focuses on this aspect of the evidence, namely Mary's ability to use or weigh the relevant information.

24 Before I do that, I want to deal with one issue related to pregnancy, which the local authority says calls into question Mary's ability to understand the information relevant to being able to consent to sexual relations. This issue arises out of the assessment Ms Clark undertook of Mary's capacity to consent to sexual relations. It is Ms Clark's view that Mary lacks an understanding that a person can say no to sex and has a choice as to whether to engage in it. Mary also told Ms Clark that she would not get pregnant because she did not want to. Ms Scott asked Dr Lawson about this. He agreed that if Mary believed she would not get pregnant simply because she did not want a baby, this would render her incapacitous. The local authority invites me to find that on this basis Mary lacks capacity to consent to sexual relations. Mr Burrows invites me not to interpret Mary's statement in

this way, and sets out in his closing written submissions, the various assumptions on which this would have to be predicated. These are:

> *First, that what Mary said was to be taken literally as meaning that she believed that not wanting to get pregnant (without more) meant that she could not get pregnant. Dr Lawson was sceptical of that interpretation, and we invite the Court to share that scepticism. It is a short answer given during a capacity assessment, by someone who appears not to have led Dr Lawson during another detailed capacity assessment to have any doubts over Mary's ability to understand relevant information.*
>
> *Secondly, it assumes that she is still unable to understand that information. Again, Dr Lawson's assessment runs contrary to that assertion.*
>
> *Thirdly, it assumes that a belief that runs counter to obvious, objective facts, is incapable of being a basis for a capacitous decision. There is a case on this. In Re MM (an adult) [2007] EWHC 2003 (Fam), per Munby, J. He says at [81] that "If one does not 'believe' a particular piece of information that one does not in truth 'comprehend' or 'understand' it".*
>
> *However, that can only be the case where the failure to believe is the result of a disorder of the functioning of the mind or brain. Or, put another way, a capacitous person may make a decision because he does not believe evidence put before him (that evidence being demonstrably true). The fact he made a mistake does not make his decision incapacitous.*

25 Having considered all the evidence, I am not persuaded that I should conclude on the balance of probabilities, that Mary lacks capacity to consent to sexual relations on the basis of her saying to Ms Clarke that she would not get pregnant because she did not want to. This was one small part of the assessment and this conclusion would run counter to the weight of the other evidence. Further, Dr Lawson was not concerned about Mary's understanding the relevant information when he assessed her capacity. He asked Mary about sexual relations, and he concluded that she understands that pregnancy is possible. I accept that this contradicts what Mary told Ms Clarke, but given that the burden falls on the local authority, it has not satisfied me on this point.

26 Turning then to the evidence of Dr Lawson in detail. He said that Mary could not use or weigh information to enable her to consider the risks associated with decision making as the prism through which she makes decisions is abnormal, and is distorted by her personality disorders. Her pathological emotional needs affect her decision making. He said that a person does not just process decision making cognitively, but also psychologically and emotionally. Information is interpreted by Mary in the context of her abnormal emotional state.

27 Dr Lawson was asked about Mary's decision making when in a relationship with a risky person. He concluded that her decision making was affected by reason of her fear of losing her relationship with them and her fear of abandonment. When asked about her decision making when meeting someone for the first time, and being given relevant information about them, my note of his evidence was that Dr Lawson accepted that she may be able to say, 'I don't want anything to do with this person'. It was his view that an ability to make a decision in respect of those

she was already connected with was more likely to be vitiated than in respect of those with whom she had no relationship.

28 In his report, he explains how the abnormal fear of abandonment and pathological dependence on abusive men causes her to lose objectivity and impairs her ability to use or weigh relevant information. When asked about the impact of non-abusive relationships, he said that the personality disorders will still influence Mary's ability to use or weigh the relevant information as it still operates to a degree, even where the relationship is not an abusive one.

29 In re-examination by Ms Scott, Dr Lawson said that the personality disorders form the foundation for how Mary responds. The personality disorders are so pervasive and ingrained, whether she is having a discussion with someone she knows or not, because it comes from within and affects how she makes her decisions. Thus, her personality disorders operate on her thought-making process whether she is in discussion with abusive men or those that support her such as her social worker or her carers.

30 The local authority asks the Court to find that one cannot separate out the intellectual from the emotional response when making decisions, in all domains, and that Mary cannot apply the information she receives, because she cannot use or weigh that information and that this is all down to her pathological personality disorders.

31 There is one other area of Dr Lawson's evidence which is of some significance. Ms Scott referred the Court to the issue as to whether or not Mary can assess the truth of information given to her. There is evidence of her rejecting as untrue, information given to her by professionals which is objectively true, and evidence of her accepting information from third parties as true, when it is objectively untrue. Dr Lawson said this is not a failure to *understand* the information, but a failure to *believe* it. He agreed that if Mary cannot assess the validity of information when it is given to her, she will not be able to use that information effectively due to her personality disorder. He also accepted that if Mary makes a decision about contact for example, on the basis of incorrect information because she does not accept or believe something that is objectively true, this affects her ability to make the decision about contact because the premise upon which the decision is being made, is wrong.

