Protecting and Empowering Vulnerable Adults: Mental Capacity Law in Practice

by

Jaime Tabitha Lindsey

A thesis submitted to the University of Birmingham for the degree of DOCTOR OF PHILOSOPHY

School of Law
University of Birmingham
Edgbaston
Birmingham
B15 2TT

January 2018

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.

ABSTRACT

This thesis uses a socio-legal methodology to investigate how mental capacity law balances protection and empowerment of vulnerable adults in cases concerning capacity to: consent to sex, marry and decide on contact. The thesis questions answered are: 1) Who is understood to be vulnerable in mental capacity law and why? 2) To what extent do vulnerable adults participate in mental capacity law proceedings? 3) What forms of knowledge are valued in mental capacity law? 4) How do mental capacity law interventions balance protection and empowerment in relation to adults vulnerable to abuse? These questions are answered by analysing empirical data collected through Court of Protection observations, case file reviews and social worker interviews.

I argue that mental capacity law views its subjects as inherently vulnerable, usually because of their disability, in contrast to viewing adults as being vulnerable for situational reasons. Contributing to vulnerability theory, I argue that vulnerability needs to be understood in situational, embodied and relational terms, rather than as caused by features inherent to the individual, such as their mental disability. Viewing adults as vulnerable in situational ways can lead to more nuanced interventions to protect them from abuse whilst ensuring they are empowered as decision-makers.

ACKNOWLEDGEMENTS

I firstly want to thank my supervisors, Professor Rosie Harding and Professor Marie Fox for their guidance throughout. Without their belief and support I would not have been able to undertake or complete this project. I also want to thank the University of Birmingham for providing me with a scholarship to complete this PhD. An earlier version of Chapter Two was published as Lindsey, J. (2016) Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities. *Feminist Legal Studies,* 24 (3), 295-314. I am grateful to the editors and anonymous peer reviewers for their comments which have strenghtened my arguments throughout.

At the core of this thesis is the empirical data I obtained. Firstly, from carrying out interviews with social workers. I am thankful to all who took the time to share their experiences of working in a challenging but rewarding profession. I am also grateful to all at the Court of Protection, the Ministry of Justice and Her Majesty's Courts and Tribunals Service who supported the Court of Protection aspect of this research. In particular I want to thank James Batey, Wendy Treadway, Joanne Earley and Mr Justice Charles for their support from start to finish. It is clear that the Court of Protection staff are dedicated and passionate about what they do and I feel lucky to have spent time working with them. I am also thankful to all Court of Protection participants for letting me gain an insight into their lives at often difficult times.

Finally, thank you to my family. To my Mum for being a constant support and my Dad for always believing in everything I do. Thanks to Charlotte for being my best cheerleader and for bringing Lilly and Marley into my life. Finally I want to thank Samed for supporting me in my choice to undertake this project and for always challenging me and giving me new perspectives - you know how much you have influenced this thesis.

TABLE OF CONTENTS

ABSTRACT ..... **ii**

ACKNOWLEDGEMENTS ..... **iii**

TABLE OF CONTENTS ..... **iv**

CASE LAW ..... **x**

LEGISLATION ..... **xiii**

CHAPTER ONE: INTRODUCTION **1**

1. Introduction **1**

2. Key Themes **2**

2.1. Mental disability **2**

2.2. Adults vulnerable to abuse **6**

2.3. Empowerment versus protection **8**

3. Research Context: Adult Social Care and the COP **10**

4. The Legal Frameworks **12**

4.1. The Mental Capacity Act 2005 and the concept of autonomy **13**

4.2. The Care Act 2014 and adult safeguarding **22**

4.3. The Forced Marriage (Civil Protection) Act 2007 ..... **25**

5. Overview of Thesis **28**

6. Conclusion **31**

CHAPTER TWO: VULNERABILITY, EMBODIMENT AND RELATIONAL THEORY **32**

1. Introduction **32**

2. Vulnerability Theory **33**

2.1. Universal, inherent and situational vulnerability **35**

2.2. Vulnerability and relational autonomy **38**

2.3. Vulnerability and embodiment **46**

3. Vulnerability Contextualised **50**

3.1. An inherent vulnerability approach: *The London Borough of Tower Hamlets v TB and SA* **51**

3.2. An embodied, situational approach: *In Re A (Capacity: Refusal of Contraception)* and *Local Authority X v MM* **54**

4. Conclusion **58**

CHAPTER THREE: A MATERIAL-DISCURSIVE METHODOLOGICAL APPROACH TO MENTAL CAPACITY LAW IN PRACTICE **60**

1. Introduction **60**

2. Theories of Knowledge: A Material-Discursive Approach **60**

2.1. A material analysis **62**

2.2. Discourse analysis **65**

2.3. A material-discursive analytic approach **67**

3. Methodological Underpinning of Mixed Methods **69**

4. Methods **77**

4.1. Interviews with social workers **77**

4.2. Court of Protection observations **81**

5. Ethical Issues **85**

6. Conclusion **88**

CHAPTER FOUR: THE MEANING OF VULNERABILITY IN PROTECTING ADULTS FROM ABUSE **90**

1. Introduction 90

2. Vulnerability in the Court of Protection.. 91

2.1. Vulnerability discourse in mental capacity law proceedings 91

2.2. Act-specific versus person-specific approaches to capacity 94

2.3. Failure to provide support to achieve capacity 97

3. Vulnerability in Social Work.. 101

3.1. A material-discursive approach to inherent vulnerability........................ 101

4. Inherent Vulnerability: Under-protection and Over-protection................... 109

4.1. Under-protection and sexual violence.. 109

4.2. Under-protection and failures of the criminal justice system.................. 118

4.3. Over-protection and specific findings of incapacity 123

4.4. Over-protection and depriving a person of their liberty 130

5. Conclusion 132

CHAPTER FIVE: GIVING EVIDENCE AND PARTICIPATING IN COURT OF PROTECTION PROCEEDINGS: P'S SILENCE AND TESTIMONIAL INJUSTICE **134**

1. Introduction 134

2. Testimonial Injustice in the Court of Protection 135

3. P's Embodied Absence From Proceedings 137

4. P's Silence, Vulnerability and Impaired Credibility 142

4.1. Inherent vulnerability and the pre-emptive lack of credibility 144

4.2. Situational vulnerability.. 149

4.3. Rejection of P's voice 153

5. Facilitating P's Participation 156

5.1. Intrinsic benefits **157**

5.2. Improved outcomes **159**

5.3. Reforms and special measures for ‘vulnerable’ witnesses **162**

6. Conclusion **166**

CHAPTER SIX: EXPERT AND EXPERIENTIAL EVIDENCE IN THE COURT OF PROTECTION: COMPETING KNOWLEDGE CLAIMS ABOUT MENTAL CAPACITY 168

1. Introduction **168**

2. Knowledge Claims About Mental Capacity **169**

2.1. Expert knowledge and the *psy* professions **170**

2.2. Experiential knowledge and social work **173**

2.3. Expert versus experiential evidence and the test for mental capacity **176**

3. Hierarchies of Expert and Experiential Evidence **182**

3.1. *Psy* evidence **183**

3.2. Social work evidence **188**

3.3. The contrast between *psy* and social work evidence in the COP: *Y County Council v (1) LC (2) GK (3) SC* **195**

4. Valuing Relational, Experiential Evidence **201**

4.1. Relational capacity assessments: valuing experiential knowledge **202**

4.2. The case for independence? **205**

5. Conclusion **207**

CHAPTER SEVEN: LEGITIMACY, SOCIAL WORK AND INTERVENTIONS TO SAFEGUARD VULNERABLE ADULTS FROM ABUSE 209

1. Introduction **209**

2. The Meaning of Legitimacy and the Resort to Law in High-Risk Cases... **210**

2.1. The contrasting legitimacy of law and social work................................. **211**

2.2. Duty of care and vulnerability in high-risk cases of abuse **217**

3. The Use of Controlling Interventions in Mental Capacity Law................... **223**

3.1. The types of cases before the COP **224**

3.1.1. Cases involving interventions to protect the abused adult.................. **227**

3.1.2. Cases involving interventions to control the abuser **234**

4. Interventions to Safeguard Vulnerable Adults From Abuse **239**

4.1. Strengthening social work legitimacy through a safeguarding adults framework **239**

4.2. Specific legal reforms to safeguard situationally vulnerable adults **245**

5. Conclusion **250**

CHAPTER EIGHT: CONCLUDING REMARKS 252

1. Introduction **252**

2. Empowering and Protecting Vulnerable Adults **253**

2.1. The meaning of vulnerability **253**

2.2. Participation of vulnerable adults **255**

2.3. Hierarchies of evidence in mental capacity law...................................... **257**

2.4. Interventions to protect and empower vulnerable adults........................ **258**

3. Future Possibilities for Reform **259**

3.1. Mental capacity law reforms... **259**

3.1.1. Diagnostic threshold.. **260**

3.1.2. Situational responses **261**

3.1.3. Relational reformulation of capacity.. **262**

3.2. A strengthened safeguarding framework **263**

4. Future Research Possibilities **264**

4.1. Methodology **264**

4.2. Facilitating P’s participation **266**

4.3. Remedies for dealing with abuse **267**

5. Final Reflections **268**

6. Conclusion **270**

REFERENCES 271

APPENDIX ONE 297

APPENDIX TWO 315

APPENDIX THREE 317

APPENDIX FOUR 323

APPENDIX FIVE 324

APPENDIX SIX 326

APPENDIX SEVEN 334

CASE LAW

UK cases:

A County Council v (1) AB (2) BB (3) CB [2016] EWCOP 41

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

A Local Authority v H [2012] EWHC 49

A Local Authority v SA [2005] EWHC 2942

A Local Authority v SY [2013] EWHC 3485

A Local Authority v TZ [2013] EWCOP 2322

A Local Authority v TZ (No.2) [2014] EWHC 973

A NHS Trust v DE, FG, JK, C Local Authority, B Partnership Trust [2013] EWHC 2562

AN NHS Trust v A [2015] EWCOP 71

Ashley v CC Sussex Police [2006] EWCA Civ 1085

Birmingham City Council v Riaz and others [2014] EWHC 4247

Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582

Bolitho v City and Hackney Health Authority [1998] A.C. 232

Cambridge University Hospitals NHS Foundation Trust v BF [2016] EWCOP 26

CC v KK and STCC [2012] EWHC 2136

CH v A Metropolitan Council [2017] EWCOP 12

Cheshire & Wirral Partnership NHS Foundation Trust v Z [2016] EWCOP 56

D Borough Council v AB [2011] EWHC 101

D County Council v LS [2010] EWHC 1544

Derbyshire County Council v AC [2014] EWCOP 38

Enfield LBC v SA [2010] EWHC 196

G v E [2010] EWCA Civ 822

In Re A (Capacity: Refusal of Contraception) [2010] EWHC 1549

In Re D (Vulnerable Adult) (Injunction: Power of Arrest) [2016] EWHC 2358

In Re L (Vulnerable Adults with Capacity: Court's Jurisdiction) [2012] EWCA Civ 253

Local Authority X v MM [2007] EWHC 2003

IM v (1) LM (2) AB (3) Liverpool City Council [2014] EWCA Civ 37

R v Cooper (Gary Anthony) [2009] 1 W.L.R. 1786

R v R [1991] 3 W.L.R. 767.

R v Samuel Hill (1851) 169 E.R. 495

R v Wade (1825) 1 Mood CC 86

Re C (Refusal of Medical Treatment) [1994] 1 F.L.R. 31

Re M (Best Interests: Deprivation of liberty) [2013] EWHC 3456

Re MB (Caesarean Section) [1997] 2 F.L.R. 426

Royal Free NHS Foundation Trust v AB [2014] EWCOP 50

RS v (1) LCC (2) AB and (3) AL [2015] EWCOP 56

Spittle v Walton [1870] L.R. 11 Eq. 420

St George's NHS Healthcare Trust v S [1998] 3 W.L.R.

The Hospital Trust v V and Others [2017] EWCOP 20

The London Borough of Southwark v KA [2016] EWCOP 20

The London Borough of Tower Hamlets v TB and SA [2014] EWCOP 53

Toohey v Commissioner of Police of the Metropolis [1965] A.C. 595

WBC v Z and others [2016] EWCOP 4

Wigan Council v M, C, P, GM, G, B and CC [2015] EWFC 8

W Primary Care Trust v B [2009] EWHC 1737

Wye Valley NHS Trust v B [2015] EWCOP 60

X v A Local Authority and another [2014] EWCOP 29

XCC v AA and others [2012] EWCOP 2183

X City Council v MB [2006] 2 F.L.R. 968

York City Council v C and another [2013] EWCA Civ 478

International cases:

HL v United Kingdom (2004) 40 E.H.R.R. 761

Shtukaturov v Russia (2012) 54 E.H.R.R. 27

LEGISLATION

UK statutes and statutory instruments:

Adult Support and Protection (Scotland) Act 2007

Anti-social Behaviour, Crime and Policing Act 2014

Care Act 2014

Care and Support (Eligibility Criteria) Regulations 2015 (SI 2015/313)

Children and Social Work Act 2017

Civil Evidence Act 1995

Civil Procedure Rules 1998 (SI 1998/3132)

Contempt of Court Act 1981

Court of Protection Rules 2007 (SI 2007/1744)

Court of Protection (Amendment) Rules 2015 (SI 2015/548)

Court of Protection Rules 2017 (SI 2017/1035)

Data Protection Act 1998

Domestic Violence, Crime and Victims Act 2004

Family Law Act 1996

Forced Marriage (Civil Protection) Act 2007

Mental Capacity Act 2005

Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 (SI 2006/1832)

Mental Health Act 1983

Protection from Harassment Act 1997

Sexual Offences Act 2003

Youth Justice and Criminal Evidence Act 1999

International instruments:

Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (1950) Treaty no. 2889. *United Nations Treaty Series*, 213, p. 221.

United Nations *Convention on the Rights of Persons with Disabilities* (2006) Treaty no. 44910. *United Nations Treaty Series*, 2515, p. 3.

CHAPTER ONE: INTRODUCTION

1. Introduction

In this thesis I explore how mental capacity law operates in practice by reference to the views of social workers and cases at the Court of Protection (COP). The main focus is on cases concerning capacity to consent to sex, capacity to marry and capacity to decide on contact. Mental capacity law is often seen through the wording of the Mental Capacity Act 2005 (MCA) and its associated jurisprudence. Understanding mental capacity law in this way represents a doctrinal analysis of the law. However, in this socio-legal thesis I investigate how the MCA, and associated legal frameworks, operate *in practice* – that is, both in legal proceedings and in social work practice.

I argue that mental capacity law in practice understands its subjects (commonly referred to as 'P') to be inherently vulnerable, usually because of their disability. Understanding adults as inherently vulnerable leads to a failure to account for the situational causes of the adult's vulnerable position. I explore the implications of viewing adults in this way and argue that it results in a paradox of under-protection and over-protection, a failure to value the experiential knowledge of P and those close to her, and the use of interventions in the name of protection that control rather than empower P. Furthermore, I suggest that, in the context of my research at least, mental capacity law has become a tool for dealing with abusive behaviour where other legal frameworks (such as criminal justice and adult safeguarding) have failed.

