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Case No: B4/2019/2691

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
The Hon Mrs Justice Roberts DBE
Case no. 13059833

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 June 2020

Before :

SIR ANDREW MCFARLANE, PRESIDENT OF THE COURT OF PROTECTION
LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF JB (CAPACITY: SEXUAL RELATIONS)

Between :

A LOCAL AUTHORITY	**Appellant**
- and -	
JB	**Respondent**
(by his litigation friend, the Official Solicitor)	

- -
- -

Vikram Sachdeva QC (instructed by **Local Authority Solicitor**) for the **Appellant**
Parishil Patel QC and Ian Brownhill (instructed by **Enable Law**) for the **Respondent**

Hearing date: 3 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on Thursday 11 June 2020.

LORD JUSTICE BAKER:

Introduction

1. The issue arising on this appeal is whether a person, in order to have capacity to decide to have sexual relations with another person, needs to understand that the other person must at all times be consenting to sexual relations.

2. The issue arises in proceedings in the Court of Protection concerning a 36-year-old man with a complex diagnosis of autistic spectrum disorder combined with impaired cognition. The question before the judge at first instance, and in written submissions presented to this court before the hearing, was couched in different terms, namely whether a person, in order have capacity to *consent* to such relations, must understand that the other person must consent. Those are the terms in which the issue of capacity and sexual relations have been discussed in all reported cases up to now. None of those cases, however, directly concerned the specific issue arising in this case.

3. The issue is of great importance to people with learning disabilities or acquired disorders of the brain or mind. It requires the court to balance three fundamental principles of public interest.

4. The first is the principle of autonomy. This principle lies the heart of the Mental Capacity Act 2005 and the case law under that Act. It underpins the purpose of the UN Convention on the Rights of Persons with Disabilities 2006, as defined in article 1:

> "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

5. The second is the principle that vulnerable people in society must be protected. As this court observed in *B v A Local Authority* [2019] EWCA Civ 913 (at para 35):

> " … there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation."

Striking a balance between the first and second principles is often the most important aspect of decision-making in the Court of Protection. The Mental Capacity Act Code of Practice expresses this in simple terms (at para 2.4):

> "It is important to balance people's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves."

6. There is, however, a third principle that arises in this case. The Mental Capacity Act and the Court of Protection do not exist in a vacuum. They are part of a wider system of law and justice. Sexual relations between two people can only take place with the full and ongoing consent of both parties. This principle has acquired greater recognition in recent years within society at large and within the justice system. The greater recognition has occurred principally in the criminal and family courts, but it must extend across the whole justice system. The Court of Protection is concerned first and foremost with the individual who is the subject of proceedings, "P". But as part of the

wider system for the administration of justice, it must adhere to general principles of law. Furthermore, as a public authority, the Court of Protection has an obligation under s.6 of the Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, as set out in Sch.1 to the Act. Within the court, that obligation usually arises when considering the human rights of P. But it also extends to the rights of others.

7. These three principles must all be borne in mind when considering the issue arising on this appeal.

Background

8. Throughout his life, JB has suffered from severe epilepsy. Repeated analysis over the years has concluded that his global intellectual functioning is not at a level which would lead to an overall classification of learning disability, although tests have shown that he has marked problems in several areas, including adaptive functioning and social interactions. In 2011, JB was assessed as having Asperger's Syndrome, and this diagnosis has been confirmed in subsequent assessments. He has been assessed as lacking capacity to make decisions in a number of areas, including making decisions about contact with others, making decisions as to his residence, making decisions about access to social media, consenting to arrangements about his care, and the conduct of legal proceedings.

9. For the past six years, JB has lived in a supported living placement with a comprehensive care plan with restrictions on his ability to live independently. In particular, there are restrictions on his access to the local community, his contact with other people, and his access to social media and the internet. The restrictions on contact and access to the community have been imposed principally because of his tendency to behave inappropriately towards women. Under his care plan, he has 1:1 supervision when out in the community and, in particular, when in the presence of women.

10. For many years, including during the course of this litigation, JB has said in clear terms that he has a strong desire to have a girlfriend and engage in sexual relations. He wishes to have less support and to have time unaccompanied in the community so that he can go on dates and have more unsupervised access to the internet. Unfortunately, he has consistently demonstrated disinhibited behaviour towards women, which has led those who care for him to conclude that he cannot safely have unsupervised contact with them.

11. The pattern of JB's behaviour was described in the evidence put before the judge, in particular in reports from two clinical psychologists, Dr Susan Thrift and Dr Jillian Peters, instructed in the course of the proceedings. Dr Thrift examined the records relating to JB and found repeated references throughout the documentation describing how he became fixated on particular women, contacting them via social media or text messages, and making advances towards them that were sexualised or otherwise inappropriate. From her interviews with JB, Dr Peters concluded that he represented a moderate risk of sexual offending to women. Her report included the following passage (quoted by the judge at paragraph 53 of her judgment):

> "Based on descriptions of his previous and ongoing behaviours, this is most likely to take the form of sexual harassment through the form of repeated, unwanted

> sexually explicit messages to females whose numbers he has obtained or whom he contacts through social media or dating sites. [JB] has also been observed to have limited social boundaries around women, particularly those who are vulnerable but also women in pubs or clubs whom he has approached whilst dancing. Additionally, he acknowledges not being able to judge women's reactions to him and that he is unwilling to directly ask for clarification of these issues. In these and similar situations the risk is of [JB] sexually touching these women without consent. In terms of vulnerable women who do not have the capacity to consent to sexual relations, there is a risk of [JB] not recognising or respecting this fact, resulting in the potential for rape to occur."

12. As a result of his behaviour, JB was stopped from taking part in a range of social activities, including clubs attended by persons with learning disabilities. On one occasion, JB's behaviour led to a police investigation. Although there was an allegation that he had assaulted a woman, the police decided not to prosecute.

13. On 25 April 2017, the local authority filed an application in the Court of Protection seeking declarations as to his capacity in various matters and "a decision that it is in [JB]'s best interests to receive care and support in the community with such arrangements to include restrictions on his contact with women and that such restrictions and any deprivation of liberty arising as a result is authorised by the court as a relevant decision". The Official Solicitor accepted a request to act as JB's litigation friend. After the proceedings had been continuing for eighteen months, during which time three reports were prepared by Dr Thrift, directions were given transferring the matter to be heard by a High Court judge and listed for hearing before Roberts J in July 2019. By the time of the hearing, the parties had reached agreement on the majority of issues about JB's capacity, including that he lacked capacity to conduct the proceedings and to make decisions relating to his residence, care and support, contact with others and as to his use of the internet and social media. There remained an issue as to whether he had the capacity to consent to sexual relations.

14. In her initial report, Dr Thrift recorded that JB understood the mechanics of sexual acts and the risks of pregnancy and sexually-transmitted disease. She reported, however, that his "understanding of consent is lacking". He defined consent as "one party allowing the other party to have sex without the other party complaining". When asked about withdrawing consent, JB said:

> "If 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."

Dr Thrift described JB as visibly shaken at the idea that a partner would be able to withdraw consent and did not shift in his view in subsequent assessment sessions. He thought that a woman who had got drunk at a party and had sex with a man was "fair game" for anyone else.

15. Dr Thrift concluded from further questions that JB had very limited understanding of the emotional state or intentions of others. His sole goal was to have physical and sexual contact with a woman. He lacked the ability to understand or weigh the importance of ensuring his partner was consenting as a pertinent factor in his decision

making. For those reasons, Dr Thrift concluded in her first report that, "despite the capacity test for sexual relations being low, JB does not understand and therefore weigh highly pertinent factors in relation to having consenting sexual relations". She predicted that, if he were to be unsupported in the community and/or return to a club for people with learning disabilities, there was a high risk that he would commit a sexual assault in pursuit of a sexual relationship.

16. In a supplemental letter of instruction approved by both the Official Solicitor and the local authority, Dr Thrift was informed that the legal test for capacity to consent to sexual relations had been established by case law and that the information relevant to the decision had been held to be the mechanics of the act, the fact that health risks were involved, and the risk of pregnancy. She was informed that the understanding of consent was not part of the information relevant to the decision and invited to agree with the Official Solicitor's view that, when applying the established legal test, JB had capacity to consent to sexual relations. In a short second report in reply to this letter, Dr Thrift concluded that, on the basis of the legal test as described in the supplemental letter of instruction, JB had the ability to consent to sexual relations.