32 I have been referred to the decision of **MM** [2007] EWHC 2003 (Fam) a decision of Munby J as he was then, in which he held that, "*if one does not believe a particular piece of information then one does not, in truth, comprehend or understand it, nor can it be said that one is able to use or weigh it."* In other words, the specific requirement of belief is subsumed into the more general requirements of understanding and the ability to use and weigh information.

33 The local authority says Mary cannot make some decisions due to her personality disorder which causes her to not be able to believe the relevant information. She is making decisions on a false basis and this is relevant to capacity.

34 In his report, Dr Lawson sets out how this occurs: Mary has a pathological dependence on abusive relationships which causes her to reject the truth of information given to her. This means that she cannot consider satisfactorily the merit or demerits of information given to her in balanced manner. I accept that there is a contradiction in Dr Lawson's evidence. He says Mary understands the relevant information given to her, but he also accepts that she does not always *believe* the relevant information. Having heard his evidence, I find that this is a difference in terminology rather than substance. The case law makes it clear that a failure to believe is a failure to understand and use or weigh in the context of the specific decision-making exercise engaged. I am satisfied, on the balance of probabilities, that Dr Lawson's evidence is that Mary is not always able to understand the relevant information, particularly when making decisions about contact and social media.

35 The critical question for me is whether I am persuaded that Dr Lawson is right that Mary's personality disorders so distort her perception of the world to such an extent that she lacks capacity within the meaning of the MCA, or whether I am persuaded, as the Official Solicitor submits, that it all depends on the context in which she is making a decision, i.e. in some circumstances she can make a decision and in some, her decision making will be vitiated. The Official Solicitor asks the court to conclude that Dr Lawson's evidence means that while Mary is always affected by her personality disorder whether or not her capacity is vitiated depends on the circumstances. If she is subject to coercive control or someone who has influence over her, she will be unable to make the decision for herself.

36 Taking Dr Lawson's evidence as a whole and considering how the personality disorders impact on all Mary's decision-making, I have concluded that they do so distort her perception of the world, that she lacks MCA capacity in all domains. This is where the weight of the evidence lies. The only exception was when Dr Lawson said that there was a possibility that she could sometimes make her own decisions if not with people she knew, but he later clarified that her decision-making is distorted and affected even when she is with those with whom she has a limited relationship and who are not abusive to her. He cited as an example how Mary did not wish to upset Dr Tubb or damage her relationship with her.

37 I conclude that this evidence, taken with her inability to understand relevant information in that she is not always able to believe the truth of what she is told, means the local authority has rebutted the presumption that Mary has capacity to make the range of decisions before the Court. Dr Lawson went further than saying it depended on the circumstances. His evidence was that the personality disorders are pathological and so distort her decision-making as to render her incapacitous. The evidence is that there is no room for a distinction to be made depending on who Mary is in conversation with. So pervasive and distorting are the disorders on the operation of her mind, that even with those with whom she is in a therapeutic or benign and caring relationship, her fear of damaging that relationship is so great that her capacity to make a decision is vitiated.

38 If I am wrong about this, I am satisfied that Mary is a vulnerable adult within the meaning of the test in the case law and the High Court should consider what protective measures should be put in place.

39 There is one further point on the question of Mary's capacity to consent to sexual relations. Although what I have set out above I have found applies to all domains, I must consider separately Mary's capacity to consent to sexual relations. Mr Burrows draws a distinction in his skeleton argument between a decision in this domain and all the others on the basis that it is a visceral decision-making exercise. In the case of *Re IM (An Adult)(Capacity: consent to sexual relations) [2014] 3 W.L.R. 409,* Sir Brian Leveson endorsed the approach of Bodey J in **Re A**. The process of deciding whether to have sexual relations, "*is largely visceral rather than cerebral, owing more to instinct than analysis. 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."*

40 Relevant to this consideration is the other point the local authority submitted to the Court, namely the proposition that Mary does not understand that she can say no to having sexual relations. In other words, she does not understand that sexual relations are consensual. If that is right, then that would render her incapacitous. The local authority relies on the evidence of Ms Clarke in this regard. Dr Lawson agreed that if the Court found that Mary did not understand that she had a choice about whether or not to engage in sexual relations, then this would render her incapacitous. In his evidence, he agreed with Ms Clarke that while Mary understood as a matter of theory that a person can say no to sex, she did not understand the choice when it related to her. I agree that this is what the evidence shows.

41 I am therefore satisfied that Mary does not appreciate she has a choice as to whether or not to have sexual relations. The case law makes it clear that this must inform capacity, and so I conclude that the local authority has rebutted the presumption in this domain as well.