



Neutral Citation Number: [2023] EWCOP 44

Case No: COP13494871

**COURT OF COURT OF PROTECTION**

Date: 20 October 2023

**Before:**

**Mr Justice Poole**

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**Re PN (Capacity: Sexual Relations and Disclosure)**

**Between:**

**PN  
(By his litigation friend, the Official Solicitor)**

**Applicant**

**- and -**

**(1) Durham County Council  
(2) North East and North Cumbria Integrated  
Care Board**

**Respondents**

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**Victoria Butler-Cole KC** (instructed by **Irwin Mitchell solicitors** on behalf of the **Official Solicitor**) for the **Applicant**  
**Joseph O'Brien KC and Simon Garlick** (instructed by **Durham City Council**) for the **First Respondent**  
**Brett Davies** (instructed by **Hempsons**) for the **Second Respondent**  
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Hearing dates: 10 and 11 October 2023  
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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 incapacitated person and members of their family, and the place where they live, 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.

## Mr Justice Poole:

### Introduction

1. This judgment concerns a 34 year old man, PN, who has lived in the care of the First Respondent Local Authority for many years due to having significant care needs as a result of his mild learning disability and autistic spectrum disorder (ASD). There is no dispute about PN's diagnoses or his lack of capacity to conduct these proceedings. Previous declarations have been made that he lacks capacity to make decisions about his residence, care, contact with others, and use of social media and the internet. The issues at this hearing are whether PN lacks capacity to make decisions about engagement in sexual relations, about disclosing information about the risk of sexual harm he poses to others, and about allowing the Local Authority to disclose information about the risk of sexual harm he poses to others ("the decisions").
2. After hearing evidence from Dr Ince, Consultant Psychiatrist, who gave oral evidence and who has produced five substantive reports mostly on capacity, but also addressing best interests, and Mr Curran, Allocated Social Worker, who also gave oral evidence and who has assessed PN's capacity in relation to the second and third decisions, as well as consideration of a large volume of written evidence including a statement from Mr York from Irwin Mitchell Solicitors who act for the Official Solicitor, Counsel for all three parties submitted that PN has capacity to make the decisions. I agree, for the reasons set out in this judgment, but determination of PN's capacity in relation to the decisions has not been straightforward.
3. PN has challenged the standard authorisation granted to care home 1 by the Local Authority. PN has lived at care home 1 for a number of years. I met him there earlier this year and had the pleasure of conversing with him in the company of a carer for twenty minutes or so. He is a big man with a big presence. He has strong views that he sometimes expresses with conviction. He can be unpredictable in his behaviour. He is interested in computer games which he often plays long into the night. He has a brother with whom he spends time once a week. He requires support in relation to many activities of daily living and has one to one care 24 hours a day.

### Evidence

4. PN was diagnosed with ADHD when younger but there is no evidence that, as a mature adult, he is affected by ADHD. Dr Ince has advised that the diagnosis of ASD is based upon terminology within the Diagnostic and Statistical Manual, Fifth Edition, and the presence of "persistent difficulties with social communication and social interaction" which "limit and impair everyday functioning". PN's ASD limits his ability to empathise. In Dr Ince's opinion both PN's learning disability and ASD are lifelong and will not improve in terms of his global cognitive and adaptive functioning. He further advises that PN has been offered a range of interventions over the years and that he does not believe that "he will make substantive gains in terms of the internalisation of risk management and self-awareness of risk and – as such – the maintenance of the current level of risk is derived from eternal strategies only." Dr Ince also advised the court that PN has a full scale IQ of 69. PN has no relevant communication difficulties.
5. The risks to which Dr Ince was referring arise from PN's sexual offending behaviour. PN has a history of offending behaviour, some of it violent, including the possession of

weapons. In addition, he has a long history of reported sexual offending. There is a body of evidence confirming this history but PN has largely escaped the attention of the police and the criminal justice system – he has one “warning” in 2006 for “Sexual assault – Intentionally Touch Female – No penetration”. However, I have been provided with a very long list of incidents of concern stretching back to 2001 which includes multiple examples of sexual assault by unconsented-to touching, typically of women’s breasts or legs. He has also made sexually offensive remarks, for example in a vape shop in 2018 when he said to a woman working there, “It’s a shame you don’t work at [care home 1] I would pull you by the hair and chuck you around and have my way with you like I do with staff”. In fact he has not behaved in that way with staff on any occasion but in recent years, his sexual assaults by touching have been against female members of staff and female residents at care home 1. Although PN has denied these past incidents, there is good evidence that they occurred and all parties have proceeded on that basis. The assaults appear to be opportunistic: if he finds himself near a woman, unsupervised, then he may go closer to her and touch her sexually without her consent. Most recently, on 24 August 2023, he was in a minibus on an outing when he grabbed the breasts and leg of a female carer. I have no evidence that he has ever committed rape, nor that he has had sexual intercourse with consent and so his sexual relations have not resulted in a risk of pregnancy, and no such risk is likely to arise in the future. There is no suggestion that he has been involved in intimate sexual relations of a kind that could result in the transfer of a sexually transmitted disease.

