***A LOCAL AUTHORITY V JB* [2020] EWCA Civ 735 and *A LOCAL AUTHORITY V AW* [2020] EWCOP 24: RETHINKING SEXUAL CAPACITY?**

**ABSTRACT**

In *A Local Authority v JB* and *A Local Authority v AW* the Court of Appeal and Court of Protection respectively had to consider questions regardingdecision making about sexual relationships. This case commentary suggests that both decisions are to be welcomed in many ways, not least in the primacy they give to the role of consent within sexual relationships. However, working through their implications also reveals a number of perplexing legal and practical binds that cannot easily be overcome, and that in fact stem from the way that the Mental Capacity Act 2005 itself works. In light of this, the commentary concludes by suggesting that it is likely that there will be continued dissatisfaction with this area of law, and hints that the time may have come to rethink sexual capacity.

**KEYWORDS:** best interests; capacity; mental capacity; Mental Capacity Act 2005; safeguarding; sexual relationships

1. **INTRODUCTION**

It is trite to say that the Mental Capacity Act 2005 is an important piece of legislation. Not only is it the legal framework applied in deciding whether a person (P) lacks capacity to make a particular decision at a particular time, but it also provides the structure by which professionals and the Court of Protection can decide what is in that person’s best interests if they do, as well as stipulating certain things under section 27 that *cannot* be consented to in a person’s best interests - including sex. A person lacks capacity as to a particular decision if, at the material time, they are unable to understand, retain, or use and weigh relevant information, or communicate their decision, because of an impairment or disturbance in the functioning of the mind or brain.[[1]](#footnote-0)

The test contained within sections 2 and 3 of the Mental Capacity Act has been the subject of much expansion and clarification since the Act’s entry into force in 2007. The Court of Protection, and the Court of Appeal, have both been willing to elaborate on - among many other things - the role of values in capacity assessment,[[2]](#footnote-1) what counts as a distinct ‘decision’ for the purposes of assessing capacity,[[3]](#footnote-2) and what is ‘relevant information’ for the purposes of different decisions. It is this last aspect that the Court of Appeal was concerned with in *A Local Authority v JB;* namely, what constitutes ‘relevant information’ for the purposes of decision making in relation to sexual decisions. More specifically, is it a necessary component of capacity to decide about sex that the person understands that the *other* person must also consent?

The decision of the Court of Appeal was twofold. First, while in previous cases sexual capacity had been framed as capacity to *consent to* sex, the Court of Appeal held that this was a misnomer. The test for capacity for sex should, in fact, be framed as the capacity to decide whether to *engage in* sexual relations. Second, the Court also held that in light of the previous point, that relevant information for the purposes of section 3(1)(a) of the Act *did* include the need to understand that the other person must consent to sex. This commentary argues that the decision of the Court is naturally to be welcomed on a number of fronts, not least because it protects both P himself from potentially committing a criminal offence, as well as protecting any victims from possible sexual offences. Nonetheless, the ‘all-or-nothing’[[4]](#footnote-3) approach of the Mental Capacity Act 2005 in relation to sexual decision making - explained below - renders the decision of the Court of Appeal problematic in some situations. Moreover, an analysis of wider case law - notably *A Local Authority v AW* - reveals that these dilemmas run throughout sexual capacity cases, and suggests that the time may have come for further legislative and judicial clarity in this area.

1. **FACTS AND BACKGROUND LITIGATION**

JB is a 36 year old man with severe epilepsy, complex autism, and impaired cognition. For a number of years he has been living at a supported living placement with a care plan, which included restrictions on his movement, his ability to live an independent life, his contact with other individuals, and restrictions on him accessing the internet and social media. These restrictions had been put in place because of JB’s tendency to act in an inappropriate manner towards - and limited social boundaries around - women, which included repeated and unwanted sexually explicit messages. For a number of years, JB had indicated that he wished to find a girlfriend and have a sexual relationship. His ‘disinhibited’[[5]](#footnote-4) conduct around women, however, has precluded him from being afforded a greater degree of freedom to do this given that there was a risk of him both sexually touching women without their consent, or potentially having a sexual relationship with a woman who may lack capacity herself.[[6]](#footnote-5) Either of these outcomes would have likely resulted in a criminal offence being committed, and on one occasion JB’s conduct was subject to a police investigation but no criminal charges were ultimately brought.

JB had been assessed under the Mental Capacity Act 2005 as lacking capacity to make decisions about contact with other individuals, his residence, accessing social media, and consenting to care arrangements. Proceedings were commenced in the Court of Protection to authorise best interests decisions in relation to these matters, but there remained a dispute between the local authority and the Official Solicitor acting on JB’s behalf as to his capacity to make decisions about sex. In the Court of Protection, the evidence of two clinical psychologists was accepted; that JB’s “understanding of consent is lacking”,[[7]](#footnote-6) with his definition of consent being “one party allowing the other party to have sex without the other party complaining,”[[8]](#footnote-7) as well as his difficulty comprehending that consent could also be withdrawn even during sexual activity.

