

Perspectives on the Mental Capacity Act, sex, and relationships: Where is the line and who draws it?

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Sex and relationships in the Court of Protection

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Legal framework

- The legal framework for **capacity** is the same as for other decisions such as where to live or what medical treatment to accept - apply ss.2 and 3 MCA 2005 and the Code of Practice

Relevant information

Sex IM v LM, AB and Liverpool City Council [2014] EWCA Civ 37

Relationships/contact *LBX v K, L and M* [2013] EWHC 3230 (Fam); *A Local Authority v TZ (No. 2)* [2014] EWCOP 973

Contraception *A Local Authority v A & Anor* [2010] EWHC 1549 and *The Mental Health Trust & Ors v DD & Anor* [2015] EWCOP 4

Marriage *Local Authority X v MM* [2007] EWHC 2003 (Fam)

Best interests

- If you lack capacity to consent to sexual relations or marriage, there is **no best interests decision** to be made. Sex where one person lacks capacity to consent is rape. Rape cannot be in someone's best interests.

S.27 MCA 2005

(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person—

(a) consenting to marriage or a civil partnership,

(b) consenting to have sexual relations...

Capacity with incapacity

- A person may have capacity to consent to sexual relationships but lack capacity to decide about contact/assess potential risk from partners
- Duty not to obstruct sexual relationship – breach of Article 8
- But also a duty to prevent harm.....

Article 8 ECHR

- Obstruction or prevention of sexual relationship, including by failing to assist someone to acquire capacity to consent to sex, may violate Article 8

CH v A Metropolitan Council [2017] EWCOP 12 - £10,000 damages plus legal costs

Resources

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- www.mclap.org.uk
- www.mentalhealthlaw.co.uk
- www.courtprotectionhandbook.com



Assessing Capacity for Sex and Relationships: The Clinical Psychologist's Role

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Supported Loving

Referrals

Received from GPs, Psychiatrists, Service Providers.

Not uncommon for them to lack specificity in terms of the decision in question.

We accept if appropriate, but sometimes have to remind that we must assume capacity.

Clinical Psychologist's Role

Provide professional opinion on how the 'impairment of mind' appears to impact the making of a specific decision.

Provide a conclusion based on evidence and not merely judgement.

- Operationalised through direct quotes and descriptions of past behavior in subsequent report conclusions

Specific Decisions – Essential Information

Sex

The mechanics of the act.

That sex between a man and woman may result in pregnancy.

Unprotected sex increases risk of STDs/STIs.

That both parties must consent and each have the right to say no.

Relationships (contact with)

The person's own support needs.

The level of support available in each relationship.

The physical, psychological and social benefits which each relationship will provide.

Any physical, psychological or social harm which may be sustained in each relationship.

The person needs to understand these benefits and harms in the short, medium and long term.

The Assessment

Clinical interview and discussion (using prompts where needed, such as pictures or vignettes).

Formalised assessment tools may also be used (but results cannot be sole basis for conclusions).

Breadth and quality essential; multiple sessions, information from third parties, consideration of 'when, where, and how' to put person most at ease.



Could Capacity be Gained?

Judgement made based on cognitive profile and psychological formulation of the person.

Recommendations made on how this might best be achieved (e.g. sex education, assertiveness training).

May be assigned to other profession, such as a nurse.



Moving Forward

May offer to reassess after practicable steps have been taken to help person gain capacity.

Provide consultation on best interests decision (if we know the person well).

Where assessment was requested without sufficient justification, systems level input maybe required with staff team and/or service provider.



Let's hear from an expert by
experience...



Thank you

Any questions?

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