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Protecting disabled adults from abusive family relationships: Mental capacity, autonomy and vulnerability

Jaime Lindsey, University of Essex

Introduction

This chapter explores disability and abuse in family relationships, and the way that the civil law responds to the widespread abuse against disabled adults (McCarthy and Thompson 1997; Mencap 2001; Curry et al. 2009; Hughes et al. 2012). It particularly focuses on abuse against adults who have what are broadly referred to as 'mental disabilities' - a term used to include people with psychosocial disabilities, cognitive and intellectual disabilities.[1] This chapter argues that there is a misplaced focus in the legal literature and case law on whether or not mentally disabled adults are acting autonomously when choosing to maintain a relationship with an abusive family member. The argument in favour of intervention is that the disabled adult's ability to make an autonomous choice to leave an abusive situation is undermined and they are therefore unable to consent to remain in an abusive relationship. In this respect they are in need of protection, even if protecting them goes against their expressed wishes. In many cases, this leads to the individual being found by the courts to lack the mental capacity to make decisions about contact with the family member or where to live. In other cases, the inherent jurisdiction of the High Court is used to protect. In both instances, the disabled adult victim of abuse can have their freedom to make their own decisions denied and a different course of action imposed on them by the court in the name of their protection. Ironically, such findings of incapacity can lead to the adult having their choices overridden by the state, thereby undermining their autonomy further. However, those who support coercive intervention in these cases argue that once the individual is

[1] The term mentally disabled adults is imperfect and does not adequately represent how many individuals within this category would identify. However, it is used to indicate the broad range of disabled adults that are potentially caught by the Mental Capacity Act 2005 and is a term used elsewhere in the disability literature, see Bartlett (2012), Benedet and Grant (2014), Lindsey (2016).

removed from the abuse, their true wishes or desires will become apparent and therefore their autonomy will be promoted by the coercive intervention. This dominant approach in mental capacity law is problematic for a number of reasons. First, it focuses the gaze of the law on the victim of abuse by looking at their internal mental functioning, rather than targeting the cause of the harm - the perpetrator. This can lead to legal surveillance and control over the victim of abuse. Second, it is not clear that the problem in these cases really is one of a lack of autonomy. Instead, it is more likely a materialisation of vulnerability in the disabled adult's life. Finally, an autonomy based approach reflects a problematic understanding of the interplay between disability and abuse, which has wider implications for how disabled people are viewed as participants in society.

I refer to the different understandings of the concept of autonomy throughout the legal and philosophical literature. My aim is not to advance a particular understanding of the concept of autonomy, that is beyond the scope of this chapter. Autonomy is varied and difficult to pin down beyond its core principle of letting people live their lives according to their own values and keeping external interference to a minimum. However, I do acknowledge that autonomy is an inherently relational concept (Mackenzie and Stoljar 2000). This means that choices that individuals make are done so within their relational context and may therefore not always appear rational to an objective outsider. Therefore we should be careful about judging an action based solely on its seemingly unwise content. Whichever understanding of autonomy is used though, all decisions are influenced by a person's social, biological, economic and personal conditions such that decisions are often constrained and negotiated. Therefore while I understand the core meaning of autonomy in this chapter as being about self-determination, I also recognise that choices are not always free or rational.

The legal backdrop to the discussion in this chapter is the Mental Capacity Act 2005 (MCA) and the inherent jurisdiction of the High Court. This is for two reasons. First, many cases that reach the Court of Protection (CoP), the court that deals with disputes under the MCA, concern relational abuse of mentally disabled adults. However, in some of those cases, the inherent jurisdiction is used interchangeably where the MCA does not provide a route for protection. Second, this area of law is widely regarded as being underpinned by a liberal autonomy analysis. Under the MCA, decisions can be made on behalf of an adult who is held to lack the mental capacity to make their own decision

"because of an impairment of, or disturbance in the functioning of, the mind or brain".[2] Mental capacity law takes an autonomy-based approach to decision-making because the law requires respect for the decisions of autonomous adults, even if they are seen to be unwise, whereas for adults who are seen as lacking autonomy, their decisions can be overruled on the basis that they lack capacity. I argue that this approach to decision-making fails to appreciate the particular vulnerability of being in an abusive family relationship, whether that relationship be with a relative or intimate partner. This often leads to mentally disabled adults who have been abused having their decisions overruled on the basis that they lack the autonomy, and therefore mental capacity, to make certain decisions which are not in their best interests. Whilst an autonomy approach may be persuasive for those who are able to strongly assert their autonomy to prevent interference in their lives, it more commonly leads to the use of restrictive interventions against disabled victims of abuse on the basis that they *lack autonomy*. Instead, if disabled victims of abuse were viewed as vulnerable this would subtly shift the balance of intervention away from the victim, towards the perpetrator. This argument will be elucidated through discussions of mental capacity law and the inherent jurisdiction.