In July 2019, Roberts J, sitting in the Court of Protection, was asked to decide essentially the same issue as was the subject of this appeal. In essence:

does the ‘information relevant to the decision’ within section 3(1) of the Mental Capacity Act 2005 include the fact that the other person engaged in sexual activity must be able to, and does in fact, from their words and conduct, consent to such activity?[[9]](#footnote-8)

Roberts J concluded that it was not. In order to demonstrate capacity to consent to sexual activity, JB need not show that he understood that the other person must also consent for the sex to be lawful. To decide otherwise would ‘confuse the *nature* or *character* of a sexual act with its lawfulness’[[10]](#footnote-9). It would therefore be inappropriate to raise the sexual decision making capacity bar and deprive them of a fundamental human right to protect him - or any possible victim - from potential criminal acts.[[11]](#footnote-10) Second, the judge held that there was an important distinction between *having* mental capacity, and *exercising* that capacity. To decide that consent *was* an aspect of decision making capacity would fail to recognise that distinction. Section 3 of the Mental Capacity Act 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’.[[12]](#footnote-11) In essence, consent of the other person was part of exercising capacity, and was not a relevant factor in deciding whether P had decisional capacity in the first place.

1. **THE DECISION OF THE COURT OF APPEAL**

Baker LJ, who gave the leading judgment in the Court of Appeal, began by providing a summary of the three fundamental principles that form the backdrop to the decision that the Court was required to make. The first of these was the principle of respect for autonomy; where individuals are able to make decisions about their lives, they should be allowed to. The second principle is that it is necessary to protect individuals when they are putting themselves in positions of vulnerability. Last, that this area of law does not exist in a ‘vacuum’[[13]](#footnote-12) but is part of a wider system of law and justice which recognises that lawful sexual relations between two individuals can only take place with the consent of both parties. In effect, JB should be allowed to make as many decisions as possible about his own life where he is able to, and be able to enter into a sexual relationship if he wishes. However, because he was unable to understand the fact that the other party must fully consent to the sexual relationship and what that consent should look like, he risked sexually abusing other individuals, and putting himself in a vulnerable position of potentially committing a criminal offence.

1. ***Capacity to Decide Whether to Engage, not to Consent.***

The Court of Appeal recognised that in previous judgments on this matter, capacity for sexual relations had been framed in the language of consent; that is, the decision had been framed as whether or not P had capacity to *consent to* sex or not.[[14]](#footnote-13) A brief reflection on the origins of contemporary mental capacity law reveals that this is unsurprising. The historical development of this area of law has its genesis in trespass to the person torts and medicine, where consent is a valid defence to medical treatment that would otherwise be a battery. Indeed, the case that ultimately paved the way towards the Mental Capacity Act 2005 - *F v West Berkshire Area Health Authority[[15]](#footnote-14)* - was a case involving proposed medical treatment (sterilisation) where the individual in question was not able to give lawful consent due to her cognitive impairment. This was followed throughout the 1990s by a series of cases that were also, by and large, concerned with medical treatment.[[16]](#footnote-15) In effect, the concepts that frame this area of law were largely generated from situations where something is ostensibly done *to* a patient - often against their wishes or where they are unable to give a valid consent - but where the patient’s consent is required for it to be lawful. So it is perhaps unsurprising that the capacity for other decisions - such as sex - had also become mired in the same language of consent.

Rather than view capacity for sex as a decision about whether P had the mental capacity to consent to sex - and which the Court acknowledged portrays P as a passive actor of something done ‘to’ them - the Court of Appeal in *JB* held that the correct question is whether P has the capacity to decide whether to *engage* in sex:

The word “consent” implies agreeing to sexual relations proposed by someone else. But in the present case, it is JB who wishes to initiate sexual relations with women. The capacity in issue in the present case is therefore JB’s capacity to decide to *engage in* sexual relations.[[17]](#footnote-16)

Such a shift is welcome; it moves away from the traditional ‘consent to’ model that has historically been prevalent. For sexual decision making, ‘consent to’ does not fully fit the nature of what was being assessed, and simply as a matter of common sense the shift to ‘*engaging in* sexual relations’ better reflects the nature of this type of decision making. Sex is largely not about P being a passive recipient of something done to them but where their consent is needed to make it lawful, but is about an intimate relationship between P and another person, and on many occasions one that is initiated by P themselves.

