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**House of Lords: Sexual Offences and Mental Capacity**

***R v C [2009] UKHL 42***

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D1 and D2 were crack cocaine addicts. V was a young woman who was diagnosed as having a schizo-affective disorder, an emotionally unstable personality disorder and an IQ of less than 75. This combination of mental disorders left her prone to delusions, hallucinations, severe disturbances of mood and become upset without rational cause.

D1 met V and took her to D2's home. They gave her crack cocaine. D1 asked V to perform oral sex on him and she felt unable to escape or refuse. He placed his penis in her mouth and told her what to do. She complied. D2 then gave her more crack cocaine and then took his clothes off. V again felt unable to escape and also took her clothes off. D2 then had vaginal sexual intercourse with her.

Both D1 and D2 were charged with rape, but before the case came to trial these charges were replaced by charges under s. 30 of the Sexual Offences Act 2003, which provides:

- (1) A person (A) commits an offence if--
  - (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) B is unable to refuse because of or for a reason related to a mental disorder, and
  - (d) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.
- (2) B is unable to refuse if--
  - (a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or

- (b) he is unable to communicate such a choice to A.
- (3) A person guilty of an offence under this section, if the touching involved--
  - (a) penetration of B's anus or vagina with a part of A's body or anything else,
  - (b) penetration of B's mouth with A's penis,
  - (c) penetration of A's anus or vagina with a part of B's body, or
  - (d) penetration of A's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for life.

The judge had directed the jury in the following terms:

Now [the complainant] would be unable to refuse if she lacked the capacity to choose whether to agree to the touching, in other words the sexual activity, for any reason, for example, an irrational fear arising from her mental disorder or such confusion of mind arising from her mental disorder, that she felt that she was unable to refuse any request the defendants made for sex. Alternatively, [the complainant] would be unable to refuse if through her mental disorder she was unable to communicate such a choice to the defendants even though she was physically able to communicate with them. (*R v C* [2008] EWCA Crim 1155 at [38])

D1 and D2 were convicted of the offence.

D1 appealed to the Court of Appeal and the appeal was allowed (*R v C* [2008] EWCA Crim 1155) on the basis that V was not unable to refuse because '[i]rrational fear that prevents the exercise of choice cannot be equated with lack of capacity to choose' ([2008] EWCA Crim 1155 at [53]). Section 30(2)(b) was not satisfied as '[t]here was no evidence in this case that the complainant was unable to communicate any choice that she had made' (ibid. at [55]).

The Crown appealed to the House of Lords.

**Held, allowing the appeal**, the Court of Appeal was wrong in that irrational fear is capable of depriving a person of capacity and was also wrong to limit s. 30(2)(b) to a physical inability to communicate.

## Commentary

The decision of the Court of Appeal only came about because the court was unduly influenced by two decisions of Mummby J in a different context into finding that lack of capacity to choose to agree to sexual activity cannot be 'person specific' or 'situation specific'. As Baroness Hale states in a speech with which their Lordships agreed:

... 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. ([2009] UKHL 42 at [27])

Baroness Hale's speech sets out the revolution in the attitude of the law to problems of **mental capacity**

brought about by the Sexual Offences Act 2003 and the **Mental Capacity** Act 2005. Both were enacted as a result of work by the Law Commission--the former from Law Com. Consultation Paper No. 139, *Consent in the Criminal Law* (1995) and the latter from the report, Law Com. No. 231, *Mental Incapacity* (1995). These were projects which started when Baroness Hale was a member of the Law Commission, with the publication of Law Com. Consultation Paper No. 119, *Mentally Incapacitated Adults and Decision-Making: An Overview* in 1991.

This revolution rejected the status approach of earlier law, in this instance the Sexual Offences Act 1956, which, by s.7, provided that:

It is an offence for a man to have unlawful sexual intercourse with a woman whom he knows to be an idiot or imbecile.

before being amended by the Mental Health Act 1959 to read that:

It is an offence, subject to the exception mentioned in this section, for a man to have unlawful sexual intercourse with a woman who is a defective.

and that:

In this Act 'defective' means a person suffering from severe subnormality within the meaning of the Mental Health Act, 1959.