In this chapter I introduce the key themes that permeate this thesis (mental disability, abuse of vulnerable adults, protection versus empowerment) and set out the legal frameworks that form the background to the discussion. I also provide an overview of the research context, including the role of the COP and adult social work. I

highlight the gaps in legal research in this area, particularly at the intersection of mental capacity and adult safeguarding, and explain how my research helps to address those gaps. I finally outline the four research questions that guide my thesis and provide a brief overview of each chapter.

2. Key Themes

2.1. Mental disability

In this thesis I refer to adults with 'mental disabilities'. This term is used to refer to adults who may or may not fall within the jurisdiction of the MCA but are deemed to have a mental impairment. The range of disabilities covered under this term includes, but is not limited to: dementia, learning disability, autism, personality disorder, Down's Syndrome, cerebral atrophy and schizophrenia. Whilst I accept there is a range of terminology that could be used, for example cognitive or psychosocial disabilities, I adopt this term throughout for clarity and breadth. Firstly, using different terminology in different places could be confusing. Secondly, I use the term 'mental disability' to enable sufficient breadth of analysis. For example, in also using the term mental disability Benedet and Grant explain, "we sought an umbrella term that could describe, in a shorthand way, women whose disabilities affect cognition, perception, intellectual ability or decision-making, but who are otherwise a heterogeneous group" (Benedet and Grant, 2014, p. 133). Therefore the term allows a wide range of individuals who may share experiences to be discussed together without suggesting that they are one homogenous group. Similarly, the term 'mental disability' is regularly used in legal literature and therefore assists in bringing different branches of law together (Bartlett, 2012; Herring, 2012; Benedet and Grant, 2014; Craigie, 2015). Whilst the context of this thesis is mental capacity law, my arguments have wider implications for mental

health law, criminal law and beyond and therefore this term is used to ensure that my arguments are understood in their broadest terms.

In using the term mental disability I take into account the social model of disability which criticises the situating of disability within the biological features of the person. Disability theorists challenge this medicalised model of disability and argue that the social structures and environment cause a person to experience disability, rather than their individualised, biological and inevitable impairment (Oliver, 1990). This is in contrast to the medical model which views disabilities as stemming from an individual dysfunction to be dealt with primarily through medical treatment.[1] As Clough rightly explains, the prevalence of a medical model may have acted as a barrier to those who experience mental disabilities asserting their human rights (Clough, 2015, p. 55).

The social model of disability has achieved a great deal in trying to improve the lives of individuals with disabilities and reduce the stigma they experience. However, Shakespeare criticises the social model for its impact on disability research; as the medical model is rejected, people become sceptical and suspicious of medical solutions to impairments (Shakespeare, 2006, p. 30). Similarly, the social model of disability has failed to sufficiently account for mental disability and appears to primarily serve as a model for considering the negative experiences of the physically disabled resulting from environmental structures. Furthermore, in arguing that disability can be entirely removed by changing the environment, the social model fails to appreciate that for many individuals with severe cognitive impairments changing their environment cannot remove the disabling experiences their condition presents. Even in optimum environmental conditions they may experience their impairment negatively and not be able to function fully (Scully, 2014, p. 207). Whilst this is true, Scully also explains that the proportion of vulnerabilities that are purely inherent to the individual are likely to be

[1] Albeit that more recent authors are critical of this dichotomy and suggest that it is not only those who subscribe to the social model who can or should be seen as working to protect or promote the rights of those with disabilities, see Shakespeare (2006).

much lower than traditional approaches to disability suggest (Scully, 2014, pp. 207-208). Therefore a combination of medical and social understandings of disability is likely to be useful.

The biopsychosocial model (Hull, 2006; Clough, 2015) is a bridge between the social and medical models of disability. This model emphasises the distinction between impairment and disability whilst acknowledging that there is a link between the two. According to the World Health Organization, an impairment is a problem in body function or structure (World Health Organization, 2018). Impairment is therefore seen as more biological in nature, although it still might include reference to a variation in bodily functioning from the biological 'norm'. Disability on the other hand is described as "a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which he or she lives" (World Health Organization, 2018). Therefore the biopsychosocial understanding of disability recognises the relationship between various biological, psychological and social factors (Shakespeare, 2006) to bridge the gap between the medical and social approaches.

'Mental disability' could be viewed as either impairment or disability. It could be caused by something biological and inherent (an impairment) or by environmental and situational factors (a disability). More likely is that the distinction between biological and environmental features is not so clear cut. The problem, as I explain in Chapter Two, is that an inherent impairment, such as a mental disability, is too often categorised as making that person *especially* or *disproportionately* vulnerable. The social model, and subsequent critiques, helps to draw this out even if it does not fully account for the experiences of all of those with mental disabilities.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) articulates the social model of disability. It contains a number of provisions which try to ensure non-discrimination on the grounds of disability, most of which I do

not have the space to explore in this thesis.[2] This international human rights instrument entered into force on 3 May 2008 and was ratified by the United Kingdom on 8 June 2009, although legally it only has the status of an international treaty and therefore primary legislation, including the MCA, prevails. The UNCRPD's importance lies in its disability neutral approach. As Bartlett explains:

> Disability is articulated not in terms of limitations or impairments of disabled people, but as flowing from inadequate social responses to the particular needs of individuals in society. (Bartlett, 2012, p. 753).

There are two main provisions of the UNCRPD which I refer to in this thesis. Firstly, Article 12 UNCRPD requires state parties to "… recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" as well as to "… take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". Respecting legal capacity requires the state to ensure the individual is able to make their own decisions about their lives and take part in legal processes, irrespective of their mental capacity. This issue of legal capacity is important for this thesis and arises in Chapters Five and Six where I discuss participation and the role of evidence in mental capacity law proceedings. A second important provision of the UNCRPD is Article 16, which requires state parties to:

> ... take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse,

[2] For a further analysis of issues relating to the UNCRPD see in particular Bartlett (2012) and Flynn and Arstein-Kerslake (2014).

including their gender-based aspects.

This provision is relevant to this thesis because, as I explain in the following section, the cases explored primarily concerned abuse. However, precisely what the UNCRPD requires in this regard is unclear. Bartlett and Schulze describe it as more than a simplistic libertarian document that simply requires the right to be left alone (Bartlett and Schulze, 2017, p. 3). Instead they suggest that Article 16 can be interpreted alongside the other provisions to ensure the proper realisation of the rights contained within the convention. Therefore the UNCRPD, whilst taking a social approach to understanding disability, also requires that adults with disabilities are protected from abuse through positive steps. An important question is *how* states respond to abuse against people with mental disabilities. Bartlett and Schulze argue that the UNCRPD does not only require an equality of approach between disabled people and others, but that it requires giving more protection to people with disabilities who suffer abuse (Bartlett and Schulze, 2017, p.9). Therefore it is a possible interpretation of the UNCRPD that even when the general population has no comparable protections from abuse, people with disabilities should be provided with protection. Whilst I do not question the need for protection from abuse for people with mental disabilities, and that is a theme that permeates this thesis, the form that that protection should take requires deeper scrutiny. If, as I argue, mental capacity law is more likely to apply to adults who have experienced abuse and, furthermore, the use of mental capacity law to protect is controlling rather than empowering, then it is unlikely to be UNCRPD compliant.

2.2. Adults vulnerable to abuse

As noted above, many of the cases that arose in this research concerned abuse. In some cases this was abuse by intimate partners or family members and in others it

was abuse by acquaintances or those unknown to P. The primary reason for this recurring theme was because I focused on cases concerning capacity to consent to sex, capacity to marry and capacity to decide on contact. The subject matter of those cases almost always centred on allegations of abuse, something I explore further in Chapters Four and Seven (also see Table A1, Appendix one, for a summary of the subject matter of the cases reviewed at the COP).

Whilst the arguments in this thesis apply to men and women, intimate abuse is a gendered phenomenon (Benedet and Grant, 2014). Females are more likely to be victims of intimate abuse in nearly all of its forms (Office for National Statistics, 2017).[3] Furthermore, women with mental disabilities are additionally more vulnerable to sexual abuse in particular (Martin *et al.*, 2006; Benedet and Grant, 2012). This is for a number of reasons including that abuse is perpetrated by those in positions of trust, the role of institutionalisation and segregation (Hollomotz, 2011, pp. 36, 72-73; Plummer and Findley, 2012, p. 23) and the targeting of groups less likely to resist or report violence (Martin *et al.*, 2006, p. 824). Women with mental disabilities are also vulnerable in the way that all women are; as a result of society's failures to address violence against women (Benedet and Grant, 2014).

Benedet and Grant consider "prevention of and redress for sexual violence to be a precondition to meaningful sexual self-determination…" (Benedet and Grant, 2014, p. 136). By allowing sexual (and other forms of) violence against women to continue unchallenged we further undermine women's ability to develop the capacities required for autonomy (Benedet and Grant, 2014). This is the case for women generally as well as women with mental disabilities. The relevance of this discussion for this thesis is, as I outline in Chapter Four, too often women with mental disabilities

[3] The Office for National Statistics confirm this is the case for all forms of intimate violence except for non-sexual family abuse where the difference between men and women was not significant. They also define intimate violence by reference to a number of different forms of physical and non-physical abuse including partner abuse, family abuse, sexual assault and stalking (Office for National Statistics, 2017).

who are subjected to sexual abuse are left under-protected. The reasons for this include attitudes of those working in law and social care, as well as persistent failures of the criminal justice system to recognise and give value to the experiences of those who have suffered sexual violence (Benedet and Grant, 2014). For example, there are a number of reported cases where the police appear not to have taken action against perpetrators.[4] Therefore whilst I am mindful of the potential for over-protection, I also urge caution about the failures to protect vulnerable adults, particularly women with mental disabilities who suffer intimate abuse.

2.3. Empowerment versus protection

A final theme that permeates this thesis is the balance between empowerment and protection. This is a theme which is present throughout mental capacity law but is intensified in the context of abuse because there is a greater protection imperative. I use the term empowerment to mean encouraging and facilitating the adult to: develop the skills and abilities needed to live a fulfilling life, to make decisions for herself, and to have her decisions respected. In other words therefore, being empowered involves having a sense of control over one's life. As has been identified elsewhere, adults with mental disabilities have long lacked this sense of empowerment and control (Hollomotz, 2011). Others argue that the imperative to intervene in the name of adult protection could lead to those individuals being disempowered (Dunn, Clare and Holland, 2008). This argument is particularly prevalent in the context of vulnerability discourse as there are concerns about the over-protection of adults who are categorised as vulnerable (Dunn, Clare and Holland, 2008; Hollomotz, 2011). However, as I outline in Chapter Two, much of this turns on how we view vulnerability

[4] *Derbyshire County Council v AC* [2014] EWCOP 38, *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53, *Birmingham City Council v Riaz and others* [2014] EWHC 4247.

and I advocate a nuanced, situational and embodied understanding throughout this thesis.

Empowerment is an important concept in this area, at the very least as a mechanism to ensure that adults with mental disabilities are given the same respect as other adults in society. In the absence of empowerment discourse there is a risk of reverting back to the protection imperative, which may result in controlling interventions, something I explore in Chapter Seven, and a failure to value the experiences of the adult in question as explored in Chapter Five. In some cases the adult requires protection for a reason unrelated to their disability. In other cases their vulnerability might be exacerbated by their disability, for example where they are specifically targeted by an abuser. Therefore, and particularly in light of Article 16 UNCRPD, in many cases the subjects of mental capacity law *are* vulnerable and *do* need protection. How the balance between empowerment and protection is resolved requires further analysis.

In advocating solutions to the problems identified throughout this thesis, I have tried to strike a balance between empowerment and protection because the two concepts do not necessarily conflict. As Keeling explains, "increased involvement of the individual in their own safeguarding investigation is increasing empowerment and resulting in better, more stable outcomes" (Keeling, 2017, p. 83) and this is supported by evidence from practice (Cooper *et al.*, 2015). Therefore by endeavouring to balance protection and empowerment, I advocate original solutions based both on empowering the adult to participate in decision-making whilst also suggesting innovative approaches to help protect them from abuse.

3. Research Context: Adult Social Care and the COP

In this section I provide an overview of the research context, focusing on resource allocation in adult social care and the COP. This background context requires setting out because it inevitably shapes the practice of law in this area. Concerns about resource allocation permeate any area of public law because the challenges involved in public authorities carrying out their statutory duties are inevitably impacted by the availability of resources. Therefore one of the central material factors that shapes the findings in this thesis is adult social care provision in England.[5] In recent years there has been a reduction in public spending which has meant local authorities are less able to meet the needs of service users (Association of Directors of Adult Social Services, 2015). Evidence shows that despite demand increasing in 2013-14 (up four per cent from 2012-13 and up six per cent from 2008-09), the provision of services in the same period went down four per cent from 2012-13 and down 29 per cent from 2008-09 (Health and Social Care Information Centre, 2014). Correspondingly, the time that social workers have to spend with each service user has also fallen. Insufficient budgets alongside increased workloads mean that social workers simply do not have the time to spend with service users to sufficiently seek their views or to give weight to their input into the decision-making process, thereby risking disempowering them further.

Adult social care has historically been underfunded and difficult to access, in contrast to NHS services which, although have had their share of funding challenges, have generally been free at the point of need (Humphries, 2013, p. 3). Structurally, adult health and social care spending has been focused on acute needs at times of

[5] There is insufficient space here to consider all of the contributing causes to this complex issue. However, one other important material cause is the fact that the disability movement has only recently developed a significant voice within the legal sphere, in contrast for example to the criminal justice system where the lobbying and advocacy system for defendants and prisoners has resulted in increased rights for those involved in the criminal justice process.

crisis rather than long term, supportive engagement (Humphries, 2013). Furthermore, levels of funding were facing downward pressures precisely at a time when demands for P's voice to be heard were beginning to increase, particularly in light of the UNCRPD's 'paradigm shift' in thinking about mental disability (Clough, 2015). Therefore the material pressures faced by adult social care over many years have, in part, contributed to the failure to listen to service users. This is exacerbated by funding constraints which do not allow for social workers to spend sufficient time with service users to ascertain and give weight to their views. Whilst this is the result of material causes, it is reinforced as the service user is excluded from decision-making processes. It becomes normal to make decisions *on behalf of* instead of *with* the person as they are treated as "'objects' with limited agency and control, rather than 'subjects' of the law" (Keeling, 2017, p. 80).

Unsurprisingly, being able to maintain a continuing relationship with the same social worker and allowing sufficient time for service users to express their needs and wishes are central to effective social work practise (Meakin and Matthews, 2015, p. 19). However, attitudinal problems in social work, such as not valuing the service user's experience, may also be partially attributable to funding issues as time pressures are a factor in obtaining and attributing value to such experiences (Meakin and Matthews, 2015, p. 33). Furthermore, evidence shows that of those who sought access to social services, the majority were signposted to other services (31%) or did not receive a service at all (28%) (Health and Social Care Information Centre, 2015). Of those who were permitted access, the ever-increasing demand alongside cuts to adult social care budgets will inevitably present a challenge for levels of support.