6. I have had regard to all the detailed evidence in this case but the key evidence on the issue of capacity to engage in sexual relations is as follows:

i) I have referred to PN’s offending history. When he was much younger it included reports of touching children, something he denies. There do not appear to be any reports of that kind for a number of years. He has one police warning, but no convictions. He is an avid consumer of online pornography. I have no evidence that he has experience of a sexual relationship, only sexual encounters which he has initiated without the other person’s consent, and sexual language used in contexts which have offended or alarmed other people. His sexual interest appears to be with adult women. Given his lack of real life experience of a sexual relationship, and his learning disability, his consumption of pornography is likely to have distorted his view of how sexual activity with women might be initiated or sustained.

ii) On 1 November 2020, Dr Ince stated that in his opinion,

“I am mindful as to the amended test within the referenced *Re: JB* judgment and I would agree that, taking into consideration PN’s autism spectrum disorder and mild learning disability as the relevant causative nexus, the crux of the matter is likely to rest upon whether he has the ability to understand the issue of consent from the perspective of “the other person” ...

It is my current view that it is unlikely that he will develop the requisite skills so as to satisfy the amended test, and I base this both upon the intrinsic characteristics of his mental disorders and also that a large amount of therapeutic work has already been undertaken with him ... without evidence of any substantive

internalisation of risk management or any shift within his undermining knowledge and consequent behaviours.”

- iii) In April 2021, a Community Nurse carried out an assessment of PN using the Socio-Sexual Knowledge and Attitudes Assessment Tool – Revised (SSKAAT-R). PN engaged well during the assessment sessions and it was concluded that,

“PN’s main strength was within the healthy sexual boundaries section ... PN was able to differentiate between male and female and adult and children as well as identifying what is rape and sexual assault, covering legality and consent correctly identifying the answers. PN highlighted that this is illegal and that he would be arrested for it...

Despite knowing that it is not [acceptable] to touch females and knowing the consequences of these behaviours, this has not been enough to stop his impulse to touch females in negative ways.”

- iv) Following consideration of the SSKAAT-R assessment, Dr Ince revised his opinion on PN’s capacity to engage in sexual relations. In his report of 9 December 2021, he said,

“[3.1.5] ... there is sufficient evidence to conclude that whilst PN may continue to engage in sexualised behaviours that would be prosecutable under the current legislation, PN has sufficient understanding and can retain and weigh that information, such that he has capacity to engage in sexual relations.”

[3.6.2] I do not believe that it is appropriate to consider that, at times that PN sexually offends, this constitutes a lack of capacity.

[3.6.3] PN continues to express a range of dissocial attitudes based upon race gender and sexuality: he continues to act in a manner that is predatory and opportunistic and thus poses a significant risk of harm.”

- v) Mr Curran, PN’s allocated social worker, completed assessments with PN on three days. He has a good rapport with PN and I was impressed by his thoughtful insights into PN’s character. He said that whilst PN denied past offending, even offences he had previously accepted, Mr Curran considered that PN was aware of his past offending and that the denials were motivated by embarrassment and fear of the consequences of making admissions. Insofar as he did admit his past offending, PN said, “I accept I have been accused but none of them were serious.” He accepted that he had been accused of “touching female staff between the legs”. During discussions with Mr Curran about what others might need to know about PN’s past sexual offending, which I shall address later in this judgment, PN said that someone might want to know his history “so they can protect themselves”.

