**Unspoken and Unthinkable: The Older Disabled Body in Judicial Discourse**

**Abstract:** While much has been said about gendered bodies in legal discourse, as yet relatively little has been written about older bodies. This is surprising given the fact older people are statistically far more likely to be the subjects of certain areas of law which constrain and regulate bodily autonomy, such as mental health and capacity law. This discussion uses discourse analysis to understand the way in which older disabled bodies appear in judicial discourse. It is argued that these bodies are often understood as abject, which in turn is used to legitimise certain problematic legal interventions.

**Keywords:** abjection; ageing; bodies; discourse analysis; old age; mental capacity

**1. Introduction**

Much has been and, indeed, continues to be written about the law and how it interacts with the sexed or gendered body.[[1]](#footnote-2) This special issue itself is testament to the depth of analysis that a ‘gender’ lens adds to discussions about legal regulation, or lack thereof. But what of the aged body? As Newdick wrote in 1996, ‘“[t]he elderly” have never commanded sufficient political attention’ (Newdick, 1996, 146). It may be just as easy to substitute the word ‘legal’ for the word ‘political’ in Newdick’s assertion; the elderly[[2]](#footnote-3) have never commanded sufficient legal attention. Where discussion about the law and its application to older adults *has* proliferated in recent years, such discussions have predominantly focussed on the substance of particular areas of law; for example, mental disability law (Herring, 2009; Pritchard-Jones, 2016a) and human rights law (Kanter, 2009; Clough and Brazier, 2014), or how the law has been implemented in relation to older adults with particular mental disabilities, such as dementia (Harding, 2012; Pritchard-Jones, 2016b). Rarely has academic discussion about old age and the law focussed on bodies. This is surprising, because as Keywood notes, bodies are the very ‘stuff’ of law (Keywood, 2000, 319). Nowhere is this more pronounced than in the case of older adults, or, indeed, in the case of mental health and capacity law.[[3]](#footnote-4) This area of law closely regulates what can legally be done *to* older bodies, or – because actions and choices are ultimately embodied experiences – what can be done *by* olderbodies. Moreover, courts often use those older bodies themselves as justification for their decisions in implementing the law. For Douglas Meyers,[[4]](#footnote-5) for example – a case that this paper will return to later – the courts decided that he should be required to live in a care home temporarily, but that he should also permanently live separately from his son, partly because of neglectful conditions in which he – his body – was found at home. Such constraints[[5]](#footnote-6) on older peoples’ bodily autonomy are not uncommon. In issuing these constraints, it seems sensible to assume that the courts will talk about these older bodies; the very bodies it seeks to define, contain, and regulate. An analysis of how the law speaks of and relates to such bodies can thus be seen as timely.

In light of the above, this paper takes a different approach to mental health and capacity law. It does not seek to analyse the position of gender *within* old age, such as understanding the effects of dementia on women, for example.[[6]](#footnote-7) What the paper seeks to do instead is, through discourse analysis, understand the way the courts engage with the older, disabled, ‘leaky’ body (Shildrick, 1997). Using discourse analysis as the methodological framework – explored in greater detail in the next section – the foci for such an analysis is twofold. The first is etymological and pertains to the content of the language used by the courts to describe certain older bodies; it is concerned primarily with what the courts *say* about bodies and the way in which it is said. The second is a consideration of what the law *does* with these bodies in light of this language; i.e. how such language impacts the substance of the law, such as the types of interventions in Douglas Meyers’ case. This majority of this analysis is carried out in relation to five legal cases involving older adults, and where the bodies of these older adults feature heavily in the judgments and discourse of the courts; *R v Kurtz* [2018] EWCA Crim 2743*, Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399*, NCC v PB* [2014] EWCOP 14*, Hounslow Clinical Commissioning Group v RW* [2019] EWCOP 12*, and R (McDonald) v Royal Borough of Kensington & Chelsea* [2011] UKSC 33*.*[[7]](#footnote-8) The paper argues that a discourse analysis of these judgments reveals an emergent process of abjection by the courts, that takes the form of disassociation from – and even disgust towards – the older disabled body, and which in turn serves to reinforce boundaries between judicial ideas of corporeal normality and abnormality. As Clough (2018) argues, only through understanding why such boundaries are created and constructed can some of them be dismantled, and the normative standards about ‘normal’ bodies held by the law challenged. The analysis that ensues in this paper demonstrates, therefore, that these cases are not simply about doctrinal issues. Unpicking the etymological aspects of these judgments shows that the older disabled person’s body in fact lies at the very heart of the courts’ legal and moral reasoning.

**2. Discourse Analysis and Law**

Before moving on to the discussion of the cases that forms the remainder of the paper, it is necessary to briefly outline what is meant by discourse analysis and its benefits as a methodological framework in a legal context. Discourse analysis is predominantly concerned with the use and structure of language across different domains and disciplines. More specifically, it is concerned with examining ‘what language is used *for*’ (Brown and Yule, 1983, 1). One of the central objectives of discourse analysis, is therefore to navigate and investigate the way in which language can be used in a performative manner; language as ‘constitutive of the social world’ (Harding, 2012, 434). In effect, looking more closely the way things are written about can help us to understand the way these things are constructed and perceived in a particular context. As Black (2010, 2) - writing specifically about the use of discourse analysis in a legal or regulatory context - outlines, ‘[d]iscourse analysis would go one step further in its own justification, for it contends that social action can be comprehended only by comprehending discourse, that discourse is the basis of social action in that it is constitutive, functional and coordinative.’ Although this article does not take a radically social constructionist stance towards language and the constructions of identities – that bodies are *entirely* socially constructed by language and ideas – it does suggest that the way in which older bodies are identified with and described through the use of language impacts on how the law interjects.

It is not difficult to see, given this dual aspect to discourse analysis, how it might be used in critiquing law. As outlined in the introduction, and above, discourse analysis requires a focus both on the very language used, but also its effects. In legal terms, this translates into, first, an analysis of the language spoken by the law – in this paper, the courts as a manifestation of the ‘law’ – and furthermore, how that language justifies the law being ‘performed’ or implemented in a certain way. While, as Harding (2012, 434) notes, discourse analysis has not yet gained much traction in socio-legal studies, there is some evidence of its utility in critiquing the law and its application. Stefan (1993), for example, in part uses discourse analysis to scrutinise discursive and testimonial interactions between judges and women who are subject of guardianship proceedings in America in order to demonstrate the ‘relational and contextual’ nature of judgements about their mental competence (Stefan, 1993, 790). Likewise, Harding (2012) scrutinises how judicial discussions of autonomy and capacity in the context of a person with dementia can help understand the way those individuals are situated within the regulatory and legal framework. Lastly, and most recently, Harrington, Series, and Ruck Keene (2019) have drawn on the concept of rhetoric in analyzing aspects of mental capacity law discourse in England and Wales. In doing so, they argue that ‘ethical and legal debates concerning individual autonomy, medical paternalism, and judicial power, resolve into fundamentally rhetorical questions over who speaks and how they are represented, who is addressed and who is silenced’ (Harrington, Series, and Ruck Keene, 2019, 303). The link that is inherent within discourse analysis - between language and its performative consequences – therefore makes it a particularly interesting framework within which to analyse legal interactions, which – to put it at its most basic – typically include the performance of law following words spoken in statute or by a judge.

