

Capacity to consent to sex in the civil and criminal law: blurring the boundaries

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CHAPTER 3

Capacity to Consent to Sex in the Civil and Criminal Law: Blurring the Boundaries

Jaime Lindsey and Karen Brennan

[pre-publication version]

Introduction

This chapter considers the legal test for capacity to consent to (or engage in) sexual activity at the boundary of the civil and criminal law. This is an area that has been underexplored, with focus tending to be in the respective silos of each jurisdiction. Instead, we combine our expertise as a mental capacity law scholar and a criminal law scholar, to consider the relationship between these two distinct branches of the law. We argue, drawing on new materialist theories (Barad, 2003; Barad, 2007; Garland-Thomson, 2011; Conaghan, 2013), that the boundary between the civil and criminal law on capacity to consent to sex is permeable and, moreover, that the underpinning justifications for the civil and criminal law regarding capacity to consent to sex¹ are fundamentally the same, with divergence primarily in relation to the procedural safeguards in the respective jurisdictions. We suggest that strengthening the procedural safeguards of the civil law, specifically the Court of Protection (CoP), is a more productive way forward than reinforcing the perceived boundary.

This tension between the civil and criminal law came to the fore following the Supreme Court decision in *A Local Authority v JB*,² one of the few appellate decisions concerning the operation of the Mental Capacity Act 2005 (MCA) and the catalyst for the discussion in this edited volume. By way of background, we first see an attempt at defining capacity to consent to sex by Munby J in *X City Council v MB, NB and MAB*,³ with subsequent interpretation under the MCA, consent to sex jurisprudence soon became a minefield. As decisions about consent to sex are excluded from the best interests approach of the MCA,⁴ where the CoP is called upon to assess capacity to consent to sex it is concerned with whether or not an individual has the general capacity to consent, rather than capacity in relation to a specific individual.

¹ While the terminology used in JB is ‘engage in’ sexual relations, we still use the term ‘consent to’ given its importance in the criminal context and the issue of consent is therefore central to our argument here.

² [2021] UKSC 52.

³ [2006] 2 FLR 968.

⁴ S 27 MCA.

In *JB* the Supreme Court affirmed the principle that it is necessary for the decision-maker to understand that both they and the other person involved must give consent to the sexual activity in question, thereby recentring the role of consent in mental capacity law. Several responses to the *JB* decision and wider commentary about sexual capacity have raised concerns about the law representing a high threshold above that reasonably required of the non-disabled decision-maker, with some even arguing that it is discriminatory (Arstein-Kerslake and Flynn, 2016; Pritchard-Jones, 2020; Ruck Keene and Enefer, 2022). What this critique means is that, in the absence of a mental impairment under section 2 of the MCA, many individuals may disregard the need for the consent of others, but they are not prevented from engaging in sexual relationships. This can be seen as a form of indirect discrimination against mentally disabled people. Criticism has also been levied by those who think the decision imposes too high a threshold and does not recognise the differences in the developments of the civil and criminal law (Ruck Keene and Enefer, 2022). While we acknowledge these wider critiques, we base our argument on the application of the law in England and Wales; arguments about abolition of a mental capacity threshold in its entirety have merit, but they are not the focus of this chapter, which considers what the role of consent should be in mental capacity law as it stands today. If we are to have a legal test for capacity to engage in sex at all, which is required under any ordinary interpretation of the MCA, then we think it is right as a matter of principle that it includes understanding consent. To fail to include consent as part of the test is to fail to account for an essential aspect of sexual relations which is that it should always be consensual; if it is not, it is a sexual offence. This inevitably brings the criminal and civil law into closer alignment which then raises questions about what opportunities arise from this to further bridge the gap between the two jurisdictions in ways which offers benefits for those impacted by mental capacity law.

In this chapter, we commence our argument from the starting point that it was right for the Supreme Court to place consent at the heart of the test for sexual capacity. Some of these arguments have been made elsewhere (Lindsey and Harding, 2021). Here, we focus on how the decision in *JB* represents a closer alignment of the civil and criminal law on capacity to consent to sexual activity. Although there remain important distinctions between the two jurisdictions,⁵ we argue that the two areas of law have much more in common than might appear on first glance, justifying their alignment post-*JB*. Finally, we consider how hybrid orders might apply in this

⁵ *JB* (n2) [99-116].

context, enabling more effective cross-working for difficult cases, moving beyond the apparent silos of the civil and criminal law.

Consent, capacity and the law

The meaning of consent

Consent is a foundational concept when thinking about sexual activity between adults, and it is of fundamental importance in the area of sexual offences, delineating lawful sexual activity from serious criminal offending. Consent has been extensively theorised and justified as a framework through which to understand sexual relationships (Lacey, 1998; Clough, 2014; Arstein-Kerslake and Flynn, 2016; Carline, Gunby and Murray, 2020), notwithstanding some critiques of consent as representing the correct approach to sexual relations, particularly from feminists (Lacey, 1998, 112-124; Cowan, 2007, 51). At its core, consent is a mutual concept, whereby all parties involved in the sexual activity provide agreement to taking part in it. On the face of it, consent has a relatively simple definition in section 74 of the Sexual Offences Act 2003 (SOA): ‘A person consents if he agrees by choice, and has the freedom and capacity to make that choice’. Lack of consent does not have to be communicated; the fact that the complainant did not resist or protest should not be taken to mean that they consented as consent should not be assumed from the complainant’s passivity.⁶ Whether or not the complainant of a sexual offence consented, however, gives rise to complex issues. For example, difficulties arise in cases where the complainant on the face of it consented, giving what Wallerstein terms as ‘factual consent’, but where this was legally invalid due to the fact that she had no freedom or capacity to choose (Wallerstein, 2009). Aside from the circumstances included in the list of evidential and conclusive presumptions found in sections 75 and 76 of the SOA, the legislation left undefined the important concepts of capacity and freedom which the section 74 definition embraces as essential to consent (Temkin and Ashworth, 2004; Elvin, 2008; Elliott and de Than, 2007; Cowan, 2007).

