SEXUAL OFFENCES AND CAPACITY : RECENT REFORMS

A Paper given by Sir James Munby (Judge of the Court of Appeal of England and Wales and Chairman of the Law Commission of England and Wales)

at the Annual Conference of the Law Reform Commission held on 7 November 2011 in Dublin at the Law Society of Ireland

It is a privilege and a pleasure to be asked to speak here today. And it has been an enormous pleasure reading the Law Reform Commission's Consultation Paper on *Sexual Offences and Capacity to Consent*. It is, if I may say so, a wide-ranging, magisterial and compelling analysis of a profoundly important topic.

I doubt that I can add anything of use to the analysis, and it is probably not my place to do so, coming from the other side of the water. But it occurred to me that an account of the English experience might be of interest. It is, as it happens, an area of law with which I have been much concerned: first as barrister and subsequently as a judge in the Family Division of the High Court of Justice of England and Wales and, most recently, as Chairman of the Law Commission of England and Wales. I apologise if, in consequence, what I have to say may sound indecently autobiographical. You will, I am sure, understand if I make clear that I speak today in a purely personal capacity: neither on behalf of the English judiciary nor as Chairman of the Law Commission.

At this point you will, I trust, permit me a historical diversion. In 1989 the House of Lords[1] had to consider whether it was lawful to sterilize an adult woman who lacked capacity to consent. The problem arose because in 1960, when the Mental Health Act 1959 was brought into force, the inherent *parens patriae* jurisdiction in relation to an incapacitated adult's financial affairs was transferred to the (old) Court of Protection. But the corresponding jurisdiction in relation to such an adult's non-financial affairs was inadvertently abolished. So there was a gap in the law, which the House of Lords was able to plug by finding that the newly elaborated doctrine of necessity could render lawful in certain circumstances what would otherwise be a tortious or criminal invasion of the patient's body. At the same time, it held that the question of whether a

[1] *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

proposed procedure would be lawful in a particular case could be determined by way of proceedings for a declaration.

So far, so good – and this solution has sufficed ever since as the basis for judicial decision-making in the medical or surgical context. But neat as this solution was, it had three great defects. First, it was tied to the doctrine of necessity, which was simply not apt to regulate many non-medical personal welfare decisions.[2] Second, it assumed a traditional operation of the declaratory jurisdiction; but a declaration changes nothing, it is merely declaratory of the lawfulness or otherwise of a state of affairs. Third, since the jurisdiction was concerned fundamentally with declaring what was lawful, and since the benchmark of legality appeared, despite rhetorical references to the patient's best interests, to be whether what was proposed met the '*Bolam*' test[3] of professional negligence, the possibility remained that two diametrically opposed courses of conduct could both be lawful – with the consequence that a jurisdiction whose very purpose was to determine what should or should not be done, on occasions left the underlying question undetermined.[4]

The law was rescued from this dead end by two decisions of the Court of Appeal in 2000, shortly before the Human Rights Act 1998 came into force. One[5] framed the jurisdiction in terms which included reference to Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The other[6] discarded the '*Bolam*' test in this context, asserted that the jurisdiction was indeed founded on an appraisal of the patient's best interests – best meant best, so in any given set of circumstances there could only be one solution which was best – and held that the declaratory jurisdiction was akin to a welfare *parens patriae* jurisdiction.

The timing of these two decisions was fortunate, for it enabled the Family Division to explore the nature and extent of the jurisdiction, as it now had to, at a time when it

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2 See, for example, *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50.

3 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

4 The nadir was reached when a judge, loyally applying what the House of Lords had said, and faithfully giving effect to all the medical evidence he had heard, declared that it was lawful to sterilize the woman and also lawful not to sterilize her—the resulting order being quite useless to answer the question for the resolution of which the proceedings had been brought, namely whether or not she should be sterilized.

5 *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38.

6 *Re S (Adult Patient: Sterilisation)* [2001] Fam 15.

had to hand the newly available tools of the Human Rights Act and the Convention. There were three drivers for the process. The first was the increasing volume of cases coming before the Family Division which involved non-medical issues to which the doctrine of necessity did not apply. The first case had been in 1993.[7] It was followed by an increasing trickle through the 1990s and ever more, year by year, after the turn of the century. The second was the delay in implementing the Law Commission's proposals which, dating from the mid-1990s,[8] were not introduced until April 2007, when the Mental Capacity Act 2005 was finally brought into force. The third was the obligation of the court as a public authority to comply with the Convention, which required the court to develop its jurisdiction in such a way as to give proper effect to the Article 8 rights of all involved. Unless the court moved beyond the limited jurisdiction assumed by the House of Lords, we would be in breach of our obligations under the Convention.