Similarly, bringing a case to the COP, the court that deals with disputes under the MCA, can be extremely costly. For example, research suggests that it costs an estimated £13,000 for a local authority to take a welfare case to the COP (Series *et al.*, 2017b). Furthermore, during 2013-14 81% of local authorities in England reported

being involved in at least one COP welfare case, the average number was three and 4% had been involved in more than ten (Series *et al.*, 2015b). The decisions that reach the COP are only a small fraction of the cases that involve capacity issues in health and social care and the high cost of proceedings may be one factor which deters local authorities from bringing cases to court. If fewer cases were taken to court that may help to divert resources away from the legal process back to front line services, which in turn may improve the situation for service users on the ground. There may therefore be pressure to seek an out of court resolution in light of current resource constraints, albeit cases do still reach the COP and part of the aim of this thesis is to understand why.

In this thesis I acknowledge that focusing on legal proceedings may ignore the reality of how mental capacity law applies in everyday settings. In those cases which do not reach court, individual social workers or other professionals may instead rely on the 'general defence' contained within s 5 MCA, which provides protection for those who act in a person's best interests in relation to care or treatment where they reasonably believe that the person lacks the capacity to make that decision. Therefore the practice of mental capacity law by local authorities may be overshadowed by the presence of funding constraints and restrictions on time, resources and training, as well as the ability to fall back on s 5 MCA. In proposing solutions in this thesis I am therefore mindful of these constraints and take them into account in any proposals for reform.

4. The Legal Frameworks

In this section I introduce the legal frameworks referred to throughout this thesis. The primary legislation is the MCA. However, this area of law is complex and often intersects with other frameworks. Therefore I also provide an introduction to the Care

Act 2014, the inherent jurisdiction of the High Court and the Forced Marriage (Civil Protection) Act 2007 (FMCPA) and consider how they relate to this thesis. The criminal law and the Mental Health Act 1983 are also two further potentially relevant legal frameworks. However, these latter two areas are not considered in any detail in this thesis as they did not arise as a theme from the empirical data.

4.1. The Mental Capacity Act 2005 and the concept of autonomy

The MCA is the legal framework at the core of this thesis and sets out an entire legislative structure on mental capacity. The MCA allows for interventions in the lives of adults who lack the capacity to make decisions in various domains,[6] thus denying legal capacity to those who lack the mental capacity to make decisions for themselves (Flynn and Arstein-Kerslake, 2014). The MCA includes clear principles at its outset which include that "[a] person must be assumed to have capacity unless it is established that he lacks capacity"[7] and that "[a] person is not to be treated as unable to make a decision merely because he makes an unwise decision".[8] This presumption of capacity, even for unwise decisions, is important in the context of sex, marriage and contact cases because there is often a strong imperative to protect an adult from exploitative relationships. Allegations of abuse dominate the sex, marriage and contact cases in mental capacity law and where an adult is in an abusive situation, this may shift the delicate balance from empowerment towards protection.

Recent literature acknowledges the challenges posed when borderline capacitous adults make seemingly unwise decisions (Herring, 2012; Clough, 2014; Herring and Wall, 2014; Series, 2014). The capacity/incapacity binary in the MCA means that any adult with capacity can make decisions for themselves, even if those

[6] s 1 (5) MCA.
[7] s 1 (2) MCA.
[8] s 1 (4) MCA.

decisions are deemed unwise. Whereas once a person crosses the threshold of incapacity, decisions can be made by the court on their behalf in their best interests.[9] This binary obviously lacks nuance in considering the reasons why capacity might be impaired in particular instances and the ways in which it could be facilitated in others. The primary concern of scholars who criticise the direction of the current law is that findings of capacity can leave vulnerable adults without protection. For example, Herring explains this gap in protection as one between "having capacity under the MCA and being genuinely autonomous" (Herring, 2016, p. 64). This implies that individuals who make decisions to stay in abusive relationships may, legally, have the capacity to make those choices, but he argues those choices cannot properly be characterised as autonomous. Herring focuses on the concept of autonomy to highlight the problem of the capacity binary in hard cases.

The MCA has been described as the "gatekeeper for autonomy" (Donnelly, 2010) and the concept of autonomy is at the heart of debates about the MCA. Whilst the meaning of autonomy and the different interpretations of it are vast and worthy of their own detailed analysis which I do not have the space to explore here,[10] it is important to acknowledge the role of autonomy in mental capacity law because it shapes much of the literature. The principle of autonomy is engaged to protect an individual's right to choose how to live their life – to protect their self-determination. However, precisely what this requires varies depending on the particular conception of autonomy adopted. Liberal accounts of autonomy have asserted that autonomous choices are independent, self-interested and rational (Kant, 1998).[11] Liberal theorists similarly argue that autonomous choices should not be interfered with, albeit Coggon

[9] s 1 (5) MCA.

[10] See section 2.2 of Chapter Two for further analysis of the meaning of autonomy.

[11] Notwithstanding the differences between different liberal understandings of autonomy. For example, Donnelly sets out the difference between Kantian interpretations of autonomy and interpretations based on John Stuart Mill's work in this context, see Mill (1909), Kant (1998) and Donnelly (2010).

and Miola argue that, strictly speaking, non-interference protects liberty rather than autonomy (Coggon and Miola, 2011). In this liberal understanding of autonomous decision-making, the content of the decision is not what matters, but the ability of the person to self-govern and make their own choices about how to live their lives. Preserving this right for autonomous adults to make their own decisions and empowering them through law to do so is certainly an important liberal principle worth defending.

Some take the concept of autonomy beyond this liberal account to argue for a relational approach. Relational autonomy takes into account the personal relationships and other environmental and contextual factors that impact upon an individual's decision-making (Mackenzie and Stoljar, 2000; Mackenzie, 2014b; Herring, 2016). In this respect, relational autonomy requires considering the constraints on individual choices that arise from particular, harmful relationships (Mackenzie and Stoljar, 2000; Mackenzie, 2014b). Therefore a decision may not fulfil the liberal criteria for rationality because it appears to go against the individual's interests, but relational theorists argue that might be because of the relational context within which that person is living. For example, staying in an abusive relationship might appear irrational to outsiders on an abstract analysis. However, perhaps that choice appears more rational in light of well-established evidence that the point of leaving an abusive relationship is the time when women are at highest risk of the most serious abuse (Humphreys and Thiara, 2003, p. 200).

Whilst liberal and relational accounts of autonomy have a different focus, both can be engaged to argue that certain decisions (or people) are not autonomous, therefore justifying interference with those decisions (Coggon and Miola, 2011; Herring, 2016; Kong, 2017). This approach can emerge from liberal accounts of autonomy on the basis that only autonomous decision-making should be protected by law. Therefore if a person lacks the rational capabilities to self-govern, the law need not protect her

decisions. Similarly, but for different reasons, on a relational account of autonomy, decisions may be overridden. It could be argued that the social conditions a person is in undermine her decision-making abilities such that it is not reflective of her true desires or values. The example often given is of a person who accepts her own oppression by, for example, agreeing to be enslaved. On both liberal and relational accounts, a person's lack of, or reduced, autonomy can lead to law interfering with her decisions. Thus a lack of autonomy also impacts on liberty. The liberal account of autonomy is reflected in the test for capacity in the MCA in that if a person does not meet a certain threshold of understanding then decisions can be made on their behalf in their best interests.[12] Conversely, the inherent jurisdiction, which I discuss in section 4.2 below, arguably reflects a more relational understanding of autonomy as it looks at the vulnerability of the adult to undue influence by others and justifies interference on that basis.

Whilst the MCA most reflects a liberal conception of autonomy, concerns about interference with the liberty of adults and the difficulties in identifying what constitutes non-autonomous decision-making may partly explain why the law has adopted a low, 'act-specific' threshold for capacity to consent to sex and marriage. The test for capacity to consent to sex was originally set out in *obiter* comments by Munby J (as he then was) in a pre MCA decision, *X City Council v MB*.[13] The information deemed relevant to a decision to consent to sex includes understanding:[14]

(a) the mechanics of the sexual act;

(b) that there are health risks involved, particularly the acquisition of

sexually transmitted and sexually transmissible infections; and

[12] s 1 (5) MCA.

[13] [2006] 2 F.L.R. 968.

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

(c) that sex between a man and a woman may result in the woman becoming pregnant.

The mechanics of the sexual act covers the functional and physical aspects of sex. Understanding the health risks most often requires an understanding that sexual activity can result in sexually transmitted infections (STIs). The third aspect of the relevant information is that P must understand the possibility that sex can result in pregnancy, but does not require knowledge of childbirth or the bringing up of a child. These three aspects are at the core of the test for capacity to consent to sex and set a relatively low threshold for understanding. There is some debate as to whether the test also includes whether the person understands that they can say no to sex, with the judges coming to different conclusions in *Derbyshire County Council v AC*[15] and *The London Borough of Tower Hamlets v TB and SA.*[16] Despite the uncertainty in relation to this additional aspect, the test currently requires at least an understanding of the mechanics, health risks and possibility of pregnancy. Similarly, the legal test for capacity to marry is also act-specific. The following principles inform the legal test for capacity to marry: [17]

a) Marriage is status specific not person specific.

b) The wisdom of the marriage is irrelevant.

c) P must understand the broad nature of the marriage contract.

d) P must understand the duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other.

[15] [2014] EWCOP 38, where it was held that the whether or not a person understands they can say no to sex was not a required part of the relevant information.
[16] [2014] EWCOP 53, where it was held that for a person to have capacity to consent to sex part of the relevant information would be whether or not they have a choice and can refuse.
[17] *The London Borough of Southwark v KA* [2016] EWCOP 20 para 76.

e) The essence of marriage is for two people to live together and to love one another.

f) P must not lack capacity to enter into sexual relations.

Whilst the test for marriage is arguably more complex than for sexual activity, it is still a low threshold and does not allow for a consideration of the features of a particular marriage with a particular individual.[18] For both sex and marriage, the act-specific approach means that decisions can only be considered in the abstract – whether or not a person understands the relevant information in a general, rather than specific, sense.[19] There is limited recourse to the circumstances in which the decision is made or the environmental, social or economic factors that might influence the decision. Some argue that this can leave vulnerable adults unprotected (Clough, 2014; Herring and Wall, 2014). In contrast, a person-specific test considers whether or not a person understands the nature and character of the particular activity with a particular person in particular circumstances. It can therefore lead to findings of incapacity which can protect the person from that particular relationship whilst still facilitating their sexual autonomy in relation to other, non-exploitative relationships.

In this thesis I also explore cases concerning capacity to decide on contact. This was partly because case law shows that incapacity for contact is sometimes used as a way of regulating intimate relationships. For example, in a number of reported cases, the courts have reached a different conclusion in regards to a person's capacity to consent to contact compared to their capacity to consent to sexual activity –[20] that is, the courts have found that under the act-specific approach P has been deemed to have the capacity to consent to sex but under the person-specific approach P has been

[18] *York City Council v C and another* [2013] EWCA Civ 478.
[19] This position was affirmed in *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37.
[20] *Local Authority X v MM* [2007] EWHC 2003, *Derbyshire County Council v AC* [2014] EWCOP 38 and *A Local Authority v TZ* (No. 2) [2014] EWHC 973.

found to lack the capacity to decide with whom she should have (sexual) contact. Unlike sex and marriage, capacity to decide on contact can be a person-specific test, as explained by MacFarlane LJ in *York City Council v C and another*:[21]

> The determination of capacity under MCA 2005… is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific.

Furthermore, according to Cobb J in *WBC v Z and others*[22] the relevant information that needs to be understood, retained and weighed or used for a decision about contact to be capacitous includes:[23]

> … an understanding of the positives and negatives of having contact, or a relationship, with another individual, and an ability to assess the risks posed by another individual or situations from which to extricate herself if she were vulnerable to exploitation.

It is arguable that having an act-specific approach to sex and marriage, but a person-specific approach to contact, facilitates a liberal account of sexual autonomy and promotes liberty in that it maximises the numbers of people who are able to enjoy intimate relationships without interference (Clough 2014; Series, 2014). Individuals are able to have intimate relationships but it provides the state with some ability to supervise their contact with abusive others, an issue I explore in Chapter Seven. Whilst

[21] [2013] EWCA Civ 478 para 35.
[22] [2016] EWCOP 4.
[23] para 38.

this distinction is criticised by those who see it as unprincipled and illogical (Ruck Keene *et al*., 2014), it is a potentially useful way of protecting vulnerable adults from abusive relationships within the confines of mental capacity law. It means that social workers or court appointed deputies[24] could monitor and decide who a person is safe to have intimate contact with, without the need for a wide-ranging finding of incapacity in relation to all intimate relationships.

The low threshold for capacity to marry and consent to sex reflects concerns about interfering in the decisions of adults. For example, the operation of s 27 MCA means that a court cannot decide that it is in a person's best interests to engage in sexual activity or get married.[25] This means that any finding of incapacity in respect of sex and marriage has potentially highly restrictive consequences for the adult in question. It could mean that they are prevented from engaging in any intimate contact whatsoever and may therefore be accompanied by highly restrictive supervisory arrangements, an issue I consider further in Chapter Seven. Whilst having a relatively low threshold for capacity protects the widest conception of sexual autonomy, it can mean that the balance between empowerment and protection is not always achieved in individual cases.

As this discussion has shown, the concept of autonomy pervades mental capacity law. It has influenced the direction of the jurisprudence to primarily protect a liberal conception of autonomy and, more specifically, non-interference (Donnelly, 2010). However, in this thesis I move away from this focus on autonomy. This is partly because focusing on autonomy does not further our normative understanding of the appropriate balance between protection and empowerment in mental capacity law. Apart from the fact that it problematically relies on having an agreed definition of autonomy, which can detract from providing real solutions for people, it also has the

[24] s 16 MCA.
[25] s 27 (1) MCA.

potential to justify highly restrictive and disempowering interventions in peoples' lives in the name of their own protection. Similarly, viewing people as acting 'non-autonomously' can impact on how we view and empower them as participants in society more broadly. Furthermore, in cases where there are allegations of abuse, it may not actually be a question of a lack of autonomy, rather, an overpowering of autonomy or a failure by the state to protect autonomy by not taking action against the abuser. As Clough persuasively states in this respect "[i]t [the mental capacity framework] does not engage with the crux of the problem" (Clough, 2014, p. 381) and I consider this partly to be because of the emphasis on the concept of autonomy in the literature.