1. ***Their Partner’s Consent is Relevant Information.***

In light of its decision to reframe the issue as being whether P had capacity to engage in sexual relations, the Court of Appeal further held that

it becomes clear that the “information relevant to the decision” 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.[[18]](#footnote-17)

In doing so it rejected the notion that sexual decision making was *solely* visceral, emotional, or instinctive as had been suggested by previous courts, and recognised that there is also a cognitive or cerebral element to sexual decision making. This cerebral element to sex includes a consideration of whether the other person consents or not. To add this requirement in for the purposes of deciding whether P has capacity to engage in sexual activity does not, as the Official Solicitor had argued, represent an unwarranted infringement on P’s rights. It is a consideration that everyone must have when entering into sexual encounters, and thus cannot be considered discriminatory towards P; ‘we all accept restrictions on our autonomy that are necessary for the protection of others’.[[19]](#footnote-18)

Moreover, and returning to the three-way balance that he set out at the beginning of his judgment, Baker LJ held that requiring this as part of sexual decision making capacity struck an appropriate balance between protecting P’s rights, the rights of others around him, and recognising that neither the Mental Capacity Act nor the Court of Protection exist in a vacuum but are ‘part of a system of law and justice in which it is recognised that sexual relations between two people can only take place with the full and ongoing consent of both parties.’[[20]](#footnote-19) As such, the result of this judgment is that in order to assess a person’s capacity to engage in sexual relations, information relevant to that decision may include:

(1) the sexual nature and character of sexual intercourse, including its mechanics;

(2) that other person must have the capacity to consent to the sexual activity, and must in fact consent before and throughout the sexual activity;

(3) that P him or herself can say yes or no to having a sexual relationship and can decide whether to give consent or not;

(4) that pregnancy is a reasonably foreseeable consequence of sexual intercourse between a man and woman;

(5) that there are risks of sexually transmitted infections, which can be reduced by the taking of precautions such as the use of a condom.[[21]](#footnote-20)

A final point that the Court refrained from making a full decision on was the appropriateness of the approach taken by the Court of Protection in *London Borough of Tower Hamlets v NB & AU.*[[22]](#footnote-21)In that case, Hayden J held that it was possible for assessors to ‘expand or contract’ these elements of relevant information depending on the facts of a particular case. For example, the risk of pregnancy does not arise in situations where there is a heterosexual relationship where the woman is infertile, postmenopausal - as was the case in *NB* itself - or in same sex relationships. It would therefore be inappropriate and unnecessary to assess P’s understanding of these factors in those circumstances.[[23]](#footnote-22) To do so would be setting the standard for capacity too high, and go against the ethos of the Mental Capacity Act itself. The legality of this position therefore remains to be decided in any future appeal on this matter.

**IV. THE IMPLICATIONS OF THE DECISION IN *JB***

The recognition that the full consent of both parties is a fundamental aspect to sex - *lawful* sex - is, naturally, to be welcomed. In pushing the ‘reset’[[24]](#footnote-23) button on this area of mental capacity law, the Court of Appeal has made the lives of practitioners tasked with applying these principles a little easier in many ways,[[25]](#footnote-24) as well as upholding the rights of individuals not to be subject to sexual offences. Many of the cases that come before the Court of Protection and that are concerned with sexual decision making also involve situations of suspected or potential abuse; either of P themselves, or another individual.[[26]](#footnote-25) The Court of Appeal’s ruling will therefore be more effective in safeguarding both P, and/or and anyone they may be at risk of having a non-consensual sexual relationship with than the previous legal position.

However, while many of the cases faced by professionals applying the Act or that come before the Court of Protection will involve some sort of abusive context, not all will. Not all cases - especially ones that are uncontentious or often *do not* make it to the Court, or that perhaps do not even come to the attention of professionals - will involve abuse or safeguarding concerns. These types of relationships now risk being left in a perplexing legal bind following the decision of the Court of Appeal in *JB.* In developing the law to respond to situations where there are safeguarding concerns, the courts risk forgetting about the implications that this has for situations where there are no such concerns.[[27]](#footnote-26)

In its most simple form, there are essentially two kinds of scenarios that might arise here in relation to sexual decision making and consent of the other party. The first iswhere P wants to have sexual activity with someone who may not or does not consent. The result of the ruling in this case is that if P does not understand that the other person must consent, they would be deemed to lack capacity and P could be prevented from having sex in their best interests - as may ultimately be decided here[[28]](#footnote-27) - otherwise P would be committing a criminal offence under the Sexual Offences Act 2003. These are the kinds of facts that formed the background to *JB.*

The second scenario, however, is where P might want to have sex with someone who *does* consent, and where P themselves also consents.[[29]](#footnote-28) Lorraine Currie provides an example of a married couple where one partner has lost the mental capacity for a number of things due to dementia,[[30]](#footnote-29) but who still enjoy sexual activity that both individuals consent to and enjoy. In this type of scenario - and given that capacity to decide to engage in sex is issue specific not person or situation specific[[31]](#footnote-30) - P would still lack mental capacity because they do not understand that the other person must consent.

