**‘Palm Tree Justice’: The Inherent Jurisdiction in Adult Welfare Cases**

**Laura Pritchard-Jones, Senior Lecturer in Law, Keele University**

**ABSTRACT:** The Mental Capacity Act 2005 came into force in 2007 and now provides the legal framework governing what practitioners can do, and when, where it is believed someone’s capacity to make decisions is compromised because of a disturbance in the functioning of the mind or the brain. However, in 2012 the Court of Appeal in the case of *DL v A Local Authority* identified a lacuna in the legal landscape in that no legal regime existed to intervene in situations where a person did not lack capacity under the Mental Capacity Act 2005, but who was being abused, coerced, or otherwise unduly influenced in their decision-making. The Court of Appeal held that the inherent jurisdiction of the High Court could be used to fill this gap. Since this development in 2012, cases where applications have been made under this ‘rediscovered’ inherent jurisdiction have increased apace. Through an analysis of subsequent case law, the article argues that there are three areas of concern and confusion in the way the jurisdiction has developed since 2012: when it should apply, what it should do, and on what basis judges decide what it should do. This has resulted in incoherent, inconsistent, and unprincipled developments, which are fundamentally at odds with the primary aims of the common law.

**KEYWORDS:** inherent jurisdiction; Mental Capacity Act 2005; capacity; undue influence; vulnerable adults

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**INTRODUCTION**

Prior to 2007 – the year in which the Mental Capacity Act 2005 (MCA) came into force – decisions involving adults who lacked mental capacity, or who were otherwise ‘vulnerable’ because of undue influence or coercion, were made using the inherent jurisdiction of the High Court. Since 2007, many of these decisions are decided under the MCA, which covers situations where a person lacks capacity to make a decision because of an impairment or disturbance in the functioning of the mind or brain.[[1]](#footnote-1) Subsequent case law, however, has confirmed that the inherent jurisdiction retains a role in a variety of situations where there may be threats to an adult’s welfare. Following the seminal case of *DL v A Local Authority*[[2]](#footnote-2) these include to provide a remedy where someone does not lack capacity under the MCA but is otherwise vulnerable because of coercion or undue influence, and, more recently, to authorise a deprivation of liberty where gaps arise between the Mental Health Act 1983 (MHA) and the MCA, or within the MHA itself.[[3]](#footnote-3) It is therefore unsurprising that the use of the inherent jurisdiction has not only garnered criticism from commentators based on its seemingly arbitrary, incorrect, and expansive development in recent years as a form of ‘palm tree justice,’[[4]](#footnote-4) or - on a somewhat pithier note - a ‘magical sparkle power’,[[5]](#footnote-5) as well as proving difficult for practitioners and professionals working in adult welfare to navigate.[[6]](#footnote-6) While most literature on the jurisdiction to date has focussed on particular aspects of its use such as its conceptualisation of ‘vulnerability’ or critiques of specific cases,[[7]](#footnote-7) as yet there remains no recent[[8]](#footnote-8) literature that evaluates its use and development in these types of cases more broadly; a gap this article seeks to fill. Thus, the article broadly identifies three areas of concern and confusion in the way the jurisdiction has developed in adult welfare cases since 2012: when it should apply, what it should do, and on what basis judges decide what it should do.

In 1995 the Law Commission described the existing state of the law in this area – including the use of inherent jurisdiction – as being characterised by ‘incoherence, inconsistency and historical accident.’[[9]](#footnote-9) It is therefore ironic that this article argues that contemporary judicial decision-making and the use of the inherent jurisdiction is now similarly characterised by incoherence, inconsistency, and historical accident. Indeed, such extraordinary powers to intervene in largely undefined ways are unparalleled elsewhere in law. These concerns also arguably undermine Farley’s proposition that ‘any decision based on [an inherent power] should be in the tradition of the common law – incremental extensions of existing law, judicially and judiciously arrived at on a reasoned basis using analogy from established principles where possible.’[[10]](#footnote-10) This article will, in part, argue that the modern use of the inherent jurisdiction in such cases has departed considerably from such a basic and well-established common law principle. While this paper also offers some suggestions as to how the deployment of the inherent jurisdiction in such cases might consequently be modified to provide greater clarity and consistency, any systematic answers to many of the questions and issues it highlights are impossible given that the very knots this paper identifies are now woven into the fabric of the common law. It is perhaps for this reason that, in recent years, the Law Commission has been pressed to further consider statutory powers to replace the jurisdiction’s remit in adult welfare cases.[[11]](#footnote-11)

The paper begins with an overview of the historical development of the jurisdiction in adult welfare cases up to 2012, including its relationship with the MCA, an exploration of which is crucial to understand the way in which the jurisdiction is used in contemporary case law. The paper then moves on to a consideration of two central axes of criticism in that contemporary use - confusion over who may be considered a ‘vulnerable adult’, and over what remedies the jurisdiction may be used to invoke. The paper concludes with an analysis of what could be done to provide greater clarity and certainty in such cases.

**what is the inherent jurisdiction?**

The inherent jurisdiction is a power vested in a superior court to make decisions in the interest of fairness or justice where no statutory regime exists; a ‘great safety net’,**[[12]](#footnote-12)** as it has been described. In England and Wales the jurisdiction is vested in the High Court, and as Lord Diplock noted in 1981, its use is rather broadly ‘confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.’[[13]](#footnote-13) In 1970 Sir Jack Jacob thus identified, through a classification of cases, the origins of the jurisdiction and the contexts in which it could be deployed: control of process, control over persons, and control over the powers of inferior courts. In relation to the second of these, which is of most relevance to this article, Jacob identified two kinds of use: those to control children - known as the *parens patriae* jurisdiction[[14]](#footnote-14) - and those to control officers of the court. No reference is made to its use to control adults more generally. In the history of development of the inherent jurisdiction, it was not until 1990, some 20 years after Jacob’s essay, that the House of Lords confirmed that this jurisdiction could be invoked in relation to situations that Jacob – had he been writing in 1991 – might have properly described as control of adults.[[15]](#footnote-15)

This development before the House of Lords in 1990 in the case of *F v West Berkshire Area Health Authority*[[16]](#footnote-16) involved the proposed sterilisation of a young woman, F, with learning disabilities and who had developed a sexual relationship with a man, but for whom other modes of contraception were ostensibly unviable. F lacked capacity[[17]](#footnote-17) to consent to such a procedure, and in the absence of consent, such a sterilisation would have amounted to tortious interference with F’s body, as well as potentially being a criminal offence. Because it would be ‘intolerable to place professionals in a position that...if they administer the treatment which they believe to be in the patient's best interests...they run the risk of being held guilty of trespass to the person, but if they withhold that treatment, they may be in breach of a duty of care owed to the patient,’[[18]](#footnote-18) the court at first instance - upheld on appeal - decided that it was in her best interests to be sterilised. The House of Lords, however, was required to decide whether the court even had the power to make this decision to authorise what would otherwise be an unlawful medical interference and, if so, using which legal power. It was agreed that the *parens patriae* jurisdiction previously exercised over adults of unsound mind as vested in the courts by Royal Warrant had been removed through a combination of the revocation of the last warrant in November 1960, as well as the entering into force of the Mental Health Act 1959, subsequently replaced by the Mental Health Act 1983.[[19]](#footnote-19) The House of Lords held that Part VII of the latter Mental Health Act[[20]](#footnote-20) could not be interpreted to extend to medical treatment such as the sterilisation proposed.

There therefore appeared to be an erroneous lacuna in the law in that there was no statutory power to authorise the operation on F. Medical treatment without consent constitutes a battery, but there did not appear to be any statutory power to allow practitioners to perform medical treatment[[21]](#footnote-21) on someone who lacked capacity and was therefore unable to legally consent to the treatment. Notwithstanding Lord Brandon of Oakbrook’s dissenting judgment, in which he suggested that ‘if [the *parens patriae*] jurisdiction, or something comparable with it, is to be re-created, then it must be for the legislature and not for the courts to do the re-creating',[[22]](#footnote-22) the majority of the House of Lords held that the inherent jurisdiction could be used to authorise the medical treatment using the common law doctrine of necessity, and, in order to be deemed necessary, it must be in F’s best interests.[[23]](#footnote-23) Such a development would, according to Lord Griffiths, be a ‘humane development of the common law’,[[24]](#footnote-24) but nonetheless, it was also an entirely ‘new branch of the law’,[[25]](#footnote-25) and while not ‘strictly the exercise of a *parens patriae* jurisdiction…is similar to it'.[[26]](#footnote-26)

Following *West Berkshire* it became apparent that the early 1990s would be a fertile time for increasing use of the inherent jurisdiction in cases involving proposed medical treatment.[[27]](#footnote-27) For example, the withdrawal of medical treatment from an incapacitated patient which might lead to their death,[[28]](#footnote-28) forced caesarean sections,[[29]](#footnote-29) and – in an important turn of events on which the current use the jurisdiction is predicated – to authorise a blood transfusion on those who had been coerced or unduly influenced into rejecting one in the case of *Re T.*[[30]](#footnote-30) Notwithstanding earlier decisions[[31]](#footnote-31) indicating that the jurisdiction could only be used where the proposed conduct would constitute a tort (i.e. medical treatment without a person’s consent) – a point explored further below - in the later part of the decade and into the early 2000s, the courts confirmed that the inherent jurisdiction could also be used in a broader type of case not necessarily involving medical treatment. Later decisions, for example, confirmed the jurisdiction could be used to authorise a deprivation of liberty of a person who lacked capacity where the person was not detained under the Mental Health Act 1983,[[32]](#footnote-32) and to limit contact between a woman who did *not* lack mental capacity and her abusive father.[[33]](#footnote-33) In addition – in an instrumental Court of Appeal judgment that decisively held that it could apply beyond just tortiousinterferences with a person – the inherent jurisdiction could be used to make directions regarding accommodation and residence for a person who lacked capacity.[[34]](#footnote-34) Many such cases involved adults who lacked capacity to make decisions about these issues for themselves because of a mental health condition, brain injury, cognitive or intellectual disability. These situations are now squarely covered by the MCA, which entered into force in 2007. Indeed, the very impetus for the MCA came from this early strand of inherent jurisdiction cases, which one Master of the Court of Protection likened to ‘a string bag, which can stretch further and hold more than a basket but which is essentially a group of holes…’.[[35]](#footnote-35)

The question as to whether the inherent jurisdiction remained for any type of situation involving threats to an adult’s welfare, but particularly the *Re T* scenario involving coercion, was left unanswered - at least definitively so[[36]](#footnote-36) - until the Court of Appeal’s pronouncements in *DL v A Local Authority*. The case involved a couple, ML and GRL, who had been subjected to coercive behaviour by their son, DL. This included DL physically and verbally abusing his parents, controlling who may visit them, and the terms upon which they may visit. There were also reports that DL was trying to coerce GRL into transferring the ownership of the house into DL's name and for ML to move into a care home. At the time proceedings commenced neither ML nor GRL lacked capacity to make any decisions under the MCA.[[37]](#footnote-37) McFarlane LJ summarised the issue to be determined thus: ‘whether, despite the extensive territory now occupied by the MCA 2005, a jurisdictional hinterland exists outside its borders to deal with cases of 'vulnerable adults' who fall outside that Act and which are determined under the inherent jurisdiction.’[[38]](#footnote-38) Answering this in the affirmative, His Lordship held that to do so would - contrary to the argument made by DL’s counsel - *better* promote GRL and ML’s autonomy. If the jurisdiction was not available in such circumstances this would have left ML and GRL without the protection of any legal regime given the lack of wider statutory adult safeguarding framework:

There is, in my view, a sound and strong public policy justification for [the availability of the inherent jurisdiction]. The existence of 'elder abuse’...is sadly all too easy to contemplate…Where the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes.’[[39]](#footnote-39)

The Court of Appeal’s judgment rested squarely on the shoulders of an earlier, pre-MCA decision in the High Court by Munby J; that of *Re SA.[[40]](#footnote-40)* In that case – the intricacies of which will be explored below – Munby J had held that,

it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.[[41]](#footnote-41)

In much the same way as the 1990s and early 2000s saw the widespread development and use of the inherent jurisdiction in an array of pre-MCA type cases, it would appear that post-*DL* has been an equally fertile time for the development and expansion of the inherent jurisdiction in circumstances where an adult is considered ‘vulnerable’ and therefore incapacitated and unable to make a decision about something because of undue influence, abuse, coercion, or ‘for some other reason’.[[42]](#footnote-42) As with any inherent power, it is therefore also unsurprising that its development has, on the one hand, caused consternation given its possible scope, yet, on the other, been welcomed as ‘a valuable asset, mending holes in the legal fabric that would otherwise leave individuals bereft of a necessary remedy’.[[43]](#footnote-43) Nevertheless – as this article will show – exactly what remedy it can be used to invoke is unclear. From here, however, the paper turns to the first area of concern; what is meant by a ‘vulnerable’ adult that lies at the heart of the post-*DL* incarnation of the inherent jurisdiction.

