MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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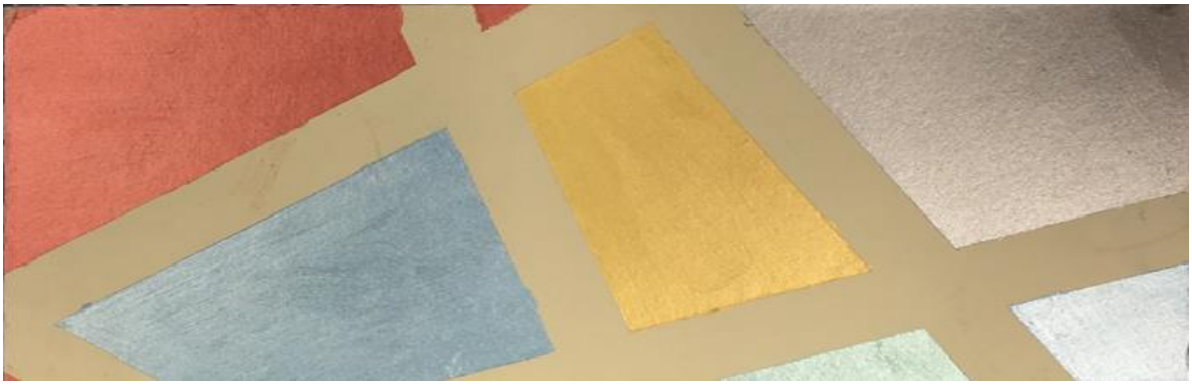

Welcome to the October 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court pronounces on confinement and 16/17 year olds and two important – and difficult – cases about sex;

(2) In the Property and Affairs Report: attorneys and gifts, and withholding knowledge of an application from P or another person;

(3) In the Practice and Procedure Report: the Court of Protection mediation scheme, and the inherent jurisdiction, necessity and proportionality;

(4) In the Wider Context Report: learning from a complex case about medical treatment for a child, the Irish Bournewood and an important shift from the CRPD Committee in the context of legal capacity;

(5) In the Scotland Report: developments in the context of the MHTS and sentencing in the presence of disability.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find our new guidance note on the inherent jurisdiction.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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'Baby Bournewood' – the Supreme Court pronounces

In the Matter of D (A Child) [2019] UKSC 42 (Supreme Court (Hale, Carnwath, Black, Lloyd-Jones and Arden SCJJ))

Deprivation of liberty – children and young persons

Summary

The Supreme Court has held (by a majority) where a 16 or 17 year old lacks capacity to give their own consent to circumstances satisfying the 'acid test' in *Cheshire West*, and if state either knows or ought to know of the circumstances, then the child is to be seen as deprived of their liberty for purposes of Article 5 European Convention of Human Rights, and requires the protections afforded by that Article. That is so whether or not their parent(s) are either seeking to consent to those arrangements if imposed by others or directly implementing them themselves.

Background

D was diagnosed with attention deficit hyperactivity disorder at the age of four, Asperger's syndrome at seven, and Tourette's syndrome at eight. He also had a mild learning disability. His parents struggled for many years to look after him in the family home, despite the many difficulties presented by his challenging behaviour.

In October 2013 when he was 14, he was informally admitted to a psychiatric hospital for multi-disciplinary assessment and treatment. He lived in a unit in the hospital grounds and attended a school which was integral to the unit. The external door to the unit was locked and D was checked on by staff every half hour. He could only leave if accompanied by staff on a one to one basis and his visits home were supervised at all times. The Hospital Trust recognised that D was confined, and sought authority for that confinement from the High Court under its inherent jurisdiction. Keehan J held that D was confined but the fact that his parents were consenting to the confinement meant that he was not deprived of liberty: *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam).

Now 16 years old, D was discharged from hospital and accommodated in a residential placement ('Placement B') with his parents' agreement under section 20 of the Children Act 1989. It was a large house set in its own grounds, with 12 residential units, each with its own fenced garden. He lived with three other young people in a house whose external doors were

locked. D was not allowed to leave except for a planned activity (eg attending school on site, swimming and leisure activities). He received one to one support during waking hours and staff were in constant attendance overnight.