Underlying these scenarios is the fact that mental capacity to make decisions about sexual relationships under the Mental Capacity Act is ‘all-or-nothing’; that is, where someone *does* lack capacity, then - unlike many other decisons such as contact, or medical treatment - under section 27(1)(b) no consent to engage in sex can be given on their behalf. Moreover, finding that P lacks capacity potentially means that the other person would be committing a criminal offence under the Sexual Offences Act 2003 if they *did* have a sexual relationship. And if supportive education for P to understand that the other person needs to consent was unsuccessful[[32]](#footnote-31) then it is unlikely that P could *ever* have a lawful sexual relationship, despite having a consenting partner.

The same issue also occurs if the facts are reversed. If P is not able to understand that they themselves also have the right to withhold consent and refuse a sexual relationship, then they will lack capacity under the Act. Often in these situations there are, again, safeguarding concerns about P being sexually abused or coerced into sex against their will, and so this finding of incapacity rightly enables lawful restrictions to be put in place to safeguard P against such abuse. This situation arose for a woman called Mary in *Leicester City Council v MPZ*[[33]](#footnote-32)where HHJ George found that ‘while Mary understood as a matter of theory that a person can say no to sex, she did not understand the choice when it related to her.’[[34]](#footnote-33) But what if someone in Mary’s position met someone with whom they wanted to consent to a sexual relationship with but where there were *no* safeguarding concerns? If they were still unable to understand that they had the *right* to say no, they would still lack capacity and it would be unlawful to enter into a sexual relationship.

What becomes apparent from the above analysis is that the decisions of the Courts in these cases are, in fact, being driven by safeguarding; a desire to protect P from abusing another person, or being abused themselves. As a result, it places consenting couples where there are no safeguarding concerns in a bind. This has obvious Article 8 implications for both P, and their sexual partner; both people are effectively being stopped from having a sexual relationship with the person they want to even though it would be fully consensual; and, indeed, this would be the case if P could not understand any one of the elements laid down by the Court of Appeal. The upshot of the Court of Appeal’s decision in *JB* - created by the ‘all or nothing’ nature of mental capacity to engage in sex under the Mental Capacity Act 2005 -effectively renders any sexual relationship in those sorts of circumstances unlawful for both parties. On the face of it, this seems strange; two mutually consenting adults are unable to have a sexual relationship because one of those adults understands most of the aspects as laid down by the Court of Appeal, but does not understand that the other person *must* consent. This begs two questions; given that it is in fact consensual, can such an interference with both P and his or her partner’s rights be justified? And if not, how might a sexual relationship between both individuals that is legal be facilitated in light of the requirement that the Court of Appeal set down in *JB*?

Notwithstanding the fact that both parties in the scenario above are ostensibly consenting, there remains an important justification as to why we should still require P to understand that the other person *must* consent.[[35]](#footnote-34) Consent can be withdrawn at any point, including during the sexual activity itself. If P is unable to understand that the other person has the right to do this, then it potentially leads to a situation where P’s partner is placed in a vulnerable position, and risks the commission of a criminal offence by P. It is this dimension that in fact makes it incredibly difficult to reduce a sexual relationship simply down to ‘decision making’ in the way that the Mental Capacity Act requires. Take, for example, a similar but non-sexual factual matrix where P wants to have contact with someone - perhaps a friend, or family member - and is assessed as having capacity to decide about this contact. If, however, the other person later incites P to commit a criminal offence during that contact and it becomes apparent to P’s support workers that P may not fully understand the implications of this, given that capacity is both time *and* decision specific, it is possible to undertake further assessments of P’s capacity as to contact with the other person in light of this. Indeed, failures to assess capacity precisely in such circumstances has been criticised.[[36]](#footnote-35) But such ‘monitoring and intervention’ is impossible with private sexual relationships. In such circumstances, where both parties ostensibly consent, it would therefore be open to a court to say that the fact that it is consensual on both sides does not matter. P still lacks capacity and so a sexual relationship between them should not be facilitated because of the risk of P’s partner withdrawing their consent. In effect, this becomes a question of risk, and whether the risk of P’s partner possibly withdrawing their consent justifies the interference with the Article 8 rights and the effective criminalisation of any sexual relationship between them.

