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Sexual Relations After JB

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Today's Webinar

- **Overview of the law- Sophy Miles**
- **HD- Mary-Rachel McCabe and Sophy Miles**
- **Questions/discussion**

F v West Berkshire HA [1990] 2 AC 1 (1)

- **Landmark case about the use of declarations under the inherent jurisdiction**
- **Decision in question was sterilization**
- **F was 36, a second woman, B, was 17.**
- **B was a ward of court and had “the mental age of a child of 5”
“cannot learn the causal connection between intercourse and pregnancy”**
- **Could not consent to sex BUT “to incarcerate her... would be gravely detrimental to the amenity and quality of her life..”**

F v West Berkshire HA [1990] 2 AC 1 (2)

- **F was born in 1953 and had been ‘voluntary’ patient since 1967**
- **“The general mental capacity of a four-or-five year old”**
- **Had a sexual relationship with P, who had a psychotic disorder. He did not regard F as “mentally handicapped”. F gained pleasure from relationship. Pregnancy would be “a disaster”. To prevent further relationship would be “seriously restricting her already limited freedom....it would be extremely detrimental”**

Mental Capacity Act 2005, Section 27-No Go Areas

- "Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person –
- (a) consenting to marriage or a civil partnership,
- (b) **consenting to have sexual relations**, (c) consenting to a decree of divorce being granted on the basis of two years 1 separation,
- (d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation....”

IM v LM and Others [2014] EWCA Civ 37 (1)

“We accept the submission made to us to the effect that it would be totally unworkable for a local authority or the Court of Protection to conduct an assessment every time an individual over whom there was doubt about his or her capacity to consent to sexual relations showed signs of immediate interest in experiencing a sexual encounter with another person. On a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis.”

IM v LM and Others [2014] EWCA Civ 37 (2)

“The requirement for a practical limit on what needs to be envisaged as "reasonably foreseeable consequences" derives not just from pragmatism but from the imperative 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. That process, as Ms Richards observes, is largely visceral rather than cerebral, owing more to instinct and emotion than to analysis.”

The “relevant information”

- (i) the sexual nature of the act
- (ii) the mechanics of the act; and
- (iii) that there are health risks/risks of pregnancy; and
- (iv) that he or she has a choice and can refuse.”

But

- Contact? Or “whether or not an individual with whom he may wish to have sexual relations is safe?” TZ (2) 2014 [EWCOP] 973

London Borough of Tower Hamlets v NB, AU

[2019] EWCOP 17,27

- Interim judgment of Hayden J- obiter
- NB had a ‘general global learning difficulty’
- Married to AU to whom she was very attached; one daughter of 20 years old
- Could not understand link between sex and pregnancy/STIs
- “May not serve to vitiate” consent as she was only likely to have sex with AU
- OS and LA accepted could “tailor” approach to the test to reflect P’s circumstances

JB- the story so far

A Local Authority v JB [2019] EWCOP 39

- **JB had epilepsy and Asperger's syndrome and was believed to lack capacity to make a range of decisions.**
- **Considered to pose a moderate risk of sexual offending.**
- **Comprehensive care package with a number of restrictions intended to prevent disinhibited sexual behaviour towards women**

JB at First Instance

Roberts J held:

“For the purposes of determining the fundamental capacity of an individual in relation to sexual relations, the information relevant to the decision for the purposes of section 3(1) of the MCA 2005 does not include information that, absent consent of a sexual partner, attempting sexual relations with another person is liable to breach the criminal law”.

On this test JB had capacity to consent to sexual relations.

Local authority appealed.

JB in the Court of Appeal-1

Judgment of Baker LJ (McFarlane P, Singh LJ)

The three imperatives:

- **Autonomy- “lies at the heart of the MCA” and underpins purpose of UNCRPD.**
- **Protection of vulnerable people.**
- **Obligation on the COP to adhere to general principles of law- s6 HRA 1998.**

JB in the Court of Appeal-2

- Full survey of case law
- Starting with *X City Council v MB and Others* [2006] EWHC (Fam)
- Pre-MCA decision- Munby J (obiter)
- "How then is one to assess whether someone has the capacity to consent to sexual relations, the ability to choose whether or not to engage in sexual activity?"

JB in the Court of Appeal-3

IM: “I would not regard the requirement that, in order to have capacity to engage in sexual relations, P must have the ability to understand that such relations must be mutually consensual to be inconsistent with the analysis in that case.” [53]

“.....giving consent to sexual relations is only part of the decision-making process. The fundamental decision is whether to *engage* in sexual relations. The focus on the capacity to *consent* derives, in part, from the judgments delivered by Munby J prior to the implementation of the MCA.....”

JB in the Court of Appeal-4

[93]: “But in the present case, it is JB who wishes to initiate sexual relations with women. The capacity in issue in the present case is therefore JB's capacity to decide to engage in sexual relations. In my judgment, this is how the question of capacity with regard to sexual relations should normally be assessed in most cases.”

JB in the Court of Appeal-5

[98]...No man is an island. This principle is well recognised in the [European Convention on Human Rights](#) . For example, the rights in [Article 8](#) are not absolute and must be balanced against other interests, including the rights of others. Although the Court of Protection's principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole.

JB in the Court of Appeal -6

Relevant information MAY include (at [100])

- **Sexual nature/mechanics of the act**
- **Other person must have capacity to consent and does consent**
- **P can say yes or no**
- **Pregnancy is reasonably foreseeable consequence of intercourse between man and woman**
- **There are health risks of STIs which a condom can reduce.**

JB in the Court of Appeal-7

Will those always be included?

- “Considerable importance” but would be obiter and “prudent .. to refrain from commenting”
- But...
 - In TZ [2013] EWHC 2322 (COP), Baker J tailored the relevant information so that a gay man did not need to understand risk of pregnancy
 - LBTH v NB [2019] EWCOP 17 Hayden J held relevant information should incorporate P’s circumstances (interim)
 - B v A Local Authority EWCA Civ 913- guidance on relevant information on social media is “to be adapted to the facts of the particular case”

And beyond....

- OS has applied for permission to appeal to Supreme Court
- Decision on PTA awaited

Where does this leave us?-1

- “A great opportunity to strike the right balance” -
<https://www.communitycare.co.uk/2020/06/17/capacity-consent-sexual-relations-latest-case-may-help-social-workers-navigate-challenges/>

“This has to start way back. It has to start with a rights-based approach from the earliest possible age and to do this differently with disabled young people than we would with any other young people is unacceptable.”

Where does this leave us?-2

- Risk to others as part of best interests matrix
- Impact on people leaving inpatient forensic settings?
- Increase in Re X applications (and LPS.....?)
- Vital that if more people are assessed as lacking capacity, they are supported to attain it.

CH (by his litigation friend the Official Solicitor)

[2017] EWCOP 12

Approval of claim for damages for violation of Article 8 ECHR

Married man of 38- 7 year relationship with WH

CH assessed as lacking capacity to consent to sex

WH warned of possible prosecution if continued to have sexual relations

LA failed to follow advice of psychologist to provide sex education

£10,000 damages approved

HD (Capacity to Engage in Sexual Relations) [2021] EWCOP 15



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