- vi) Albeit in a “classroom” type setting, PN has demonstrated a reasonably good awareness of other people’s ability to consent and the need for them actually to consent to sexual relations. The SSKAAT-R assessment is one example of such evidence.
- vii) In his oral evidence, Dr Ince was asked to analyse why, if as he confirmed, PN can understand, retain, and weigh the relevant information in relation to the decision to engage in sexual relations, including the relevant information in relation to consent, he nevertheless sexually assaults women. Dr Ince’s view was that PN was able to use the relevant information but that he chose to touch women even though he knew they had not consented to him doing so. His impulse to touch women in this way was not rooted in his ASD. He was not generally impulsive – there is no evidence that he acts on impulse in other fields of activity. Dr Ince does not accept that PN is overwhelmed by impulse due to his impairments.
- viii) Reports are that when PN is with his brother or with a member of staff whom he respects, he does not engage in sexual offending. This suggests that he is capable of suppressing his sexual impulses.
- ix) After the most recent sexual assault, on 24 August 2023, PN admitted what he had done and told staff afterwards that he felt bad about his actions. This shows awareness both of the consequences of his actions and that he ought not to act as he did on that occasion.
- x) Dr Ince’s opinion is that even if the view were taken that PN is unable to use the relevant information about consent at a moment when he has an impulse to touch a woman sexually, that inability is not caused by his ASD and/or learning disability. His impulsive actions are not a manifestation of his impairments but are behaviours that stem from PN’s character and outlook.

### **The Legal Framework**

7. The test for capacity in ss2 and 3 of the Mental Capacity Act 2005 (MCA 2005), together with the principles in s1, apply to the decisions. The Supreme Court’s decision in *A Local Authority v JB* [2021] UKSC 52, [2022] 3 All ER 697 (“*JB*”), and the Court of Appeal judgement of Baker LJ in the same case, [2020] EWCA Civ 735, [2021] 1 All ER 1103, provide this court with a definitive guide to applying the test for capacity to make decisions to engage in sexual relations. At paragraphs [63] to [77] of his judgment in *JB*, Lord Stephens, with whom the other Justices agreed, set out the correct approach to determining capacity in all cases, endorsing the judgment of McFarlane LJ in *York City Council v C* [2013] EWCA Civ 478; [2014] Fam 10. MCA 2005 s2(1) provides a single test for capacity which falls to be interpreted by applying the remaining provisions of ss2 and 3:

“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.”

The “material time” is the specific time when the decision has to be made. Having identified the matter in respect of which decision is made, and the information relevant to the decision, which will include the reasonably foreseeable consequences of making or not making the decision, the first question is whether P is unable to make a decision for himself in relation to the matter (the functional test). If so, then,

[78] ... the second question that the court is required to address under s 2(1) is whether that inability is ‘because of’ an impairment of, or a disturbance in the functioning of, the mind or brain. The second question looks to whether there is a clear causative nexus between P’s inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P’s mind or brain.

[79] The two questions under s 2(1) are to be approached in that sequence.”

8. Prior to the judgments of the Court of Appeal and Supreme Court in *JB*, capacity in relation to sexual matters had been framed as a question of whether P had capacity to consent to sexual relations. Following *JB*, the question to address is whether P has capacity to engage in sexual relations. At [84] Lord Stephens approved the formulation of the information relevant to a decision to engage in sexual relations given by Baker LJ at paragraph [100] of his judgment:

‘... the information relevant to the decision [to engage in sexual relations] *may* include the following:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
- (2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.’  
(Emphasis added.)”

Lord Stephens remarked that he had added emphasis to the word “may” because Baker LJ next considered at paras [101] to [103] of his judgment whether the information relevant to the decision to engage in sexual relations *must* always include all of the matters identified in para [100] so as to prevent the tailoring of relevant information to

accommodate individual characteristics. For example, (4) may not be relevant information for the decision of a homosexual man. Although Baker LJ had refrained from deciding whether the information could be tailored, because it was not necessary to decide that issue in JB's case, Lord Stephens had earlier noted at [72],

“[72] If the formulation of "the matter" for decision can properly be described as person-specific, then the information relevant to the decision may be different, for instance depending on the characteristics of the other person, see *TZ* at para 55 (risk of pregnancy resulting from sexual intercourse is not relevant to a decision whether or not to engage in, or consent to, sexual relations with someone of the same sex) or the risks posed to P by an individual who has been convicted of serious sexual offences, see *York City Council v C* at para 39. Moreover, the practicable steps which must be taken to help P under section 1(3) MCA may be informed by whether "the matter" in relation to sexual relations may be described as person-specific. For instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where he will remain unable to understand the diverse responses of many hypothetical sexual partners. Furthermore, if the matter can be described as person-specific then the reasonably foreseeable consequences of deciding one way or another (see section 3(4)(a) MCA and para 73 below) may be different. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner has developed dementia. Finally, the potential for "serious grave consequences" may also differ.”

