

Capacity after *JB*

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It's not just about P

73. The information relevant to the decision includes information about the “reasonably foreseeable consequences” of a decision, or of failing to make a decision: section 3(4). These consequences are not limited to the “reasonably foreseeable consequences” for P, but can extend to consequences for others. This again illustrates that the information relevant to the decision must be identified within the factual context of each case. In this case there are reasonably foreseeable consequences for JB of a decision to engage in sexual relations, such as imprisonment for sexual assault or rape if the other person does not consent. **There are also reasonably foreseeable harmful consequences to persons whom JB might sexually assault or rape.**

A Local Authority v JB [2021] UKSC 52

- How far does this extend – and what are the implications in terms of ‘capacity to commit crime’?
- A Ruck Keene, & A Enefer (2022). [What place has ‘capacity’ in the criminal law relating to sex post JB?.](#) International Journal of law and Psychiatry, 85, 101843.
- [When P is an Offender | 39 Essex Chambers](#)

Interpersonal influence

- K Ariyo, N Kane, G Owen, A Ruck Keene, [Interpersonal influences on decision-making capacity: a content analysis of court judgments](#), Medical Law Review, 2023
- Content analysis of published court judgments in England and Wales in which interpersonal problems were discussed as relevant to capacity.
- Typology highlighting five ways the courts considered influence to be problematic to capacity across these cases. Interpersonal influence problems constructed as:
 - P's inability to preserve their free will or independence
 - The influence restricting P's perspective
 - P valuing or dependence on a relationship
 - The other person acting on a general suggestibility to influence
 - P denying facts about the relationship
- Two approaches from the courts:
 - An expansive approach to the causative nexus: the combination of an impairment of mind or brain *and* an external influence
 - Recourse to the inherent jurisdiction
- How satisfactory?

The death of act-specificity

A Local Authority v JB [2021] UKSC 52

67. The first question is whether P is unable to make a decision for himself in relation to the matter. As McFarlane LJ stated in *York City Council v C* at para 37, “the court is charged in section 2(1), in relation to ‘a matter’, with evaluating an individual’s capacity ‘to make a decision for himself in relation to the matter’.” The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific as the Court of Appeal stated in this case at para 91. **The only statutory test is in relation to the ability to decide. In the context of sexual relations, the other vocabulary that has developed around the MCA, of “person-specific”, “act-specific”, “situation-specific” and “issue-specific”, should not be permitted to detract from that statutory test, though it may helpfully be used to identify a particular feature of the matter in respect of which a decision is to be made in an individual case.** For instance, “the matter” in this case cannot be described as being “person-specific” as there is no identified person with whom JB wishes to engage in sexual relations

The death of act-specificity: sex

Hull City Council v KF [2022] EWCOP 33 (Poole J) at paragraph 24

ii) The application before this court concerns a person-specific decision about sexual relations. [...] In the present case, KF does not want to make decisions about having sexual relations in general, she wants to have (the opportunity for) sexual relations with KW and for that to occur within the next few days, prior to his likely incarceration. Information relevant to that specific decision includes information about the history and nature of the relationship between KF and KW. KW has been violent to KF in that relationship and has perpetrated sexual violence against her. KF is at specific risk of harm or assault by KW including in a sexual context. That risk is a foreseeable consequence of KF's decision-making about having sexual relations with KW. Dr Mynors-Wallis had already advised that KF cannot retain information about KW's past assaults on her or the risk that KW will assault her again. That is information relevant to the matter for decision, particularly given the nature and circumstances of the most serious assault by KW on KF, which was a sexual assault. Dr Mynors-Wallis also advises, that KF cannot weigh or use the foreseeable consequences of deciding to have sexual relations with KW, which include the risk of assault from him as has happened in the past. Dr Mynors-Wallis' previous report approached the matter for decision as general – the capacity to engage in sexual relations. He has now considered capacity to decide to engage in sexual relations in a person-specific context and, unsurprisingly given his previously expressed opinions, concludes that KF lacks capacity to decide to engage in sexual relations with KW.