To some extent, the complexity of consent can, however, be over-emphasised. It is a relatively simple concept that asks; does the other person(s) voluntarily agree to engage in the activity in question? The reasons for their agreement may vary and voluntariness may be disputed in specific instances, and this is where the difficulties arise particularly in determining the meaning of the criminal law and its application on particular facts. However, we suggest that it is not difficult to understand the need for consent at a conceptual level; that is, it requires an understanding that

⁶ *Malone* [1998] 2 Cr App R 447.

there must be agreement to do the sexual activity proposed. Furthermore, it is a relatively low threshold to require an understanding that an absence of consent at all makes the sexual activity a form of criminal conduct.

Capacity to consent in the civil and criminal law

The concept of capacity to consent is relevant to sexual offences in the criminal law in a number of ways, depending on whether the person with impaired capacity is the complainant or the defendant. Capacity is relevant to wider issues where the person with impaired capacity is the alleged perpetrator. For example, capacity can arise as a focus in relation to plea, sentencing and defences (Ruck Keene and Enefer, 2022). More specifically, at trial a defendant's capacity may arise as an issue in determining whether they had the *mens rea*, or mental fault, for the offence or whether they could rely on the insanity defence. In cases where the person lacking capacity is the victim of a sexual offence, their capacity is crucial to the issue of whether they consented for the non-consensual sexual offences found in sections 1-4 of the SOA. Their capacity is also relevant to the special offences found in sections 30-31 of the SOA which offer additional protection to persons with a mental disorder - which includes a disability or disorder of mind - against sexual exploitation. These offences criminalise sexual offences⁷ against persons who due to a mental disorder were "unable to refuse" either because (a) he lacks capacity to choose whether to agree (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 choice. These provisions make no reference to 'consent', and so a lack of consent does not need to be proven. However, there is some degree of overlap between these provisions, especially the concept of inability to refuse, and the concept of consent found in section 74.⁸

Capacity is crucial to the question of whether the complainant consented for the purposes of the non-consensual offences because the definition *incorporates* the requirement that the complainant had the capacity to choose.⁹ Like in the civil law, capacity may be lost due to various causes, including mental impairment, being drugged, intoxicated, unconscious, or extreme youth. However, there is also surprisingly little case law on the meaning of capacity for the purposes of s 74, despite the statute being now 20 years old. The House of Lords in *R v C*¹⁰ addressed the

⁷ Including sexual touching; causing or inciting to engage in sexual activity; engaging in sexual activity in their presence; causing to watch a sexual act: SOA ss 30-33.

⁸ See discussion below on *R v C*.

⁹ s 74 SOA (definition of consent).

¹⁰ *R v C* [2009] 1 WLR 27.

meaning of capacity in the context of the concept of being ‘unable to refuse’ found in the section 30-33 offences, and therefore offers guidance on the meaning of capacity more generally, and its interaction with the civil law. The House of Lords held that the assessment of whether a complainant was unable to refuse due to lacking capacity to understand or for any other reasons is an individualised assessment, based on the situation in which the complainant was in at the time of the alleged offence. Therefore, the focus was not on their ‘status’ as a disabled person, nor was the question about whether they had capacity in general, but was focused on the particular circumstances at hand, recognising that persons with mental disorders may have fluctuating abilities depending on the context. The core issue, according to the House of Lords, was autonomy, namely their ability to make a free choice, which meant that the ability of the complainant to understand the relevant information was only part of the assessment. Therefore, ‘or for any other reason’, according to Baroness Hale, was ‘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 of the information relevant to making it’.¹¹

In addition to whether the complainant understood the information relevant to the decision, it was also necessary to show that she had the ability to process that information – to weigh it – so as to arrive at a choice.¹² Although the judgment did not address the meaning of capacity outside of the section 30-33 provisions, the emphasis on autonomy, choice, and freedom of choice, very much reflect the core definition of consent given in section 74 and the meaning of capacity under the MCA: the criminal test for capacity, like that under the MCA, is one which involves understanding of the relevant information as well as the ability to process/weigh that information to arrive at a choice. Indeed, in *R v A(G)* the Court of Appeal, agreeing with the ‘obvious desirability’ of having similar tests, held that the approach to capacity in the criminal law should be ‘necessarily informed by the definition and guidance contained in sections 2 and 3 of the Mental Capacity Act 2005’, though it recognised that a jury would not ‘need to be directed in strict accordance’ with the MCA provisions’.¹³

¹¹ (n10) [25].

¹² Ibid [24-25]

¹³ [2014] EWCA Crim 299 [19]. The SC in *JB* (n2) agreed that, if the tests were the same, strict adherence to the MCA guidance would not be needed in a criminal case [103].

What this analysis of the criminal law shows is that the meaning of capacity in relation to consent to sex is already very closely aligned with the civil law; it is focused on choice, which may be undermined by a range of circumstances, including mental disorder. As identified above and elsewhere in this collection, in *JB* the Supreme Court affirmed the pivotal role of consent in understanding information relevant to sexual relationships, bringing it in line with the criminal law. It is, in some ways, obvious why consent was a central feature of that case given the expert evidence and pattern of behaviour by JB. In fact, had the Supreme Court sidestepped the issue by focusing on risks of pregnancy, disease and the mechanics of the sexual act, they would likely have attracted significant criticism. For example, when asked by Dr Thrift about the other person withdrawing consent during a sexual act JB said, at paragraph 34:

“That’s a tricky one ... If the person gives consent then she’s already given consent and you have to go through with it to the end. Once you’re half way through she can’t say ‘I don’t give you consent’ ‘cos you’re already doing what you need to do. She cannot change her mind if you are already doing it. Cos it’s her fault in the first place for saying yes. She can’t say yes and then say no. Already said yes and you’ve got your chance.”