If, however, we take the stance that such an interference *is* unjustified, that everyone has ‘a right to a sexual life where there is true consent and mutual desire’[[37]](#footnote-36) despite the fact that P does not fully understand that the other person *must* consent, then in order for this to be a lawful sexual relationship there are only two options. Either P needs to somehow be found to have capacity,[[38]](#footnote-37) or it must be possible to make a best interests decision on their behalf to consent to the relationship.[[39]](#footnote-38) In relation to the first of these, one option would be to adopt the Court’s approach in *A Local Authority v NB.* As outlined above, in *NB* the Court held that when conducting capacity assessments, assessors can expand or contract the elements of ‘relevant information’ depending on the facts of the case. For example, the risk of pregnancy would not necessarily be relevant in a same sex relationship. In a fully consensual sexual relationship one approach might therefore be to contract the relevant information to put less emphasis on the fact that P did not understand that their partner must consent, or to require a lesser understanding of this aspect of relevant information. That is not to say that *consent* in such circumstances should be regarded as less important, but we should consider whether P’s *understanding of it* should be. This approach, however, is difficult to reconcile with how fundamental consent is; it goes ‘to the root of capacity itself.’[[40]](#footnote-39) Moreover, it would open up even more difficult questions for practitioners as to when it might be appropriate to ‘contract’ relevant information in this way for the purposes of a capacity assessment.

Another approach might be to bring capacity assessments for sexual relationships in line with decisions about contact and make capacity to engage in sex person specific, rather than issue specific. In this approach, all the elements outlined as relevant by the Court of Appeal would be assessed, but P would be assessed about these elements in relation to each specific sexual partner. Such an approach has been recommended elsewhere,[[41]](#footnote-40) but again, there remain problems with this notion. First, without reliance to some degree on the principle from *NB,* P would ostensibly still not understand the consent element even with their consenting partner and therefore still lack capacity. Moreover, it would still fail to circumnavigate the concerns raised earlier about the fact that P’s partner may withdraw consent at a later stage during the sexual activity, which P may not understand. Lastly, a person specific approach may arguably place a large burden on professionals in this area, who would need to conduct a capacity assessment in relation to each possible sexual relationship. As Mostyn J asked rhetorically in *D Borough Council v AB,* ‘is the local authority supposed to vet every proposed sexual partner of AB to gauge if AB has the capacity to consent to sex with him or her?’[[42]](#footnote-41) The case commentary will return later to why this concern may, however, be ill-founded.

One final option would be, for the Court to decide that despite P’s lack of capacity, in situations where P and another individual (or individuals) are fully and mutually consenting, it is not bound by section 27(1)(b) of the Mental Capacity Act 2005.[[43]](#footnote-42) That is, the Court could make a best interests decision for P to engage in the sexual relationship, and that it would be a lawful relationship. Again, there remain problems with this approach. It would not circumnavigate the fact that P still does not understand that the other person can withdraw their consent *during* sex. In finding that it is not bound by section 27 the Court would risk sanctioning what has the potential to turn into a criminal offence if P’s partner did, in fact, withdraw their consent at some point during the sexual relationship. Without robust practical safeguarding measures in place to protect against such occurrences it is unlikely a court would be willing to make such a decision.

**V. *A LOCAL AUTHORITY V AW***

The decision of the Court of Appeal in *JB* is a welcome clarification on an area of mental capacity law that has long caused confusion and consternation. But as indicated above, in solving some of these issues it also opens up a raft of others, and fails to really get to the root of the inadequacy of this area of mental capacity law. These issues are also reflected in the wider state of sexual capacity case law, especially where tests for other decision making - such as contact - continue to creep in different directions. In some circumstances, for example, it may be that P is assessed as having the capacity to engage in a sexual relationship with another individual, but they may not have capacity in relation to contact, which isassessed on a person-specific basis.[[44]](#footnote-43)

Such facts arose in *A Local Authority v AW.*[[45]](#footnote-44) The case concerned AW, a 35-year-old man with learning disabilities and autism, who enjoys using sexual websites, dating sites, and chat rooms, both to watch sexual acts and also to meet other men, and was driven by the desire to find a boyfriend. Notwithstanding his ability to appear highly capable, AW is said to be ‘socially vulnerable’, particularly in his sexual relationships and use of the internet.[[46]](#footnote-45) AW’s behavioural history demonstrates how the safeguarding concerns that the authorities and AW’s family had were not ill-founded. AW himself had been assaulted, at least one of these being a sexual assault, and his social worker provided the Court with a chronology of how and when AW had put himself at ‘considerable risk’ through meeting up with men he had met on the internet. Moreover, AW had engaged in inappropriate and criminal behaviour; he had assaulted a minor, had assaulted staff at his residential facility, and there were also allegations that he had behaved inappropriately towards women including being aggressive, and following another woman home.