The outcome was the re-discovery – in plain language the invention – by the family judges of a full-blown welfare-based *parens patriae* jurisdiction in relation to incapacitated adults which is indistinguishable from the long established *parens patriae* jurisdiction in relation to children. A jurisdiction, moreover, which bears little relation to the declaratory jurisdiction as reinvigorated by the House of Lords in 1989. The result is that well before the Mental Capacity Act 2005 reached the statute book the inherent jurisdiction was already being exercised in a manner largely indistinguishable from the way in which the new Court of Protection now exercises its statutory 'personal welfare' jurisdiction under that Act. Indeed, by the time the Mental Capacity Act was in force the inherent jurisdiction had gone ever further. Under the Act, the Court of Protection can exercise jurisdiction only if someone lacks decision-

7 *Re C (Mental Patient: Contact)* [1993] 1 FLR 940.

8 The Law Commission issued four consultation papers: *Mentally Incapacitated Adults and Decision-Making: An Overview*, Consultation Paper No 119, March 1991; *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction*, Consultation Paper No 128, February 1993; *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, Consultation Paper No 129, April 1993; and *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection*, Consultation Paper No 130, April 1993. This work culminated in its Report, *Mental Incapacity*, Law Com No 231, February 1995. The Government issued a Consultation Paper, *Who Decides?* in 1997, Cm 3803, followed by a Report, *Making Decisions* in 1999, Cm 4465.

making capacity. In 2005 I had held[9] that in certain circumstances the inherent jurisdiction can be invoked where an adult is vulnerable even if she has capacity.

Without the impetus of the Human Rights Act I doubt whether the jurisdiction could have developed so quickly or been extended so far. It has long been recognized that the common law is probably beyond child-bearing and the received wisdom is that equity's last progeny dates from the 1840s. But, appropriately perhaps, the Family Division is still able to give birth to a lusty infant, even if only with the assistance of a foreign midwife.

So much for the jurisdictional context. I must return to capacity.

The common law has always recognised that capacity is 'issue specific'. For example, capacity to consent to medical treatment is not incompatible with lack of capacity to make a will. A very striking example is the deceased who was found by Karminski J to have had capacity to marry at 11.30 am on 30 May 1949,[10] having previously been found by Pearce J and a jury not to have had capacity to make a will early in the afternoon of the same day.[11] Karminski J's decision was upheld by the Court of Appeal. Hodson LJ commented[12] that the jury's answer to the question put to them by Pearce J "cannot be treated as if it were a certificate of insanity". But capacity is also 'issue specific' in other ways. Capacity always has to be assessed as at the relevant date. Even then someone may, for example, have the capacity to consent to a simple medical procedure while lacking capacity to consent to a more complex procedure, just as someone may have capacity to litigate in a simple case but lack capacity, and therefore need a litigation friend (a next friend) in a more complex case.

At the same time as the Family Division was exploring the nature and extent of its new jurisdiction it was also having to grapple with the very practical issues which inevitably arise in non-medical personal welfare disputes: prominent amongst them the question of capacity. Unsurprisingly the early cases revolved around capacity to

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9 *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867.

10 *In the Estate of Park deceased, Park v Park* [1954] P 89.

11 *In re Park, Culross v Park* (1950) The Times December 2.

12 *In the Estate of Park deceased, Park v Park* [1954] P 112, 136.

decide where to live and who to have contact with. Sooner or later the Family Division was bound to have to grapple with the related, but necessarily distinct, questions of capacity to marry and capacity to enter into sexual relations. Historically, these had arisen in very different forensic contexts. Capacity to marry had been a matter for the Divorce Court; capacity to enter into sexual relations a matter for the Criminal Court. Now, for the first time, both would fall for consideration by the same court, the Family Division (and now the Court of Protection).

