Case No: COP11724583

Neutral Citation Number: [2011] EWHC 101 (COP)
IN THE COURT OF PROTECTION

The Law Courts
Newcastle-upon-Tyne, NE1 3LA

Date: 28/01/2011

Before :

THE HONOURABLE MR JUSTICE MOSTYN

- -

Between :

	D Borough Council	**Applicant**
	- and -	
	AB	**Respondent**

- -

Mr Joseph O'Brien (instructed by Local Authority Solicitor) for the Applicant
Mr Vikram Sachdeva (instructed by Irwin Mitchell, on behalf of the Official Solicitor) for the Respondent

Hearing date: 24 January 2011

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Judgment**Mr Justice Mostyn:**

1. I shall call the person the subject of these proceedings "Alan". The primary issue in this case is this: what is the legal test to be applied in determining whether Alan has the mental capacity to consent to sexual relations? Counsel are divided on what that test should be. The secondary issue is, if I determine that Alan does not presently have the requisite capacity (whatever it is), whether I should make final declarations to that effect, as contended for by the local authority; or, as contended for by the Official Solicitor, interim declarations coupled with an order that the local authority do provide Alan with sex education in the hope that he thereby gains that capacity. On that footing the matter would be returned to Court after a period for a review in order to see what

progress the education is making, with a view to making final declarations at that point.

2. Alan has been represented by the Official Solicitor, instructing Mr Vikram Sachdeva. The local authority has been represented by Mr Joseph O'Brien. Both are counsel of high experience in this field. I heard oral evidence from a distinguished psychiatrist Dr Ian Hall. His evidence was clear and forceful. Both counsel made compelling, economical and clear submissions. The issue is highly complex - legally, intellectually and morally. The excellence of the representation and the quality of the evidence has not made my task any easier.

3. The story is easily told. Alan is 41. He has a "moderate" learning disability. His IQ is assessed at 48. In terms of classification an IQ in the range 50-70 is a "mild" learning disability. 35 – 50 is "moderate". 20 – 35 is "severe". Under 20 is "profound". The percentage of the population that is IQ 50 or fewer is under ½ %. That said, it is a sizeable number.

4. Alan is seriously challenged in all aspects of his mental functionality.

5. Prior to the commencement of the proceedings in July 2009 Alan had shared a home with a man whom I shall call "Kieron" in accommodation provided by the local authority. Alan received a care package that included constant supervision within placement and in the community. Alan was sociable and presented as an able man. He had, and has, a vigorous sex drive. This has led to sexual relations with persons of both genders, although it is not suggested that Alan has ever had heterosexual coitus.

6. At some point Alan was reported to have developed a sexual relationship with Kieron which involved penetrative anal sex. In his oral evidence Dr Hall explained that to his understanding Alan's sexual activity involved kissing, mutual masturbation; oral sex (both active and passive); and anal sex (again, both active and passive).

7. In addition to the relationship between Alan and Kieron, two events involving Alan in 2008 prompted the local authority to make this application.

i) On 12 September 2008 a young boy in a dentist's waiting area observed a man touching his groin, licking his lips and was then asked by the man for his name. The dentist's diary showed that Alan was due for an appointment at that time.

ii) On 10 September 2008 two girls aged 9 and 10 stated that when travelling on a bus a man had commented upon their physical appearance, touched their upper legs and then attempted to look up their skirts. The police were notified. On 4 October 2008 these two girls were travelling on the bus once again, as was Alan. The girls notified the bus driver who also notified the police. Alan was then taken to the police station and questioned. However, the police decided that no further action should be taken against him.

8. On 10 June 2009 these proceedings were commenced. They sought a declaration that Alan lacked capacity to consent to sexual relations and an order authorising a restriction of contact between Alan and Kieron (and between Alan and another person) so as to prevent further sexual relations taking place. On 1 July 2009 District Judge Mainwaring Taylor made interim declarations and orders to this effect. Since then Alan has been subjected to close supervision to prevent any further sexual activity on his part, other than private masturbation, which he is allowed to perform in the bathroom or in his bedroom.

9. Alan now has his own accommodation, where he is closely supervised. His relationship with Kieron has ended. The evidence of the local authority is that he has thrived in his new placement and has not expressed any wish to resume sexual activity. On the other hand, he has asked a representative of the Official Solicitor to ask me, the judge, to allow him to have sex again. When asked how he would feel if the judge would allow him to do "these things" once again, he said "it would make me feel happy". He said, as regards the persons under discussion, "say I want

to kiss them again".

