

IN THE COURT OF PROTECTION

Before:

HHJ CRONIN

Between:

JC

(by their Litigation friend, the Official Solicitor)

-and-

CORNWALL COUNCIL

-and-

NHS CORNWALL AND ISLES OF SCILLY INTEGRATED CARE BOARD

-and-

CORNWALL PARTNERSHIP NHS FOUNDATION TRUST

Kriti Upadhyay (instructed by Butler and Co) for the **Applicant**
Luke Berry (instructed by **Browne Jacobson**) for the **Respondents**

JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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HHJ CRONIN:

1. JC, who was born on 18th July 1966 and is now aged 58, has a mild learning disability, mild disorder of intellectual development, and cerebral palsy. They have some autistic-like traits, but there is no final diagnosis of autism, the expert view having been that this warrants further exploration (E82). They may have an acquired brain injury but the medical records are incomplete and this is based on JC saying they had been in a coma. I am told that JC likes now to be called Jay (not their real name) and is using the pronouns they and their and dressing in women's clothes, although sometimes dressing in men's clothes and asking to be called JC or James (not their real name). They had a challenging childhood and were sexually abused by their stepfather and went on in turn to abuse their nephew and niece. They have previously been an inpatient at Budock Hospital. They are described as having quite settled presentation and behaviour at present. They live in Falmouth. They act through the Official Solicitor. The Court has been considering their arrangements from time to time since this application was issued on 16th October 2019.
2. The original application sought declarations in respect of JC's capacity to make decisions about their residence, care, contact with others and their capacity to conduct proceedings. They sought to challenge the restrictions on their care and sought declarations concerning their best interests. They have lived throughout in a privately rented property with a 24-hour package of care and support, subject to continuous supervision and control, apart from some periods of unsupervised access to the community which were ended after an event on 22nd July 2024. JC have expressed themselves as lonely and seeking companionship, and particularly wishing to engage in sexual activity.

3. It has been agreed that JC does not have litigation capacity and does not have capacity to make decisions about where they should live, the care and support that they should receive, their contact with other people, their use of the internet and social media and the management of their property and affairs. What remains in issue is their capacity to engage in sexual relations.
4. An expert psychiatrist, Dr ML, has been instructed throughout to advise the court about capacity across all the relevant domains. The three respondents to the application, Cornwall Council, NHS Cornwall and the Isles of Scilly Integrated Care Board and Cornwall Partnership NHS Foundation Trust, have cooperated to be jointly represented. The written evidence has included statements from JB, who has known JC for 20 years and worked with them for three or four years and from BT, who has been their social worker since 2008. DW, who manages their accommodation and sees them on a daily basis, attended the hearing and would have spoken to the statements filed by other witnesses: it was agreed that it would be a constructive approach to defining and exploring the issues for a meeting to take place between the advocates, the official solicitor's representative, DW and Dr ML. I was provided with an 11 page note of this meeting and it was not then necessary to hear from him directly in court.
5. The Official Solicitor could not agree on their behalf that JC lack capacity to engage in sexual relations. The court is therefore required to make a decision and then the parties agreed that it would then be necessary to develop JC's care plans in either event.
6. There was no disagreement between the parties about the relevant law. A person is assumed to have capacity unless it is established that he lacks capacity, he is not be

treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success, he is not to be treated as unable to make a decision merely because he makes an unwise decision and any decision made on his behalf must be made in his best interests. A person lacks capacity if he is unable to make a decision for himself in relation to a specific matter at a specific time because of an impairment of or disturbance in the functioning of the mind or brain. In order to make a decision, a person must be able to understand the information relevant to the decision, retain that information, use that information as part of the process of making the decision and be able to communicate his decision. The relevant information includes information about the reasonably foreseeable consequences of deciding either way or failing to make the decision. The court must consider all the relevant evidence, not limited to the expert evidence. The person need not understand every detail of the issue but must be able to comprehend and weigh the salient details relevant to the decision.

7. The most recent authority is the case known as A Local Authority v JB [2021] UKSC 52. The Court of Appeal had recast the decision as “to engage in sexual relations” rather than “to consent to sexual relations” recognising that the decision may involve some element of initiative. The information relevant to the decision must include the fact that any person with whom JB engaged in sexual activity must be able to consent to that activity and in fact consent to it – at the outset and throughout. It is notable that the criminal law and society’s understanding in relation to consent has developed during JC’s lifetime and in parallel with that there has been a recognition of the universal need for education in relation to consent.