There has also been extensive debate about the appropriate balance between empowerment and protection in sex and marriage cases, but again much of this has focused on whether the act-specific or person-specific test would better protect autonomy. Some argue that a person-specific approach would better protect vulnerable adults who might have capacity but are not necessarily autonomous (Herring, 2012; Clough 2014) whereas others have raised concerns about interference in the lives of adults with disabilities (Hollomotz, 2011; Dunn, Clare and Holland, 2008) as well as their limited participation in decision-making (Hollomotz, 2011; Keeling 2017). However, where cases concern allegations of abuse, I question whether the distinction between autonomous and non-autonomous decision-making should be the focus. Many welfare cases are not brought to court under the MCA because of concerns about autonomy. They are brought because of concerns the individual is vulnerable, whether that be to abuse, exploitation or self-neglect.[26] Whilst much of the literature centres on the legal test for mental capacity, and its underpinning principle of autonomy, I instead use vulnerability theory to analyse this area. In doing this, I consider the types of cases that reach court and in relation to which vulnerable adults,

[26] This thesis does not consider the issue of self-neglect.

the interventions that are applied and how they exacerbate or protect against vulnerability, and the overall balance between empowerment and protection in those cases.

In shifting the focus from autonomy to vulnerability, as well as considering the relationship between the two concepts, the interaction between mental capacity and safeguarding adults law requires further analysis. In fact, one of the difficulties with this area of law is the overlap between a number of different legal frameworks, with many professionals and service users struggling to know where the boundaries lie. As Pritchard-Jones explains, "[u]nfortunately only when the courts begin to engage the [inherent] jurisdiction rather than forcing such cases under the Mental Capacity Act will these areas open up for discussion" (Pritchard-Jones 2016, p. 66). Therefore whilst I focus on mental capacity law in practice and consider ways in which it can better protect and empower vulnerable adults, I also consider the interlocking jurisdictions of the inherent jurisdiction of the High Court, Care Act 2014 and FMCPA 2007. As Keywood explains "mental health law and mental capacity law are ill-suited to addressing the array of safeguarding concerns that local authorities ought to be confronting" (Keywood, 2017, p. 91). Therefore I argue that, in many instances, these alternative frameworks provide better solutions for vulnerable adults than the MCA.

4.2. The Care Act 2014 and adult safeguarding

The Care Act 2014 placed adult safeguarding on a statutory footing. Safeguarding is concerned with the state's obligation to protect the health, rights and welfare of persons who are unable to protect themselves from abuse. Whilst a number of agencies will be involved in adult safeguarding, the primary duty is on local authorities who are required to protect adults with care and support needs who are experiencing,

or are at risk of, abuse or neglect, and as a result are unable to protect themselves.[27] This represents a movement away from the internalising discourses of the MCA and previous *No Secrets* guidance (Department of Health, 2000) because there is no reference to internal features such as disability and it has been acknowledged at para 5.2 of the Office of the Public Guardian's Safeguarding Policy that "…the term 'vulnerable adult' may wrongly imply that some of the fault for the abuse lies with the victim of abuse" (Office of the Public Guardian, 2017). The distinction is in the subtle wording of s 42; whether or not an adult with care needs is *able to protect themselves* is an important way of encompassing those who might suffer a mental disability without defining them as vulnerable solely on that basis. Vulnerable adults may find it more difficult to protect themselves due to their disability, but also as a result of their life experiences, or lack thereof.

The Care Act 2014 does not have any additional enforcement mechanisms despite a power of entry being considered (Department of Health, 2017), but it does require local authorities to set up Safeguarding Adults Boards,[28] multi-agency cooperation[29] and provide an annual report.[30] Once a safeguarding enquiry has been undertaken, there are no mechanisms to guide how local authorities should respond to abuse. On reviewing statutory guidance (Department of Health, 2017) and evidence from Hansard debates, for example in questions from Paul Burstow MP (2014), it was clearly not Parliament's intention for local authorities to do nothing where abuse was identified. A better interpretation for the lack of a power or duty to intervene is resource related; in difficult financial times Parliament did not want to interfere with the discretion that local authorities have in deciding how best to allocate resources (Herring, 2016, p. 178).

[27] s 42 (1) Care Act 2014.
[28] s 43 Care Act 2014.
[29] s 6 (7) Care Act 2014.
[30] schedule 2 para 4 Care Act 2014.

The limited effectiveness of the Care Act 2014 (and previous safeguarding frameworks) is arguably one of the reasons why abuse cases dominate mental capacity law. Given that the inherent jurisdiction is the way civil interventions under the s 42 safeguarding provisions of the Care Act have any legal bite, I argue that the Care Act renews the inherent jurisdiction's authority (Lindsey, 2016a). The inherent jurisdiction of the High Court explicitly allows High Court judges to intervene where they are faced with a 'vulnerable adult'. Historically, the inherent jurisdiction pre-dates the MCA and its background was as a *parens patriae* jurisdiction (Herring, 2016, pp. 72-76). Today the inherent jurisdiction can be invoked to allow judges to intervene to protect a vulnerable adult even where the person has capacity to make a decision under the MCA.[31] The High Court's inherent jurisdiction can be invoked where a vulnerable adult is "reasonably believed to be, (i) under constraint, (ii) subject to coercion or undue influence, or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent".[32] This conception reflects a more relational understanding of autonomy than the MCA. In situations where the MCA does not apply, for example where the threshold for incapacity is not reached, the inherent jurisdiction provides professionals with an alternative route to safeguarding (Department of Health, 2016). As Herring explains, "the inherent jurisdiction challenges the binary divide between those who have capacity and those who do not… by offering the potential for legal intervention when a person has capacity, but only just" (Herring, 2016, p. 71).

The inherent jurisdiction has undoubtedly survived the enactment of the MCA,[33] despite the legislative authority of the MCA and the intention that it was to replace the inherent jurisdiction (Law Commission, 1995, p. 16). Perhaps this is because

[31] *A Local Authority v DL and others* [2012] EWCA Civ 253.
[32] *A Local Authority v SA* [2005] EWHC 2942 para 77.
[33] *A Local Authority v DL and others* [2012] EWCA Civ 253.

"vulnerability casts a much wider gaze than the mental capacity approach" (Clough, 2014, p. 372) and therefore allows for exposure of the situational conditions that make people at risk of abuse. The implementation of the Care Act has arguably addressed some of the constitutional concerns about the post-MCA use of the inherent jurisdiction, for example there were concerns about the use of the common law alongside a statutory framework (Miles, 2011; Hewson, 2013). The inherent jurisdiction can arguably be used as a way of responding to abuse identified as a result of a safeguarding enquiry under s 42 Care Act 2014. I have written elsewhere about the value of the inherent jurisdiction and Care Act being used together to safeguard vulnerable adults (Lindsey, 2016a), particularly given the weaknesses in enforcement within the Care Act.

Therefore the use of the inherent jurisdiction and Care Act together in safeguarding cases may also better enable UNCRPD compliance (Herring, 2016, p. 96) in relation to Articles 12 and 16 as the inherent jurisdiction is, on the face of it at least, disability neutral. However, as I explain in Chapter Four, who is considered to be vulnerable, and in what ways, influences who is subject to the law. Whilst the inherent jurisdiction is not the focus of the research, it provides an insight into how a vulnerability analysis might operate as a legal tool.

4.3. The Forced Marriage (Civil Protection) Act 2007

The final legal framework I introduce here is the FMCPA. This legislation was enacted to help address the problem of forced marriage through the civil law. Given the subject matter of this thesis, the research inevitably touched on forced marriage cases, despite this not being the primary focus, again highlighting the complexity of mental capacity welfare cases. The boundaries of what constitutes a 'forced marriage' are arguably not easy to define and links with the practice of arranged marriage need to be carefully

drawn (Enright, 2009). However, under s 63A Family Law Act 1996 (as amended by the FMCPA) the court can make an order to prevent a person from being forced into a marriage. A person is deemed to be forced into a marriage if another person forces them to do so without their free and full consent.[34] 'Force' includes coercion by threats or other psychological means.[35] Therefore force in this context includes a lack of consent, which may be achieved through violence or threats or through other forms of psychological pressure.

The reason that many forced marriage cases appear before the COP is that a person who lacks capacity to enter into a marriage is deemed to be forced into that marriage because there is an absence of consent. The operation of s 27 MCA means that no other person, including the COP, can consent to the marriage on P's behalf. Urgent proceedings may be brought under the FMCPA if an agency, such as the local authority, is concerned that a person who they suspect lacks capacity is going to marry. A Forced Marriage Protection Order (FMPO) can then be obtained which can contain prohibitions, restrictions or requirements, or any other terms which are considered appropriate.[36] The legislation has the benefits of being pre-emptive in dealing with and responding to concerns about a vulnerable adult at risk of being forced into marriage above and beyond the MCA. Furthermore it provides an "innovative approach to culturally-specific difficulties in facilitating exit from forced marriage" (Enright, 2009, p. 343).

One of the key cases that helps elucidate this area is *XCC v AA and others*.[37] The case concerned DD, a woman with a significant learning disability and described as having "little language, very little comprehension of anything other than simple matters, and needs assistance with almost all aspects of her daily life". In 2003 DD

---

[34] s 63A (4) FMCPA.
[35] s 63A (6) FMCPA.
[36] s 63B (1) FMCPA.
[37] [2012] EWCOP 2183.

entered into a marriage in Bangladesh with her cousin, AA. Concerns arose about the marriage and the police obtained a FMPO. Parker J watched the wedding video and described that during the ceremony DD “was slumped in a chair almost comatose and only just able with considerable prompting to repeat the words of consent to marriage”.[38] It was also said that the marriage would not have taken place were it not for the fact that AA came to the UK for the express purpose of working.[39] Parker J stated:[40]

> In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007. In my earlier judgment I said:
>
> …
>
> "[186] "Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity."

Ultimately Parker J found that DD lacked the capacity to marry and declared, using the court’s inherent jurisdiction, that the marriage was not a valid marriage in England and that it was in DD's best interests for the marriage to be annulled.

Statistics from the Forced Marriage Unit confirm that in 2016 they assisted in 140 cases, 10% of their total number, which involved victims who had a learning disability (Home Office and Foreign and Commonwealth Office, 2016). This does not inevitably mean those adults lacked the capacity to marry, as it is possible that they had capacity but were otherwise forced. However, it is the best evidence available as

[38] para 26.
[39] para 10
[40] para 30.

to the prevalence of the problem of adults with mental disabilities being forced into marriage. This thesis explores further some of those cases that reached the COP, many of which also involved issues around capacity to consent to sex. As will be shown throughout this thesis, the boundaries between mental capacity and other areas of law, such as adult safeguarding and forced marriage, are often difficult to define.

5. Overview of Thesis

In light of this background, it is evident that a number of gaps exist in understanding how adults vulnerable to abuse are protected and empowered through mental capacity law. These gaps include understanding: the reason why mental capacity law is used in relation to particular vulnerable adults in particular cases; how mental capacity law empowers and protects *in practice*; and, how mental capacity law intersects with adult safeguarding, the inherent jurisdiction and the forced marriage legal frameworks.

In this thesis I ask: 1) Who is understood to be vulnerable in mental capacity law and why? 2) To what extent do vulnerable adults participate in mental capacity law proceedings? 3) What forms of knowledge are valued in mental capacity law? 4) How do mental capacity law interventions balance protection and empowerment in relation to adults vulnerable to abuse? I answer these four questions starting with Chapter Two where I set out the theoretical framework that I use. I provide an original contribution to the understanding of vulnerability, as a situational, relational and embodied concept, and explain how vulnerability could be harnessed as a useful legal tool. Drawing on feminist approaches to vulnerability (Fineman, 2008; Fineman, 2010; Clough, 2014; Mackenzie, Rogers and Dodds, 2014b), I argue for a focus on the situational factors which make adults with mental disabilities vulnerable, rather than the current focus on inherent causes of vulnerability such as disability. I also place emphasis on the concepts of relationality and embodiment in helping us to understand vulnerability. This

is because in developing vulnerability as a legal tool there is a need to consider the impact of decisions and interventions on vulnerable bodies. I further show, by reference to the intersection of mental capacity and adult safeguarding case law, that the law has not taken a situational approach to understanding vulnerability nor has it sufficiently taken into account the impact of interventions on the bodies of vulnerable adults.

In Chapter Three I set out the methodological approach I take and the methods chosen for the research. I interrogate the strengths and weaknesses of the law as well as investigating how law operates in practice by using an empirical socio-legal methodology. In doing this I develop Karen Barad's material-discursive approach to understanding phenomena (Barad, 1998; Barad, 2003; Barad, 2007) as a way of achieving a more informed understanding of the world. I also set out the empirical methods chosen, explaining why they are effective in uncovering partial truths about mental capacity law in practice. Finally, I explain the practicalities of carrying out the empirical research and address the ethical issues that arose during the project.

Chapters Four to Seven are the chapters in which I analyse the empirical data obtained. Chapter Four informs the remaining chapters as to the way that 'vulnerability' was understood in the intersection of adult safeguarding and mental capacity law. In Chapter Four I apply the vulnerability theory set out in Chapter Two to show, using my empirical data, that inherent approaches to vulnerability dominate the practice of mental capacity law. That is in contrast to understanding vulnerability situationally. I particularly focus on the discourse of vulnerability by reference to both COP proceedings and the language used by social workers. I further argue that vulnerability discourse has led to a paradox of under-protection and over-protection of adults vulnerable to abuse. I conclude by arguing that viewing vulnerability more situationally will achieve a better balance between empowerment and protection, rather than rejecting the concept of vulnerability altogether.

Chapters Five and Six focus on evidence given in mental capacity law proceedings. Chapter Five concerns P's limited participation in proceedings, which I frame as a form of testimonial injustice, that is, a failure to value a person in their capacity as a giver of knowledge (Fricker, 2007). The issue of competence to give evidence is considered but it is argued, based on the data obtained, that it is not the formal evidential rules that prohibit P from giving evidence. Instead, and linked to Chapters Two and Four, I argue that P's limited participation is the result of a persistent assumption that she is inherently and situationally vulnerable. The chapter concludes with a discussion about the importance of participation and considers how participation might be facilitated.

The focus of Chapter Six is on the evidence of professionals in mental capacity law, particularly psychiatrists and social workers. The chapter contributes to the debate over the objectivity of knowledge and argues that law categorises psychiatric knowledge about mental capacity as a form of objective expert evidence whereas knowledge of others such as social workers is seen as subjective, experiential evidence. Resulting from this characterisation I argue that mental capacity law treats psychiatric evidence as a superior knowledge claim over the evidence of social workers, despite it taking an inherent vulnerability approach. Finally, I question this hierarchy and instead argue for greater weight to be placed on 'experiential' forms of knowledge, such as that possessed by those who have an existing relationship with P, including social workers. Experiential knowledge not only represents a more reliable claim to truth about mental capacity, but experiential knowledge is more likely to facilitate situational responses to vulnerability and therefore a achieve a better balance between empowerment and protection.

Finally, in Chapter Seven I argue that the limited legitimacy of social work, and the process of legal legitimation in high-risk cases, contributes to the use of controlling rather than empowering interventions in this area. I instead suggest that the law needs

to focus on the material, situational conditions that the individual is in and understand how law can be used to empower and protect individuals in vulnerable circumstances. I advocate solutions which focus on the situational causes of vulnerability or impaired decision-making, which I view as a more empowering response than further restricting the choices of vulnerable adults. I particularly argue that social workers need greater legitimacy to intervene in supportive ways and suggest that one way this could be achieved in abuse cases is through strengthening the safeguarding adults legal framework.