First, the chapter starts with an analysis of the meaning of mental capacity, autonomy and vulnerability, and how they are interpreted in a context of familial abuse, contributing to emerging debates about vulnerability theory and its relevance for law. The chapter then discusses three court decisions to highlight the misplaced focus on autonomy and a failure to properly adopt a vulnerability approach. The chapter concludes with a discussion of how a different approach to these cases might be achieved, pointing throughout towards the need to focus on the perpetrator, which is more likely to be achieved through a situational vulnerability analysis rather than an analysis predicated on autonomy.

Autonomy, Vulnerability and Mental Capacity Law

Discussions of autonomy dominate debates around mental capacity law and it is widely accepted that autonomy is the underpinning principle of the MCA (Donnelly 2010; Coggon and Miola 2011; Harding

[2] S 2 (1) MCA.

2012; Series 2015; Halliday 2016; Skowron 2019). Similarly, the concept is employed in relation to debates around abuse within familial and intimate relationships, with some scholars arguing that 'choices' to remain in a situation of abuse are not autonomous (Mackenzie and Stoljar 2000; Oshana 2006; Herring 2016). Whilst the concept of autonomy can help to illuminate the choices individuals make and highlight the influences on those choices, I suggest that it does not provide a useful analytical approach when considering how to respond to the widespread abuse of disabled people. I provide three main reasons for this. First, the concept of autonomy is broad and highly contested by its very nature, even within the context of medical and family law. This makes it difficult to apply in real life contexts because what it means and how it is interpreted varies enormously. Second, an autonomy analysis justifies interference in the lives of adults on the basis that they lack mental capacity, thereby disempowering and, on some understandings of the concept, undermining their autonomy further. Finally, the focus on autonomy obscures the more important condition of vulnerability.

Autonomy and mental capacity law

Generally an autonomous person is one who is able to make their own decisions and follow their own goals determined by their own values. Liberal approaches to autonomy centre on the notion of self-determination. That adults *who are able to do so* should be able to make their own choices without interference from the state or others. In some ways this conception is about free choice by adults with the abilities to make choices. This is an internalist understanding of autonomy (Oshana 2006) as it focuses on the internal conditions within which a person makes their own decisions. Provided that the individual has the necessary abilities to make a choice, then the content of that choice cannot indicate a lack of autonomy (Hall 2012; Banner 2013; Mackenzie and Rogers 2013). The corollary of this approach though is that those adults who are *not able* to make their own free decisions are not able to act autonomously. For disabled adults, particularly those with mental disabilities, this focus on how the individual makes a decision can make it difficult for them to assert their right to self-determination and make their own decisions about their lives. This is because the ability to make a decision focuses on an individual's mental state and their individual functioning. Therefore, such an approach can collapse into

a binary of denying self-determination for individuals with cognitive impairments who are found to lack capacity, contrasted with those without cognitive impairments whose right to self-determination is protected even if legitimate questions are raised about the extent to which their decisions are fully autonomous (Clough 2017; Clough 2018).

Not all liberal conceptions of autonomy are the same though. Some indicate that the content of the decision can reflect whether or not it was autonomous. For example, for Kant, a decision is autonomous if it is universalisable, that is, if it is based on a principle that could be applied to and adopted by all (O'Neill 1996; Kant 1998). The Kantian conception of autonomy is sometimes referred to as a rationalist account as the decision must stand up to rational scrutiny. In this respect, the content of the decision itself can be scrutinised and used as a basis for identifying non-autonomous decisions. This approach is arguably less problematic for disabled people as it focuses on the content of the decision and is therefore applicable to all persons, disabled or not. Similarly focusing on the content of decisions, Oshana has argued in favour of 'externalist' accounts of autonomy (Oshana 1998, 85). This means that simply looking at the capabilities with which the decision or choice is made does not make it autonomous. As Oshana explains (1998, 85):

> On the external analysis, it is possible for two individuals to satisfy all the psychological and historical conditions… but to differ with respect to their status as autonomous being… there are objective social criteria according to which we judge someone as autonomous, and these external criteria are independent of the individual's internal state

The value in this argument is that it allows the content of the decision or choice to be subjected to scrutiny, rather than focusing on the person and their abilities. In making this argument, Oshana explicitly acknowledges the role of social conditions in influencing autonomy. For example, a person generally cannot submit herself to slavery because it is seen as a decision borne out by oppressive or harmful social conditions, most typically poverty/economic need (Oshana 1998, 86-89). The decision to submit oneself to slavery itself indicates that the decision is not an autonomous one, without the need