The agreement between the parties to the case was that AW lacked capacity in relation to making decisions regarding contact with other people, using social media and the internet, making decisions about disclosure of personal information to others, but had capacity in relation to consenting to sexual relations:

This suite of conclusions reflects a potential anomaly… namely [that AW has] the decision making facility to embark on sexual relations whilst, at the same time, he is not able to judge with whom it is safe to have those relations.[[47]](#footnote-46)

The best interests care package proposed a solution to this anomaly by agreeing that

a person-specific contact risk assessment would be undertaken to establish whether AW has the capacity to have contact with any individuals with whom he wished to embark on a sexual relationship, and a specific support plan drawn up as appropriate where that is the case.[[48]](#footnote-47) Cobb J also stressed that such an approach should not mean that the role of the local authority is to ‘vet’ his potential sexual partners.[[49]](#footnote-48) The evidence presented to the Court was that the local authority, AW’s support workers, and his current residential facility were all incredibly supportive of AW’s needs, and had agreed a care plan that genuinely ‘seeks to strike a balance between offering AW protection, while affording him privacy and a degree of autonomy’.[[50]](#footnote-49)

But this situation nonetheless leaves an awkward legal conundrum. If AW has mental capacity to make his own decisions about sex, then notwithstanding a risk assessment that considers a sexual partner ‘inappropriate’, AW is free to pursue a sexual relationship with that person. Indeed, as Cobb J states, it is not the local authority’s role to ‘deny him time with any sexual partner simply because they are considered to be unsuitable’.[[51]](#footnote-50) Yet it is possible that AW might also be found to lack capacity to have contact with that individual, and that the suspension of contact is in his best interests, which it *would* be lawful to suspend, and restrictions would be placed on AW which had the *de facto* effect of stymying that sexual relationship. In essence, it could be both lawful and in AW’s best interests to suspend contact with a person, but simultaneously unlawful to prevent him having sex with them.

The issues that *JB* and *AW* have thrown into sharp relief were not necessarily caused by the judgment of the courts themselves, but are in fact a product of a number of different factors. The first is that the Mental Capacity Act 2005 places individuals who *are* deemed to lack capacity for sexual decision making in a catch-22 position. If supportive education to help them to understand the role of consent is unsuccessful - which it may well be in circumstances where for example, one person has a degenerative cognitive impairment such as dementia[[52]](#footnote-51) - then they are likely to lack capacity any time this is assessed, and it will ultimately never be lawful for them to have sex. This is not necessarily a problem with the decision of the Court of Appeal in *JB* itself, but it is caused by the binarism of mental capacity, coupled with section 27.

Moreover, the decision-specific nature of mental capacity is unsatisfactory in many ways. Although intended as a safeguard for autonomy in spheres where an individual *can* make their own decisions, it is in fact divorced from the way in which decisions are made on an everyday basis by most people. When making decisions about sexual activity, individuals rarely separate out whether they *also* want to have contact with that person. Sexual activity ordinarily sits within a wider relationship with the other person, whether that be a long term relationship or a short term, fleeting one. By driving the decision-specific tests for contact and sexual relationships in different directions, the judiciary *are*, in fact, holding P to a higher standard of cognition and decision making by requiring an assessment of P’s understanding of both issues separately. Moreover, the person specific risk assessment proposed in *AW* risks ending up as a person specific capacity assessment about sexual activity by the back door. It is precisely this that one of the fundamental principles of the Mental Capacity Act seeks to avoid; ‘a person is not to be treated as unable to make a decision merely because he makes an unwise decision.’[[53]](#footnote-52)

Short of a radical overhaul of mental capacity legislation and a rethink of both the division between sexual and contact capacity as well as section 27, or the introduction of specific adult safeguarding legislation with more substantive powers than afforded by the Care Act 2014,[[54]](#footnote-53) it may be impossible for the courts to further disentangle the knots inherent within sexual capacity decision making. As outlined above, there are no direct solutions to the precise conundrums that *JB* throws up where both individuals consent to the sexual relationship but one is unable to understand that the other must consent. In the first instance, however, the courts may consider moving to a situation or person specific decision[[55]](#footnote-54) for capacity to engage in sexual relations. The current issue specific nature of capacity assessments for sexual decision making is a legal fiction,[[56]](#footnote-55) albeit one with good intentions: one which aims to set the bar low enough so as to maximise the potential for those who may be subject to the Mental Capacity Act to have sexual relationships. But beyond this - it allows for the potential anomalous situation to arise where P can have capacity to engage in sexual activity with another person, but not to have contact with them. As shown above, however, this largely does not reflect the reality of decision making for most people. More importantly, perhaps, it does not actually reflect the nature of good support work, social work, and safeguarding for individuals with a cognitive impairment. In situations which involve safeguarding concerns, professionals do not simply consider a person divorced from their context or the people around them. Indeed, effective safeguarding *requires* an assessment of an individual’s context, and working towards the outcomes that P wants to achieve. The concerns of the Court of Appeal in *IM v LM,* that a ‘person approach’ to capacity for sex would be unworkable, is unfounded given that this is almost exactly what professionals do more generally when working with and supporting individuals with cognitive or intellectual impairments, and assessing capacity regarding contact. Moreover, it is also the hallmark of good adult safeguarding practice in situations of alleged abuse.