**who is a vulnerable adult?**

The articulation of the jurisdiction reasserted by the Court of Appeal in *DL* rested on the earlier decision in *Re SA.*[[44]](#footnote-44)In exploring the contours of the jurisdiction where a person does not lack mental capacity under the MCA (which, by the time of *Re SA*, had been passed but not yet entered into force) but is otherwise vulnerable through coercion, Munby J held that:

the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (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...The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some 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.’[[45]](#footnote-45)

On the one hand, Munby J’s framing of the concept of a vulnerable adult, and thus when the inherent jurisdiction might ‘bite’, was exceptionally broad and potentially covered an exponential number of situations. Beyond this, many of the features of the inherent jurisdiction that we might now regard as problematic may stem from the approach of tying vulnerability to the concept of being *unable to make a relevant decision* about something. In doing so, this has inextricably linked the concept of vulnerability to that of capacity/incapacity to decide.[[46]](#footnote-46) This is problematic when read alongside the clearer statutory framework which governs mental capacity to make decisions under the MCA, the origins of which are – as shown above – interwoven with the earlier use of the inherent jurisdiction in the 1990s. As Skowron notes, the MCA does not lay claim to being an exclusive definition of capacity or incapacity to make decisions in domestic law.[[47]](#footnote-47) However, this article argues that the concept of incapacity to decide under the inherent jurisdiction is more ambiguous and lacks the same degree of certainty as that found in the MCA in two ways: first, failing to enunciate what is meant by ‘a decision’, and, second, failing to identify the components of ‘lacking capacity’ under the jurisdiction and its relationship to coercion or undue influence.

**A ‘decision’**

In addition to the already-broadly framed concept of vulnerability that Munby J articulated in *Re SA*, linking the use of the inherent jurisdiction to the idea of making – or being unable to make – a decision further broadens the theoretical scope of the jurisdiction. As outlined above, McFarlane LJ continued this relationship between vulnerability and decision-making in *DL* by stating that the jurisdiction is ‘targeted solely at those adults whose ability to *make decisions* for themselves has been compromised’.[[48]](#footnote-48) Yet such an approach of tying the use of the jurisdiction to making decisions fails to offer the same level of protections around the concept of ‘decision-making’ as those contained in the MCA. At this juncture, it is therefore important to outline some of those safeguards contained in the MCA. First, the MCA is often referred to as decision-specific and time-specific. This means that a lack of capacity can only be identified in relation to specific decisions at specific times rather than declaring someone ‘globally’ incapacitous about *all* their decisions, *all* of the time. Moreover, decision-specificity under the MCA usually relates to particular areas of decision-making, some of the most of common of which are issues such as litigation, managing property and affairs, medical decision-making, contact with other individuals, engaging in sexual relationships, and making decisions about residence, for example. While this aspect of the MCA have arguably led to some problematic case law[[49]](#footnote-49) its intention is ultimately to curtail professional involvement in a person’s decisions. It is designed to allow individuals the greatest freedom to make decisions on areas in which they retain capacity, while similarly allowing measures – protective or otherwise - to be put in place to make decisions on their behalf where there *are* specific decisions they lack capacity to make.

Yet in invoking the inherent jurisdiction in cases of abuse such as *DL* and in subsequent cases,[[50]](#footnote-50) and linking its use to the concept of capacity to make a decision, the courts have failed to enunciate the same sorts of safeguards around the concept of a ‘decision’ for those who might be subjected to the use of the jurisdiction. Many cases involving the inherent jurisdiction are often absent an explicit statement as to what decision the court thinks the person is unable to make in situations where they are being coerced. This is problematic partly because of the inevitable possible breadth it affords to the scope of the jurisdiction. If it is possible to make a decision about *anything* - as indeed it is - and if any action proposed need not be one that would be tortious without the person’s consent (i.e. *any* course of action), then it follows that the inherent jurisdiction might be asserted for *any* proposed intervention against *any* decision that an individual purports to make. For example, it could potentially be used just as easily against someone’s coerced decision to buy a pet goldfish as it could against someone’s coerced decision to refuse a blood transfusion. The development of the jurisdiction in such a manner has been criticised by Lock who suggests that *Re SA* – the very case that prompted the development of the jurisdiction in this way - was wrongly decided on this front.[[51]](#footnote-51)

One such case which exemplifies this ambiguity in relation to the concept of a ‘decision’ as it has (or - as this article argues - has not) been conceptualised under the inherent jurisdiction, is *NCC v PB*.[[52]](#footnote-52) PB had been married to her husband, TB, for many years. There had been increasing concerns about PB’s welfare, which included being abandoned on trips, living in insanitary conditions, and resultant deteriorating physical and mental health. In respect of her relationship with TB Parker J notes that ‘PB has repeatedly demonstrated deference to, and over-reliance and dependence upon, the views/desires of her husband even when to do so places her at significant risk of harm.’[[53]](#footnote-53) In light of the above, the local authority in question sought orders under the MCA about PB’s capacity to make decisions about her living arrangements, contact with TB, and residence, and, if she was deemed to *retain* capacity under the MCA, whether orders could be made under the inherent jurisdiction. As part of this, the court ordered a psychiatric report and capacity assessment from a consultant old age psychiatrist, Dr Barker, which is discussed by Parker J in the following terms:

Dr Barker is not certain about the extent to which PB's decisions may be based on her beliefs about marriage, and to what extent TB's influence leads her to be *incapacitous* *all the time*. Dr Barker states that PB is heavily influenced by her husband. When not with TB she has capacity (in his original report he wrote "has considerable capacity") but may be *incapacitous* when with him. He does not know to what extent influence may be taken into account in deciding that she is *incapacitous*. In his report and evidence he suggested that PB may simply be making a decision based on her commitment to marriage over her own wellbeing which is unwise but which is not caused by her mental impairment. "If she has preferred to ally herself with her husband she may accept the level of squalor". In cross–examination he said that in his view her decisions "are not solely driven by mental impairment" and "it is difficult to judge whether it is cognitive impairment, or other factors which lead her to make unwise, or *incapacitous*, decisions when with TB".[[54]](#footnote-54)

A consideration of this description demonstrates the problems with the potential[[55]](#footnote-55) use of the inherent jurisdiction suggested above, especially around the concept of what is meant by PB’s ability to make a decision in this particular case. First is the statement that PB is incapacitous *all the time*, in contrast to the safeguard contained in the MCA that incapacity to make decisions is time specific. No such mention of a similarly measured approach is apparent in the evidence before Parker J in *PB.* Second, there is no mention as to what decision PB might be incapacitous to make under the inherent jurisdiction. This is in contrast to the application under the MCA in the same case, which stipulated clearly that the particular decisions that were being challenged were whether PB had capacity under the MCA to decide whether to live with TB, what contact to have with him, and her care and support arrangements.

If the use of the inherent jurisdiction is reserved for situations where a person may be coerced or abused by another person[[56]](#footnote-56) then one option open to the courts is to clarify that ‘a decision’ for the purposes of the jurisdiction means a decision about contact or residence with the person who is allegedly doing the coercing or abusing, such as the son in *DL,* or the husband in *NCC v PB.* This is the approach taken by the Court of Protection in cases where there are concerns about a person’s mental capacity *under the MCA* in relation to contact or residence with abusive individuals.[[57]](#footnote-57)However, adopting the same approach under the inherent jurisdiction risks a ‘concertina effect’[[58]](#footnote-58) of identifying a perceived unwise decision first – the decision to remain in an abusive situation - and declaring a person therefore lacks capacity to make the decision in question to reflect that. This - known as the outcome-based approach to incapacity - is potentially problematic for several reasons. First, cases such as these are not always solely about the decision to remain in a coercive relationship, but about the impact of that coercive relationship on other aspects, such as PB’s receipt of care in *NCC v PB.* Second, in its consultation into the reform of mental capacity law in the 1990s, the Law Commission rejected an outcome-based approach to mental capacity because of concerns that ‘any decision which is inconsistent with conventional values, or with which the assessor disagrees, may be classified as incompetent. This penalises individuality and demands conformity at the expense of personal autonomy.’[[59]](#footnote-59)Third, it might register as uncomfortable to declare that a person is deprived of capacity to *make a decision* because of coercion, although as this paper will explore briefly below, it is not necessarily wrong to assert this. In reality, that person *can* make a decision;[[60]](#footnote-60) indeed, it is the very decision(s) they are purporting to make that results in the litigation. On one view, they are simply making decisions that others would consider unwise because it is one that places them at continued risk of harm. Such situations are very different to circumstances where the MCA might more readily apply, such as where a person has advanced dementia and is, for example, unable to understand information regarding a proposed course of medical treatment and thus unable to understand relevant information or use and weigh that information to make a decision.[[61]](#footnote-61) Lastly, such an approach would clearly be at odds with the safeguard contained in section 1(4) of the Mental Capacity Act; that a person is not to be deemed to lack capacity simply because they make an unwise decision.

One option open to the courts in dealing with applications brought both under the MCA or, in the alternative, under the inherent jurisdiction is that a ‘decision’ for the purposes of the inherent jurisdiction means the same areas of decision-making that are being challenged under the MCA. For example, in situations where there is a confluence of ‘a disturbance in the functioning of the mind or brain’ as well as abuse, applications are often made to the court for a final decision as to whether that person lacks capacity under the MCA to make decisions about residence or contact with their abuser, or whether they lack capacity to make decisions because of coercion and are therefore a vulnerable adult for the purposes of the inherent jurisdiction.[[62]](#footnote-62) In such cases, if invoking the inherent jurisdiction, the court may wish to explicitly state that ‘a decision’ under the inherent jurisdiction means the same decisions that are challenged under the MCA (for example, contact, or residence). Indeed, although not explicitly stated by the judge, this is the most likely interpretation of Parker J’s approach in *NCC v PB*. However, not all cases are jointly brought under both the MCA and the inherent jurisdiction, which leaves a gap as to what ‘decision’ is being challenged in those cases brought solely under the inherent jurisdiction. Moreover, as the next section will show, even if the court is better able to clarify what it means by ‘a decision’ for the purposes of the inherent jurisdiction, there remains considerable doubt as to the meaning of ‘incapacity’ when compared to its statutory counterpart under the MCA.

In the alternative, the courts could look to Lock’s proposal, touched upon earlier. That is, for a declaration using the inherent jurisdiction to be made and to have effect, there should have been an actionable legal wrong, or at least one that could be seen as a legal wrong without the order:

the compromise of decision making by the vulnerable must be sufficiently focused that, if this were to be a private law action where P was later seeking to avoid legal responsibility for his or her decisions, the court would grant P a remedy (or would restrain D acting in the manner in which he was proposing to act). In other words, it is not vulnerability *per se* that gives rise to the jurisdiction but vulnerability coupled with decisions which could later be set aside on established legal grounds or where there is threatened future wrong doing which can be restrained by an injunction.[[63]](#footnote-63)

Lock’s proposals would therefore suggest that one potential avenue for controlling the use of the jurisdiction would be to ensure it is available only where the proposed action or intervention would be one that – without the court’s authority – would constitute an actionable wrong and could later be set aside by a court. In other words, if preventing someone from making the decision to buy a pet goldfish would not constitute an actionable wrong or could later be set aside on established legal grounds, then it is not a decision that can be challenged under the inherent jurisdiction. The decision to refuse a blood transfusion *is* however, because performing that transfusion is one that could later be considered battery if done without the court’s order. The concern with this approach, however, is that it requires something akin to a counterfactual harm[[64]](#footnote-64) crystal ball in pre-identifying what conduct might be considered tortious; identifying actions that could possibly be set aside at some point in the future if they are done without the court’s authorisation, or that constitute a legal wrongdoing.

