

IN THE COURT OF PROTECTION

12471012

The Nottingham Regional Court

Date: 17 April 2020

Before:

HIS HONOUR JUDGE MARK ROGERS

(sitting as a nominated Judge of the Court of Protection)

Re: C

Mr Lindsay Johnson (instructed by **the local authority solicitor**) for the local authority

Mr Jonathan Bellamy (instructed by **Irwin Mitchell on behalf of the Official Solicitor**) for C

(Other parties to the proceedings who are unrepresented family members did not attend or make submissions)

Hearing dates: 16 January 2020

JUDGMENT
(Approved)

His Honour Judge Mark Rogers, sitting as a nominated Judge of the Court of Protection:

1. I must first apologise for the delay in delivering this judgment and its relative brevity. Both are as a direct result of the current public health crisis. Unfortunately, other pressing responsibilities have, by necessity, taken priority. I do not underestimate the importance of this decision to C and to those around her and it is my profound regret that she has had to wait.
2. The issue under current review arises in the context of much more extensive litigation concerning C. She is a 28 year old woman with a diagnosis of moderate intellectual disability. As a young child she suffered a bout of bacterial meningitis and tragically the consequence has been severe and irreversible brain damage. Her IQ has been measured at 51.
3. Her personal and developmental history is well documented. Sadly, but inevitably she lacks capacity in a range of domains and so the jurisdiction of this Court has been extensively engaged over a period exceeding 4 years. She has a loving family who have supported and looked out for her, but her needs are such that residential care is the environment which best meets her needs. There have been conscientious disputes from time to time and contact questions remain far from straightforward but for the purpose of this judgment I need say no more.
4. It has been my pleasure to meet with C and whilst it is obvious she has some limitations, she is nevertheless engaging and charming and I feel a strong sense of responsibility for her future.

5. As a young woman, understandably, she has sexual needs and desires. Similarly, she is no different from the majority of her peers in gaining pleasure and fulfilment from the use of the Internet and social media. This is the context for the current issue.
6. In 2017 a significant number of graphic sexual images were discovered on C's electronic devices. Some content was extreme and worrying. The local authority was authorised to place restrictions upon her use of electronic media. A Police investigation was launched, given the suspicion that some of the content crossed into the realm of the criminal law and C was subject to bail conditions for a protracted period. Ultimately, the Police investigation concluded that there was insufficient evidence to justify a prosecution and, in any event, that such would not be in the public interest. The Police acted entirely independently of the Court but, in my view, the decision taken was both fair and humane.
7. Notwithstanding the conclusion of the Police involvement, the day to day issue of the use of social media involving sexual or pornographic content remained and that has led to the current issue.
8. I have to determine whether C has or lacks capacity to access the Internet and social media. Such a determination is, axiomatically, essential as the Court has no jurisdiction to regulate the activities of capacitous individuals whatever objectively might be regarded as being in their best interests or designed to promote their welfare. The determination of a capacity issue is freestanding and involves no investigation of best interests and thus has no element of discretion attached. It is binary and a simple judicial finding of fact.

9. I need not set out the very well-known statutory framework in the Mental Capacity Act 2005, read as it often is with the Rules, Codes and Guidance. I simply remind myself explicitly of the statutory assumption of capacity, that capacity is domain specific (without becoming sterile, silo based and non-contextual), the two-stage diagnostic and functional approach, the materiality of time provision, the importance of practical support in decision making and the public policy imperative of empowering where possible rather than disabling vulnerable individuals.
10. This shorthand and ad hoc checklist is not intended to be exhaustive but includes some of the issues in play here upon which counsel concentrated their submissions.
11. As well as concentrating upon first principles derived from the statutory framework, enormous assistance is to be found in the well-known decision of Cobb J in Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2. That case, which is helpfully read alongside Re B (Capacity: Social Media: Care and Contact) [2019] EWCOP 3, is a very useful practical guide to the approach to cases in this category. Whilst facts vary from case to case, Cobb J provides a helpful route map through the issues likely to be in play. Although a decision at first instance, it carries the authority of a hugely experienced Tier 3 Judge.
12. The whole authority should be read and reread but for the purposes of this judgment the lengthy section from paragraph 25 (with particular emphasis on paragraphs 28 and 29) particularly informs my approach.

13. The hearing was originally anticipated to be quite an extensive investigation. In the end, with commendable economy, it was agreed that the oral testimony should be limited to the expert evidence in the case with detailed submissions following from counsel.
14. What makes this a difficult decision is the relatively high level of functioning that C displays. That is acknowledged by all who deal with her and so the dual issues of the presumption and the desire not to disempower are key.
15. Evidence was given by Dr Jo Lilley who is a consultant clinical psychologist. She reported on 28 February 2019 (E17) with two addenda later in the year (E96 and E108). She spoke from her own expertise but was specifically provided with a copy of Re A to ensure she had all relevant materials.
16. Dr Lilley has an impressive CV and her reports are plainly thorough and analytical. The local authority accepts and adopts her evidence. The Official Solicitor does not overtly criticise or challenge her approach or methodology but Mr Bellamy was instructed to “test” and explore her evidence to ensure that her conclusions were robust, evidence based and consistent with the required legal approach to the issue.
17. It would be time consuming and superfluous to read substantial tracts of Dr Lilley’s reports into this judgment. A number of prominent themes, however, emerge. She found C to be concrete in her thinking, accordingly struggling with abstract questions. She found she had poor knowledge of social moral rules and difficulty with social moral reasoning. She fell into the extremely low ranges in various aspects of cognitive and adaptive functioning. She had a reasonable understanding of the functionality of sexual relationships but lacked depth of