9. In *Hull City Council v KF* [2022] 33 I adopted the person-specific approach and decided that although KF had capacity to engage in sexual relations in general she lacked capacity to decide to engage in sexual relations with a particular person who had subjected her to life-threatening abuse. Because of her impairments she could not understand, retain, and weigh or use information relevant to the decision to engage in sexual relations with that man. But if the decision to engage in sexual relations can be person-specific, such that the relevant information can depend on the characteristics of the other person and P's ability to understand risk in relation to that other person, then the relevant information might also depend on other circumstances such as the nature of sexual relations in which P is likely to engage. The term “sexual relations” covers a very wide range of contact and activity. Information relevant to a decision to agree to have penetrative sex with a long term partner might be different from information relevant to a decision to initiate oral sex with a stranger. Sexual activity has many different forms and takes place in many different circumstances. In *London Borough of Tower Hamlets v NB and another* [2019] EWCOP 17, Hayden J made a determination about the capacity of a woman with a "general global learning difficulty" who at the time of the hearing had been married to her husband for 27 years. In contrast, the individual subject to the proceedings in *JB* does not appear to have been engaging in sexual intercourse but had a history of fixating on certain women, targeting vulnerable women, and “inappropriate” touching [20]. The Supreme Court proceeded on the basis

that a decision whether to initiate sexual activity including “inappropriate” touching was a decision to “engage in sexual relations”.

10. Baker LJ giving the lead judgment in the Court of Appeal in *JB*, summarised Hayden J’s comments in *NB*, as follows:

(1) The "general" test for capacity to consent to sexual relations ... presented a difficulty on the facts of the case where there was only one individual with whom it was contemplated that NB was likely to have a sexual relationship, namely her husband of 27 years. "It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific" (paragraph 12).

(2) "On the facts of the case, for example, it may be that her lack of understanding of sexually transmitted disease and pregnancy may not serve to vitiate her consent to sex with her husband" (paragraph 13).

(3) The issues were integral to the couple's basic human rights and it was "important that the relevant test should not be framed in such a restrictive way that it serves to discriminate against those with disabilities, in particular those with low intelligence or borderline capacity" (paragraph 14).

(4) Baroness Hale's observation in *R v Cooper* (supra) that "it is difficult to think of an activity which is more person and situation specific in sexual relations" was "a very forceful point" (paragraph 16).

(5) The applicable test in the Court of Protection did not necessarily exclude the person-specific approach (paragraph 16).

Whilst Baker LJ in *JB* did not endorse that approach and left open the question of whether the relevant information in relation to decisions about engaging in sexual relations must be the same for every case, Lord Stephens judgment appears to me to recognise that the relevant information may differ from case to case. He expressly held that in certain cases the approach should be person-specific and that the “reasonably foreseeable consequences of deciding one way or another may be different” [72]. He gave the example that the risk of a sexually transmitted infection may not be part of the relevant information that has to be understood, retained, weighed or used if the circumstances of the case render that irrelevant. Hence, Lord Stephens’ judgment establishes that there is no requirement that all of Baker LJ’s relevant information must apply in every case. The relevant information will depend on P’s circumstances, their sexual orientation, sexual practices and preferences, whether there is an identifiable person or persons with whom they are likely to have sexual relations, and what the characteristics are of that person or those persons.



11. Now that understanding of the consent of others requires to be considered in the context of capacity to engage in sexual relations, it is natural for Local Authorities and the courts to consider the safety and rights of others. The courts have long warned against the “protective imperative” driving the capacity assessment towards an outcome that protects P’s safety rather than their autonomy. In *NB* (above), Hayden J observed at [27],

“The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacitous, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P’s right to a sexual life on the other.”

Similarly, following *JB*, there may be a natural desire to protect those with whom P might want to have sexual relations, in particular in cases where P has a history of sexual offending. Lord Stephens repeatedly refers to the MCA 2005 protecting not just P, but others – at [92], [106], and [107]. However, it seems to me, although the issue of the consent of others to sexual relations has entered the list of relevant information, the Court of Protection must not allow the desire to protect others unduly to influence a clear-eyed assessment of P’s capacity. The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere. If P would otherwise have capacity, then the court should not allow its understandable desire to protect others to drive it to a finding that P lacks capacity, thereby depriving P of the right they would otherwise have to a sexual life. The Court of Protection should not assume the role or responsibilities of the criminal justice system. One of the core principles of the MCA 2005 is that “a person is not to be treated as unable to make a decision merely because he makes an unwise decision” – s1(4). Deciding to act in a way that might be a criminal offence would be an “unwise” decision. Such decisions might contribute to a determination of a lack of capacity, but P is not to be treated as unable to make a decision merely because they may make a decision to act in a way that might amount to a criminal offence.