17. Further reports were prepared by Dr Thrift and subsequently Dr Peters addressing the risks posed by JB's behaviour and the options for managing his behaviour through supervision of his contact with women.

18. At the hearing in July 2019, the judge was asked to consider a single issue, which the parties informed her was a lacuna in the law, which she defined in her judgment (at paragraph 6) as follows:

> "does the 'information relevant to the decision' within section 3(1) of the Mental Capacity Act 2005 include the fact that the other person engaged in sexual activity must be able to, and does in fact, from their words and conduct, consent to such activity?"

At the end of her judgment delivered on 17 September 2019 (paragraph 87), she expressed her answer to this question in these terms:

> "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".

19. The order made following judgment therefore included a declaration that JB has capacity to consent to sexual relations. It further included an interim declaration that there was reason to believe that JB lacked capacity in a number of areas (including the conduct of proceedings, and the making of decisions regarding his residence, care and support, and as to what contact he should have with others), together with interim orders as to his best interests and case management directions for a further hearing. The local authority applied for permission to appeal against the ruling, which was refused by the judge on 24 October. The case proceeded to a further hearing at which the judge made final declarations as to JB's capacity in those other areas and a number of further interim orders as to JB's best interests in the light of those declarations. The care plan included provision for close supervision of JB in the community, and a programme for treatment

and education "to improve his social awareness and to mitigate the risks posed to him by others". A final hearing was listed for February 2020.

20. On 28 October, the local authority filed a notice of appeal against the declaration that JB has capacity to consent to sexual relations. Permission to appeal was granted by King LJ on 20 November 2019.

The law

(a) The statute and code of practice

21. The relevant statutory provisions in the MCA 2005 are as follows.

> "1. **The principles**
>
> (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.
>
> 2. **People who lack capacity**
>
> (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 behavior, 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.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3. **Inability to make decisions**

(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."

22. Further guidance as to the assessment of capacity generally, and the interpretation and application of the four components of the functional test in particular, is set out in chapter 4 of the Mental Capacity Act 2005 Code of Practice. One point of particular relevance to the present case is in paragraph 4.19 of the Code:

> "If a decision could have serious grave consequences, it is even more important that a person understands information relevant to that decision."

23. There is only one reference to sexual relations in the MCA, namely s.27(1) which provides that nothing in the Act permits a decision to be made on behalf of a person with regard to a number of matters listed in the subsection including "consenting to have sexual relations".

(b) Case law

24. In order to understand the somewhat confusing development of the case law in this field, it is necessary to analyse the relevant cases in chronological order. In doing so, I have been greatly assisted by the skilful and comprehensive presentation by Mr Sachdeva in his oral submissions on behalf of the appellant.

25. The earliest case cited to us was *X City Council v MB and others* [2006] EWHC 168 (Fam), a decision of Munby J (as he then was) before the implementation of the MCA. This concerned an application in the High Court Family Division for a declaration that a 25-year-old man lacked capacity to marry and an injunction restraining his parents from causing or permitting him to undergo a marriage ceremony. The declaration was granted and the application for an injunction resolved by way of undertakings given by the parents. There was no application for any declaration or order relating to sexual relations. The judge, however, heard argument on the test for capacity with regard to sexual relations and decided it was appropriate to address that issue in his judgment.

26. At paragraph 65 of his judgment, Munby J posed the question in these terms:

> "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?"

It should be noted that this sentence in fact contained two questions: (a) whether someone has the capacity to consent to sexual relations, and (b) whether someone has the ability to choose whether or not to engage in sexual activity.

27. Having considered a number of Victorian criminal authorities, some more recent Australian decisions, in particular that of the Supreme Court of Victoria in *R v Morgan* [1970] VR 337, and the terms of the Sexual Offences Act 2003, he reached this conclusion (at paragraph 84):

> "Generally speaking, capacity to marry must include the capacity to consent to sexual relations. And the test for capacity to consent to such relations must for this purpose be the same in its essentials as that required by the criminal law. 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, 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)?"

28. It will be noted that this paragraph also refers to "the capacity to choose whether or not to engage" in sexual intercourse as well as the capacity to decide whether to give or withhold consent, that is to say both elements of the question posed earlier in his judgment There is, however, no specific consideration of the capacity to choose whether or not to engage in sexual activity. So far as I can detect, the only allusion to this is to be found a little earlier in the judgment. At paragraphs 60 to 61, Munby J expressed agreement with various propositions put forward by counsel for the Official Solicitor, including that

> "the sexual element in marriage requires respect by each party of the right of the other to choose whether or not to engage in any and if so what sexual activity."

29. For reasons explained below, this is an important judgment in the evolution of the case law in this area. It is, however, important to note the following points about it. First, the observations concerning sexual relations are plainly *obiter*. Secondly, they are made in the context of a case involving the capacity to marry. Thirdly, as noted above, Munby J identified that the issues included the ability to choose whether or not to engage in sexual activity as well as the capacity to consent to sexual relations. Subsequent cases, however, have seemingly focussed on the first question rather than the second.

30. Eighteen months later, shortly before the implementation of the MCA, Munby J returned to the issue of capacity with regard to sexual relations in *Re MM; Local Authority X v MM and another* [2007] EWHC 2003 (Fam). That case concerned a 39-year-old woman in respect of whom the local authority sought various declarations as to her capacity. She was in a long-term relationship with a man but no application was made for a declaration in respect of sexual relations. An expert appointed by the court, applying the test set out in *XCC v MB*, had concluded that she had the capacity to consent to sexual relations.

31. In his judgment, Munby J stated (at para 67):

> "What is … clear … is that the general rule of English law, whatever the context, is that the test of capacity is the ability (whether or not one chooses to exercise it) to understand the nature and quality of the relevant transaction."

He then returned to the question of sexual relations. Once again, the analysis is linked to the capacity to marry.

> "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 (and Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam) …. 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 … 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. …. 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: see *XCC v MB* …. 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."

32. This judgment has been equally, possibly more, influential on the subsequent development of the law, not least because of the oft-cited passages in paragraphs 119 to 120, concerning the proper approach to the assessment of risk, which have profoundly influenced subsequent decisions of the Court of Protection. As Mr Sachdeva pointed out to us on behalf of the local authority, however, the passage in the judgment concerning the test for capacity to consent to such relations was, once again, *obiter*.

33. The impact of Munby J's observations in the two cases cited was felt first in the criminal law. In *R v Cooper* [2009] UKHL 42, the defendant was charged with an offence of sexually touching a person with a mental disorder impeding choice, contrary to section 30 of the Sexual Offences Act 2003. A psychiatrist gave evidence that, given the complainant's impaired intellectual functioning and highly aroused state, she would not have had the ability to consent to sexual contact at the time of the alleged offence. The judge directed the jury that the complainant would have been unable to refuse sexual activity if she had lacked the capacity to choose whether to agree to it for any reason, including an irrational fear arising from her mental disorder. The defendant was convicted. The Court of Appeal allowed his appeal against conviction, stating, *inter alia*, that irrational fear which prevented the exercise of choice could not be equated with lack of capacity to choose and, relying on Munby J's analysis in the two cases cited, that a lack of capacity to choose was issue-specific and not person- or situation-specific.

34. But the Supreme Court allowed the Crown's appeal. Baroness Hale of Richmond observed (at paragraph 24):

> "The Court of Appeal … 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 *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 295, approved in *In re MB (Medical Treatment)* [1997] 2 FLR 426, 433."

At paragraph 25, she continued:

> "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': section 30(2)(a). Provided that the inability to refuse is 'because of or for a reason related to a mental disorder' (section 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."

35. For the criminal law, therefore, the issue was resolved by reference to the applicable statutory provision. Munby J's analysis in the two cases cited was irrelevant. Nevertheless, Baroness Hale went on (at paragraph 27 of her judgment) to explain further why she disagreed with Munby J's interpretation:

> "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 [ECHR]. 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 deny them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways."