8. The Supreme Court in *JB* endorsed five elements that *may* be included in the information relevant to the decision to engage in relations at paragraph 84. These are
 1. The sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
 2. The fact that the other person must have the capacity to consent to sexual activity and must in fact consent before and throughout the sexual activity.
 3. The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
 4. That a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
 5. That there are health risks involved particularly the acquisition of infection which can be reduced by the taking of precautions.

9. It may be that these are minimum requirements for some decisions, although (for example) the consequence of pregnancy would not be relevant in all cases. The Supreme Court has not referred to two other considerations: that engaging in sexual relations may result in emotional distress or disappointment (which might be relevant here since JC talk about being lonely and wanting family life) and that engaging in sexual relations may result in a negative reputation for promiscuity (possibly too remote a consideration, probably not a mainstream concern but relevant to the protection of any person in JC's position.) Under 5, and relevant to the other person's consent, is the risk of passing on infection, but this was not specifically referred to

and might be considered only to be relevant in the case of a person with an infection.

I do not import these considerations into this judgment or the test but note them as illustrations of factors taken into account by many people not included in the JB list.

10. In JC's case, there is no evidence that they have any memory difficulty and so it appears not to be an issue that once they have understood information they are able to retain it for long enough to use it. However, recorded in the MDT meeting that took place on 30th July there was concern that they do not always appear to remember information and ask the same question again. There is no issue about their ability to communicate a decision. The respondents say that the presumption of capacity is rebutted because they say that JC do not really understand the need for the giving of consent before and throughout sexual activity and/or are not able to use and weigh the information. They point to their difficulty in recognising subtle signals and interpreting body language which would be relevant information as to consent and would need to be communicated.
11. JC have been known to be capable of sexually predatory behaviours and to be keen to engage in sexual relations. Their attention has been directed to men and women and to people under the age of 16 and people who might be described as elderly as well as to their peers. They say they are lonely and they want company. They have formed casual relationships with vulnerable people, including homeless people, who may in turn present risk to them. They invite strangers to come home with them, to stay in their property or the shed. They borrow money from local shopkeepers.
12. An incident occurred very shortly before the hearing. JC went to Wetherspoons (a pub) on 22nd July 2024 and engaged in kissing a very drunk woman who could not be considered capable of consenting to his advances. This was clearly an assault. She

was subsequently removed from the scene in an ambulance, apparently due to her level of intoxication.

13. Previously, there has been an incident when JC stroked a woman's hair without any introduction or permission. They have also alienated friends as a result of inappropriately asking for sex when the friends had already indicated they were not interested in a sexual relationship. They have not always understood that a friend agreeing to stay in their property overnight was not also agreeing to have sex with them.
14. The risk assessment conducted by their care provider notes that JC makes contact via social media with children, inviting them to be their girlfriend, and has interest in male and female people and young and old people.
15. I heard evidence from Dr ML, who has provided the court with three reports, dated 25.8.20, 3.5.22, 8.12.23, and replies to questions dated 22.5.22 and 17.6.24. JC were unwilling to be assessed and declined to engage fully with the interviews. However, they have had the benefit of continuing care from JB and BT, management of their home by DW, and conduct of their case by KJ for many years and so there was sufficient information available for Dr ML from people who have observed JC's behaviour and know them very well for Dr ML to be able to reach conclusions that he was professionally satisfied with. In evidence he described this approach as "triangulation" and I am satisfied that it is a valid way of making an assessment. Dr ML is satisfied that JC have a learning disability which interferes with their ability to weigh up the relevant information: they are sensitive to information they perceive to be negative, which may underlie their unwillingness to engage with Dr ML. They are highly motivated to engage in sexual activity and they understand the basic tests

around capacity to engage in sexual relations *apart from the need for the other person to consent.*

16. DW has discussed the sexual issues in detail a number of times with JC. He says that they have never appeared to understand that they would have to stop if the other person said no during sex. CS, who had done a lot of work with JC around sexual issues, reported that JC had persisted in seeking a sexual relationship with his girlfriend K after she had made it clear she did not want one. CS described an incident when JC engaged with a person purporting to be 14 and displayed a picture of a 14 year old online and JC claimed she was aged 41, not 14: her view was that they were able to judge her age and chose to pretend she was older because they knew they should not be looking at or talking to her.

