

# Consenting adults?

Laura Davidson examines the law on capacity to have sexual relations

## IN BRIEF

► *A Local Authority v JB* [2020] EWCA Civ 735: a fascinating and comprehensive review of the law on capacity to have sexual relations.

'No man is an island'. So Lord Justice Baker reminded us recently in *A local authority v JB* [2020] EWCA Civ 735, [2020] All ER (D) 62 (Jun) (at [98]). The judgment provides a fascinating and comprehensive review of the law on capacity to have sexual relations, cutting through the confusing mire of (largely *obiter*) case law to bring a degree of clarity and refinement to the requisite capacity test. Naturally, the wishes of P (the subject of a capacity assessment) and his or her consent to sexual relations were central in previous reported decisions, but in *JB* it was the consent of a potential partner under the microscope.

Due to his Asperger's Syndrome, JB had marked difficulties in social interactions and his adaptive and global intellectual functioning. Like P in *Re A (An Adult)* [2019] EW COP 2, [2019] All ER (D) 124 (Feb) his access to social media and the internet had been restricted. This was due to his tendency to send inappropriate and sexually explicit and/or harassing messages to women. Due to the 'high risk that he would commit a sexual assault in pursuit of a sexual relationship' (an allegation of which had already been subject to police investigation), JB received 1:1 supervision outside his supported living placement.

Parties to Court of Protection (COP) proceedings agreed that JB lacked capacity to make decisions on residence, care and support, contact with others, and internet and social media usage. An independent clinical psychologist considered him unable

to understand the concept of consent due to limited comprehension of other people's emotional states or intentions. Despite the repeated provision of information, he could not comprehend that someone might either refuse consent, or change their mind and withdraw it, with rape a possible consequence (para [11]). While unable to understand or weigh these 'highly pertinent factors' (para [15]), JB knew the mechanics of the sexual act, and understood the risks of pregnancy and sexually-transmitted diseases. Thus, the court found he had capacity to consent to sexual relations. As decisions relating to social media and the internet were fundamentally different in nature, Mrs Justice Roberts rejected a submission that *Re A (An Adult)* was authority for the need to include potential exposure to criminal sanctions as part of the information relevant under s 3(1) of Mental Capacity Act 2005 (MCA 2005) to decisions about sexual relations. The key to the issue, in her view, was the difference between 'having the mental capacity to consent to sexual relations and exercising that capacity' (para [79]). Knowledge of the other party's consent to the proposed sexual activity went to choice about the latter, rather than to capacity itself (para [80]). Policing the exercise of capacity regarding sexual relations, the judge held, was the role of criminal law.

## The judgment

Upon appeal by the local authority, Baker LJ gave a unanimous judgment overturning Mrs Justice Roberts's decision and remitting it to the first instance court. Previous case law framing the decision-making in terms of capacity to *consent* to sexual relations had been unhelpful, since 'giving consent to sexual relations is only part of the decision-making process' (para [92]). The 'fundamental decision' which 'should normally be assessed in most cases' (para [93]) was whether to *engage* in sexual relations (para [92]).

Baker LJ held that the 'instinctual, emotional component of sexual desire' was not to the exclusion of 'a cerebral element' which required everyone to consider whether the other person consented (para [96]). A 'fundamental part' of information relevant to the decision was that sexual relations must be between consenting partners and take place 'only for as long' as that consent lasts (para [94]). Including that requirement within the information relevant to the decision which would inevitably restrict autonomy and rights was not discriminatory to those with mental disabilities since it applied to everyone '[a]s social beings' (para [98]). It also accorded with the COP's duty to protect P, and simultaneously protected other participants from serious harm (para [106]). Since 'the consensuality of sexual relations is part of the relevant information, it plainly relates to capacity itself rather than the exercise of capacity' (para [95]).