36. Despite Baroness Hale's criticisms, however, Munby J's analysis was endorsed and adopted by several High Court judges sitting at first instance in the Court of Protection in the years following the introduction of the MCA – see in particular *D Borough Council v B* [2011] EWHC 101 (Fam) (Mostyn J), *A Local Authority v H* [2012] EWHC 49 (Hedley J), *Re TZ* [2013] EWHC 2322 (COP) (Baker J), and *London Borough of Tower Hamlets v TB* [2014] EWCOP 53 (Mostyn J).

37. In *D Borough Council v B*, Mostyn J granted an application by a local authority for a declaration that a vulnerable adult ("Alan"), with a moderate learning disability, lacked capacity to consent to sexual relations. Having considered the case law, he reached this conclusion at paragraph 35:

> "In my view the analogy drawn by Munby J with capacity to marry is faultless and is impossible to challenge successfully. Of course Baroness Hale is right to say … '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 the 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?"

38. A consultant psychiatrist giving expert evidence before Mostyn J had proposed what the judge (at paragraph 23 of his judgment) described as "more specificity to the simple test propounded by Munby J". The psychiatrist had suggested that:

> "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 them becoming pregnant; (6) that sex is part of having relationships with people and may have emotional consequences."

Mostyn J accepted factors (1), (4) and (5) and concluded (at paragraph 42):

> "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 infection; that sex between a man and a woman may result in the woman becoming pregnant."

He rejected the expert's proposed factors (2), (3) and (6). As to factor (3) – that both parties to the act need to consent to it – Mostyn J, having observed that "rapists have the capacity to consent to sex", stated (at paragraph 40):

> "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."

He accepted the psychiatrist's opinion that the need for consent is one of the very first messages conveyed to people with learning disabilities who are being taught about sex but added (at paragraph 41):

> "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."

39. *A Local Authority v H* concerned a 29-year-old woman with mild learning difficulties and atypical autism who demonstrated a deep degree of sexualisation and who had been subjected to exploitative and abusive behaviour by a number of men over a period of years. Hedley J granted an application by the local authority for a declaration that she lacked the capacity to consent to sexual relations and made a consequential order to protect her best interests. His judgment contains a characteristically perceptive analysis of the issues in this difficult area. At paragraph 20-1, he observed:

> "20. Any sexual act between human beings is a complex process. Although sharing physical similarities to sexual congress in the animal kingdom, that between human beings is qualitatively different. It has not just a physical but an emotional and moral component as well. Victims of sexual assault rarely refer to physical injury, their emphasis is on emotional damage and moral violation. Whether these concepts can be incorporated into a test of capacity is of course an

> important question but it is essential to acknowledge their significance in human relationships.
>
> 21. It is of course important to remember that possession of capacity is quite distinct from the exercise of it by the giving or withholding of consent. Experience in the family courts tends to suggest that in the exercise of capacity humanity is all too often capable of misguided decision-making and even downright folly. That of itself tells one nothing of capacity itself which requires a quite separate consideration."

40. Having acknowledged the significance of the moral and emotional components of sexual relations, however, Hedley J held (at paragraphs 24-5) that they have no specific role in a test of capacity:

> "In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component."

He concluded (at paragraph 26):

> "Whilst I accept of course that human sexual relations are particularly person as well as situation-specific, I would be disposed to view that in terms of whether any specific consent was or in these circumstances could be given. The difficulty in the Court of Protection is the need to determine capacity apart from specific persons or situations: H is in one sense a classic illustration of the problem. On the other hand one can see as a criminal lawyer the difficulties raised by a general finding in relation to a person who without knowledge of it embarks on what he thinks is consensual sexual activity. The focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of this court, however, has to be effective to work on a wider canvas. It is in those circumstances that I find myself closer to the views expressed by Munby J (as he then was) and Mostyn J although I have reached that position by a more tortuous route."

41. *Re TZ* concerned a 24-year-old homosexual man with mild learning disabilities and atypical autism who wished to have the opportunity to engage in sexual relations. Having heard evidence, including informal evidence from TZ himself, I concluded and declared that he had capacity to consent to and engage in sexual relations. At paragraph 23, I set out my views as to the legal approach in these terms:

> "With respect to Baroness Hale, it seems to me that the approach favoured by Munby J and Mostyn J is more consistent with respect for autonomy in matters of private life, particularly in the context of the statutory provisions of the MCA and specifically the presumption of capacity and the obligation to take all practical steps to enable a person to make a decision. To require the issue of capacity to be considered in respect of every person with whom TZ contemplated sexual relations would not only be impracticable but would also constitute a great intrusion into his private life."

At paragraph 55, I observed:

> "Most people faced with the decision whether or not to have sex do not embark on a process of weighing up complex, abstract or hypothetical information. I accept the submission on behalf of the Official Solicitor that the weighing up of the 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. There is a danger that the imposition of a higher standard for capacity may discriminate against people with a mental impairment."

42. In passing, I draw attention to the fact that the implication of the words in brackets in paragraph 55 of my judgment in *Re TZ* is that the "relevant information" must be tailored to the facts of the case. The risks of pregnancy resulting from sexual intercourse is not relevant to a decision whether or not to engage in, or consent to, sexual relations with someone of the same sex.

43. Following my judgment in *Re TZ*, there was a further hearing leading to another judgment – *Re TZ (No.2)* [2014] EWCOP 973 – in which I considered supplemental questions arising as a result of my conclusion that TZ had the capacity to consent to sexual relations. Those questions were (1) whether TZ had the capacity to make a decision whether or not an individual with whom he may wish to have sexual relations is safe and, if not, (2) whether he has the capacity to make a decision as to the support he requires when having contact with such a person. Having concluded that TZ lacked both of these capacities, I made an order in his best interests approving a care plan aimed at providing him with the necessary education and support to allow him to meet persons with whom he may wish to have sexual relations. This approach has been adopted in subsequent cases (see for example *A Local Authority v P and others* [2018] EWCOP 10).

44. In *London Borough of Tower Hamlets v TB*, which concerned a 41-year-old woman with a learning disability who had been the subject of domestic abuse inflicted by her husband, Mostyn J returned to the test he had propounded in *D Borough Council v AB* and modified its terms in the light of Hedley J's judgment in *A Local Authority v H* and my judgment in *Re TZ*. In the light of the latter, and submissions made to him on the facts of the case before him, he said (at paragraph 36) he had

> "come to the conclusion that the third element of risk of pregnancy should not be a separate one. Rather it should be subsumed into the second which should simply be expressed as 'that there are some health risks involved'."

Having cited paragraph 25 of Hedley J's judgment in *A Local Authority v H*, Mostyn J observed (at paragraph 40):

> "In my judgment this simply cannot be gainsaid. It was accepted by everyone in this case that sex between humans must involve more than mere animalistic coupling. It is psychologically a big deal, to use the vernacular. Hedley J's formulation captures perfectly why and how that extra ingredient should be defined."

He therefore concluded (at paragraph 41) that the components of the test should be recrafted in these terms:

"(i) the mechanics of the act; and

(ii) that there are health risks involved; and

(iii) that he or she has a choice and can refuse."

45. The cases considered above were all decided at first instance. I now consider two important decisions of this Court. The first was *PC and another v City of York Council* [2013] EWCA Civ 478. The issues arising in that case did not include the capacity to consent to sexual relations. It concerned a woman with significant learning disabilities who cohabited with a man, whom she later married while he was imprisoned for sexual offences. The local authority, concerned that she would be at risk on his release, issued proceedings under the MCA seeking declarations that she lacked capacity *inter alia* in respect of making decisions about contact, residence and care. It was the local authority's case that, despite having capacity to marry, the woman lacked capacity to decide whether to cohabit with her husband. The judge at first instance made declarations in line with the local authority's case, but his decision was overturned on appeal. It was held by this Court (Richards, McFarlane and Lewison LJJ) that, since she had had the capacity to marry, and there had been no change in her capacity since her marriage, there was insufficient evidence for the judge to justify his finding that she lacked capacity in relation to cohabitation.

46. The relevance of this decision to the current appeal lies in observations made by McFarlane LJ (as he then was). At paragraphs 21 to 27, he noted the conflict of views between Munby J and Baroness Hale but found it unnecessary for the purposes of the case before the court to resolve that conflict. At paragraph 35, however, he set out a principle of general importance:

> "The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person-specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished. I do not agree with the Official Solicitor's submission that absurd consequences flow from a failure to adopt either an act-specific or a person-specific approach to each category of decision that may fall for consideration. To the contrary, I endorse Mr Hallin's argument [on behalf of the local authority] to the effect that removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite upon. The MCA 2005 itself makes a distinction between some decisions (set out in s.27) which as a category are exempt from the court's welfare jurisdiction once the relevant incapacity is established (for example consent to marriage, sexual relations or divorce) and other decisions (set out in s.17) which are intended, for example, to relate to a 'specified person' or specific medical treatments."