The happenstance of litigation meant that the first of these questions presented to the Family Division for decision was in relation to capacity to marry. The question came before me in 2004 in a case[13] which raised the point very neatly. The local authority whose objective was to stop a young woman, E, marrying an older man S, did not assert that E lacked capacity to marry anybody; its case was that she lacked capacity to marry S because of what the local authority asserted was her inability to understand the implications of marriage to him.[14] E was a young woman of 21, functioning, it was said, at the level of a 13 year old, with limited independence skills and very vulnerable to exploitation. S was 37, an offender with a substantial history of sexually violent crimes, including convictions for buggery of a minor for which he had received a long sentence. The local authority's concern was that E's relationship with S had become abusive, and that E was at risk of domestic violence and sexual exploitation at S's hands. Its case was that E lacked the capacity to make decisions about where she should live, about whether she should have contact with S and about whether she should marry S. I was concerned, on a preliminary issue relating to the form of the instructions and questions to be put to a psychiatrist giving exert evidence as to E's capacity, only with the last of those issues.

I expressed my conclusion as follows:[15]

> "The question is whether E has capacity to marry … It is a very specific question to be addressed by reference to the state of affairs existing at the time by reference to which the inquiry is made. It is … a general question, in the

13 *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), [2005] Fam 326.
14 Ibid, para [15].
15 Ibid, paras [83]-[84].

> sense that the question is whether E has capacity to marry, not whether she has capacity to marry X rather than Y, nor whether she has capacity to marry S rather than some other man. It is, moreover, a question quite distinct from the question of whether E is wise to marry: either wise to marry at all, or wise to marry X rather than Y, or wise to marry S."

I continued:[16]

> "There is, so far as I can see, no hint in any of the cases … that the question of capacity to marry has ever been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse. In all the cases … the question has always been formulated in a general and non-specific form: Is there capacity to understand the nature of the contract of marriage? Two things about this formulation are noticeable. The test is capacity to understand the *nature of the contract of marriage*. The test is not capacity to understand the *implications of a particular marriage*. Putting the same point somewhat differently … the nature of the contract of marriage is necessarily something shared in common by all marriages. It is not something that differs as between different marriages or depending upon whether A marries B or C. The implications for A of choosing to marry B rather than C may be immense. B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter. Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases."

Thus the nature of the inquiry. There are, I said,[17] two aspects to the inquiry. The first is whether the person understands the nature of the marriage contract. But this merely takes one to the central question: Does he or she understand the duties and responsibilities that normally attach to marriage? This in turn leads on to two further

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16 Ibid, para [85].

17 Ibid, paras [69], [109].

questions: (1) What are the duties and responsibilities that normally attach to marriage? (2) What is meant for this purpose by "understanding"?

I need not pursue the analysis further. I have, I hope, said enough, to indicate the nature and focus of the inquiry. All I need say is that so far as "understanding" is concerned I applied the by then familiar analysis, the so-called functional approach, namely[18] that it requires the mental ability: (i) to recognise the problem; (ii) to obtain, receive, take in, comprehend and retain information relevant to the problem and its solution; (iii) to believe that information; and (iv) to weigh (evaluate) that information in the balance so as to arrive at a solution (decision). All that said, I stressed[19] that the contract of marriage is in essence a very simple one which any person of normal intelligence can readily comprehend.

Now that was, I have to confess, very much a black-letter lawyer's approach based on a close analysis of a line of cases starting in 1808 and coming down to 2003. But I was, I trust, also sufficiently appreciative of the much wider issues of the public interest and public policy at stake. I observed that marriage carries with it "not merely all those intensely human, personal and emotional advantages that are obviously so important for so many but also a wide range of legal, social and fiscal advantages, many of which, of course, enure not just for the benefit of the married couple themselves but also for the benefit of their children." I continued:[20]

> "There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled."

The chances of litigation meant that I was also the first judge in the Family Division who had to consider the question of capacity to consent to sexual relations. The issue

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18 Ibid, para [134].
19 Ibid, para [136].
20 Ibid, paras [143]-[144].

arose in November 2005 [21] and reappeared in June 2007.[22] First, however, I need to retrace my steps.

In 1999 the Home Office had embarked upon a Review of Sex Offences. The Law Commission had already done work on consent in the criminal law.[23] Asked for its help by the Home Office, the Law Commission produced a Report in 2000[24] which was published as an appendix to the Home Office Report published later the same year.[25] The outcome was the Sexual Offences Act 2003.