to consider the individual's capacities. In this respect, Oshana takes a relational approach to autonomy, albeit a substantive rather than procedural one. Relational autonomy was developed by feminist theorists to account for the personal, social and environmental conditions within which decisions are made (Mackenzie and Stoljar 2000). Under a relational approach, decisions can be seen as autonomous only where they are understood within their specific social context. Relational theorists focus on the conditions within which choices are made to argue that certain oppressive social conditions can make a choice non-autonomous. Similarly, Herring and Wall argue that individuals can be found to have the mental capacity to make a decision even when they may not be acting autonomously (Herring and Wall 2015). They suggest that it is a "concerning possibility that a court would determine that, because a person has been found to have capacity, it cannot intervene to protect them (despite genuine concern as to their autonomy)." (Herring and Wall 2015, 715). However, taking into account the individual's circumstances might mean acknowledging that a seemingly 'non-autonomous' decision to an outsider is actually an autonomous one within that person's social context. For example, a woman's decision to remain in an abusive relationship may seem at odds with a rationalist conception of autonomy and, from an external perspective, there may be a strong imperative to intervene to remove her from that situation. However, relational theorists might argue that it could be an autonomous decision within the context of that woman's life. This may be because of the well-established evidence that a woman is at greatest risk of harm at the point of leaving an abusive relationship (Humphreys and Thiara 2003) or it may be that the alternatives for that woman are, in her subjective analysis, no better for her at that point in her life. Furthermore, intervening to protect her from abuse on the basis that her decision to remain may not be fully autonomous still focuses on the victim and arguably undermines her ability to live a self-determined life by removing her ability to choose if, and when, to leave. Instead, focusing on the action that can be taken against the perpetrator helps to minimise the problems with this approach.

Discussions over these varied conceptions of autonomy dominate much of the literature in this area (O'Neill 1996; Donnelly 2010; Halliday 2016). Most scholars agree that the concept of autonomy maps onto a mental capacity analysis in English law. In this respect mental capacity is seen to be "the gatekeeper for autonomy" (Donnelly 2010). This is because adults who are able to make their own decisions must have those decisions respected by the law, whether those decisions are based on any

reason, rational or irrational, or no reason at all.[3] In contrast, adults who are found to lack capacity can have their choices overridden because they are not made by an autonomous person, thereby also restricting their self-determination. Mental capacity law may not explicitly mention the concept of autonomy, but it underpins much of the justification and discussion of this area (Donnelly 2010; Banner 2013; Skowron 2019). Mental capacity law is governed by the MCA, an area of the civil law in England and Wales which sets out the legal test for mental capacity. Capacity is decision-specific and cases arise concerning a very broad range of matters including but not limited to medical treatment, contact with friends and family, sexual relationships, marriage and divorce, financial matters and property decisions. The legislation allows for certain decisions to be taken on behalf of adults who are found to lack the capacity to make decisions for themselves. Furthermore, such decisions can be made against the clear and expressed wishes of individuals if they are found to lack the capacity to make the decision for themselves.[4] Therefore, the MCA can authorise highly interventionist measures in people's lives, including voiding a marriage, restricting contact with friends and family members and declaring that a person is unable to consent to sexual activity.

Under the MCA, individuals lack capacity if they are unable to make a decision because of a "disturbance in the functioning of the mind or brain"[5] and are unable to understand the information relevant to the decision,[6] unable to retain it[7] or unable to use or weigh it to make the decision.[8] The individual must also be able to communicate their decision[9] and s 3 (4) MCA requires an appreciation of the reasonably foreseeable consequences of the decision. Once a person is found to lack capacity, s 1 (5) MCA allows a decision to be made on behalf of the person in their best interests, albeit under that test the individual's past and present wishes and feelings must be taken into account.[10] This focus on the individual decision-maker and their abilities is widely viewed as reflecting an autonomy analysis

[3] See *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871, [904-905] and *St George's Healthcare NHS Trust v S* [1999] Fam 26.
[4] Albeit the best interests test takes into account their wishes.
[5] S 2(1) MCA.
[6] S 3 (1) (a) MCA.
[7] S 3(1) (b) MCA.
[8] S 3(1) (c) MCA.
[9] S 3(1) (d) MCA.
[10] S 4 (6) MCA.

(Donnelly 2010; Banner 2013; Mackenzie and Rogers 2013; Skowron 2019). However, Skowron (2019, 32) goes further and outlines different understandings of the ways that judges use the concept of autonomy. The first is the traditional understanding – that capacity is essentially a threshold concept for respecting autonomy. Therefore even though the MCA does not explicitly mention the word 'autonomy', "a gatekeeper account of the relationship between autonomy and capacity helped to justify the Act." (Skowron 2019, 36). The second account focuses on the need for the decision-maker to be acting 'freely' for a decision to be autonomous. The third account is essentially that even people who are found to lack capacity should sometimes be treated as being autonomous. In practice, this means not interfering with their decisions, or at least taking into account their wishes when applying the best interests test under s 4 MCA. While Skowron's account of judicial decision making under the MCA and how the concept of autonomy is used is persuasive, it does not seek to address the value of the concept of autonomy in mental capacity law in the first place.