In a case brought by Birmingham City Council, as responsible for his placement, Keehan J held [2016] EWCOP 8 that D's parents' continuing consent to the arrangements could not be relied upon after he turned 16 to prevent his circumstances being seen as a deprivation of liberty for purposes of Article 5 ECHR. The Court of Appeal overturned his decision ([2017] EWCA Civ 1695). The Supreme Court has now allowed the Official Solicitor's appeal (on behalf of D), declaring that D was at the material times to be seen as deprived of his liberty for purposes of Article 5 ECHR.

The issue

As Lady Hale, in the majority, identified, the case was about:

> 3. […] *the interplay between the liberty of the subject and the responsibilities of parents, between the rights and values protected by article 5 and the rights and values protected by article 8, and between the relationship of parent and child at common law and the Convention rights. The principal issue can be simply stated: is it within the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of article 5?*

Reasoning: the majority

Lady Hale founded her decision ultimately upon her analysis of Article 5 ECHR, although she acknowledged the force of the analysis of Lady Black to the effect that, even at common law, a parent does not have power to bring about a confinement of their child. Article 5 contains three limbs (sometimes called the *Stork* criteria after the Strasbourg case in which they were first identified): (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the State.

Lady Hale considered the crux of the issue under Article 5 to be:

> 39. […] *whether the restrictions fall within normal parental control for a child of this age or do they not? If they do, they will not fall within the scope of article 5; but if they go beyond the normal parental control, article 5 will apply (subject to the question of whether parental consent negates limb (b) of the Storck criteria* […]*).*

In contrast to the Court of Appeal, she found that "*quite clearly*,"

> *the degree of supervision and control to which D was subject while in Placement B and Placement C was not normal for a child of 16 or 17 years old. It would have amounted to a deprivation of liberty in the case of a child of that age who did not lack capacity. The question then arises what difference, if any, does D's mental disability make?*

Looking back to the discussion of Lord Kerr in *Cheshire West* as to the application of Article 5 to children at different ages, and consistent with the approach of the majority in that decision, Lady Hale found that D's mental disability made

no difference: "*a mentally disabled child who is subject to a level of control beyond that which is normal for a* [non-disabled] *child of his age has been confined within the meaning of article 5.*"

Lady Hale found, further, that there was no support in Strasbourg case-law for a parent (or anyone else) to give substituted consent so as to take a confinement out of the scope of Article 5 ECHR. She considered that, in cases where it was said that valid consent had been given, "*it is because the evidence showed that the person concerned was willing to stay where he or she was and was capable of expressing that view*" (para 42).

Birmingham had, at an earlier stage, argued that the fact that D was placed subject to the agreement of his parents (recorded under s.20 Children Act 1989) meant that the confinement to which he was subject was not imputable to the state. Before the Supreme Court, Birmingham abandoned that argument, "*rightly so*," according to Lady Hale:

> *43* […] *Not only was the State actively involved in making and funding the arrangements, it had assumed statutory responsibilities - albeit not parental responsibility - towards D by accommodating him under section 20 of the Children Act 1989, thereby making him a "looked after child". Even without all this, it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this: see, for example Storck, para 89.*

On the face of it, therefore, all three requirements for a deprivation of liberty had been met, a conclusion Lady Hale considered to be:

> *45* […] *consistent with the whole thrust of Convention jurisprudence on article 5, which was examined in great detail in Cheshire West. But it is reinforced by the consideration that it is also consistent with the principle of non-discrimination in article 2.1 of the United Nations Convention on the Rights of the Child, which requires that the rights set out in the Convention be accorded without discrimination on the ground of, inter alia, disability, read together with article 37(b), which requires that no child shall be deprived of his liberty unlawfully or arbitrarily, and article 37(d), which requires the right to challenge its legality. It is also consistent with article 7.1 of the United Nations Convention on the Rights of Persons with Disabilities, which requires all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*