**Incapacity, coercion, and being unable to decide**

In addition to the problems as to what the courts mean by ‘a decision’ for the purposes of the inherent jurisdiction - outlined above - a further issue which has emerged from the inherent jurisdiction case law is what is meant by being incapacitous. It is in relation to this issue that the paper now turns. As established above, it is clear from Munby J’s original decision in *Re SA* that he saw the inherent jurisdiction as being available in situations where a person is incapacitated from making a decision: ‘The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason *deprived of the capacity* to make the relevant decision’.[[65]](#footnote-65) Moreover, it is clear from both *DL* and subsequent case law that this incapacity (or ‘vulnerability’) must be linked to coercion or undue influence, and does not necessarily depend on the presence of some sort of disability or medical condition. In *DL*, for example, McFarlane LJ suggested that the use of the inherent jurisdiction is ‘aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised *by a reason other than mental incapacity*’[[66]](#footnote-66) thereby clearly envisaging that *mental* incapacity is not the basis for invoking the inherent jurisdiction. In this respect, incapacity under the inherent jurisdiction diverges from incapacity under the MCA, which relies on evidencing that an inability to make a decision is because of a disturbance in the functioning of the mind or brain, such as dementia, a learning disability, mental illness, brain injury, or autism.[[67]](#footnote-67)

The requirement for some sort of coercion or undue influence has been reaffirmed in subsequent case law, notably *Southend-on-Sea Borough Council v Meyers.*[[68]](#footnote-68) This important caseinvolved a man, Douglas Meyers, with physical disabilities and diabetes. He had lived, for many years, with his son, KF, with whom he had a ‘co-dependent,’[[69]](#footnote-69) ‘dysfunctional’[[70]](#footnote-70) but ‘tender’[[71]](#footnote-71) relationship. KF himself had mental health, drug, and alcohol issues, but Mr Meyers had promised his wife before she died that he would ‘look after’[[72]](#footnote-72) KF. There were concerns about KF’s behaviour, including restricting his father’s access to care, acting in an aggressive and intimidating manners towards the carers, and damaging the family home. This ultimately culminated in a situation which included Mr Meyers being left in circumstances which amounted to severe physical neglect. An earlier *ex tempore* judgment in Mr Meyers’ case, and an unsuccessful appeal against it, held that there were reasonable grounds to believe that Mr Meyers lacked capacity under the MCA and authorised an urgent interim order for him to be accommodated in a care home.[[73]](#footnote-73) By the time the final case was heard, and following the stay in a care home, Mr Meyers wanted to return home to live with his son and no longer lacked capacity to make decisions about this under the MCA.

There were continuing concerns, however, as to the impact this move home might have on Mr Meyers’ future health and wellbeing, particularly if he continued to live with KF. In light of this, the local authority sought orders under the inherent jurisdiction on the basis that Mr Meyers was a vulnerable adult, and claimed he was vulnerable simply on the basis of his blindness, a ground mentioned by Munby J in his earlier judgment in *Re SA*.[[74]](#footnote-74) Hayden J confirmed that Mr Meyers was, indeed, a vulnerable adult and not only authorised measures under the inherent jurisdiction, but also clarified the nature of the relationship between vulnerability, incapacity, and disability:

I do not consider, even for a moment, that Munby J’s descriptive indications were intended to imply that all those who are blind are necessarily vulnerable and fall within the potential reach of the court’s inherent jurisdictional powers…I do not consider that it is the fact of Mr Meyers’ blindness that renders him vulnerable.[[75]](#footnote-75)

Such an approach – vulnerability divorced from disability – is also apparent in *Mayor and Burgesses of the London Borough of Croydon v KR,[[76]](#footnote-76)* and goes some way to allaying the fears of many of those sceptical about the use of the inherent jurisdiction as relying on an out-dated and medical model of vulnerability.[[77]](#footnote-77) It also mirrors s.2(3) of the MCA, which states that a person’s lack of mental capacity cannot be established solely by their age or appearance, or condition or aspect of their behaviour that might lead to unjustified assumptions about their capacity. Indeed, in *Al-Jeffery v Al-Jeffery[[78]](#footnote-78) -* a decision this article will return to later *-* the inherent jurisdiction has also been used in a situation where there was no identified disability at all.

While Hayden J rejected the local authority’s argument that Mr Meyers was vulnerable solely on the basis of his blindness, he nonetheless held that he *was* incapacitous and therefore vulnerable under the inherent jurisdiction. However, for Hayden J, this vulnerability was because of his relationship with his son which was perceived as coercive, or ‘dysfunctional’,[[79]](#footnote-79) thereby – in Hayden J’s eyes - fatally undermining Mr Meyers’ ability to make his own autonomous decisions. Likewise, in *Wakefield Metropolitan District Council & Anor v DN and MN,[[80]](#footnote-80)* Cobb J held that any invocation of the inherent jurisdiction *required* some form of coerced decision-making. *Wakefield* involved a young man who had been found guilty of various criminal offences and sentenced to a community order with a Mental Health Treatment Requirement (MHTR)*.* In refusing to have recourse to the inherent jurisdiction, Cobb J held that:

While it is certainly true that DN is vulnerable in some ways, and particularly in some contexts which he finds challenging, I do not find as a question of fact that his decision-making in relation to his residence…has been "vitiated" or so overborne by his circumstance…that he should be regarded as requiring the intervention of the High Court exercising its inherent jurisdiction... While I accept that DN faced a 'stark' choice in the criminal court when presented with the prospect of a custodial sentence if he had not accepted a community order with MHTR, I nonetheless do not consider that this disabled him from making a free choice.[[81]](#footnote-81)

From these authorities, it is beyond doubt that ‘vulnerability’ for the purposes of invoking the inherent jurisdiction therefore relies on evidencing that a person is incapacitated in the sense that their decision-making about something has been ‘vitiated’, or that their will has become so overborne that the decision is no longer freely made. As Sir James Munby, writing extra-judicially about a pre-MCA decision in *Re SK*[[82]](#footnote-82) by Singer J, articulates: ‘It will be seen that the key insight in Singer J’s reasoning was the availability of the inherent jurisdiction, in cases where an adult was suspected of being the victim of *coercion*, to ascertain their *true wishes* and establish whether they were acting of their *free will*.’[[83]](#footnote-83) The focus of this paper for the remainder of this section, however, is an elucidation of the way in which what the courts mean by ‘incapacity’ is, in fact, more complex and problematic than it might appear at first glance.

First, the concept of incapacity as formulated under the inherent jurisdiction does not contain the same sorts of safeguards around the meaning of incapacity as those embedded in the MCA. In relation to the latter point, sections 2 and 3 of that Act clearly spell out the elements of what it means to be incapacitous. A person lacks capacity if they are unable to make a decision and this is determined by either being unable to understand information relevant to a decision, being unable to use and weigh that information to make a decision, being unable to retain that information, or being unable communicate their decision about the matter.[[84]](#footnote-84) Moreover, the Act contains further safeguards against abuse of its powers and which govern the concept of ‘incapacity’. While the legislation does not go so far as to convey a *right* to make unwise decisions, section 1(4) does nevertheless stipulate that a person must not be deemed to lack capacity simply because they are making an unwise decision,[[85]](#footnote-85) and before someone is deemed to lack capacity all practicable steps must have been taken to help them reach a decision.[[86]](#footnote-86) By comparison, under the inherent jurisdiction case law, it remains ambiguous what judges mean by being incapacitous. One example of this revolves around ‘information’. Under section 3 of the MCA a person may lack capacity if they are unable to understand information relevant to the decision, a provision which has, in turn, spawned a host of case law around what is considered ‘relevant information’ for each type of decision where assessments are carried out under the MCA.[[87]](#footnote-87) If, as argued in the previous section, no such ‘decision’ is identified in cases involving the inherent jurisdiction, then - similarly - neither have the cases identified what information might be relevant for a person to demonstrate they understand in order to be deemed able – or unable – to make that decision.

Second, the approach of the courts in developing the inherent jurisdiction as a mechanism by which to intervene where a person is incapacitous because of some form of coercion or undue influence but does not lack capacity under the MCA, suggests a clear delineation between the two legal regimes which often does not exist in practice. Many situations that practitioners working in this field face involve the convergence of some form of disturbance in the functioning of the mind or brain together with coercion or undue influence. In light of the above it is therefore also not uncommon – as indicated in the previous section – to see cases arising which ask the court for a final determination as to whether a person lacks capacity under the MCA, or, alternatively, whether they lack capacity because of the coercion and therefore whether orders might be made under the inherent jurisdiction.[[88]](#footnote-88) Such applications require judges to be prepared to switch their judicial hats between the Court of Protection, and the Family Division of the High Court,[[89]](#footnote-89) and navigate a plethora of expert evidence, usually by mental health professionals – such as that presented in *NCC v PB* – as to whether the incapacity is because of the a person’s cognitive impairment, or because of the coercion. A cynical interpretation of these cases might view them as an attempt to circumnavigate the technicalities of the MCA in having to prove that it is the disturbance of the mind or brain that is causing the incapacity so that pre-decided protective measures can be put in place around the person either way.

Third, the courts have not been clear as to what they mean by ‘coercion’ or ‘undue influence’, which is apparently so central to the way in which the inherent jurisdiction now operates in such cases. The MCA, in contrast, requires incapacity to be because of a disturbance in the functioning of the mind or brain, which the Code of Practice to that Act explains as being ‘some sort of or disturbance that affects the way their mind or brain works.’[[90]](#footnote-90) In most cases, this criterion can be met using expert evidence and objective identification of such a disturbance, usually from a medical or mental health professional. Indeed in some MCA cases, judges have refused to find a lack of capacity because no evidence of a disturbance in the functioning of the mind or brain has been presented.[[91]](#footnote-91) However, in using coercion or undue influence as the ‘hook’ on which incapacity can be hung under the inherent jurisdiction, the courts have given a limited indication as to what exactly they are looking for in such coercion or undue influence. In effect, they have failed to elucidate any objective criteria as to what it is about the nature of the relationship between the person who is ‘incapacitated’ or ‘vulnerable’ and the person, people, or circumstances that are perceived to be coercive that justifies a finding of incapacity. In *Southend-on-Sea Borough Council v Meyers,* for example, Hayden J held that ‘[t]he essence of [Mr Meyers’] vulnerability is, in fact, his entirely dysfunctional relationship with his son…’.[[92]](#footnote-92) Likewise, in the previously examined case of *NCC v PB and TB,* the expert evidence suggested that PB may be incapacitous all the time because of her relationship with her husband.[[93]](#footnote-93) On the one hand, it is not necessarily problematic to suggest that coercion or undue influence may well compromise a person’s ability to make decisions, and there is a wealth of practical and philosophical evidence that suggests why this is, indeed, the case.[[94]](#footnote-94) For example, this could be through the impact such coercion or controlling behaviour has on a person’s understanding of relevant information where their abuser coerces them into believing information that is untrue. Or it may be because of the impact the coercion and undue influence has on their own sense of self-worth or self-trust in their ability to make a decision. As Anderson and Honneth argue, for example, if someone does not see themselves as a ‘competent deliberator…it is hard to see how one can take oneself seriously in one’s practical reasoning about what to do.’[[95]](#footnote-95) On the other hand, and the question that faces the courts in any application under the inherent jurisdiction, is that it is difficult to know where to draw the line between someone forcefully expressing their own opinion on a matter, and when this moves into the realm of unduly influencing the decision of another person. What is problematic, however, is the way in which interventions by the courts under the inherent jurisdiction can be made - on the basis of a dysfunctional relationship in Mr Meyers’ case, for example - without any indication of what types of situations or relationships will be considered as such by the courts.