Approving the *obiter* observations at paras [44] and [62] in *B v A Local Authority* [2019] EWCA Civ 913, [2019] All ER (D) 51 (Jun) the appellate court reiterated that previous guidance had been just that: guidance. 'Relevant information' must be 'tailored to the facts of the case' (para [42]; TZ [2013] EWHC 2322 (COP) at [55], [2013] All ER (D) 144 (Oct)) and 'firmly anchored to the decision in question' (para [95]). Paragraph 100 of the judgment lists five matters identified as 'information relevant to the decision' on whether or not to engage in sexual relations which P must understand:

- (1) the sexual nature and character, including the mechanics, of the act;
- (2) that the other person must (a) have capacity to consent, and (b) consent prior to and throughout the sexual activity;
- (3) that P can consent to or refuse sexual relations;
- (4) that a reasonably foreseeable consequence of heterosexual intercourse is pregnancy;

(5) that health risks—particularly sexual infections—may result, reducible through precautions like condom-use.

Contrary to Roberts J's view, consent was not a difficult concept for those with full capacity to understand, but rather, '[i]t is something which any person engaging in sexual relations has to consider at all times'. This applied even though some might choose to ignore the absence of consent and commit sexual assault or rape. The Court of Appeal also disagreed with the view of the first instance court that if JB could not understand the concept, he, like everyone else, was permitted to make a mistake about a partner's consent. Such an error would be quite different from JB's *inability* to understand relevant information. Accordingly, the appeal was allowed.

### Comment

This comprehensive decision from the appellate court led by a highly experienced COP judge has further elucidated the test for capacity to make decisions about sexual relations. Rephrasing such capacity decisions as involving engagement rather than consent makes good sense. The case law review—which expressly disapproved *dicta* in several cases—is extremely useful to practitioners (see Fig.1).

### Impact on others & reasonable foreseeability

Intrinsic to the decision was the fact that P's behaviour would impact on others. However, *JB* was not the first case where such an understanding was considered integral to a capacity test. In *D Borough Council v B* [2011] EWHC 101 (Fam), [2011] 3 All ER 435 Mr Justice Mostyn held that the 'relevant information' P must understand included health risks such as 'the acquisition of sexually transmitted and sexually *transmissible* infection' (emphasis added). This risk was reiterated by Mr Justice Cobb in *Re B (Capacity: Social Media: Care and Conduct)* [2019] EWCOP 3, [2019] All ER (D) 125 (Feb) and endorsed as 'relevant information' on appeal in *B v A Local Authority* [2019] EWCA Civ 913, [2019] All ER (D) 51 (Jun) along with the need to understand that condoms can protect against infection (para [57]). That information was deemed appropriate to the test, bearing in mind that P's decision-making must be practically oriented and no more onerous than for someone with full capacity; such facts were 'well known among all sexually active generations'. So, too, is an awareness of the need for a sexual partner's consent by 'every person engaging in sexual relations' (para [96] of *JB*).

That links back to s 3(4)(a) of MCA 2005:

'[t]he information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another.'

One such consequence when deciding whether or not to engage in sexual relations is that a potential partner may not consent. Similarly, they may initially (or eventually) consent, but thereafter change their mind. Submissions on s 3(4)(a) of MCA 2005 were made by the local authority in *JB* (see para [81]), citing *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam), [2011] 3 All ER 706 in which Mr Justice Bodey was asked to consider whether the realities of parenthood (wrongly attributed to the risk of sexually transmitted infections by Baker LJ) was information relevant to contraception decisions. Clearly, risk of harm to JB's future partners (and potentially to himself, through investigation and/or prosecution) was a reasonably foreseeable consequence of having sexual intercourse without regard to the other participant's consent. However, although the protective aspect of the need to understand the requirement of consent by both sexual partners was acknowledged (at para [106]), the court did not discuss s 3(4)(a) of MCA 2005.