At this point it is important to expand upon one potential criticism about the use of discourse analysis in a legal context; what merit is there in looking at *language* used about bodies? Is it not the second dimension outlined above – the *substance* of the law alone – that is important; the aspect of the law that *actually* impacts on people, rather than the language used by the courts? In effect, should we not be concerned more with doctrine than with language? On the one hand this criticism seems intuitive; why should we be bothered by the language used by courts in their engagement with older disabled bodies when in reality it is the end point - what the law *does* - that perhaps really ‘matters’? To the doctrinal lawyers, Douglas Meyers’ case, for example, was not *really* about corporeality. It was about the scope of the inherent jurisdiction to intervene in cases of neglect. Yet such a criticism creates an artificial separation between the substance of the law and the language of the law; a separation that discourse analysis bridges. As outlined above, one of the central assumptions of discourse analysis, particularly critical discourse analysis as distinct from other forms of discourse analysis, is that language is performative (Fairclough, 2010) in that it acts as a form of social practice which sometimes serves to establish and reproduce relations of power. Critical discourse analysis in particular, for example, is a ‘type of discourse analytical research that primarily studies the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context’ (van Dijk, 2001, 352). As such, using this particular mode analysis necessitates not only a focus on language, but also the results that flow from that language in terms of the way they structure relations between individuals. This is perhaps what makes it such an interesting methodological and analytical framework for a discussion of the law, given that the law itself is often a tool which arguably reproduces social and power imbalances in the way it is framed and applied (Hunter, McGlynn, and Rackley, 2010; Keywood, 2000). Language is a vital tool in understanding how individuals are related to and perceived, as well as in the construction and dissemination of ideas, boundaries, and laws which can either empower, or disempower; ‘language is a signifying process, not simply a static system’ (Moi, 1984, 24). This is precisely why much work has been done in recent years to analyze, critique, and challenge the prevailing language associated with dementia, for example (Graham, 2017; Peel, 2014). As Clarke (2019, 38) notes specifically in the context of older age, ‘[o]lder adults’ unequal access to resources, representation and recognition are additionally reflected in and constituted by the ways that their corporeality is given meaning through symbolic signification.’

In much the same vein, this paper uses discourse analysis as outlined here to show how the law may be seen as establishing and reinforcing the disempowerment of older adults through the way their bodies are spoken about as abject; as ‘not normal bodies’. As Harrington, Series, and Ruck Keene (2019, 314) argue in their paper on rhetoric, ‘in so far as law is rhetorical, it is an argument about these constitutional issues, of inclusion and exclusion, as much as about tactics for persuasion.’ As will be shown later in the paper, language may convey values, and in doing so, sometimes help judges reach and rationalise certain substantive – arguably questionable – conclusions about the law and how it should apply to a person (Harding, 2012; Harmon, 1990; Stefan, 1993; Kong *et al,* 2019). An analysis of both the language and how this impacts the operation of law on older bodies, is therefore crucial to discourse analysis. Moreover, without a methodological framework such as this, which *requires* us to focus on - and question - the meaning behind language, as well as doctrine, we risk overlooking the fact that legal decision-making about older bodies is never value-free, and almost always value-laden. As Louise Harmon notes in this context, ‘...as we write and talk passionately about what to do with the body of the incompetent, we should be careful not only about what we say, but also about the way in which we say it’ (Harmon, 1990, 71). Language – including language used by courts – is important. Language can symbolize, rationalize, and – as will be shown in this paper – legitimize the way the law is applied to older bodies and legitimize the constraints placed on bodily autonomy.

**3. The Older Disabled Body at the Juncture of Mental Capacity and Incapacity**

The paper now turns to three of the five cases which form the basis of the discourse analysis. Each of these cases are drawn from the field of mental disability and mental capacity law in England and Wales, but concern older adults with physical and, in some circumstances, mental impairments. It is predominantly for that reason that they have been chosen; as will be shown, the confluence between the physical disabilities affecting the older body, and their relationship to findings of mental competence, is a marked feature in a number of the cases. The first of these cases, *R v Kurtz,* involved a 79-year old woman, Cecily Kurtz, who was found to have died whilst living with her daughter, Emma-Jane Kurtz. Emma-Jane Kurtz had an Enduring Power of Attorney (EPA) in respect of her mother’s affairs, and was convicted of the criminal offence of ill-treating or wilfully neglecting a person lacking capacity under section 44 of the Mental Capacity Act 2005. Section 44 states that someone commits the offence if they have an EPA for, or care for someone who lacks capacity or whom they reasonably believe to lack capacity, and they willfully neglect or ill-treat that person. Cecily is described as having been found

...sitting in her own urine and faeces, and had urine burns and sores on her buttocks and legs. She was malnourished (weighing only about six stone) and was covered in dirt. Her hair was matted and her nails were unkempt, suggesting that they had received no attention for over a year. When the paramedics tried to lift her body from her seat, her clothes fell apart. She had not changed her clothing for many, many months (para. 8).

Reporting of the initial trial elaborates on this. Cecily had been found in a ‘pool of diarrhea, she had been neglected for years in the most horrifically squalid conditions...She had suffered unimaginably and died in the most undignified manner’ (CPS News Centre, 2018). A consideration of remarks made by the judge summing up the original trial captures the ‘disgust’ felt by those listening to the evidence:

I've sat on the bench for 15 years and this was some of the toughest evidence I've had to listen to. That's as a judge who has seen some distressing things. I saw the expressions on faces at the opening. I'm not sure what you thought you would be trying, but I doubt it was this. To say thank you might sound terribly easy, but I am grateful for the attention you have given this case (Grubb, 2018).

The language used here, as well as in reports describing the case as ‘shocking, and sickening’ (CPS News Centre, 2018), are illustrative. They represent visceral descriptions of reactions to the evidence about Cecily Kurtz’s body, and indeed the trial judge’s summing up suggests that such reactions were apparently evident on the faces of those in attendance during the trial.

