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Case No: COP11895254

IN THE COURT OF PROTECTION
SITTING AT LEEDS
CIVIL JUSTICE HEARING CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th January 2012

Before :

The Hon. Mr. Justice Hedley

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Between :

A Local Authority	**Applicant**
- and -	
H	**Respondent**

- -
- -

Ms Nicola Greaney (instructed by **Weightmans LLP**) for the **Applicant**
Ms Jenni Richards, Q.C. (instructed by **Hogans Solcitors**) for the **Respondent**

Hearing dates: 15th December 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE HEDLEY

This judgment is being handed down in private on 27th January 2012 It consists of 8 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Hedley :

1. On 15 December 2011 I made an order declaring H's incapacity in many respects and making best interests declarations as to her future care. In particular I made an order declaring that H lacked capacity to consent to sexual relations and a consequential order to protect her best interests which was very restrictive and undoubtedly amounts to the deprivation of liberty. In those circumstances I reserved my reasons for making these orders with a view to handing them down without the need for attendance of any party. This I now do.

2. Moreover, having regard to the nature of the findings and restrictions consequent upon them, I think it right to deliver these reasons in open court. This judgment has been anonymised accordingly. It will, however, remain a contempt of court for anything to be published that might reasonably be expected to lead to the identification of H.

3. It is important to set the context of these proceedings and it is to be found in the history of H herself. The records available are very extensive and I therefore propose to be selective with the intention of both producing a balanced picture and including only those aspects that bear relevantly upon the issue in question.

4. H is aged 29. She was born in a northern city and lived with her parents and younger brother. She attended a special school from the age of 5 until 17 when she transferred to a community college until 19. She was by then living in the area of the current local authority. Her parents had separated and she was living at home with her father and younger brother. Sadly her father died in 2007; in the meantime her mother remarried. She retains, and wishes to retain, links with her family. Since her father's death, H has led a rather itinerant lifestyle until admission in August 2009 to a psychiatric hospital initially as an informal patient.

5. Dr. Xenitidis, a consultant psychiatrist, was jointly instructed to provide an expert opinion on capacity. He confirmed the working diagnoses in relation to H: mild learning difficulties and atypical autism with a full scale IQ of 64. Clearly those conditions have been (and will continue to be) lifelong though there remain prospects of improvement in function.

6. H's history demonstrates both a very early and a very deep degree of sexualisation. Her family and social services records (both authorities and adult as well as children services) bear powerful and consistent testimony to this. She had been consecutively on the child protection register of the authorities as well as there being extensive entries in the adult records of the current authority. Whilst some detail must be set out in the run up to the hospital admission in 2009, it is not necessary to recite in public the detailed history on which these general observations are based. It is set out in detail in the chronology.

7. Two comments do, however, require to be made. The first is that for all the concerns that were repeatedly and consistently expressed from about 1990 until 2009, it was never judged necessary for a formal statutory intervention in her life to take place. With the benefit of hindsight that may seem surprising though when each individual incident is examined and her age and the support available are considered, one can see why. What in fact happened might reasonably have done so. The second is this:

given the very restrictive regime now authorised, it is essential that the authority remain pro-active. As will appear herein, the local authority has satisfied me that that would be so though that may not always have been the case.

8. It is now therefore necessary to come to 2009. H was then 27; she had learning difficulties, was highly sexualised and, given her autistic condition, was highly vulnerable. At least one man had been convicted in respect of a sexual offence against her - attempted rape in 2003 - and others were engaging in sexual behaviour which, whilst consented to by her, could have been seen as unconventional and exploitative. In her attempts to live independently she had incurred debts in excess of £10,000 and she had suffered some harassment in her attempts at work. Matters came to a head when she sought refuge in the home of a man called R.

9. Now R was not a man with an enviable background but he clearly acted quickly and responsibly to see that H's interests were safeguarded. He drew the attention of the authorities to H's sexual activities, vulnerability and disinhibition. This resulted in a domiciliary visit by a psychiatrist. The local authority records confirm this –

> "During this interview she gave an extensive, if confused, history of the willingness to have sex with anyone who asked her including strangers. She indicated that she was engaging in sex with multiple partners at the same time, including a group of much older men, considered that she was bi-sexual, and had engaged with oral and anal sex and that she had attempted to have sex with dog".

Subsequent enquiries revealed that she saw herself as obligated to submit to that which was in fact rape. She was admitted to hospital on the day of that domiciliary visit.

10. In the event she remained in hospital until August 2011. Her behaviour in hospital often displayed highly sexualised and bizarre features. Her admission became compulsory under Section 3 Mental Health Act 1983 on 20th November 2009 and thereafter authorisation was renewed until her ultimate discharge. Attempts were made both to ascertain what she understood about sexual relations and to give some education in issues of self protection. It is fair to say that those entrusted with her care found her case perplexing and on 16th October 2010 proceedings were issued in the Court of Protection. The hearing on 15th December 2011 was hoped to be a final hearing.

11. A number of issues were obvious from the evidence which itself provided clear and, and in the event, uncontroversial answers. H lacks capacity to litigate. Her interests have been attended to throughout the proceedings by the Official Solicitor who in turn has instructed experienced local solicitors. H lacks capacity to determine her residence, her care and support arrangements, contact and her finances. Those matters require no further elucidation in this judgment. I have also found that she lacks capacity to consent to sexual relations but that it is not necessary to make declarations as to capacity to marry or deal with contraception. Those matters do require further treatment in this judgment. The order contains a number of detailed provisions relating to the appointment of a financial deputy, disclosure and costs that need no further comment here.

12. It is, however, necessary to set out the current care and living arrangements for H because they follow on from and depend on the court's conclusions about capacity to consent to sexual relations. It is intended that these arrangements in any event should continue during the better part of next year.

13. H lives in accommodation provided by a private agency in contract with the local authority. There are some three other residents living in the same building. At least 1:1 supervision is provided during the day and waking supervision is required overnight. H is supervised on a 1:1 basis at all times whether in or out of the property and she is not free to leave it on any other basis. Those who may enter the property are also carefully regulated. It is not that H does not have much to do, (she has a number of outside activities including two part time jobs) but that she cannot do it without 1:1 supervision. This highly regulated regime evokes two observations: first, that it clearly constitutes a deprivation of liberty and indeed a DOLS standard authorisation under Schedule A1 of the Mental Capacity Act 2005 is in force and its renewal will be sought; and secondly, the purpose of these restrictions is to prevent H from engaging in sexual relations (which she would otherwise willingly do) because she does not have capacity to consent and they will be potentially exploitative and damaging.

14. These are considerable incursions into personal autonomy and freedom. They depend on a best interests judgment as to her needs and have their legal foundation in a finding of incapacity to consent to sexual relations. All parties accept that if the legal foundation is secure, the best interests judgment is sound. It will be subject to a major review by the local authority in September and by the court in November 2012 both as to capacity and best interests. Although the best interests regime is highly restricted, a reading of even a cursory history set out in this judgment renders it justifiable at least on the present basis whilst further learning takes place on H's part both as to sexual and personal safety and as to life skills generally. It is to the soundness of the legal foundation that I must now turn.

15. The principal source of the law is the Mental Capacity Act 2005. Thereunder, there is a presumption in favour of capacity (Section 1(2)) and a prohibition against inferring incapacity from unwise decisions (Section 1(4)) as well as a requirement to act in the best interests (Section 1(5)) and by Section 1(6) to consider the least restrictive option. Section 2(1) requires a finding of incapacity to be based on " ... an impairment of, or a disturbance in the functioning of, the mind or brain." The psychiatric evidence in this case conclusively establishes this condition. Accordingly one turns to Section 3(1) which provides –

"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…"

In this case nothing turns on Section 3(1)(d) as she can well communicate her views. The focus of the enquiry is on the balance of Section 3(1).

16. I heard useful evidence from the social work manager which allayed some concerns and resulted in the expression of a common mind on the welfare outcomes. I also heard evidence from Dr. Xenitidis as mentioned above. His evidence needs to be considered in the framework of the necessary ingredients for capacity to consent to sexual relations. This is controversial and accordingly needs to be addressed now.

17. The question of capacity to consent to sexual relations is clearly both sensitive and difficult. Such a finding may have wide ranging implications not only for H and those responsible for her care but for any who have dealings and, in particular, sexual relations with her as any expressed consent may be void and the person concerned be at risk of conviction for a serious offence under the Sexual Offences Act 2003.

18. I have been referred to some five reported cases –

    i) **X C.C. -v- MB, NB & MAB** [2006] 2 FLR 968 (Munby J.)

    ii) **Local Authority X -v- MM** [2007] EWHC 2003 Fam (Munby J.)

    iii) **R -v-C** [2009] UKHL 42 (per Baroness Hale)

    iv) **D.C.C. -v- LS** [2010] EWHC 1544 Fam (Roderick Wood J.)

    v) **D B.C. -v- AB** [2011] EWHC 101 COP (Mostyn J.).

    Two points need to be made. First, since all cases save (iii) involve first instance decisions and since Baroness Hale's observations in C are obiter, then notwithstanding the distinction of each judge, no decision is binding on a High Court Judge sitting as a nominated judge of the Court of Protection. Secondly Counsel are agreed that the judgments are as between themselves not capable of reconciliation.

19. This is clearly an unsatisfactory state of affairs given the importance of the concept under consideration. It is, however, a real problem as in so many cases (like this one) the actual outcome is one with which all parties can live and there is accordingly no appeal. We have no procedure for bringing this issue before an appellate court save by appeal in a specific case. What then is this court to do? Clearly I cannot avoid expressing a view with the attendant risk of yet further confusion. Yet it cannot be any part of my role, nor would I regard myself as equipped to attempt it, simply to subject those five judgments to critical analysis and then solemnly pronounce as between them. I propose in fact to approach the task in this way: having acknowledged those decisions, I propose to attempt an analysis of my own from first principles, guided by the Statute, and then (and only then) to compare (and no doubt contrast) my conclusions with those reached in the five cases.

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 a 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 sexual 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 tend 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.

22. These issues, moreover, resonate both in criminal and in civil law. It is of course highly desirable that there should be no unnecessary inconsistency between them. However, capacity arises in different contexts. In the criminal law it arises most commonly in respect of a single incident and a particular person where the need to distinguish between capacity and consent may have no significance on the facts. In a case such as the present, however, capacity has to be decided in isolation from any specific circumstances of sexual activity as the purpose of the capacity enquiry is to justify the prevention of any such circumstances arising. There is of course no absolute distinction between capacity in civil and capacity in criminal law, it is merely that they fall to be considered in very different contexts and often, perhaps, for different purposes.

23. So let me turn then to Section 3(1) of the 2005 Act with the question of sexual relations specifically in mind. First comes the question of understanding the relevant information, but what is that? Clearly a person must have a basic understanding of the mechanics of the physical act and clearly must have an understanding that vaginal intercourse may lead to pregnancy. Moreover it seems to me that capacity requires some grasp of issues of sexual health. However, given that that is linked to the knowledge of developments in medicine, it seems to me that the knowledge required is fairly rudimentary. In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom. I do not think more can be required.

24. The greater problem for me is whether capacity needs in some way to reflect or encompass the moral and emotional aspect of human sexual relationships. I have reflected long and carefully on this given Miss Jenni Richards Q.C.'s challenge to formulate and articulate a workable test. In relation to the moral aspect, I do not think it can be done. Of itself that does not alarm me for two reasons: first, I think the standard for capacity would be very modest not really going beyond an awareness of 'right' and 'wrong' behaviour as factors in making a choice; and secondly, the truly amoral human is a rarity and other issues would then come into play. Accordingly, although in my judgment it is an important component in sexual relations it can have no specific role in a test of capacity.