Dr Thrift recounted how JB did not shift in this view across all her assessment sessions, and how JB was visibly shaken at the idea that a partner would be able to withdraw consent. A defendant who may well lack capacity under the MCA due to their inability to understand whether the other person was consenting may be convicted of rape. This was recognised in *JB* by the Supreme Court considering the issue of protection – although he was risky to others, he was also in need of protection due to the risk of conviction which would have a particularly negative impact on him in light of his vulnerabilities.¹⁴

At a criminal trial, there is no specific question about whether the defendant had ‘capacity’. Rather, evidence of a mental disorder/disability falls to be considered in a different way – either on the question of whether he had the *mens rea* for the offence (specifically, in the case of non-consensual offences, a reasonable belief in consent) or whether he could rely on insanity as a defence. There is little case law on the issue of what mental disabilities may be relevant in assessing the question of whether ‘having regard to all the circumstances’ the defendant had a reasonable belief in consent

¹⁴ [40, 74].

in the case of non-consensual offences such as sexual assault and rape.¹⁵ In *R v B* a delusional belief arising from a psychotic illness or a personality disorder could not be considered as a reasonable belief in consent, but the Court of Appeal left open the question about whether there may be other situations where a defendant's mental disability could be considered as contributing to a reasonable belief such as where they had an impaired ability to read subtle social signals.¹⁶

It is also important to emphasise that *JB* is not an unusual case, thereby refuting the argument that it distorts the wider application of the law to provide unjustified intrusion into people's lives. As one of the authors has argued elsewhere, cases concerning allegations of abuse either by the person or against the person, are already the most typical application of capacity to consent to sex jurisprudence in the CoP (Lindsey, 2020; Lindsey and Harding 2021). Therefore, the consent requirement is almost always a central aspect of the cases that reach the CoP anyway; the *JB* case merely affirms that practice. Furthermore, the capacity question is much more likely to be an issue where the person is the alleged victim of sexual exploitation in the CoP, rather than the perpetrator (Lindsey, 2020; Lindsey and Harding, 2021). This is, perhaps, unsurprising given what we know about sexual abuse of women with disabilities (Lindsey, 2016; see also Hollomotz, this collection).

Ralph Sandland (see further in this collection at chapter 1) has articulated that concerns about sex and disabled adults are not new, linking the civil case law on capacity to consent to sex with the historical development of the management of sexual activity by those with mental impairments (Sandland, 2013a; Sandland, 2013b). While Sandland argues that, historically, the focus was on controlling female sexuality in this regard, in more recent times we see the focus on protecting vulnerable females and restricting the risky behaviour of dangerous males.¹⁷ It is within this context that the debate surrounding the application of the civil law on capacity to consent to sex has emerged and its relationship with the criminal law has been considered. However, although there have been advances in recent decades in rules of evidence and court procedures,¹⁸ as well as in criminal law doctrine, with the aim of improving access to justice for these vulnerable victims of sexual violence, the conviction rate for sexual crimes is notoriously low, and it is often said that

¹⁵ SOA, ss 1(2) (rape) and 3(2) (sexual assault).

¹⁶ [2013] EWCA Crim 3.

¹⁷ Ibid.

¹⁸ For example, special measures directions (Youth Justice and Criminal Evidence Act 1999, ss 16-30); preventing a defendant from cross-examining the complainant in person (Youth Justice and Criminal Evidence Act 1999, s 34); rules on hearsay evidence/previous consistent statements (Criminal Justice Act 2003 s 120) and sexual history evidence (Youth Justice and Criminal Evidence Act 1999, ss 41-43).

these crimes have effectively been decriminalised (Imkaan and Rape Crisis England and Wales, 2020). Thus, when we think about the meaning of consent/capacity - and the respective roles of the criminal and civil jurisdictions – it is important to put this in the context of the wider criminal justice system’s failure to prosecute and convict the vast majority of incidents of sexual violence, and the wider social context in which these crimes are understood and minimised. Recourse to an alternative form of protection, the MCA, is therefore understandable against this backdrop (Herring and Wall, 2014).

However, where the criminal law declines to prosecute those who are suspected of perpetrating sexual violence due to, for example, difficulties in the evidence – something which poses particular issues in cases involving persons with mental disabilities¹⁹ - it may be problematic for the civil law to step in to fill this gap in terms of seeking to fulfill individual or public protection as the consequences for individuals who are the subject of CoP proceedings can be quite draconian.²⁰ This may be particularly so in instances where the person is the victim/potential victim of sexual offending as in this situation it is the *victim* who bears the burden of the court order, not the person who may be seeking to exploit their vulnerability and commit a sexual offence against them. In addition, irrespective of whether the person is the potential victim or offender in the criminal context, an order under the CoP may mean that the person is not permitted to engage in *any* sexual activity, meaning they are prevented from engaging in consensual as well as non-consensual sex. Further such orders may be imposed for lengthy periods with infrequent reviews. The fact that the CoP lacks the procedural safeguards that apply in the criminal law is particularly troubling in this context. Recognition in *JB* of the function of the CoP in relation to public protection may have the impact of enhancing the role of the CoP in this respect, thus potentially further diminishing the criminal law’s position in addressing sexual offending against/by persons with disabilities.

It is true that there may be situations where the more appropriate jurisdiction to deal with the case is the CoP, such as where there is limited public interest in prosecuting given the circumstances as a whole. However, it is also crucial that in instances where the criminal law does not prosecute, whether this is for evidential or public interest reasons, that both victims and offenders are not in effect ‘punished’ by the civil law without the safeguards available in the criminal system. This is

¹⁹ The evidence of the complainant (victim) and defendant is crucial in sexual offence cases where consent is the issue. Other evidence of lack of consent may be lacking, and the credibility of the complainant and defendant as witnesses is especially important.