10. It has taken a long time for the case to come on for final hearing. A previous fixture was lost for want of court time. It has also been necessary to obtain very full reports from Dr Hall, who was jointly instructed, and to explore his findings with him.

11. Dr Hall describes sex as one of the most basic human functions. In its origin it is coeval with the search for sustenance. Without these two functions human (or any) life would not exist. Thus the Court must tread especially carefully where an organ of the state proposes that a citizen's ability to perform, in a non-abusive way, the sex function should be abrogated or curtailed. It involves very profound aspects of civil liberties and personal autonomy.

12. The modern law concerning this sensitive subject is explained in a trio of cases decided by Munby J (as he then was) namely:

i) *Re E (an Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 1 FLR 965,

ii) *X City Council v MB, NB and MAB (by his Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968.

iii) *Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

> Each of these cases was, however, decided before the coming into force of the Mental Capacity Act 2005 ("MCA") on 1 October 2007. Moreover, the test propounded by Munby J was forcefully doubted in some obiter comments by Baroness Hale of Richmond in the House of Lords' decision of *R v Cooper* [2009] UKHL 42 [2009] 1 WLR 1786. It is now said that the law is in a state of confusion. Recently in *D County Council v LS* [2010] EWHC 1544 (Fam) Roderic Wood J attempted a reconciliation of the competing views.

13. *Re E (an Alleged Patient); Sheffield City Council v E and S* was not a case about capacity to consent to sexual relations. It was a case about capacity to marry. As such, it decided nothing new but was a typically erudite compendium of legal authority that stretched back to ancient times. The cases that are generally held definitively to state the law concerning capacity to marry are *Durham v Durham (1885) 10 PD 80*, per Sir James Hannen P, and *Re Park's Estate, Park v Park [1954] P 112, CA.* In the former case the President stated:

> I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman.

> Although reams have been written on the subject this simple proposition has never been doubted, but, rather, has been reaffirmed time and again. To enter into a marriage the bar of intelligence and understanding is set low.

14. The reason that this test for this particular contract is relevant is that it was used by analogy

by Munby J in the latter two cases of his trio, which were concerned with the very question I have before me, namely the level of mental capacity required to consent to sexual relations. The reason for this is that a sexual component or dimension is, generally speaking, an intrinsic part of marriage. Thus sexual fidelity is part of the marriage agreement, so that adultery is and always has been a ground for divorce in almost every society in almost every era. Equally, in English law incapacity, and wilful refusal, to consummate are grounds for annulling a marriage. They do not make a marriage void ab initio; rather they render a marriage voidable. True, as Munby J reminded us in *X City Council v MB, NB and MAB (by his Litigation Friend the Official Solicitor)* at para 62, the law has always recognised that a man may take a woman as his wife *tanquam soror vel tanquam frater*. But such a marriage would, for as long as it remained unconsummated, be potentially voidable. Therefore, I wholly agree with Munby J that while a sexual relationship is not a vital ingredient of marriage it is, generally speaking, implicit in the marriage agreement.

15. Thus, it can be seen that the test of capacity to marry must be very closely related to the test of capacity to consent to sexual relations. And it would be a very strange thing if the latter were set higher than the former, for it would be an absurd state of affairs if a person had just sufficient intelligence to consent to marriage but insufficient capacity to consent to its (generally speaking) intrinsic component of consummation.

16. A long standing feature of the test of capacity to marry is that it is status-specific and not spouse-specific. A person either has the capacity to marry generally, or not. A woman cannot have the capacity to marry John but not Jim. See *Re E (an Alleged Patient); Sheffield City Council v E and S* at para 85. The law of nullity allows for the position where a person's consent has been forced or tricked by the other party by the availability of the grounds of duress, mistake and fraud; but the existence of these grounds does not in any way affect or inform the level of capacity needed to marry.

17. Another test closely related to the matter in hand is the capacity of a girl to consent to contraception. Whilst contraception has been described as a form of medical treatment it is of course principally to do with sex and the ability to have it without getting pregnant. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 FLR 224, HL both Lord Fraser of Tullybelton and Lord Scarman held that a girl under 16 could validly consent to contraception by reference to the following test at p235:

> On this part of the case accordingly I conclude that there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve.