Lady Hale, however, had to return back to the concept of parental responsibility to ask whether there was any scope for the operation of parental responsibility to authorise what would otherwise be a deprivation of liberty? There were two contexts in which this might arise, she considered:

1. Where the parent is the detainer or uses some other private person to detain the child. However, as Lady Hale observed, "*in both Nielsen and Storck it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances*."
2. Where the parent seeks to authorise the state to do the detaining. However, Lady Hale

considered it would be a "*startling proposition that it lies within the scope of parental responsibility for a parent to license the state to violate the most fundamental human rights of a child*." Even if that proposition might not hold good for all the Convention rights, in particular the qualified rights which may be restricted in certain circumstances, "*it must hold good for the most fundamental rights - to life, to be free from torture or ill-treatment, and to liberty. In any event, the state could not do that which it is under a positive obligation to prevent others from doing*."

Accordingly, Lady Hale held that it was:

> *49* [….] *not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child, as the Secretaries of State acknowledge that they must.*

Lady Black agreed with Lady Hale's reasoning and conclusion, and devoted her judgment:

1. To a detailed historical exegesis of the common law, which led her (at paragraph 90) to conclude that "*as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty*;" and
2. To a detailed analysis of the relevance of s.25 Children Act 1989, which the court had of its own motion raised after the hearing, and which has separately been troubling the appellate courts. Although ultimately Lady Black was careful to make clear that she had not reached a concluded view, which would have to await the appropriate case, she noted (at paragraph 113) in observations which had the support of Lady Hale and Lady Arden that "[t]*he exercise in which we have engaged has, however, been sufficient to persuade us that section 25 is not intended to be widely interpreted, so as to catch all children whose care needs are being met in accommodation where there is a degree of restriction of their liberty, even amounting to a deprivation of liberty*," and that "[t]*here is much force in the argument that it is upon the accommodation itself that the spotlight should be turned, when determining whether particular accommodation is secure accommodation, rather than upon the attributes of the care of the child in question*."

Lady Arden agreed with Lady Hale, but also highlighted that there will be:

> *120* […] *cases where a person loses their liberty but the acid test in Cheshire West, as Lady Hale describes it, does not apply. That conclusion is shown by observing that D's case is about living arrangements. It is not about a child, or anyone else, needing life-saving emergency medical treatment. For the reasons which the Court of Appeal (McFarlane LJ, Sir Ross Cranston and myself) gave in R (Ferreira) v Inner South London Senior Coroner [2018] QB 487, the situation where a person is taken into (in that case) an intensive care unit for*

> *the purpose of life-saving treatment and is unable to give their consent to their consequent loss of liberty, does not result in a deprivation of liberty for article 5 purposes so long as the loss of liberty is due to the need to provide care for them on an urgent basis because of their serious medical condition, is necessary and unavoidable, and results from circumstances beyond the state's control (para 89).*

Reasoning: minority

Lord Carnwath, with whom Lord Lloyd-Jones agreed, dissented, associating himself (in essence) with the reasoning of the former President, Sir James Munby, in the Court of Appeal below, and analysing *Nielsen* as a decision which "*provide*[d] *amply sufficient support Strasbourg case law for the President's reliance on equivalent domestic law principles to determine the present case*."

Interestingly, however, Lord Carnwath, in addressing Lady Black's judgment, noted that, "[f]*or the moment I remain unconvinced that the earlier cases can be relied on to limit the scope of the judgments in Gillick in the way she proposes, or that the President's conclusions is undermined*," but that he "*acknowledge*[d] *that this approach, if correct, may have advantages for the certainty and coherence of the law, particularly if taken with another important point which emerges from her review of the earlier cases. That is the willingness of the courts since the 19th century to take guidance from the legislature as to where to draw the lines in relation to the limits of parental responsibilities (see para 60, citing Cockburn CJ in R v Howes (1860) 3 El & El 332). In the present case there is the added consideration that, as noted above (para 8), the exclusion of those under 16 from the new legislative scheme appears at least in part to be a reflection of the legislature's understanding of the law following Keehan J's judgment, which to that extent may be seen as having the implicit endorsement of Parliament.*"