²⁰ For further discussion of the consequences of criminal and civil proceedings, see below.

one area where space opens for greater interaction between the two jurisdictions, and we outline one suggestion below in relation to the use of hybrid orders. Other possibilities may also emerge particularly when considering what constitutes ‘justice’ for victims of sexual offending, and which may mean finding alternative and more effective ways to address sexual violence either within the criminal justice system or outside it such as, for example, through the use of restorative justice practices or alternatives to criminal justice which draw on or are based in the civil law (McGlynn, 2011; McGlynn, Westmarland & Godden, 2012).

Blurred Lines Between the Criminal and Civil Law

In this section we explore the issue of the boundaries between the civil and criminal law, arguing, in line with Clough’s analysis of the binaries of mental capacity law (Clough, 2021), that the civil and criminal law is another binary which operates in this field, to the exclusion of considering the complexities, links and boundedness between the jurisdictions of the civil and criminal law. In doing this we draw on new materialist theories (Barad, 2003; Barad, 2007; Garland-Thomson, 2011; Conaghan, 2013) to consider how these boundaries might operate in the approaches to sexual capacity. We show how the justifications underpinning the civil and criminal law already have several similarities and the differences that remain would benefit from further erosion of the boundaries between them.

Materialism means recognising that the world is made up of matter; that physicality and cause and effect apply to human behaviour as much as to any other phenomena (Murphy and Margolis, 1995). New materialist theories are developed from a foundation of materialism, but which was departed from in the mid-twentieth century towards social constructionist understandings of the world and a focus on language. Karen Barad, a leading advocate of new materialism, explains that there is a strong relationship between the material world and our linguistic world, where matter is an active agent in the process of phenomena, rather than a neutral result of other practices (Barad, 2003; Barad, 2007). This means that the way we perceive phenomena, talk about, embody and experience it impacts upon it - any reliable understanding of the world must be based on an “*intra-action*” between the material and discursive world (Barad, 2007, 815). The importance of feminist interpretations of new materialism are that they are based in the social world, analysing the ways in which our material conditions impact upon our social, emotional and psychological lives, often placing the concept of embodiment as central to an understanding of the world (Fletcher, Fox and McCandless, 2008; Garland-Thomson, 2011; Fox and Thomson, 2017; Clough, 2021). Social

norms and relationality shape our behaviours in a material sense as much as through our linguistic characterisations of ourselves (Nedelsky, 2011).

As Clough has argued regarding the MCA, it is essential to begin to break down binaries and to think more creatively about how to deal with the most challenging scenarios. We suggest that the civil and criminal law is one more *perceived* boundary in the world of mental capacity law, building on Clough's description and critique of the bounded nature of this field. As she explains about the MCA, 'The Act itself is premised upon particular ideals of subjectivity ... It sets up a framework of legal and spatial relations, drawing boundaries around and within those relations as it does so. These boundaries are inflected with an interwoven network of binaries which help to shape and form the logics of the legislation as well as broader legal frameworks' (Clough, 2021, p. 40). Having some sort of boundary between the criminal law and civil law is inevitable in that they are separate jurisdictions, but that boundary is not impenetrable. As Clough explains, 'the binary construction here is historically framed and contingent, and - of course - could be otherwise.' (Clough, 2021, 56). We suggest this analysis can be applied to the civil/criminal law binary too. In fact, Clough herself criticises the approach taken in the line of cases pre-*JB* to capacity to consent to sex in similar terms, particularly focusing on the problematic capacity/incapacity binary (Clough, 2021, pp. 68-69). Yet similar reasoning can be applied to the perceived civil/criminal binary. For example, in *JB* the Supreme Court closely considered the case law emanating from the criminal sphere and appeared to be influenced by it in coming to the conclusions they did regarding the role of consent in the civil law. Their reading shows a willingness to turn to the criminal law for help while also attempting to maintain a distinct and delineated boundary between the two jurisdictions. Despite some differences remaining, we show that the civil and criminal law here are already closely aligned. As a result, we should move away from trying to reinforce the boundary and, instead, think about the ways in which the civil and criminal law can continue to operate together in productive ways for those impacted by both jurisdictions.

As we outline below, we acknowledge that there remain some differences between the civil and criminal jurisdictions, but it is when either jurisdiction is operationalised that these differences perhaps become most apparent, as each system will operate within its own silo in the pursuit of its' own purposes until a particular case is concluded. Broadly speaking, at a general level, the criminal law's focus on retrospective condemnation and punishment of a crime that has already been committed, as well as on future public protection, marks it out as different to the civil law. However, as we explain below, this does not mean there is no scope for increasing interaction

between the two spheres, notably outside of the courtroom context, particularly in working towards the shared aim of public protection.

The already-existing similarities between the two in respect of public protection may be further harnessed at points where spaces appear to allow for beneficial interactions. What these interactions may be, and the benefits involved, will undoubtedly depend on the situation and in particular whether the person is the victim/potential victim or offender/potential offender. It may require shifts from both the civil and criminal law in terms of how they approach these cases. For example, there may be opportunities to address the issue of disabled victims suffering the burdens of a CoP order which protects them from abusive individuals who seek to exploit their vulnerability, but which leave open the possibility of them having a consensual sexual relationship with others. At present the failure to criminalise the conduct of the abuser means that it is the victim who has restrictions placed on them for their own protection, something which fails to respect their right to a consensual sex life with an appropriate (non-abusive) partner. However, criminalisation may not be possible due to difficulties with the evidence, and the criminal process itself may harm the victim. In this sense, neither the civil nor the criminal systems work well for the benefit of persons with disabilities, particularly in terms of addressing the (often) competing objectives of protection and autonomy. There may be scope to consider alternatives at the boundary of the two which can bridge these difficulties and provide for a just and effective outcome, such as with the use of hybrid orders, which we discuss in the final substantive section of this chapter. The overlap between the two in terms of the importance of consent, and the shared aim of public protection, make it easier to consider innovative ways of approaching these cases.