18. At p239 Lord Fraser explained that a doctor could prescribe contraception to a girl under 16 without her parent's knowledge or consent provided he is satisfied on the following matters:

> (1) that the girl (although under 16 years of age) will understand his advice;
>
> (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice;
>
> (3) that she is very likely to begin or to continue having sexual inter-course with or without contraceptive treatment;

> (4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer;
>
> (5) that her best interest require him to give her contraceptive advice, treatment or both without the parental consent.

It is noteworthy that the doctor does not need to know the identity of the person with whom the girl proposes to have sex, let alone his characteristics. The terms of this decision show clearly that the capacity in question is act and not person specific.

19. Given the status or act specific nature of the requisite capacity for marriage, or contraception, it is hardly surprising that Munby J should have decided that the same applied to capacity to consent to sex. In *X City Council v MB, NB and MAB* he stated:

> [85] I should add just one observation. Questions of capacity are always 'issue specific': *Sheffield City Council v E*. The question of whether someone has capacity to marry is not the same as the question whether that person has capacity to consent to sexual relations. The two questions have to be considered separately. That said, since a sexual relationship is, generally speaking, implicit in any marriage, it must follow that, generally speaking, someone who lacks the capacity to consent to sexual relations will for that very reason necessarily lack the capacity to marry. The converse, of course, is not necessarily true. Someone may have the capacity to consent to sexual relations whilst lacking the capacity to marry.

And in *Local Authority X v MM and KM* he stated:

> [86] When considering capacity to marry, the question is whether X has capacity to marry, not whether she has capacity to marry Y rather than Z. The question of capacity to marry has never been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse: *Re E (an Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 1 FLR 965, at paras [83]–[85]. In my judgment, the same goes, and for much the same reasons, in relation to capacity to consent to sexual relations. The question is issue specific, both in the general sense and, as I have already pointed out, in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is, in my judgment, a question directed to the nature of the activity rather than to the identity of the sexual partner.
>
> [87] A woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. It is difficult to see how it can sensibly be said that she has capacity to

> consent to a particular sexual act with Y whilst at the same time lacking capacity to consent to precisely the same sexual act with Z. So capacity to consent to sexual intercourse depends upon a person having sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse: see *X City Council v MB, NB and MAB (by his Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, at para [84]. It does not depend upon an understanding of the consequences of sexual intercourse with a particular person. Put shortly, capacity to consent to sexual relations is issue specific; it is not person (partner) specific.

20. So the first thing that Munby J decided was that the capacity (at whatever level it was) was act rather than partner specific. Given the analogies of marriage and contraception this was, as I have said, unsurprising.

21. As to the level of capacity required, in *X City Council v MB, NB and MAB* Munby J said this:

> [74] In my judgment, this decision of the Supreme Court of Victoria stands as an essentially correct summary and statement of the common law rule. The question is whether the woman (or man) lacks the capacity to understand the nature and character of the act. Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent.
>
> …
>
> [84]. … Therefore for present purposes the question comes to this. Does the person have sufficient knowledge and understanding of the nature and character – the *sexual* nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?
>
> …
>
> [86] As we have seen, amongst the questions on which Dr Land was asked to advise in this case was whether MAB has the

> capacity to consent to sexual relations. In responding to that question Dr Land treated the model set out in *Re MB (Medical Treatment)* [1997] 2 FLR 426 as providing what he called 'an appropriate framework'. I do not in any way criticise him for doing so, because his letter of instructions contained no guidance for him on the point. Applying the approach in *Re MB*, Dr Land asked himself what information might be relevant to making a decision about embarking on sexual activity. His answer was:
>
> 'Such information might include basic knowledge about the risks of pregnancy, sexually transmitted diseases; some understanding of what is involved in sexual activity; and an understanding of the nature of the relationship they have with the other party.'
>
> Applying that approach, Dr Land's conclusion, as we have seen, was that MAB lacks the capacity to consent to sexual relations, not having, in his view, even a rudimentary understanding of the practical issues of human reproduction.
>
> …
>
> [91] … I have absolutely no quarrel with the substance of the approach which Dr Land adopted. The matters which he considered in the passage from his report which I have quoted in para 86 above are precisely the kind of matters which I would expect to be considered in this context."

22. At the end, this test is really very simple, and is set at a relatively low level: "does she have sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent?" The simplicity and low level of this test is set consistently with the equivalently low test for capacity to marry.