### **Capacity to Engage in Sexual Relations**

12. Accordingly, it is important to consider PN and his particular circumstances. PN is heterosexual. Due to his living arrangements, character, and impairments he is not, has never been, and is very unlikely to be involved in a relationship or even in an encounter where there is a prospect of the other person becoming pregnant or where there is a chance of either contracting a sexually transmitted infection. The decisions he will be making in the future are in relation to touching others. I cannot completely exclude the possibility that PN might find himself having to decide about engaging in sexual intercourse but in reality, paragraphs (1), (4) and (5) of Baker LJ’s formulation of the relevant information are not likely to be relevant to PN’s decision-making about sexual relations. Nevertheless, as it happens, the evidence is very clear that he has an

understanding of and is able to retain, and weigh or use the relevant information within those paragraphs of Baker LJ's formulation.

13. The evidence does not reveal instances of PN being propositioned or having to decide whether he consents to sexual relations. All his sexual activity has been initiated by him. Paragraph (3) of Baker LJ's formulation of the relevant information has little to no application to PN. He is unlikely to receive an offer to engage in sexual relations, but if he were the evidence is that he would be able to understand, retain, and weigh or use information that he can give or withhold his consent. Hence, I am sure that PN understands the mechanisms of sexual intercourse, that pregnancy might result that sexually transmitted infection is a risk of sexual intimacy, and that he is able to consent to sexual relations.
14. PN is not known to fixate on any particular person or to identify vulnerable women, but he does opportunistically touch women's breasts and legs without their consent. The key relevant information therefore is at paragraph (2) of Baker LJ's formulation in *JB*: the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity.
15. I remind myself that the bar must not be set too high. The evidence satisfies me that PN understands that if he initiates sexual activity with another person they must be able to consent and they must in fact consent. He has discussed this at a number of assessments and shows a basic but clear appreciation of this information. This is the view of Dr Ince and all the parties agree. It is also beyond dispute that he can retain that information.
16. Given that, as Lord Stephens made clear, consent is a "necessity" condition for engaging in sexual relations, it is not really information to be weighed alongside other information when deciding whether to engage in sexual relations. At the hearing, there was a focus on PN's ability to *use* the relevant information, in particular in the moment when he initiates sexual activity by touching another person without their consent. After careful consideration of all the evidence but in particular the insights of Mr Curran, the opinion evidence of Dr Ince, and the witness evidence of Mr York, I am satisfied that in the moment when PN feels the impulse to touch a woman without her consent, he remains able to use the relevant information. He has sufficient understanding of the necessity of consent that he retains that understanding even at those moments. He chooses to surrender to the impulse but that does not mean that his ability to use the information is lost. To borrow a phrase used by Dr Ince during his oral evidence, PN knows that he should not touch, but thinks "Hang it! It is what I want to do." In any event, accepting as I do the expert opinion evidence of Dr Ince on this matter, I find that PN surrenders to his impulse because of his character and outlook not because of his impairments. His impairments do not cause him to lose his control in other fields of activity, or his sexual control in other settings. His sexual impulsivity is not a manifestation of his ASD and/or learning disability. There is no pattern of impulsivity due to his impairments of which his sexual offending is a part. When with his brother or others whose disapprobation he might want to avoid, he controls any impulses to sexually touch women. He disregards the need for consent but he remains able to use the information he retains, namely that the consent of the other person is necessary.
17. I am mindful, as was Dr Ince, that if it is found that PN chooses to disregard the consent of others to sexual touching, rather than being unable to understand, retain and use information that consent is necessary for sexual relations, then he may be found by the

police or others in the criminal justice system to be capable of committing criminal offences. However, I have to make decisions on capacity according to the evidence and applying the tests within the MCA 2005 and for the purposes of that Act.