17. Dr ML continues to have an open mind about whether aspects of JC's presentation indicate autism or are the effects of a head injury in the past (the medical records may not be complete.) There is a pattern of "offender thinking" in JC's behaviour – DW considers that all his friendships seem to be made with the aim of achieving sexual contact. Dr ML said that it is very difficult to say whether JC do not understand or whether they take advantage of a situation – such as being unaccompanied and imposing themselves on the drunk woman – and whether JC do not understand or are lying, such as when JC said the 14 year old online was 41. JC do not accept any deficits, reject interventions and are not receptive to the idea of work in this area (consent), although JC did work with CS on other areas. Dr ML said JC could be supported to engage with consenting capacitous adults but they have difficulty reading ordinary sexual cues and can misread an ordinary social interaction such as someone smiling at them, which they had told their support worker indicated that that

person fancied them. Dr ML's opinion was that it was unlikely that someone as cognitively sophisticated as JC just recognises that when unsupervised they will not get into trouble – JC knows that when unsupervised they will not be stopped. Some of what JC says is thought to be devious (eg wanting a friend or a family).

18. Dr ML said that JC's understanding of their own ability to consent is clouded by their desperation to engage in sexual relations and therefore JC is also at risk of exploitation
19. Dr ML's view was that JC did not understand the fact that they themselves could say yes or no to having sexual relations and did not understand the health risks involved.
20. The evidence about JC's understanding of the health risks involved was that they seemed to be able to acknowledge that there was a risk of contracting a disease but did not have more detailed information. In my view, this is sufficient. I do not think it likely that many people who are otherwise fully capacitous know or take account of anything more than that there is a risk of illness and disease (which might be quite serious) when engaging in sexual relations.
21. Paragraph 45 deals with the understanding of the health risks involved and the 2022 conclusion, which was that JC could be better able to understand this with further education.
22. The evidence about JC's understanding of the need for their partner to consent to engage in sexual relations at the beginning and throughout the process includes Dr ML's caution at paragraph 62 in his report of 3.5.22 to the effect that JC would struggle to apply the rule that the other person has to consent if that person said no when there is other evidence that JC could construe as indicating he or she wanted to

have sex, such as agreeing to stay overnight. Dr ML was unclear about whether such ambiguity was too difficult for JC to understand or whether it is simply a cognitive distortion in a sex offender – effectively “I know you said no but your behaviour means yes.” Similarly, JC’s pestering behaviour in relation to K, who would give in just to stop them pestering her - this would not be real consent, and either they had not understood that she did not consent *or* this could be offender thinking.

23. Dr ML’s final report is at E115. He concludes that JC lacks capacity for sexual relations but at paragraph 134 says that they are close to the borderline. He says at paragraph 36 that he does not think that a causative nexus can be established in relation to their understanding, retention and use of information related to offender behaviours alone because of their understanding of the rules in a range of settings. At paragraph 37 he considers the question of recognition of non-verbal communication of withdrawal of consent and concludes that on balance it is more likely than not (which is the test I have to apply) that the manifestation of autism -like traits means that JC would not be able to recognise the non-verbal withdrawal of consent during sex. They would not be able to understand or use the information. They would not be able to use the information about withdrawal of consent if it was non-verbal because of the impairment in their functioning which is compared to autism.
24. Paragraph 49 considers whether there is a prospect of JC regaining capacity and points out that work in relation to recognising non-verbal signals would be complex requiring a high level of motivation and commitment.
25. At paragraph 40, Dr ML notes that there is no new direct information about JC’s understanding that JC would have the right to not consent or withdraw consent and he

rests on his conclusion in his 2022 report that JC do not understand this issue but might be able to learn to understand it.

