Internet & social media use: a tangled capacity web

How can mental capacity be assessed in the online sphere? Laura Davidson examines two recent rulings in the Court of Protection

IN BRIEF

▶ Two recent Court of Protection cases consider mental capacity and consent through the lens of internet and social media use.

The Court of Protection was recently propelled into the technological present, with two linked cases focusing for the first time on internet and social media use by adults with learning disability. *Re A (capacity: social media and internet use: best interests)* [2019] EWCOP 2, [2019] All ER (D) 124 (Feb) and *Re B (capacity: social media: care and contact)* [2019] EWCOP 3, [2019] All ER (D) 125 (Feb) involve the sensitive topic of capacity to consent to sexual relations, and address the minefield of 'insidious threats posed by… those who prey on the wider vulnerabilities of the young, the learning disabled, the needy and the incautious' through 'mate crime' (online befriending with the abusive intent) (*Re A*, para [4]). The court sought the right balance between protection against the internet's darker side, with its access to 'dehumanising and illegal material' (*Re A*, para [4]), and ensuring non-discrimination and autonomy enhancement for those with disabilities in accordance with the European Convention on Human Rights (ECHR), and the UN Convention on the Rights of Persons with Disabilities (CRPD).

The facts & risks

The respondent in *Re A* was a 21-year-old gay male with learning disability including impairments. A's parents discovered he had shared intimate images of his genitals with unknown males on Facebook, using 'indisputably provocative' language (*Re A*, para [17]). An investigation arising from a prior rape allegation found he had contacted many males globally, including sexual predators known under Operation Sanctuary (an inquiry into modern-day slavery, trafficking and sexual exploitation). Unable to read online safety warnings, A was highly suggestible, clicking compulsively on suggested links, including sites with paedophiliac activity. Observing that those with learning disability may be 'perhaps surprisingly digitally savvy', the court noted that A was 'dextrous and canny in deleting his call and message history' (para [33]), accessing over 150 extreme pornographic sites on a staff phone and sending several unsolicited texts to his alleged rapist.

The respondent in *Re B* was an obese, epileptic, learning disabled woman in her thirties. Miss B lived with her family and mostly watched television and coloured in pictures. Socially isolated, she was 'wedded to her mobile phone' (*Re B*, para [13]). Searching for male forenames online, she would ask responders to be her boyfriend, professing love and requesting meetings. She routinely sent intimate photographs, 'sex chatted', and provided personal information—including her address—to strangers on WhatsApp, Facebook and Snapchat. One such man, Mr D, had convictions for domestic assaults and threatened to slit his wrists if she failed to send him money. Miss B also contacted Mr C, a convicted sex offender in his seventies, classed as 'medium/high risk' and subject to a Sexual Harm Prevention Order. He referred to her as his 'mistress' and 'slave', and introduced her to social media 'friends' for sex chats. He persistently WhatsApped Miss B, and expressed a desire to marry her despite accepting that she functioned as a ten-year-old. Having met him several times (staying overnight at least once), Miss B indicated a wish to have his child.