Specifically, with regard to how the concept of consent is *applied* in either context, there remain some potential differences between the two areas, set out in *JB*.²¹ These distinctions start from the basis of the criminal law being retrospective and the MCA being prospective in nature and, relatedly, the differing standards of proof – balance of probabilities in the civil courts versus beyond reasonable doubt in the criminal courts. The application of the test for capacity/consent in the criminal context is situation or person-specific. As Baroness Hale stated in *R v C*: '[i]t 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 in this

²¹ *JB* (n2), particularly paras 97-116.

particular time and place'.²² However, while the criminal law must look at the capacity of the individual in a particular set of historical circumstances and in relation to a specific sexual act with a specific person, the role of mental capacity law is broader and requires a general assessment of the person's understanding and abilities.

This means that capacity is assessed differently in the civil context, where the test is said to be issue-specific in how it is applied, meaning it asks whether the person understood the nature of the sexual act in a general or 'abstract' sense, without consideration of the specific circumstances of the potential sexual act, such as the proposed sexual partner (Herring and Wall, 2014; Clough, 2014). This may mean that, although the test for capacity is similar in both jurisdictions, it may apply differently based on whether it is conceptualised on assessment as issue- or situation-specific. While this is the doctrinal position, the reality of most mental capacity jurisprudence is that the courts here do also look to past behaviour and focus on sexual capacity in respect of specific relationships or specific concerns about an individual's sexual behaviour. This is evident in the JB case itself, where he had a history of risky sexual behaviour and there were concerns about his treatment of individuals. While JB did not have a regular partner, as we see in many CoP sexual capacity cases,²³ he did have a history of sexually dangerous and risky behaviour which suggests the situation-specific elements of his circumstances were also relevant factors, if only in contextualizing his understanding. So, in practice, there may not be a significant difference in how capacity is assessed in both contexts, even more so *post-JB*.

The material dimension of the JB case is also in the consequences the approach has for JB and those around him, as well as for mental capacity law's future subjects. The decision has shaped how his circumstances ought to be responded to, including by professionals and the judiciary, when faced with similar cases. Practitioners such as social workers and carers who work closely with sexually risky individuals on a daily basis are always operating at the intersection of the civil and criminal law, merely looking for ways to harness the tools at their disposal to provide protection for potential victims and break down the legal binaries. That is not to make a positive normative judgement about that way of working, but it does reflect the reality for professionals on the ground who seek the tools available to them irrespective of whether they fall within the criminal

²² (n10).

²³ See for example: *Local Authority X v MM* [2007] EWHC 2003, *D Borough Council v AB* [2011] EWHC 101, *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53, *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCACiv 37.

or civil law. Moreover, the resources allocated to a case such as JB are impacted by the direction the law takes. For example, including the consent element across the criminal and civil law approaches means that resources are more likely to be directed at facilitating individuals to understand consent rather than simply preventing sexual relationships. We have even seen in *Re CH v A Metropolitan Council*²⁴ that parties can be awarded damages by the court for failures to provide timely sex education. Conversely, if consent were to remain in the bounds of the criminal law alone then there would be less impetus on professionals to direct resources to facilitating capacity and understanding consent as an essential element of that. There is, therefore, an important relationship between how the civil and criminal systems operate through social work with risky individuals such as JB. If we can move away from the embedded notion that the civil and criminal law are two dichotomous legal regimes which ought not to be blurred, then we can deal with the material reality of how they operate together in a beneficial way for those impacted by and working at their intersection. Below, we explore the various claimed divergences between the civil and criminal law and show that in respect of substantive law, theory/justification and consequences, the civil and criminal law are already closely aligned.

Substantive differences

In this first section, we build on the analysis of the doctrinal position above to analyse the apparent substantive legal differences. In doing this, we can see that the differences that do remain *post-JB* are not as strong on closer inspection as they might first appear. This is exemplified above, where we have shown the close doctrinal relationship between the two jurisdictions. The Supreme Court in *JB* agreed with earlier authorities that ‘it is in principle desirable, though not necessary, that there should be the same test for capacity’ in the two jurisdictions. However, it disagreed with the conclusion of the Court of Appeal in *A(G)* that the difference between the criminal and civil tests was ‘without distinction’.²⁵ Although it made some *obiter* observations on this, it held that the issue was best left to be determined on the basis of the facts of individual cases.²⁶

Although the tests may not be precisely equivalent, in substance there are important similarities: both the civil and criminal tests focus on understanding and processing information, with consent being a central feature of this assessment. While some discussion has suggested that the focus of the test in the civil law is now capacity to ‘engage in’ sexual relations, and that this does distinguish

²⁴ [2017] EWCOP 12.

²⁵ [25].

²⁶ [108-116].

the two areas, we think this distinction is trivial (Ruck Keene and Enefer, 2022, 8). It is, of course, the case that the consent issue is most pertinent in the criminal law when it is a potential perpetrator ‘proposing’ sex, and that nobody would seriously ask the question as to whether the victim understood the perpetrator’s consent. However, that does not create a stark difference in the civil and criminal law, it is an application of the law to the factual circumstances of the case and with regard to the issues at stake. It is still right to say that consent is a central feature of both the civil and criminal law regarding capacity, but it may apply differently in different circumstances in both domains.