An understanding of the normative value of autonomy in this area is necessary because each of the philosophical and legal understandings of the concept can prove problematic for people with mental disabilities. For example, liberal and relational accounts of autonomy can be engaged to argue that certain decisions (or people) are not autonomous, therefore justifying interference with those decisions (Coggon and Miola 2011; Herring and Wall 2015; Herring 2016). On a liberal account, if a person lacks the ability to self-govern, interference with her decisions can be morally justified. Mapping this onto the MCA, if a person is unable to understand information relevant to the decision or is unable to use or weigh that information in the decision-making process, a decision can be made on their behalf because they lack the ability to do so for themselves. Similarly, on a relational account, decisions may be overridden if the social conditions a person is in undermine her decision. For example, a person who is in a situation of abuse may be found to lack the necessary capabilities for autonomy because of the perceived impact of the abuse. On both liberal and relational accounts therefore, a person's lack of, or reduced, autonomy can lead to legal and moral justification for interfering with her decisions. This can be hugely disempowering, particularly for disabled adults who may already struggle to participate in society in the way that others do. Instead, I argue that we need to move away from the pre-occupation with autonomy in mental capacity law and instead view the situation differently. In cases of abuse this

means focusing on the perpetrator and responding in ways that address their actions, rather than restricting the disabled person based on incapacity and/or a lack of autonomy.

Furthermore, by focusing on the philosophical nuances of the concept of autonomy and the complexities and disagreements about its meaning, the debate is shifted away from how the term operates for disabled individuals in their everyday lives. Discussions about the law and its underpinning justifications and assumptions must also take into account how it works in practice for those most directly affected by it. That is not to suggest that the pragmatics should override the legal and philosophical principles, but that the contested meanings of autonomy and the different ways that it can be understood can detract from its use as a concept to address everyday legal and social problems. Not only is autonomy contested but focusing on autonomy obscures the value of different ways of understanding the scenarios that arise. The focus on autonomy throughout mental capacity law has meant that other important features of the human condition have been given less attention (Fineman 2008; Fineman 2010).

Vulnerability and the inherent jurisdiction

The inherent jurisdiction of the High Court is sometimes used instead of mental capacity law. Historically, it pre-dates the MCA and its background was as a *parens patriae* jurisdiction (Herring 2016, 72-76). Today the inherent jurisdiction can be invoked to allow judges to intervene to protect a vulnerable adult even where the person has capacity to make a decision under the MCA.[11] The High Court's inherent jurisdiction can be invoked where a vulnerable adult is:[12]

> reasonably believed to be, (i) under constraint, (ii) subject to coercion or undue influence, or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

[11] *A Local Authority v DL and others* [2012] EWCA Civ 253.
[12] *A Local Authority v SA* [2005] EWHC 2942, [77].

In situations where the MCA does not apply, for example where the threshold for incapacity is not reached, the inherent jurisdiction provides an alternative way of intervening and the jurisdiction has survived the enactment of the MCA.[13] As Herring explains, "the inherent jurisdiction challenges the binary divide between those who have capacity and those who do not… by offering the potential for legal intervention when a person has capacity, but only just" (Herring 2016, 71). While the inherent jurisdiction explicitly mentions vulnerability as a justification for intervention, I suggest it adopts an inappropriate understanding of vulnerability. One which focuses on the inherent features of a person's disability rather than understanding them as primarily being in a situation of vulnerability to abuse. Further, even in cases under the inherent jurisdiction where vulnerability is explicitly discussed, the pervasive principle of autonomy still underpins the reasoning behind the judgment. By this I mean that even in cases where vulnerability is emphasised as the reason for intervention, the focus is still on the vulnerable adult having their *autonomy* overridden, albeit as a result of their vulnerability. This means that judges justify intervention based on the impact the situation is having on the person's autonomy. Instead, a meaningful and substantive reconceptualising of what it means to be a vulnerable adult in cases of abuse is required, which moves away from viewing abuse as undermining a person's autonomy, to viewing abuse as a materialisation of vulnerability. This is partly to address some of the widespread concerns regarding a vulnerability approach, which some have argued would allow interventions that are "potentially infinite in scope and application" (Dunn et al. 2008, 241).

Vulnerability is one feature of the human condition that has, until recently at least, largely been ignored (Fineman 2008; Fineman 2010; Clough 2017). The concept is sometimes posited as the opposite of autonomy, with the latter being viewed as the optimum human condition and the former as a negative and harmful state. Yet autonomy and vulnerability are linked (Anderson 2014; Mackenzie Rogers and Dodds, 2014b; Lindsey 2016). You cannot develop into an autonomous adult without experiencing or risking some degree of vulnerability. In this sense, and as Martha Fineman argues, vulnerability is universal, constant and inevitable (Fineman 2013). For example, a young adult with

[13] *A Local Authority v DL and others* [2012] EWCA Civ 253.

learning disabilities might be vulnerable as she goes to college, develops new friendships and seeks out new experiences. She is vulnerable in the way that most people are when engaging in new experiences; there is a risk that she will be rejected or fall out with friends or suffer emotional hurt from an intimate partner. However, in doing all of these things, making new friends, going to new places, she also asserts her autonomy. This means that she develops her own life goals, finds out her own likes and dislikes and is able to actualize her right to make choices about how to life her own life, perhaps distinct from the preferences of her parents. Therefore she is exercising her capacities needed for autonomy, but also learning how to navigate the social world and make good choices. In all of these experiences, the young adult is risking vulnerability, but she is doing so in a way that also helps her to assert her autonomy and develop the ability to live an autonomous and fulfilled life (Lindsey 2016).