23. In this case Dr Hall sought to supply more specificity to the simple test propounded by Munby J. He proposed the following criteria by way of particularisation:

> For capacity to consent to sex to be present the following factors must be understood:
>
> 1. The mechanics of the act
>
> 2. That only adults over the age of 16 should do it (and therefore participants need to be able to distinguish accurately between adults and children)
>
> 3. That both (or all) parties to the act need to consent to it
>
> 4. That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections
>
> 5. That sex between a man and a woman may result in the woman

becoming pregnant

6. That sex is part of having relationships with people and may have emotional consequences

24. I will decide later whether these specifics or particulars do in fact represent the current legal test.

25. Since Munby J propounded his test there have been two developments. First, on 1 October 2007 the Mental Capacity Act 2005 came into force. Second, on 30 July 2009 the House of Lords gave its opinions in the case of *R v Cooper*. It is said that both of these developments must modify, or at least question, the test propounded by Munby J, specifically as to whether the capacity in question is act rather than partner specific. It is not being suggested that either development affects the simple test as to the necessary level of capacity. However, there is disagreement between counsel as to whether Dr Hall's specific and particularised criteria accurately reflect that simple test.

26. By s1 MCA it is provided:

The principlesE+W

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

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

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

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

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

By s 2 it is provided:

People who lack capacityE+W

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

impairment of, or a disturbance in the functioning of, the mind or brain.

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

(3) A lack of capacity cannot be established merely by reference to—

(a)a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

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

…

By s3 it is provided:

Inability to make decisionsE+W

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a)to understand the information relevant to the decision,

(b) to retain that information,

(c)to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

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

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

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a)deciding one way or another, or

(b) failing to make the decision.

27. Mr O'Brien argues that this new general test of incapacity in ss2 and 3 does indeed modify the test propounded by Munby J, specifically by introducing a partner-specific dimension to the question. He says that in deciding whether someone can, or cannot, understand the reasonably foreseeable consequences of having sex with someone else, regard must be had to the characteristics and personality of the other person.

28. By s42(5)(a) MCA I must have regard to the contents of the Code of Practice in deciding this point. The common law tests of capacity are dealt with in paras 4.31 – 4.33 of the Code. A footnote to para 4.32 actually refers to *Re E (an Alleged Patient); Sheffield City Council v E and S* when mentioning capacity to enter into marriage. Para 4.33 states that the new statutory test of incapacity is in line with the existing common law tests, and does not replace them. It says that judges "can adopt the new definition if they think it appropriate". If the new test is in fact different to the common law test it would be very strange if on a case by case basis judges could cherry pick the one to use.

29. I am not persuaded that either the Act or the Code modifies the act-specific test of Munby J.

30. Before leaving the Act I would draw attention to s27(1)(a) and(b). Nothing in the Act permits a decision to be made that consents on behalf of a person to marriage, or to have sexual relations. These are decisions that can only be made by the person concerned provided that he or she has the requisite capacity. All the court can do is to decide if that capacity is there.

31. On 30 July 2009 the House of Lords gave their opinions in *R v Cooper*. In that case the complainant suffered from schizo-affective disorder. She had allowed the defendant to violate her mouth with his penis because of an irrational fear that he would harm her or even kill her. The defendant was charged with an offence of non-consensual sexual touching under s30 Sexual Offences Act 2003. This provides:

1. A person (A) commits an offence if:

(a)he intentionally touches another person (B),

(b) the touching is sexual,

(c) (B) is unable to refuse because of or for a reason related to a mental disorder, and

(d) (A) knows or could reasonably be expected to know that (B) has a mental disorder and because of it or for a reason related to it (B) is likely to be unable to refuse.

2. (B) is unable to refuse if:

(a)he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for

any other reason), or

(b) he is unable to communicate such a decision to (A)