Theory/justificatory differences

Moving next to the underpinning theoretical bases for each area, we consider the extent to which they converge. This is important because, we argue, that there are now several justificatory similarities between the civil and criminal law which indicate increased convergence of the underlying basis for the law’s role. Of course, the criminal law is different from other forms of legal regulation because it involves the coercive power of the state to publicly censure and punish wrong-doing and it plays a declaratory or communicative function in this respect (Ashworth, 2008); Lamond, 2007; Husak, 2004). The civil law does not have this public aspect to it in terms of communicating anything about the wrongness of certain conduct, or censuring individuals for engaging in it. Nonetheless, it is evident that there is marked overlap between the two systems: the civil and criminal law are both concerned with respecting sexual autonomy and with protecting people. This may be the wider public or an individual victim in a criminal case and, under the MCA, may include protecting the disabled victim from abuse or the potential perpetrator from potentially committing an offence. Furthermore, we now have Supreme Court authority that it is legitimately one of the functions of the MCA to protect the public.²⁷ Lord Stephens explained:

“The information relevant to the decision includes information about the “reasonably foreseeable consequences” of a decision, or of failing to make a decision, which consequences are not limited to the consequences for P ... The consequences for other persons or for members of the public are therefore a part of the information relevant to the decision ... In this way the court as a public authority, in determining what information is relevant to the decision, must include reasonably foreseeable adverse consequences for P and for members of the public.

²⁷ Para 92.

In practice, by doing so, the court under the MCA protects members of the public..²⁸

The idea, then, that the MCA was set up to empower and protect the individual subject of its jurisdiction alone is no longer a justifiable premise, at least not in its doctrinal and practical application *post-JB*. We do have some concerns with the approach of the Supreme Court in this regard, in particular with the potential risks of using the MCA as a tool primarily aimed at public protection, given its potentially severe consequences for those to whom it applies which is not mirrored by the procedural safeguards of the criminal process. Yet even if one objects to the public protection narrative at a conceptual level, it remains highly persuasive to incorporate the concept of consent as part of the information relevant to a decision to engage in sex. That, in our view, is not justified by protection of the public, but as a matter of realistic analysis of what a person must understand about the fundamentals of sexual activity. Therefore, while the tools may be seen to be used ‘on the ground’ by practitioners to protect the wider public, that does not undermine the principled justification for centring consent in the legal test, which aligns the criminal and civil law. The test for capacity in relation to sex in both areas of law are justified by the importance of consent in sexual relations, highlighting their close relationship.

Consequential differences

Next we look at the consequences of the civil and criminal law and argue that, in practice, these will often be similar in nature for adults who face a finding of incapacity in relation to sexual relationships and for adults who engage in criminal sexual conduct. On the face of it, most people would consider that the criminal and civil law have quite different consequences for those involved. To start with because the criminal law operates as a form of public censure to sanction individuals for what are considered public wrongs, the use of the criminal law is considered particularly oppressive, and something which should be a “last resort” (Husak, 2004; Ashworth 2008). The burdensome consequences of a criminal conviction, particularly for a serious offence, include stigma and punishment. In the case of sexual offences, both are likely to be significant, with the sanction likely to include imprisonment, thereby imposing restrictions on the individual’s liberty.²⁹ Yet on any detailed analysis of mental capacity law, it is quite clear that it also operates in an oppressive way by authorising extensive restrictions on the liberty of the person – perpetrator

²⁸ Ibid.

²⁹ For example, the punishment for rape is a maximum of life imprisonment (s 1(4) SOA 2003), and for sexual assault is a maximum of ten years’ imprisonment (s 3(4) SOA 2003).

or victim. Findings of incapacity in these domains can lead to highly restrictive care and supervision regimes which amount to a deprivation of liberty, hence the application of the Deprivation of Liberty Safeguards (DoLS) framework (Series, 2022). It is therefore not such a leap to compare the consequences of criminalization, including punishment, with restrictions on liberty under mental capacity law. The level of supervision, sometimes lifelong, that can be associated with findings of incapacity in respect of sex can be in some circumstances just as, if not more, onerous than in the criminal law. Individuals may not have their capacity reassessed in any prompt manner and so they may be subject to continuous supervision to prevent them from engaging in incapacitous sex. Thus, although there are differences between the two, both systems can result in burdensome consequences, including restrictions on liberty. It is therefore important to ensure that there are limits to who/what is subject to the jurisdiction of each and that procedural safeguards are in place to protect individuals from these oppressive aspects, which leads us to the next point.

Procedural differences

Our final point of analysis of difference relates to the procedural aspects of the civil and criminal law. We argue that the differences between the procedural protections are more stark than in any of the above areas. This is one area in which the criminal and civil law has not converged in relation to consent to sex, which we suggest is a potential problem for the CoP in how it deals with incapacity. This is particularly so given the consequences of a finding of incapacity in this regard. As we highlight above, due to the close overlap with the criminal law's consequences, civil law interventions ought to have stronger procedural protections. For example, we argue that the person ought to have direct legal representation, including representation which represents the person's own views and not just an application of what is in the person's best interests (Ruck Keene, Bartlett and Allen, 2016; Lindsey, 2022). We also argue, drawing on work by one of the authors published elsewhere, that the person must be able to call their own expert evidence in mental capacity disputes rather than relying on a single joint expert (Lindsey, 2022). This would be important in sexual capacity cases because it is essential for the person to be able to be on an equal evidential footing to challenge a finding of incapacity. While legal aid is currently available to Ps in some instances, including for DoLS challenges,³⁰ there is wider availability of legal aid in the criminal sphere compared to civil justice, for reasons related to issues of loss of liberty, albeit even in relation to criminal justice legal aid has been severely impacted in recent years (Dehaghani and

³⁰ Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, regulation 5(1)(g).