Finally, in Chapter Eight I bring all of these different themes and findings together to conclude the thesis. I do so to provide suggestions as to possible legal reforms and to set out what I have identified as possible areas for future research, before providing my final, concluding remarks.

6. Conclusion

In this chapter I have set out the key themes this thesis addresses, the legal frameworks that apply and provided an overview of the research context. In doing so I have identified the gaps in knowledge in this area of law, which I respond to in the remainder of the thesis. I have also provided an overview of the thesis, including the content of each chapter and the research questions that are answered by the thesis. In the next chapter I outline my theoretical approach in detail, drawing on vulnerability theory, understood as a relational and embodied concept.

CHAPTER TWO: VULNERABILITY, EMBODIMENT AND RELATIONAL THEORY

1. Introduction

In this chapter I set out the theoretical framework of vulnerability that I develop in this thesis.[41] I focus on how vulnerability could be a useful legal tool in mental capacity, an area where vulnerability discourse is increasingly applied,[42] and adult safeguarding, which focuses on "protecting certain people who may be in vulnerable circumstances" (Office of the Public Guardian, 2017). Drawing on feminist approaches to vulnerability (Fineman, 2008; Fineman, 2010; Mackenzie, Rogers and Dodds, 2014b), I argue that the increased vulnerability to sexual violence of women with mental disabilities[43] provides an example of how and why a situational account of vulnerability should be advanced.

In the first section of this chapter I explore the meaning of vulnerability, conceptualising it as "both universal and particular" (Fineman, 2008, p. 31). I argue that the concept of inherent and situational vulnerability developed by Mackenzie, Rogers and Dodds is the most compelling (Mackenzie, Rogers and Dodds, 2014b) as it allows us to identify vulnerability in negative and positive ways rather than as a neutral inevitability of human life. I build on their analysis to argue for the link between mental

---

[41] This chapter is based on an article I published, see Lindsey (2016a).

[42] It is present in much of the case law in this area: *D County Council v LS* [2010] EWHC 1544 paras 9, 13, 33, *A Local Authority v H* [2012] EWHC 49 paras 8-9, *York City Council v C and another* [2013] EWCA Civ 478 paras 50-51, *Derbyshire County Council v AC* [2014] EWCOP 38 paras 13, 16, 43.

[43] Whilst the arguments in this thesis are intended to apply to all adults, my focus in this chapter is explicitly on women. This is partly as a result of the focus on sexual and domestic abuse which is a distinctly gendered phenomenon, see Benedet and Grant (2014, p. 133). Furthermore, any legal response developed using vulnerability theory needs to be attentive to the embodied interplay between mental disability, sexual violence and gender. However, that does not detract from the vulnerability that men also experience and the arguments made are intended to apply to all in vulnerable circumstances irrespective of their gender or disability.

disability and vulnerability to be removed, because it focuses on the inherent rather than situational causes of vulnerability.

I then move on to explore the relationship between vulnerability and autonomy, understood in a relational sense, and consider how this relationship is operationalised in the context of abuse. I argue that the most pressing problem for women with mental disabilities has been the *failure* to protect them from abuse, with high rates of sexual violence amongst this group (McCarthy and Thompson, 1997, p. 107; Martin *et al.*, 2006, p. 829). I further consider the role that embodiment can play in working through some of the concerns about the use of the concept of vulnerability whilst also allowing vulnerable adults to be protected. I suggest that an embodied, situational understanding of vulnerability can help to develop legal responses which both protect and empower vulnerable adults, in line with the aims of this thesis.

I finally consider the extent to which my embodied, situational approach to vulnerability has been realised in case law at the intersection between adult safeguarding and the MCA. By reference to three cases, I show that the law focuses disproportionately on the inherent features of vulnerability rather than exploring the situational reasons for the adult's vulnerable position. Whilst there are some instances of a situational and embodied approach to vulnerability in the case law, it will be shown throughout this thesis that this is the exception rather than the norm.

2. Vulnerability Theory

Vulnerability typically connotes a person's susceptibility to harm. The concept has been recognised most explicitly in the bioethics context, for example, scholars such as Aday and Rogers use vulnerability to highlight the frailty of human existence, which can lead to poor health outcomes when certain vulnerabilities are present (Aday, 1994; Rogers, 2006). Similarly, debates about vulnerability arise in the context of research ethics, for

example the Nuffield Council on Bioethics highlight that (Nuffield Council on Bioethics, 2015, p. 124):

> … in many (though not all) cases, the factors that may potentially make children feel, or be, vulnerable in the context of clinical research do not arise *inevitably* because of the nature of childhood; and nor are they necessary features of research. Rather, they arise in the context of the developmental nature of childhood – experienced, for example, in a young child's need for practical and emotional support in understanding what is proposed; or an older child's anxiety about the impact of research participation on their school life.

Therefore even within bioethics, vulnerability is recognised to be a nuanced concept, varying with and dependent on a range of factors. Understanding what vulnerability means for law, and how it could be developed as a legal tool, is a difficult task as the concept is not easily defined. Martha Fineman, the leading vulnerability theorist in the legal context, describes being vulnerable as being in "a state of constant possibility of harm" (Fineman, 2008, p. 11). Fineman uses the idea of human dependency, created by our biological and material existence, to critique the pervasive notion of the rational, self-reliant man. She argues that whether at birth, during childhood or old age, there is always a certain level of inter-dependency needed for human existence to flourish because vulnerability is biological and unavoidable (Fineman, 2008, p. 2). A material, biological analysis of vulnerability is therefore persuasive to the extent that the dependent nature of human life makes us vulnerable.

2.1. Universal, inherent and situational vulnerability

Understanding vulnerability also requires understanding how law views its subjects. Fineman has theorised the concept of vulnerability to develop a broader critique of mainstream Anglo-American liberal legal theory. She questions how traditional theories of law all but ignore “our bodily fragility, material needs, and the possibility of messy dependency” (Fineman, 2008, p. 21). This is achieved through the dominance of the rational, individualised autonomous subject. Fineman instead argues that the “vulnerable subject” should be the centre of moral, legal and political concern as it better accounts for the embodied experiences of human existence (Fineman, 2008, p. 9). The way that different people experience their diverse lives is dependent upon their environments and a legal approach that considers humans in the abstract, without their messy relationships and complexities, fails to appreciate those nuances. As I demonstrate throughout this thesis, mental capacity law uses the language of vulnerability but has failed to adopt an appropriately nuanced, situational account of it.

Fineman’s analysis is a powerful reminder of why vulnerability theory is relevant to law – it is an essential feature of human existence (Fineman, 2012). Similarly Kittay argues that dependency is the paradigmatic view of moral relations; any theory of justice which fails to account for the dependent, vulnerable nature of human beings is flawed (Kittay, 1999, pp. 71-76). Kittay more strongly emphasises that vulnerability is not equally shared across different individuals and groups (Kittay, 1999), a claim which I take forward. In doing so, I focus on understanding vulnerability as inherent and situational (Mackenzie, 2014b; Mackenzie, Rogers and Dodds, 2014a; Mackenzie, Rogers and Dodds, 2014b). Inherent vulnerability relates to features intrinsic to the human condition, typically biological factors such as health or hunger (Aday, 1994). However, it also encompasses vulnerabilities such as biological sex which, although related to other vulnerabilities, come with inherent vulnerabilities of their own, such as

pregnancy. Historically, certain groups have been recognised as having vulnerabilities because of their particular status, typically women and children or people with disabilities have been viewed as weaker, more vulnerable members of society. The core of this type of vulnerability is that the individual is vulnerable *to* something because of features they possess which make them distinguishable from the rational, autonomous agent.

In contrast, situational vulnerability covers the circumstance-specific aspects of vulnerability. Mackenzie, Rogers and Dodds discuss social, political, economic, personal and environmental situations as examples of situational contexts which can cause or contribute to vulnerability (Mackenzie, Rogers and Dodds, 2014a, p. 8). This is important in the intersection between gender and disability because vulnerability has often been seen as inherent to both. In contrast, situational approaches to vulnerability allow us to question that assumed link and consider other reasons why women with mental disabilities may be more vulnerable without essentializing them as inevitably so.

As a starting point in arguing for a situational approach, vulnerability must be decoupled from any assumed linked to mental disability. Whilst a person may be more susceptible to abuse because of inherent features, that is not *necessarily* so and is not *caused* by her disability. It is the person abusing her, or her past experience of abuse, which is responsible for her vulnerability. As the social model of disability reinforces (see p. 3), individuals are often 'disabled' as a result of social and environmental factors. For example, women with mental disabilities are more vulnerable to sexual abuse for situational reasons; because of abuse perpetrated by those in positions of care and trust, the role of institutionalisation and segregation (Hollomotz, 2011, pp. 36, 72-73; Plummer and Findley, 2012, p. 23) and the targeting of groups less likely to resist or report violence (Martin *et al.*, 2006, p. 824). They are also vulnerable in the way that all women are - as a result of society's gendered responses to, and failures to address, sexual (and other forms of) violence (Benedet and Grant, 2014).

The assumed link between mental disability and vulnerability has led to claims that being labelled vulnerable is regressive and stigmatising. This is at the root of concerns around vulnerability discourse and, as I highlight from my data in Chapters Four and Seven, the term has been used to, for example, place restrictions on the movement of women with disabilities.[44] However, feminist approaches to vulnerability (Kittay, 1999; Fineman, 2008; Fineman, 2010) can help to allay these concerns. Fineman's assertion of universal vulnerability is powerful as it reinforces that we are all materially vulnerable (Fineman, 2012, p. 84). It helps to remind external observers, including social care professionals, lawyers and judges, that a vulnerable/invulnerable dichotomy is not only stigmatising but also false because we are all vulnerable to varying degrees throughout our lives.

Yet under Fineman's approach we acknowledge the universality of vulnerability but are drawn away from focusing on the specificity of it. Fineman does explain that vulnerability requires an analysis of the particular (Fineman, 2013, p. 21). Yet her motivation appears to be to point out there is no position of invulnerability (Fineman, 2013, p. 22). The observation that humans are *constantly* and *inevitably* vulnerable is essential, but in going beyond that claim, I argue that law must focus on *why* embodied experiences of vulnerability vary. Research shows that 61% of women with learning disabilities had suffered sexual abuse in their lives (McCarthy and Thompson, 1997, p. 107). This vulnerability is not inevitable or constant, yet the description is central to Fineman's characterisation (Fineman, 2008, p. 8). I agree with Mackenzie that Fineman's "claim that vulnerability is a constant feature of the human condition obscures important distinctions between different sources and states of vulnerability" (Mackenzie, 2014b, p. 38). Instead, I argue for removing the assumed link between vulnerability and disability, so that we can focus legal responses on situational causes

[44] *A Local Authority v SA* [2005] EWHC 2942, *A Local Authority v H* [2012] EWHC 49, *Derbyshire County Council v AC* [2014] EWCOP 38.

in mental capacity law in practice.

2.2. Vulnerability and relational autonomy

Whilst I have identified that the focus in mental capacity law has been on autonomy, the relationship between vulnerability and autonomy has been under-developed. This is partly because there is a perceived tension between the two (Fineman, 2008; Fineman, 2010; Mackenzie, 2014b). Anderson asks, "what does justice demand, especially where there are trade-offs between promoting autonomy and diminishing vulnerability?" (Anderson, 2014, p. 151). In exploring this, I argue that autonomy and vulnerability should not be seen as oppositional concepts (Anderson, 2014). In fact, it must be acknowledged that it may be worthwhile, even necessary, to risk vulnerability in the pursuit of autonomy and, therefore, empowerment. In the name of protection the learning disabled are often subjected to restrictions for fear of harm (Hollomotz, 2011, 133). In doing so, their ability to experience how to lead an empowered, autonomous life is undermined. For example, learning disabled adults who seek protection within their care home do not gain the benefits of social experiences (Arstein-Kerslake and Flynn, 2016), and adults who are socially isolated have a higher likelihood of suffering abuse (Plummer and Findley, 2012, p. 23). Therefore, instead of understanding vulnerability and autonomy as conflicting, we need to consider the relationship between the two more carefully. This will help to guide legal responses that better empower and protect vulnerable adults.

Liberal approaches to autonomy assert that adults make rational, independent and self-interested choices (Kant, 1998). They focus on the isolated nature of choices, made in the interests of the self. It is said that these decisions are to be respected and others have no place in interfering with choices made by autonomous agents. The importance of respecting agency must not be forgotten in any feminist critique; the

assertion of a woman's equal right to self-determination has also protected women from unwanted interference, particularly through law.[45] However, non-interference founded upon freedom-based conceptions of autonomy can often only mean respecting agency; that we must refrain from interfering with choices made by individuals, irrespective of the capabilities or circumstances within which that choice was made. Whilst agency is important because even individuals who have limited options should still in many cases have their choices respected, it is not conceptually equivalent to autonomy. Exercising agency by making or resisting a choice does not make it autonomous (Sherwin, 1998, pp. 32-33); autonomy requires something stronger than simply action, typically some degree of reflection and value/preference.[46] Autonomy may also be affected by the person's capacities or oppressive circumstances in the way that agency is not because it relates to a more fundamental ability. In fact, using agency as akin to autonomy is precisely how oppressive social relations are best maintained; when the subordinated person uses their agency to seemingly 'accept' their position (Warriner, 2015, p. 37). Therefore in considering the relationship between autonomy and vulnerability, I consider autonomy beyond individual freedom to make choices.

As discussed at section 4.1 of Chapter One, relational approaches to autonomy emphasise the impact of relationships and environment on a person's ability to act autonomously (Mackenzie and Stoljar, 2000; Christman, 2004; Oshana, 2006). Explicitly relational approaches argue that whether or not a choice is autonomous can only be understood by seeing the person in context and taking account of the situation they are in. It is the antithesis of seeing the world as made up of distinct actors behaving as individuals without connections – people are individually autonomous, but

[45] For the seminal case see *St George's NHS Healthcare Trust v S* [1998] 3 W.L.R.

[46] For example see Frankfurt's discussion of first and second order desires (1988). Whether such values or desires should be judged by reference to internal or external conditions has been the subject of further debate (Oshana, 2006; Westlund, 2009).

within their relationships, as they are also vulnerable to those relationships (Nedelsky, 2011). This approach does not entail a complete rejection of liberal approaches to autonomy that focus on the rational self-interested actor. This is because the liberal conception could still be in accordance with certain relational conceptions by expanding the scope of the 'self'. For example, if a vulnerable adult understood their sense of self as encompassing others, perhaps their child, then it would be highly rational to act in a way that also takes into account the child's interests as well as the individual's, even where they conflict. Similarly, often women have developed ways of navigating and developing their own autonomy within a context of vulnerability to abuse. The fact that the moment at which a woman is most at risk from a violent partner is at the point of leaving (or shortly after) suggests that, in many ways, remaining within an abusive relationship is, at least to some extent, an autonomous choice based on a risk analysis (Humphreys and Thiara, 2003, p. 200).