47. On the specific facts of that case, McFarlane LJ (at paragraph 39) accepted the submission that the reference in s.3(1)(a) of the MCA to the ability to "understand the information relevant to the decision" included information relevant to the woman's

husband in the light of his conviction and its potential impact on the decision before the court.

48. The importance of these observations by McFarlane LJ in the *York* case is that they apply to all assessments of capacity, including sexual relations. In each case, when determining whether P has the ability to "make a decision", the court must identify the information relevant to the decision within the specific factual context of the case.

49. The second decision of this Court was *IM v LM and others* [2014] EWCA Civ 37. In that case, M, who had cohabited with a man for several years, suffered a brain injury which caused significant amnesia with moments of lucid thought. Her cohabitee issued proceedings in the Court of Protection challenging the legality of restrictions on his contact with M by the hospital where she was being treated. At first instance Peter Jackson J (as he then was) concluded that there should be an expectation that those restrictions would be relaxed and found that M had capacity to make decisions about whether or not to have sexual relations. The Court of Appeal (Sir Brian Leveson P, Tomlinson and McFarlane LJJ) dismissed an appeal against his decision.

50. Giving the judgment of the Court, Sir Brian Leveson reviewed all the authorities on capacity and sexual relations, including those cited above. Having cited paragraph 35 of McFarlane LJ's judgment in the *York* case, the Court (at paragraph 52) observed:

> "We endorse the language of McFarlane LJ and express concern that the terminology that has developed in this field ('person-specific', 'act-specific', 'situation-specific' and 'issue-specific') although superficially attractive, tends to disguise the broad base of the statutory test which, when applied to the question of capacity in the wide range of areas that is covered by the Act, will inevitably give rise to different considerations. It is important to emphasise that s. 3(1)(c) of the Act refers to the ability to use or weigh information as part of the process of making the decision. In some circumstances, having understood and retained relevant information, an ability to use it will be what is critical; in others, it will be necessary to be able to weigh competing considerations."

51. The Court then turned to the apparent conflict between the views expressed by Munby J and Baroness Hale set out above at paragraphs 75 to 79:

> "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. We regard the passages that we have quoted from Mostyn J in *D Borough Council v B* and Hedley J in *A Local Authority v H* as being correct in drawing 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' [emphasis added]. The focus of the criminal law, in the context of sexual offences, will always be upon a particular specific past event with any issue relating to

> consent being evaluated in retrospect with respect to that singular event. 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.
>
> 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.
>
> 78. Finally, as s.27 of the Act makes plain, where a court finds that a person lacks capacity to consent to sexual relations, then the court does not have any jurisdiction to give consent on that person's behalf to any specific sexual encounter. The exclusion in s.27 supports the conclusion that assessment of capacity to consent to sexual relations can only be on a general basis, rather than tied to the specific prospect of a sexual relationship with a particular individual in specific circumstances.
>
> 79. On the basis that we have described, we hold that the approach taken in the line of first instance decisions of Munby J, Mostyn J, Hedley J and Baker J in regarding the test for capacity to consent to sexual relationships as being general and issue-specific, rather than person- or event-specific, represents the correct approach within the terms of the MCA 2005. We also conclude that this approach is not, in truth, at odds with the observations of Baroness Hale, which were made in a different legal context."

52. In addition, the Court endorsed observations made by Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam) that there should be a practical limit on what needed to be envisaged as the "reasonably foreseeable consequences" of a decision, or of failing to make a decision, within s.3(4) of the MCA. The Court observed (at paragraph 80) that the requirement for such a limit

> "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 Court went on to observe (paragraphs 81-2) that

> "it is for that reason also that the ability to use and weigh information is unlikely to loom large in the evaluation of capacity to consent to sexual relations. It is not an irrelevant consideration; indeed (as we have emphasised) the statute mandates that it be taken into account but the notional process of using and weighing information attributed to the protected person should not involve a refined analysis

> of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity ….[T]he information typically, and we stress typically, regarded by persons of full capacity as relevant to the decision whether to consent to sexual relations is relatively limited. The temptation to expand that field of information in an attempt to simulate more widely informed decision-making is likely to lead to what Bodey J rightly identified as both paternalism and a derogation from personal autonomy."

53. As in the *York* case, this Court in *IM v LM* did not expressly consider the issue arising in the current appeal. For my part, however, 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.

54. Continuing with the chronological summary of the case law, the next case of relevance was the decision of Parker J in *London Borough of Southwark v KA and others* [2016] EWCOP 20, in which the court was asked to make declarations relating to the capacity of a 29-year-old man in a number of areas, including sexual relations. The importance of this case for this appeal is that it seems to be the only reported judgment since *D Borough Council v B* in which a court has been asked to consider the extent to which an understanding of consent was relevant to the assessment of capacity. On this issue, the judge reached the following conclusions (at paragraphs 52 to 57):

> "52. In my view consent 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.
>
> 53. Mr McKendrick [for P] submits that consent is the exercise of capacity, and not relevant information. I put it a different way. The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that P 'knows that she/he has a choice and can refuse'.
>
> 54. I am less certain that consent of the other party is fundamental to capacity.
>
> 55. The court cases do not specifically deal with this issue: some refer to P's consent and in some there is passing reference to the consent of a partner. None analyses why the latter consent is part of the capacity test.
>
> 56. Since it is all too possible for sexual contact to take place, and does take place, without consent, the necessity for the consent of a partner does not obviously form part of the capacity test, particularly since the issue of consent in the criminal law can give rise to complex debate as to *mens rea*, particularly in cases of apparent consent or lack of explicit communication of consent.
>
> 57. However I need not consider these questions since I have no doubt that KA, who has been carefully educated about it, both understands and retains the understanding of the necessity for consent of both himself and his partner/spouse."

55. As Mr Sachdeva observed in submissions to us, in view of the judge's finding set out in paragraph 57, her comments in the preceding paragraphs are *obiter*.

56. Parker J went on to consider submissions as to the extent to which an understanding of the risk of pregnancy was required for a person to have capacity to consent to sexual relations. In the circumstances of the case before her, she reached this conclusion (at paragraph 63):

> "I take the view that KA, a young man, needs to have an understanding, if not a sophisticated one, that pregnancy is a foreseeable consequence of heterosexual relations. It is beyond the scope of this judgment to decide whether pregnancy is a foreseeable consequence, and therefore needs to be understood, by other individuals, for instance by reason of sexual orientation, age, or particular physical characteristics."

She added (at paragraph 72):

> "I do not agree that it is necessary for KA to understand condom use, which, leaving aside efficacy, goes to welfare and not capacity."

57. In the course of 2019, there were several cases which impinged, directly or indirectly, on the question of the capacity to consent to sexual relations.

58. In two cases heard in early 2019, Cobb J was required to consider, apparently for the first time, the capacity of an individual to make decisions about the use of social media and the internet for the purposes of contacting other people. In the first, *Re A (An Adult)* [2019] EWCOP 2, in a clear and comprehensive judgment in which he was plainly guided in particular by McFarlane LJ's observations at paragraph 35 of his judgment in the *York* case, Cobb J concluded (at paragraph 28)

> "that the 'relevant information' which P needs to be able to understand, retain, and use and weigh, is:
>
> (i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it.
>
> (ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites ….
>
> (iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended ….
>
> (iv) Some people you meet or communicate with ('talk to') online, you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly.
>
> (v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm.

(vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime …."

59. It is instructive to contrast the information identified by Cobb J in *Re A* as "relevant information" which P needed to be able to understand, retain, use and weigh in order to have the capacity to use social media and the internet with the information which other judges have identified as relevant to the capacity to consent to sexual relations. Three points of contrast stand out. First, the information identified by Cobb J is more detailed and complex than the information identified by the case law as relevant to capacity to consent to sexual relations. Secondly, the information identified by Cobb J as "relevant information" for the capacity to use social media and the internet includes, under factor (iii), consideration of the impact of P's conduct on other people. Thirdly, the "relevant information" identified by Cobb J also includes, under factor (vi), an understanding that P's conduct on social media could amount to a criminal offence.