Points not addressed

The majority were careful to make clear that they were not pronouncing upon the operation of parental responsibility in relation to other areas in respect of children under 18, leaving open the potential for (for instance) medical treatment decisions in relation to 16/17 year olds lacking capacity to be considered either by reference to the best interests decision-making process under the MCA 2005 or by the provision of a substituted consent by a parent exercising parental responsibility. Lady Black was, however, at pains, to emphasise that: "*nothing that I have said is intended to cast any doubt on the powers of the courts, recognised in the early cases to which I have referred, and still available today in both the parens patriae jurisdiction and under statute, notably the Children Act 1989, to make orders in the best interests of children up to the age of majority, with due regard to their wishes and those of their parents, but not dictated by them*" (paragraph 90, Lady Hale expressly associating herself with these observations).

Lady Hale recognised that the conclusion that she reached in relation to those over 16 would "logically" also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age." However, the question did not arise in the case, and she preferred to expressed no view upon it (paragraph 50). Lady Black, equally, expressed a desire to leave this separate question "entirely open" to be decided in a case in which it arises.

Lord Carnwath noted Lady Hale's observation about the logical application of her conclusion "with concern," and sought to emphasise that, for the time being, Keehan J's conclusion that parental agreement can operate to prevent a confinement being a deprivation of liberty in relation to those under 16 remains good law (paragraph 159).

Comment

Implications

The legal and practical implications of this judgment are dramatic. The judgment acknowledges the 'nuancing' of the acid test that Lord Kerr had proposed in relation to younger children in *Cheshire West* but its tenor is very much to the effect that there is little or no material nuancing to undertake in relation to those aged 16 or 17. In other words, the acid test is likely to apply without modification to a 16/17 year old, subject only to the 'carve-out' for everyone identified in *Ferreira* and clarified by Lady Arden in this judgment in relation to life-sustaining emergency medical treatment.

The case focuses of course upon those of lack the relevant capacity to decide on their confinement. Logically, if the 16/17 year old has such capacity and agrees to their own care arrangements then no deprivation of liberty would arise. But what if they have capacity but object? Again logically, that would amount to a deprivation and one of the procedures detailed below will be required to ensure it is lawful.

The judgment acknowledges the 'nuancing' of the acid test that Lord Kerr had proposed in relation to younger children in *Cheshire West* but its tenor is very much to the effect that there is little or no material nuancing to undertake in relation to those aged 16 or 17. In other words, the acid test is likely to apply without modification to a 16/17 year old, subject only to the 'carve-out' for everyone identified in *Ferreira* and clarified by Lady Arden in this judgment in relation to life-sustaining emergency medical treatment.

Public authorities will need to consider the circumstances of 16/17 year olds for whom they have responsibility, whether that be under the Children Act 1989, the Social Services and Well-Being Act (Wales) Act 2014, the Children and Families Act 2014, the NHS Act, or otherwise. If the circumstances of a 16/17 year old meet the 'acid test' and they cannot (or do not) consent to their confinement, then if either those circumstances cannot be changed, or they cannot be supported to consent (freely) to them, lawful authority will be required to deprive them of their liberty (precisely who will need that authority will depend upon the facts of the case). Public authorities will also need to be alert to situations where 'private' confinements may be under way in relation to 16/17 year olds in their own homes, or in private schools/colleges, because (as Lady Hale has re-confirmed) state imputability arises where the state knows or ought to know of such private confinements.