### Simplicity?

In *IM v LM and Others* [2014] EWCA Civ 37 (at [80]), [2014] 3 All ER 491 the Court of Appeal emphasised 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'. In *JB* at first instance, issues of consent were held to involve 'conceptual issues difficult for the capacitous to grasp' (para [77]). The need to use and weigh 'quasi-criminal principles' before sexual activity would demand a 'refined or nuanced analysis which would not typically inform any [such] decision...made by a capacitous individual' (para [81]). However, Baker LJ expressly disagreed, holding that 'it is something which any person engaging in sexual relations has to consider at all times' (para [107]). The Court of Appeal also disapproved Roberts J's contention that requiring a full understanding by P that sexual relations absent consent was criminal would 'confuse the nature or character of a sexual act with its lawfulness' (para [78]). The appellate court has clarified that mutual consent relates to capacity itself, rather than to its exercise (para [95]). The need for simplicity was important; a 'full' comprehension of criminal provisions would be far too onerous a test for capacity on sexual relations, the sexual urge was a

basic one, and discrimination against those with mental disabilities was prohibited. Nonetheless, it could not justify the exclusion of information 'manifestly relevant to the decision' (para [95]). 'A person who does not understand that sexual relations must only take place when, and only for as long as, the other person is consenting' would be unable to understand a fundamental part of the information relevant to the decision (para [94]). Yet, the previous sentence in the judgment delineates a slightly different formulation of 'relevant information' as 'inevitably' including 'the fact that any person with whom P engages in sexual activity must be able to consent to such activity and does in fact consent to it'. This alters the test from, 'does the potential partner consent?', to 'do they have the ability to and in fact consent?'—a more sophisticated concept with which the average lay person might struggle. Further, does an 'ability' to consent equate to a 'capacity to consent', in legal terms?

### Anomaly & lacuna

The judgment also creates an anomaly. P might be found to lack capacity to engage in sexual relations because of a lack of understanding either that someone else (i) might not consent; or (ii) might withdraw consent. This incongruity bars a sexual relationship even if a specific partner is known to be equally eager for a union, unless P can develop the requisite understanding through education. Yet, in *JB*'s case this proved impossible; he was 'visibly shaken at the idea that a partner would be able to withdraw consent' (para [14]). His fixed view during several assessments was that:

'[i]f a person gives consent then she's already given consent and you have to go through with it to the end.... She can't change her mind if you are already doing it. Cos it's her fault in the first place for saying yes. Already said yes and you've got your chance.'

The appellate court has also left a lacuna. Having clarified that capacity 'should normally be assessed in most cases' in terms of 'engagement' in sexual relations rather than 'consent' to it (para [93]), that begs the question, 'when might it not'? Perhaps the capacity decision might have been more clearly reframed by asking whether or not JB had the capacity to engage in *lawful* sexual intercourse, with the inherent corollary of an understanding of the need for mutual consent.

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**Fig 1** Key cases considered in *A Local Authority v JB* and their status post-judgment. Table compiled by Laura Davidson.