It is true in the above example that the young woman may be at risk of harm in developing new relationships, whether that be the risk that we all take in meeting new people or an increased risk if she is targeted by an abuser because of her disability (Martin et al. 2006). However, vulnerability is most harmful when what that person is *vulnerable to* actually materialises. For example, we are all vulnerable to assault by virtue of being social beings who interact with other humans, but the *harm* of that vulnerability to assault crystallises when the assault is perpetrated (or attempted). Therefore if we understood vulnerability as simply a feature of all human existence, and the subtleties and nuances that entails, then the stigmatising effect of vulnerability discourse in relation to specific groups can be diminished.

In this chapter I move away from the notion of individual vulnerability that can be seen in the inherent jurisdiction and which is centred on a person's inherent features such as disability or sex, and instead consider the broader situational causes of vulnerability (Mackenzie 2014; Mackenzie, Rogers and Dodds 2014a). A situational understanding of vulnerability allows us to question the assumption that an individual is vulnerable because of their particular disability and instead acknowledges the universal nature of vulnerability that can be caused by the circumstances in which a person finds themselves. As I have argued elsewhere (Lindsey 2016, 298):

> whilst a person may be more susceptible to abuse because of inherent features, that is not necessarily so and is not caused by her disability. It is the person abusing her, or her past experience of abuse, which is responsible for her vulnerability.

Not only is the abuser responsible for increasing vulnerability to harm, they are responsible for that harm materialising. Further, focusing on autonomy in a context of relational abuse is misplaced because the victim's autonomy is not the problem. Impaired autonomy is not the primary reason a case reaches the court, nor is the problem that a disabled victim of abuse is harmed because she is unable to make an autonomous decision to leave her abuser. The problem is that she is being abused. Once you remove the perpetrator from her life, her vulnerability to abuse will also significantly reduce, albeit that some people experience abuse repeatedly as a cycle throughout their lives and so it may not disappear entirely. In understanding personal and care based relationships through a vulnerability approach, responses can be targeted directly against the causes of the problem, rather than focusing on the mental capacity of the disabled person herself. In practice, this means that the individual victim of abuse should never have *her choices* overridden. Whether this be a choice to have contact with or live with (or any other engagement with) a perpetrator of abuse, the victim should not be the focus of intervention, whether the mechanism be mental capacity law or the inherent jurisdiction. Instead, the law should focus on targeting the perpetrator. Consequentially this may lead to contact between the victim and perpetrator being restricted. For example, if the perpetrator is subject to an injunction or to a sentence of imprisonment. This might result from the more recent movement towards so-called 'victimless' prosecutions of domestic abuse where cases continue even without the support or live testimony of the victim (Crown Prosecution Service 2017). However, the importance lies in the shift in the state's focus away from a disabled victim of abuse being seen to lack autonomy, which leads to the choices of the victim being overruled, to a focus on the cause of her vulnerability – the perpetrator. In my discussion of three cases below, I set out how they could have been decided differently had there been a real shift in focus from autonomy towards vulnerability while showing that a nuanced and situational vulnerability approach need not lead to interventions that are "infinite in scope and application" (Dunn et al. 2008, 241) targeted disproportionately against disabled people.

Vulnerable Adults and Abuse Cases in the Courts

Adults deemed to be legally autonomous and with the capacity to make their own decisions will often have those decisions respected by the Court of Protection (CoP), even if those decisions are 'unwise'. For example, adults have refused medical treatment for seemingly irrational reasons, and the courts have allowed them to do so.[14] In contrast, where adults are found to lack capacity, they can be prevented from making their own choices. These binaries of mental capacity law exist partly because an autonomy analysis underpins much of the thinking around mental capacity – capacitous choices must be respected because they are autonomous, non-capacitous choices can be overridden because they are not autonomous (Clough 2017; Clough 2018; Skowron 2019). Yet in cases concerning *abuse* of vulnerable adults, case law suggests that even adults with the capacity to make decisions might have their choices interfered with. This is typically because they are viewed as being vulnerable and therefore not free, or fully autonomous, to make their own decision. In this section I discuss the way that the concepts of autonomy and vulnerability are used in three cases and show how a different approach could have been adopted.