60. On the same day, Cobb J also handed down judgment in the case of *Re B (Capacity: Social Media: Care and Conduct)* [2019] EWCOP 3, involving a woman in her 30s with learning disabilities whose social media activity had caused concern to social workers leading the local authority to apply to the Court of Protection for a range of declarations as to her capacity. The judge held that she lacked capacity to litigate, manage property and affairs, or make decisions about her care and contact. On the other hand, he held that she had capacity to make decisions about her residence. With regard to her capacity to use social media and to consent to sexual relations, he concluded that at that point she lacked capacity but made interim declarations while attempts were made in the form of practicable help to enable her to acquire capacity. With regard to consent to sexual relations, the judge (at paragraph 43), having identified the reported authorities, summarised the "relevant information" in these terms:

"It is clear that the information relevant to the decision in this area includes

(i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;

(ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;

(iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse;

(iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;

(v) that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom."

61. B appealed against the interim declaration regarding sexual relations and the local authority cross-appealed against the final declaration regarding residence. Shortly before the appeal was heard, a judgment was delivered in another case – *London Borough of Tower Hamlets v NB and another* [2019] EWCOP 17 – in which Hayden J, Vice-President of the Court of Protection, raised concerns about the applicability of the

test propounded by this Court in *IM v LM*. NB is a woman suffering from a "general global learning difficulty" who at the time of the hearing had been married to her husband for 27 years. A safeguarding inquiry was instigated following comments made by NB which gave rise to concerns that she might be vulnerable to sexual exploitation. After she was provided with a programme of sex education, a psychologist undertook an assessment to establish her understanding of sexual matters. He concluded that she lacked an understanding of the association between sexual intercourse and pregnancy. The local authority brought proceedings seeking a declaration that she lacked capacity to consent to sexual relations. The evidence indicated that NB enjoyed being married, was affectionate towards her husband, and occasionally initiated sexual relations. After an initial hearing, the case attracted media coverage, and as a result NB's husband, who had been frightened by the publicity, left the parties' home and disengaged from the proceedings.

62. After a further interim hearing, Hayden J reserved judgment to consider the new law "in order to explore fully NB's right to a sexual life with her husband and he with her, if that is at all possible", and to give her husband an opportunity to obtain legal advice and make submissions. But he delivered an interim *ex tempore* judgment setting out his initial thoughts and concerns, which were, in summary, as follows.

(1) The "general" test for capacity to consent to sexual relations articulated by this court in *IM v LM* presented a difficulty on the facts of the case where there was only one individual with whom it was contemplated that NB was likely to have a sexual relationship, namely her husband of 27 years. "It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific" (paragraph 12).

(2) "On the facts of the case, for example, it may be that her lack of understanding of sexually transmitted disease and pregnancy may not serve to vitiate her consent to sex with her husband" (paragraph 13).

(3) The issues were integral to the couple's basic human rights and it was "important that the relevant test should not be framed in such a restrictive way that it serves to discriminate against those with disabilities, in particular those with low intelligence or borderline capacity" (paragraph 14).

(4) Baroness Hale's observation in *R v Cooper* (supra) that "it is difficult to think of an activity which is more person and situation specific in sexual relations" was "a very forceful point" (paragraph 16).

(5) The applicable test in the Court of Protection did not necessarily exclude the person-specific approach (paragraph 16).

63. Nine days after Hayden J delivered his interim judgment in the *NB* case, this Court started hearing the appeal against Cobb J's decision in *Re B*. The Official Solicitor's appeal on the judge's decision as to capacity to consent to sexual relations was dismissed but the local authority's cross-appeal on the judge's decision as to capacity to decide on residence was allowed (for reasons which it is unnecessary to consider here). In its judgment, reported as *B v A Local Authority* [2019] EWCA Civ 913 the Court (Sir Terence Etherton MR, King and Leggatt LJJ) identified (at paragraph 35) the following underlying principles:

> "Cases, like the present, which concern whether or not a person has the mental capacity to make the decision which the person would like to make involved two broad principles of social policy which, depending on the facts, may not always be easy to reconcile. On the one hand, there is a recognition of the right of every individual to dignity and self-determination and, on the other hand, there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation …."

64. Before addressing the merits of the appeal and cross-appeal, the Court (at paragraphs 38 to 45 of its judgment) considered the capacity to decide to use social media. During the hearing of the appeal, counsel for the Official Solicitor had raised objections to Cobb J's formulation in his judgment in *Re A*, which he imported into his judgment in *Re B*, of the "relevant information" for determining the capacity to make a decision to use social media. As the Court pointed out, however, there was no appeal against Cobb J's order in relation to B's use of social media. In those circumstances, the Court confined its observations on that aspect to two short points (at paragraph 44 - 45), namely

(1) that "the list or guideline of relevant information … is to be treated and applied as no more than guidance to be adapted to the facts of the particular case", and

(2) "in relation to the use of social media, as indeed to all other decisions in respect of which it is assessed that B is incapacitous, that those responsible for the care and treatment of B must act in B's best interests pursuant to s.1(5) and that those best interests may be appropriately served by allowing the act in question subject to appropriate safeguards".

65. The Court then turned to capacity to consent to sexual relations. It noted (at paragraph 47) that

> "what comprises relevant information for determining an individual's capacity to consent to sexual relations has developed and become more comprehensive over time…."

It was not in dispute on the appeal in *Re B* that the test for capacity was general and issue-specific rather than person- or event-specific. The Court noted (at paragraph 49) that the application of that test in other cases was "a live matter" as it was "currently under consideration by Hayden J" in the *NB* case. It added:

> "The argument before Hayden J in *NB* was presumably that the conclusion in *IM v LM* does not preclude the tailoring of relevant information to accommodate the individual characteristics of the person being assessed. We heard no argument on these points and do not need to decide them in the present appeals …."

66. On behalf of B, the Official Solicitor argued that Cobb J's interim declaration of incapacity was flawed because he took into account irrelevant matters which were not supported by the earlier reported cases. The Official Solicitor objected to factors (iii), (iv) and (v) in Cobb J's list.

67. As to factor (iii) – "the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse"

– it was submitted that this confused the relevant information with the actual decision whether or not to consent. On this point, the Court made the following observation:

> "51. …. This does not seem to us to be a point of any substance on the correctness of Cobb J's decision that B lacked capacity to consent to sexual relations. [Counsel for the Official Solicitor] referred us to the observation of Parker J in *London Borough of Southwark v KA* [supra] at [52] that 'consent 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'. Her point, which is plainly correct, was that awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information. As she elaborated at [53]: 'The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that 'P knows that she/he has a choice and can refuse.' The same point had previously been made by Mostyn J in *London Borough of Tower Hamlets v TB* [2014] EWCOP 53.
>
> 52. Moreover, the point seems to be an entirely arid one for the purpose of this appeal as [the psychiatrist's evidence] makes clear that B did understand perfectly well that consent could be refused and that to have sexual relations without consent is rape …."

68. It is, I think, important to note that the *obiter* observations of this Court as to whether awareness of the ability to consent or refuse was or was not part of the relevant information related to *P's* consent. The Court did not specifically address the question arising in this appeal – whether, in order to have capacity to decide to have sexual relations with another person, P needs to understand that the *other person* must at all times be consenting to sexual relations.

69. On factors (iv) – that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections – and (v) – that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom – this Court rejected the Official Solicitor's criticisms of Cobb J's analysis. Noting that the Court in *IM v LM*, approving Bodey J's approach in *Re A*, had stated 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", it concluded:

> "57. …. The risk of catching a sexually transmitted infection through unprotected sexual intercourse, and the protection against infection provided by the use of a condom, satisfy that requirement. Those are facts well known among all sexually active generations. Accordingly, we consider that, in accordance with the MCA s.3(1)-(4), the ability to understand and retain those facts at least for a period of time and to use or weigh them as part of the decision whether to engage in sexual intercourse are essential to capacity to make a decision whether to have sexual intercourse.

The Court expressly disagreed with Parker J's conclusion in *London Borough of Southwark v KA* at [72] that it is not necessary to understand condom use.

