

# ANYONE FOR SEX?



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# THE CONTEXT



*D Borough Council v AB* [2011] EWHC 101 at [11]  
*per* Mostyn J:

“...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 a very profound aspect of civil liberties and person autonomy.”

*A Local Authority v TZ* [2013] EWHC 2322 (COP)  
*per* Baker J:

“Impulsivity is a component in most sexual behaviour. Human society would be very different if such choices were made the morning after rather than the night before.”

# STRIKING THE BALANCE



- Balance to be struck between sexual freedom and freedom from sexual abuse.
- UNCRPD Articles 12, 16 and 23.
- Sexual life falls within ‘private life’ protected by Article 8: *Pretty v UK* (2002) 35 EHRR 1, para 61. See also Article 3.
- Civil and criminal law aim to protect the vulnerable.
- Sexual incapacity = legally ‘asexual’ because:
  - MCA 2005 s.27 prohibits a best interests decision
  - SOA 2003 ss.1-3, 30-37, 74 criminalise sexual contact if the person lacks the freedom and capacity to agree by choice:
    - No choice without capacity
    - Without choice there can be no valid consent

## STATUTORY A P U B L I C P R I N C I P L E S

1. A person must be **A**ssumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all **P**racticable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an **U**nwise decision.
4. 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 **B**est interests.
5. 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 **L**ess restrictive of the person's rights and freedom of action.

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# MENTAL INCAPACITY?



*PC and NC v City of York Council* [2013] EWCA Civ 478:

1. Are they unable to make a decision for themselves in relation to the matter? Unable to make a decision if unable to:
  - Understand the information relevant to the decision (includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision), OR
  - Retain that information (retention for short period does not prevent him from being regarded as able to decide), OR
  - Use or weigh that information as part of the process of making the decision, OR
  - Communicate the decision (whether by talking, using sign language or any other means).
2. Is this because of a temporary or permanent impairment or disturbance affecting the functioning of mind or brain?

# CIVIL LAW: CONTRACTUAL ORIGINS



*Sheffield City Council v E and S* [2005] 1 FLR 965

Does A have capacity to understand the duties and responsibilities that normally attach to the contract of marriage?

- “B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter.”
- “The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases.”

*LA X v MM and KM* [2009] 1 FLR 443, para 86:

- “The same goes, and for much the same reasons, in relation to capacity to consent to sexual relations.”
- Hence issue, not partner, specific: sexual nature and character of the act, its reasonably foreseeable consequences to enable the person to decide whether to give or withhold consent?
- Sexual capacity “does not depend upon an understanding of the consequences of sexual intercourse with a particular person.”
- “The test ... must for the purposes of the civil law be the same in its essentials as in the criminal law [otherwise] the law would be brought into disrepute”.

# CRIMINAL LAW'S APPROACH



*R v Cooper* [2009] UKHL 42:

- Baroness Hale was “far from persuaded [that Munby’s views] were correct”.
- “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.”

# DIFFERENT CONTEXTS?



*IM v LM* [2014] EWCA Civ 37

“75... in our view, each of the judges, including Baroness Hale, was correctly stating the law. The reason why the words used are diametrically opposed to each other arises, in our view, from the two distinct and different contexts in which the respective judgments were given. ... [There is] a distinction between the general *capacity* to give or withhold consent to sexual relations, which is the necessary forward looking focus of the Court of Protection, and the person-specific, time and place specific, *occasion* when that capacity is actually deployed and consent is either given or withheld which is the focus of the criminal law.

76. Baroness Hale is plainly right that: ‘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’ ... But the fact that a person either does or does not consent to sexual activity with a particular person at a fixed point in time, or does or does not have capacity to give such consent, does not mean that it is impossible, or legally impermissible, for a court assessing *capacity* to make a general evaluation which is not tied down to a particular partner, time and place.”

# DIFFERENT CONTEXTS?



*IM v LM* [2014] EWCA Civ 37

“77. Going further, 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.”

