



CAPACITY TO CONSENT TO SEX

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OVERVIEW

- 1. Introduction to the Mental Capacity Act 2005**
- 2. Capacity to marry**
- 3. Capacity to consent to sex – civil and criminal law**

Assessment of capacity

What is meant by “lack of capacity”?

The Mental Capacity Act 2005 (“the MCA 2005”) came into force on 1 October 2007 and is the law that governs capacity and best interests decisions.

Under s 2 MCA 2005, a person is unable to make a decision for himself (he lacks capacity) 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.

Assessment of capacity

When is a person “unable to make a decision for himself”?

Under s 3 M CA 2005, a person is unable to make a decision for himself if he is unable:

- To understand the information relevant to the decision;
- To retain that information;
- To use or weigh that information as part of the process of making the decision; or
- To communicate his decision (whether by talking, using sign language or any other means).

Best Interests

You must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

For most health & welfare matters, a best interests approach must be adopted, e.g. in relation to:

- P's care;
- P's residence;
- P's contact with family and friends;
- Any deprivation of P's liberty; and
- Medical treatment.

Excluded Decisions

- s. 27(1) provides that nothing in the Act permits a decision to be made on behalf of a person from consenting to marriage or a civil partnership, or consenting to have sexual relations.
- It follows that there is no 'best interests' question arising save insofar, as any such finding may impact on the arrangements for residence, care or contact with others.

Capacity to marry

In *Sheffield City Council v E* [2004] EWHC 2808 FAM, Munby LJ stated that:

- The question is not whether P has capacity to marry one person over another.
- The question is not whether P has capacity to marry a particular person.
- Instead, the relevant question is whether P has capacity to marry generally.

Capacity to marry

Subsequently, in *Re MAB* [2006] EWHC 168, Mr Justice Munby further stated:

- The marriage contract provides the parties the right to choose whether to engage into sexual relations within that union. A sexual relationship is implicit in any marriage.
- Someone who lacks the capacity to consent to sexual relations will for that very reason necessarily lack the capacity to marry.
- The converse, of course, is not necessarily true.

Therefore, a person who lacks capacity to consent to sex, must also lack capacity to marry. However, a person who lacks capacity to marry, will not necessarily lack capacity to consent to sex.

Capacity to consent to sex

What is the test for capacity to consent to sex?

- In *Re MAB* [2006] EWHC 168, Lord Justice Munby held that capacity to consent to sexual relations involved a low level of understanding:
 - *“Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act.*
 - *Her knowledge and understanding need not be complete or sophisticated.*
 - *It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent.”*

Capacity to consent to sex

However, in a criminal matter that was heard by House of Lords (R v C [2009] UKHL 42), Baroness Hale appeared to make it clear that she thought that capacity to choose whether to agree to sexual relations should be person and situation specific. She stated:

- It was 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.

Capacity to consent to sex

There followed a long line of cases seeking to resolve this conundrum. The answer appears to be found in the recent Court of Appeal case of *IM v LM v AB v Liverpool City Council* [2014] EWCA Civ 37:

- LM was a 41 year old woman with 3 children. She had a history of drug and alcohol abuse and convictions for offences relating to prostitution. During surgery for liver disease she suffered a cardiac arrest leading to a brain injury.
- She had been in a relationship for a number of years with LM, who had a 'significant criminal record'.
- It was agreed that LM now lacked the capacity to make decisions regarding her residence, care and contact. A consultant psychiatrist also advised she lacked capacity to consent to sex because she could not weigh the foreseeable risks to her and any future children she had if she became pregnant again.

Capacity to consent to sex

At the Court of Appeal, Sir Brian Leveson, giving the lead judgment:

- Re-affirmed that the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific.
- So why the difference between the criminal law and the civil law?

“The criminal law bites only retrospectively. Has this conduct, in these circumstances and with the knowledge or understanding of these participants, contravened the law?”

“The civil law requires prospective assessment in the light of the particular circumstances of the affected individual. The criminal law does not only protect those whom the courts have declared lack capacity.”

Criminal Law – SOA 2003

- Governed by the Sexual Offences Act 2003
- Under Section 4 it is an offence to ‘Cause a Person to Engage in Sexual Activity without Consent’
- What does it mean to ‘cause’? Common sense approach but clear implications for care workers and Financial Deputies.
- Funds could be included within someone’s activity budget? Free time can be set aside for X allowing him the freedom to engage in sexual activity of his own volition (assuming he has capacity)?

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