32. In her opinion, with whom the other members of the Committee agreed, Baroness Hale of Richmond stated:

> 24. My Lords, I have no doubt that the answer to questions (a) and (b) is "yes". The Court of Appeal acknowledged that this was a difficult area and they were, in my view, unduly influenced by the views of Munby J in another context. I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to "weigh [that information] in the balance to arrive at [a] choice": see *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 295, approved in *Re MB (Medical Treatment)* [1997] 2 FLR 426. In *Re C*, the patient's persecutory delusions might have prevented him from weighing the information relevant to having his leg amputated because of gangrene, which he was perfectly capable of understanding, but they did not. But in *NHS Trust v T* (adult patient: refusal of medical treatment) [2004] EWHC 1279 (Fam), [2005] 1 All ER 387, the patient had a history of self harming leading to dangerously low haemoglobin levels. She knew that if she refused a blood transfusion she might die; nevertheless she believed that her blood was evil and that the healthy blood given her in a transfusion became contaminated and thus increased the volume of evil blood in her body and "likewise the danger of my committing acts of evil". Charles J concluded that she was unable to use and weigh the relevant information, and thus the competing factors, in the process of arriving at her decision to refuse a transfusion (para 63). In the same way, a person's delusions that she was being commanded by God to have sexual intercourse, an act which she was perfectly capable of understanding, might make her incapable of exercising an autonomous choice in the matter.
>
> 25. However, it is not for us to decide whether Munby J was right or wrong about the common law. The 2003 Act puts the matter beyond doubt. A person is unable to refuse if he lacks the capacity to choose whether to agree to the touching "whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason" (s 30(2)(a)). Provided that the inability to refuse is "because of or for a reason related to a mental disorder" (s 30(1)(c)), and the other ingredients of the offence are made out, the perpetrator is guilty. The words "for any other reason" are clearly capable of encompassing a wide range of circumstances in which a

person's mental disorder may rob them of the ability to make an autonomous choice, even though they may have sufficient understanding of the information relevant to making it. These could include the kind of compulsion which drives a person with anorexia to refuse food, the delusions which drive a person with schizophrenia to believe that she must do something, or the phobia (or irrational fear) which drives a person to refuse a life-saving injection (as in *Re MB*) or a blood transfusion (as in *NHS Trust v T*).

26. The 2003 Act also makes it clear that the question is whether the complainant has the capacity to choose whether to agree to "the touching", that is, the specific act of sexual touching of which the defendant is accused. It is, perhaps, easier to understand how the test of capacity might be "act specific" but not "person specific" or "situation specific" if intellectual understanding were all that was required. The complainant here did know what a "blow job" was. Even then, it is well accepted that capacity can fluctuate, so that a person may have the required degree of understanding one day but not another. But that is because of a fluctuation in the mental disorder rather than a fluctuation in the circumstances. Once it is accepted that choice is an exercise of free will, and that mental disorder may rob a person of free will in a number of different ways and in a number of different situations, then a mentally disordered person may be quite capable of exercising choice in one situation but not in another. The complainant here, even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had not put her in the vulnerable and terrifying situation in which she found herself on 27 June 2007. The question is whether, in the state that she was in that day, she was capable of choosing whether to agree to the touching demanded of her by the defendant.

27. My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention on Human Rights. The object of the 2003 Act was to get away from the previous "status" based approach which assumed that all "defectives" lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in

other ways.

33. These obiter remarks, coming from the very summit, have obviously cast some doubt on whether Munby J was right to have stated that the capacity to consent to sex is strictly act-specific. In *D County Council v LS* [2010] EWHC 1544 (Fam) Roderic Wood J sought to build a bridge between the two viewpoints. He stated:

> 37 It is not for me to second-guess what conclusions the Supreme Court (as it now is) might come to if the old common-law decisions under the inherent jurisdiction were reviewed by them in the light of the above recorded observation made by Baroness Hale. Nor is it necessary for me to attempt to interpret, and decide upon, whether or not phrases used by Munby J. in MAB (paragraph 74) and MM (paragraph 87) (see for example the words emphasised in citation in paragraph 13 above) indicated that, to his mind, the test now contained in section 3 (1) (c) of the 2005 Act was considered by him (albeit he expressed his reflections, if made, in succinct form) to be a necessary part of any test of capacity in relation to the two issues of sexual relations and marriage.
>
> 38 I have decided that such an exercise is unnecessary because, in my judgment, the observations of Baroness Hale in paragraphs 24 to 28 in particular of the judgment in R v C (but in the context of the whole of her judgment) are, though framed in terms of an analysis of the relevant aspects of the SOA 2003, so self-evidently of wide application in considering questions of capacity in the civil as well as the criminal context that it is impossible for me to come to any other conclusion than that the approach adopted in those paragraphs of R v C apply to questions of the capacity, or lack of it, to make decisions on the issue of sexual relations (and indeed of marriage), in both the civil and the criminal arena and, in particular, are, in my judgment, wholly consistent with the statutory requirements of section 3 of the 2005 Act.
>
> 39 In other words the above approach accommodates the need to "understand the information relevant to the decision", retention of that information for a necessary period, and the requirement "to use or weigh that information as part of the process of making the decision ……" required by section 3 (1) of the 2005 Act.
>
> 40 In considering these matters all counsel emphasised, and I agree, that it is necessary to discriminate between those matters which go directly to a person's capacity (or impeded capacity, or lack of capacity) to make a choice, and those matters which can only be relevant to a "best interests" decision. What is necessary is