Southend on Sea v Meyers [2019] EWHC 399 concerned Mr Meyers,[15] a 97 year old man, who wished to return to live at his own home with his son, KF. Mr Meyers was described as having "a range of health problems, including blindness in both eyes, diabetes and osteoarthritis".[16] The case is complex and requires a detailed background. Underlining the case were concerns about KF's aggressive and abusive behaviour towards his father, with the court stating that damage was "caused by KF to the bungalow and the extremely aggressive and intimidating manner in which KF behaved towards carers".[17] The case was brought by the local authority following a series of decisions relating to Mr Meyers' welfare and there were various injunctive orders preventing KF from residing at Mr Meyers'

[14] *St George's Healthcare NHS Trust v S* [1999] Fam 26, *Newcastle upon Tyne Hospitals Foundation Trust v LM* [2014] EWCOP 454.
[15] According to Hayden J, Mr Meyers wanted to be identified and for his name to be in the public domain. His son's name remained anonymised, [1].
[16] *A Local Authority v BF* [2018] EWCA Civ 2962, [4].
[17] [2019] EWHC 399, [6], [36-41].

bungalow and preventing Mr Meyers from returning home. It appeared that many of these orders had been unsuccessful, or at least had not been successfully enforced, because at the point of the hearing in December, KF was still living in his father's home. Mr Meyers on the other hand was living in a care home, despite his very clearly expressed wishes to return to his own home.

Given the limited success in resolving the issues and Mr Meyers' wish to return home by Christmas, the local authority made an urgent application to request declarations that they had discharged their obligations to Mr Meyers under the Care Act 2014 and the Human Rights Act 1998, and that it would be lawful to allow his return home. The local authority were understandably concerned about allowing Mr Meyers to return home to his son who had a history of abuse against him and against care staff. The desire to have court approval for risky decisions such as this is, perhaps, understandable and local authority social workers who make risky decisions may well benefit from legal protection where they do so. However, Hayden J refused to grant the requested declarations at an urgent application hearing in December 2018 and Mr Meyers remained in the care home against his express wishes over the Christmas period. This was despite it being accepted by all involved in the case that Mr Meyers had the mental capacity to make his own decisions about where to live. His clearly expressed and capacitous wishes were denied by the court using their inherent jurisdiction, on the basis that "a return home would seriously compromise his welfare and, as the Local Authority identified, potentially risk his life".[18] That interim decision was appealed but the Court of Appeal upheld Hayden J's original decision.[19]

At the final hearing in February 2019 Mr Meyers' capacitous wishes to return to live at home were again denied and Hayden J refused to grant the local authority's requested declarations. Whilst we have not seen the full text of the order, it appears from the judgment that a man with capacity to make his own decisions about where to live and with whom had his ability to make that choice restricted. The decision was made on an understanding that Mr Meyers was not acting autonomously in that he was "co-dependent"[20] with his son. The implication was that Mr Meyers' abilities to make autonomous

[18] [2019] EWHC 399, [20].
[19] [2018] EWCA Civ 2962.
[20] [2019] EWHC 399, [22].

decisions were undermined by his relationship with his son and therefore he needed protecting from his own wishes to return to live with his son. The fact that Mr Meyers apparently stated that he would "rather die as a result of [KF] than live a life without [him]"[21] implied his poor decision making and was a central factor in Hayden J's conclusion that "[t]he consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival".[22] While Hayden J did acknowledge that the "essence of his vulnerability is, in fact, his entirely dysfunctional relationship with his son"[23] I suggest the case was unlikely to have even reached the High Court had Mr Meyers not in fact had a disability. Importantly though, Hayden J did make it clear that:[24]

> [t]he objective here, which the Court's order should reflect, is that Mr Meyers be prevented from living with his son, either in the bungalow **or** in alternative accommodation. I do not compel him to reside in any other place or otherwise limit with whom he should live.

In this regard, the judgment has many positives. First, Mr Meyers was found to have the mental capacity to make decisions about his life. He was involved in the court process, having given unsworn evidence over the phone and attended the final hearing in person.[25] Further, the outcome did not require Mr Meyers to reside in the care home against his wishes. He was therefore, in principle at least, free to live where he wished. However, this *prima facie* freedom was restricted on the basis of an order than prevented Mr Meyers' from living with his son. Therefore, while his son remained at his home, Mr Meyers would not be able to return. This order did, in effect, restrict Mr Meyers' choice about where and with whom to live. In better conceptualising the abusive dynamic within this familial relationship through a lens of situational vulnerability, the court could instead have focused their restrictive interventions entirely and solely on the cause of that vulnerability – KF. Instead, Hayden J focused his

[21] [2019] EWHC 399, [40].
[22] [2019] EWHC 399, [41].
[23] [2019] EWHC 399, [34].
[24] [2019] EWHC 399, [45].
[25] For further discussion of participation in mental capacity law see Lindsey (Forthcoming).

judicial intervention on Mr Meyers by ordering that he could not live with his son. This meant that a disabled victim of abuse, with capacity to make his own decisions, was denied the ability to live where he wished. Making a decision to move a person against their wishes because of a risk of abuse focuses on the individual's inability to make an autonomous decision to leave the abusive situation. This is in contrast to taking steps that target the source of the vulnerability – typically the perpetrator. While it undoubtedly would have been a risky course of action to leave Mr Meyers free to return home, it would have been his choice. Victims of abuse without disabilities do not routinely have their choices overridden in the name of their own protection. In fact, empowerment and individual choice to leave is a central facet of feminist work on domestic abuse (Smart 1989; Humphreys and Thiara 2003; Kulkarni, Bell and Rhodes 2012). That does not, however, mean that the state should do nothing. Instead, reconceptualising this area of law through a lens of situational vulnerability would require the state to take action against the *perpetrator* rather than the victim. Hayden J does implicitly acknowledge this in the concluding paragraph of his judgment:

> The ideal solution here, it seems to me, would be for Mr Meyers to return to his bungalow with a suitable package of support, his son having been excluded from the property.[26]

Despite this judicial rhetoric, the court order, which is the force behind any judicial decision, restricted Mr Meyers rather than restricting the perpetrator of the abuse against him. Yet where adults are found to lack the capacity to make a decision, their decisions can even more easily be overridden than under the inherent jurisdiction. This can be disempowering for disabled adults who are subjected to mental capacity litigation merely because they are being abused rather than because they are unable to make decisions for themselves. For example, *Re AG* [2015] EWCOP 78 concerned a 20 year old woman, AG, with a moderate learning disability, autism and depression. She made allegations that her mother, DG, had hit her and there were other allegations about physical and emotional abuse by DG as well as the

[26] [2019] EWHC 399, [59].

provision of inadequate care by staff. AG was held to lack capacity to litigate and to make decisions about residence, care, contact and her finances. AG's mother appealed the decision, one of the grounds being that there was an inadequate assessment of AG's capacity. Essentially, her mother felt that AG's capacity fluctuated and that, at the time of the later hearing, she had capacity to make decisions about where she should live and what care she should have. DG's concerns particularly related to the restriction on her own ability to contact and spend time with her daughter, which she said were based on flawed allegations of abuse. On that basis DG submitted that AG should have been able to make her own decisions rather than have her best interests being decided for her. In particular, DG appeared to be concerned about the best interests decision which moved AG to a residential placement identified by the local authority and only allowed contact between mother and daughter according to a contact plan. Ultimately DG's appeal failed, and the capacity declarations were upheld. However, the case highlights that instances of abuse can trigger mental capacity interventions whereas in cases where no allegations of abuse exist the same adult with the same mental functioning may have been left to make their own decisions about where to live and who to have contact with. Instead, if scenarios of abuse were viewed through an understanding of situational vulnerability, this type of case would likely not have reached the CoP in the first place. Instead, the allegations of abuse would have been investigated and dealt with, either through adult safeguarding mechanisms and/or the criminal law, separating the vulnerable adult's wishes in respect of contact or residence from the abuse they are suffering.

The final example that I look at in this chapter explores the clear contrast between the law's response to abuse in relation to adults with and without capacity. *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53 concerned TB, a 41 year old woman with a moderate learning disability who was described as having the cognitive abilities of a "child between the age of 4 to 8 years".[27] TB was married to SA, who was also her first cousin, and she had four children with him, all of whom were the subject of care proceedings and placed for adoption. SA also married SSB, again his first cousin, while still married to TB, notwithstanding that their Islamic marriage was not valid in English law. SA and SSB also had two children together. There was no evidence within the judgment

[27] [2].

that SSB had a disability or that there were proceedings under the MCA in relation to her, but she was subject to immigration law.[28] During the previous care proceedings findings were made that SA had committed acts of violence against TB[29] and Mostyn J explained that following removal of their child at birth:[30]

> within three months SA had impregnated TB again. Inevitably when SHT was born he was immediately removed also. It was a very heartless thing for SA to impregnate TB when he must have known that the baby would be removed instantly on birth.

It was further noted that "[SA] has regular sex with SSB… He regards it as his right to have sex with her and her duty to submit to it. This is a tenet of his culture and religion".[31] The evidence of abuse was overwhelming. However, there was a clear contrast in the law's treatment of these two women (Lindsey 2016). TB was found to lack the capacity to consent to sexual activity and to decide on residence and contact, following which it was held that it was not in TB's best interests to live with SA[32] and that TB should only have limited contact with SA, fortnightly for one hour.[33] In contrast SSB continued her relationship with SA and had two children with him. Therefore SSB's sexual contact with SA likely continued while TB was protected. This is despite the fact that both women had similar vulnerabilities; they had a comparable home life in that they had regular contact with an abusive partner who regarded it as his right to have sex with them. Their backgrounds were similar and both appeared to be under pressure to remain in the relationship.[34] Yet mental capacity law draws a clear dividing line between adults who are deemed able to make autonomous decisions (SSB), and therefore can make seemingly 'unwise' decisions to remain in abusive relationships, and those who are unable to make their own autonomous decisions because of their impaired mental capacity (TB) who can have their decisions to

[28] SSB had not entered the UK lawfully and was in the process of appealing against deportation, [18].
[29] [5].
[30] [15].
[31] [10].
[32] [4].
[33] [26].
[34] [5].

remain in an abusive relationship overruled.