Newman, undated; Moorhead, 2004; Dehaghani and Newman, 2022).³¹ We think that expansion of legal aid in mental capacity disputes is also necessary given the similar potential impacts on those affected by findings of incapacity. As a result, we suggest that procedural justice protections ought to be much stronger in the CoP. This is something that one of the authors has argued for elsewhere (Lindsey, 2022) and, if enacted, we could make the argument that civil and criminal law are even more closely aligned, which justifies further the hybrid approach.

In these sections above, we have highlighted that the essence of the issues are fundamentally the same under the MCA as under the criminal law; that is, whether or not a person is or has been exploited in some manner because of their impaired mental functioning which prevents them from understanding that sexual relations are a mutual, consensual, intimate act. Furthermore, we have shown the already present similarities across theory, consequences and substantive law. In light of the strong similarities in the underpinnings of the civil and criminal law on the issue of capacity to consent to sex, this perceived hard boundary is not immovable and practitioners should be willing to use the two jurisdictions more interchangeably and creatively to work together. For the CoP, though, we would also recommend greater procedural safeguards being adopted to avoid the risks of criminalisation of sexual behaviour without due process.

Hybrid orders and responding to risky sexual behaviour

The above analysis points towards greater use of a hybrid approach to dealing with the problem of capacity to consent to sex and specifically its application to cases of sexual violence where the person is the perpetrator. We consider how a hybrid approach might be developed for use in the intersection between the criminal law and civil law, drawing on analysis of other types of hybrid order, including the sexual risk order under section 122A of the SOA 2003 and those in the adult safeguarding context.³² We consider some of the conceptual criticisms of these orders, arguing for modifications of how they are currently formulated to provide an effective way of dealing with those individuals at the intersection of the civil and criminal law.

The orders subject to analysis here are a form of civil/criminal hybrid procedure, which operate within the civil jurisdiction but can provide for criminal sanctions in the event of a breach.

³¹ See Legal Aid, Sentencing and Punishment of Offenders Act 2012.

³² One of the authors has argued for the implementation of a safeguarding adults order with specific recommendations for a support based approach, see (Lindsey, 2020; Lindsey, 2022b).

Different orders have different consequences for breach, but typically will require proof on the civil standard of the balance of probabilities. This means that criminal consequences can result from a civil standard of proof. Despite this distinctiveness, hybrid orders have taken hold in the politics of law making over the past two to three decades, perhaps most notably with the advent of anti-social behaviour orders (ASBOs) (Ashworth *et al.*, 1998) but also with some wider support and success in the domestic abuse context (Wing-Cheong, 2017; Lindsey 2020). A particular benefit of protection orders in the domestic abuse context is that they are targeted against the perpetrator of abuse. While this may seem obvious, it is important to note because women (and it is disproportionately women who suffer domestic abuse) have often had to flee their home, friends, jobs and support networks to escape abuse. Therefore, placing consequences and restrictions on the perpetrator is essential if women are not to suffer double victimisation. The point is also relevant to the application of mental capacity law. As one of the authors has written elsewhere, too often in safeguarding investigations concerning disabled women, mental capacity law is used to remove a woman from an abusive partner by restricting and coercing her rather than through restrictions against the perpetrator (Lindsey, 2020; Lindsey, 2022b). If hybrid orders are to be enacted in this context, it is essential that they are focused on perpetrators of abuse rather than, again, operating as ways of restricting disabled women.

Turning next to the role of hybrid orders as they presently exist in the criminal law, Sexual Risk Orders (SROs) are a specific type of hybrid order under section 122A of the SOA.³³ A chief of police can apply for an SRO to apply to an individual who is believed to pose a risk of sexual harm against the public, but that person need not have been convicted of a criminal offence.³⁴ SROs are a civil order and are therefore controversial given their potential for intrusion into the lives of adults who have not been convicted, or even tried, for a criminal offence.³⁵ The requirements for an SRO to be imposed are that they have done an act of a sexual nature; and, as a result of which, there is reasonable cause to believe that it is necessary to make an order to protect the public from

³³ There are other types of criminal orders that can be made for sexual conduct of this nature, such as Sexual Harm Prevention Orders (SHPOs) under s 103A(2) SOA. This article focuses on SROs rather than SHPOs as SROs have potentially broader scope, not requiring criminal proceedings in relation to the alleged perpetrator. However, SHPOs are worthy of further analysis as they apply where a person is found not guilty by reason of insanity or under a disability, thereby making them potentially relevant for some of the individuals who fall within the CoP's jurisdiction too.

³⁴ *Chief Constable of Kent Police v Carter* [2022] EWHC 1972 (Admin): confirmed that it is not necessary that the respondent committed a criminal offence.

³⁵ For example, see *R v Mayne (Phean)* [2021] EWCA Crim 737; [2022] 1 Cr App R (S) 9, where a SRO was made following arrest (but not prosecution) for accessing child sexual exploitation pornography online.

harm.³⁶ Despite being a civil order, SROs are hybrid in nature because they act at the intersection of the civil and criminal law. For example, it must be proved to the criminal standard, beyond reasonable doubt, that the person has done an act of a sexual nature. However, the civil standard of proof applies to the second part of the test - that there is reasonable cause to believe that is necessary to make an order to protect the public from harm – meaning this only needs to be established on the balance of probabilities. What this might mean depends on the individual case and there is relatively little case law on this. However, *R v Mayne (Pbean)*³⁷ suggests that it may be sufficient that a prosecution of the criminal conduct was not possible, for whatever reason that may be, but there is still a perceived need to protect the public due to the nature of the alleged offences, in that case accessing child sexual abuse material. Consequences for breach of SROs are also criminal in nature and can lead to a maximum term of imprisonment of six months or five years, depending on the indictment.³⁸

While SROs may appear to encroach on the freedom of adults who have not been convicted of a criminal offence, two important features stand out to us as justifying their use. Firstly, the requirement to establish that the person has done an act of a sexual nature must be proven beyond reasonable doubt. This imports a criminal threshold into the analysis, which we think is important to show that the person has a degree of risk in their behavioural profile. Secondly, there is a proportionality requirement for the court to consider when making a SRO, which brings the law in line with the requirements of the European Convention on Human Rights (ECHR).³⁹ These two elements together appear to balance the needs of the wider public to be protected against the need for the individual to not have their rights interfered with without due process.

