

Sexual Activity and the Mental Capacity Act

David Thornicroft

St Thomas Training



Age of consent

- What's the age of consent in England for opposite sex sexual activity?
- What's the age of consent in England for same sex sexual activity?
- Is it different elsewhere in the UK ... or around the world?



Is it legal ...

• For a 16 year old boy to have consensual sex with his 15 year old girlfriend?



• For a 25 year old woman to have consensual sex with her 15 year old girlfriend?



• For a 14 year old boy to have consensual sex with his 14 year old boyfriend?



Sexual Offences Act 2003

- “A person consents if he agrees by choice and has the freedom and capacity to make that choice”
- So, for example, if someone has a knife to your throat, you don’t have the freedom to make the choice, and therefore consent is absent
- But note also the word “capacity”, and this pre-dates the Mental Capacity Act 2005



Moral dilemma #1

- Elsie and Jack have been married for 60 years
- Jack has severe dementia, and is being cared for at home by Elsie, helped by domiciliary care visits several times a day
- The carers know not to visit between 2pm and 5pm on Saturdays and Wednesdays, because that's when Elsie and Jack have their "private time in bed together".
- Elsie tells you that sex has always been a big part of their relationship, and she wants this to continue, as Jack seems to enjoy it, even though he doesn't really understand what's going on

- Is this OK???????



Moral dilemma #2

- Molly and Shaminder both have a learning disability, and they live with their respective parents
- They met at the day centre and started holding hands, then kissing. Now they see themselves as girlfriend and girlfriend
- Molly wants to stay over at Shaminder's house, sharing her bed, next week
- Shaminder's parents are fine with this, but Molly's are adamantly opposed, saying that Shaminder is taking advantage of their daughter. They are especially worried that Molly has no concept of the word "no"
- Staff at the day centre report that Molly and Shaminder seem very happy together

• Is this OK???????

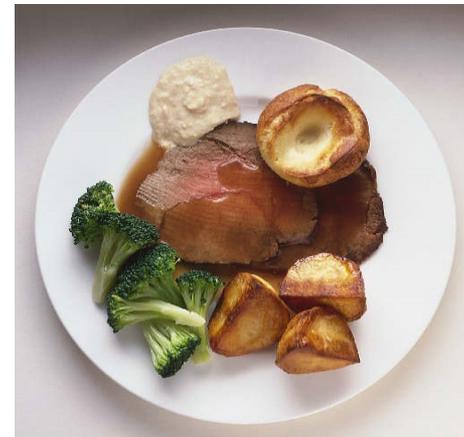


The Mental Capacity Act 2005

- Its purpose is to enable people to make decisions about their own lives, if they possibly can.
- Even if the decision might appear to be unwise
- For example ...



Simple decisions



Complicated decisions



Consenting to sex

- When you consent to sex you make a decision
- You choose to have sex, just like you might choose to have a salad for dinner, or a kidney transplant to cure your illness
- Or of course, you choose not to have sex, or perhaps only to go so far but no further
- Therefore the Mental Capacity Act applies to the decision to consent to sex, just as much as it applies to any other decision



Five Principles of the MCA Code of Practice

1. **Assume capacity:** A person must be assumed to have capacity until it is established that they lack capacity
 2. **Help to make a decision:** A person is not to be treated as unable to make a decision until all practicable steps to help him do so have been taken without success
 3. **Unwise decisions:** A person is not to be treated as unable to make a decision merely because he makes an unwise decision
- *
4. **Best interests:** An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests
 5. **Least restrictive option:** Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action



Assessing capacity to consent to sex (1)

Court of Protection has indicated that the person needs to have a basic understanding of:

1. The mechanics of the act
2. That there are health risks (which might include pregnancy)
3. That each person has a choice



Assessing capacity to consent to sex (2)

- Don't set the bar too high
- Don't go looking for problems
- People don't have to prove that they have capacity



Best interests

- Principle 4 of the Mental Capacity Act

BUT

- Consenting to sex is an “excluded decision” for best interests purposes
- You cannot consent to sex on behalf of someone else



Moral dilemma #1

- Elsie and Jack have been married for 60 years
- Jack has severe dementia, and is being cared for at home by Elsie, helped by domiciliary care visits several times a day
- The carers know not to visit between 2pm and 5pm on Saturdays and Wednesdays, because that's when Elsie and Jack have their "private time in bed together".
- Elsie tells you that sex has always been a big part of their relationship, and she wants this to continue, as Jack seems to enjoy it, even though he doesn't really understand what's going on

- Is this OK???????



Moral dilemma #2

- Molly and Shaminder both have a learning disability, and they live with their respective parents
- They met at the day centre and started holding hands, then kissing. Now they see themselves as girlfriend and girlfriend
- Molly wants to stay over at Shaminder's house, sharing her bed, next week
- Shaminder's parents are fine with this, but Molly's are adamantly opposed, saying that Shaminder is taking advantage of their daughter. They are especially worried that Molly has no concept of the word "no"
- Staff at the day centre report that Molly and Shaminder seem very happy together

• Is this OK???????



Some interesting Court of Protection cases

- Re MAB; X City Council v MB, [\[2006\] EWHC 168 \(Fam\)](#)
- LB Tower Hamlets v TB and ors, [\[2014\] EWCOP 53](#)
- CH v A Metropolitan Council, [\[2017\] EWCOP 12](#)



For more information

<https://www.stthomatraining.co.uk/law-and-policy/>



<https://www.patreon.com/themcapodcast>