> that the particular sexual partner (to continue this illustration) impedes or undermines or has the effect of impeding or undermining the mental functioning of a person when that person makes their decisions, so as to render them incapacitous. See, for example, the plight of the victim in R v C.
>
> 41 Further illustrations of this proposition may be seen in the cases of a lack of capacity to consent based upon an irrational fear; for examples of which see paragraph 24 of the decision in R v C, and the references to NHS Trust v T (Adult Patient: refusal of Medical Treatment) [2005] 1 AER 387, and Baroness Hale's own example at the conclusion of that paragraph.
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> 42 These types of impediment which affect mental functioning to the extent of undermining the ability to make a capacitous decision must be carefully distinguished from a person's specific features which do not undermine capacity in the same way. Another person's view of the suitability of a particular sexual partner for the person whose capacity is being considered is irrelevant to the determination of whether or not that person has capacity. To take account of such a feature in determining capacity would be risking the importation of "best interests," and runs directly counter to section 1 (4) of the 2005 Act ["a person is not to be treated as unable to make a decision merely because he makes an unwise decision"]. Furthermore, as Baroness Hale pointed out in R v C, to apply such a consideration to the determination of capacity would be, as Miss Greaney also observed in her submissions to me, a gross failure to respect a person's autonomy, protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in relation to one of the most intimate and personal aspects of their private life.
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> 43 For the avoidance of doubt, it seems to me (approaching the issue of capacity to consent to marriage on the conventional assumption that almost invariably, but not inevitably, contemplation of marriage includes contemplation of sexual relations within marriage) the above approach has relevance to the issue of capacity to consent to marriage; but the application of the above test is not dependent upon there being such a contemplation of sexual relations.

34. The kernel of this compromise approach is of course the penultimate sentence of para 40. Mr O'Brien praises this reasoning as perfect. By contrast, Mr Sachdeva bravely criticises it as "incoherent". Mr Sachdeva also criticises the reasoning of Lady Hale as conflating the capacity to consent to sex with the exercise of capacity to consent to sex.

35. With a considerable degree of trepidation I have concluded that Mr Sachdeva's arguments

have force, although I would not for a moment go along with his criticism of Roderic Wood J's reasoning. That reasoning is perfectly coherent if it is accepted that the test contains a partner-specific ingredient. In my view the analogy drawn by Munby J with capacity to marry is faultless and is impossible to challenge successfully. Of course Lady Hale is right to say that "it is difficult to think of an activity which is more person and situation specific than sexual relations", but the same is true (if not truer) of marriage. But it does not follow that capacity to marry is spouse as opposed to status specific. Far from it. I do think, with the greatest possible respect, that there has been a conflation of capacity to consent to sex and the exercise of that capacity. There is also a very considerable practical problem in allowing a partner-specific dimension into the test. Consider this case. Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her?

36. I therefore adhere to the view of Munby J. I do not follow the compromise approach of Roderic Wood J.

37. The next question is to decide whether the six criteria of Dr Hall do indeed accurately particularise the simple test of Munby J. It is fair to say that neither counsel supports the inclusion of the sixth criterion as an essential ingredient of capacity to consent to sex (viz "an awareness that sex is part of having relationships with people and may have emotional consequences"). I agree. This criterion is much too sophisticated to be included in the low level of understanding and intelligence needed to be able to consent to sex. Apart from anything else, I would have thought that a deal of sex takes place where one or other party is wholly oblivious to this supposed necessity.

38. Counsel are agreed that an awareness and understanding of the first, fourth and fifth criteria are indeed essential ingredients of the capacity to consent to sex. They are divided as to the inclusion of the second (age) and third (consent). Mr O'Brien strongly argues that the law requires their inclusion; Mr Sachdeva states that "they go beyond the factors which have been expressly stated as being necessary elements of capacity to consent to sex in previous case law".