Case/Year	Judge	Person (P)	Issue(s)	Test(s)	Status post-JB
<b>X City Council v MB and Others</b> [2006] EWHC 168 (Fam)	Munby J	Forced marriage injunction in place concerning a 25-year-old man with mild learning disability (pre-MCA)	i. Capacity to marry ii. Capacity to consent to sexual relations	<ul style="list-style-type: none"> <li>▶ Generally, (ii) is subsumed in (i)</li> <li>▶ '[T]he test of capacity to consent to sexual relations must...be the same in its essentials as that required by the criminal law' (para [84])</li> </ul>	<ul style="list-style-type: none"> <li>▶ <i>Obiter</i> on test for capacity on sexual relations</li> <li>▶ <i>JB</i> (at [106]) disapproved <i>dicta</i> that test for capacity on sexual relations equates to that of criminal law</li> </ul>
<b>Re MM; Local Authority X v MM and Another</b> [2007] EWHC 2003 (Fam)	Munby J	Woman in her late 30s with a moderate learning disability and schizophrenia	i. Capacity to marry ii. capacity to consent to sexual relations	<ul style="list-style-type: none"> <li>▶ Relevant information included:               <ul style="list-style-type: none"> <li>i. the sexual nature and character of the act of sexual intercourse; and</li> <li>ii. the reasonably foreseeable consequences of sexual intercourse</li> </ul> </li> <li>▶ Capacity to consent to sexual relations is issue (rather than person) specific (para [87])</li> </ul>	<i>Obiter</i> on information relevant to capacity on sexual relations
<b>R v Cooper</b> [2009] UKHL 42	HoL ( <i>per</i> Baroness Hale)	Appeal by the Crown on the overturning of D's conviction for an offence of sexually touching a person with a mental disorder impeding choice, contrary to s.30 Sexual Offences Act 2003	Discussion of capacity in statutory criminal context	'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.' (para [27])	<i>Obiter</i> on test for capacity on sexual relations
<b>D Borough Council v B</b> [2011] EWHC 101 (Fam)	Mostyn J	41-year-old man with moderate learning disability and a vigorous sex drive who was a possible risk to others	Consent to sexual relations	<ul style="list-style-type: none"> <li>▶ Consent to sexual relations was issue specific</li> <li>▶ Relevant information was an understanding and awareness:               <ul style="list-style-type: none"> <li>i. of the mechanics of the act;</li> <li>ii. that there are health risks involved; particularly sexual infection transmission;</li> <li>iii. that heterosexual sex could result in pregnancy (para [42])</li> </ul> </li> <li>▶ Too complex to demand an understanding that all partners to sexual acts must consent (para [40])</li> <li>▶ Capacity does not equate to 'what is right and wrong in the pursuit of sex' (para [41])</li> </ul>	<i>Obiter</i> , but Mostyn J refined this test (at [41]) in <i>London Borough of Tower Hamlets v TB</i> [2014] EWCOP 53
<b>A Local Authority v H</b> [2012] EWHC 49	Hedley J	29-year-old sexualised woman with mild learning disabilities and atypical autism and a history of sexual abuse and exploitation	Consent to sexual relations	<ul style="list-style-type: none"> <li>▶ '[C]apacity is quite distinct from the exercise of it by the giving or withholding of consent' (para [21])</li> <li>▶ '[M]isguided decision-making and even downright folly...tells one nothing of capacity itself' (para [21])</li> <li>▶ P must 'understand that they do have a choice and that they can refuse' sexual relations (paras [24]-[25])</li> </ul>	<i>JB</i> (at [40]) tacitly overruled paras [24]-[25] (that 'the moral and emotional components of sexual relations...have no specific role in a test of capacity')
<b>Re TZ</b> [2013] EWHC 2322 (COP)	Baker J	24-year-old homosexual man with mild learning disabilities	Capacity on sexual relations	<ul style="list-style-type: none"> <li>▶ Impracticable and 'a great intrusion into... private life' to assess capacity for every partner contemplated (para [23])</li> <li>▶ Need to avoid danger of discrimination by imposition of higher capacity standard (para [55])</li> <li>▶ Weighing up relevant information 'should be seen as a relatively straightforward decision balancing the risks of ill health (and possible pregnancy if the relations are heterosexual) with pleasure, sexual and emotional brought about by intimacy' (para [55])</li> <li>▶ 'Relevant information' must be tailored to the facts of the case' (para [55])</li> </ul>	
<b>In Re TZ (No.2)</b> [2014] EWCOP 973	Baker J	As above	Capacity to decide whether or not a potential sexual partner was safe	LA was ordered to provide P with: <ul style="list-style-type: none"> <li>i. necessary education;</li> <li>ii. support to enable him to meet possible sexual partners</li> </ul>	