Although establishing a lack of capacity under the Mental Capacity Act 2005 for civil matters is usually decision-specific, and a rigorous process on the balance of probabilities which includes establishing that a person is unable to understand information relevant to a decision, retain that information, use and weigh that information to reach a decision, or communicate the decision (section 3(1)), and any of these failures must be because of a disturbance in the functioning in the mind or the brain (section 2(1)), the test for capacity under section 44 is lower than the general test for mental incapacity under the Act. Given this, the Court of Appeal quashed Emma-Jane Kurtz’s conviction on the basis that the trial judge had not directed the jury to the question of Cecily Kurtz’s capacity; there needing to be a lack of capacity for the essential requirements of the offence to be made out. In doing so the Court of Appeal confirmed that simply because Emma-Jane Kurtz held an EPA, this did not obviate the need to establish that Cecily Kurtz lacked capacity or that Emma-Jane Kurtz reasonably believed that her mother lacked capacity. Despite the jury at the original trial not having been directed as to Cecily Kurtz’s capacity and therefore no finding having been made about this, the judgment of the Court of Appeal is notable in the context of this paper, however, for the manner in which it approaches a discussion of Cecily Kurtz’s mental capacity. The Court of Appeal noted simply that

The *state of Cecily Kurtz* in the months leading up to her death, *and the conditions in which she spent the last weeks and months of her life*, might well have been sufficient, *without more*, for the jury to have been satisfied that she lacked capacity (para. 19, emphasis added).

Put starkly, the Court’s statement here indicates that Cecily Kurtz’s bodily state and her environmental conditions which created that bodily state could, *alone,* be evidence of mental incapacity - albeit a low threshold of incapacity - under section 44. While this paper remains silent as to whether Cecily Kurtz necessarily *had* capacity,[[8]](#footnote-9) and also remains silent as to the accuracy of the doctrinal reasoning regarding section 44 that ensues in the case, what is notable in the judges’ use of language here is the fact that rather than using factors usually used to establish that a person lacks capacity – such as evidence of a mental illness or evidence of cognitive functioning, for example – the Court simply makes reference to Cecily Kurtz’s body and the state in which she was found in order to make the claim that she lacked mental capacity. Although they are referred to elsewhere in the judgment, there is no reference at all to her mental illnesses - bipolar disorder, depression, and obsessive-compulsive disorder - in this paragraph to explain that if she had lacked capacity, that these might have been partly the cause. The conditions in which Cecily Kurtz lived and the disgust and shock felt towards the way in which her body was found are sufficient alone to place her the other side of the capacity/incapacity boundary.

If ‘[t]he abject is a force which disrupts the social world in order to secure social norms...’ (Tyler, 2009, 82), and abjection can be understood as a process of rejecting or repulsion towards that in order to protect what is considered ‘normal’ - ‘identity, system, or order’ (Kristeva, 1982, 4) - against those entities which are perceived to disturb them, then this may be one way of interpreting the approach of the courts and the reaction to the evidence about Cecily Kurtz’s body in this particular case. In the language used by the Court of Appeal, for example, Cecily Kurtz’s body has the effect of challenging their conceptions of what a normal body should be, to the extent that the judges cannot help but find that she *must* have lacked mental capacity simply because of the state of her body when she was found. In other words, it cannot possibly be that a body in the state of Cecily Kurtz’s when she died could have belonged to anybody of *full* capacity, thereby reaffirming that bodies of those with full capacity simply do not look like that. The position of the Court of Appeal, read in conjunction with the discourse from the trial judge and the strength of feeling toward the evidence presented to that court, indicates that the only way they can perhaps understand and make sense of the evidence before it, and the way in which Cecily Kurtz’s body was found, is to understand her as being beyond the boundary of being able to have mental capacity. To put this another way, her bodily state represented someone not of full capacity; a label that serves to differentiate her body from a ‘normal’ body. It is to hint at what bodily states can tell us about the boundary between mental capacity and incapacity; and, by implication, to hint at what we – or at least the courts – think of the older physically and mentally disabled body.

Such evidence of *physically* disabled bodies giving rise to assumptions of *mental* incapacity continues in other, more recent cases concerning older disabled bodies. *A Local Authority v BF* [2018] EWCA Civ 2962 and *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 involved a 91-year old man, Douglas Meyers,[[9]](#footnote-10) who was ‘blind, a little hard of hearing and diabetic’ (*Southend-on-Sea Borough Council v Meyers,* para. 3), but had no diagnosed mental impairment. For many years since his wife died, Mr Meyers had lived with his son, KF, who had behavioural difficulties and long term problems with drug addiction and alcoholism. Nevertheless, Mr Meyers told the court that he ‘had promised his late wife that he would look after KF and he wished to honour his commitment’ (*Southend-on-Sea Borough Council v Meyers,* para. 19), and therefore wished to continue living at his home with his son. The local authority, however, was concerned that KF had been preventing Mr Meyers from receiving the necessary care he needed for his physical conditions: blindness, osteoarthritis, and diabetes. This culminated in a visit to Mr Meyers by a social worker, and the situation in his house is described as follows:

The description of the scene is set out in graphic detail in the witness statement of Ms C, social worker, who reported in summary that she and her colleagues found BF sitting bare-bottomed on the wooden slats of his bed. He had no mattress or sheets. He was surrounded by flies, blood, food, faeces and clutter. He was in pain. He reported he had had nothing to eat or drink for several days. He was hallucinating (*A Local Authority v BF,* at para. 11).

Mr Meyers’ home circumstances were clearly akin to such as would be expected in instances of physical and environmental neglect. Moreover, the relationship with his son, who himself may well have had his own mental health condition but of which there was no concrete evidence (*Southend-on-Sea Borough Council v Meyers,* para. 39), and which also formed a crucial part of the court’s ultimate reasoning, is described as being ‘extremely complex...which, on the evidence which I have read, seems to me at least to have elements of the insidious, persuasive undue influence...’ (*A Local Authority v BF,* para. 31) by KF towards his father. For the Court, one of the crucial factors in deciding to intervene is that

KF is needy, irrational, frequently out of control as well as manifestly emotionally dependent on a father who, despite the alarming history of this case, he obviously loves. KF’s influence on his father is insidious and pervasive. It triggers Mr Meyers’s sense of duty, guilt, love and responsibility (*Southend-on-Sea Borough Council v Meyers,* para. 41).

The case had originally been heard in the Family Division of the High Court by Hayden J in December 2018,[[10]](#footnote-11) where the local authority had sought an interim declaration that it would be lawful to deprive him of his liberty in a care home pursuant to the inherent jurisdiction of the High Court, rather than under the usual Deprivation of Liberty Safeguards.[[11]](#footnote-12) Hayden J issued the declaration sought, and a subsequent legal challenge to this decision to the Court of Appeal was unsuccessful.[[12]](#footnote-13) As is well rehearsed in legal discussion, in order to be compliant with Article 5 of the European Convention on Human Rights, any deprivation of a person’s liberty must be made on one of the grounds in Article 5(1), which includes of persons ‘of unsound mind’ (Article 5(1)(e)).[[13]](#footnote-14) The Court held, surprisingly, that his infirmities – ostensibly only physical – at least in part rendered him vulnerable enough to potentially be of unsound mind within the meaning of Article 5:

...although the expert evidence is that he has capacity to make decisions concerning his care and residence, there is certainly *prima facie* evidence that he is of unsound mind *by reason of his infirmity* and/or all the extraneous circumstances identified above. In assessing whether someone is of unsound mind, a judge looks not only at the expert evidence, but at all the evidence directed to the particular issue. Manifestly, the test of "unsound mind" is different from the test of capacity under the Mental Capacity Act. It is at this stage unclear whether he is of unsound mind, but there are certainly *prima facie* grounds for thinking that he may be (para. 33, emphasis added).