Prior to the coming into force of the LPS in October 2020, the only "procedure prescribed by law" that can operate to provide the necessary lawful authority are:

1. The MHA 1983 where applicable. This judgment may lead to an increase in the use of the 1983 Act because the degree or intensity of arrangements in most psychiatric hospitals/units is likely to give rise to confinement. As a result, it is most

unlikely that there will be any place for informal admission for incapacitated 16/17 year olds on the basis of parental consent;

2. Section 25 Children Act 1989, where relevant, and bearing in mind the detailed observations by Lady Black about its scope;

3. An order of the court. Whether this court will be the Court of Protection or the High Court under its inherent jurisdiction will depend upon the facts of the case, but as a general rule it is more likely that the right court will be the Court of Protection (by a so-called *Re X* COP DOL11 application – for guidance, see here). If the right court is the High Court, then the procedure will be as set down by Sir James Munby P in *Re A-F (Children) (No 2)* [2018] EWHC 2129 (Fam), although note that the judgment does not discuss that there are two potential grounds upon which deprivation could be justified, Article 5(1)(d) and Article 5(1)(e). We suggest that it is necessary for the application to be clear as to which is relied upon, as this will dictate the evidence required, and the nature of the test to be applied by the court. In the case of those children who do not lack capacity (or, if relevant competence) we anticipate that public bodies and the courts will be dusting off copies of *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 to examine the scope of Article 5(1)(d) to justify deprivation of liberty "of a minor by lawful order for the purpose of educational supervision."

Looking ahead, the consequences of the judgment are perhaps less dramatic than they would have been had the question of the scope of parental responsibility in this area not been so thoroughly canvassed in the Law Commission's Mental Capacity and Deprivation of Liberty report leading, ultimately, to the inclusion of many 16/17 year olds within the Liberty Protection Safeguards. We say 'many' because LPS will only be available for those who lack the relevant capacity and have a mental disorder. The Supreme Court did not expressly address whether there may remain a cohort of 16/17 year olds who have capacity to consent to confinement but lack *Gillick* competence. Moreover, LPS will not be available for 16-17 year olds who have capacity/competence and object to their confinement. The judgment certainly reinforces the need for children's services in local authorities and NHS bodies with responsibility for under 18s to undertake the necessary work to prepare for LPS.

Other issues

The decision also gives rise to a number of other issues which will no doubt be examined in cases to come.

For example, what is the legal position regarding confinement of those under 16? There is clear disagreement in the judgment but it was not necessary to determine it.

Secondly, to what extent does *Gillick* competence apply to 16/17 year olds? Lady Black at paragraph 71 did not accept the Official Solicitor's argument that the MCA provides a complete decision-making framework in relation to acts of care and treatment because there is clear overlap with the Children Act 1989 up to the age of 18, but Lady Hale and Lady Arden did not address this. Those working on the revised version of Code of Practice to the MCA 2005 – and, in all likelihood the courts – will have to

grapple with the issue that decision-making in relation to medical treatment applying the MCA 2005 and decision-making relying upon parental consent cannot be guaranteed to reach an identical answer in every case.

Thirdly, all parties agreed that a local authority with parental responsibility by virtue of an interim or final care order, or with any other statutory responsibilities for a child, could not supply a valid consent to a child's confinement. Lady Hale doubted the basis for such agreement (paragraph 18) as the Children Act 1989 makes no distinction between the holders of parental responsibility. This may therefore be revisited in relation to those under 16.

Fourthly, for Article 5(1)(e) ECHR geeks, we note in passing Lady Hale's comment at paragraph 30 that that Article 5 ECHR "*applies to people who lack the capacity to make decisions for themselves is made clear by article 5(1)(e) which permits "the lawful detention of … persons of unsound mind*"". Whether "*unsound mind*" equates to "mental disorder" or "mental incapacity" has been a long-running issue.

Finally, there is the vexed question of the scope for using s.25 Children Act 1989 secure accommodation orders, Lady Black noting at paragraph 109 that this section "*extends well beyond local authority homes, and undoubtedly encompasses secure accommodation which does not have to be approved by the Secretary of State*".

Entirely separately, this decision also allows us to note the fund-raising being undertaken by the First 100 Years campaign to create the first Supreme Court artwork to feature women from the legal profession. The artwork, by the Turner Prize nominated artist Catherine Yass, will celebrate the centenary of the 1919 Sex Disqualification (Removal) Act which paved the way for women to practice law. It will be displayed in courtroom two where the first majority-female court – three out of five justices – sat in October 2018 on D's case.