As Baroness Hale points out:

This approach was both under- and over-inclusive. It included some severely handicapped women and men who might be quite capable of making a genuine choice about their sexual partners and would not be harmed by their sexual relationships. It denied them the sexual fulfilment which most people take for granted these days, simply on the basis of a status or diagnosis. On the other hand, it did not include people with other mental disorders which might well mean that they lacked the capacity to make a genuine choice about their sexual relationships. ([2009] UKHL 42 at [10])

In existing law and literature, approaches to problems of **mental capacity** have been characterised as 'status', 'outcome' or 'functional', i.e. persons lack capacity because they come within a certain definition (status); they are judged to have made a decision which is inconsistent with conventional values or with which an assessor disagrees (outcome); or they are unable to understand or unable to decide (functional).

The Law Commission Report on *Consent in Sex Offences* was published as an Appendix (27 July 2000) to the Home Office Report, *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office: 2000). As Baroness Hale states:

This adopted essentially the same 'functional' approach as had the earlier Report on Mental Incapacity, but using simplified language 'more apt to describe the process of deciding to consent to sexual activity, as opposed to deciding upon a course of conduct with civil legal consequences ...'. ([2009] UKHL 42 at [15])

This translated into ss 30-37 of the Sexual Offences Act 2003.

The questions certified by the Court of Appeal were summarised as:

Whether the decision of the Court of Appeal ... has unduly limited the scope of section 30(1) of the Sexual Offences Act beyond that which Parliament intended. Specifically

- (a) in holding that a lack of capacity to choose cannot be person or situation specific
- (b) in holding that an irrational fear that prevents the exercise of choice cannot be equated

with a lack of capacity to choose

(c) in holding that to fall within section 30(2)(b) a complainant must be physically unable to communicate by reason of his mental disorder. ([2009] UKHL 42 at [23])

Baroness Hale's response is a firm:

I have no doubt that the answer to questions (a) and (b) is 'yes' ... 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'. ([2009] UKHL 42 at [24])

Clearly, the irrational fear prevented V from being able to weigh the information in the balance to arrive at a choice as she believed she had no alternative. She wanted her choice to be 'no', but was unable to refuse. Any other view, such as that of the Court of Appeal, would take the law back to a status approach rather than a functional one, at least in respect of (b). As Baroness Hale concludes:

The 2003 Act puts the matter beyond doubt. A person is unable to refuse if he lacks the capacity to choose whether to agree to the touching 'whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason' (s 30(2)(a)). Provided that the inability to refuse is 'because of or for a reason related to a mental disorder' (s 30(1)(c)). ([2009] UKHL 42 at [25])

because:

The words 'for any other reason' are clearly capable of encompassing a wide range of circumstances in which a person's mental disorder may rob them of the ability to make an autonomous choice, even though they may have sufficient understanding of the information relevant to making it. ([2009] UKHL 42 at [25])

She continues:

Once it is accepted that choice is an exercise of free will, and that mental disorder may rob a person of free will in a number of different ways and in a number of different situations, then a mentally disordered person may be quite capable of exercising choice in one situation but not in another. ([2009] UKHL 42 at 26)

V may, in other circumstances, have been able to choose whether or not to engage in any particular form of sexual activity with any particular person, but she could not in the circumstances she found herself with those people.

Similarly, the answer to the Court of Appeal's question in (c) had to be a resounding 'yes' because otherwise it is V's characteristics or status which is relevant rather than ability to function. To require a physical inability would mean that the person would have to have had no power of speech, either because they had never learned to speak due to a lack of **mental capacity** or because they had lost the power of speech. Although s. 30(2)(b) includes such people, it goes further. In Baroness Hale's words:

But it is quite clear that in the 2003 Act Parliament had in mind an inability to communicate which was the result of or associated with a disorder of the mind. There is no warrant at all for limiting it to a physical inability to communicate. ([2009] UKHL 42 at 30)

This would be sufficient to dispose of the case, but Baroness Hale went on to examine some of the other offences in the 2003 Act with which D1 might have been charged and which would have given the trial judge an opportunity to explain the various concepts and to distinguish them from one another. As she concludes:

One difficulty which the jury might have had with the judge's reference to 'irrational fear' is that some of this complainant's fears may have been all too rational. ([2009] UKHL 42 at [32])

It was V's lack of capacity which had led her into the situation from which she was unable to extricate herself without giving in to the demands made of her.

However, in practice the jury appeared not to have this problem. In the words of Baroness Hale:

But on the evidence and on the judge's direction they were entitled to conclude that she lacked the capacity either to choose or to communicate within the meaning of the Act and the conviction must therefore stand. ([2009] UKHL 42 at [32])