Case/Year	Judge	Person (P)	Issue(s)	Test(s)	Status post-JB
<b>London Borough of Tower Hamlets v TB</b> [2014] EWCOP 53	Mostyn J	41-year-old mother of four children with a learning disability within a physically abusive marriage	Capacity on sexual relations	Reformulated 'relevant information': i. mechanics of the act; ii. possibility of health risks (including pregnancy, where relevant); iii. 'that P has a choice and can refuse' (para [36])	<i>JB</i> (at [100]) disapproved the risk of pregnancy being subsumed into general health risks
<b>PC and Another v City of York Council</b> [2012] EWCA Civ 478	CoA (Richards, LJ, McFarlane, LJ, & Lewison LJ)	Woman with a learning disability with capacity to marry who cohabited with and subsequently married a man imprisoned for sexual offences	Capacity to decide whether to cohabit with a partner	Decision overturned: ▶ Test on cohabitation is subsumed by the test for capacity to marry (paras [59]-[60]) ▶ Relevant information included information on P's husband's conviction 'and the potential that he therefore has for future abusive behaviour' (para [31]; para [39]) ▶ Test for capacity on sexual relations is decision specific (para [35]; para [40])	<i>JB</i> (at [35]) approved para [40] that all capacity decisions are 'decision specific'
<b>IM v LM and Others</b> [2014] EWCA Civ 37	CoA (Leveson, LJ, Tomlinson, LJ, & McFarlane, LJ)	Restrictions on contact (hospital visits) challenged by P's cohabitee following his partner's injury	Capacity on sexual relations	▶ Criticised person, act, situation, and issue 'specific' terminology (para [52]) ▶ Criminal law considered the specific (para [79]) ▶ Capacity on consent to sexual relations is 'general and issue-specific, rather than person- or event-specific' (para [79]) ▶ Decisions on sexual relations are 'largely visceral rather than cerebral, owing more to instinct and emotion than to analysis' so 'the ability to use and weigh information is unlikely to loom large in the evaluation of capacity to consent to sexual relations' (paras [80]-[82])	<i>JB</i> (at [94]) tacitly disapproved paras [80]-[82] (that 'the ability to use and weigh information is unlikely to loom large' when assessing capacity on sexual relations)
<b>London Borough of Southwark v KA and Others</b> [2016] EWCOP 20	Parker J	29-year-old man with a learning disability subject to Forced Marriage Protection Order	▶ Capacity to marry ▶ Capacity on sexual relations	▶ '[C]onsent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself' (para [52]) ▶ Knowledge that sex is a choice is essential: '[t]he ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity' (para [53]) ▶ 'J' less certain that consent of the other party is fundamental to capacity' (para [54]) ▶ Since non-consensual sex can and does take place, a partner's consent 'does not obviously form part of the capacity test' (para [56]) ▶ Condom use went to welfare rather than capacity and did not require understanding (para [72])	▶ <i>Obiter</i> (see para [57]), but <i>B v A Local Authority</i> [2019] EWCA Civ 913 i. (at [51]) approved para [53] <i>dictum</i> ; ii. (at [58]) disapproved para [72] <i>dictum</i> on condom use ▶ <i>JB</i> (at [94]) disapproved <i>obiter dicta</i> in paras [54] and [56] (Parker J's uncertainty as to whether partner's consent is fundamental to capacity, and that it does not 'obviously' form part of capacity test on sexual relations)
<b>Re A (An Adult)</b> [2019] EWCOP 2	Cobb J	21-year-old homosexual man with a learning disability with a history of sexual abuse and a predilection for extreme pornography, assessed as having capacity on sexual relations	Capacity to use the internet and social media	Six salient factors are within the information relevant to capacious use of the internet and social media: i. information and images shared online could be disseminated more widely without P's knowledge or permission (para [27]); ii. 'privacy and location settings' can be applied (and P must be able to use them, if necessary with support); iii. rude or offensive material or images shared on social media might upset or offend others; iv. some people online may be unfriendly or untruthful, or use a disguise; v. sometimes people lie, exploit, or take advantage of others sexually, financially, emotionally and/or physically; vi. certain specified online acts are criminal (para [29])	CoA in <i>B v A Local Authority</i> [2019] EWCA Civ 913 endorsed (at [44]) the specified relevant information for capacity to use the internet and social media, provided it was 'treated and applied as no more than guidance to be adapted to the facts of the particular case'