Sex, capacity and the need for the other's consent

A Local Authority v JB [2019] EWCOP 39 (Roberts J)

Mental capacity – sexual relations

Summary

This case was concerned with whether the presumption that a man had capacity to consent to sexual relations had been rebutted. In particular there was a dispute as to whether the "information relevant to the decision" within s.(31) MCA 2005 includes the fact that the other person engaged in sexual activity with P, must be able to, and does in fact, from their words and conduct, consent to such activity.

JB was a 36 year old man with a diagnosis of autism combined with impaired cognition. JB lived in a supported residential placement where he was subject to a comprehensive care plan which imposed significant restrictions on his ability to socialise freely with whomever he chooses. These were imposed primarily in order to prevent him from behaving in a sexually inappropriate manner towards women. JB had been assessed as a moderate risk of sexual offending to women. In particular the risk was 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."

The single joint expert instructed by the parties was of the view that JB had the ability to consent to sexual relations albeit that he does not understand or weigh "*highly pertinent factors in ensuring he engages in lawful sexual activity*."

JB objected to the restrictions, wanting desperately to find a girlfriend and to have a sexual relationship.

The local authority argued that an understanding that sexual activity is a consensual act on the part of any potential partner is necessary in order to protect JB from committing criminal acts and so being imprisoned or hospitalised pursuant to the Mental Health Act "*in circumstances where, due to his mental impairment, he cannot comprehend or acknowledge the concept of consent."*

The Official Solicitor argued that as a matter of public policy the MCA should not be used as the means of imposing on a protected party restrictions which are designed either to avoid the risk of criminal offending or for the protection of the public at large. Further, the local authority's approach amounted to an impermissible attempt to include within the text for capacity to consent to sexual relations a requirement to understand, retain use and weigh potentially sophisticated aspects of domestic criminal law thus raising the bar from the deliberately low level at which it has been set in order to avoid discriminating against vulnerable adults with learning disabilities and other cognitive challenges who, despite those challenges, should be entitled nevertheless to exercise one of the most basic and instinctive functions of a human existence.

Roberts J ultimately agreed with the arguments of the Official Solicitor on the basis that:

(1) 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. It is therefore inappropriate to increase the bar for the potentially incapacitous and 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.

(2) To hold otherwise is to fail to recognise the distinction between the concept of having the mental capacity to consent to sexual relations and exercising that capacity. Roberts J considered that Section 3 MCA 2005 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.

It was agreed between the parties that "*whilst it is permissible to weigh the risk of P entering the criminal justice system and/or being the target of some form of vigilante violence as part of a best interests analysis, what is not permissible is the imposition of a restriction on his liberty in order to prevent the possibility of offending insofar as it purely risked harm to those other than P. In this context the protection of others falls squarely within the Mental Health Act 1983 as opposed to the MCA 2005*."

Comment

This case raises highly sensitive and difficult issues of, on the one hand, public protection and on the other, fundamental rights. Such decisions are rooted in public policy as the Court of Appeal accepted in *IM v LM and Others* [2014] EWCA Civ 37.

While it is clear that the court's primary concern was not to raise the bar on the test for capacity to consent to sexual relations impermissibly high so as to discriminate against JB (consistent with the Court of Appeal decision in *IM*), the consequence of the judgment is to strike from the test as relevant information a foreseeable consequence of JB having sexual relations (namely exposure to criminal sanctions or detention under the MHA as a result of his lack of understanding of the need for his partner to consent to the act). This approach is arguably inconsistent with the Court of Appeal decision in *B v A Local Authority* [2019] EWCA Civ 913 in which the Court of Appeal emphasised that P's ability to understand, retain, use and weigh the reasonably foreseeable consequences of the decision at hand is at the heart of the MCA test.

A further difficulty can be seen from paragraph 80, in which Roberts J observed that:

> *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.*

But, if JB had no understanding – and hence arguably no ability to 'know' – either the need for or the fact of a prospective partner's consent, then how could he be said to be exercising a capacitous choice whether to engage in sexual relations?