TB was found to lack the capacity to decide where to live, who to have contact with and to consent to sexual relations. It could be argued that TB's disability meant that she was unable to protect herself from SA and therefore the law has a duty to protect her in a way that it does not for other adults. However, to protect a person through undermining her ability to make her own decisions and to forcibly move her into a particular residence further disempowers her. For example, the finding that TB lacked the capacity to consent to sexual activity was likely to mean that TB's contact with male friends and strangers was limited to avoid the risk of her entering a sexual relationship. Having the freedom to interact with a range of individuals may risk some vulnerability as TB may well have ended up being sexually exploited, but it would also have helped TB to develop her autonomy. This is because she could have developed a better understanding of positive relationships and it may have led to TB living a more fulfilled life.

Further, it is not clear that the consequences of moving disabled adults to institutional settings are fully considered. For example, TB had previously been living in a self-contained flat where she received round the clock care, but Mostyn J ordered that a supported living placement was in TB's best interests. The primary concern was to remove TB from SA, but a vulnerability analysis would also require taking into account the harm that can be created by such moves. This could be achieved within the MCA confines through the best interests test, which would require an analysis of the risks of moving the adult to an institutional setting, which should not be underestimated. It is well established that risks of abuse are high in residential settings and within relationships of trust (McCarthy and Thompson 1997; Hughes et al. 2012). Yet it is perhaps unsurprising that disabled adults are moved to institutional settings if the dominant approach is that they lack the autonomy to make rational decisions for themselves. In such instances, decisions are taken by people who 'know better' and can rationally weigh up the risks in their life. Moving the adult away from those risks, often in emergency circumstances, seems an easier and more protective response. Yet "protection by containing individuals in segregated settings is ineffective" (Hollomotz 2011, 73). Instead, in TB's case, an approach predicated on a real understanding of situational vulnerability would have meant taking action solely against the perpetrator – her husband. This would have protected both TB and SSB from an abusive man while minimising the

risks involved in moving TB against her wishes to an institutional setting and restricting her contact with others.

Both mental capacity law and the inherent jurisdiction fail to view mentally disabled victims of abuse as situationally vulnerable in the ways that other non-disabled victims of abuse also are. If there were a shift from understanding the adults in these situations as non-autonomous to understanding them as situationally vulnerable, then different responses could be adopted that still protect but in ways that do not result in restrictions against disabled adults themselves. For example, civil and criminal law responses should be used to target situational causes of vulnerability – typically perpetrators. The state should take effective criminal action in cases of domestic abuse, even in the absence of the support of the victim in some instances, to prevent the perpetuation of abuse and protect the wider interests of society (Dempsey 2007). But the civil law can and should also do more. In particular, the use of injunctions and protection orders which protect the vulnerable adult without coercing or restricting her should be expanded. Such approaches are well established in the domestic abuse context but have had less of an impact in relation to adults considered to be vulnerable because of their disability.[35] If disabled adults know that they have been believed when making allegations of abuse, and if they feel they can trust those in positions of authority to take action against perpetrators, rather than place restrictions on them, then they may feel encouraged to resist abuse or take action to stop it again in the future. Finally, the provision of support to leave the perpetrator and the development of resilience post-abuse (Hollomotz 2011, 45; Anderson, Renner and Danis 2012) must accompany any legal action taken in this area if meaningful change in disabled peoples' lives is to be achieved beyond moving them and placing them under restrictions.

Conclusion

This chapter has highlighted some of the problems in the way that mental capacity law and the inherent jurisdiction are used to intervene in cases concerning family and intimate abuse against disabled people.

[35] For further discussion of this issue which is beyond the scope of this chapter see Burton (2009), Lindsey (2016), Wing-Cheong (2017).

I have put forward why a (situational) vulnerability analysis is preferable to the current dominance of an autonomy approach in this area of law. In particular, focusing on the causes of the disabled adult's vulnerability in contexts of abuse helps to shift responses away from restriction, institutionalisation and protection in favour of action being taken against perpetrators. As rates of abuse against disabled adults remain high, mental capacity law may continue to be used as a way of dealing with a difficult problem. However, the wider implications of using mental capacity law must not be underestimated. Moving disabled adults into institutional settings have risks of their own, which family members, carers and social workers should also take into account when advocating such settings as an appropriate response to safeguarding concerns.

Moving away from an autonomy analysis is also important because it helps push back against a persistent assumption that disabled adults cannot (or should not) participate fully in society (Scott-Hill 2002). By viewing disabled adults as situationally vulnerable like any other victim of abuse, we can respond to and focus on ways to help reduce their vulnerability, without assuming them to be unable to make decisions about their own lives because of their mental functioning. In taking this approach, which better aligns with the Social Model of Disability, the law should acknowledge that disabled people, as with all human beings, make unwise and sometimes seemingly irrational decisions, yet that does not mean that they lack autonomy. Furthermore, protection for disabled victims of abuse should be achieved through the use of civil or criminal measures targeted against perpetrators, rather than using the MCA and assuming that disabled people need to be restricted for their own protection. Disabled people must be valued equally as participants in society and ensuring that they are able to obtain justice for abuse is a central part of that.

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