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

40. Mr O'Brien says that this argument is over-intellectual. We are dealing here, he says, with mentally incapacitated people, who in the terms of s2(1) of the Act are suffering impairment of, or a disturbance in the functioning of, the mind or brain. We are not talking about perverts who obviously have the capacity to consent to sex. This is true enough, but I believe that to import these knowledge requirements into the capacity test elevates it to a level considerably above the very simple and low level test propounded by Munby J namely "sufficient rudimentary knowledge of what the act comprises and of its sexual character".

41. In his evidence Dr Hall emphasised that the need for consent is one of the very first messages that is conveyed to people with learning disabilities who are being taught about sex. Nothing I say is intended to diminish that obviously vital message. There is a difference, however, between the teaching of what is right and wrong in the pursuit of sex, and what level of understanding and intelligence is needed to be capable of consenting to it.

42. I therefore conclude that the capacity to consent to sex remains act-specific and requires an

understanding and awareness of:

- The mechanics of the act
- That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections
- That sex between a man and a woman may result in the woman becoming pregnant

43. I would also make this observation. I am sure that the first and second of these criteria is needed to be able to consent to penetrative anal sex and oral sex. I doubt if the third is. And I doubt if either the second or third is needed to be able to consent to sexual activity such as mutual masturbation. This leads to potentially serious management problems where different kinds of sexual activities are practised at different times.

44. I turn to the evidence concerning Alan's understanding and awareness. Dr Hall told me that Alan had little or no idea what female genitalia were, or what they were for. He had no concept of sex being the reproductive function. Although he had not asked him he thought it likely that Alan believed that babies were delivered by a stork or found under a bush. He had no understanding at all of heterosexual coitus. He understood the mechanics of mutual masturbation and anal sex, with persons of either gender. His knowledge as to health risks was very limited and faulty – he thought that sex could give you spots or measles. Although he knew what a condom was he was not able to put one on properly on a prosthetic penis – he put it on inside out so it could not be rolled down.

45. It was accepted on Alan's behalf by Mr Sachdeva that as regards heterosexual penetrative vaginal sex Alan fails all three criteria. As regards homosexual anal and oral sex, he failed on the second criterion. Mr Sachdeva did not press me to find that Alan had capacity to consent to, and to engage in, homosexual (or for that matter heterosexual) sexual activity falling short of anal or oral sex, and I am not prepared to do so given the impossible management problems that will arise were I to do so.

46. I therefore make a declaration that at the present time Alan does not have the capacity to consent to and engage in sexual relations. Whether this declaration should be interim or final will be addressed below.

47. In such circumstances it is agreed that the present régime for Alan's supervision and for the prevention of future sexual activity is in his best interests. I will therefore order a continuance of them for the time being.

48. This leads me to the secondary question namely whether I should make a final declaration to that effect, as contended for by the local authority; or, as contended for by the Official Solicitor, an interim declaration coupled with an order that the local authority do provide Alan with sex education in the hope that he thereby gains that capacity.

49. By s1(3) MCA it is provided:

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

The question here is whether further steps of a sex-educative nature should be taken to try to bring Alan up to the requisite level of capacity so that the present régime of deprivation of liberty can, at least regards sex, be lifted.

50. Dr Hall was quite firm in his evidence that such a project would be a bad idea. He said that if such a project were initiated Alan may well become confused, with raised levels of anxiety. This

may make him very anxious with a consequential deterioration in his (presently very good and compliant) behaviour. Challenging behaviour may arise, which may put his current placement in jeopardy. Therefore he advised against this proposal.

51. Dr Hall's evidence is wholly valid when viewed through the prism of best interests. Yet I believe that an issue such as this must surely be subject to a threshold akin to that of significant harm, as is applicable to children when the state seeks to intervene under Part IV of the Children Act 1989. This must be implicit in s1(3) MCA. I am not satisfied that sufficient practical steps have yet been taken to see if Alan can have sex, with the result that the present régime of deprivation of liberty can be lifted.

52. I therefore order that:

i) the declarations I have made be of an interim nature;

ii) the local authority do provide Alan with sex education in the hope that he thereby gains that capacity; and

iii) the matter be returned to Court after a period of nine months for a review in order to see what progress the education is making, with a view to making final declarations at that point.

53. In view of the sensitivity and importance of the matters raised by this case I grant the local authority permission to appeal.