70. Following the handing down of this Court's judgment in *B v A Local Authority*, Hayden J received supplemental submissions from the parties in *NB*. The Official Solicitor now argued that a "tailored approach" to the application of each element of the test for capacity to consent to sexual relations was "logical and permissible and reflects the reality of relationships". In support of this submission, she cited the (*obiter*) observation of this Court at paragraph 44 of the judgment in *B v Local Authority* that the list of relevant information identified by Cobb J in relation to a decision to use social media was to be "treated and applied as no more than guidance to be adapted to the facts of the particular case".

71. Hayden J subsequently delivered a further judgment in the *NB* case, in which he developed the views expressed in his interim judgment. He set out his approach in these terms:

> "27. The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacitous, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere, i.e. capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other.
>
> 28. …. [I]n this interpersonal context, relationships are driven as much by instinct and emotion as by rational choice. Indeed, it is the former rather than the latter which invariably prevail. This fundamental aspect of our humanity requires to be identified and appreciated as common to all, including those who suffer some impairment of mind. To fail to do so would be to lose sight of the primary objective of the MCA. It would require a disregard of at least two decades of jurisprudence emphasising P's autonomy. Moreover, it would seriously risk discriminating against vulnerable adults with learning disabilities and other cognitive challenges.
>
> 29. It strikes me as artificial, at best, to extract both instinct and emotion from an evaluation of consent to sex, they are intrinsic to the act itself. In many ways, of course, instinct and emotion are the antithesis of reason. However, whilst they may cloud decision making, perhaps even to the point of eclipsing any calculation of risk, they are nonetheless central to sexual impulse. To establish an inflexible criterion to what may properly constitute 'consent' risks imposing a rationality which is entirely artificial.
>
> 30. It also needs to be emphasised that the law does not identify the criteria which are being considered here. The MCA 2005, in some ways like the Children Act 1989, is a distillation of principles which require to be applied in the context of a careful balance, one in which proportionality of intervention will always be an indivisible feature. Much of the applicable criteria concerning assessment of capacity, across a broad range of decisions, finds its way into this process via the conduit of expert evidence. This is all profoundly helpful to the practitioners and the professionals but the danger is that conceptual silos are created which fail to appreciate the individual and the infinite variety of people's lives."

72. Drawing on this Court's judgment in *B v A Local Authority*, he concluded (at paragraph 48):

> "I am emphasising that the tests require the incorporation of P's circumstances and characteristics. Whilst 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. This entirely accords with the approach pursued by Sir Terence Etherton MR in *B v A Local Authority* (supra)."

At paragraph 51, he added (adopting the language used by this Court in *B v A Local Authority* with regard to the capacity to use social media):

> "The applicable criteria in evaluating capacity to consent require to be rooted within the clear framework of MCA 2005 ss 1 to 3. The individual tests are not binding and are to be regarded as guidance *'to be expanded or contracted'* to the facts of the particular case. They are to be construed purposively, both promoting P's autonomy and protecting her vulnerability."

73. By way of illustration, he observed (at paragraph 54):

> "That there is no need to evaluate an understanding of pregnancy when assessing consent to sexual relations in same sex relationships or with women who are infertile or post-menopausal strikes me as redundant of any contrary argument. Nor, with respect to what has been advanced in this case, can it ever be right to assess capacity on a wholly artificial premise which can have no bearing at all on P's individual decision taking. It is inconsistent with the philosophy of the MCA 2005. Further, it is entirely irreconcilable with the Act's defining principle in Sec. 1 (2) … 'a person must be assumed to have capacity unless it is established that he lacks capacity'."

74. At paragraph 60, Hayden J drew an important distinction.

> "It is important not to conflate an approach, which tailors the applicable criteria of assessment to a particular individual and his circumstances, with a *'person specific'* test. The two are fundamentally different …. What I am emphasising here is the application of *'the act specific test'* (to use the favoured argot), deployed in a way which promotes P's opportunity to achieve capacity. This, as I have laboured to highlight, is nothing less than a statutory imperative. It cannot be compromised."

75. Returning to the facts of the case before him, Hayden J concluded that "the preponderant evidence" suggested that NB was capacitous. He adjourned the proceedings to allow the local authority to consider a reassessment of her capacity in the light of his judgment.

The judge's reasons

76. The judge's reasons for reaching her decision that the relevant information did not include the fact that the other person was able to, and did in fact, consent are set out in the following passages from her judgment.

77. Having considered the case law in some detail, Roberts J noted that neither this Court in *B v A Local Authority* nor Hayden J in *NB* had expressly ruled out the consent of others as part of the relevant information (paragraph 69). She noted Hayden J's view

that the tests for capacity were to be regarded as general guidance to be expanded or contracted to the facts of the particular case (paragraph 70). She reminded herself that one of the purposes of the MCA was to facilitate the rights of an incapacitous person so as provide him or her with the fullest experience of life. She noted that, following the *Re TZ* cases, the fact that an individual may be held to be capacitous in relation to the decision to have sexual relations may not preclude a subsequent best interests decision that he or she lacks capacity to decide whether a prospective sexual partner is "safe". She considered the local authority's submission that if, as Cobb J held in *Re A*, exposure to potential criminal sanctions is relevant for consent to the use of social media and the internet, it is also relevant for consent to sexual relations, but rejected it on the grounds that the two decisions were fundamentally different in nature, one being part of a voluntary engagement in technology and the other a "primal expression of our humanity and existence as sexual beings". In support of this characterisation of sexual relations, she repeated the observation in earlier cases that decision-making in this context was "largely visceral rather than cerebral, owing more to instinct and emotion than to analysis" (paragraph 78).

78. The judge continued:

> "78 …. The outcome for P in this context is binary. If judged incapacitous because he or she has no comprehension that his or her consent is required before engaging in acts of a sexual nature, he or she is potentially consigned to celibate abstention unless capacity is established at some point in the future. In my judgment, to argue that a full and complete understanding of consent (in terms recognised by the criminal law) is an essential component of capacity to have sexual relations is to confuse the *nature* or *character* of a sexual act with its lawfulness.
>
> 79. Further, in this context it is important to distinguish between the individual (and different) concepts of *having* the mental capacity to consent to sexual relations and *exercising* that capacity. In this respect, I agree with the Official Solicitor that section 3 of the MCA 2005 is designed to determine what is often referred to as the 'functional test'. It does not look to outcome or to the fact that the absence of consent from a sexual partner may expose P to the rigours of the criminal justice system. Had protection per se of the potential incapacitous in this respect been a driving factor of the 2005 Act or its subsequent judicial interpretation, no doubt appropriate (but necessary) inroads could have been made into the non-paternalistic ethos of the legislation.
>
> 80. Distilled into its essence, it seems to me that P's own choice, and his appreciation of that choice and the opportunity to refuse to consent, is an integral element of the capacity decision itself. Knowledge of the other party's consent to the proposed sexual activity is certainly relevant to the choice which then confronts P as to whether or not he (or she) goes ahead with that activity and thus its essentially lawful or unlawful nature.
>
> 81. If these conceptual issues are difficult enough for the capacitous to grasp, it seems to me that very great care is needed before imposing on the potentially incapacitous the need to understand these quasi-criminal principles and the potential for consent to be withdrawn by the other party at any stage. In my judgment, importing into the test for capacity and/or the information which informs that test a requirement for an understanding of parallel and continuing consent in a

> sexual partner imposes a test which is set too high. I do not accept that it is appropriate to increase the bar for the potentially incapacitous and thus potentially deprive them of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for either P himself or for any victim of non-consensual sex when those consequences are viewed through the prism of the criminal law. Whilst the ability to use and weigh information remains relevant to a capacity assessment in the domain of sexual activity, it should not involve a refined or nuanced analysis which would not typically inform any decision to consent to such relations made by a capacitous individual. The law in this context strives to assist a potentially incapacitous individual to participate in the fullest experience of life. JB has already made it abundantly clear that he wishes his experience of life to include sexual relations and the ability to find a partner. To require him to demonstrate as an aspect of his fundamental capacity in this context a full appreciation of both his own and a partner's initial and ongoing consent throughout the course of that sexual activity would be to impose on him a burden which a capacitous individual may not share and may well be unlikely to discharge. It is true that knowledge of the absence of consent might expose either to the risk of criminal prosecution but in both cases each is entitled to make the same mistakes which all human beings can, and do, make in the course of a lifetime."