Perhaps one way of trying to unpick this legal and ethical quagmire is to focus in on the decision that P is being asked to make. If the question is – can P consent to sexual relations (and it is worth noting that this is the way the 'matter' is defined in s. 27 MCA 2005 where the prohibition on consenting on P's behalf to certain family relationships lies) – it is easier to understand why an understanding of the other parties' need to consent is not relevant. Articulating the question in this way suggests that P is a recipient of sexual advances on the part of a willing and consenting individual. All P needs to do is consent to the act on his/her own behalf. To hold otherwise in the case of a person such as JB whose deficit is said to be understanding the need for consent from the other partner would be to mean that the person wishing to have sexual relations with P would be committing an offence even though both of them were in fact consenting to the act.

But describe the 'matter' in a different way – whether P can make decisions about sexual relations – and change the scenario (in the case of JB to the more realistic one of JB being, for want of a better term, the aggressor, seeking out sexual partners), then the decision arguably shifts from looking at the matter simply through the lens of P's consent, to encompass the partner's consent as well, given the reasonably foreseeable consequences to a P who commits

a sexual offence.

We suspect that this judgment is not the last word on this knotty subject and our analysis raises the fascinating possibility that if the 'matter' is articulated in the wider way as capacity to make decisions about sexual relations, that a best interest decision could be made in respect of P as it is not prohibited by s. 27 MCA 2005.

Facilitating sexual activity – how far does the duty extend?

Lincolnshire County Council v Mr AB [2019] EWCOP 43 (Keehan J)

Best interests – contact

Summary[1]

Mr AB was a 51-year-old man with a diagnosis of moderate learning disabilities, autistic spectrum disorder, harmful use of alcohol and psychosis due to solvent abuse.

Mr AB had, as a result of a friendship with a sex worker, developed a fascination with female sex workers. He had since lived at a number of residential properties and during this time the local authority had been facilitating his access to sex workers both in the UK and in the Netherlands.

Having reversed this decision and concluded that they would no longer facilitate Mr AB's visits to sex workers, Lincolnshire County Council made an application for the court to determine P's capacity and best interests, specifically with regard to contact with sex workers.

An independently instructed psychiatrist concluded that Mr AB lacked the capacity to make a wide range of decisions including having contact with sex workers and managing his property and affairs. He was however assessed as having the capacity to consent to sexual relations. Keehan J was informed by Mr AB's litigation friend that Mr AB had a high sex drive and found the lack of access to sex workers frustrating. He wished to continue his past conduct of having and being permitted to have sexual relations with sex workers, in the UK and in the Netherlands.

The question for Keehan J was whether to endorse the decision not to facilitate Mr AB's access to sex workers made by the local authority.

Keehan J concluded that the local authority's decision was correct for a number of reasons, first because the court was of the view that:

> *a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39,42 and 53A of the Sexual Offences Act 2003.' Thus any care worker supporting P, and making arrangements for him to travel to the Netherlands for the purposes of having sexual activity with a woman for payment, would be at risk of being prosecuted for a breach of the Sexual Offences Act 2003.*
>
> *(i) Secondly, it would be wholly contrary to public policy for the court and for the local authority, to endorse and sanction P*

[1] Nicola having been involved in the case, she has not contributed to this report.

having sexual relations with a woman for payment.

(ii) Thirdly, notwithstanding P's clearly expressed wishes and his clear desires to continue to meet prostitutes for sexual activity, it is not in his best interests to do so. The evidence before the Court is clear. Mr AB 'does not understand all of the implications of having sexual relations with a woman for payment. He puts himself at risk to his health, his welfare and his safety and he puts himself at risk of exploitation: none of which he accepts or understands.'

Comment

Keehan J's support for the local authority's decision as to the right course of action is unsurprising given the evidence before it. It is however worth unpicking the conclusion that '*a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39,42 and 53A of the Sexual Offences Act 2003'.* This part of what is a very short judgment conflates two separate offences under the SOA, s. 39 and s. 53A. They are however quite distinct.

