# NO ACT IS MORE PERSON-SPECIFIC THAN THAT OF SEX

A CRITICAL COMPARISON OF THE JUDICIAL APPROACH TO CAPACITY TO CONSENT TO SEXUAL RELATIONS IN X CITY COUNCIL V MB, NB AND MAB [2006] EWHC 168 AND R v C [2009] 1 WLR 1786

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### **ACT-SPECIFIC APPROACH**

'Does the person have sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual inter-(and, where relevant, to communicate their choice to their course spouse)?'

### **CRITICISM**

- No account taken of emotional factors
- Focus on understanding of mechanics lacks nuance
- No consideration of how someone's understanding of sexual nature and character have been acquired
- **Raises general barriers to sexual relationships**
- Takes no account of the diversity of potential sexual encounters



'It is difficult to think of an activity which is more person and situationspecific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.'

### CRITICISM

- Practical considerations: would the local authority be required to vet potential partners?

- **Raises barriers to specific sexual relationships**

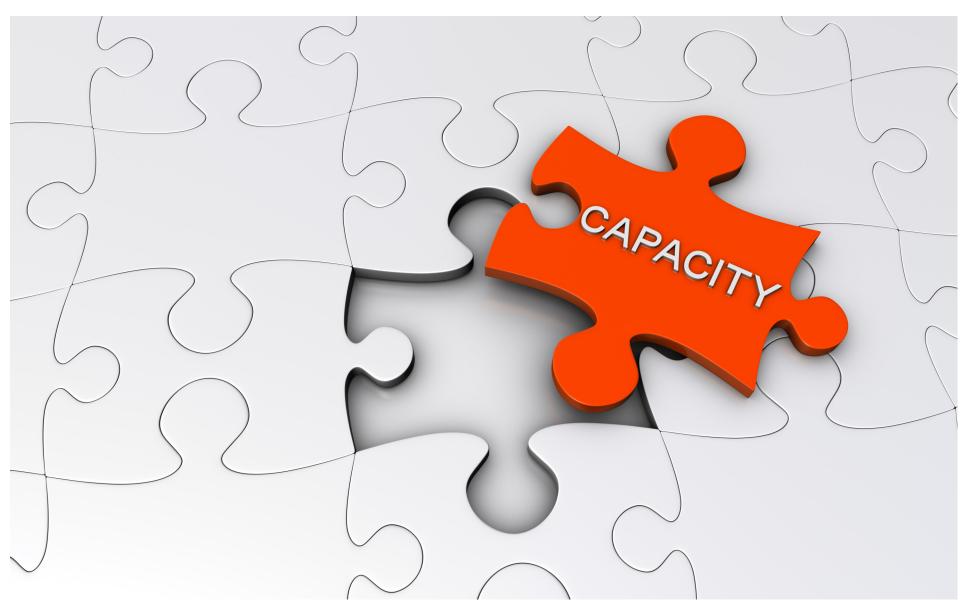
## **THEMES AND ISSUES**

- Article 8 European Convention on Human Rights
- United Nations Convention on the Rights of Persons with Disabilities
- Differences between criminal and civil law
- Learned sexual history
- Relationship between capacity and consent
- Practitioner understanding of Mental Capacity Act 2005 principles
- Role of sex education

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### **PERSON-SPECIFIC APPROACH**

Risk of paternalism: should the state have a role in deciding between partners?



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### **RESOLUTION?**

*IM v LM* [2014] EWCA Civ 37 'The criminal law bites only retrospectively... The civil law requires prospective assessment in the light of the particular circumstances of the affected individual.

'On a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis.'

### THE FUTURE

Supported rather than substitute decision making Is this compatible with the Mental Capacity Act 2005? Is it fair to raise extra barriers that may prevent people having sexual re-

- lationships?

Does the UNCRPD offer a better way of resolving these issues?