The fourth and final criticism is more complex, and therefore requires greater unpacking. As mentioned above, there is nothing particularly problematic in suggesting that coercion or undue influence can compromise a person’s autonomous decision-making. However, there is an uncomfortable ambiguity that has emerged from the inherent jurisdiction case law as to what exactly is meant *legally* by being incapacitated because of coercion or undue influence. This is linked to the previous point because it results in the following question: when exactly will coercion, abuse, or undue influence threaten a person’s capacity to make a decision to such an extent that the court looks to intervene using the inherent jurisdiction? This depends on – and to return to Munby’s quote above – what is meant either by ‘true wishes’ or ‘free will’. A consideration of the case law suggests there are at least two potential explanations as to what is meant by being unable to make a decision because of coercion in the context of the inherent jurisdiction. The first is straightforward: a person explicitlywants to make a particular decision but is physically being prevented from exercising that decision by someone else’s coercion. In *Al-Jeffery v Al-Jeffery[[96]](#footnote-96)* for example, Amina Al-Jeffery was allegedly being physically held against her will in caged conditions in a locked apartment in Saudi Arabia and had communicated that she wanted to return home to the UK. She was being prevented from doing so by her father because, among other things, he had her passport. Holman J held that the inherent jurisdiction could be used in such circumstances to make orders against Ms Al-Jeffery’s father to require and facilitate her return to the UK.

However, not all cases where the jurisdiction has been used are ones where the ‘vulnerable’ adult is simply being prevented from *executing* a decision they have already made and the court agrees with, and thus helps to facilitate the exercise of that decision. Most cases where the inherent jurisdiction has been used – or at least argued - have been cases where it is suggested that the *decision itself* is claimed to have been overborne. Take, for example, Mr Meyers’ decision in *Southend-on-Sea Borough Council v Meyers* in which he wanted to remain living at home with his son. It was not the case that Mr Meyers had been very clear that he wanted to live at home *without* his son, but, rather, that his son was simply refusing to leave the premises. In such cases he might have been able to apply for a legal order preventing his son from staying in the house.[[97]](#footnote-97) In invoking the inherent jurisdiction, it is clearly something about Mr Meyers’ original decision to stay at home that the court perceives is being coerced. To again return to Munby J’s language, Mr Meyers’ decision to want to remain at home is not his true choice, or a product of his free will*:*

KF's influence on his father is insidious and pervasive. It triggers Mr Meyers's sense of duty, guilt, love and responsibility. These, in my assessment, are pronounced facets of Mr Meyers's character, reflected in a different way in his sense of duty, love for his country and pride in his medals. In this particular context however, these admirable features of his personality have become confused and distorted in a relationship in which the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.[[98]](#footnote-98)

In this second type of case, the High Court has failed to elucidate at what threshold a decision ceases to be authentically one’s own because of coercion. While this may seem a daunting task – albeit one that has been the subject of centuries of philosophical deliberation – without an elucidation of such matters it is difficult to see how the High Court’s approach is anything other than a kind of second-order paternalism, indicating to those at the centre of such cases that they are not making the decision that the courts think they really want tomake*,* or that they should be making. It is indicative of the confusion over this area of law that the same judge as made the declarations in Mr Meyers’ case, Hayden J, subsequently also had the following to say about this very matter when *declining* to use the inherent jurisdiction to enforce medical treatment on a patient who did not lack capacity under the MCA in *PH v Betsi Cadwaladr University Health Board*:

The court has no business in telling capacitious [sic] individuals what is in their best interests nor any locus from which to compel others to bend to the will either of what capacitious [sic] individuals may want or what the court might consider they require.  Such a regime would be fundamentally unhealthy in a mature democratic society and would have the collateral impact of undermining the principle of autonomy which is central to the philosophy of the MCA.[[99]](#footnote-99)

In one crucial way *PH v Betsi Cadwaladr University Health Board* is, in fact, perfectly reconcilable with the earlier cases considered in this paper: PH was not being subjected to coercion or undue influence and so there was no indication that he was ‘vulnerable’ in such a way for the purposes of the inherent jurisdiction. However, it is also worth considering why, in *PH,* Hayden J seemed so vociferous in his assertion of the right of MCA-capacitous patients to make decisions about medical treatment and for the court to uphold those, yet was willing to overrule Mr Meyers’ decision – which was also MCA-capacitous – that he wished to continue living at home with his son. If the response to this is that Mr Meyers lacked capacity because of his relationship with his son – exactly as the court held – then it becomes even more important for the court to provide more clarification as to what lacking capacity in this regard looks like, and when a relationship will cross the line into being so coercive that the court needs to intervene. Otherwise, it seems that decisions about contact and residence such as those in *Meyers* are ‘fair game’ to be overruled, but decisions about medical treatment, such as those in *PH,* are not.

**What sort of intervention and on what basis is this decided?**

While the previous section of this article has explored some of the issues in the characteristics of *who* might be the subject at the centre of an inherent jurisdiction case – the vulnerable adult who is being coerced - this section of the paper now moves to consider the next logical question. What orders might be made, and how are decisions about these orders reached, where there is a *prima facie* case that an adult is vulnerable in such a way? As with the previous section of this paper, in order to contextualise the argument that follows it is first necessary to outline some of the similar powers available under the MCA as a point of comparison. While the MCA has no definitive list of orders thatcan be made where a person lacks capacity to make a decision, it does provide legal mechanisms for either interim[[100]](#footnote-100) or more permanent[[101]](#footnote-101) orders. What these orders are will ultimately depend on the facts of the case and what the parties – often publicly funded parties – are able to or prepared to provide.[[102]](#footnote-102) However, the Act is clear that anything done for a person who lacks capacity must be done in their best interests.[[103]](#footnote-103) Moreover, the Act provides a defence against any legal liability for anything done in an incapacitated person’s best interests[[104]](#footnote-104) with section 4 detailing who must be consulted in arriving at a best interests decision,[[105]](#footnote-105) as well as the factors to consider in doing so, including the person’s past and present wishes and feelings, values and beliefs.[[106]](#footnote-106) Moreover, in making a best interests decision, section 1(6) requires consideration to be given as to whether its purpose can be effected in such a way that is less restrictive of a person’s rights and freedoms. As in the previous section of the paper, the MCA therefore provides important safeguards for anyone who lacks capacity to make decisions, and the courts have made it clear that a failure to follow those factors in section 4 will be a violation of a person’s rights, as well as rendering the defences in sections 5 and 6 of the Act unavailable.[[107]](#footnote-107) However, no such framework or principles guide implementation of the inherent jurisdiction, a lacuna that this section of the article now turns to. From here, the article argues that this omission ultimately has two implications: erroneous, irreconcilable, and problematic decisions being made by the court in different cases, as well as a lack of certainty as to what measures the court could – and should – impose under the inherent jurisdiction.

Before considering these criticisms, it is worth clarifying that there appear to be several situations when the courts have held clearly that they *cannot* intervene in adult welfare cases using the inherent jurisdiction. The first of these is the *De Keyser*[[108]](#footnote-108) principle, ‘that the inherent jurisdiction is *pro tanto* ousted by any relevant statutory scheme,’[[109]](#footnote-109) or where an order under the inherent jurisdiction would sit directly at odds with a statutory regime. Recent High Court decisions have held as much in relation to, for example, refusing to use it to provide secure accommodation when to do so would be at odds with the prohibition on using the inherent jurisdiction to such effect under section 100(2) of the Children Act 1989,[[110]](#footnote-110) or where using the inherent jurisdiction would expressly go against the statutory framework in the MCA where it ceases to have a remit because the person is no longer resident in England or Wales.[[111]](#footnote-111) Second, the inherent jurisdiction cannot usually be used to authorise what would otherwise be the commission of a crime,[[112]](#footnote-112) such as care workers facilitating access to sex workers by someone with a mental disorder.[[113]](#footnote-113) Finally, and in-line with basic rules of precedent, it is also unlikely that the inherent jurisdiction can be used to make orders that directly conflict with an approach taken by a higher court in an earlier decision, or for the enforcement of orders made beyond those already available in the procedural rules that govern the courts. For example, refusing to attach a power of arrest to an injunction made under the inherent jurisdiction in relation to a vulnerable adult who did not lack capacity under the MCA.[[114]](#footnote-114)

Notwithstanding the fact that the courts have been clear as to what it *cannot* be used to do, such clarity has, unfortunately, not been forthcoming as to what it *can* be used to do. As shown in the previous sections, the court has clearly found a role for the inherent jurisdiction in allowing it to intervene in certain cases such as those faced by the parents in *DL,* or by Mr Meyers in *Southend-on-Sea Borough Council v Meyers.* In *XCC v AA,[[115]](#footnote-115)* it was even used by Parker J, sitting in the Court of Protection, to issue a non-recognition of forced marriage order in relation to a young woman with severe and profound intellectual disabilities and who, having entered into a marriage ceremony in Bangladesh, was described as ‘slumped in a chair almost comatose and only just able with considerable prompting to repeat the words of consent to marriage, which…she did not understand.’[[116]](#footnote-116) Such a remedy – a non-recognition order - does not exist under the MCA, but was perceived to be needed on the facts, which justified the use of the inherent jurisdiction in implementing it.Yet there remains significant confusion as to what the inherent jurisdiction can be used to do, and how judges should decide this. From here, the paper critiques three particular areas of confusion that emanate from the courts as to how the jurisdiction should be used in such cases: first, whether it should be used to direct orders against the person being abused or just their abuser; second, the principles on which anything done under the inherent jurisdiction rests, and, finally, whether the jurisdiction should ever be used to deprive a person of their liberty.

**Against the Abuser or the Abused: ‘Facilitative’ of Autonomy, or ‘Dictatorial’?**

A key locus of debate before the courts is the way in which orders under the inherent jurisdiction should be used, and particularly whether it can be used for orders directed against the adult being abused or coerced. In *DL,* MacFarlane LJwas clear that ‘the facilitative, rather than dictatorial, approach of the court…would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their Article 8 rights.’[[117]](#footnote-117) In effect, orders made should be those which facilitate the making of an autonomous decision,[[118]](#footnote-118) and therefore directed towards the person doing the abusing, rather than imposing a decision on an individual - or the ‘vulnerable adult’, to use the court’s terminology. This approach seems to be in line with earlier case law. For example, in in *Re SA*, Munby J held that the court has:

the power to make whatever orders and direct whatever inquiries are needed to ascertain, when a marriage is proposed or arranged, what SA’s true wishes are and to ascertain whether or not she has been able to exercise her free will or is confined, controlled, coerced or under restraint – in short to ascertain the true state of affairs.[[119]](#footnote-119)

Likewise, in *LBL v RYJ,[[120]](#footnote-120)* Macur J held that the jurisdiction should be used to ‘facilitate the process of unencumbered decision-making,’[[121]](#footnote-121) and, in *A Local Authority v A*, Bodey J held that ​the aim of anything done under the inherent jurisdiction should be ‘to create a situation where he or she can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do.’[[122]](#footnote-122) It is precisely this reasoning that led Hayden J in *Al-Jeffery* to state that he makes no orders directed towards Amina herself,[[123]](#footnote-123) and for Alex Verdan QC to refuse to place a travel ban on a young woman over whom there were concerns about grooming in the recent case of *London Borough of Islington v EF.[[124]](#footnote-124)*

Yet three points are worth considering here. First, it is not always possible to separate out the interests, actions, or decision-making of the ‘coerced’ person, from the person doing the coercing. It is precisely this that Hayden J acknowledges in *Meyers* when he identifies how ‘enmeshed’[[125]](#footnote-125) both Mr Meyers and his son are. That an order made by the courts is viewed objectively as facilitative simply because it is against an abuser highlights the epistemological dissonance between the perceived objectivity of the courts as compared to the subjective experience of the person whose autonomous decision-making is being ‘facilitated’. The same order may well be subjectively perceived as dictatorial by the person being abused because it has the de factoresult of controlling who and how they can see and spend time with. As the commentators at 39 Essex Chambers note about the decision in *Meyers*; *‘*although intended to be facilitative, rather than dictatorial…the great safety net of the inherent jurisdiction is capable of “facilitating” a vulnerable adult to move in one direction, by removing all other available choices*.*’[[126]](#footnote-126)While procedurally an order under the inherent jurisdiction might be directed towards the ‘abuser’, it is difficult to see how an order directed towards KF is experienced by Mr Meyers differently to an order directed towards Mr Meyers himself, prohibiting him from living with his son.