26. The Official Solicitor on JC's behalf challenges Dr ML's analysis. The position statement properly emphasises the significant restriction on JC's autonomy and rights to private life if the court declares they lack the capacity to engage in sexual relations. Indeed, JC themselves make this point that they are lonely and that they are aware of being watched all the time and that they want a sexual relationship as well as companionship. Not only is this question one of the most difficult in the general sense, but it is particularly finely balanced in JC's case. The Official Solicitor makes three strong points in relation to this report. Taking the last first, I have already said above at paragraph 19 that I do not regard the evidence as establishing that JC does not understand the risk of contracting the disease in the course of sexual relations and that I am satisfied that the evidence is that JC's awareness is sufficient and does not need to encompass any more detailed biological or medical information.
27. The Official Solicitor also criticises the evidence in relation to part three of the test, the right to refuse or withdraw consent. The direct evidence here is limited and relatively old. It can fairly be considered alongside the evidence in relation to part two, the understanding of the consent and continuing consent of the other party. In fact, paragraph 40 of Dr ML's report dated 8.12.23 simply repeats the contents of his earlier report. There is old evidence that JC engaged in sex and later told their support worker that they hadn't wanted to do so: they knew they did not consent but nevertheless submitted. It is difficult to tell if they did not understand that they were entitled to say no or if they were disempowered in the situation and knew they could choose not to consent but not did not feel able to communicate that. I accept that the

evidence here is limited. Given JC's otherwise strength in communicating their views and wishes I think it more likely that they could not understand they could say no. However Doctor ML recognises this could also be to do with their learning disability and the lost opportunity for education and that capacity or the lack of it should not be determined under this heading until or unless more education has taken place.

28. The core point is JC's understanding of the need for the other person to consent and to continue to consent, particularly where the consent might be withdrawn and communication was non-verbal (which is very often a complaint between capacitous adults.) The Official Solicitor asks if this would be imposing too high a burden on JC, and asked me to consider the criminal law in relation to consent. The criminal law regarding intention in rape does depend on the accused's reasonable belief in the consent and the Official Solicitor argues that the potential to understand or fail to understand nonverbal communication could be relevant to the question of reasonableness. I have to be careful about importing learning from the criminal law into this jurisdiction given their different objects. The Court of Appeal has warned against that approach where rape is alleged in Children Act proceedings. The analysis in criminal cases appears to be, was the defendant's belief in the consent genuine, which is a subjective concept, and then was it reasonable, which is considered objectively? The CPS guidance identifies many other relevant factors but the Official Solicitor focused on the question of what is reasonable for this individual?
29. I have to set aside the criminal law analogy. The point here is not whether JC would be acquitted of guilty intention because they could not detect a non-verbal signal as to refusal or withdrawal of consent. The point is whether JC can understand relevant information in the form of non-verbal signals.

30. I am satisfied that non-verbal signals as to consent or refusal or withdrawal of consent are important parts of the relevant information needed to decide to engage in sexual relations. These will include eye contact, averting the eyes, making hand or arm gestures, folding arms, turning away, moving closer, making a face, touching the other person or pushing them away: these are all commonplace in the circumstances of one person approaching another seeking to have sexual relations or in the response of the person approached, both preceding, and during intimacy, and possibly more commonplace than verbal communication. Paragraph 121 of *Re JB [2021]UKSC52* includes as information relevant to engaging in sexual relations the fact that the other person must have the capacity to consent and must actually consent before and throughout the sexual activity. This must mean that for a person to be able to engage in sexual relations that person must be able to understand whether the other person consents and continues to consent, which involves taking into account non-verbal signals – body language – as well as verbal agreement or refusal.
31. I do not need to consider what are said to be JC’s “predatory tendencies”: there is evidence that they have acted to exploit or manipulate others for their own satisfaction but this does not render them subject to any different test or requirement than any other person.
32. I find that JC’s autistic-like traits and learning disability or impaired function consequent on injury prevent them identifying non-verbal signals and prevent them from understanding those or recognising meanings alternative to assumptions made or inferred from other actions (such as agreeing to stay overnight), or meanings inconsistent with JC’s own wishes, in behaviours such as K agreeing to stay overnight in JC’s property.

33. Since JC cannot understand that information when it is in non-verbal form, they lack capacity to decide to engage in sexual relations.
34. The next question for the court is whether or not JC have had all the opportunities that could be made available to assist them with their understanding. JC have made it clear that they are not motivated to do that kind of work and they have demonstrated in relation to Dr ML himself an ability to refuse to engage. I therefore agree with Dr ML that unless there is a change in attitude they are unlikely to gain capacity and there are no other opportunities that should be provided until or unless there is change in JC's motivation.
35. I have used plural pronouns throughout this judgment as they are conventionally used where the subject or object of a verb is "they" or "them" and I hope this meets with JC's approval.

HHJ Cronin

4th September 2024, corrected 1st October 2024 and 23rd October 2024