Submissions to this Court

79. The submissions made by Mr Vikram Sachdeva QC on behalf of the appellant local authority were in summary as follows.

80. First, he relied on the proposition, first stated by Munby J in *X City Council v MB* and *Re MM* and accepted by other judges in later cases, that an understanding of the "nature and character" of the sexual act is a component of the capacity to consent to sexual relations. Mr Sachdeva submitted that the "nature and character" of the sexual act includes the fundamental characteristic that it is a mutual act which requires the consent of both parties participating in the act.

81. Secondly, Mr Sachdeva submitted that the ability to understand, retain, use and weigh up the other person's factual consent to sexual relations is mandated by the plain words of s.3(4). It is a reasonably foreseeable consequence of having sexual relations without regard to whether the other person is consenting that harm will result to the other person and/or to P. He cited the observation of Bodey J in *Re A (Capacity: Refusal of Contraception)*, adopted by this Court in *IM v LM* and *B v A Local Authority*, 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"

Bodey J's observation concerned information about the risk of catching a sexually-transmitted infection, but Mr Sachdeva submitted that there is an obvious direct analogy with information concerning the other party's factual consent. If P does not understand the need for factual consent, they may repeatedly make decisions that put themselves at risk or result in harm to others.

82. Mr Sachdeva submitted that the judge in this case erred in finding that the concept of the other person's consent was a burden which a capacitous person may not share and may well be unlikely to discharge. He described it as a fundamental aspect of sex which anyone seeking to participate in it should be able to comprehend. Including this factor in the information relevant to the decision was not discriminatory against people who lack capacity because whether the other party can consent and is in fact consenting is a strong, and probably determinative, factor in a decision by a person of full capacity to have sex. The fact that some people with full capacity choose to force their attentions on those who cannot consent or do not consent should not, as a matter of policy, have any relevance to what is relevant information for the test of capacity for sexual relations.

83. Third, Mr Sachdeva argued that the prospect of *ex post facto* punishment by the criminal justice system would be unlikely to provide sufficient protection for P against the risk of committing offences or violence from third parties aggrieved at P's behaviour. A person who lacks the capacity to understand that consent of the other party is required should be protected from being placed in a situation where they could inadvertently commit a serious sexual offence. He rejected the Official Solicitor's assertion that his argument was an attempt to impose the criminal test on the civil test for capacity.

84. Fourth, Mr Sachdeva argued that the judge should have accepted that there was a clear parallel with the test for capacity in relation to social media, articulated by Cobb J in *Re A* and approved by this court in *B v Local Authority*. He submitted that there is no convincing justification for the potential for illegality being relevant to capacity in relation to social media but not relevant when assessing capacity for sexual relations.

85. Fifth, Mr Sachdeva submitted that the judge was wrong to find that including an understanding of the other person's consent as part of the relevant information would raise the bar too high (paragraph 81). It was his contention that it was hard to see why an understanding that the other party must consent should be a significantly more difficult concept than that of the other party's potential to fall pregnant.

86. Sixth, having taken us in some detail through the case law, Mr Sachdeva accepted that his argument was not directly supported by any previous authority. On the contrary, it had been disapproved by Parker J *London Borough of Southwark v KA* and by Mostyn J in *D Borough Council v B*. On the other hand, Parker J's observation was plainly *obiter* and Mostyn J's analysis of the test for capacity had undergone revision in his later judgment in *London Borough of Tower Hamlets v TB*. Mr Sachdeva submitted that there was nothing in any previous decisions of this Court to contradict appellant's argument. The fact that this Court in *B v A Local Authority* approved Parker J's observation at paragraph 53 of her judgment in *London Borough of Southwark v KA* that

> "an ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity"

did not indicate that it was approving her (*obiter*) comments at paragraphs 54 to 56 about the capacity to understand the need for the other party's consent. Mr Sachdeva relied on the observation of this Court in *B v A Local Authority*, cited above, that

> "what comprises relevant information for determining an individual's capacity to consent to sexual relations has developed and become more comprehensive over time."

He argued that we should extend this development by recognising that the information relevant to the capacity to consent to sexual relations includes the fact that the other person engaged in sexual activity must be able to, and does in fact, consent to such activity.

87. Turning to the facts of this case, Mr Sachdeva drew attention to passages in Dr Thrift's report which, he submitted, clearly demonstrated that JB does not understand that the other person involved in sexual activity must be able to consent and must consent at the outset of and at all points during the activity.

88. On behalf of the Official Solicitor responding to the appeal, Mr Parishil Patel QC and Mr Ian Brownhill relied on a number of principles and judicial observations in the reported cases cited above, in particular:

(1) that capacity to consent to sexual relations is to be assessed on a general and non-specific basis;

(2) that the information relevant to the decision in this area is kept at a deliberately low level reflecting the simple and fundamental nature and character of the act;

(3) that it is important not to conflate capacity to consent to sexual relations and the exercise of that capacity;

(4) that decision-making in consenting to sexual relations is largely visceral rather than cerebral, owing more to instinct and emotion than to analysis, and that accordingly the ability to use and weigh information is unlikely to loom large in the evaluation of the capacity;

(5) that issues of capacity and the exercise of the capacity arise in different contexts in the criminal and civil law and it is important not to conflate the two approaches;

(6) that there is a tension between the potential for exploitation of the vulnerable and P's right to a sexual life.

89. Mr Patel submitted that the information relevant to the decision whether to consent to sexual relations had been comprehensively analysed and identified in the series of cases cited above and should not be expanded to include the fact that the other person must be able to, and does in fact, consent. Such an expansion would be inconsistent with the principles and observations set out in the previous paragraph. Consideration of whether someone is in fact consenting would turn the test from being act-specific to person-specific. It would add complexity to a test which needs to be kept simple. It would introduce a cerebral element into a process of decision-making which is largely visceral. It would conflate capacity and the exercise of that capacity. It would amount to using the MCA as means of protecting the public and preventing criminal offences, objectives which should be confined to the criminal law. It would be an unwarranted infringement

with P's rights to a sexual life and run contrary to the focus of the MCA which is to empower P and encourage his autonomous decision-making.

90. Mr Patel further submitted that the proposed expansion of the relevant information to include an understanding of the consent of the other person is unnecessary. Where, as here, P lacks the capacity to make decisions as to his contact with other people, any risks arising from such contact can be managed by decisions made on his behalf and plans for education implemented in his best interests.

Discussion and conclusion

91. As McFarlane LJ observed in *PC and another v City of York Council*, the determination of capacity under Part 1 of the MCA 2005 is decision specific. The focus of sections 2 and 3 of the Act is on the capacity to make decisions. The "information relevant to the decision" depends first and foremost on the decision in question.

92. The analysis of capacity with regard to sexual relations in the case law has hitherto been framed almost exclusively in terms of the capacity to *consent* to sexual relations. But as this case illustrates, 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, which unsurprisingly influenced the analysis in subsequent cases after the Act came into force. In addition, as pointed out above, the only reference to sexual relations in the MCA is in s.27 where the list of "excluded decisions" which cannot be made on behalf of a person lacking capacity includes "consenting to have sexual relations". But the list in s.27 does not purport to be a comprehensive list of the decisions in respect of which issues as to capacity will arise.

93. It is interesting to note, as pointed out above, that in *X City Council v MB* Munby J framed the analysis both by reference to the question whether someone has the capacity to consent to sexual relations and also by reference to the question whether someone has the ability to choose whether or not to engage in sexual activity. In subsequent cases, however, the analysis has focused on the first question to the exclusion of the second. The word "consent" implies agreeing to sexual relations proposed by someone else. 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.

94. When the "decision" is expressed in those terms, it becomes clear that the "information relevant to the decision" inevitably includes 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. Sexual relations between human beings are mutually consensual. It is one of the many features that makes us unique. 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 is unable to understand a fundamental part of the information relevant to the decision whether or not to engage in such relations.

95. In response to my suggestion during the hearing that the decision should be expressed not as whether to consent to sexual relations but whether to engage in sexual relations.