A relational approach is important when considering the human relationships that permeate this thesis. Sex, marriage and contact inevitably involve another person and therefore the relational dimension of these capacity domains is explicitly drawn. By relational I do not simply mean intimate relationships, albeit those are the primary focus of sex and marriage cases. However, the way that people interact with each other, and with the world around them, is central to understanding who they are. Nedelsky refers to "nested relations" as an approach to relationality (Nedelsky, 2011), a description which captures the core of relational theory as it is clear that relations are complex, interconnected and interdependent. This idea of nesting draws out the fact that, so often, relationships are often built on and within different relational and social conditions and it can be difficult to delineate between the various factors. Again, this is particularly relevant for sexual activity and marriage because a person's intimate relationships are often negotiated along complex social, gender and familial lines, such that a choice to engage in sexual activity is often complex, negotiated and constrained.

Relationships are not always positive and taking a relational approach does not mean that all relationships must be accounted for. Relations can be a confusing mix of benefit and harm and this may also vary temporally as relationships develop and change over time. Mackenzie and Stoljar's (Mackenzie and Stoljar, 2000) approach to relationality focuses on this harmful aspect of relations. They consider that relationships could be harmful to a greater or lesser extent and in different contexts, for example, a particularly pushy parent may push their child academically which may have benefits for that child's economic success but which may also have a harmful impact on their own relationship with that parent in the long term. The harmful nature of relationships is at the core of my analysis: the subject matter of this thesis is fundamentally about abusive relationships and how the law, social work and medicine responds to such relationships.

Mackenzie, Rogers and Dodds' taxonomy of vulnerability similarly draws on relational autonomy to highlight examples of pathogenic vulnerability. This is defined as a harmful form of situational vulnerability which should be removed because it is so undermining of (relational) autonomy or exacerbates other vulnerabilities to such an extent it is always undesirable (Mackenzie, 2014b, p. 39; Mackenzie, Rogers and Dodds, 2014a, p. 9). In contrast, not all inherent or situational vulnerabilities are undesirable, particularly if connected to features inherent to embodiment, for example age. Therefore the concept allows us to distinguish between the positive and negative aspects of vulnerability. Anderson discusses the related problem of surplus vulnerability, which refers to an excess of vulnerability otherwise needed to maximise autonomy (Anderson, 2014, p. 154) and enable a person to pursue their conception of the good life. For me this ties in with pathogenic vulnerability which is also surplus – it is harmful and should be removed typically because it impacts on autonomy. In contrast, surplus vulnerability may not always be pathogenic. For example, if we could develop technology that extended the period for which humans could survive without

food this would reduce inherent vulnerability to hunger but in an industrialised country might have little impact on a person's autonomy. Similarly certain mental disabilities may fall within the category of surplus vulnerability as they may increase a person's vulnerability to no benefit to their autonomy. However, they wouldn't necessarily be pathogenic, for example bipolar disorder has been shown to have positive effects (Galvez, Thommi and Ghaemi, 2011).

The presence of surplus pathogenic vulnerability in a person's life increases their situational vulnerability, has a destabilising effect on their autonomy and has little or no other benefit to them. That is not to say that law should always intervene where surplus pathogenic vulnerability is present. Instead, the concept provides a way of understanding the circumstances in which law could usefully identify and respond to harmful forms of situational vulnerability. For example, in entering any relationship we risk the possibility of being hurt. This is a form of vulnerability, but it is not necessarily harmful because it is the only way to assert autonomy; we risk our emotional stability to make friendships that enhance our lives. Yet we do so knowing that if those relationships become abusive, we can end them and move on. In contrast, when a woman is unable to leave, whether because a learning disability means she cannot identify the abusive behaviour, or financial dependence on the other person, at that point that relationship becomes a harmful, surplus pathogenic vulnerability. As Scully puts it "if autonomy is the capacity to make what you want happen, then vulnerability, as the inability to protect oneself against unwanted things happening, is a specific kind of autonomy deficit" (Scully, 2014, p. 212). However, in this scenario law should not intervene on the basis that the decision to remain in the relationship is not autonomous, but because the abusive partner represents a surplus pathogenic vulnerability in the woman's life. Whilst this form of vulnerability impacts on her autonomy, intervention is not justified on the basis that the decision is non-autonomous. Instead, the emphasis is on responding to the surplus pathogenic

vulnerability and its situational cause.

To help understand how vulnerability can work as a legal tool I use the concept of situational vulnerability, specifically highlighting surplus and pathogenic vulnerability in cases of abuse. Sexual violence and other forms of abuse can be seen as surplus pathogenic vulnerabilities because they stem from harmful and oppressive social structures that should be eliminated (making them pathogenic).[47] Furthermore, the current level of vulnerability to violence is not necessary to enhance autonomy (making it surplus). In fact the opposite is required; sexual and domestic abuse is so prevalent and linked to inequality that a reduction in female sexual vulnerability would result in an enhancement of female autonomy generally (Benedet and Grant, 2014, pp. 136-137). Benedet and Grant consider "prevention of and redress for sexual violence to be a precondition to meaningful sexual self-determination…" (Benedet and Grant, 2014, pp. 136). Viewing abuse as a surplus pathogenic vulnerability can help to achieve such redress, without focusing on the victim of abuse as a non-autonomous decision-maker, which can be disempowering.

The type of redress that is usually advocated where abuse is present is gained through the criminal justice process. However, persistent failures of the criminal justice system to value the experiences of those who have experienced abuse undermines autonomy and increases vulnerability (Benedet and Grant, 2014), as discussed further at section 4.2 of Chapter Four.[48] Therefore I argue that the state's obligation to protect cannot end with criminal justice processes, as there are a number of reported civil

[47] For example being within an abusive relationship or experiencing failures of criminal justice. Around 90% of victims of the most serious sexual abuse knew the perpetrator. Only 15% of victims of the most serious sexual offences reported them to police and their reasons for not doing so included they "didn't think the police could do much to help" and that it was "embarrassing". In 2011 the 2,900 defendants prosecuted for rape were prosecuted, on average, for 2.3 rape offences each, suggesting that failures to apprehend and punish means they are able to continue committing sexual violence (Ministry of Justice, Home Office and the Office for National Statistics, 2013).

[48] The point at which perpetrators should be held accountable through the criminal law is beyond the scope of this thesis and my arguments are not intended to detract from the importance of criminal law reform to achieve justice.

cases where the police appear not to have taken action.[49] Alongside, or in the absence of, the criminal law, it remains the responsibility of the state to minimise vulnerability through the civil law where abuse is proven on the balance of probabilities. The civil law regularly challenges violence in other contexts, for example in tort claims for battery.[50] Yet the way in which the civil law responds is through civil law remedies such as injunctions.

For example, *Birmingham City Council v Riaz and others*[51] concerned a 17 year old woman without any recognised mental disability, AB, who was a victim of sexual exploitation by at least ten older men.[52] The police came to the conclusion that there was insufficient evidence to bring a prosecution, highlighting an all too common problem. In *Riaz*, initially AB was subjected to a secure accommodation order which would have restricted her liberty rather than those abusing her. However, the local authority sought an injunction against the perpetrators – meaning they could not contact or associate with AB nor any other female under 18 years, previously unknown to them, in a public place.[53] The order was granted under the inherent jurisdiction and this case highlights the situational approach to minimising vulnerability that I explore throughout this thesis. The use of a civil law injunction in this case is similar to the use of a non-molestation order under s 42 Family Law Act 1996. However, non-molestation orders require initiation from the victim and there is no duty on the state to consider such action.[54] Therefore the use of the inherent jurisdiction gave the state more flexibility to respond to abuse where other areas of law, such as criminal justice, had failed.

---

[49] *Derbyshire County Council v AC* [2014] EWCOP 38, *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53, *Birmingham City Council v Riaz and others* [2014] EWHC 4247, *The Hospital Trust v V and others* [2017] EWCOP 20.
[50] *Ashley v CC Sussex Police* [2006] EWCA Civ 1085.
[51] [2014] EWHC 4247.
[52] para 1.
[53] para 7.
[54] One way around this would be to enact a power for local authorities to apply for non-molestation orders. For a further discussion see Miles (2011).

Justifying interventions based on the inherent vulnerability of an individual (Mackenzie, 2014b; Mackenzie, Rogers and Dodds, 2014b) focuses the gaze of the law in the wrong direction. Instead, in *Riaz* the court focused on the situational causes of AB's vulnerability – that she was at risk of abuse from perpetrators of sexual violence. In that case AB was legally a child and, therefore, it may have been easier to justify intervention using the inherent jurisdiction, but it would better if the court focused on perpetrators of abuse in cases concerning vulnerable adults too. AB was not especially vulnerable because she was 17 years old, nor will she cease to be vulnerable once 18. AB, like many others, was situationally and pathogenically vulnerable because of the conditions within which she had developed and as a result of the continual threat and past experience of sexual violence. This is the case for a young woman such as AB as much as for an older woman with or without disabilities.[55]

Therefore in mental capacity law, the focus must similarly shift from the inherent to the situational causes of vulnerability to enable vulnerability to be a useful legal device. Using a vulnerability analysis helps law to move away from a focus on the autonomy of the vulnerable adult, which can be disempowering, towards an emphasis on their vulnerable position. That is not to say that redefining vulnerability as caused by situational conditions will solve the problem of abuse (Williams, 2002, p. 312). However, it should lead to the use of more nuanced legal tools to address the situational causes of vulnerability, rather than attributing the adult's vulnerable position to inherent features.

[55] *Riaz* is not the only reported case that concerns people without mental disabilities, albeit they are much less common, see also *In Re L (Vulnerable Adults with Capacity: Court's Jurisdiction)* [2012] EWCA Civ 253, *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37.

2.3. Vulnerability and embodiment

In this thesis I understand vulnerability as embodied. Embodiment is founded upon an understanding that humans live and navigate the social world through their bodies (Fletcher, Fox and McCandless, 2008; Mackenzie, 2014a, pp. 157-158). Fineman explains that it is our embodied nature that makes us "constantly vulnerable to events that might render us dependent" (Fineman, 2012, p. 86). Therefore it is predominantly our embodiment which contributes to our vulnerability. As such, embodiment is not something that should be ignored when considering how to frame legal responses. Taking account of embodiment requires understanding the different ways that bodies are vulnerable and can be affected by legal responses, and how certain bodies are excluded from analysis. For example, it must be remembered that female bodies might become pregnant; disabled females might have their bodies restricted or denigrated; and mentally disabled females may never have known what it means to have their body respected.

Yet, as discussed, the traditional account of autonomy has focused on rationality (Kant, 1998) at the expense of an analysis of the body (Eisenstein, 1988; Naffine and Owens, 1997; Fletcher, Fox and McCandless, 2008). Feminists have long criticised this with women being viewed as constrained by their bodies but men being able to step outside bodily restrictions (Nedelsky, 1990; Naffine and Owens, 1997). This is not only based on the idea that capacities for rationality are superior to other, more 'animalistic' capacities associated with the female but that these capacities stem from somewhere other than the body. Such a claim is now widely believed to be false as the mind is situated within the physical realm (Nemeroff, Kilts and Berns, 1999, p. 672).

In contrast, it is often (wrongly) argued that when men force their sexual desires on others their behaviour should be understood because of their strong biological

underpinnings (Hale, 1736; Sandland, 2013b).[56] This once common understanding is in stark contrast to theorisation of the body in other contexts, such as reproduction, where women are perceived to be unable to overcome the trappings of their own biology (Eisenstein, 1988; Jackson, 2008). Similarly, the female with mental disabilities is characterised as doubly biologically determined since she is seen as being driven by instinct and a dangerously insatiable appetite to engage in sex; it is seen to be an inevitability of her mental state. This characterisation is more similar to descriptions of men's sexuality than non-mentally disabled women (Sandland, 2013b, p. 984) and helps to obscure the vulnerability these women often experience.

The difficulty with mentally disabled women's sexual embodiment is the tendency to dichotomise; they are seen as either sexually risky and uncontrollable or asexual and in need of protection (Doyle, 2010; Sandland, 2013b). Furthermore, their bodies are either controlled through the use of secure accommodation from which they cannot leave,[57] or given absolute liberty to engage in dangerous and abusive sexual behaviour (Doyle, 2010). This dichotomy is achieved by reference to sexual instinct, pointing towards an inherent vulnerability within all mentally disabled women; from which they are also perceived to seek out risky sexual encounters (Sandland, 2013b, p. 1002). Their reduction through the law to an instinct driven, non-rational body can be seen in the way that their vulnerability is constructed as inherent and inevitable, rather than situational and preventable.

Partly as a result of these concerns, vulnerability theory has attracted criticism. For example, Munro and Scoular raise concerns about the term's increased use and potential for supporting regressive practices (Munro and Scoular, 2012, p. 197). They are critical of legal responses focused on maintaining security and labeling based on the perceived vulnerability of victims despite their varying experiences of vulnerability.

[56] Or when husbands were deemed to have a right to sex with their wives, see *R v R* [1991] 3 W.L.R. 767.
[57] *A Local Authority v H* [2012] EWHC 49.

Similarly, in the disability context it is the impairment that is perceived to make that person (disproportionately and inevitably) vulnerable. Disability theorists also take contrasting perspectives on the usefulness of vulnerability theory; for some it provides an opportunity for a disability neutral justification for legal interventions in line with the UNCRPD (Bartlett, 2012; Clough, 2014; Series, 2015b). Conversely, the practice and interpretation of vulnerability could be linked to internalising and stigmatising discourses of disability which might be difficult to move away from (Fawcett, 2009; Hollomotz, 2011). Furthermore, as highlighted in Chapter One in discussing the social model of disability, the proportion of vulnerabilities that are inherent are much lower than traditional approaches to disability suggest (Scully, 2014, pp. 207-208) as many stem from social and institutional responses to disability. The prevalence of vulnerability being tangled up with stigmatising labels and inherent notions of disability has contributed to concerns around its use.

Yet in being wary of the negative connotations of vulnerability (Brown, 2011; Munro and Scoular, 2012), there is a danger of shifting the balance too far in the opposite direction. For example, fears around state intervention can lead to non-interference, which, in turn, allows the causes of vulnerability to continue. As Herring explains:

> such comments are in danger of underplaying the extent to which the state is already meeting people's needs and intervening in people's lives in a way which is uncontroversial. Whether it be the provision of sewerage, electricity, transportation or security… (Herring, 2016, p. 25).

