

The challenges of assessing capacity for relationships and sex

Dr Brad English

Highly Specialist Clinical Psychologist

Supported Loving



Introduction

- My role
- What Clinical Psychologists are asked to do
- What Clinical Psychologists can actually do, and how we do so
- A brief demonstration of the nuance (short video)

Referrals

Received from GPs, Psychiatrists, Service Providers.

Not uncommon for them to lack specificity in terms of the decision in question.

We accept if appropriate, but sometimes must remind that we always assume capacity.



Clinical Psychologist's Role

- Establish whether we are the best placed to assess, and if we are...
- Work to provide a conclusion based on evidence and not merely judgement.
→ *Operationalised through direct quotes and descriptions of past behaviour in the conclusions of subsequent report*



How we approach this

- The Mental Capacity Act (MCA) 2005, elaborated in the MCA Code of Practice 2007 (i.e. principles, definition etc.).
- Issue-specific not person-specific.
- While **suggestibility** has not been established in case law as a core part of the test of sexual capacity, it is implicit within the legislation regarding sexual consent that the individual should be able to make a free choice; as such, assessing suggestibility is pivotal to informing the practitioner psychologist's opinion regarding an individual's capacity to consent to contact and/or sexual relationships. (British Psychological Society, 2019).
- Mindful of any existing therapeutic relationship.



Specific Decisions – Essential Information

Sex

The mechanics of the act.

That sex between a man and woman may result in pregnancy.

Unprotected sex increases risk of STDs/STIs.

That both parties must consent and each have the right to say no.

Relationships (contact with)

The person's own support needs.

The level of support available in each relationship.

The physical, psychological and social benefits which each relationship will provide.

Any physical, psychological or social harm which may be sustained in each relationship.

The person needs to understand these benefits and harms in the short, medium and long term.

Could Capacity be Gained?

Judgement made based on cognitive profile and psychological formulation of the person.

Recommendations made on how this might best be achieved (e.g. sex education, assertiveness training).

May be assigned to other profession, such as a nurse.



LB Tower Hamlets v NB & AU

[2019] EWCOP 27

- *“It strikes me as artificial, at best, to extract both instinct and emotion from an evaluation of consent to sex, they are intrinsic to the act itself. In many ways, of course, instinct and emotion are the antithesis of reason. However, whilst they may cloud decision making, perhaps even to the point of eclipsing any calculation of risk, they are nonetheless central to sexual impulse. To establish an inflexible criterion to what may properly constitute ‘consent’ risks imposing a rationality which is entirely artificial.”*
- *“One of the central difficulties faced by practitioners, both in the court setting and in the wider community, is that the relevant tests for capacity are framed by psychologists, psychiatrists etc and a practice has developed of applying these tests as if they had the force of statute. It is necessary to emphasise that when an application is made to a judge, it is the judge who evaluates the broad canvas of evidence to determine the question of capacity.”*



The Assessment

Clinical interview and discussion (using prompts where needed, such as pictures or vignettes).

Formalised assessment tools may also be used (but results cannot be sole basis for conclusions).

Breadth and quality essential; multiple sessions, information from third parties, consideration of 'when, where, and how' to put person most at ease.



BPS Frameworks (2019)



Table 1: A framework for assessing capacity to consent to sexual relations

DOMAIN	ISSUES TO CONSIDER
Relationship narratives	<ul style="list-style-type: none"> Understanding of emotional aspects of relationships and consideration of 'morality' Potential power imbalance, fear or obligation Coping skills
Intellectual disability or other cognitive impairment	<ul style="list-style-type: none"> Cognitive, emotional, physical deficits or impairments Decision-making skills Social cognition
Knowledge	<ul style="list-style-type: none"> Understanding of different body parts and genders Understanding of sexual relationships and different levels of intimacy Understanding of pregnancy and STDs Knowledge of contraception: when and how [note: this is not part of the legal test]
Asserting choice	<ul style="list-style-type: none"> Ability to use staff in a positive way (asking for help, or asking for private time) Understanding that they have a choice whether to participate in the relationship How to say no and the ability to say no/assert own choice in the moment Knows what to do if the other person says no
Organisation and family	<ul style="list-style-type: none"> Family context Type of service, policies of service, staff attitudes/beliefs Opportunities to meet other people socially
Environmental	<ul style="list-style-type: none"> Opportunities to meet people (access) Suitable places to spend time together

Tools for assessing capacity

Sex and the Three Rs, rights, responsibilities and risks. (*McCarthy & Thompson, 2007*)

Exploring sexual and social understanding – an illustrated pack (and CD-ROM) designed for working with people with learning disabilities (2nd edn). (*Dodd et al., 2015*)

Sexuality knowledge, Experience and Needs Scale for People with Intellectual Disability (SEX KEN-ID). (*McCabe, 1994*)



Possible outcomes

1. The person has capacity (but there may be a need to manage the risks around unwise decisions).
2. The individual has the capacity to consent to the relationship in question, but may lack capacity to make decisions in other areas that restrict their ability to participate in a sexual relationship.
3. The individual may need support to gain the required knowledge and consider relevant issues.
4. The individual lacks the capacity to consent to sexual relations.



Report

- There is a clear requirement to indicate how the inability to make a decision is because of the impairment or disturbance of the mind.

→ link between the diagnostic and functional tests needs to be clearly outlined in assessment report – psychological formulation can be used to frame this



Moving Forward

May offer to reassess after practicable steps have been taken to help person gain capacity.

Provide consultation on action to be taken, where applicable (if we know the person well).

Where assessment was requested without sufficient justification, systems level input maybe required with staff team and/or service provider.





Any questions?