Second, it is not always the case that orders under the inherent jurisdiction have been sought solely towards those doing the abusing. It is therefore not immediately obvious from the current state of the case law that this is, in fact, the only approach the courts would take under the inherent jurisdiction, despite the dicta of the Court of Appeal in *DL*. This is partially demonstrated over the confusion by the courts as to whether the inherent jurisdiction can ever be used to deprive someone of their liberty, discussed further below. Aside from this, however, even in *Southend-on-Sea v Meyers* Hayden J acknowledged that orders solely directed towards an abuser might not always be feasible, by directing that orders might have to be drawn up following the hearing which restricted Mr Meyers’ contact with his son; orders which the judge further acknowledged that Mr Meyers may not comply with.[[127]](#footnote-127) In *Mazhar v Birmingham Community Healthcare NHS Foundation Trust*,[[128]](#footnote-128) urgent without notice orders were sought (and carried out) against Mr Mazhar to remove him to hospital. Likewise, in *Redcar and Cleveland Borough Council v PR[[129]](#footnote-129)* interim orders were made against PR to stop her living at home with her parents using the inherent jurisdiction but later discharged and criticised by Cobb J; and in *London Borough of Islington v EF[[130]](#footnote-130)* orders against EF restricting her travel to Brazil were sought but refused.

**Best Interests or Necessary and Proportionate?**

When decisions are made using the inherent jurisdiction, it is also unclear on what principles such decisions will be made. Unlike the MCA, which has a requirement that decisions made on behalf of an incapacitous adult are made in their best interests, there is no such corresponding principle under the inherent jurisdiction. Yet an analysis of the case law demonstrates some confusion as to on what basis orders should be made, and what should be weighed up as part of the inherent jurisdiction. Indeed, given the cases above that indicate that the aim of the inherent jurisdiction should be facilitative rather than dictatorial, it is unlikely that ‘best interests’ - a form of substituted decision-making in which a decision is effectively imposed on a person - would be best suited to such a goal. Despite this, some judges have suggested that best interests *should* be the standard under the inherent jurisdiction. For example, in *NCC v PB,* Parker J made the following comments about the remit of the inherent jurisdiction*:* ‘I see no indication that the inherent jurisdiction is limited to injunctive relief. Each case depends on the degree of protection required and the risks involved. And the court must always consider Article 8 rights and *best interests* when making a substantive order.’[[131]](#footnote-131) Aside from these *obiter* comments, some courts have been more detailed as to the principles at play when deciding to make orders using the jurisdiction, such as the following principles used to decide whether to authorise DNA testing on a deceased man: statutory interpretation, the presence or absence of consent, the public interest, knowledge of identity, the interests of others, the interests of justice, and the range of circumstances that might arise.[[132]](#footnote-132)

Other judges, however, have suggested that the proper basis for determining what should be done using the inherent jurisdiction should be whether an order is ‘necessary and proportionate’, aligning it both with the defences available in the MCA,[[133]](#footnote-133) and the standard in human rights law. As Hayden J states in *Meyers,*

It is also necessary to restrict the extent of Mr Meyers's contact with his son in order to keep him safe. I am bound to say that I do not see that this should represent an insuperable challenge, even anticipating, as I do, that Mr Meyers may not cooperate. To the extent that this interferes with his Article 8 rights it is, again as I have indicated above, a necessary and proportionate intervention.[[134]](#footnote-134)

Likewise, in *London Borough of Wandsworth v M,[[135]](#footnote-135)* injunctive relief was granted under the inherent jurisdiction against J - a 17-year-old on the cusp of turning 18 *-* as the interim capacity assessment under the MCA was weak*.​* Hayden J held that‘central in considering the extent of the relief to be granted is the requirement to identify a balance between the protection of the individual and respect for his liberty. Thus, the order must reflect the tension between these two competing rights and obligations.’[[136]](#footnote-136)In this case then, the balance was achieved not by compelling J to live at a particular place, but by putting in place an injunction to stop him living with his mother at her house.

Without this certainty as to how the jurisdiction could be used, there can also be no indication of the factors that courts must consider in deciding anything under the inherent jurisdiction. While section 4 of the MCA is clear that the wishes, feelings, values, and beliefs of the person who lacks capacity should be taken into consideration in any best interests decision, as well as the views of anyone engaged in caring for them, there is no such similar obligation in cases involving the inherent jurisdiction. This is perhaps unsurprising because it would require an explicit recognition of the fact that the court is going against the wishes of an adult who does not lack mental capacity. This is despite Davis LJ in *DL* acknowledging that it is,

the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are…there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible.[[137]](#footnote-137)

However, a failure to elucidate the extent to which the inherent jurisdiction *does* allow a person to be eccentric, unorthodox, obstinate, or irrational – and it clearly does not in some cases – or to elucidate the weight to be given to the views of the person seeking to make an unwise decision, is, yet again, another safeguard provided in the MCA that the inherent jurisdiction lacks. As Keywood notes,

at a time when English law is increasingly recognising the residual autonomy interests of those who lack capacity to make an autonomous decision…it is right to question whether the wishes and values of those subject to the inherent jurisdiction might, at least in some cases, seem to count for so little.[[138]](#footnote-138)

**Deprivation of Liberty**

A final area that has caused confusion among the courts in cases where the inherent jurisdiction is argued is whether it can be used to authorise a person’s deprivation of liberty. At the crux of this issue is Article 5 of the European Convention, which states that everyone has a right to liberty, and nobody shall be deprived of their liberty unless, under Article 5(1)(e)*,* this involves the detention of a person of unsound mind and that such detention is in accordance with a procedure prescribed by law. In order to answer the question as to whether the inherent jurisdiction can therefore be used to deprive someone of their liberty in accordance with Article 5 it is first necessary to take a brief historical detour, and return to the decision of the House of Lords in *R (L) v Bournewood Community and Mental Health NHS Trust.[[139]](#footnote-139)* The case involved a young man, HL, who had become distressed while at his day care centre. He had subsequently been taken to Bournewood hospital and sedated. Although eligible, he was not admitted or detained formally under the Mental Health Act 1983, and his detention was therefore challenged by his foster carers as being unlawful. The issue for the court to determine was whether HL was deprived of his liberty given that he never attempted to leave the hospital; a question to which the House of Lords answered ‘no’.[[140]](#footnote-140) However, they continued that even if they had decided that HL had been deprived of his liberty, then it was possible to use the common law doctrine of necessity - the inherent jurisdiction - to authorise this. HL’s appeal to the European Court of Human Rights succeeded,[[141]](#footnote-141) and it was subsequently held (by 5 judges to 4) both that he had been deprived of his liberty, and that this had not been ‘in accordance with a procedure prescribed by law’[[142]](#footnote-142) and had therefore violated Article 5. It is the decision of the European Court of Human Rights that led to the insertion of the Deprivation of Liberty Safeguards into the MCA to satisfy this requirement.

Given the decision in *HL v UK,* it is apparent that there is an argument that the inherent jurisdiction should never be used to deprive someone of their liberty given that it is still a procedure that is not prescribed by law, and therefore still not compliant with Article 5. Yet recent decisions have held that it can. First, where there is a gap between the MCA and the Mental Health Act 1983 and an adult is incapacitous under the MCA because of a mental disorder such as in *An NHS Trust v Dr A,* [[143]](#footnote-143) and second, when authorising a care plan pursuant to a conditional discharge under the MHA in *Hertfordshire County Council v AB*.[[144]](#footnote-144) However, the question as to whether a ‘vulnerable adult’ - someone who is being coerced or abused but does not lack mental capacity under the MCA - can be deprived of their liberty using the inherent jurisdiction remains an open question, and one that is likely to see future litigation before the courts.

In the recent case of *Mazhar*,[[145]](#footnote-145) Baker LJ believed that there was a ‘preponderance of authority at first instance [which] supports the existence of this jurisdiction, but there is some authority to the contrary.’[[146]](#footnote-146) Yet as Sir James Munby, writing extra-judicially, has pointed out, this claim cannot be supported.[[147]](#footnote-147) Neither of the previous cases discussed in this section, *An NHS Trust v Dr A,* nor *Hertfordshire County Council v AB,* are authority for this given that neither of the individuals in those respective cases were ‘vulnerable’ because of coercion. Dr A was on hunger strike, and moreover, lacked mental capacity under the MCA to make decisions about the matter. AB did not lack mental capacity under the MCA, but neither was he being coerced by another individual. While both were vulnerable in many ways, this was not because their free will had been overborne, or their decision-making vitiated because of undue influence by a third party. Properly read, neither is *Meyers* authority for this proposition. Although an earlier unpublished judgment, later upheld on appeal[[148]](#footnote-148) found that Mr Meyers could be taken to a care home and effectively deprived of his liberty, this was held to have been an emergency and was thus permitted under Article 5, although argued by Pugh[[149]](#footnote-149) to be an improperly decided as such. In the alternative it was permitted under the MCA given that Mr Meyers probably ‘lacked the capacity to take decisions regarding his general welfare in consequence of the temporary disabling effects of the dehydration and urinary tract infection.’[[150]](#footnote-150) Although we do not have a copy of Hayden J’s final orders in the earlier *ex tempore* judgment, the later decision involving Mr Meyers under the inherent jurisdiction that prohibited him from living with his son, but allowing him to move home, may not have been a deprivation of liberty at all.[[151]](#footnote-151)

The only authorities for the claim that the inherent jurisdiction can be used to deprive a ‘vulnerable’ person of their liberty are now *Mazhar* itself - although this point was not argued before the Court of Appeal and so Baker LJ’s comments should only be considered *obiter* - and the similarly *obiter* statements made by Parker J in *NCC v PB: ‘*In my view the inherent jurisdiction does extend to orders for residence at a particular place. If that constitutes a deprivation of liberty then in my view the court could authorise it pursuant to the inherent jurisdiction.’[[152]](#footnote-152) Indeed, other courts have disagreed strongly with this proposition. In *Wakefield Metropolitan District Council v DN[[153]](#footnote-153)* Cobb J refused to authorise DN’s deprivation of liberty using the inherent jurisdiction and expressed considerable doubt as to whether it should ever be used to deprive a person of their liberty. Moreover, and notwithstanding Baker LJ’s assertions in *A Local Authority v BF* that in some cases adults who did not lack capacity under the MCA might still be of unsound mind within the meaning of Article 5(1)(e),*[[154]](#footnote-154)* such a use of the inherent jurisdiction to deprive someone of their liberty may not comply with *Winterwerp.*[[155]](#footnote-155)In that case, the European Court of Human Rights held that – save in exceptional circumstances - unsoundness of mind for the purposes of Article 5(1)(e) required a mental disorder, evidenced through objective medical expertise, and the nature of the mental disorder must justify the deprivation. This was acknowledged as much by the Law Commission in 1993:

No such justification exists in relation to people who are merely believed to be vulnerable, rather than incapacitated or mentally disordered, and who do not wish to be removed. The extension of these powers to such persons would, therefore, not only give rise to the general issue of policy to which we have already referred, but would also raise serious questions under the Convention.[[156]](#footnote-156)

Nor would it comply with *HL v UK,* in that it is not in accordance with a procedure prescribed by law. It also seems impossible to resolve this particular question without resolving the previous issue identified in this section, notably, on what basis orders *are* made using the jurisdiction. If indeed it is the test of necessary and proportionate as it is for any restraint under the MCA[[157]](#footnote-157) - or a ‘facilitative’ approach - then it seems unlikely that a deprivation of liberty – placing someone under continuous supervision and control and not free to leave wherever they are placed – would be considered proportionate, or facilitative of a decision free from coercion.