**VI. CONCLUSION**

*JB* is a decision to be commended for many reasons in its approach to sexual decision-making capacity, particularly in the way it situates this area of law within the wider framework of justice and emphasises the importance of P’s partner also consenting, while at the same time trying to protect P against potentially committing a criminal offence. Likewise, *AW* also attempts to provide a nuanced best interests outcome when confronted with a very difficult situation where capacity to decide about sexual relationships deviates from capacity to decide about contact. The aim of this commentary has not, therefore, been to undermine the crucial role consent plays in sexual activity or the commendable aims of the Courts in both of these cases. Nonetheless, there is a very valid discussion to be had as to whether law that regulates ‘decision making’ in such a binary and decision-specific way is an appropriate legal framework for dealing with these issues. We may not necessarily criticise the implications of these cases for situations of alleged abuse - situations which ultimately drove the courts’ decisions - but as suggested earlier, not all situations where a person’s capacity is in question involve abuse. The decisions in *JB* and *AW* may very well enable professionals to respond appropriately to situations where there *are* safeguarding concerns, but leaves other non-safeguarding scenarios in a legal limbo. If it is not the case that hard cases make bad law, it may well be the case that ‘bad law makes hard cases.’[[57]](#footnote-56) It is perhaps time for a rethink of the legal framework that governs sexual decision-making capacity.