18. I have considered whether there is further relevant information that I should take into account. The information relevant to a decision whether to engage in sexual relations includes the foreseeable consequences of making the decision. One foreseeable consequence of sexually assaulting another person is that there may be adverse consequences for the perpetrator. For PN this might include retaliatory actions such as an assault on him, or the involvement of the criminal justice system. It would be a very severe consequence for him to be incarcerated or made subject to a hospital order, for example. It is clear from *JB*, that these are reasonably foreseeable consequences in a case where P engages in unconsented to sexual touching: they are part of the relevant information in a such a case. As Dr Ince pointed out during his oral evidence, PN's past offending conduct has not had many adverse consequences for him. He has had one police warning but no criminal sanctions. His care home arrangements have not been changed very much as a result of his conduct. Perhaps because of his size and manner he has not suffered any retaliatory actions. Nevertheless, his discussions on assessment, including during the SSKAAT-R, show that he knows that touching another without their consent, in particular sexual touching, is illegal and may result in police involvement. The fact that he does not act opportunistically when with his brother, for example, shows that he is aware of the likely response of an authority figure to sexual assault. His history suggests that he has managed to avoid sexually assaulting others in circumstances where they or another person with them might react violently towards PN. I am quite satisfied, on the evidence provided to me, that PN understands and retains the information that there are liable to be such repercussions from his decisions.
19. If the relevant information includes the reasonably foreseeable consequences for PN of sexually touching another without their consent, does it also include the reasonably foreseeable consequences to that other person? During closing submissions, I raised the question of whether the reasonably foreseeable consequences of the decision to engage in sexual relations by touching a woman sexually without her consent, include the distress and loss of autonomy suffered by the woman. If so, does the lack of empathy which PN suffers as a result of his ASD prevent him from using the relevant information about consent? Can it be said that PN cannot understand, retain, weigh or use information that sexual relations without the other's consent will cause distress and harm to that other person? In response, Ms Butler-Cole KC submitted that *JB* decided that whilst the relevant information included the necessity of consent it did not include the reasons why consent was necessary, or the impact on the other person of engaging in sexual activity without their consent. She took me to paragraphs 73, 75 and 93 of *JB*.

[73] The information relevant to the decision includes information about the 'reasonably foreseeable consequences' of a decision, or of failing to make a decision: s 3(4). These consequences are not limited to the 'reasonably foreseeable consequences' for P, but can extend to consequences for others. This again illustrates that the information relevant to the decision must be identified within the factual context of each case. In this case there are reasonably foreseeable consequences for JB of a decision to engage in sexual relations, such as imprisonment for

sexual assault or rape if the other person does not consent. There are also reasonably foreseeable harmful consequences to persons whom JB might sexually assault or rape.

...

[75] On the other hand, there should be a practical limit on what needs to be envisaged as the ‘reasonably foreseeable consequences’ of a decision, or of failing to make a decision, within s 3(4) of the MCA so that ‘the notional decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity’: see *Re M (An Adult) (Capacity: Consent to Sexual Relations)* at para [80]. To require a potentially incapacitous person to be capable of envisaging more consequences than persons of full capacity would derogate from personal autonomy.

...

[93] It is correct that the adverse consequences for others were not specifically listed by the Court of Appeal as part of the information relevant to the decision to engage in sexual relations (see para [84] above). However, it was not necessary to do so as these adverse consequences would not arise given that the relevant information includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity.”

Lord Stephens therefore acknowledged the argument that the potentially harmful consequences to the other person of sexual assault or even rape should be part of the relevant information P must be able to understand, retain, and weigh or use in order to have capacity to make a decision to engage in sexual relations. He then cautioned against requiring too much of P in relation to envisaging consequences, before concluding at [93] that it was not necessary to include the adverse consequences for others as part of the relevant information. Lord Stephens’ view that the inclusion of the adverse consequences for others was not necessary because they would not arise, is open to argument. However, I am bound to follow the decision of the Supreme Court. The bar should not be set too high. The Supreme Court has determined that understanding of the necessity of consent is sufficient. If P is able to understand, retain, and weigh or use information that it is necessary for others to be able to consent, and to consent in fact to sexual relations with him, then the court need not enquire into whether P has the ability to understand or envisage the ramifications of initiating or continuing sexual relations without consent.

20. Accordingly, having considered the relevant information pertinent to PN, I am satisfied that he is able to understand, retain, and weigh or use all that information when making

decisions, both by giving his consent to sexual relations and by initiating sexual activity. The presumption of capacity to decide to engage in sexual relations is not displaced.

**Capacity to Decide to Disclose Information to Others, or Allow the Local Authority to Disclose such Information**

21. After testing the evidence of Mr Curran and Dr Ince, the parties agreed that PN had capacity to decide whether to disclose information about the risk of sexual harm he poses to others, and to allow the Local Authority to disclose information about the risk of sexual harm he poses to others. Again, I agree. Mr Curran's evidence was the key to these determinations. He has developed a good rapport with PN. It is true that during Mr Curran's assessments, PN denied his past offending. He also made the point that he had not been convicted of anything, so why would he have to disclose these matters. Some capacitous individuals might share that view. As to his denials, he has at times simply denied other facts that are patently true. For example, he gave Dr Ince wrong information about his name and age. Dr Ince said that he could be very plausible when giving misleading information. However, at other times he has been more open. Mr Curran reported,

"PN was asked if he thought he should tell someone about his offending history due to it being "a mile long". PN stated "no, not when you first meet, only when you trust them". PN was asked if he thought someone he met had a right to know about his offending history. PN stated "not necessarily, they could just be horrible". I asked PN why he thought someone did not have the right to know and he stated, "don't know".