appreciation. She knew what pornography was and why it could be stimulating but had a limited appreciation of its implications. She had no real understanding as to the types of pornography and why some are deemed criminal and others not. She had an understanding of the practicalities of electronic media but had only a superficial grasp of its dangers, unless prompted.

18. In relation to the advantages and dangers of online encounters, Dr Lilley's opinion is that C has significant difficulty in grasping the concept of a stranger. The fact of anonymity may well be understood but the subtle potential underlying risk factors were not, in her view. To C a person with whom she interacts in an open and friendly way is likely to gain her trust and cease very quickly to have the underlying potential as a dangerous stranger.
19. Dr Lilley was clear that although C has intellectual impairment, she is not incapable of learning or developing some level of protective strategy. Unfortunately, C's innate difficulties mean that progress on that level is likely to be extremely slow, chequered and requiring constant prompting or reinforcement.
20. Dr Lilley's conclusions in writing are, both from her own clinical judgment and with specific emphasis being placed upon the Re A approach, that C lacks capacity in respect of accessing the Internet and social media. Importantly, so far as the Official Solicitor is concerned, Dr Lilley states in terms (E111) that it is her view that, notwithstanding her considered conclusion, she accepts that C is "close to having capacity" and would benefit from further education.
21. I completely understand the cautious approach adopted on behalf of C by the Official Solicitor and her desire to ensure the issue of capacity was rigorously

investigated. Mr Bellamy, on her behalf, undertook a careful cross examination of Dr Lilley and explored both in principle and by practical examples the views and conclusions reached.

22. In addition to her written material, Dr Lilley reiterated her view that whilst the cognitive impairment was fixed, nevertheless C had the ability to improve her knowledge and skills if she was given great assistance. Her fundamental findings, though, were unaltered. C's inclination to the concrete rather than the abstract was a major hurdle to profound progress. Her impaired perception of the social and moral implications of her decisions was also significant.
23. In practical terms, Dr Lilley was satisfied that C could be instructed in the privacy and blocking settings on her devices and would not resist their use. However, she felt there would be limited understanding as to the reasons for their use and so C would not be inhibited from unblocking if requested to do so. She was satisfied that C realised pornography has the potential to get her into trouble but did not really understand why. She also felt that C would struggle to conceptualise pornography from another person's perspective who might be offended. Similarly, although C might willingly desist from sharing information if asked to do so, Dr Lilley did not think C would be able to rationalise the prudence of such a course unprompted.
24. In terms of personal interaction, whether face to face or online, Dr Lilley's opinion is that for C a stranger could soon become a friend. The use of that term on Facebook could also be a source of confusion.
25. Dr Lilley was positive about the advantages of education and support, principally by the reinforcement of messages. She recommended a high level of

further engagement but was cautious about the prospect of a successful outcome. Her opinion, understandably in my judgment, was careful. She felt education “would help C to develop her understanding” (E113) but that she had especial problems with abstract reasoning.

26. In my judgment, Dr Lilley’s evidence was careful and considered. She was keen, quite properly, to look for the positives and her recognition that this was a balanced decision made her analysis all the more important. I was struck by her use of the terms “may” and “might”. She was careful not to underestimate the inherent difficulties faced by C in this sensitive area.
27. I am grateful to Mr Bellamy for his thoughtful cross examination which achieved its object of probing and exploring Dr Lilley’s opinion. I am satisfied that her oral testimony reinforced her reports and represents a robust and well-argued opinion.
28. Dr Lilley is, of course, not the decision maker in this case. I am bound, however, to give substantial weight to her opinion in determining the factual question of capacity. Although I have concentrated upon her view, it is only one part of the whole picture. Whilst I need not read from it, the extensive evidence of SW, the social worker, adds very helpfully to the body of relevant material both from her own observations and those of other social work and healthcare professionals, whom she quotes. There are, in addition, substantial volumes of background records and notes about C. Many are not directly on this point but are of assistance in building up a comprehensive picture of her functioning. It is my role to take account of all relevant material and I have sought to do so.