1. Section 2-3, Mental Capacity Act 2005. [↑](#footnote-ref-0)
2. *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80. [↑](#footnote-ref-1)
3. *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2; *Re B(Capacity: Social Media: Care and Contact)* [2019] EWCOP 3; *B v A Local Authority* [2019] EWCA Civ 913. [↑](#footnote-ref-2)
4. Beverley Clough, ‘Vulnerability and Capacity to Consent to Sex - Asking the Right Questions?’ (2014) 26(4) *C*FLQ 371, 382 [↑](#footnote-ref-3)
5. *A Local Authority v JB* [2020] EWCA Civ 735 at [10]. [↑](#footnote-ref-4)
6. *A Local Authority v JB* [2019] EWCOP 39 at [53]. [↑](#footnote-ref-5)
7. Supra (n5) at [14]. [↑](#footnote-ref-6)
8. ibid. [↑](#footnote-ref-7)
9. Supra (n6) at [6]. [↑](#footnote-ref-8)
10. Ibid at [78]. [↑](#footnote-ref-9)
11. Ibid at [81]. [↑](#footnote-ref-10)
12. Ibid at [79]. [↑](#footnote-ref-11)
13. Supra (n5) at [6]. [↑](#footnote-ref-12)
14. Ibid at [92]. [↑](#footnote-ref-13)
15. [1990] 2 AC 1 [↑](#footnote-ref-14)
16. It was not until later in the 1990s that the concept of mental capacity was discussed in relation to other types of personal welfare decisions (*Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50), and even then arguments were often put to the court on the basis of the fact that P did not have the capacity to *consent* *to* do something, for example, be detained in a hospital (*R (L) v Bournewood Community and Mental Health NHS Trust* [1997] EWHC Admin 850). For an excellent summary of this chronologically in best interests for incapacitated patients, see M Dunn, I Clare, A Holland, and M Gunn, ‘Constructing and Reconstructing ‘Best Interests’: An Interpretative Examination of Substitute Decision‐making under the Mental Capacity Act’ (2007) 29(2) JSWFL 117, 120. [↑](#footnote-ref-15)
17. Supra (n5) at [93], emphasis added. [↑](#footnote-ref-16)
18. Ibid at [94]. [↑](#footnote-ref-17)
19. Ibid at [98]. [↑](#footnote-ref-18)
20. Ibid. [↑](#footnote-ref-19)
21. Ibid at [100]. [↑](#footnote-ref-20)
22. [2019] EWCOP 27. [↑](#footnote-ref-21)
23. Ibid at [54]. [↑](#footnote-ref-22)
24. 39 Essex Chambers, ‘Mental Capacity Report: Health, Welfare, and Deprivation of Liberty’ (*June 2020)* <<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/Mental-Capacity-Report-June-2020-HWDOL.pdf>> accessed 29 June 2020 [↑](#footnote-ref-23)
25. Lorraine Currie, ‘Capacity, consent and sexual relations: how latest case may help social workers navigate challenges’ (*Community Care,* 17 June 2020) <<https://www.communitycare.co.uk/2020/06/17/capacity-consent-sexual-relations-latest-case-may-help-social-workers-navigate-challenges/>> accessed 29 June 2020. [↑](#footnote-ref-24)
26. Jaime Lindsey and Rosie Harding, ‘Capabilities, Capacity and Consent: Sexual Intimacy in the Court of Protection’ Journal of Law and Society (forthcoming). [↑](#footnote-ref-25)
27. This is perhaps unsurprising in light of the context within which many of these decisions come to court, or even generate capacity assessments in the first place. As Kong and Ruck Keene note, ‘many assessments come about when a person’s choice diverges from the advice of professionals…’ Camilia Kong and Alex Ruck Keene, *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues’* (Jessica Kingsley Publisher, London 2018) 99. [↑](#footnote-ref-26)
28. The Court of Appeal did not determine JB’s *actual* capacity, but remitted this issue back to the Court of Protection for a decision. [↑](#footnote-ref-27)
29. There may also be issues around the *other* person’s capacity to engage in sex, the overlap with which is not discussed here. [↑](#footnote-ref-28)
30. Supra (n25). [↑](#footnote-ref-29)
31. That is, it can only be assessed as whether P has capacity to engage in sex generally, not whether P has capacity to engage in a sexual relationship with *a particular person*: *IM v LM & Ors* [2014] EWCA Civ 37. [↑](#footnote-ref-30)
32. This may be a particularly pronounced concern in situations where, for example, P had a degenerative cognitive condition such as dementia. [↑](#footnote-ref-31)
33. [2019] EWCOP 64. [↑](#footnote-ref-32)
34. Ibid at [40]. [↑](#footnote-ref-33)
35. This justification and ensuing analysis also applies for why we should also require P to understand that they also have the right to withhold consent. [↑](#footnote-ref-34)
36. Tom Wood, ‘The Death of Lee Irving: Safeguarding Adults Review’ (Newcastle Safeguarding Adults Board, 2017). [↑](#footnote-ref-35)
37. Supra (n22) at [41]. [↑](#footnote-ref-36)
38. The legal position and implications of ‘tailoring’ a mental capacity assessment so as to be able to find that a person has capacity - or, putting the cart before the horse, so to speak - is beyond the remit of this commentary. Nonetheless, the Court of Appeal has suggested that it might be acceptable: *B v A Local Authority* [2019] EWCA Civ 913 at [49]. [↑](#footnote-ref-37)
39. This latter approach also raises questions as to whether an amendment to either the prosecution guidance for sexual offences, or an amendment to the Sexual Offences Act 2003 itself would be needed so as to clarify the legal position of the person P wanted to have sex with. [↑](#footnote-ref-38)
40. *London Borough of Southwark v KA & Ors* [2016] EWCOP 20 at [52]. [↑](#footnote-ref-39)
41. Victoria Butler-Cole, ‘Capacity to consent to sexual relations and the Mental Capacity Act 2005’ (2017) 11(2) Advances in Mental Health and Intellectual Disability 40. [↑](#footnote-ref-40)
42. *D Borough Council v AB* [2011] EWCOP 101 at [31]. [↑](#footnote-ref-41)
43. Supra (n24). [↑](#footnote-ref-42)
44. *PC & NC v City of York Council* [2013] EWCA Civ 478 [↑](#footnote-ref-43)
45. [2020] EWCOP 24. [↑](#footnote-ref-44)
46. Ibid at [8]. [↑](#footnote-ref-45)
47. Ibid at [28]. [↑](#footnote-ref-46)
48. Ibid at [43]. [↑](#footnote-ref-47)
49. Ibid. [↑](#footnote-ref-48)
50. Ibid. [↑](#footnote-ref-49)
51. Ibid. [↑](#footnote-ref-50)
52. For further discussion of the limits of the ‘support’ model as required by the United Nations Convention on the Rights of Persons with Disabilities in this context, see: Laura Pritchard-Jones, ‘Exploring the potential and the pitfalls of the United Nations Convention on the Rights of Persons with Disabilities and General Comment no. 1 for people with dementia’ (2019) 66 International Journal of Law and Psychiatry 101467. [↑](#footnote-ref-51)
53. Section 1(4), Mental Capacity Act 2005. [↑](#footnote-ref-52)
54. Section 42 of the Care Act 2014 only requires an enquiry to be conducted in cases where an adult with needs for care and support is being, or is at risk of being, abused, and is unable to protect themselves against that abuse. It offers no substantive legal powers to intervene in cases of suspected abuse. Professionals must look to other legislation such as the Mental Capacity Act, the Mental Health Act 1983, the inherent jurisdiction, or the criminal law. Perhaps the dissatisfaction with this area of mental capacity law could be used as evidence of the need for such comprehensive statutory adult safeguarding legislation. [↑](#footnote-ref-53)
55. Jonathan Herring and Jesse Wall, ‘Capacity to Consent to Sex’ (2014) 22(4) Med LR 620, 629. [↑](#footnote-ref-54)
56. Louise Harmon, ‘Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment’ (1990-91) 100 Yale LJ 1. [↑](#footnote-ref-55)
57. John Chipman Gray, *The Nature and Sources of the Law,* (Columbia University Press, New York 1909) 263. [↑](#footnote-ref-56)