In my view the problem is not state intervention *per se*; but how the state responds in a way which empowers whilst also protecting vulnerable adults. Taking an embodied, situational approach is central to achieving this as the focus should be on achieving a

better balance between empowerment and protection for the vulnerable adult. As highlighted in the previous section, I consider this can partly be achieved by framing legal responses which target situational causes rather than the vulnerable adult herself, something explored in more detail at section 4 of Chapter Four and section 3 of Chapter Seven. For example, the law could focus on providing a vulnerable adult with a safe space to consider and communicate her own wishes away from the vulnerability inducing circumstances. This means minimising the surplus pathogenic vulnerability factors present in the adult's environment to enable her to make a decision, for example by targeting the abusive individuals in the person's life, typically husbands and partners (Martin *et al.*, 2006, p. 834; Plummer and Findley, 2012, p. 23). This is in strict contrast to forcing an intervention on the vulnerable adult. For example, by removing her against her will into what is perceived to be a safe environment through the use of the deprivation of liberty (DOL) provisions under the MCA. A focus on embodiment emphasises that it is not the vulnerable adult who should be coerced by any legal intervention. The role of the court must be "facilitative, rather than dictatorial"[58] towards the vulnerable party as there are legitimate concerns about the role of the law in interfering with her liberty (Hewson, 2013, p. 457).

As I do not argue for interventions which coerce the vulnerable adult directly, her objection cannot be a barrier to intervention. However, interventions should still take account of her wishes. This is important because historically women and people with disabilities have been subjected to pathogenic legal responses which control them, often ignoring the embodied consequences. Similarly, I argue in my following discussion of the case law that derivative vulnerability may be created by law's response if the adult's views are ignored (Fineman, 2010, p. 24; Fineman, 2013, p. 18). Derivative vulnerability is not universal in the way Fineman describes other forms of vulnerability but is constructed as a result of other inequalities (Fineman, 2010, p. 24).

[58] *A Local Authority v DL and others* [2012] EWCA Civ 253 para 67.

In this sense, legal interventions which place an adult in secure accommodation for her own protection, for example, may exacerbate her vulnerable position rather than reduce it. Only an embodied analysis of vulnerability ensures such consequences are considered.

3. Vulnerability Contextualised

In this section I consider the extent to which my embodied, situational approach to vulnerability is reflected in the law. The intersection between mental capacity and adult safeguarding law provides an interesting point of analysis because of the pervasiveness of vulnerability in both contexts. Yet both areas have taken an inherent approach to vulnerability. For example, Department of Health guidance, *No Secrets* (Department of Health, 2000), defined a vulnerable adult in relation to their mental (or other) disability, age or illness. The meaning of vulnerability in safeguarding, pre-Care Act at least, was therefore focused on the inherent features of persons (Clough, 2014, p. 372). The focus in the MCA on internal features also points towards an inherent vulnerability approach, stating that "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself…because of an impairment of, or disturbance in the functioning of, the mind or brain".[59] The language of inherent vulnerability is equally present throughout judicial discourse in this area.[60]

Law's focus on inherent causes of vulnerability will be highlighted in the following two sections, as well as being a theme to which I return throughout this thesis. Despite this inherent focus, I also show that there are limited examples from the case law which point towards the possibility that an embodied, situational approach to

[59] s 2 (1) MCA.
[60] *D County Council v LS* [2010] EWHC 1544 paras 9, 13, 33, *A Local Authority v H* [2012] EWHC 49 paras 8-9, *York City Council v C and another* [2013] EWCA Civ 478 paras 50-51, *Derbyshire County Council v AC* [2014] EWCOP 38 paras 13, 16, 43.

vulnerability could be operationalised that better protects and empowers adults vulnerable to abuse.

3.1. An inherent vulnerability approach: *The London Borough of Tower Hamlets v TB and SA*

I now discuss one case which I suggest is typical of the approach taken in this area of law. It is a case that provides a useful example to contrast the position of two women in similar situations, one of whom was 'protected' as a result of her inherent vulnerability (her mental disability) whilst the other was left to remain situationally vulnerable within an abusive relationship. I argue that there was a failure to apply an embodied, situational vulnerability approach in relation to either woman in this case.

The London Borough of Tower Hamlets v TB and SA[61] concerned TB, a 41 year old woman with a moderate learning disability believed to be genetic in aetiology and who was described as having the cognitive abilities of a "child between the age of 4 to 8 years".[62] TB, who was found to lack capacity to consent to sexual activity and decide on residence and contact, was married to a man, SA, who was also her first cousin and had four children with him. All four children were the subject of care proceedings and placed for adoption. In the course of care proceedings, findings were made, supported by witness evidence, that SA had committed acts of violence against TB.[63] Following this course of events, and whilst TB and SA were still married, SA married SSB, also his first cousin, under the laws of Islam, albeit this marriage was not valid in English law. SA and SSB had also had two children together at the time of the proceedings.

Mr Justice Mostyn noted in his judgment "[SA] has regular sex with SSB. He told me that this had occurred the previous week, and happened about every two

[61] [2014] EWCOP 53.
[62] para 2.
[63] para 5.

weeks. He regards it as his right to have sex with her and her duty to submit to it. This is a tenet of his culture and religion".[64] In relation to TB it is also noted "that according to his religion and culture he regards himself as entitled to do this [have sex with TB] and he regards it as her duty to submit".[65] Mostyn J further explained that following removal of their child at birth:[66]

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

Therefore TB's relationship with SA was evidently abusive and of understandable concern to all involved with the family. However, the contrast between the law's treatment of the two women, TB and SSB, both in abusive relationships, highlights the effect of attributing 'vulnerable' status on the basis of an inherent vulnerability, in this case TB's mental disabilities. Both women had similar situational and pathogenic vulnerabilities; they had a comparable home life in that each had regular contact with an abusive partner who regarded it as his right to have sex with them. Culturally they were from similar backgrounds and there appeared to be pressure on both women to remain in the relationship.[67] In many ways SSB's vulnerability to harm may actually have been greater than TB's as an earlier decision found that TB lacked capacity to decide on residence and that it was not in her best interests to live with SA.[68] Therefore SSB's sexual contact with SA likely continued while TB was protected. Furthermore, the finding that TB should only have limited contact with SA, fortnightly

---

[64] para 10.
[65] para 12.
[66] para 15.
[67] para 5.
[68] para 4.

for one hour,[69] also likely reduced her surplus pathogenic vulnerability as SA would have been unable to have the level of influence over her that he would have had if she lived with him. Therefore whilst the court rightly identified the cause of vulnerability as SA, they only intervened to protect TB because she had a mental disability. The MCA appears not to have been used in relation to SSB, with the seemingly preferred approach being the use of immigration law to address SSB's vulnerable situation.[70] The contrast here is clear; TB was protected because of her inherent vulnerability, whereas SSB appears to have been left unprotected because she was not sufficiently inherently vulnerable.

Whilst I agree that TB needed protecting from SA, in being found to lack capacity in relation to sex and residence, it is not clear that the embodied consequences for TB were fully considered. For example, TB had been living in a self-contained flat with 24 hour care but Mostyn J ordered that a supported living placement was in her best interests. The risks with moving TB into an institutionalised setting appear not to have been fully considered. The primary concern was to remove TB from SA, but an embodied approach would also require taking into account the derivative and pathogenic vulnerabilities that can be created by legal interventions. Furthermore, a finding of incapacity in relation to sexual activity may have led to TB being prevented from having contact with any other males because of the risk of sexual activity. Having the freedom to interact with others undoubtedly risks vulnerability but it is done so in the pursuit of autonomy and may have led to TB living a more fulfilled life.

In this case, the fact that TB had a mental disability meant the MCA was an available tool to help address the abuse against her. If TB's vulnerability had been viewed in situational terms then the focus would have been on restricting SA, which would also have had benefits for SSB. However, the court viewed TB and SSB's

---

[69] para 26.
[70] SSB had not entered the UK lawfully and was in the process of appealing against deportation, para 18.

vulnerability in a way that focused on the inherent rather than situational causes, without taking full account of the embodied consequences of such an approach for either woman.

3.2. An embodied, situational approach: *In Re A (Capacity: Refusal of Contraception)* and *Local Authority X v MM*

Despite my analysis above, embodied, situational responses to vulnerability have, at times, been achieved under mental capacity law. In particular this has most clearly occurred where the court has taken the lead from the inherent jurisdiction and has sought to intervene to allow unencumbered decision making by the adult herself.[71] In *In Re A (Capacity: Refusal of Contraception)*[72] the High Court held that A, a married adult woman, lacked the capacity to make decisions about contraception, primarily because of the coercive, and therefore pathogenic, pressure to refuse contraception under which her husband had placed her. Despite being a Court of Protection decision, the court drew heavily on the inherent jurisdiction and described A as a vulnerable woman and saw it as their duty to intervene where a person "coerces or unduly influences a vulnerable party from making free decisions".[73] As in most cases in this area, the inherent conception of vulnerability described by the court has wide-reaching implications as it turns on who they consider to be vulnerable. In this case the implication was that Mrs A was vulnerable because of her IQ of 53[74] and this highlights the court's problematic focus on inherent rather than situational vulnerability. A had learning difficulties but, more importantly, she had had two children removed from her at birth and was now in a relationship with a man who was abusive and trying to restrict

[71] *A Local Authority v DL and others* [2012] EWCA Civ 253.
[72] [2010] EWHC 1549.
[73] para 79.
[74] para 4.

her reproductive choices.[75] Not only was she subject to coercion by her partner but had he succeeded in his efforts, the embodied vulnerability which she would have experienced, namely pregnancy and the resulting likelihood of having her child removed, would most likely have had harmful consequences. If vulnerability means being at greater risk of harm then A was undoubtedly vulnerable, but situationally rather than in any inherent sense. By this I mean that had A been in a supportive intimate relationship, where her partner had encouraged her to make decisions for herself, then perhaps A would not have been viewed as especially vulnerable at all.

Despite this focus on inherent vulnerability, the court also explained the purpose of the inherent jurisdiction as "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."[76] This unusual approach looks as if the court's intention was to enable Mrs A to make the decision free from Mr A's influence. Her susceptibility to his pressure was in excess of any vulnerability needed to maximise autonomy, highlighting how a surplus pathogenic vulnerability analysis might develop. However, the court did not issue an injunction against Mr A. A more conciliatory approach was preferred, on the basis that Mr A gave assurances that he would allow Mrs A to access support. Perhaps if his behaviour had not changed the court may have taken a more interventionist approach. Yet the fact the court was able to recognise that this adult was vulnerable because of her partner's oppressive influence, and that he may need to be removed to allow her to develop, is an important step forward in identifying situational causes of vulnerability and responding in ways that are sensitive to embodiment.

The importance of this case for my situational, embodied approach is also in the court's finding that it was in Mrs A's best interests to receive contraception only if she

---

[75] paras 4, 17.
[76] para 79.

consented to it.[77] This was because it was held to be unacceptable to physically force contraception on her. The court in this case therefore tacitly recognised its ability to create derivative and surplus vulnerability. Therefore using an embodied vulnerability analysis not only highlighted Mrs A's vulnerability but led to the court recognising the material impact of its decision on her. Had Mrs A been forced to receive contraception against her will, this would have involved physical restraint and possibly even secure accommodation. This outcome may appropriately have been described as pathogenic and would have done very little to enhance Mrs A's autonomy. The best outcome for Mrs A was surely to allow her the space to make the decision herself; for her to recognise the impact on her physical and mental health of becoming pregnant again and consider this in the absence of Mr A's pathogenic influence.

In recognising embodiment in mental capacity law, courts must also think of ways to facilitate decision-making by vulnerable adults. Removing surplus pathogenic vulnerability through the creation of spaces for decision-making is one way the courts can empower whilst protecting vulnerable adults. For example, this arguably occurred in *Local Authority X v MM*,[78] a decision handed down shortly before the MCA came into force, where it was accepted by all parties that MM had the capacity to consent to sex. MM was described as having an IQ of 56, a moderate learning disability, poor cognitive functioning and suffering from paranoid schizophrenia.[79] MM's partner, KM, had a history of violence against her and encouraged her to disengage from support. The local authority initially submitted that MM should be prevented from contact with KM entirely. The extent to which a complete ban would exacerbate rather than reduce MM's vulnerability is difficult to determine. If MM was prevented from contacting KM but expressed a wish to do so, physical restraint would presumably have to be used. The extent of physical restraint would depend on MM's reaction. However, enforcing such

[77] para 77.
[78] [2007] EWHC 2003.
[79] para 2.

restrictions would likely have exacerbated MM's embodied vulnerability.

Munby J, as he then was, found that whilst it was in MM's best interests to be placed in supported living arrangements, that should not involve a ban on contact with her partner. A reasonable set of restrictions on KM's behaviour were proposed, including that KM should not be under the influence of alcohol or be verbally or physically threatening towards MM or staff at her supported accommodation. This represents a focus on the situational cause of vulnerability and the embodied harms that can result from such vulnerability. In this respect MM's expressed wishes to retain contact with KM were respected, but the nuanced approach in restricting *KM's* behaviour may have reduced the surplus pathogenic vulnerabilities she experienced as she was given the space to develop free from an abusive environment. This approach also better represents an embodied analysis of MM's vulnerability as it minimises the likelihood of future disengagement from support which may have occurred had she been subject to restraint or a complete prohibition on contact with KM. Whilst the case still highlights a preference for the use of supported accommodation and therefore surveillance of the vulnerable adult, it was, at least, carried out in a manner that was sensitive to her embodiment and situational vulnerability.[80]

In cases where surplus pathogenic vulnerability has been implicitly recognised the courts have tread a fine line between protecting the adult and creating further derivative pathogenic vulnerability. Rather than resorting to surveillance and control, the court was reminded of the situational reasons for Mrs A's vulnerability, allowing it to respond in non-pathogenic ways. However, as I show throughout this thesis, in practice in the sex/marriage/contact cases that I analysed, such an approach was rare. Furthermore, even in the limited examples provided here where the court arguably took a more embodied, situational approach to vulnerability, they still remain resolute in

---

[80] For example, it is also distinguishable from TB's case discussed above because in this case the local authority accepted that MM had capacity to consent to sex and therefore the restrictions placed on her were likely much less onerous, para 20.

adopting an inherent vulnerability approach by applying the law primarily to adults with mental disabilities. Traditionally, in engaging a concept of vulnerability, the courts have failed to distinguish between inherent and situational vulnerability, nor have they sufficiently considered the embodied consequences of their decisions to intervene in particular ways in particular cases. Targeted interventions against abusive partners, as occurred in *In Re A* and *Local Authority X v MM*, are rare cases, but they highlight the possibility of an embodied, situational understanding of vulnerability being adopted through legal interventions.

4. Conclusion

In this chapter I have set out the theoretical approach that I use in this thesis, drawing on theories of vulnerability, relational autonomy and embodiment. In doing so I have contributed to the emerging debate around the meaning of vulnerability and considered how it might be developed as a useful legal tool. Whilst I have aimed to move away from the categorisation of the mentally disabled as especially and inherently vulnerable, in reality in the intersection between mental capacity and adult safeguarding law, mental disability is used disproportionately as a justification for intervention, something that my empirical data confirms (see Chapters Four and Seven in particular). I have argued that the law in this area needs to move away from this focus on inherent vulnerability and instead view vulnerability in more nuanced and situational ways. If this is achieved then interventions targeted against situational causes of vulnerability, sensitive to embodiment, can be developed which help to better protect the vulnerable adult whilst also empowering her to make her own decisions.