Approaching the issue in 2006, I referred to three background considerations.[26] First, since a sexual relationship is, generally speaking, implicit in any marriage, capacity to marry must include the capacity to consent to sexual relations. So, generally speaking, someone who lacks the capacity to consent to sexual relations will for that very reason necessarily lack the capacity to marry. The converse, of course, is not necessarily true. Second, the test of capacity to consent to sexual relations must for this purpose be the same in its essentials as that required by the criminal law. There are two reasons for this: (1) Unless there is capacity to consent to sexual relations there will be risk of serious criminal offences being committed contrary to the Sexual Offences Act 2003, in particular contrary to sections 30-37 which apply whether or not the parties are married. (2) There are also, as I pointed out in a later case,[27] sound reasons of policy why the civil law and the criminal law should in this respect be the same and speak with one voice. In this context both the criminal law and the civil law serve the same important function: to protect the vulnerable from abuse and exploitation. Viewed from this perspective, X either has capacity to consent to sexual intercourse or she does not. It cannot depend upon the forensic context in which the question arises. Otherwise, it might be thought, the law would be brought into disrepute. Third, and

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21 *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968.

22 *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443. For the further proceedings see *Re MM (An Adult)* [2007] EWHC 2689 (Fam), [2009] 1 FLR 487.

23 *Consent in the Criminal Law*, Consultation Paper No 139, xxx 1995.

24 *Consent in Sex Offences: A Report to the Home Office Sex Offences Review*, February 2000.

25 *Setting the Boundaries: Reforming the Law on Sex Offences*, Home Office, 2000.

26 *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, paras [53]-[56], [75], [84]-[85].

27 *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, para [89].

reflecting what I had said in relation to marriage in 2004, there is this important point of principle. There needs to be a low requirement of understanding because, as Glanville Williams has observed:[28]

> "it is necessary in order not to forbid sexual expression to women of low intelligence. Every offence has the effect of diminishing the liberty of the defendant, but when a person is convicted on account of a consensual activity the practical result is to restrict not only his liberty but that of the person with whom he acts."

There is, of course, an inherent tension between the two principles set out by the Law Reform Commission in its Consultation Paper:[29] that the law should respect the right to sexual fulfilment and should, so far as practicable, protect persons with limited capacity from sexual exploitation and abuse (principles, I might add, which the Commission wisely places in the wider context of reproductive freedom[30] and the special place of the family in society[31]). As the leading English textbook comments:[32]

> "Although there is a clear need to protect the mentally disordered from sexual abuse, it is important that the law is not drawn so restrictively that it denies the mentally disordered their right to engage in sexual relationships … There is in this area an inherent potential conflict between legislative paternalism and sexual freedom; what is clear is that there is a delicate balance to be struck between undue state interference in an individual's sexual life and the state's responsibility to protect an individual from exploitation and abuse."

This tension is, of course, reflected in the Strasbourg jurisprudence[33] showing that Article 8 imposes on the State positive obligations both to respect an individual's sexual activities but also, on the other hand, to protect the vulnerable from sexual abuse and exploitation.

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28 *Textbook of Criminal Law*, ed 2, 2003, para 25.12.

29 Paras 1.09, 1.51.

30 See, for example, paras 3.01, 3.07, 3.12.

31 See, for exampler, paras 3.46-3.47

32 *Rook and Ward on Sexual Offences – Law and Practice*, ed 3, 2004, para 7.03.

33 See, for example, *Dudgeon v United Kingdom* (1981) 3 EHRR 149, *X and Y v The Netherlands* (1986) 8 EHRR 235, and *Pretty v United Kingdom* (2002) 35 EHRR 1.

Against this background, and having examined a number of decisions in criminal cases (in particular the decision of the Supreme Court of Victoria in *R v Morgan*[34]) I summarised my conclusions as follows:[35]

> "the question comes to this. 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,[36] 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 intercourse … ?"

I had previously pointed out that:[37]

> "Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent."

I examined the provisions of the 2003 Act[38] but said that there was no need for me to come to any concluded view and that it was better I did not. The finer points of what is meant by the relevant sections in the Act were much better left for resolution by the Crown Court or the Criminal Division of the Court of Appeal if and when they arose for decision on the specific facts of a particular case.

By the time I next considered the point, in June 2007 in *MM*,[39] the Mental Capacity Act 2005 was partly in force. Having considered the Act and the relevant provisions

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34 [1970] VR 337.