Although a full discussion of the technical ramifications of this judgment are beyond the scope of this paper, it is important to note that, legally, this paragraph – and the wider judgment of the Court – is remarkable. It suggests – much as the *dicta* of the Court of Appeal in *R v Kurtz* hinted at – that unsoundness of mind for the purposes of Article 5 could be based at least in part on Mr Meyers’ *physical* disabilities, and his need for care, albeit care that his son was prohibiting him from receiving. This is as opposed to any sort of *mental* impairment, which, under section 2 of the Mental Capacity Act 2005, is the usual mechanism by which the courts establish unsoundness of mind. In effect, a deprivation of liberty could be lawful even where there is no mental disorder in play, but could simply be down Douglas Meyers’ physically infirm body.[[14]](#footnote-15) The legal implications of this decision can therefore be seen as potentially wide ranging and intrusive. Beyond this - and in much the same way as the Court of Appeal approached the issue of Cecily Kurtz’s capacity - the judgment is also notable, however, for the way in which they position Douglas Meyers’ ‘infirm’ body as justification of their argument that he must be of unsound mind.

Moreover, if as suggested earlier, abjection is a process, the end point of which is to safeguard order and reinforce ideas about what the normal body should look like – the ‘clean and proper self’ (Kristeva, 1982, 8) – then what follows in the judgment can also be read as reinforcing the boundaries of that domain. This process of using Mr Meyers’ physically disabled body as a method of both *justifying* and *demarcating* order – the domain of the ‘subject’ – remains subtly evident throughout subsequent developments in the case. Following the Court of Appeal’s decision that Mr Meyers’ interim deprivation of liberty using the inherent jurisdiction *was* lawful, the case returned to Hayden J in January 2019 (*Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam)). In this final case, Hayden J concluded – contrary to the view of the Court of Appeal – that Mr Meyers was not, in fact, of ‘unsound mind’, nor was he eligible to be detained in a care home under the inherent jurisdiction. He did decide, however, that the court could nonetheless invoke this latter power to prevent Mr Meyers from residing with his son, KF, either at his bungalow or elsewhere.[[15]](#footnote-16) More crucially for the purposes of this paper, however, in order to justify such a decision Hayden J makes a point of referring to how clean and well-presented Mr Meyers looks, following his spell in a care home pursuant to the earlier interim decision and the failed appeal to the Court of Appeal:

If he will forgive me for commenting on his appearance, I should like to note that he was extremely smartly presented. He wore his medals, which I noted were well polished and had been looked after. I was told that though he arrived at Court by wheelchair he insisted on walking in to Court. He is a proud and determined man (*Southend-on-Sea Council v Meyers,* para. 24).

As opposed to the living conditions the Court was first presented with, it is clear that following his temporary period in a care home Mr Meyers presents in a manner that the Court can relate to. Mr Meyers’ body, and his infirmities, that the Court of Appeal considered might indicate unsoundness of mind, have been replaced with an appearance that the court almost indicates is one that is worthy of pride. More purposefully, this ‘clean’ appearance is almost used as a retrospective justification for the earlier interim decision; Mr Meyers’ appearance now – returned to a state of perceived ‘normality’ – certainly appears to be persuasive and important for the Court in justifying its earlier decision to temporarily move Mr Meyers to a care home. Charting a course in contrasting the depiction of Mr Meyers’ body in the earlier case versus this one demonstrates very clearly the idea that there is a boundary between soundness and unsoundness of mind; between abnormal older bodies and normal ones. In the latter case, Mr Meyers’ body is not one that gives rise to unsoundness of mind[[16]](#footnote-17) but is one in which he can take pride, and this restoration of normality is used as justification for the legitimacy of the original legal decision to deprive him of his liberty in a care home.

Teasing out the language in the cases above begins to highlight the way in which the courts sometimes engage in a process of abjection with the older body in front of them in order to shore up their perceived notions of ‘normal’ bodies. While the abjection outlined above may be subtle, and relate to the perception of *physical* bodies giving rise to *mental* incapacity, in some cases it is more directly aligned with discourses of disgust and filth, as it is in many theories of abjection (Kristeva, 1982; Biles, 2014; Arya, 2017). In the oft-commented on decision in *NCC v PB* [2014] EWCOP 14,the Court of Protection,[[17]](#footnote-18) again, had to deal with similar circumstances to that of Douglas Meyers’ case. In this case, an older woman with both mental and physical impairments, PB, had frequently been found in conditions that the judge, Parker J, describes as ‘filthy’ (para. 52(i)), both at home in the house she shared with her husband TB, who also had needs for care and support and a propensity for self neglect. Of the conditions in which PB lived with TB, the judge goes on to say:

 it is not necessary for me to describe them in detail: the premises were clearly disgusting and a health hazard. PB was often in a urine soaked bed. Industrial cleaners had to go in on several occasions (para. 16).

At both paragraphs 17 and 52(ii), the judge notes that how, on the 6th March 2012, PB had been found in her husband’s flat in a ‘filthy state,’ and replaces a detailed description of the facts with the word ‘disgusting’. While not using the conditions and the state of PB’s body *per se* to argue that she lacked capacity,[[18]](#footnote-19) as was essentially the upshot of the Court of Appeal’s reasoning in *Kurtz* and Douglas Meyers’ case, the choice of language used in the judgment in *NCC v PB* - such as ‘filth’ and ‘disgusting’ - has associations with core features of abjection. As Kristeva elaborates in her discussion of ‘filth’ by drawing on the work of Mary Douglas (1966), ‘filth is not a quality in itself, but applies only to what relates to a boundary and represents the object jettisoned to a boundary out of that boundary, its other side, margin’ (Kristeva, 1982, 69). In other words, the terms ‘filth’ and ‘disgusting’ have particular value judgements attached to them (Grosz, 1994, 192) because of negative connotations, values, or beliefs, that we – individually, or even collectively – attach to those things given the distruptive nature they have on our psyches and our belief system about what is ‘normal’. This process of describing something as ‘disgusting’ or ‘filthy’ acts to disrupt the ego of our focus for the benefit of generating collective normalcy at the level of the unconscious. This disruption therefore reaches its conclusion when the realm of the ‘clean and proper’ self has once again been reaffirmed.

