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Live-tweeting of the Supreme Court hearing in *A Local Authority v JB* (by his Litigation Friend, the Official Solicitor) (AP) coming up...

[#COP](#) [#courtofprotection](#) [#capacity](#)
[#capacitytohavesexualrelations](#)

The Official Solicitor appeals the decision given by the Court of Appeal in this case about the capacity to decide whether or not to have sexual relations. See <https://www.supremecourt.uk/cases/uksc-2020-0133.html>

Counsel for the OS highlighting inquisitorial nature of the Court of Protection. Acknowledges that P and P's partner's consent to sexual relations is fundamental. Both should have the relevant capacity to provide consent. Non-consensual sex is of course wrong.

OS's arg is three fold: 1. CoA departed from language and purpose of MCA when it made interim declaration the subject of appeal. 2. Parliament has set out respective roles of CoP and criminal offences under the SOA 2003.

When these roles are properly understood, HHJ Roberts' decision at first instance is to be preferred.

Counsel notes this is a "highly complex area" and the Court of Appeal was constituted by the President of the Court of Protection, Sir Andrew McFarlane.

This case concerns the intersection of disability and human sexuality, and the "Court is being asked to find the least imperfect solution to a complex human problem"

Counsel discusses P's background, as a "very likeable man" interested in arts and crafts, with no criminal convictions or civil orders in place. Important not to lose sight of the human aspect of this problem, albeit much Court discussion will be necessarily high-level.

Counsel for the OS: "The expression of sexual identity to P and indeed many humans is central to their identity".

Lady Arden asks about pre-legislative materials re third party interests when making best interests decisions, and whether these have been located / considered.

Lady Arden states that as a public authority, when the Court of Protection makes a decision, if it engages Article 8, including for 3rd parties (not just P), it must take into account 3rd parties' article 8 rights too.

Counsel: "The Court is concerned with whether P can consent, and that does not involve third parties". Lady Arden states that Article 8 will need to be satisfied.

Counsel for the OS is defining the issue - "What is the decision - is it consent to sexual relations or engaging in them?" OS's case: Short answer - s.27 MCA - states what the matter is: "consenting to have sexual relations"

Counsel for the OS says the Court of Appeal considered the separate question of what information would a capacitous person consider in reaching a decision?

Lady Arden points to s.3(4) MCA 2005 which states that the information relevant to a decision includes "information about the reasonably foreseeable consequences" of deciding one way or another. She asks whether this does not cover 3rd party consent to sexual relations?

Lord Briggs raises the general law of negligence, and the duty to exercise reasonable care towards other people - the 'neighbour duty'. Is Counsel saying that taking decisions about oneself excludes concerns about others (i.e. am I going to injure my neighbour?)

Counsel highlights that the Court of Protection can impose contact restrictions even where P has capacity to have sexual relations. Cites TZ. Counsel highlights safeguards from Parliament in the Sexual Offences Act 2003.

Counsel for the OS states that the Court of Protection does not have a public protection role. Rather Parliament has devised different legislative schemes, such as Sexual Risk Orders, for this purpose.

Debate about 'low-level' threshold for capacity and understanding the nature of an act and exercising it (capacity). Counsel for OS clear that qs for capacity to consent to sexual relations = does P understand nature of the act? Health risks? Pregnancy risk?

Court asks why the fact that an act might cause "grievous, irreparable harm" to another person is not a matter going to the decision? Wouldn't a capacitous person wish to take this into account?

Counsel for the OS's reply is that there is a difference b/t capacity (low threshold) and exercising that capacity. If a risk is presented, it can be controlled by contact restrictions / sexual risk orders.

OS says the criminal law has influenced civil in what it means to have capacity to consent to sexual relations. Points to R v Morgan - Supreme Court of Victoria in Australia. This focusses on understanding the nature of the sexual act.

Not the foreseeable consequences of the act with a particular person. That has not been the formulation in the common law or in the COP. The formulation has focussed on criminal law understanding of nature of the act.

Lighthearted moment where Lord Burrows (who was a Law Commissioner reporting on Mental Incapacity in 1995 here <https://www.lawcom.gov.uk/app/uploads/2015/04/lc231.pdf>) confirms that Lady Hale (then Prof Hoggett) was at the forefront of that work, being cited now

OS on s.4 MCA - how would a person-specific approach be applied in practice? How would you go about identifying potential sexual partners and their characteristics / the consent process for that

OS's Counsel: P either has capacity to consent to the sexual act or not. That cannot depend on who P's partner is, according to the language of the Act.

Now listening to the LA's Counsel Vikram Sachdeva QC. Lovely to see some women barristers / lawyers in the camera shot. They appear to be for both sides. Also heartening to see Lady Rose and Lady Arden, so women on both sides of the Bench which is not true in every case.

The LA's submissions were accepted by the Court of Appeal, so the LA's case is primarily taking the Court through that. In Counsel's words, "[t]his is where the Court of Appeal get it absolutely right..."

The information relevant to the decision to enter into sexual relations "inevitably includes the fact that any person with whom P engages in sexual activity must be able to consent to such activity and does in fact consent to it" (citing CoA judgment)

"Sexual relations between human beings are mutually consensual. It is one of the many features that makes us unique." para 94 CoA judgment

"A person who does not understand that sexual relations must only take place when, and only for as long as, the other person is consenting is unable to understand a fundamental part of the information relevant to the decision whether or not to engage in such relations."

Interesting interjection from the Supreme Court: "Does that mean that rapists lack capacity?" Counsel: "No, they have capacity to understand [that the decision to have sexual relations must only take place when both people consent] but they ignore it"

Can't stay for the rest of this unfortunately, but cannot wait for what will no doubt be a hugely insightful judgment on the complex topic of capacity to enter into sexual relations, and how capacity in the Court of Protection context differs / overlaps with the criminal context

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