The Great Safety Net

Martha Spurrier

The paradox of individual autonomy and state protection is age old and enduring. The courts have long been trying to reconcile these concepts in cases involving vulnerable individuals. This article considers the Court of Appeal's navigation of the dichotomy in *DL and Ors v A Local Authority* and suggests that a new approach to autonomy and protection in the context of psychological abuse is emerging. In *DL* the Court of Appeal was faced with the question of whether the courts can intervene to protect vulnerable adults from psychological abuse even though they don't lack mental capacity for the purpose of the Mental Capacity Act 2005 (MCA). Holding that an inherent jurisdiction exists to protect such adults, the Court of Appeal has identified a remedy that lawyers dealing with psychological abuse cases may find powerful and effective.

The right to autonomy is fiercely guarded:

> "English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions."[1]

But the idea that a person could not exercise her autonomy to do some things is well recognised. The inability to consent to physical assault has a long pedigree,[2] culminating in *R v Brown,* when the House of Lords[3] upheld the convictions of five adults for participating in consensual sadomasochistic sexual practices.

In the 2011 case of *Yemshaw v London Borough of Hounslow* the Supreme Court held that "violence" includes psychological abuse as well as physical violence because "to conclude otherwise would be to play down the serious nature of psychological harm".[4] This approach is in line with the government definition of domestic violence, which includes psychological abuse.[5]

But the law has not yet joined up the dots. Until now there has been little consideration of whether a person can give true consent to psychological abuse. Parliament has recognised that people with mental capacity cannot consent to physical violence and that people lacking mental capacity may not be able to consent to anything at all. But a lacuna remains. What of those who have mental capacity and are apparently consenting to psychological abuse? Is consent to psychological harm true consent or does the abuse itself

[1] *S v McC: W v W* [1972] AC 25 per Lord Reid.
[2] See for example, *R v Coney* [1881-82] L.R. 8 Q.B.D. 534; *R v Donovan* [1936] 25 Cr. App. R. 1; *R v Boyea* [1992] Crim. L.R. 574.
[3] [1994] 1 A.C. 212; [1993] 2 W.L.R. 556.
[4] para.46 Lord Rodger
[5] http://www.cps.gov.uk/publications/docs/domesticviolencepolicy.pdf

undermine a person's autonomy to such an extent that their consent is vitiated?

In *DL* the Court of Appeal was the first appellate court to grapple with this issue since the coming into force of the MCA. The case was decided on the basis of the following assumed facts: ML is an elderly woman who lives with her adult son, DL. ML does not lack mental capacity, in other words she does not suffer from any impairment of or disturbance in the functioning of her mind or brain. The Local Authority have concerns that DL is psychologically abusing his mother, alleging that his behaviour includes verbal threats, controlling where and when his mother may move in the house, preventing her from leaving the house, trying to coerce her into moving into a care home and controlling who may visit her.

ML was clear in expressing her wish to the Local Authority that she wanted to preserve her relationship with DL and did not want proceedings taken against him.

In 2010 the Local Authority applied to the Family Division for an *ex parte* injunction without notice to protect ML. This injunction was wide-ranging, restraining DL from, amongst other things:

- Preventing ML from having contact with friends and family members;
- Seeking to persuade or coerce ML into moving into a care home;
- Engaging in behaviour towards ML that is otherwise degrading or coercive;
- Interfering in the provision of care and support to ML.

The question before the Court of Appeal was whether the court's inherent jurisdiction is available to make such an injunction in relation to adults who do not fall within the MCA but who are disabled from expressing true consent by reason of such things as coercion, constraint or undue influence.

DL submitted that where adults have mental capacity their autonomy must be respected, however unwise their decisions may appear to others. The Court of Appeal rejected this approach. There are three strands to the decision. The first lies in a series of cases prior to the enactment of the MCA where the High Court exercised its inherent jurisdiction to protect vulnerable adults. In *Re T (Adult: Refusal of Treatment)*,[6] for example, the Court of Appeal upheld a decision that a refusal of a blood transfusion by a woman with mental capacity was ineffective because she had been unduly influenced by her mother, who was a Jehovah's Witness and in *Re SA,*[7] Munby J held that the courts have a "protective jurisdiction" that can be exercised in favour of vulnerable adults who are deprived of their ability to exercise autonomy or give true consent by reason of coercion, undue influence or other external factors.[8]

The second strand stems from the ancient common law doctrine of necessity, which can intervene to protect the best interests of the vulnerable. This

[6] [1993] 95 (Fam).
[7] *Re SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam).
[8] Allcard v Skinner (1887) 36 ChD 145 at page 183.

doctrine is found in marriage cases where the law of nullity allows for the position where a person has been tricked by the other party on the grounds of duress and in probate where equity steps in to protect those subject to undue influence.