If filth is not necessarily a quality of itself, but relates to a boundary of something that is ‘jettisoned’ outside of that boundary, then in describing PB’s environment, and moreover, describing PB *herself* as being filthy, represents abjection of PB to a realm that the Court deems unspeakable; again, a moral statement on what a ‘clean and proper’ body *should* look like. In this instance, the fact that the judge does not even feel the need to verbalize the conditions in which PB was found lends credence to this analysis. The same approach is evident in *CB v Medway Borough Council,*[[19]](#footnote-20) in which CB, a 91-year old woman with dementia, wished to return home from the care home the local authority had placed her in. For the HHJ Backhouse, it is death - the dying older body - that becomes the ‘unspeakable’:*‘*The Judge also observed *“money is not infinite and we do not know when she is going to… how long she is going to last, bluntly”’* (para.18, emphasis in original)*.*[[20]](#footnote-21) Again, if we briefly return to the case of *Southend-on-Sea Borough Council v Meyers*, the idea of the older disabled body as ‘unspeakable’ also appears there. At paragraph 14 Hayden J states that he will ‘resist describing Mr Meyers’ circumstances in graphic detail to avoid compromising his dignity’, indicating that not only is there something undignified in the appearance of Mr Meyers’ body when he was found at home, but even just the process of describing and verbalizing these circumstances may compromise his dignity. For the courts, it appears that to verbalize or to describe such conditions, impairments, and bodily states, is about more than just the words used to describe them; it is about the broader meaning that attaches to those words and how those words would be understood by anybody hearing them (in court) or reading them (in the judgment) as posing a risk to the very thing that – at least in human rights discourse, for example – makes Mr Meyers, and us, human; his dignity. While Hayden J’s approach is reflective and charitable in that it displays an understanding of the impact such a description may have on Mr Meyers, in doing so – and in refusing to verbalize this description, as the judges did in *NCC v PB,* and in *CB v Medway* – it could be seen as confining the physically impaired and ‘undignified’ body to the realm of the unspeakable.

**4. ‘Problems’ and ‘Misfortunes’: The Physically Disabled Older Body**

Abjection of older bodies through language is not peculiar to the domain of mental disability law, from which the above cases are drawn, but in fact stretches much more broadly to bodies that experience solely physical impairments. This sections moves to the remaining cases that form the basis of analysis in this paper; *R (McDonald) v Royal Borough of Kensington & Chelsea* and *Hounslow Clinical Commissioning Group v RW*. In the first, there was no issue of mental disability; in the latter there was.[[21]](#footnote-22) However, both cases are interesting for their use of judicial language in relation to the physical disabilities experienced by the individuals at the centre of the case. As such, this section aims to show how abjection does not only inhere in cases where there is a perceived juncture between mental capacity and incapacity, but that it is also emerges in cases where physical impairments alone are in issue.

*R (McDonald) v Royal Borough of Kensington & Chelsea* involved a judicial review[[22]](#footnote-23) challenge to the proposal of the local authority, Kensington and Chelsea, to remove the night time carers from Elaine McDonald, who, at the time of the proceedings was 67, and had a number of physical disabilities following a stroke in 1999. For a number of years, Ms McDonald had overnight carers to assist her in using the lavatory. The local authority later revised her care plan and replaced the night time carers with incontinence pads, despite the fact that Ms McDonald was not, in fact, incontinent. She was able to use control her urination and defecation albeit with the help of carers to assist her in getting to the toilet. The Supreme Court found – by a majority of 4 to 1 (Lady Hale dissenting) – that the decision by the local authority to replace her night time care team with incontinence pads was lawful.[[23]](#footnote-24) A key area of dispute between the majority judges and Lady Hale, however, centred on what the implications might be if the replacement with incontinence pads was found to be lawful by the court, and whether the necessary implications would be that Ms McDonald might need to use the incontinence pads for both urinating *and* defecating. Lady Hale believed the logical extension of the argument put forward by the local authority would be that should Ms McDonald’s bladder and bowel function deteriorate further, she may find herself in the position of having to use the incontinence pads for both urination and defecation, which Lady Hale found unacceptable:

...I am troubled by the implications of the contrary view. A person in her situation needs this help during the day as well as during the night and irrespective of whether she needs to urinate or to defecate. Logically, the decision of the majority in this case would entitle a local authority to withdraw this help even though the client needed to defecate during the night and thus might be left lying in her faeces until the carers came in the morning. This is not Ms McDonald’s problem at the moment, but her evidence leaves one in no doubt that this is one of her fears. Indeed, the majority view would also entitle an authority to withdraw this help during the day. The only constraint would be how frequently (or rather how infrequently) it was deemed necessary to change the pads or sheets, consistently with the avoidance of infection and other hazards such as nappy rash. The consequences do not bear thinking about (para. 77).

The strength of feeling Lady Hale has towards Ms McDonald’s fear that she may find herself in the position of having to defecate in the incontinence pads is evident. Indeed, throughout her judgment, faeces is singled out as being of particular significance and as distinct from other bodily functions; in this case, urination. Any upshot that required Ms McDonald to be left in incontinence pads for faeces is, according to the last line of Lady Hale’s quote, unthinkable. Such language is reminiscent of that used in *R v Kurtz,* or *NCC v PB*: bodily waste from the physically disabled body represents something so challenging that it is beyond the boundary of what should be thought about or discussed.

The decision of the Court, however, is not simply to do with defecation on a superficial linguistic level; as something ‘unthinkable’. A consideration of the judgment of the majority shows how the abjection of bodily functions such as defecation is substantive; abjection of faeces is, in fact, what the entire majority decision of the Supreme Court *hinges* upon. The crux of the legal matter for the Supreme Court justices was whether the local authority required Ms McDonald to use incontinence pads for urination alone, or for defecation as well. In effect, the boundary between urine and faeces becomes not only one of language, but also a substantive one upon which the case turns. Lady Hale’s argument is that this is a perfectly valid assumption to make. If the local authority is allowed to require Ms McDonald to use incontinence pads for urination, then there is no reason as to why this might not eventually logically extend to defecation, and - in her opinion - this was not acceptable. It is perhaps this that Lady Hale meant when using the term ‘unthinkable’. Lord Walker, on the other hand, accompanied by Lord Brown, felt that Lady Hale had jumped the gun on this issue. There was only limited cause to believe the local authority would require Ms McDonald to use the pads for defecation as well as urination.[[24]](#footnote-25) That was not, in fact, what was proposed by the revised care plan that was at the centre of the current legal challenge:

It will be noted that in his last witness statement Mr Brown referred to a possible need to pass faeces at night, but noted that it had not been raised as an issue at the most recent review. In view of this I find it rather regrettable that Lady Hale’s judgment makes so many references to defecation. She says, at the end of para 77, that the consequences (of what she describes as the logical implications of the majority decision) do not bear thinking about. But in this case we do have to think about urine and faeces. For an adult to use incontinence pads for urination may be quite unpleasant for both the user and the carer, but most people would agree that it is a good deal less unpleasant and undignified than their use for defecation. I totally disagree with, and I deplore, Lady Hale’s suggestion that the decision of the majority would logically entitle a local authority to withdraw help from a client so that she might be left lying in her faeces day and night, relieved only by periodic changes of absorbent pads or sheets (para. 32).