In the following chapter I build on my situational understanding of vulnerability to outline the material-discursive methodology that I use for this thesis. I also explain the methods I used and how I collected the data. My methodological approach and the

data obtained informs the remaining chapters of the thesis, including my understanding and critique of the meaning of vulnerability in mental capacity law and practice.

CHAPTER THREE: A MATERIAL-DISCURSIVE METHODOLOGICAL APPROACH TO MENTAL CAPACITY LAW IN PRACTICE

1. Introduction

In this thesis I draw on empirical socio-legal methods because the need to cross boundaries in research is essential; the world is complex, messy and inseparable into discrete areas of expertise. It further enables more accurate and informed knowledge production (Harris, 1989). This is also the value of socio-legal research; I am not only interrogating the strengths and weaknesses of specific laws, but how they operate in everyday life and interact with social work and courtroom practices.

In this methodology chapter I firstly explain the material-discursive approach that I take to understanding phenomena, arguing that it allows for a more reliable and informed understanding of the reality of mental capacity law in practice. I then set out the empirical methods used, explain why I chose them and apply my material-discursive methodology to those methods. Finally, I provide an outline of the empirical research I carried out and highlight some of the opportunities and challenges, ethical and practical, that arose during this project.

2. Theories of Knowledge: A Material-Discursive Approach

I have used two empirical methods for this project; courtroom observation (including a review of court files) and interviews with social workers. These methods were chosen to gain knowledge of the discourse and material reality of mental capacity law. In the literature there is a stark contrast between epistemological positions underpinning the production of knowledge. Positivist approaches to knowledge consider the possibility of

an objective, discoverable truth or reality, which can be measured and tested (Banakar and Travers, 2005, pp. 14-16; Kvale and Brinkmann, 2009, pp. 57-58). Under positivism, the subjective experiences of individuals are not necessary or relevant to understand the truth of phenomena (Durkheim, 1966). Knowledge can be gained through the testing of hypotheses, independent of the views of those who have experienced the thing in question. This latter approach is more akin to scientific approaches to research and is more commonly associated with quantitative than qualitative methods, albeit not exclusively so. Traditionally, legal analysis has been heavily dominated by positivist theory. The doctrinal meaning of the law was seen as authoritative of how law is and ought to be. Under positivism, it is assumed that the observer's own thoughts or preconceptions are excluded in favour of an objective analysis of the phenomena under observation. Similarly, the judge has been treated as an objective, neutral arbiter of disputes. However, many critiques have been made of such an analysis because of the inevitable interaction between observer and observed. Not only is there evidence that things behave differently under observation, but questions have been raised about whether it is possible for an observer, human or otherwise, to have no effect on the phenomena being observed (Barad, 2003, p. 816).

In contrast, those who take a social constructionist approach consider that knowledge is subjective, that it is based on a person's thoughts, ideas, experience and language (Kvale and Brinkmann, 2009, pp. 52-53; May, 2011, p. 164). In this sense, knowledge of phenomena cannot be gained independently of understanding it in context. In anthropology this aligns with ideas as the guiding aspect of human culture (Geertz, 1973). Similarly, social constructionist approaches draw heavily on the concept of discourse as the representation of how things are, rather than there being any singular, discoverable reality. It is argued that reality is socially constructed through discourse and ideology rather than existing independently of social context (Berger and Luckmann, 1971).

I find the extremes and confines of the above positions unhelpful and instead make claims about the truth and reliability of my particular research without disregarding the importance of context (Giddens, 1984; Knauft, 2006; Jacob, 2012, p. 21). In many ways, experiencing a phenomena or culture can be the most scientific way of analysing it; it is only once you understand the phenomena in its context, with the subtleties of meaning that are so often hidden to outsiders that you can give an accurate picture of the whole (May, 2011, p. 164). Therefore I emphasise the importance of real world experience and, as such, draw on materialist approaches to phenomena and knowledge production.

2.1. A material analysis

Materialism, as a form of realism, is often seen as more akin to positivism than constructionism as it is underpinned by a commitment to science and the explanation of things, albeit beyond that it is quite different from positivism. Materialism means recognising that the world is made up of matter; that physicality and cause and effect apply to human behaviour as much as to any other phenomena (Murphy and Margolis, 1995). As Karen Barad, a leading advocate of material-discursive approaches, explains "*matter refers to the materiality/materialization of phenomena*, not to an inherent fixed property of abstract independently existing objects of Newtonian physics…" (Barad, 2003, p. 822). Therefore matter is an active agent in the process of phenomena, rather than a neutral result of discursive or other practices. This approach is also reflected in my focus on embodiment, as discussed in Chapter Two, because the traditional understanding of matter as fixed, inherent and atomistic feeds in to the problematic mind-body dualism which is so harmful, particularly for women (Barad, 2003).

As matter is not a neutral phenomenon, materialist approaches contend that the environment, or what is often referred to as infrastructure, constrains and provides

possibilities for an explanation of observed phenomena. Materialist approaches consider that there is a reality to be discovered, but recognises that objectivity is not always possible and that subjectivity can also be part of one shared reality. It makes a claim for the likelihood of truths or partial truths (Harris, 1995, p. 67), rather than the absolute claims to truth of positivism. Not everything about the physical world is yet fully known to humans. However, materialist approaches contend that it is at least possible that physical causes (albeit not justifications) could be located for all phenomena (Murphy and Margolis, 1995).

In adopting a materialist approach, I draw on Karen Barad's work on the importance of matter; she proposes "a specifically posthumanist notion of performativity – one that incorporates important material and discursive, social and scientific, human and nonhuman, and natural and cultural factors" (Barad, 2003, p. 808). Discourse and power matters, but in recent years as Barad explains, "there is an important sense in which the only thing that does not seem to matter anymore is matter" (Barad, 2003, p. 801). Yet any reliable understanding of the world – that is any understanding which has a persuasive claim to truth - must be based on an "*intra-action*" (Barad, 2003, p. 815) between the material and discursive world. Matter is not an immutable concept, but is shaped by and in turn shapes the discourse. *Discourse* matters because *matter* matters; the primary and most persuasive social constructivist concern about discourse stems from the impact it has on material, living beings.

A material-discursive approach is also important in seeking reliable knowledge. Discourse and matter are intertwined, forever linked and inseparable, and to focus on one without an understanding of the other does not provide a sufficiently full explanation of observed phenomena (Barad, 1998). To make claims about the problems with mental capacity law and how it might be improved, such critiques must be based on knowledge that reflects the reality of how law operates in practice. This cannot be gained from a purely discursive analysis. I agree with Nussbaum's assertion

that what we need "is a subtle study of the interplay of bodily difference and cultural construction" (Nussbaum, 1999). As Barad also explains, too often matter is seen as "merely an end product rather than an active factor in further materializations" (Barad, 2003, p. 810) which, if adopted, leads to many multiple and important non-discursive (and non-human) factors being ignored in the search for explanation of phenomena. Importantly therefore, material-discursive practices are central to the production of meaning and knowledge beyond the human sphere (Conaghan, 2013, p. 47).

In the context of law, the messy inter-subjective relationship between language, tradition, ideas and behaviour make it very difficult to delineate between material and discursive causes. Furthermore, legal responses must simultaneously engage in discourse and representations of what the law is and apply it to real lives of the individuals before it. However, by subscribing to the turn towards discourse so dominant in academia today, it can result in "the discursive disaggregation of subjects from their physical, biological, environmental and material contexts, producing the neglect of actual living bodies" (Conaghan, 2013, p. 33). In contrast, Nussbaum's assertion that we should be more concerned with living, breathing beings, reflects an important turn back towards material realism (Nussbaum, 1999; Conaghan, 2013, p. 35). The importance of feminist interpretations of materialism are that they are based in the social world. Social norms and relationality shape our behaviours (Nedelsky, 2011). Similarly, my account of vulnerability in this thesis is explicitly material and embodied; it requires an understanding of the bodily, social and environmental conditions that cause and shape vulnerability. A material-discursive approach takes the view that analysing the intra-action between environment, bodies and discursive practices provides the best insight and understanding of phenomena (Barad, 2003, p. 814). This is in contrast to the atomistic, individualistic approaches of traditional liberal theory. As outlined in Chapter Two, only relational accounts of existence can account for the complexities of the relationships and interactions that life entails.

2.2. Discourse analysis

Building on my explanation of materialism, I now explain how I have carried out discourse analysis in parts of this thesis. Discourse analytic methods include focusing on the use of language and texts and how they reflect, create and produce the social world in which we live (Fairclough, 1992; Black, 2002; Blommaert, 2009). However, as Barad also explains, discourse is more than just the "property of words" (Barad, 2003, p. 818). She further states, "[d]iscourse is not what is said; it is that which constrains and enables what can be said" (Barad, 2003, p. 819). In taking this claim forward, I have used critical discourse analysis (CDA) to study the discourse that emerged from the social worker interviews and COP proceedings. CDA is a method that studies how text and talk enact and reproduce power and inequality within society (Van Dijk, 2015, p. 466). It involves using discourse analysis within a particular critical perspective. I have done so drawing on feminist approaches to power relations to show how individuals can escape "the homogenizing tendencies of power in modern society through the assertion of their autonomy" (McNay, 1992, p. 3). I understand power to mean the capacity to control the actions of others, but also incorporate Foucault's conception of the productive capacity of power (Foucault, 1979); its ability to shape behaviour within a material context. However, Foucault's analysis of power is too heavily concentrated on specific exercises of power by state institutions, rather than on the power that can be exerted laterally between individuals in less formal ways. Bell picks up on this when focusing on Foucault's failure to consider the relationship between men and women, but it importantly applies to the relationship between individuals more broadly (Bell, 1993, p. 27). This is particularly so when considering abuse which typically involves females with mental disabilities being subjected to violence by males. In Chapters Four and Seven in particular, I focus on how these

relationships are responded to by law and social work, without assuming that law's intervention is disempowering.

CDA has been applied to judicial and regulatory language (Black, 2002; Harding, 2012, p. 434) but is a relatively new development in the legal field. It lends itself well to legal analysis because the struggle for neutrality in law reinforces law's claim to truth (Foucault, 1980, pp. 8-9). Discourse analysis provides an important framework to explore how power is constructed and reflected through the courtroom and how judges, advocates and participants define the meaning and importance of the interaction (Holmes, 2005, p. 32). Whilst I accept that discourse reflects and reinforces knowledge, I do not proceed on the basis that "nothing has any meaning outside of discourse" (Black, 2002, p. 168). Instead I focus upon the "expression in language of relations of power and hegemony with a view to challenging and changing those relations" (Black, 2002, p. 169). I consider whether the discourse analysed reflects an understanding of existing stereotypes about vulnerable adults within this context. For example, in Chapter Four I highlight the operation of power through the practice of mental capacity law to designate particular adults as vulnerable in particular ways, and to consider the effect of this. In understanding vulnerability through a material-discursive lens I consider the material boundaries within which the meaning of vulnerability has emerged. Moreover, assumptions emerging from the discourse about P's limited role in the social work or court process reflect the wider hegemony of P's material exclusion and the power imbalances underpinning mental capacity law.

Importantly, CDA also provides a method to analyse communication. Social work is defined by communication between the professional and person being supported. Communication within such relationships is an essential part of achieving positive outcomes in social work practice (Trevithick, 2005, pp. 116-117). Courtrooms are equally characterised by communicative practices; it is not only the mechanism through which the arguments are conveyed but also highlights the underlying

assumptions they involve. Therefore the two cultures of the courtroom and social work, which are both heavily dependent on communication, naturally lend themselves to CDA to help to understand the life of each culture (Black, 2002, p. 164). Applying CDA to my interview data also allowed me to be sensitive to the different discourse used within single interviews and, furthermore, between interviewees (Kvale and Brinkmann, 2009, p. 156). This ability to compare language provided an insight into how different professionals understood and applied their discourse to different scenarios. In addition, the often contrasting understanding between me and the interviewees of certain topics highlighted the disjuncture between law and social work, despite social workers ultimately having to apply and interpret the law on a daily basis (Kvale and Brinkmann, 2009, p. 157). I then built on this to consider how it ties in with the types of cases observed in the courtroom. This was to assist in identifying the constraints and incentives as to why certain cases were pursued. In the parts of this thesis where I have undertaken a discursive analysis of my data, I have shown how discourse is shaped by and shapes environmental factors and why the use of particular discourse can be damaging for material, embodied lives (Black, 2002, pp. 177-178).

2.3. A material-discursive analytic approach

As outlined above, material-discursive approaches acknowledge that both matter and discourse matter. Therefore a material-discursive analytic approach considers that resources, and thus infrastructure, shape and constrain reality, language and experience, and vice versa. In analysing the data for this thesis I took account of the material reasons why particular language might have been used as well as understanding how language impacted on the material lives of those involved in mental capacity law. For example, in Chapter Six I explore the difference in the way that expert and experiential evidence was received in mental capacity law proceedings,

arguing that there is a hierarchy of evidence in this context, which reinforces whose evidence is given value.

More broadly, the pathogenic vulnerability to abuse that women with mental disabilities experience is traceable to material-discursive causes. Harris argues that the infrastructure of defence and aggression has led to women being oppressed and subjugated throughout the human world (Harris, 1989, p. 84). He claims that "[s]ex is a source of aggressive energy and brutal behavior only because male chauvinist systems expropriate sexual rewards, allocate them to aggressive males, and deny them to passive, nonaggressive ones." (Harris, 1989, p. 106). Others argue that it is woman's distinct ability to reproduce through pregnancy which has been the cause of female oppression (Firestone, 1971). Similarly, in the disability context, as discussed at section 2.1 of Chapter One, it has been argued that the shape of the material world needs to be changed to effectively achieve change in the lives of disabled people (Garland-Thomson, 2011). A specific example is the lack of sex and relationship education for adults with mental disabilities and the related lack of opportunities for them to pursue relationships. These limitations in the every day lives of adults with mental disabilities does nothing to equip them with the abilities to understand, implement and respond to positive and harmful relationship practices (Hollomotz, 2011). These multi-faceted examples of material causes, and failures, have led to the current marginalised position in which many adults with mental disabilities find themselves.

Building upon this material reality of increased vulnerability to sexual and other forms of abuse against adults with mental disabilities, the discourse of vulnerability has been used to reinforce particular understandings of which adults should be eligible for legal and social care protection. The discourse of inherent vulnerability attributes the cause of vulnerability to inherent features, such as being a female or having a disability, rather than analysing the material underlying reasons why that person is

vulnerable. This construction is not harmful merely discursively, but it has embodied consequences for the individual in relation to her ability to control her body and make choices about how she lives her life. The language of vulnerability can reinforce and perpetuate the material causes of vulnerability; particularly when the labelling of groups deemed vulnerable can lead to them seeking protection in environments where they are at a higher risk of abuse (Hollomotz, 2011). Only a material-discursive analysis can account for the interconnected causes of vulnerability, something explored further in Chapter Four. