Presentation handout

Capacity & sexual relations : the role of local authorities

The important role of local authorities in: (1) assessing; and (2) facilitating capacity to engage in sexual relations was recently highlighted by the decision in CH v A Metropolitan Council [2017] EWCOP 12.

CH:

- CH was an application for the approval of a settlement agreed between CH and the local authority.

- The facts:

    - CH was a 38 year old man.
    - He was born suffering from Downs Syndrome and had an associated learning difficulty.
    - In 2010 CH married WH.
    - Since 2010 CH and WH have lived together in CH's parent's home.
    - Initially, CH and WH "*enjoyed normal conjugal relations*".

    - In late 2014 CH was assessed by a consultant psychologist, who concluded that he lacked capacity to consent to sexual relationships.
    - The assessment had come about because CH and WH had sought fertility treatment.

    - By letter dated 27 March 2015, CH and WH were informed of CH's lack of capacity.
    - WH was advised that she must abstain from sexual intercourse with CH as that would, given his lack of capacity, amount to a serious criminal offence.

- WH reasonably understood that should she fail to comply, safeguarding measures would be undertaken requiring the removal of her or CH from their home.

- WH moved into a separate bedroom.
- Further, in order not to "*lead him on*", she significantly reduced any physical expression of affection.
- CH could not understand why WH did that. The impact on him was considerable.

- The consultant psychologist made it clear that CH needed a course of sex education to assist him to achieve the necessary capacity.
- The local authority failed to provide that sex education (despite requests).

- CH's sister instituted proceedings to the Court of Protection in February 2016.
- The Court ordered that the psychologist's original advice be implemented.
- The course of sex education began on 27 June 2016.

- Following two course of sex education, CH was assessed as having capacity to consent to sexual relations on 19 March 2017.

- The claim:

  - CH's legal team submitted a letter before claim to the local authority.
  - It was argued that the delay in instituting the recommended sex education between March 2015 and June 2016 constituted a breach of CH's ECHR Article 8 right to respect for his private and family life.

  - The local authority conceded that they had breached CH's Article 8 right.
  - The Parties agreed to a settlement including:
    - A formal apology to CH.
    - Payment of damages in the sum of £10,000.

- Sir Mark Hedley approved the settlement, but noted that £10,000 was "*towards the lower end of the range*"

There is, in my opinion, nothing particularly novel about the decision in CH, rather, its importance for local authorities is as a warning that:

1. They must give serious consideration to their duties as regards capacity to consent to sexual relations; and
2. The financial consequences of neglecting to do so may be particularly severe.

That brings me to the second part of this presentation: what must a local authority do?

This part of the presentation is divided into three parts:

1. The duty to assess capacity
2. The principles governing capacity assessment
3. What to do when P lacks capacity to consent to sexual relations

The duty to assess capacity

S42 of the Care Act 2014 states:

(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there) –
   a. Has needs for care and support (whether or not the authority is meeting any of those needs),
   b. Is experiencing, or is at risk of, abuse or neglect, and
   c. As a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

(2) The local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom.

My understanding is that the effect of this is that:

- Where a local authority has reasonable cause to suspect that an adult in its area lacks capacity to consent to sexual relations, but is engaging in sexual relations (or at risk of engaging in sexual relations), a capacity assessment must be undertaken.

The principles governing capacity assessment

The guiding principles are those in sections 2 and 3 of the Mental Capacity Act 2005:

S2(1) – "*For the purposes of this Act, a person lacks capacity in relation to a matter 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.*"

S3(1) – "*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 (whether by talking, using sign language or any other means)."

In relation to sexual relations, the leading authority is IM v LM [2014] EWCA Civ 37.

Facts:

- During surgery in 2011, LM suffered a cardiac arrest leading to a hypoxic brain injury.
- LM's injury resulted in significant amnesia with moments of lucid thought. Her memory loss causes her confusion and distress.

- Prior to her brain injury, LM had had a sexual relationship with a man AB, and they had lived together for a number of years.

- During a capacity assessment being undertaken for the purpose of resolving issues as to residence, contact, treatment etc, LM informed the assessor that she wished to re-establish a sexual relationship with AB.
- Thus the issue of LM's capacity to consent to sexual relations arose.

Having considered the evidence on capacity, the judge at first instance (Peter Jackson J) concluded:

> "*I find … that [LM] does possess the abilities required to lead to the conclusion that she has capacity to make decisions about whether or not to have sexual relations. She is somebody who has been [fully] sexually active in the past; she has had children; she understands the rudiments of the sexual act; she has a basic understanding of issues of contraception and the risks of sexually transmitted diseases. The area in which she is weakest is her ability to understand the implications for herself should she become pregnant. Pregnancy for [LM] would be an extremely serious state of affairs; there can be no doubt about that. But her weakness in that respect does not for me lead to the conclusion that her capacity is absent; it argues for her to receive continued safeguarding and help, advice and explanation as and when the question of sexual activity might become a reality.*"

This conclusion was endorsed by the Court of Appeal, who then gave the following guidance:

- For pragmatic reasons, capacity to consent to future sexual relations should be assessed on a general basis (i.e. not tied down to a particular partner, time or place).

- The assessment of capacity is to be undertaken by considering the four elements of the decision making process identified in s3(1) MCA.
- However, "*The extent to which, on the facts of any individual case, there is a need either for a sophisticated, or for a more straightforward, evaluation of any of these four elements will naturally vary from case to case and from topic to topic.*"
- And in the case of sexual relations, the third factor – the ability to use and weigh information – is unlikely to loom large in the evaluation of capacity.

- The reason for this is that we should not hold people who lack capacity to any higher standard than that which is typical of all other human beings.

Thus the key question for someone assessing capacity to engage in sexual relations will be whether P is able to understand and retain the information relevant to the decision.

Guidance on what information should be regarded as "*information relevant to the decision*" is provided in The London Borough of Southwark v KA, MA, RN "Capacity to Marry" [2016] EWCOP 20 at [41]:

"*...the core relevant information, in respect of sexual relations, on the basis of established authority, is*

i) The mechanics of the act.

ii) That sexual relations can lead to pregnancy.

iii) That there are health risks caused by sexual relations."

Where the contemplated sexual relations are anal sex or oral sex, the second of these becomes irrelevant (see Mostyn J in D Borough Council v AB [2011] 3 WLR 1257 at [43])

There is authority that P must still understand that sexual relations can lead to pregnancy when she has an IUD fitted (Mostyn J in London Borough of Tower Hamlets v TB [2014] EWCOP 53). On its face this is somewhat inconsistent with the approach to anal or oral sex, and may be open to appeal. Particularly given (and without being too graphic) that anal sex between heterosexual couples carries with it some risk of pregnancy.

A further outstanding question, illustrated by the facts of CH, is the extent to which an understanding of the health risks of sexual intercourse is relevant when the sex in question is solely in the context of a stable, monogamous relationship.

What to do when P lacks capacity to consent to sexual relations

The first point to emphasise is what the local authority cannot do. It cannot make a decision that it is in P's best interests to engage in sexual relations.

This is a result of s27(1) of the Mental Capacity Act 2005, which states "*Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person*" and specifies at (b) "*consenting to have sexual relations*".

In fact, sex with someone lacking capacity is rape – R v A [2014] EWCA Crim 299.

In my opinion, the absolute prohibition on making best interests decisions in relation to sexual relations in s27(1)(b) of the MCA is unjust. Take CH for example, where, had CH not regained capacity following his sex education, the finding of a lack of capacity would have destroyed an apparently very beneficial relationship between CH and WH.

It may be arguable that the absolute prohibition in s27(1)(b) is contrary to Article 8 ECHR (but I won't dwell on the point).

Where P is assessed as lacking capacity to consent to sexual relations, there are two things that a local authority must do:

1. Prevent relevant sexual activity;
2. Facilitate capacitous decision making.

Preventing sexual relevant sexual activity

Local authority (safeguarding) is under a duty to do anything which appears to it to be necessary or desirable to protect adults at risk of abuse or neglect (s43 Care Act 2014).

In IM v LM, the Court of Appeal describes the duty as follows: "*if, in any case, there is a declaration of lack of capacity, the relevant local authority must undertake the very closest supervision of that individual to ensure, to such extent as is possible, that the opportunity for sexual relations is removed.*"

This may be an overstatement, the duty is to do anything which appears necessary or desirable, and this does not necessarily equate to "*the very closest supervision*" of the individual considered to lack capacity.

For example, in CH, a letter was sent to CH and WH explaining that they must abstain from sexual relations. There was no suggestion in that case that this approach was insufficient.

The steps to be taken must be assessed on a case by case basis.

Facilitating capacity

S1(3) of the Mental Capacity Act 2005 states "*A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.*"

All practicable steps is a high hurdle.

Practically, the implication of this obligation for Local Authorities:

1. Always ask an assessor to consider whether or not education will be appropriate
2. If there is any suggestion that it will, then implement the suggested programme

Referring back to CH where we started, it is a breach of P's Article 8 rights to protection of his private and family life if recommended steps aren't promptly followed up.

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