25. And so one turns to the emotional component. It remains in my view an important, some might argue the most important, component; certainly it is the source of the greatest damage when sexual relations are abused. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. 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.

26. That then would be my analysis of the requirements for capacity to consent to sexual relations. 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.

27. I am conscious that all this may have deepened rather than dispelled the legal fog in which this concept of capacity to consent to sexual relations has drifted. It can only be hoped that in the not too distant future this issue may be addressed by the appellate courts.

28. Turning then to H's position as discerned by Dr. Xenitidis, the stumbling block for him was her capacity to appreciate that there were health issues even though she had suffered from a sexually transmitted disease. Her appreciation of anal and oral sex (which she had practised) was particularly lacking in this understanding as was her appreciation of how she could protect herself. Moreover, she clearly had difficulty saying no but that is not the same as understanding that she had a choice: she understood that but had found it very difficult to practise.

29. Learning difficulties impair memory and H is no exception. She has difficulty retaining information but with patient explanation and repetition will be able to retain basic information. I would be reluctant to conclude that she lacks capacity on this basis.

30. Then one comes to the question of using and weighing the information. This is a difficult concept in the context of human sexual relations since choices are generally made rather more by emotional drive and instinct than by rational choice. Of course there is a rational element that has been for most people assimilated into instinct and the control of emotional drive. It seems to me that what is at issue here is whether the person is able to deploy the general knowledge as set out above into a specific decision making act. Again H would struggle here partly through an incomplete knowledge base and partly through an inability to deploy the knowledge she has when (as readily happened) she was sexually aroused.

31. I have therefore come to the conclusion that H lacks capacity to consent to sexual relations on two specific bases: first, that she does not understand the health implications of sexual relations, a matter made more serious in this case by her history of multiple partners indiscriminately accommodated; and secondly, that she cannot deploy the information she has effectively into the decision making process. Those

matters are evidenced both by the history of the case and the expert psychiatric assessment of Dr. Xenitidis.

32. It must of course be remembered that improvement and maturation is possible on both these fronts and hence the need to keep the matter under review, though this is clearly at best a medium to long term possibility.

33. Having concluded that H lacks capacity to consent to sexual relations, let me turn to the issue of capacity to marry. H shows no present disposition to marry. Marriage of course raises more and complex issues than does consent to sexual relations. On the other hand for so long as marriage requires sexual intercourse for its consummation, it must follow that the person who lacks capacity to consent to sexual relations (as H does) must lack capacity to marry. It is enough to state that. There is no purpose in exploring H's general capacity to marry and accordingly I decline to make a formal declaration that she lacks capacity to marry beyond lacking capacity to consent to sexual relations.

34. Likewise I think it is premature to make a like declaration in respect of contraception. She has some basic understanding of it, she is capable of learning more and she is currently prevented from having sexual activity with another. She currently receives adequate contraceptive protection in any event. The focus here should be on educating H and, in the course of that, negotiating a suitable contraceptive routine. If necessary, this issue could be revisited in the future. In the end all were content to accept that view.

35. The local authority wish to continue with H's education and awareness of sexual protection and sexual health issues. Dr Xenitidis thinks further progress is possible. They wish to conduct a wholesale review of H's capacity and best interests in September 2012. They clearly fully appreciate how restrictive of H's personal freedom the current arrangements are and how the balance always has to be struck between the competing demands of freedom and protection. I fully agree with that approach and, given the significance of the issues raised in this case, propose that I should review the case in November 2012. It is strange, but nevertheless true, that even the freedom to make unwise decisions, clearly a real risk here in relation to sexual relations, is one that the court is required to guard and only to restrict if and when (bearing in mind Section 1(6) of the Act) the best interests of H positively so require.

36. It is in those circumstances that I have concluded that this judgement should be given in public. Accordingly I decided to grant the declarations and make the orders which I did on the 15 December 2011.