**The Need for REFORM?**

In many ways the current state of the inherent jurisdiction case law is confused and troubling. It is also therefore worth considering the extent to which some of these issues could be resolved in other ways, either through existing legal frameworks, the creation of a new one, or a more principled approach under the inherent jurisdiction. It is clear that in situations where a person lacks capacity under the MCA, remedies under this piece of legislation remain available. Beyond this, however, one option to clarify what types of situations might fall foul of the inherent jurisdiction where the MCA does not apply might be for the courts to divorce its use from the concept of either ‘decisions’ or ‘incapacity’, and instead simply grant orders on the basis of whether there appears to be controlling or coercive behaviour. This approach chimes with that advocated by the Law Commission in 1993. In its consultation into a new mental capacity law which ultimately culminated in the MCA, the Law Commission suggested a set of public law powers to intervene in cases of abuse and neglect but did not see these as linked to a person being incapacitated: ‘…there are other people *who are not incapable of taking their own decisions*, but are also especially vulnerable to abuse or neglect from which they are unable to protect themselves.’[[158]](#footnote-158) In pursuing such an approach, courts might look to definitions found in criminal law or domestic abuse legislation and develop the inherent jurisdiction more explicitly using these. Section 76 of the Serious Crime Act 2015, for example, criminalises controlling or coercive behaviour in an intimate or family relationship. The components are that A commits an offence if they are personally connected to B, they engage in repeated behaviour that is controlling or coercive towards, and has a serious effect on, B and which A knows, or ought to have known, will have a serious effect on B.[[159]](#footnote-159) Having a serious effect on B is defined as causing B to fear, on at least two occasions, that violence will be used against them, or if it causes B serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.[[160]](#footnote-160) Furthermore, the statutory guidance for this offence indicates that the types of behaviour that would be considered controlling or coercive are, for example, depriving someone of their basic needs,[[161]](#footnote-161) and a serious effect might be physical or mental health deterioration.[[162]](#footnote-162) The Domestic Abuse Act 2021 contains similar provisions in that it includes controlling or coercive behaviour as ‘abusive’.[[163]](#footnote-163) It is clear that on any reading of the facts in Mr Meyers’ case, the nature of his relationship with his son would have met this definition. Such an approach may offer more clarity than relying on the concept of a ‘dysfunctional relationship’ as being the basis of Mr Meyers’ vulnerability, as well as offering a greater steer to practitioners as to when an order under the inherent jurisdiction might be appropriate. However, it also provokes the question as to why a court order would be needed when interventions under either the Serious Crime Act or Domestic Abuse Act could be pursued.

In the alternative, there are also domestic abuse protection orders (DAPO) and notices (DAPNs) under the Domestic Abuse Act 2021 which can be made in certain circumstances either by the police in the case of DAPNs, or a court in the case of DAPOs. The Act only applies where two people are ‘personally connected’[[164]](#footnote-164) and so these provisions do not extend to all types of relationships where a person might be abused or coerced. Moreover, the non-judicial powers in the form of DAPNs can only be issued by the police, indicating that the Act still views domestic abuse as firmly within the realm of criminal law enforcement. This is also the case for any injunctions under the Anti-social Behaviour, Crime and Policing Act 2014 as suggested by Lock.[[165]](#footnote-165) Yet many situations that arise where a person is being abused or coerced may not come to the attention of the police, and the adults involved may be more likely to have had closer contact with other services such as health, social care, or social work. In Mr Meyers’ case, for example, it was the social worker who found Mr Meyers and persuaded him to leave his home initially and move to a care home. Other orders such as non-molestation orders, or injunctions under the Protection from Harassment Act 1997, can only be sought by the person being abused or harassed, which many individuals may not want to pursue, or be in a position to seek.

It is also important to note that in its series of consultations into the reform of this area of law in light of the decision in *West Berkshire,* the Law Commission clearly intended for there to be some form of statutory power to intervene in situations where there was suspected abuse or neglect. The Law Commission proposed, among other things, a statutory duty to investigate suspected abuse,[[166]](#footnote-166) to authorise the assessment or placement of a person in protective accommodation,[[167]](#footnote-167) as well as the deployment of emergency protection powers where a vulnerable person is at risk of harm.[[168]](#footnote-168) One argument might therefore be that Parliament has decisively decided against such powers by not enacting them into legislation, particularly since subsequent legislation *has* been enacted thus providing some public law obligations in these situations. For example, the duty to undertake enquiries where there are adults with needs for care and support experiencing or at risk of experiencing abuse or neglect and unable to protect themselves,[[169]](#footnote-169) to provide an advocate,[[170]](#footnote-170) and the availability of Adult Support and Protection Orders in Wales.[[171]](#footnote-171) In effect, this argument suggests that Parliament has had multiple opportunities to legislate for greater powers but has declined to do so. The consequence of this position might be that the way the inherent jurisdiction has been used could be seen as unlawful if – as mentioned earlier – the *De Keyser* principle applies. That is, the existing legislation that *does* exist in this area can be seen as having *pro tanto* ousted the remit of the jurisdiction. This argument is yet to be tested before the courts given that the seminal appeal case of *DL*, which resulted in the ‘rediscovery’ of the inherent jurisdiction in relation to vulnerable adults, was decided in 2012, before the Care Act 2014 – now the primary piece of adult safeguarding legislation – entered into force.

Thus, the question comes full circle: should Parliament revisit the question as to whether statutory mechanisms are needed to replace the court’s ad hoc use of the inherent jurisdiction? In *Meyers,* Hayden J clearly thought there was a *prima facie* case for some sort of legal intervention and, moreover, thought that failing to do so would violate the positive obligation the state has to protect Mr Meyers’ life: ‘the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers' life requires to be protected and I consider that, ultimately, the State has an obligation to do so.’[[172]](#footnote-172) If there is, indeed, a positive obligation to protect lives in cases such as Meyers, then why have legislators not yet taken up the mantle to offer such substantive protections in a statute, and enabled professionals working in this sphere to take such actions without requiring recourse to the courts? Perhaps more importantly, given the serious intervention such cases have with a person’s Article 8 rights, why is such intervention not ‘in accordance with the law’ through the provision of statutory powers and obligations? A statutory framework would not simply be there to offer substantive protection for adults facing abuse or neglect, but also to ensure there is accountability for anything done by professionals, clarity for adults as to what their rights are, and a clear framework for how anything done under the legislation could be challenged. What is currently confused about the state of the inherent jurisdiction case law – when it should apply, what it should do, and on what basis this should be decided – is exactly what is required from a legislative framework for situations such as those faced by Mr Meyers, or the parents in *DL*, should Parliament decide to take up this task*.*

**Conclusion**

Since 2012 the inherent jurisdiction retains a variety of roles and can be used in many types of cases that, broadly speaking, involve possible threats to the welfare of adults. In this way it has become a form of adult safeguarding power invoked where a person’s decision-making is vitiated or overborne by coercion or undue influence. In light of this, the court has very clearly made a value judgment that such adults deserve some protection. To return to a quote used earlier, ‘the inherent jurisdiction is plainly a valuable asset, mending holes in the legal fabric that would otherwise leave individuals bereft of a necessary remedy.’[[173]](#footnote-173) However, such sentiments also generate cause for concern where there is confusion as to what courts mean by an ‘individual’, what is ‘necessary’, or even what is a ‘remedy’! It is undoubtedly the case that adults who are being abused require some protection, but what that protection is should arguably not be left to the common law on an ad hoc and case by case basis.

While it is not possible to say that the inherent jurisdiction will *never* be needed in future adult welfare cases, the use of the inherent jurisdiction as it has evolved to date lacks some of the core safeguards that can be found in parallel statutory frameworks such as the MCA: who it applies to, when you can do something, and how you might decide to do that. If there is indeed a relationship between vulnerability and incapacity, then much like the MCA spells out the meaning of incapacity in being unable to make a decision, it needs to be made clear exactly what it means to be incapacitated because of coercion or undue influence. If the inherent jurisdiction can allow for the deprivation of liberty of a capacitous but vulnerable adult – a contentious and, according to this paper, erroneous proposal – then this needs to be clarified either by the courts, or preferably by Parliament, including when such a remedy might be warranted and how this will be determined. As Hewson has argued in respect of *DL*, ‘if the public and Parliament perceive judicial power as being confined by nothing more than what judges think is right, then confidence in the judicial system will be replaced by fear of it becoming arbitrary and uncertain in its application.’[[174]](#footnote-174) When deciding when to invoke the jurisdiction, the courts may very well be ‘neither midwives nor rainmakers,’[[175]](#footnote-175) but at present they are acting like both. Adults who may be vulnerable to coercion or undue influence require more than such a piecemeal, contentious, and confused approach to the development of the law. They deserve more than ‘palm tree justice.’