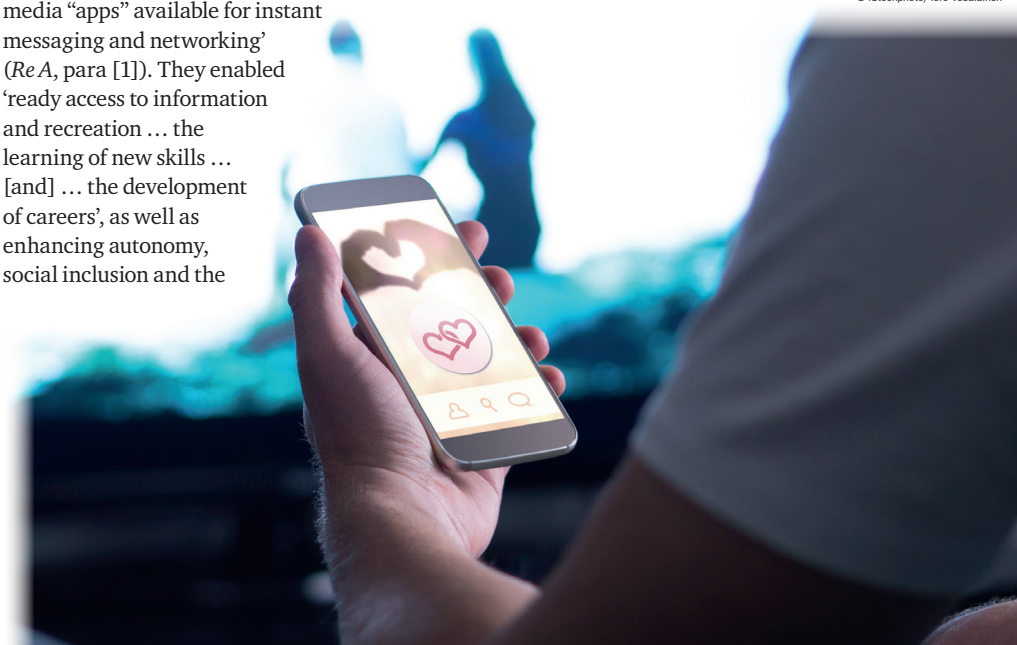
Balancing rights

Mr Justice Cobb acknowledged the importance for those with disabilities of the 'ever-growing number of social media "apps" available for instant messaging and networking' (*Re A*, para [1]). They enabled 'ready access to information and recreation … the learning of new skills … [and] … the development of careers', as well as enhancing autonomy, social inclusion and the expression of social identity (para [2]). The judgments identify types of unwitting or impulsive online engagement, setting out the range of possible internet abuse: bullying, harassment, child sexual abuse, sexual grooming, trafficking, trolling, and personal identity theft (*Re A*, para [4]).

Despite non-incorporation of the UN CRPD into UK law, the state has a duty to interpret and apply laws consistently with its obligations 'wherever possible' (*Re A*, para [3]); see eg *AH v West London Mental Health Trust* [2011] UKUT 74 (AAC) at [16]). For independent living and full participation in all aspects of life, the disabled are entitled to ready access to 'information and communications technologies and systems' (*Re A*, para [3]; Art 9 CRPD). Article 21 CRPD demands the removal of access barriers to 'information, communications and other services, including electronic services', and 'freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of… choice'. Internet restrictions would conflict with such rights, along with the right to privacy (protected under Art 22 CRPD and Art 8 ECHR), and the right to freedom of expression protected by Art 10 ECHR. Also in conflict was the concept of 'best interests' under s 4 Mental Capacity Act 2005 (MCA 2005) which included the need to protect those lacking capacity from harm. The balance between competing rights would be achieved by ensuring that any interference was proportionate, not unduly restrictive, and justified (s 1(6) MCA 2005).

Causative nexus & practical steps

A causative nexus between the impairment of mind and the inability to make a decision is required to displace the presumption of capacity under s 1(2) MCA 2005. However, the influence of Miss B's father and Mr C upon her was not found to be operative on her decisions (*Re B*, para [19]). As



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'practicable steps' under s 1(3) MCA 2005 to aid decision-making, both respondents had received education on the risks of contacting internet strangers, pregnancy and sexually transmitted diseases. Additionally, A had been referred to a free confidential LBGT service. Nonetheless, they both continued to put themselves at risk. Were they merely making 'impulsive, risk-taking, and/or "unwise"' decisions (*Re A*, para [20]) falling outside the definition of incapacity (s 1(4) MCA 2005), or were they unable to 'understand', or to 'use and weigh' the relevant information in the decision-making process, even with simplified information?

Relevant information

The court outlined what information — limited to 'salient factors' (*LBL v RYJ* [2010] EWHC 2665 (Fam) at [24]; *CC v KK and STCC* [2012] EWCOP 2136 at [69])—was relevant. Importantly, it decreed that online and social media 'contact' was within a unique category, rather than a sub-set of general direct or indirect 'contact' or 'care' (*Re A*, paras [25-26]). The internet being 'the communication platform on which social media operates', it would be impractical for capacity assessments regarding internet use for social communications to be considered separately from its use for entertainment, education, relaxation, and/or information-gathering (para [26]). Accordingly, Cobb J identified six salient factors (*Re A*, para [28]). The person must be able to understand that:

i. information and images shared online could be disseminated widely without either knowledge or permission (para [27]);
ii. '[P]rivacy and location settings' could limit personal information or image-sharing, and the person must understand how to use them (if necessary with support);
iii. Sharing rude or offensive (defined as insulting, abusive, sexually explicit, indecent or pornographic) material might upset or offend others;
iv. Some internet users may call themselves a 'friend', yet be unfriendly, untruthful, or disguise themselves;
v. Sometimes people lie, exploit, or take advantage of others sexually, financially, emotionally and/or physically; and
vi. Viewing, investigating further, and/or disseminating extremely rude or offensive content online (even if accidentally encountered) could be criminal (para [29]).