29. Were it simply a question of evaluating the evidence as a whole and forming a view based upon Dr Lilley's report, then this would be a relatively straightforward exercise. However, Mr Bellamy takes two separate points on behalf of the Official Solicitor which he submits go to the decision on capacity, even if I am inclined to accept the clinical findings and methodology of Dr Lilley.
30. Put shortly, Mr Bellamy submits that there is the danger of an over complicated or sophisticated application of Re A, which will have the tendency to be restrictive of the autonomy of people like C because of such an overly paternalistic application of it. Linked to that he also submits that an unduly analytical approach to what might in general terms be characterised as "understanding" and the other aspects of the functionality aspect of the statutory test will lead to an undesirably restrictive approach.
31. Section 3 of the 2005 Act defines the criteria (applicable to this case) which justify a finding of incapacity as the inability to "understand", "retain" and "use or weigh" "information relevant to the decision".
32. Retention of information is a fact specific and usually relatively easy to determine criterion. Understanding and weighing involve less tangible concepts and, to some extent, are dependent upon the value judgement of the assessor, whether clinical or judicial. Mr Bellamy argues that it is dangerous to set the bars of understanding and weighing too high as the result is likely to entail unnecessary findings of incapacity when compared to the often superficial or casual approaches of a large cohort of otherwise capacitous individuals who may not have a severe intellectual deficit but nevertheless are, comparatively

speaking in the population, unsophisticated. They, he argues, frequently and without consequence make risky and poorly reasoned decisions.

33. Mr Bellamy's arguments were attractively presented and obviously raise difficult legal and philosophical questions. However, I am not persuaded that the approach adopted by Dr Lilley, if adopted by me, involves an elaborate and unnecessarily cerebral approach which runs counter to the statutory language or the helpful route map of Re A.
34. Cobb J in Re A, specifically in paragraph 27, addressed the question of the correct approach to the "relevant information" issue and set out in broad terms, in succeeding paragraphs, the key factors. The language he uses is practical and clear and directs the reader (or assessor) to the real day to day issues likely to be in play. Further, the qualifications in paragraph 29 are, in my judgment, specifically designed to ensure that an unnecessarily narrow approach is avoided.
35. Re A was a decision on its facts and too close a comparison is dangerous. However, I am struck by the terms of paragraph 31 where Cobb J summarises the evidence of the expert in his case. That expert, rather like Dr Lilley, had explored not only the superficial engagement with the criteria but the reality for A in that case. The assessment was described by Cobb J as appropriate, revealing the "deficits" in understanding and weighing ability. It is an example of a carefully refined test without descending into the purely academic. Whilst the particular factors in Re A are irrelevant to my decision, I am quite satisfied that there is an equivalence of appropriateness in the methodology of Dr Lilley.

36. I agree with Dr Lilley that C has qualities and attributes which makes this a difficult case exactly to categorise and that, particularly when given substantial help and prompting, she appears to be close to having capacity to make relevant decisions. However, I accept and indeed agree with Dr Lilley's substantial reservations about sustainability.
37. On behalf of the local authority, Mr Johnson made a number of points with which I agree. He was careful to place this decision in its timely context. He said C is "not ready yet" by which he meant that there may come a point where, as a result of the reinforcement and education, she may have a durable ability to retain and understand the relevant information. I hope that may be so but I confess to reservations.
38. Mr Johnson also took me through the sub paragraphs of paragraph 28 of Re A and submitted that individually and cumulatively, C's difficulty with differentiation of categories, inability to identify aspects of risky behaviour and tendency towards concrete thinking meant that the key ingredient of weighing in the capacity test was wholly or very substantially lacking.
39. He rejected the suggestion of the Official Solicitor that his analysis added an unnecessary layer of sophistication or gloss or that it made practical satisfaction of the requirements of the statute or Re A very much more difficult than Parliament or Cobb J intended.
40. Finally, whilst the local authority welcomes and encourages practical strategies to assist C and recognises the benefit of support in the area of technology and its use, Mr Johnson's realistic submission was that there comes a point where support and encouragement becomes so integral to the decision making process

that, in reality, the individual concerned is little more than an automaton who is simply carrying out the instruction of others rather than responding to prompts and making capacious personal decisions. His submission was that for C, at this point in her personal development, that would be the reality as there would have to be continuous one to one supervision and support of her use of technology.

41. It is very important that I confine this point to the discrete issue of capacity and do not unwittingly draw in considerations of best interests or protection from harm. Even in the narrow context of capacity, I accept the force of Mr Johnson's submission. I do not find that C can understand, retain and weigh the relevant information independently and, sadly, if the process could only really occur with the degree of supervision and prompting suggested then that would, in truth, be a fiction rather than a genuine exercise in autonomy. It would probably also be impractical in the care setting.
42. I fear that C will be disappointed that, in her eyes, I am saying she should not have the freedom to use technology which she enjoys as others do. I regret that disappointment but am satisfied the decision I am taking is both consistent with the prevailing facts and in line with the established approach to issues such as this.
43. Therefore, I find that C lacks capacity in this domain. The consequences as to the practical regulation of her devices were not discussed in detail. Interim arrangements have been in place. A more permanent regime needs to be agreed and I anticipate that should not prove difficult. Plainly she must be given as much freedom and autonomy as is commensurate with her best interests and the

programme of education should continue. Some relaxation or modification may occur in the future and the issue must be kept under regular review.

44. I would be grateful if the parties, having read this, would provide me with an order for approval incorporating the consequential matters referred to. If a further hearing is required they should apply their minds firstly to any necessary case management directions.