1. Mental Capacity Act 2005, ss 2-3. [↑](#footnote-ref-1)
2. *DL* *v A Local Authority* [2012] EWCA Civ 253. [↑](#footnote-ref-2)
3. *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam). [↑](#footnote-ref-3)
4. David Lock, ‘Decision Making, Mental Capacity and Undue Influence: Do hard cases make bad – or least fuzzy edged – law? (The Court of Protection Bar Association Seminar 28th October 2019); Barbara Hewson, ‘Analysis. “Neither Midwives nor Rainmakers” – Why DL is wrong. (2013) PL 451; James Munby, ‘Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going? (The Court of Protection Bar Association Lecture, 10th December 2020). [↑](#footnote-ref-4)
5. Suespiciousminds ‘The court’s magical sparkle power™ - can you take a DNA paternity test from a dead man?’ (21 April 2016) <https://suesspiciousminds.com/tag/spencer-v-anderson-2016/> (last visited 18 July 2022). [↑](#footnote-ref-5)
6. See, for example, the Safeguarding Adults Review into the death of Miss T: ‘The on-going difficulty of the safeguarding partners to gain a sufficient understanding of the nature of inherent jurisdiction is understandable, it not widely used and by its nature is difficult to grasp because it is not referred to in legislation and rarely mentioned in guidance.’ Alison Ridley, ‘Learning Review – Miss T’, (Isle of Wight Safeguarding Adults Board, 2016) <https://www.iowsab.org.uk/wp-content/uploads/2019/01/2880-Miss-T-final-report-for-publication-22.09-v9.pdf> (last visited 3 July 2022), 13. In this particular case, the local authority solicitor did not think an application under the inherent jurisdiction was appropriate despite the head of a local barristers' chambers thinking that it might be, and even advising the local authority as such. Contrast this with the evidence of the psychiatrist: "His view was that Miss T’s freedom of action was constrained by her past history of trauma and a lack of ability to make truly autonomous decisions, and for this reason, he regarded her as possibly coming under the Inherent Jurisdiction of the High Court with regard to some decision making" (page 12). [↑](#footnote-ref-6)
7. Kirsty Keywood, ‘The Vulnerable Adult Experiment: Situating Vulnerability in Adult Safeguarding Law and Policy’ (2017) 53 *International Journal of Law and Psychiatry* 88; Laura Pritchard-Jones ‘The Good, the Bad, and the Vulnerable Older Adult’ (2016) 38 JSWFL 51; Amber Pugh ‘Emergencies and Equivocality Under the Inherent Jurisdiction: *A Local Authority v BF* [2018] EWCA Civ 2962 and *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam)’ (2019) 27 Med LR 675. [↑](#footnote-ref-7)
8. For an excellent early summary see: Alex Ruck Keene, ‘The Inherent Jurisdiction: Where are we now?’ (23 January 2013) <https://www.localgovernmentlawyer.co.uk/adult-social-care/307-adult-care-features/12939-the-inherent-jurisdiction-where-are-we-now> (last visited 22 July 2022). [↑](#footnote-ref-8)
9. Law Commission, *Mental Incapacity* (Law Com No 231, 1995), 2.45. [↑](#footnote-ref-9)
10. J Farley ’Minimize Codification by Expanding Use of Inherent Jurisdiction‘ (2007) 27 *Lawyers Weekly* 13, as cited in Joan Donnelly, ’Inherent Jurisdiction and Inherent Powers of Irish Courts’ (2009) 2 *Judicial Studies Institute Journal* 122, 160. [↑](#footnote-ref-10)
11. Alex Ruck Keene, ‘Vulnerable Adults Bill’ (16 March 2017) <https://www.mentalcapacitylawandpolicy.org.uk/vulnerable-adults-bill-help-wanted/> (last visited 28 July 2022). [↑](#footnote-ref-11)
12. *F v West Berkshire* *Area Health Authority* [1990] 2 AC 1, 13. [↑](#footnote-ref-12)
13. *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] AC 909, 977. [↑](#footnote-ref-13)
14. This article does not reflect on the use of the inherent jurisdiction or *parens patriae* jurisdiction in cases involving children, which is more common. [↑](#footnote-ref-14)
15. Jacob does acknowledge that the jurisdiction also had other uses, most prominent among these is punishment for contempt of court and to stay or dismiss an action. [↑](#footnote-ref-15)
16. n 12 above. While this is the first appellate decision confirming that courts could have recourse to its declaratory jurisdiction to authorise medical treatment, Wood J had, 3 years earlier, also made a similar decision in the High Court in the case of *T v T* [1988] Fam 52. [↑](#footnote-ref-16)
17. No test at the time as to what lacking capacity meant, however at page 4 Lord Brandon states ’mental incapacity is that a person cannot by reason of mental disability understand the nature or purpose of an operation or other treatment.’ The test was later clarified by Thorpe J in *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819. [↑](#footnote-ref-17)
18. n 12 above, 52. [↑](#footnote-ref-18)
19. For a detailed history of the development of the *parens patriae* jurisdiction, see James Munby, ‘Protecting the Rights of Vulnerable and Incapacitous Adults - the Role of the Courts: An Example of Judicial Law Making’ (2014) 26 CFLQ 64. It is also therefore unfortunate that, in recent cases, there appears to be confusion over where the powers of the inherent jurisdiction are derived from, and that it is not the same as the *parens patriae* jurisdiction. In *Re EOA* [2021] EWCOP 20 at [10], for example, the judge Williams J, in recounting the argument put forward by the Official Solicitor, incorrectly described the inherent jurisdiction as the ‘Parens Patriae Inherent Jurisdiction.’ [↑](#footnote-ref-19)
20. This provides for the management of ’property and affairs’ of patients. The Court decided that Part VII was designed to cover business matters and legal transactions, not healthcare or medical treatment decisions. [↑](#footnote-ref-20)
21. Non-mental health treatment, which was governed at that time by the Mental Health Act 1983. [↑](#footnote-ref-21)
22. n 12 above, 5. Parliament did ultimately enact the Mental Capacity Act 2005 to fill this gap. [↑](#footnote-ref-22)
23. *ibid* 75 per Lord Goff of Chieveley. [↑](#footnote-ref-23)
24. *ibid* 19. [↑](#footnote-ref-24)
25. Munby, n 19 above. [↑](#footnote-ref-25)
26. *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528, 530. [↑](#footnote-ref-26)
27. For a summary of some of these cases, see Michael Dunn, Isabel Clare, Anthony Holland, and Michael Gunn, ‘Constructing and Reconstructing ‘Best Interests’: An Interpretative Examination of Substitute Decision‐making under the Mental Capacity Act’ (2007) 29 JSWFL 117, 120: Pritchard-Jones, n 7, above. [↑](#footnote-ref-27)
28. *Airedale NHS Trust v Bland* [1993] AC 789. [↑](#footnote-ref-28)
29. *Re S (Adult: Refusal of Medical Treatment)* [1992] Fam 123; *Re MB (Caesarean Section)* [1997] EWCA Civ 1361. [↑](#footnote-ref-29)
30. *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649. [↑](#footnote-ref-30)
31. *Re C (Mental Patient: Contact)* [1993] 1 FLR 940; *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50. [↑](#footnote-ref-31)
32. *R (L) v Bournewood Community and Mental Health NHS Trust* [1998] 3 All ER 289, although note this case proceeded to the European Court of Human Rights and the use of the inherent jurisdiction was not found to be ’a procedure prescribed by law’ and therefore did not satisfy Article 5(1)(e). Article 5 had therefore been violated in this case. This point will be explored further below. [↑](#footnote-ref-32)
33. *Re G* [2004] EWHC 2222 (Fam). [↑](#footnote-ref-33)
34. *Re F (Adult Patient)* [2000] EWCA Civ 3029. [↑](#footnote-ref-34)
35. n 9 above, 2.47. [↑](#footnote-ref-35)
36. Earlier High Court decisions indicated that it did remain: *Re SK* [2004] EWHC 3202 (Fam)*; A London Borough Council v KS and LU* [2008] EWHC 636 (Fam), and that it was ‘alive and well’: *A Local Authority v A* [2010] EWHC 1549 (Fam) at [79]. [↑](#footnote-ref-36)
37. At some point during the proceedings GRL lost mental capacity under the MCA to make decisions about matters and his proceedings were transferred to the Court of Protection. [↑](#footnote-ref-37)
38. n 2 above, at [1]. [↑](#footnote-ref-38)
39. n 2 above, at [63]. [↑](#footnote-ref-39)
40. *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam). [↑](#footnote-ref-40)
41. *ibid* at [76]. [↑](#footnote-ref-41)
42. *ibid* at [82]. [↑](#footnote-ref-42)
43. *Spencer v Anderson*[2016] EWHC 851 at [59]. [↑](#footnote-ref-43)
44. n 40 above. [↑](#footnote-ref-44)
45. n 40 above, at [77]-[79] (emphasis added). Munby J also elaborated on a vulnerable adult as being ‘someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity’ (at [82]). This has been criticised by some as being dated, not least because of his reliance on the wording of the National Assistance Act 1948: Pritchard-Jones, n 7 above. [↑](#footnote-ref-45)
46. Munby, n 4 above. [↑](#footnote-ref-46)
47. Paul Skowron ‘The Relationship Between Autonomy and Adult Mental Capacity in the Law of England and Wales’ (2019) 27(1) Med LR 32, 42. [↑](#footnote-ref-47)
48. n 2 above,at [53] (emphasis added). [↑](#footnote-ref-48)
49. An analysis of which is outside the remit of this paper. However, one example is the way in which the Court of Protection has ‘subdivided’ the concept of a decision about contact into narrower areas, such as decisions about using the internet, and social media: *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2*; Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3. See: Laura Pritchard-Jones, ‘*A Local Authority V JB* [2020] EWCA Civ 735 and *A Local Authority V AW* [2020] EWCOP 24: Rethinking Sexual Capacity?’ (2021) 29(1) Med LR 143. [↑](#footnote-ref-49)
50. *Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam). [↑](#footnote-ref-50)
51. Lock, n 4 above. [↑](#footnote-ref-51)
52. *NCC v PB and TB* [2014] EWCOP 14. [↑](#footnote-ref-52)
53. *ibid* at [52]. [↑](#footnote-ref-53)
54. *ibid* at [63]-[65] (emphasis added). [↑](#footnote-ref-54)
55. PB was deemed to lack capacity under the MCA and so the case was eventually decided under that statutory framework. [↑](#footnote-ref-55)
56. Which it may not be given Munby J’s expansive framing of the jurisdiction in *Re SA* as outlined above; a person may lack capacity under the jurisdiction ‘for some other reason’. [↑](#footnote-ref-56)
57. *LBX v K* [2013] EWHC 3230 (Fam); *PC v City of York Council* [2013] EWCA Civ 478. [↑](#footnote-ref-57)
58. Toby Williamson, Geraldine Boyle, Pauline Heslop, Marcus Jepson, Paul Swift, and Val Williams. ‘Listening to the Lady in the Bed: The Mental Capacity Act 2005 in Practice for Older People’ (2012) 2 *Elder Law Journal* 185, 189. [↑](#footnote-ref-58)
59. n 9 above, 3.4. [↑](#footnote-ref-59)
60. The same issue exists in the MCA, where being unable to decide means a variety of things. At one end of the spectrum, it may mean literally being unable to decide because of the effects of a persistent vegetative state, for example. At the other end of the spectrum, it may mean that a person is only marginally unable to do any one of the things in section 3(1) and therefore only just falls into ‘lacking capacity’. I would like to thank Paul Skowron for this point. [↑](#footnote-ref-60)
61. These are the two aspects of the test for incapacity in section 3 of the MCA on which most people are found to lack capacity: Alex Ruck Keene, Nuala B Kane, Scott YH Kim, Gareth S Owen ‘Taking Capacity seriously? Ten years of mental capacity disputes before England’s Court of Protection’ (2019) 62 *International Journal of Law and Psychiatry* 56. [↑](#footnote-ref-61)
62. See, for example: *Re EOA*, n 19 above; *Leicester City Council v MPZ* [2019] EWCOP 64; *London Borough of Redbridge v G* [2014] EWCOP 17; *PH v Betsi Cadwaladr* [2022] EWCOP 16; *NCC v PB,* n 52 above. [↑](#footnote-ref-62)
63. Lock, n 4 above, 1633. [↑](#footnote-ref-63)
64. Craig Purshouse, ‘A Defence of the Counterfactual Account of Harm’ (2016) 30 *Bioethics* 251, 251: ‘This determines whether harm is caused by comparing what actually happened in a given situation with the ‘counterfacts’ i.e. what would have occurred had the putatively harmful conduct not taken place. If a person’s interests are worse off than they otherwise would have been then a person will be harmed.’ [↑](#footnote-ref-64)
65. n 40 above, at [79] (emphasis added). [↑](#footnote-ref-65)
66. n 2 above, at [53] (emphasis added). [↑](#footnote-ref-66)
67. Mental Capacity Act 2005, s 2. See also: Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (London: TSO), para 4.12. [↑](#footnote-ref-67)
68. n 50 above. [↑](#footnote-ref-68)
69. *ibid,* at [22]. [↑](#footnote-ref-69)
70. *ibid* at [34]. [↑](#footnote-ref-70)
71. *ibid* at [23]. [↑](#footnote-ref-71)
72. *ibid* at [39]. [↑](#footnote-ref-72)
73. Unpublished, and *A Local Authority v BF* [2018] EWCA Civ 2962. [↑](#footnote-ref-73)
74. ‘In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive’: n 40 above,at [82]. [↑](#footnote-ref-74)
75. n 50 above, at [33]. [↑](#footnote-ref-75)
76. *Mayor and Burgesses of the London Borough of Croydon v KR and ST* [2019] EWHC 2498 (Fam) at [60]: ‘The fact that someone has physical disabilities does not mean that there should be an assumption that they are vulnerable for the purposes of the inherent jurisdiction.’ [↑](#footnote-ref-76)
77. Keywood, n 7 above; Pritchard-Jones, n 7 above; Michael Dunn, Isabel Clare and Anthony Holland ‘To Empower or to Protect? Constructing the ‘Vulnerable Adult’ in English Law and Public Policy’ (2008) 28 LS 234. [↑](#footnote-ref-77)