35 *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, para [84].

36 For discussion of what is meant by "reasonably foreseeable consequences" in the context of capacity to decide whether to use contraceptives, see *A Local Authority v Mrs A (Test for Capacity as to Contraception)* [2010] EWHC 1549 (COP), [2011] 1 FLR 26, paras [56]-[64].

37 Ibid, para [74].

38 Ibid, paras [76]-[82].

39 *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

of the Mental Capacity Act 2005 Code of Practice, I said[40] that in this respect the Act gives statutory force to the existing common law principles and "encapsulates in the language of the Parliamentary draftsmen the principles hitherto expounded by the judges". I applied, as correct and still apposite, what I had said in the earlier case. But I added a further point.

In *MM*, just as in the *Sheffield* case in 2004, the local authority's intervention was triggered by its concerns about the suitability of a woman's partner. MM suffered from paranoid schizophrenia, her illness appearing to relapse rapidly at times of stress. She had only limited insight into the nature of her illness, a moderate learning disability and poor cognitive functioning and she was functionally illiterate. Her long-term partner, KM, had in the past been diagnosed with a psychopathic personality disorder and alcohol misuse. He led an unstable and nomadic life, to which MM had been exposed, had been violent towards her and had encouraged her to disengage from psychiatric services.

I said:[41]

> "When considering capacity to marry, the question is whether X has capacity to marry, not whether she has capacity to marry Y rather than Z. The question of capacity to marry has never been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse … In my judgment, the same goes, and for much the same reasons, in relation to capacity to consent to sexual relations. The question is issue specific, both in the general sense and … in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is … a question directed to the nature of the activity rather than to the identity of the sexual partner.
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> A woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. It is difficult to see how it can sensibly be said that she has capacity to consent to a particular sexual act with Y whilst at

[40] Ibid, paras [78], [80].
[41] Ibid, paras [86]-[87].

> the same time lacking capacity to consent to precisely the same sexual act with Z. So capacity to consent to sexual intercourse … does not depend upon an understanding of the consequences of sexual intercourse with a particular person. Put shortly, capacity to consent to sexual relations is issue specific; it is not person (partner) specific."

The next development was a consideration of the question of capacity to consent to sexual relations in the *criminal* context in the important case of *R v Cooper*. The Court of Appeal, Criminal Division, following the Family Division case-law, quashed the defendant's conviction.[42] The House of Lords allowed the Crown's appeal.[43]

So far as material for present purposes the question which the House of Lords had to consider[44] was whether the decision of the Court of Appeal had unduly limited the scope of section 30(1) of the Sexual Offences Act 2003, specifically (a) in holding that a lack of capacity to choose cannot be person or situation specific and (b) in holding that an irrational fear that prevents the exercise of choice cannot be equated with a lack of capacity to choose. Baroness Hale of Richmond gave the leading speech. She said:[45]

> "I have no doubt that the answer to questions (a) and (b) is "yes". The Court of Appeal acknowledged that this was a difficult area and they were, in my view, unduly influenced by the views of Munby J in another context. I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to "weigh [that information] in the balance to arrive at [a] choice" … However, it is not for us to decide whether Munby J was right or wrong about the common law. The 2003 Act puts the matter beyond doubt."

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42 *R v C* [2008] EWCA Crim 1155, [2009] 1 Cr App R 211.
43 *R v C* [2009] UKHL 42, [2009] 1 WLR 1786.
44 Ibid, para [23].
45 Ibid, paras [24]-[25].

She continued:[46]

> "it is difficult to think of an activity which is more person and situation specific 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. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so … I believe that the Court of Appeal were led astray by their understandable reliance upon the contrary view, that capacity could not be situation specific, and it was for this reason that they found the matter so difficult."