## RELEVANT INFORMATION FOR SEXUAL RELATIONS?



1. The mechanics and nature of the sexual act
2. The risk of sexually transmitted infections.
3. The potential that sexual activity between a man and a woman can give rise to pregnancy
4. A basic understanding of contraception
5. That one has a choice whether to have sex and can refuse

# RELEVANT INFORMATION FOR CONTACT?

1. With whom the contact will be
2. In broad terms, the nature of the relationship between the person under assessment and the contact in question
3. What sort of contact the person under assessment could have with each of the individuals with whom they may have contact
4. The positive or negative aspects of having contact with each person
5. What a family relationship is and that it is in a different category to other categories of contact
6. Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party

# DISTINGUISH CONTACT FROM SEX?



*A Local Authority v TZ* [2014] EWHC 973

Lack contact capacity but have sexual capacity? Using best interests as to contact to empower and facilitate capacitous decisions as to sexual relations.

Lacked capacity to make a decision as to: (1) whether or not an individual with whom he may wish to have sexual relations is safe; and (2) the support he requires when having contact with an individual with whom he may wish to have sexual relations.

Education and empowerment:

1. Named worked to oversee education programme to identify and assess risk
2. Seek advice/peer support from LGBT groups
3. Programme of social activities, visiting pubs, cafes, clubs etc, checking to see if milieu of interest to and safe for TZ.

Support:

1. Specify amount of 1:1.
2. Support to assess and step back when they feel that TZ is managing himself appropriately and is safe. Must have space to make mistakes to learn.
3. Staff cannot interview/vet: only intervene if identified risk of person being abusive to TZ.

# THE ORPHANED PRINCIPLE



## *CH v A Metropolitan Council* [2017] EWCOP 12

- Married in a monogamous and exclusive relationship.
- Late 2014: CH lacked capacity to consent to sexual relations but advised he required sex education. *“For reasons that have never been satisfactorily explained, the Local Authority failed to implement that advice despite requests and protracted correspondence.”*
- March 2015: couple informed of CH’s incapacity assessment. Wife moved to other bedroom and celibacy began.
- Feb 2016 COP proceedings; June 2016: COP order led to sex education beginning – practicable step under MCA s.1(3).
- May 2017: Had capacity, after which conjugal relationship resumed.

# THE ORPHANED PRINCIPLE



## *CH v A Metropolitan Council* [2017] EWCOP 12

“15. ... This case is unusual; indeed thus far it may be unique in being applied to a settled, monogamous and exclusive married relationship. In those rare cases where the courts have made declarations of incapacity to consent to sexual relations, they have generally been cases of restraining sexual disinhibition to protect from abuse or the serious likelihood of abuse. However, logically the question of capacity must apply also to married relations and the criminal law makes no distinction between settled relations and sexual disinhibition or indeed between sexual relations within or outside marriage. Society’s entirely proper concern to protect those who are particularly vulnerable may lead to surprising, perhaps even unforeseen consequences. Such, however, may be the price of protection for all.”

25... Many would think that no couple should have had to undergo this highly intrusive move upon their personal privacy yet such move was in its essentials entirely lawful and properly motivated. As I have said, perhaps it is part of the inevitable price that must be paid to have a regime of effective safeguarding.”.

- See Community Care (13.9.17), ‘Councils risk heavy costs from not taking steps to promote capacity’

# REFERENCES



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- P Bartlett et al, ‘You May Kiss the Bride, But You May Not Open Your Mouth When You Do So’: Policies Concerning Sex, Marriage and Relationships in English Forensic Psychiatric Facilities’ (2010) 31 *Liverpool Law Review* 155
- P Bartlett, ‘Sex, Dementia, Capacity and Care Homes’ (2010) 31 *Liverpool Law Review* 137:
  - Allow best interests decisions?
  - Improve DPP guidance on prosecuting sexual offences?
  - Manipulate definition of “capacity”, “sexual” and “non-sexual behaviour”?
- E Hasson, ‘“I can’t”: Capacity to Marry and the Question of Sex’ (2010) 31 *Liverpool Law Review* 95
- J Herring, ‘Mental disability and capacity to consent to sex: *A Local Authority v H*’ (2012) 34(4) *Journal of Social Welfare and Family Law* 471
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