78. *Al-Jeffery v Al-Jeffery* [2017] EWHC 774 (Fam). [↑](#footnote-ref-78)
79. n 50 above, at [34]. [↑](#footnote-ref-79)
80. *Wakefield Metropolitan District Council v DN* [2019] EWHC 2306 (Fam). [↑](#footnote-ref-80)
81. *ibid* at [45]. [↑](#footnote-ref-81)
82. *Re SK,* n 36 above. In this case Singer J held that the jurisdiction could be used in respect of a capacitous person over whom there were concerns about a forced marriage abroad. [↑](#footnote-ref-82)
83. Munby, n 4 above, 14 (emphasis in original). [↑](#footnote-ref-83)
84. Mental Capacity Act 2005, s 3(1). [↑](#footnote-ref-84)
85. Mental Capacity Act 2005, s 1(4). [↑](#footnote-ref-85)
86. Mental Capacity Act 2005, s 1(3). [↑](#footnote-ref-86)
87. For a helpful summary of the different types of decision and what will be considered relevant information under the MCA, see: 39 Essex Chambers, ‘Guidance Note: Relevant information for different categories of decisions’ (May 2021) <https://www.39essex.com/sites/default/files/Mental-Capacity-Guidance-Note-Relevant-Information-for-Different-Categories-of-Decision-1.pdf> (last visited 15 March 2023). [↑](#footnote-ref-87)
88. n 62 above. [↑](#footnote-ref-88)
89. Because the inherent jurisdiction is a power that is vested in the High Court it is therefore only available to a Tier 3 judge (a judge eligible to sit in the High Court). It is not, for example, ordinarily available to Tier 2 judges, such as many that sit in the Court of Protection. See, for example, *XCC v AA* [2012] EWHC 2183 (COP) where Parker J had recourse to the inherent jurisdiction to grant declarations in relation to someone who lacked capacity under the MCA, but where the remedy was not one available under that Act. [↑](#footnote-ref-89)
90. Department for Constitutional Affairs, n 67 above, 4.11. [↑](#footnote-ref-90)
91. *King’s College NHS Foundation Trust v C and V* [2015] EWCOP 80. [↑](#footnote-ref-91)
92. n 50 above, at [34]. [↑](#footnote-ref-92)
93. n 52 above, at [63]-[65]. [↑](#footnote-ref-93)
94. A full exploration of this is outside the remit of the paper. See, for example: Paul Benson, ‘Free Agency and Self-worth’ (1994) 91(12) *Journal of Philosophy,* 650; Trudy Govier, ‘Self-trust, Autonomy and Self-esteem’ (1993) 8(1) *Hypatia* 99; Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000). [↑](#footnote-ref-94)
95. Joel Anderson and Axel Honneth, ‘Autonomy, vulnerability, recognition and justice’ in John Christman and Joel Anderson (eds), *Autonomy and the Challenge to Liberalism: New Essays* (Cambridge University Press 2005) 132. [↑](#footnote-ref-95)
96. n 78 above. [↑](#footnote-ref-96)
97. For example, an occupation order under section 33 of the Family Law Act 1996. [↑](#footnote-ref-97)
98. n 50 above, at [41]. [↑](#footnote-ref-98)
99. *PH v Betsi Cadwaladr University Health Board*, n 62 above, at [19]. Although, as Hayden J goes on to explain, this does not apply where a person’s will has been overborne by coercion thereby justifying his earlier decision in *Meyers.* [↑](#footnote-ref-99)
100. Mental Capacity Act 2005, s 48. [↑](#footnote-ref-100)
101. Mental Capacity Act 2005, ss 15-18. [↑](#footnote-ref-101)
102. *ACCG v MN* [2014] EWCA Civ 1176. [↑](#footnote-ref-102)
103. Mental Capacity Act 2005, s1(5). [↑](#footnote-ref-103)
104. Mental Capacity Act 2005, ss 5-6. If the act is one that involves restraint, there is an explicit requirement under section 6(2) and (3) to prove that the restraint is necessary and proportionate. [↑](#footnote-ref-104)
105. Mental Capacity Act 2005, s 4(7): anyone named by the person to be consulted on that matter, anyone engaged in caring for them or with an interest in their welfare, the donee of any Lasting Power of Attorney, or anyone appointed as deputy for the person’s affairs by the Court of Protection. [↑](#footnote-ref-105)
106. Mental Capacity Act 2005, s4(7). [↑](#footnote-ref-106)
107. *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB). [↑](#footnote-ref-107)
108. *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508. [↑](#footnote-ref-108)
109. Munby, n 4 above, 2. [↑](#footnote-ref-109)
110. *A City Council v LS*[2019] EWHC 1384​ (Fam). [↑](#footnote-ref-110)
111. *AB v XS* [2021] EWCOP 57. [↑](#footnote-ref-111)
112. This line of authority is derived from *In the matter of T (A Child)* [2021] UKSC 35. The case involved the use of the inherent jurisdiction in a situation which would amount to an offence under section 11 of the Care Standards Act 2000, and which Lady Black, who gave the leading judgment, authorised. However, as Lord Stephens notes in the same case:‘The judgment of Lady Black [in is confined to the permissible use of the inherent jurisdiction in the context of the commission of an offence under section 11 of the Care Standards Act 2000. On that basis the decision in this case should not be taken as a wider-ranging precedent for the use of the inherent jurisdiction notwithstanding that the court is aware that some other criminal offence may be committed’: (at [173]). [↑](#footnote-ref-112)
113. Sexual Offences Act 2003, s 39: *Secretary of State for Justice v A Local Authority* [2021] EWCA Civ 1527. [↑](#footnote-ref-113)
114. *Re FD (Inherent Jurisdiction: Power of Arrest)* [2016] EWHC 2358 (Fam).In the earlier decision of the Court of Appeal in *Re G (Wardship) (Jurisdiction: Power of Arrest)* [1983] 4 FLR 538, 541, Sir Roger Ormrod had held that ‘I should be even more reluctant to extend, by some form of analogy, a power in a judge in wardship to grant a power of arrest. In fact, I think it must be constitutionally fundamental that only Parliament or the old common law can create a power in one citizen to arrest another citizen.’ [↑](#footnote-ref-114)
115. *XCC v AA*, n 89 above. [↑](#footnote-ref-115)
116. *ibid* at [26]. [↑](#footnote-ref-116)
117. n 2 above, at [67]. [↑](#footnote-ref-117)
118. ‘In short, the goal of the jurisdiction is to safeguard decision making, rather than to safeguard well-being per se*’:* Kristy Keywood, ‘Safeguarding Reproductive Health? The Inherent Jurisdiction, Contraception and Mental Incapacity’ (2011) 19 Med LR 326, 331. [↑](#footnote-ref-118)
119. n 40 above, at [95]. [↑](#footnote-ref-119)
120. *LBL v RYJ*[2010] EWHC 2665. [↑](#footnote-ref-120)
121. *ibid* at [62]. [↑](#footnote-ref-121)
122. *A Local Authority v A*, n 36 above,at [79]. Mrs A was deemed to lack capacity under the MCA therefore Bodey J’s comments are *obiter.* [↑](#footnote-ref-122)
123. ‘I wish to make crystal clear that, apart from requiring her attendance before me at that hearing, if she has indeed voluntarily returned to Wales and England, I do not make any order whatsoever against Amina herself. The purpose is not to order her to do anything at all. Rather, it is to create conditions in which she, as an adult of full capacity, can exercise and implement her own independent free will and freedom of choice:’n 78 above, at [66]. [↑](#footnote-ref-123)
124. *London Borough of Islington v EF* [2022] EWHC 803 (Fam). [↑](#footnote-ref-124)
125. n 50 above, at [41]. [↑](#footnote-ref-125)
126. 39 Essex Chambers ‘Southend-on-Sea Borough Council v Meyers’ (39 Essex Chambers 20 February 2019) <https://www.39essex.com/cop_cases/southend-on-sea-borough-council-v-meyers/> (last visited 18 July 2022). [↑](#footnote-ref-126)
127. n 50 above, at [57]. [↑](#footnote-ref-127)
128. *Mazhar v Birmingham Community Healthcare NHS Foundation Trust* [2020] EWCA Civ 1377. The Trust’s actions in seeking these urgent without notice orders were later criticised by the Court of Appeal. [↑](#footnote-ref-128)
129. *Redcar and Cleveland Borough Council v PR* [2019] EWHC 2305 (Fam). [↑](#footnote-ref-129)
130. n 124 above. [↑](#footnote-ref-130)
131. n 52 above, at [114], emphasis added. [↑](#footnote-ref-131)
132. n 43 above, at [71]. [↑](#footnote-ref-132)
133. Mental Capacity Act 2005, s 6(2)-(3). [↑](#footnote-ref-133)
134. n 50 above, at [57]. [↑](#footnote-ref-134)
135. *London Borough of Wandsworth v M* [2017] EWHC 2435 (Fam). [↑](#footnote-ref-135)
136. *ibid* at [86]. [↑](#footnote-ref-136)
137. n 2 above, at [76]. [↑](#footnote-ref-137)
138. Keywood, n 7 above, 93. [↑](#footnote-ref-138)
139. n 32 above. [↑](#footnote-ref-139)
140. A decision for which the House of Lords has been criticised for misinterpreting the law around false imprisonment, and the European Court of Human Rights jurisprudence: Philip Fennell, ‘Doctor Knows Best? Therapeutic Detention Under Common Law, the Mental Health Act, and the European Convention’ (1998) 6 Med LR 322**.** It is illustrative that two judges dissented on this point and found that HL had, in fact, been deprived of his liberty. [↑](#footnote-ref-140)
141. *HL v UK* [2004] ECHR 471. [↑](#footnote-ref-141)
142. European Convention of Human Rights, Art 5. [↑](#footnote-ref-142)
143. *An NHS Trust v Dr A* [2013] EWHC 2442 (COP). Dr A was being held under MHA 1983 and on hunger strike to try to get his passport back after unsuccessful attempt to get asylum. He was therefore ineligible for a Deprivation of Liberty Safeguards authorisation under the MCA. However, he was also ineligible for treatment (force feeding) under MHA as that would be treatment for a physical illness, not a mental illness. Baker J held that the inherent jurisdiction could be invoked to fill that gap between the MHA/DoLS interface. [↑](#footnote-ref-143)
144. n 3 above. In *Secretary of State for Justice v MM*[2018] UKSC 60 and *Welsh Ministers v PJ*[2018] UKSC 66 the Supreme Court decided that conditions amounting to a deprivation of liberty could not be imposed as part of a patient’s conditional discharge from hospital under the MHA 1983. ​As such, in *Hertfordshire* *County Council v AB*Justice Gwynneth Knowles held that In light of this, the inherent jurisdiction could be used instead even where a person was not incapacitated:​ ‘In circumstances where AB is subject to a plan which has been very carefully designed for his particular benefit and also to protect members of the public, the choice for him if that plan is ruled unlawful is stark; indeed, that choice amounts to either consenting to his return to confinement in hospital or indeed a consent to a relaxation of the restrictions in that care plan so that they would no longer amount to a deprivation of his liberty‘ (at [39]). This decision has been criticized as being ‘unsustainable as a matter of principle’: Munby, n 4 above, 24. [↑](#footnote-ref-144)
145. n 128 above. [↑](#footnote-ref-145)
146. *ibid* at [52]. [↑](#footnote-ref-146)
147. Munby, n 4 above, 23. [↑](#footnote-ref-147)
148. *A Local Authority v BF*, n 73 above. [↑](#footnote-ref-148)
149. Pugh, n 7 above. [↑](#footnote-ref-149)
150. n 50 above, at [16]. [↑](#footnote-ref-150)
151. *P v Cheshire West and Chester Council* [2014] UKSC 19: a person is deprived of their liberty if they are under continuous supervision and control, and not free to leave. See, however, Pugh’s argument that it might be: Pugh, n 7 above. [↑](#footnote-ref-151)
152. n 52 above, at [121]. [↑](#footnote-ref-152)
153. n 80 above. [↑](#footnote-ref-153)
154. *A Local Authority v BF*, n 73 above, at [23(c)]. [↑](#footnote-ref-154)
155. *Winterwerp v Netherlands* 6301/73 [1979] ECHR 4 [↑](#footnote-ref-155)
156. Law Commission, *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* (Law Com CP 130, 1993) 3.37. [↑](#footnote-ref-156)
157. Mental Capacity Act 2005, s 6(2)-(3). [↑](#footnote-ref-157)
158. n 156 above, 1.6, emphasis added. [↑](#footnote-ref-158)
159. Serious Crime Act 2015, s 76(1). In bringing the use of the inherent jurisdiction more into line with the elements of controlling or coercive behaviour found in the Serious Crime Act, however, it is arguable that there would be no need for the *mens rea* element to be established. Unlike the criminal law, the focus of the inherent jurisdiction is prospective; protecting the person being coerced, not attributing blame to the alleged perpetrator. [↑](#footnote-ref-159)
160. Serious Crime Act 2015, s 76(4). [↑](#footnote-ref-160)
161. Home Office, ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship Statutory Guidance Framework’ (Home Office 2015), 4. [↑](#footnote-ref-161)
162. *ibid* 5 (footnote 3). [↑](#footnote-ref-162)
163. Domestic Abuse Act 2021, s 1(3)(c). [↑](#footnote-ref-163)
164. The Domestic Abuse Act 2021, s 2(1) defines personally connected as a relationship where they either have been, or are: married, engaged, in a civil partnership, in an intimate relationship, in a parental relationship in relation to the same child, or relatives. [↑](#footnote-ref-164)
165. Lock, n 4 above. [↑](#footnote-ref-165)
166. n 9 above, 9.16. [↑](#footnote-ref-166)
167. *ibid* 9.19. [↑](#footnote-ref-167)
168. *ibid* 2.51. [↑](#footnote-ref-168)
169. Care Act 2014, s 42; Social Services and Well-being (Wales) Act 2014, s 126. [↑](#footnote-ref-169)
170. Care Act 2014, s 68. [↑](#footnote-ref-170)
171. Social Services and Well-being (Wales) Act 2014, s 127. [↑](#footnote-ref-171)
172. n 50 above, at [42]. [↑](#footnote-ref-172)
173. n 43 above, at [59]. [↑](#footnote-ref-173)
174. Hewson, n 4 above, 459. [↑](#footnote-ref-174)
175. S*iskina (Owners of Cargo Lately Laden on Board) and Other Respondents v Distos Compania Naviera S.A.*[1979] AC 210, 243 per Lord Justice Bridge. [↑](#footnote-ref-175)