I asked PN if he understood why someone might want to know about his history. PN stated "so they can protect themselves".

I asked PN if he thought that someone he met might consider his offending a risk. PN stated "might do" I asked him to explain this to which he stated, "don't know".

I then asked PN to imagine that he met someone who had been accused of the things that PN had listed and what he might think of that person. PN stated "I would think they were crazy in the head". I asked PN if he would want to know this information about someone else to which he stated "not bothered. Only care about present and future".

22. The notes of Mr York's attendance on PN in October 2023 are consistent with the discussions Mr Curran had with PN several months earlier. Mr Curran's perception was that PN was aware of his offending history and that when he denies it, his motivation is embarrassment and fear of getting into trouble. Mr Curran has got to know PN well and, given PN's responses such as those set out above, I accept that Mr Curran's insight is accurate. PN does understand that he has a history of sexual offending which others might wish to know in order to protect themselves.
23. I have already expressed concern that the natural desire to seek to protect others from unwanted sexual contact or sexual assault must not drive the assessment of P's capacity.

The second and third decisions in relation to which I have to consider PN's capacity, are raised by the Local Authority because if, as is the case, I find that PN has capacity to engage in sexual relations, there are understandable concerns about how both he and others can be protected. Disclosing information about his offending history might be thought to protect others from being victims of sexual assault from PN, and to protect PN from the adverse consequences to him of committing sexual assaults. However, if I were to find that PN lacks capacity in relation either to disclosing information about his offending history, or to allowing the Local Authority to disclose that information, I do wonder what practical steps could be taken to share information with others. I am put in mind of the young David Copperfield being forced to wear a sign on his back warning others, "He bites". A capacitous person with an offending history might struggle with decisions about when and how to share that information with others. Would it be on first meeting, or when a relationship was established? Would the information be given with caveats such as "I have never been convicted"? In any event, under the MCA 2005, "best interests" decisions about sharing information would have to be in PN's best interests, not in the best interests of those whom the decisions might protect.

24. I have concerns that it is not necessary or appropriate for the court to consider the second and third decisions in issue. Counsel could not point to any previous judgment relating to such decision-making. Having determined that PN has the ability to understand, retain, and weigh or use information relevant to decisions to engage in sexual relations, including the need for the other person or persons to be able to consent and in fact consent, then, borrowing Lord Stephens' wording, it does not appear to be "necessary" to consider whether he has capacity to make decisions about sharing information relevant to consent with others. I understand that the Local Authority are more concerned with the disclosure of information to someone with whom PN might enter into closer relations, which might lead to sexual intimacy or intercourse, but his offending history is not particularly relevant to such a situation. He has never been in a relationship, he has not, it appears, had intercourse, and he has not ever been accused trying to rape anyone or to persist with an assault after his initial sexual contact has been repelled. Decisions about disclosure of information about past behaviour to others are very complex. Many capacitous individuals would struggle with them. It is important not to allow consideration of capacity to make a complex decision on disclosure to deprive PN of autonomy in relation to his decisions to engage in sexual relations for which he does have capacity.
25. Hence, I hesitate to set out what I regard as the information relevant to the second and third decisions I have to consider, lest it be wrongly taken as guidance for future decision-makers. However, for present purposes I assume that the relevant information will include the risks to others that arise from the previous offending, how the disclosure of information might be given so as to allow others to avoid or mitigate such risks and prevent P from committing offences which could have adverse consequences, and the reasonably foreseeable consequences of sharing or not sharing the information. In PN's case there are a large number of possible ways in which he might share information, from providing strangers with a long list of previous behaviour, to saying to someone with whom he has formed a relationship, "I have been accused of touching women inappropriately before, but I will not do so with you."
26. As it is, I find that PN does have the capacity to make decisions about sharing information about his offending history with others. The bar must not be set too high,

and I am satisfied that PN is able to understand, retain, and weigh or use, the relevant information. He may choose, as might any capacitous person, not to share information about his offending history, but he is able to make a decision whether or not to do so. Desirable though it is to try to protect others from the risk that he presents, I cannot allow that to detract from a clear-eyed application of the statute.