Dissecting these paragraphs, however, also reveals an emergent process of abjection; setting up the boundaries of what the court thinks is acceptable versus what is unacceptable. Lord Walker begins with a very clear rebuke to Lady Hale’s use of defecation, indicating that ‘...I find it rather regrettable that Lady Hale’s judgment makes so many references to defecation.’ In this refusal to acknowledge defecation, and depicting it as something to be ashamed of, and furthermore, reprimanding Lady Hale for referring to it, Lord Walker displays strong associations with the kind of repulsion or disassociation that – as explained above – are a core response that demonstrate abjection. The logical meaning of Lord Walker’s quote is that there is a very clear boundary between the acceptable and unacceptable in this case: the case is about urination alone, and references to faeces are ostensibly unacceptable. But as he goes on to note, this case *is*, in fact,about faeces and defecation – ‘we do have to think about urine and faeces’. This is in seeming contradiction to his previous rebuke, but also acts as a direct counterpoint to Lady Hale’s assertion that leaving someone lying in incontinence pads in faeces is *unthinkable*. More crucially, perhaps, is the fact that it is on this substantive boundary – between urine and faeces – that he bases his final decision as to the legality of the local authority’s decision. The former – using incontinence pads for urine – is acceptable. The latter – using them for defecation – is so repugnant that he finds it in himself to ‘deplore’ Lady Hale’s suggestion that the local authority’s decision might require it. Faeces represents a challenge to dignity in the way urine does not, and his strength of feeling towards the former is so strong that he uses it as a central rationale for his ultimate ruling that the local authority’s decision to remove night time carers was lawful. To put this in terms of abjection, by putting faeces as outside the boundary of what the Court is dealing with, he finds the decision of the local authority to remove night time carers lawful, thereby legitimizing the decision of the majority.

However, through his abjection of faeces, there also becomes apparent a more nuanced and subtle kind of linguistic abjection towards Elaine McDonald’s physically disabled body itself. Consider the following section of the above quote: ‘...Mr Brown referred to *a* possible need to pass faeces at night...For *an adult* to use incontinence pads for urination may be quite unpleasant for both *the user* and *the carer*...I deplore Lady Hale’s suggestion that the decision of the majority would...entitle a local authority to withdraw help from *a* client’ (emphasis added). Although apparently an innocuous description, on one reading the language could be seen as representing an abjection of the very person at the centre of the case; Elaine McDonald. The language used by Lord Walker categorizes urination and defecation as processes and bodily functions that occur to an unnamed body, not the specific individual affected by this judgment; Ms McDonald. In effect, urination and defecation become things that happen to an abstract person, and fail to grasp the lived bodily experiences of the person at the centre of the case - Elaine McDonald. If one of the core reasons as to why the abject comes in to being is to protect domains of order and normality - the domain of the ‘subject’ – then this choice of language, in many ways, is unsurprising. Sterilizing the language used, and thinking of corporeal waste as disassociated from particular bodies rather than as something in fact experienced by a real body - in this case, Ms McDonald – is one way in which this protection can be achieved psychologically, at least from an etymological perspective. Indeed, the language used to describe the circumstances of Cecily Kurtz, Douglas Meyers, and PB’s cases show what happens when faeces is linked to particular bodies at the centre of the cases. When this happens, evidence becomes ‘shocking’ and difficult to hear, and situations become ‘disgusting’ and ‘filthy’.

This reading of the language used in the majority judgment is supported if we also look elsewhere at some of the broader language used to describe the circumstances of the case. Lord Brown and Lord Walker both describe Elaine McDonald’s circumstances as representing a ‘misfortune’; the former, for example, states ‘I have the greatest sympathy for the appellant’s misfortunes and a real understanding of her deep antipathy towards the notion of using incontinence pads’ (para. 19). Perhaps more tellingly, however, is the fact that physical impairments have befallen Ms McDonald are presented as ‘problems’. Lord Brown states at the outset of the case, for example, that ‘[t]he problem at the centre of these proceedings, however, is that the appellant suffers also from a small and neurogenic bladder which makes her have to urinate some two to three times a night’ (para. 1). Later, Lord Walker states that

Leaving aside the problems of managing functional incontinence in care homes...I can see no evidence that the respondent...is not well aware of Miss McDonald’s right to have her dignity respected...She is a courageous and determined lady and [the Royal Borough of Kensington and Chelsea’s] Adult Social Care Department have tried hard to find a solution to her problems (para. 29).

I have suggested in the previous section that abjection begins with something that causes or forces a disruption to our psyches as individuals; our ‘conscious ego’ (Tyler, 2009, 79). It is therefore possible that abjection can occur in relation to embodied differences such as disability, or the physical infirmities of old age, as Kristeva herself has recently argued (Kristeva, 2010; 2013). In the context of advanced old age, Gilleard and Higgs, for example, suggest that

The deeper abjection of old age lies not so much in the leaking of bodily products nor in the physical stigma of an ageing appearance nor the demonstrable performance handicaps of a disabled person. What constitutes abjection in old age is the evidence of absence, absence of self consciousness, of self control, of corporeal ownership...(Gilleard and Higgs, 2011, 139).[[25]](#footnote-26)

In effect, the thing that generates the process of abjection need not always be a physical entity such as faeces, but it could be brought about because of perceived differences in embodied states. It is apparent from the judgments in *McDonald* that physical impairments – *Elaine McDonald’s* physical impairments – represent a ‘problem’; something that presents difficulties for the court, which need to be solved. For Lord Brown, it is exactly that – Elaine McDonald’s physical impairment – that is the central *problem* in the case; that Elaine McDonald has a small bladder which requires to urinate two or three times per night. Likewise, for Lord Walker, the same need is characterized as ‘*her* problem’ (emphasis added), as well as functional incontinence in care homes being a ‘problem’ that requires ‘management’. These are, ostensibly, not the problem of the court, or any other individual or organization, but they belong to Ms McDonald, or those who suffer the ‘misfortune’ of experiencing physical impairments. They are something that, ultimately, the older and physically disabled body is responsible for. The effect of such a description is to place a distance between the court and Ms McDonald; between normal bodies and ‘problematic’ bodies; between normal bodies and bodies with physical impairments.