Finally the Court of Appeal held that in spite of the extensive territory occupied by the MCA, there exists a jurisdictional hinterland outside its borders to deal with cases of vulnerable adults. In the words of Lord Donaldson MR in *Re F (Mental Patient: Sterilisation)*, the common law could be used as "the great safety net" to fill the gaps left by statute where it was necessary to do so.[9]

This must be the right outcome. It would be unacceptable if the courts were powerless to intervene to assist an individual who, while not mentally incapacitated, was succumbing to a type of psychological abuse that had the effect of undermining her autonomy and vitiating her consent. This is not a Big Brother jurisdiction: the Court was quick to point out that its powers cannot be applied to adults acting unwisely, eccentrically, obstinately or irrationally. Nothing but loss of autonomy will suffice.

However, the decision and its consequences remain vexed with complexities. Most importantly, it is by no means clear where the limits of the inherent jurisdiction lie, not least because the Court rejected DL's submission that all such injunctions should be time-limited. The only check on the invasiveness of injunctions made under the inherent jurisdiction will be Article 8 of the European Convention on Human Rights (ECHR), which protects the right to a private and family life. *DL* injunctions must be necessary and proportionate and any judge constructing one will have to undergo the complex exercise of balancing competing rights: in this case protecting the benign aspects of ML's private life while respecting DL's right to minimal interference with his own private life.

Lawyers dealing with cases of this nature must first establish whether the person is in fact being psychologically abused or unduly influenced. To do this the inherent jurisdiction can be invoked to obtain a *Harbin v Masterman* order, under which the Official Solicitor will be directed to investigate the person's situation. If the individual is, or is reasonably considered to be, subject to undue influence, lawyers can pursue a *DL*-type injunction. *DL* injunctions must be tightly focussed and properly particularised; rather than attempting to injunct someone from "unduly influencing their mother", lawyers should specify the areas in which the mother is at risk of undue influence, the kind of behaviour that would amount to undue influence and the measures that can be put in place to prevent it. The watchword in this kind of case is "facilitative": the Court of Appeal approved the submission that injunctions should be drafted so as to give a person the time and space to make autonomous decisions. Facilitative measures might include nominating an independent person to go through the pros and cons of a decision, restraining those who might unduly influence the person from raising certain topics with them in the

[9] *Re F (Mental patient: Sterilisation)* [1989] 2 W.L.R. 1025 at para.13. See also *Re A Local Authority (Inquiry: Restraint on Publication)* [2004] Fam 96.

absence of an independent third party or putting in place structures for friends, family members or care professionals to have regular one-to-one access to the person.

A wide-ranging injunction of this nature should be used as a last resort. Lawyers should investigate other statutory remedies before resorting to the inherent jurisdiction. Such remedies might include applying for an Anti-Social Behaviour Order under the Crime and Disorder Act 1998 (although these are only available for conduct against a person "not of the same household"), contacting the police domestic violence team or applying for an Anti-Social Behaviour Injunction under the Housing Act 1996 (this is unlikely to be available for those in private accommodation because the council would not be deemed to be acting in a "housing related function"). Only once every option has been exhausted should lawyers have recourse to the inherent jurisdiction.

In order to harness the full potential of the inherent jurisdiction, lawyers should consider deploying a human rights approach by relying on the emerging jurisprudence on the positive obligations arising under Article 8 ECHR. The High Court in *DL* held that the positive obligations under Article 8 ECHR may oblige the courts to exercise their inherent jurisdiction to protect the vulnerable. Similarly, in *Waxman v CPS* the Administrative Court found that the Crown Prosecution Services' failure to prosecute a woman's stalker violated her right to a private life because she had not been protected from psychological harm.[10] This is a useful tool for lawyers who will often face local authorities who are reluctant to intervene in the absence of a statutory obligation to do so. Lawyers may now be able to rely on positive obligations under Article 8 ECHR to show that local authorities are *obliged* to take action to protect the vulnerable from psychological harm. This action can now take the form of injunctive relief under the *DL* jurisdiction. The combination of Article 8 ECHR positive obligations with the High Court's protective jurisdiction may prove to be a powerful and effective new way for lawyers to tackle psychological abuse cases.

This article was first published in the *Solicitors Journal* on 2nd April 2012 and is reproduced by kind permission (www.solicitorsjournal.com).

[10] *Waxman v Crown Prosecution Service* [2012] EWHC 133 (Admin)