27. In his discussions with Mr Curran, PN made clear his opposition to the Local Authority disclosing his offending history to others. He understood why they might want to do so: “to keep them and me safe”. He recognised the consequences of doing so, namely the likelihood that others would end any relationship with him because they would not want “to be with a guy with that many convictions.” He suspected that the Local Authority would want to share the information to “keep their asses in check” by which I understand that he meant “to cover their backs”. Again, Mr Curran’s assessments are extremely helpful to the court. He concluded,

“PN was able to demonstrate that he understood the information relevant to the decision [to allow the local authority to share information with others] including his history of offending, that disclosing this information would likely lead to a breakdown in any potential relationship and that professionals may share this information on his behalf. PN was able to retain this information and use it to weigh up potential options. He was then able to communicate this decision verbally.”

I agree with that conclusion and find that PN has capacity to make this decision.

28. In making these determinations I have also considered whether they are consistent with the other determinations in relation to PN’s capacity to make decisions, in particular the previous determination by the court that he does not have capacity to make decisions about contact with others. In *Hull City Council v KF* (above) I observed at [24],

“It is difficult to see how a person who lacks capacity to decide to have contact with a specific person could have capacity to decide to engage in sexual relations with that person. Sexual intimacy is a form of contact with another or others.”

Here, on the facts of the present case, the determinations of capacity to decide to have contact with others and to engage in sexual relations are not person-specific. Is it inconsistent to find that in general PN lacks capacity to have contact with others but does have capacity to engage in sexual relations with others? On the face of it, those conclusions do not sit easily together. However, on the facts of this case, I am satisfied that there is no inconsistency. Ms Butler-Cole KC reminded me of the past incident when PN entered a vape shop and made sexually offensive remarks, as set out above. He did not initiate any sexual activity but he certainly offended against socially acceptable behaviour in his contact with others. Dr Ince’s opinion evidence is that PN has capacity to engage in sexual relations but not to decide on his contact with others. PN understands sexual boundaries but he does not understand social boundaries. He sometimes stares at other people and he stares at women’s breasts. He knows, as I have found, that he ought not to touch them without their consent. He retains that understanding, and can weigh or use the information even when the urge takes him to touch the other person. However, he does not have the same understanding in relation

to staring at or speaking to others. He does not understand the foreseeable consequences of speaking offensively to others, but he does understand the foreseeable consequences of touching them without consent. His lack of understanding in relation to non-sexual contact with others is because of his impairments. That was the conclusion of Dr Ince. Mr Curran's evidence is consistent with that conclusion. Sexual boundaries are perhaps clearer and so more easily understood by PN even with his impairments, whereas social boundaries are less clear to him and are not understood by him because of his impairments. I bear in mind the relevant information in respect of contact with others as set out by Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam) and summarised by Cobb J in *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3:

- “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.”

The contact in question in the present case is very broad – it comprises contact with the public in all manner of potential situations, such as travelling with others, entering a shop, or being in a public area. There are no particular issues about PN's past decisions about whether to spend time with specific people, such as his brother, but there is a concern that he might wish to have in person contact with someone he has “met” online. With PN, his inability to understand social boundaries because of his impairments, means that he cannot understand and weigh or use information about the positive or negative aspects of interacting with members of the public, or other people with whom he does not have a relationship. He cannot foresee the reasonable consequences of interacting with others with whom he has contact when he says offensive things to them or acts in an intimidatory manner. Whereas he understands the disapprobation attached to sexually touching a woman without her consent, he does not understand that he is at risk from adverse reactions to speaking offensively to others. The sexual boundaries are understood by him, the social boundaries are not. Accordingly, a refinement should be



made to the previous finding that PN lacks capacity to make decisions about contact with others, namely that his lack of capacity is in relation to non-sexual contact with others.

### **Conclusion**

29. In conclusion, I find that PN does have capacity in relation to the three decisions under consideration and that those findings are consistent with the previous finding that he lacks capacity to make decisions about (non-sexual) contact with others. I appreciate the difficulties those caring for and supporting PN may have in navigating the consequences of findings in relation to capacity. The courts need to try to make decisions that are coherent and that provide clarity for carers and those responsible for acting in P's best interests. The more refined the decision-making under consideration, the more difficult it can be to delineate the boundaries between different kinds of decision-making and to implement practical care and support. Rather than seeking to identify yet more specific kinds of decision-making, it might be simpler and of more practical use to focus on the core decision-making areas, such as residence, care, contact, marriage, sexual relations, property and affairs, use of social media and the internet, and conduct of litigation, but to be astute to apply the principles involved in assessing capacity to the particular individual characteristics and circumstances of P.
30. I thank all Counsel for their insightful and well targeted submissions which were of considerable assistance to the Court.