While SROs are, of course, not within the remit of the CoP's powers, we raise them here for two reasons. Firstly, those working with individuals such as JB ought to consider the use of SROs as an alternative to CoP proceedings in relevant cases. For example, where the primary concern is about sexual harm and sexual risk, rather than mental incapacity. We think that by arguing for a blurring of the boundaries of the criminal and civil law this ought to encourage professionals working with risky adults in this context to consider the full range of legal interventions that might

³⁶ S122A(6) SOA.

³⁷ At n35.

³⁸ S122H SOA.

³⁹ For example, see the judicial review of interim SROs where discussion of vulnerability of victims was a key part of the proportionality analysis, *R (on the application of Anderson Pinheiro) v North Tyneside Magistrates Court and anor* [2022] EWHC 1176 (Admin).

be available to them. Where the adult has a disability there may be a tendency to resort to the MCA framework, due to its relative simplicity and accessibility. However, it is not the only legal framework that is relevant here and greater cross-agency working between social work, criminal justice and healthcare is warranted, albeit inter-agency working has long been desired but not always successfully achieved (Klebens et al, 2008; Davies, Barlow and Fish, 2023). Secondly, we argue that there may be scope to incorporate an order, similar in nature to SROs, but for application to individuals who may, by reason of their mental impairment, be unable to understand the consent of the other party in a sexual relationship. At present, the CoP has the power to grant injunctions under section 16(5) of the MCA, and the MCA's jurisdiction also intersects with that of the inherent jurisdiction of the High Court, which has been used somewhat interchangeably with the MCA in some instances.⁴⁰ Both of these forms of injunctive relief could be applied where the person is at risk of sexual abuse. However, it is less clear that an injunction could be granted against a person in the name of his or her own protection. Instead, expansion of safeguarding powers could be a way forward for use in cases of abuse where the person is believed to be the perpetrator and has care and support needs, which is the requirement that triggers the safeguarding duties under the Care Act 2014 (Lindsey, 2022b) or the Social Services and Well-being (Wales) Act 2014. This approach may provide a clearer route for professionals working with individuals such as *JB* to tailor any intervention in the ways in which it is most needed, without needing to engage the criminal justice system as is required for SROs. One of the authors has argued elsewhere for the use of targeted orders in the safeguarding context, which in principle could deal with cases such as that of *JB* including that local authorities should be given 'the power to apply for protection orders in the safeguarding context, but in ways that focus on perpetrators rather than coercing the vulnerable adult.' (Lindsey, 2020, 159).

Hybrid orders have been extensively criticised, most acutely by Hendry and others whose criticisms centre on the preventive turn of criminal law, 'othering' and instrumentalization of the subjects of these orders (Green and Hendry, 2021; Hendry, 2021). We do not find these concerns persuasive as an objection, in absolute terms, to the use of hybrid orders. This is because we would suggest that their application itself is not a harm, rather, the harmful consequences only crystallise for the individuals subject to them at the point at which those individuals breach them. Provided the prohibited conduct in question is fundamentally criminal in nature (i.e. meets the criminal threshold for a specific offence), we think this justifies the consequences that flow as a prohibition

⁴⁰ *Southend on Sea v Meyers* [2019] EWHC 399.

on criminal conduct is not unreasonable. However, a more persuasive criticism of hybrid orders has been articulated, which we think does merit careful consideration here. This is the criticism that hybrid orders circumvent the procedural safeguards of the criminal law (Hendry and King, 2017; Hendry, 2022) and permit criminal sanctions on the basis of a civil law burden of proof.⁴¹ We are alive to this criticism and so a hybrid approach which seeks to operate across the boundaries of the civil and criminal law on capacity to consent to sex would need to ensure strong procedural justice protections. We have not sketched out in detail in this chapter what this hybrid order might look like in practice, as that is beyond our scope. However, if a hybrid order were to be incorporated into safeguarding legislation, we think it would be essential to strengthen the procedural safeguards before implementation. Specifically, this would require that the subject of the order must have direct representation, including representation which represents their own views and not just an application of what is believed to be in their best interests if they lack capacity, they must be able to call their own expert evidence (Lindsey, 2022), and must have legal aid to bring any challenge against the imposition of the order.

Conclusion

This chapter has argued that the Supreme Court's focus on consent in the test for mental capacity to engage in sexual relations was the right approach. This is not only because it places greater emphasis on an important substantive element to sexual relations, but also because it shows the alignment between the civil and criminal law. We have argued that the perceived civil/criminal law binary regarding consent to sex is illusory, highlighting the ways in which the two areas are underpinned by similar justifications. Differences do remain, but there are more similarities than might first appear. We think that there is diffusion across the boundary between the civil and criminal law and that this allows closer overlap between the two jurisdictions, which could be harnessed to provide a hybrid solution in the form of a civil order, with criminal sanctions, for criminal sexual behaviour which is otherwise difficult to pursue through the criminal courts. We acknowledge there are procedural safeguards needed for such an approach to be expanded, but we think this is possible within the wider project of rethinking how to approach capacity in the realm of consent to sex.

⁴¹ In *Mayne (Phean)* for example he had not attended or been compelled to attend the Magistrate's Court hearing. The Court of Appeal was critical of this, stating: '[i]f such drastic orders are to be made it seems to us that this should be at a hearing at which the defendant is present and legally represented, so that the court can consider submissions about the wording and proportionality of the order proposed' [9].

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