iii) It is important that the Court of Protection does not approach questions of capacity in "silos" – *B v A Local Authority* [2019] EWCA Civ 913. I would regard it as incoherent to find that KF did not have capacity to decide to meet KW alone for a meal in a restaurant but did have capacity to decide to have sexual relations with him. Decisions about capacity must be coherent and allow those responsible for caring for and safeguarding KF to make practical arrangements.

iv) In cases in which it has been determined that P lacks capacity to make decisions about contact with a past or potential partner because of the risk of harm to P or by P, and it has been determined that P has capacity to decide to engage in sexual relations, consideration should be given to P's capacity to decide to engage in sexual relations with that partner. Failure to do so could result in incoherent capacity decisions. It was right to consider capacity to engage in sexual relations as a person-specific issue in this case.

The death of act-specificity: marriage?

NB v MI [2021] EWHC 224 (Fam) (Mostyn J)

26. Distilling all this learning results in some straightforward propositions:

- i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.
 - ii) **Marriage is status-specific not spouse-specific.**
 - iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.
 - iv) A sexual relationship is not necessary for a valid marriage.
 - v) The procreation of children is not an end of the institution of marriage.
 - vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.
 - vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.
 - viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.
 - ix) The wisdom of a marriage is irrelevant.
- Does *JB* open the way to reconsider this - and a way to think about 'predatory' marriage?
 - Outside the scope of the Law Commission Weddings Report: [A-new-weddings-law-LC-report.pdf](#) at paragraphs 1.74 – 1.78
 - *Re BU* [2021] EWCOP 54

What might be coming down the line?

- And remember the Code of Practice is badly out of date
- Update to main body - timeline not known at present, but collateral damage from LPS fall-out
- In the meantime [Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf \(netdna-ssl.com\)](https://www.netdna-ssl.com/wp-content/uploads/2022/02/Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf)

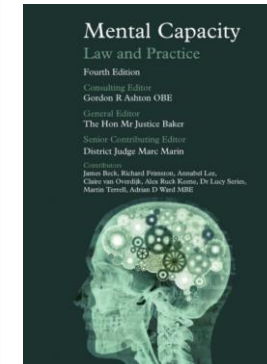
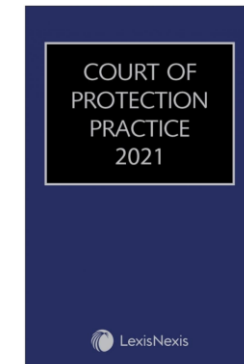
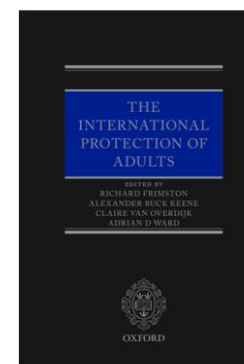
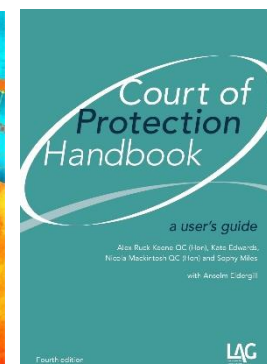
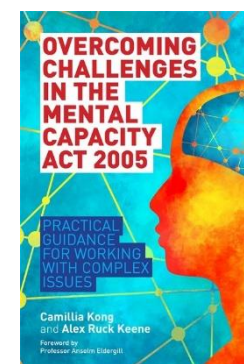
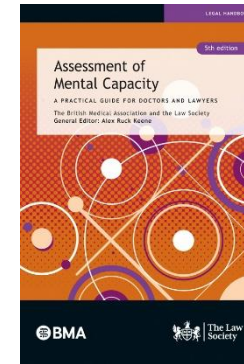


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