Section 39 of the SOA makes it an offence to incite or cause an individual with a mental disorder to engage in sexual activity. There is of course potential for a care worker to be guilty of an offence pursuant to section 39 where they arrange, and take P to have sex with a third party. Whether such an offence would be engaged is going to be very fact-specific, depending (we suggest) upon the extent to which the care worker could be seen to be 'driving' the sexual activity, or providing support where a person themselves is seeking to initiate sexual activity with another. Although not relevant on the facts of this case, we suggest that it is doubtful that a care worker facilitating a P who has capacity to consent to sexual relations, to take up a sexual relationship with their partner could be said to be committing an offence under section 39. This is because the care worker's actions would not be to incite or cause the sexual relationship, but to facilitate it.

Section 53A on the other hand is a strict liability offence (which applies world-wide). Payment for sexual services is not per se illegal; however, the operation of s.53A means that a person (A) is guilty of an offence if he:

- makes or promises a payment for the sexual services of a prostitute (person B)
- where person C has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B) – in other words where person C has exploited B.

Mr AB was assessed as lacking capacity to manage his property and affairs. It is likely therefore that the care worker taking him to visit the sex worker would be the person making the payment to the sex worker. The first part of the offence is therefore likely to be made out (although this is not made explicit in the judgment).

As to whether the offence is completed will depend on whether the sex worker had been exploited. Thus, unless the care agency or local authority were able to investigate whether the sex worker they were engaging for Mr AB had

been exploited by a third person, there remains a real risk that an offence would be being committed pursuant to section 53A. The judge may well therefore have been right to conclude that offences pursuant to section 53A would be committed on the facts of this case.

Whilst one can understand why Keehan J took the approach that he did, especially given the potential implications for the care workers, it is perhaps just worth remembering that:

(1) It may be morally wrong, but it is not illegal (outside the scope of s.53A) to pay for sex. As has been said in another context, the onset (or here, the fact of) mental incapacity "*is not an opportunity for moral correction*" (*Re Peter Jones* [2014] EWCOP 59);

(2) It is not immediately obvious how one filters questions of public policy through the best interests framework. Parker J, it should be noted, decided that she had to have recourse to the inherent jurisdiction in *XCC v AA* to discharge a pure public policy function arising out of P's circumstances (in that case, to grant a declaration of 'non-recognition' in relation to a marriage contracted overseas where P lacked capacity to enter into it).

Deprivation of liberty application statistics

The most recent statistics from the Ministry of Justice (for April to June 2019) have been published. They show an increase in number of applications and orders made in relation to deprivation of liberty. There were 1,372 applications relating to deprivation of liberty made in the most recent quarter, up 18% on the number made in April to June 2018. Orders made for deprivation of liberty increased by 17% to 651 over the same period, despite a decrease since the end of 2018.

The statistics show that for the first quarter of 2019 (i.e. the period before these), the 1,326 Deprivation of Liberty applications made then were broken down as follows: 85 for Section 16, 313 for Section 21A and 928 for the *Re X* process (i.e. community deprivation of liberty). We do not have the breakdown for the statistics for the second quarter, but the trend appears clearly to be upwards in terms of community deprivation of liberty applications (the quarter previously having seen 663 applications).

Separately, the statistics show that there were 8,110 applications made under the MCA 2005, up 9% on the equivalent quarter in 2018. 44% related to applications for appointment of a property and affairs deputy. In comparison, there were 11,814 orders made under the MCA 2005, 31% more than the same quarter in 2018. The MoJ explains that the increase is largely due to a 72% increase in orders by an existing deputy or registered attorney, which accounted for 36% of all orders made under the MCA.

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Conferences

Conferences at which editors/contributors are speaking

AWI, guardianship and elder law conference

Adrian is giving the keynote address for the Law Society of Scotland's conference on this subject in Glasgow on 30 October. For more details, and to book, see here.

Adult incapacity law

Adrian is delivering a lecture at Edinburgh Napier University on 13 November on "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history." For more details, see the website of the Centre for Mental Health and Capacity Law.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, see here.

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see here.

Other conferences of interest

The Court of Protection Bar Association will be holding a seminar, open to members of the Association, on 28 October at 39 Essex Chambers in London addressing recent developments in mental capacity law. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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