Case/Year	Judge	Person (P)	Issue(s)	Test(s)	Status post-JB
<b>London Borough of Tower Hamlets v NB and AU</b> [2019] EWCOP 17	Hayden J	Woman married for 27 years with a learning disability who was vulnerable to sexual exploitation	Capacity on sexual relations	<ul style="list-style-type: none"> <li>▶ Expressed concern about CoA's test in <i>IM v LM</i></li> <li>▶ On the facts, lack of understanding of sexually transmitted infection and pregnancy might not vitiate consent to have sex with her husband who appeared sexually faithful (para [13])</li> <li>▶ A person-specific approach was not necessarily excluded (para [16])</li> </ul>	<p><i>Obiter</i></p> <p><i>JB</i> (at [91]) tacitly disapproved the possibility of a person-specific test; all capacity decisions are 'decision specific'</p>
<b>London Borough of Tower Hamlets v NB and AU</b> [2019] EWCOP 27	Hayden J	As above	Capacity on sexual relations	<ul style="list-style-type: none"> <li>▶ Elided issue and person specific tests ('the tests require the incorporation of P's circumstances and characteristics. While the test can rightly be characterised as 'issue specific', in the sense that the key criteria will inevitably be objective, there will, on occasions, be a subjective or person specific context to its application') (para [48])</li> <li>▶ Tests are non-binding 'to be regarded as guidance 'to be expanded or contracted' to the facts of the particular case [and]... construed purposively' (para [51])</li> <li>▶ Evaluation of risk of pregnancy redundant within homosexual relations and those involving post-menopausal, and infertile female partners (para [54])</li> <li>▶ Test is act-specific, not person-specific (para [60])</li> </ul>	<p><i>JB</i> approved</p> <ul style="list-style-type: none"> <li>i. (at [95]) the finding that relevant information identified in past cases was mere guidance;</li> <li>ii. (at [102]) the subjective or person specific context to the test for capacity on sexual relations</li> </ul>
<b>Re B (Capacity: Social Media: Care and Conduct)</b> [2019] EWCOP 3	Cobb J	Woman in her 30s with learning disability who sent intimate photographs of herself and personal information to male strangers on social media	<ul style="list-style-type: none"> <li>▶ Capacity to use social media</li> <li>▶ Capacity on sexual relations</li> </ul>	<p>Relevant information on sexual relations includes:</p> <ul style="list-style-type: none"> <li>i. the sexual nature, character and mechanics of the act;</li> <li>ii. the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;</li> <li>iii. the fact that P has a choice whether to engage or to withhold consent;</li> <li>iv. the fact that there are health risks involved; particularly sexual infection transmission;</li> <li>v. the fact that infection risks can be reduced by precautions such as by using condoms (para [43])</li> </ul>	<p><i>JB</i> (at [100]) approved list of relevant information, in addition to an understanding of the need for a partner's consent</p>
<b>B v A Local Authority</b> [2019] EWCA Civ 913	CoA (Sir Terence Etherton MR, King LJ, & Leggatt LJ)	As above	<ul style="list-style-type: none"> <li>▶ Appeal in <i>Re B (Capacity: Social Media: Care and Conduct)</i> [2019] EWCOP 3 by P against a finding she lacked capacity to <ul style="list-style-type: none"> <li>i. make decisions to use social media for the purpose of developing or maintaining connections with others;</li> <li>ii. consent to sexual relations</li> </ul> </li> <li>▶ Cross-appeal by LA against decision that P had capacity regarding residence</li> </ul>	<ul style="list-style-type: none"> <li>▶ Relevant information specified in previous cases 'no more than guidance to be adapted to the facts of the particular case' (paras [44]-[45])</li> <li>▶ Endorsed <i>obiter dicta</i> in <i>KA</i>: <ul style="list-style-type: none"> <li>i. an awareness of the ability to consent to or refuse sexual relations is more than just relevant information (para [51]);</li> <li>ii. P's knowledge of having a choice and a right to refuse was 'fundamental' to capacity (para [51])</li> </ul> </li> <li>▶ Disapproved conclusion in <i>KA</i> that understanding condom use is unnecessary (para [72])</li> </ul>	<ul style="list-style-type: none"> <li>▶ <i>Obiter</i> on para [51] (awareness of ability to consent to or refuse sexual relations being fundamental to capacity and going to the root of capacity rather than being merely an item of relevant information)</li> </ul> <p><i>JB</i></p> <ul style="list-style-type: none"> <li>i. endorsed (at [95]) paras [44]-[45];</li> <li>ii. rephrased (at [94] and [95]) para [51]: understanding consent is a 'fundamental part of the information relevant to the decision' and 'relates to' capacity</li> </ul>