Mr Patel on behalf of the Official Solicitor maintained that, even if the decision was expressed in those terms, the relevant information should not include an understanding of the consensuality of sexual relations, for the reasons set out in his skeleton argument as summarised above. In my judgment, however, none of those arguments stands up to scrutiny. The inclusion of an understanding of the other person's consent as part of the relevant information does not, as he asserted, recast the test as "person-specific" but, rather, ensures that the information is firmly anchored to the decision in question, as required by statute and confirmed by this court in the *York* case. I accept that it is important for the test for capacity with regard to sexual relations to be as simple and straightforward as possible but that cannot justify excluding information which is manifestly relevant to the decision. And if the consensuality of sexual relations is part of the relevant information, it plainly relates to capacity itself rather than the exercise of capacity.

96. Mr Patel understandably relies on earlier judicial observations that sexual activity, and decisions made about such activity, are "largely visceral rather than cerebral, owing more to instinct and emotion than to analysis". But it has never been suggested that decisions are *exclusively* visceral or instinctive. It is, of course, true that sexual desire is emotional rather than intellectual, but for human beings the decision whether or not to engage in sexual relations obviously includes a cerebral element. It involves thought as well as instinct. And amongst the matters which every person engaging in sexual relations must think about is whether the other person is consenting.

97. Mr Patel also relies on the point made in earlier judgments that the focus of the MCA is different from that of the criminal law. It would, however, be wrong and unprincipled to exclude an understanding of the consensuality of sexual relations from the relevant information on the grounds that non-consensual sexual acts should be dealt with by the criminal justice system. As illustrated by the background history to this application, which includes an incident of alleged sexual abuse in respect of which the police decided to take no action, the criminal justice system does not necessarily deal with such cases and there may well be good reason for this, because the police and the prosecution authorities have a discretion whether or not to pursue every potentially available criminal charge and exercise that discretion in the public interest. But even if it could be guaranteed that such incidents were dealt with by the criminal courts, to leave such matters to the criminal justice system would be an abdication of the fundamental responsibilities of the Court of Protection, which include the duty to protect P from harm.

98. As I said at the start of this judgment, striking a balance between the principle that vulnerable people in society must be protected and the principle of autonomy is often the most important aspect of decision-making in the Court of Protection. But I do not accept the argument that including an understanding of the consensuality of sexual relations as part of the information relevant to the decision about the capacity regarding sexual relations amounts to an unwarranted infringement of JB's personal autonomy or of his rights. Insofar as it is a restriction of his autonomy and his rights, it cannot be described as discriminatory because it is a restriction which applies to everybody, regardless of capacity. As social beings, we all accept restrictions on our autonomy that are necessary for the protection of others. 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. As I said at the outset of this judgment, the Mental Capacity Act and the Court of Protection do not exist in a vacuum. They are part of a system of law and justice in which it is recognised that sexual relations between two people can only take place with the full and ongoing consent of both parties.

99. I recognise that, by recasting the decision as the decision to engage in sexual relations, and by including an understanding of the consensuality of sexual relations as part of the information relevant to the decision, we are moving on from the previous case law. But that is because the issues arising in this case and the arguments presented to us have not been considered by this Court before. In my judgment, however, it is not inconsistent with the earlier authorities of this Court. As recognised by this Court in *B v A Local Authority*, "what comprises relevant information for determining an individual's capacity to consent to sexual relations has developed and become more comprehensive over time." That development has continued in this case. The Court in *IM v LM* stressed that "the notional process of using and weighing information attributed to the protected person should not involve a refined analysis of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity". But as already stated, the information which a capacitous individual must take into account in deciding whether to engage in sexual relations includes whether or not the other person is consenting. My decision in this case is therefore not inconsistent with earlier decisions of this Court. As for the decisions at first instance, I respectfully disagree with the contrary observations of Parker J in *London Borough of Southwark v KA* and Mostyn J in *D Borough Council v B*.

100. In summary, when considering whether, as a result of an impairment of, or disturbance in the functioning of, the mind or brain, a person is unable to understand, retain, or use or weigh information relevant to a decision whether to engage in sexual relations, the information relevant to the decision may include the following:

(1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

(2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;

(3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

(4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;

(5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

101. There remains the question whether the information relevant to the decision whether to engage in sexual relations must always include all of the matters identified in the previous paragraph.

102. This is clearly a matter of considerable importance. In *NB*, Hayden J held that an assessment of the information relevant to a decision to have sexual relations requires the incorporation of P's circumstances and characteristics according to the facts of the particular case. *NB* was not the first case in which this approach was adopted. As illustrated above, it was an approach I adopted myself in *Re TZ* when I observed in passing that the relevant information included the risks of pregnancy "if the relations are heterosexual".

103. It is important to note, however, that the question whether the information relevant to the decision whether to engage in sexual relations must always include all of the matters identified in paragraph 100 above does not arise on the present appeal. Any observations we might make on the subject would therefore not be binding authority. The summary of the case law set out above illustrates that on several occasions judicial *obiter dicta* in this difficult area of the law have been initially followed by other judges, only to be rejected in later cases after hearing further argument. For that reason, it would be prudent for this Court to refrain from commenting until it has an opportunity to hear full argument on the point in a case where the issue arises on the appeal.

104. I turn back to the judgment in this case.

105. The judge's strong commitment to the principle of autonomy, and the right of disabled people to enjoy life's experiences to the full, is wholly commendable. It is a view that I have expressed in a number of previous judgments. It is therefore with considerable regret that I part company with the judge on a number of her observations cited above.

106. First, I do not consider it appropriate to view these issues through "the prism of the criminal law". In fairness to the judge, I think she was understandably led into this approach by dicta in previous reported cases and by submissions given to her by counsel, who in turn were influenced by the earlier cases. But in my view it is unnecessary and inappropriate to consider whether "a full and complete understanding of consent *in terms recognised by the criminal law*" (my emphasis) is an essential component of capacity to have sexual relations. What is needed, in my view, is an understanding that you should only have sex with someone who is able to consent and gives and maintains consent throughout. The protection given by such a requirement is not confined to the criminal legal consequences. It protects both participants from serious harm.

107. Secondly, although some capacitous people might struggle to articulate the precise terms of the criminal law in this regard, I do not agree that capacitous people have difficulty understanding that you should only have sex with someone who is able to consent and who gives and maintains consent. I respectfully disagree with the judge that this is "a refined or nuanced analysis which would not typically inform any decision to consent to such relations made by a fully capacitous individual". Nor is it "a burden which a capacitous individual may not share and may well be unlikely to discharge". It is something which any person engaging in sexual relations has to consider at all times. This is not altered by the fact that some capacitous people choose to ignore the absence of the other person's consent and proceed with sexual activity anyway (thus probably committing a criminal offence such as sexual assault or even rape).

108. Thirdly, I do not think it right to reject the requirement of an understanding as to the necessity of mutual consent to sex on the grounds that there are "mistakes which all

human beings can, and do, making the course of a lifetime". There may be occasions, I suppose, where someone genuinely makes a mistake about whether their sexual partner is giving or maintaining consent. But that circumstance, if it ever arises, is very different from the situation where one person does not understand that the other person has to give and maintain consent.

109. Accordingly, I would allow the appeal and set aside the declaration that JB has capacity to consent to sexual relations.

110. It would be open to this court to make a final declaration that JB does not have the capacity to make a decision to engage in sexual relations. The passages from Dr Thrift's report summarised above provide evidence that JB does not understand the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity. But because of the line taken by the parties during the proceedings, set out in the supplemental letter of instruction to the expert, this aspect of Dr Thrift's opinion was not fully considered in the oral evidence nor analysed during the hearings before the judge. Accordingly, in my judgment, it would be wrong for this court to make such a final declaration. The right course is to remit the matter to the judge for reconsideration of the matter in the light of this judgment. I anticipate that the judge will consider it appropriate to seek supplemental evidence from Dr Thrift, and/or others, in the light of this judgment. If my Lords agree, I would therefore allow the appeal, remit the matter to the judge to reconsider whether JB has the capacity to decide whether to engage in sexual relations, and make an interim declaration under s.48 of the MCA that there is reason to believe that JB lacks that capacity.

SINGH LJ

111. I agree that this appeal should be allowed, and the other orders proposed by Baker LJ should be made, for the reasons that he has given.

SIR ANDREW MCFARLANE P

112. I also agree.