Similar linguistic techniques of disassociation is also evident – albeit to a lesser extent – in other cases. *Hounslow Clinical Commissioning Group v RW* [2019] EWCOP 12 concerned concerned RW, a 78-year old man with vascular dementia who lacked capacity under the Mental Capacity Act 2005, and over whom a long running dispute had arisen between RW’s son, PT, and his treating team, as to whether he should continue to receive artificial nutrition and hydration (CANH). The case had previously come before the Court of Protection[[26]](#footnote-27) in March 2018, when Parker J had held that it would be in RW’s best interests for CANH to be discontinued – a decision later upheld by the Court of Appeal.[[27]](#footnote-28) Following the judgment of the Court of Appeal, it is clear that while RW did return home without CANH, his youngest son, PT, continued to feed him, hence RW’s continued survival nearly 12 months later. Following admission to hospital, doctors became increasingly concerned with RW’s physical state, which included one of RW’s legs that had become ischemic. The events that followed regarding RW’s physical state are described at some length in the judgment. In PT’s most recent evidence to Hayden J, it became clear that RW’s leg had become detached:

This was, to say the least, disturbing and shocking evidence. I have never heard of a situation like this and I sensed the doctors were equally alarmed. When I asked PT about it today, I was concerned that nobody had been able to identify where *the* leg is. PT told me he had wrapped it in cling film and put it in the freezer... He told [the doctors] how he had changed the catheter himself three months ago and was entirely clear regarding the treatment he

had been providing to his father’s leg, and how he responded when the lower leg separated. There was no spreading of any infection from *the detached left leg* *to the rest of the body* (para 18-19, emphasis added).

From the description in these paragraphs it is unsurprising, then, that Hayden J finds RW’s situation ‘truly parlous’ (para 20), and describes PT’s evidence over the situation with RW’s leg as given with ‘*alarming* candour’ (para. 12, emphasis added). It is unlikely that anybody reading the case would disagree with this assessment of RW’s physical situation. It is perhaps for this reason that the judge notes how ‘disturbing and shocking’ the evidence had been; it is, in abjection terms, evidence that has the ability to cause some sort of shock to – and force a disturbance in – those hearing it. Yet what is also interesting is the pattern of language used in discussing the events outlined above, which mirrors the pattern of language seen in the previous case. Hayden J notes that there was no infection spread from RW’s leg to ‘*the* rest of the body’ (emphasis added). RW’s body, and particularly the physically disabled part of his body – his leg – is no longer associated as his. RW’s body becomes a medicalized entity; something that is either a site of infection, or not. Evidence that is ‘disturbing and shocking’ is mediated by the judge having recourse to an almost sanitized and medicalized description of RW’s body, and his left leg.

Of itself – and as with the majority judgment in Elaine McDonald’s case above – this sort of language may appear unremarkable. It is perhaps simply one way the judge has in discussing what is physically happening to the older bodies at the centre of the case. Yet – to conclude – the paper briefly suggests that perhaps the most telling aspect to these cases is that such linguistic detachment may arguably be peculiar – and specific – to older *bodies*, as opposed to other, non-corporeal properties. Contrast the language above with the description of RW’s personality, where the judge strives – through examining PT’s evidence – to almost bring RW to life in the courtroom. Such descriptions provide a stark contrast to the kind of medicalization and dehumanization used to portray RW’s body:

In this court room, this afternoon, PT has brought his father’s personality into the hearing. This has included not only RW’s strengths but his weaknesses too... I pause for a moment to record that as PT was telling me about his father, his approach to life and his personality generally, he illustrated an occasion when, at the early stages of his dementia, he had taken him on holiday to Israel. This had been a country that RW very much wanted to see and it was obvious, as PT recounted the story, that he recognised that time was limited. He described how one afternoon, swimming in the Dead sea, his father swam too far out, rather dangerously and against the protestation of the life guard. Both brothers laughed together, in court, as PT related this story, particularly when PT said it was the sort of thing their father would do even before the dementia. That was the way he was’ (para. 3-5).

Although a full exploration of this point is outside the remit of the paper, it is offered here as a means of contrasting how judges describe and deal with older bodies, compared to how judges consider evidence about an older person’s wishes, feelings, or personalities. It may well be the case, then, that there is an emergent chasm between the language used to describe bodies and bodily functions, compared to that used to discuss the non-corporeal aspects of an older person.[[28]](#footnote-29)

**4. Conclusion**

The judgments analysed here have often attracted speculation and discontent; whether it be because of their overly paternalistic use of the law, or the extent to which they ride roughshod over the fears of older disabled adults as in Elaine McDonald’s case. However, this paper has sought to consider how such cases can be criticised from a different dimension: by using discourse analysis to focus on the language used to describe the bodies that lie at the heart of the cases in order to uncover assumptions and value judgements that lie beneath the surface of judicial discourse. It has been argued that such an analysis reveals an emergent process of abjection between the courts and the older disabled body, which is used by the judges as a means by which they can reaffirm their own notion of ‘normal’ bodies. While neither discourse analysis, nor abjection, are offered in this paper as the *only* methodological or analytical frameworks that can help understand the way older disabled bodies are engaged with by the courts – as Iris Marion Young argued, any ‘claim to universality operates politically to exclude those understood as different’ (Young, 1990, 60) – they do, however, offer one perspective on the language used and the legal outcomes of these cases.

As mentioned in the introduction, to the doctrinal lawyers some of these cases may not look - on the face of it - as if they are *really* about bodies. Legally, Elaine McDonald’s case was about the proper remit of what a local authority could lawfully provide her in the way of social care. Cecily Kurtz’s case was about the proper interpretation of section 44 of the Mental Capacity Act 2005. RW’s case was about what would be in the best interests of a man with end stage dementia, thereby dictating what it would be lawful for his treating clinicians (and, indeed, his son, to do to him). Douglas Meyer’s and PB’s cases were about the powers available to the court to protect an older person with multiple impairments in abusive and neglectful circumstances. Moreover, at no point has the paper sought to argue – morally or legally – that any of the individuals at the centre of the cases should be left *without* legal assistance. Nor has it sought to argue that the intervention and interpretation of the law in each case was necessarily wrong from a solely doctrinal perspective.[[29]](#footnote-30) But one of the broader goals of the paper – as lies at the heart of discourse analysis – has been to suggest that analyzing only the doctrinal questions in each case would be superficial, without also considering the *way* in which those issues are framed and addressed by the court. The law is never free from the assumptions and values that condition those who implement it. For the judges in *R v Kurtz,* Cecily Kurtz lacked mental capacity simply because of the state of her physical body. In *McDonald,* Elaine McDonald’s body is the ‘problem’. In *NCC v PB,* PB’s body is ‘filthy’. And in *Meyers,* verbalizing what Douglas Meyers’ body looked like when he was found at home would be ‘undignified’. Shining a spotlight on the language used by the courts, and the way in which this legitimizes certain legal interventions, show how bodies – ideas about older disabled bodies, *and* ideas about ‘normal’ bodies – in fact rest at the very core of the courts’ reasoning in these cases.