It would not be appropriate for me to comment on the implications of Lady Hale's opinion for the civil jurisdiction. That burden, happily for me, has fallen to two other Family Division judges: Roderic Wood J[47] and Mostyn J.[48] Mostyn J characterised[49] Roderic Wood J's judgment as an attempt to build a bridge between the two viewpoints. His own approach was characteristically robust. Counsel for the Official Solicitor had, as Mostyn J put it,[50] bravely criticised Roderic Wood J's reasoning as "incoherent" and also criticised the reasoning of Baroness Hale of Richmond as "conflating the capacity to consent to sex with the exercise of capacity to consent to sex." Mostyn J expressed his own conclusions as follows:[51]

> "With a considerable degree of trepidation I have concluded that [counsel's] arguments have force, although I would not for a moment go along with his criticism of Roderic Wood J's reasoning. That reasoning is perfectly coherent if it is accepted that the test contains a partner-specific ingredient. In my view, the analogy drawn by Munby J with capacity to marry is faultless and is impossible to challenge successfully. Of course, Baroness Hale of Richmond is right to say that "it is difficult to think of an activity which is more person and situation specific than sexual relations", but the same is true (if not truer) of marriage. But it does not follow that capacity to marry is spouse as opposed

46 Ibid, paras [27]-[28].
47 *D County Council v LS* [2010] EWHC 1544 (Fam).
48 *D Borough Council v AB* [2011] EWHC 101 (COP), [2011] 2 FLR 72.
49 Ibid, para [33].
50 Ibid, para [34].
51 Ibid, paras [35]-[36].

> to status specific. Far from it. I do think, with the greatest possible respect, that there has been a conflation of capacity to consent to sex and the exercise of that capacity. There is also a very considerable practical problem in allowing a partner-specific dimension into the test. Consider this case. Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her? I, therefore, adhere to the view of Munby J. I do not follow the compromise approach of Roderic Wood J."

Overall, his conclusion was that:[52]

> "the capacity to consent to sex remains act-specific and requires an understanding and awareness of:
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> - the mechanics of the act;
> - that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections;
> - that sex between a man and a woman may result in the woman becoming pregnant."

He added the observation that while he was sure that the first and second of these criteria is needed to be able to consent to penetrative anal sex and oral sex, he doubted if the third is; and he doubted if either the second or third is needed to be able to consent to sexual activity such as mutual masturbation.

So there is, in England, an unresolved issue of some importance. It will, I am sure, be illuminated by the very interesting analysis of the English authorities undertaken by the Law Reform Commission and by the Commission's conclusions.[53]

As the Law Reform Commission's Consultation Paper wisely recognises, the questions we are here considering are part of a much wider context, namely safeguarding of the vulnerable.

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52 Ibid, paras [42]-[43].

53 Paras 2.06-2.44.

I have to admit that the existing legal framework for adult protection in England and Wales is neither systematic nor coordinated. In contrast to Scotland, there is no single or coherent statutory framework. What there is, is a patchwork of statute law, Ministerial Guidance,[54] common law and, now, the extended inherent jurisdiction of the Family Division. My survey of the field judicially in 2010,[55] illustrated the confused state of this complex area of law which is, I have little doubt, a significant cause of deficiencies in local authority practice.

This was a topic considered by the Law Commission of England and Wales in the 1990s as part of its wider investigation into mental incapacity.[56] It recognised that the existing mechanisms for protecting those who were vulnerable but who did not lack capacity were inadequate. It recommended the creation of statutory powers enabling a local authority to investigate and, if appropriate, and with prior judicial sanction, to enter premises, to assess, and, in the last resort to remove to temporary protective accommodation. These proposals were not taken forward by government. The Law Commission returned to the topic as part of its recent Adult Social Care project.[57] Our conclusion, criticised by some, is that the introduction of new compulsory powers is a matter for decision by government as a matter of policy. The Law Commission's recommendations are accordingly limited: we recommend that the duty to investigate should be put on a statutory basis, as also the existing non-statutory adult safeguarding boards.

The Law Reform Commission's analysis in Chapter 4 of the Consultation Paper, *Safeguards from Sexual Abuse* includes a detailed and illuminating analysis of the position in England. Again, we are indebted to the work of the Commission. Where this will all go, both here and in London, only time will tell.

Again, and to finish, my thanks to you all and, in particular, to the Commission.

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54 In particular, *No Secrets*, Department of Health and Home Office, 2000.

55 *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363, paras [50]-[57], [63]-[79].

56 *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection*, Consultation Paper No 130, April 1993, esp Part III, and the Report, *Mental Incapacity*, Law Com No 231, February 1995, Part IX.

57 *Adult Social Care: Scoping Report*, 2008, *Adult Social Care: A Consultation Paper*, Consultation Paper No 192, February 2010, esp Part 12, and the Report, *Adult Social Care*, Law Com No 326, May 2011, esp Part 9.