Thus, the bar has been set quite high for the establishment of capacity on internet use, requiring relatively sophisticated conceptual thinking. Perhaps unsurprisingly, neither A nor Miss B satisfied the test.

Applying the capacity tests

A could repeat information, but could not apply it, and struggled with flexible, adaptive reasoning (*Re A*, para [32]). Similarly, Miss B had difficulties with abstract concepts including motives (*Re B*, paras [25], [27] and [39]), and could not comprehend 'stranger danger' due to her rigid beliefs that someone she 'met' on Facebook was a friend and 'good'. Deceit and harmful intent were not objectives she understood (*Re B*, para [39]). Similarly trusting and 'easy to manipulate on the internet', A could not understand possible motives behind identity-disguise. He only partially understood privacy settings and the potential for wider information-sharing. While knowing criminality arose from viewing or sharing certain things, he could not assess illegality or comprehend that accidental viewing might fall within it (*Re A,* para [31]). Lacking understanding of what constituted a 'child', he was 'at risk of entering into intimate relationships online or in reality with minors' (para [22]).

The court found neither A nor Miss B had real understanding of 'mate crime'. Significant impairment in using and weighing information meant A lacked capacity to utilise the internet and social media. The local authority's 'internet access and safety' care plan was endorsed as in A's best interests (para [33]). It involved enabling access only to a 'non-smart' mobile phone (which was to be financially capped), curtailment and supervision of his iPad use, and daily staff checks to intercept inappropriate communications. Miss B was to be given further education to help her gain capacity regarding internet use, and an interim capacity declaration made (*Re B*, para [40]).

Anomalies

The court's application of the nine-fold test in *LBX v K* [2013] EWHC 3230 (Fam), [2013] All ER (D) 298 (Jun) (at [43]) on information in capacity assessments 'relevant to a decision' on residence, care and contact raised certain anomalies in Miss B's case. She had a 'childlike', 'basic' understanding of all nine areas, and evidenced capacity to decide upon residence. Nonetheless, unaware of her own daily care needs, the implications of moving away from her home, support, and community evaded her. While broadly understanding the care Mr C would provide compared to that received at home or in residential care (the test including understanding what would happen if support failed or was refused (*LBX* at [48])), Miss B still favoured residing with him despite likely inappropriate care. The court neatly side-stepped the serious risks to her wellbeing (*Re B,* para [30])—which she did not appreciate—should she reside with Mr C by concluding that the 'implications' of living with a *particular* person related to care and contact, rather than residence (paras [27-28]). This contrasts with the test for capacity to consent to sexual relations, which is limited to 'the nature of the activity, rather than to the identity of the sexual partner' (*Re B,* para [42]; *A Local Authority v P (by her litigation friend, the Official Solicitor) and others* [2018] EWCOP 10, [2018] All ER (D) 149 (Apr)).

Although understanding the mechanics of the sexual act and its pregnancy risk, Miss B believed no sexually transmitted infection risk existed if Mr C showered daily. Unable to use or weigh the relevant information, Miss B lacked s 3(1)(a) MCA 2005 understanding, and had lost capacity to consent to sexual relations. Education provided pursuant to s 1(3) MCA 2005 might help her to regain it. However, her lack of capacity to decide with whom to have sexual relations and to make general decisions about contact was intractable, as her understanding 'in some respects [fell] far short' of that required in 'too many ways' (paras [20] and [31]).

Comment

Social media use and the internet are part of everyday life, and the somewhat artificial separation between online and general contact adds additional complexity to already difficult capacity decisions. Several observations on the superficiality of the new tests are worth making. The court excluded the potentially harmful psychological impacts of the internet eg, its addictive nature, or its potential to cause distress or 'distorted views of healthy human relationships, from the information assessed as 'relevant'. It did so because capacitous people frequently fail to consider or are indifferent to such risks (*Re A,* para [30]). However, despite many people without learning disability developing toxic attachments to abusive partners—with no outside interference—the court held that Miss B could not use or weigh the highly relevant information that Mr C had convictions for sexual offending. Furthermore, for an assessment of capacity regarding contact, the court considered relevant Miss B's dogged denials that she contacted men online and sent them inappropriate messages 'when the opposite is patently known to be true' (*Re B,* para [33]). Yet, such behaviour only amounts to attempted deceit which neither forms part of a capacity test, nor evidences incapacity. Did Cobb J, therefore, really apply the test to Miss B on an equal basis with others in accordance with the CRPD? NLJ

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