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1. See, for example, Keywood (2000), Thomson (1998), and Sheldon (2002). [↑](#footnote-ref-2)
2. The term ‘elderly’ is now seen by some cultures as being a pejorative term, however it is used here to be consistent with Newdick’s quote. [↑](#footnote-ref-3)
3. Older adults are statistically more likely to be at the centre of legal disputes in mental capacity law (Series *et al.,* 2017; Ruck Keene *et al.,* 2019). [↑](#footnote-ref-4)
4. *A Local Authority v BF* [2018] EWCA Civ 2962; *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399. [↑](#footnote-ref-5)
5. The paper does not, at this stage, purport to make any claim about the correctness – moral or legal – of these constraints. [↑](#footnote-ref-6)
6. Although it is important to note that there is also a dearth of literature on that dimension to old age (Alzheimer’s Disease International, 2015; Bamford, 2011; Ludwin and Parker, 2015; Savitch, Abbott, and Parker, 2015). [↑](#footnote-ref-7)
7. The rationale for choosing these five cases is explained in greater detail later in the paper. [↑](#footnote-ref-8)
8. It must also be noted that evidence suggests mental capacity may indeed be an issue in many neglect cases (Braye, Orr, and Preston-Shoot, 2015; Braye and Preston-Shoot, 2017). [↑](#footnote-ref-9)
9. The anonymity order was lifted at a subsequent hearing, therefore while the earlier judgment refers to ‘BF’, later judgments refer to Mr Meyers’ full identity. [↑](#footnote-ref-10)
10. Unreported. [↑](#footnote-ref-11)
11. In brief, the Deprivation of Liberty Safeguards allow an authorisation for someone to be deprived of their liberty where they are over the age of 18 and have a mental disorder within the meaning of the Mental Health Act 1983, do not have an advance refusal in place to such a deprivation, lack mental capacity to make a decision as to their deprivation, where it is in their best interests to be deprived of their liberty, and are not otherwise eligible to be deprived of their liberty i.e. under the Mental Health Act 1983. The Safeguards are soon to be replaced by the Liberty Protection Safeguards following the passing of the Mental Capacity (Amendment) Act 2019. [↑](#footnote-ref-12)
12. *A Local Authority v BF* [2018] EWCA Civ 2962. [↑](#footnote-ref-13)
13. One of the central aspects of the challenge to the Court of Appeal in respect of Mr Meyers’ case was that he was not, in fact, of unsound mind. It was agreed by the parties that he did not lack mental capacity under the Mental Capacity Act 2005; hence his ineligibility for deprivation under the Deprivation of Liberty Safeguards. [↑](#footnote-ref-14)
14. It is debatable whether such an approach would be harmonious with the decision of the European Court of Human Rights in *Winterwerp v The Netherlands* [1979] ECHR 4, which required a ‘true mental disorder’ (para. 39), notwithstanding the Court of Appeal’s assertion in *A Local Authority v BF* that it would be when the situation amounted to an emergency: *A Local Authority v BF,* para. 34. The judgment also authorizes such a deprivation using the much criticized, ill defined, and apparently ever extending powers of the High Court’s inherent jurisdiction (Keywood, 2017; Pritchard-Jones, 2016a). It is precisely this use of the jurisdiction for authorizing a deprivation of liberty that the European Court of Human Rights found was unlawful and a violation of Article 5 itself in 2004 in *HL v UK* [2004] ECHR 471. [↑](#footnote-ref-15)
15. Hayden J also found that such an approach would not amount to a deprivation of liberty. He concluded that requiring Mr Meyers not to live in the bungalow with his son amounted merely to a restriction on Mr Meyers’ liberty, not a deprivation. The case did not, therefore, fall within the scope of Article 5. This decision has also attracted criticism on the basis that it may not be entirely consistent with dicta in previous case law (39 Essex Street, April 2019). [↑](#footnote-ref-16)
16. Quite literally: as mentioned above Hayden J states very clearly that he does not consider Mr Meyers to be of unsound mind. Indeed, the fact that the anonymity was waived in accordance with Mr Meyers’ own wishes is testament to the strength of feeling that Hayden J has towards Mr Meyers *soundness* of mind. [↑](#footnote-ref-17)
17. The Court of Protection is the court responsible in England and Wales for deciding matters under the Mental Capacity Act 2005. [↑](#footnote-ref-18)
18. Although the Court did conclude that PB lacked capacity under the Mental Capacity Act 2005, and even if she had not, she would still have ‘lacked capacity’ because of the undue influence of her husband. [↑](#footnote-ref-19)
19. [2019] EWCOP 5*.* CB wished to appeal the previous judgment of HHJ Backhouse who had decided it would be in her best interests to remain in the care home. [↑](#footnote-ref-20)
20. In this statement Hayden J is discussing the judge’s comments in the previous case. [↑](#footnote-ref-21)
21. This paper does not discuss this particular aspect of the case, but focuses solely on an aspect of the discussion that relates to the individual’s physical impairments, hence the case’s inclusion in this section. [↑](#footnote-ref-22)
22. Judicial review is a mechanism by which individuals or organisations in England and Wales can challenge the decisions of governmental bodies, including local authorities. [↑](#footnote-ref-23)
23. The decision in the case has already generated much criticism (Clements, 2011; George, 2011), including from a gender perspective (Carr, 2012; Pritchard-Jones, 2018). [↑](#footnote-ref-24)
24. As George (2011) has noted, however, this was not in fact what Lady Hale was pointing out. Lady Hale’s comment was that allowing incontinence pads for defecation might be a *logical extension* of allowing incontinence pads for urination, not that the local authority was *in fact* requiring this. [↑](#footnote-ref-25)
25. It must be noted that Gilleard and Higgs – as I do in this paper - are pointing out the negative associations with old age but do not *agree* with these associations. Their problem is with the negativity assigned, not old age itself. Indeed, they also suggest that care ethic may help remove these negative associations and replace them with positive ones. [↑](#footnote-ref-26)
26. The earlier case in the Court of Protection involving RW is unreported. [↑](#footnote-ref-27)
27. *PW v Chelsea and Westminster Hospital NHS Foundation Trust* [2018] EWCA Civ 1067 [↑](#footnote-ref-28)
28. Much the same has been argued in relation to a similar case of *Wye Valley NHS Trust v B* [2015] EWCOP 60 where the judge again sought to do the same regarding Mr B’s personality in that case (Series, 2016). [↑](#footnote-ref-29)
29. Save, perhaps, in Douglas Meyers’ case. [↑](#footnote-ref-30)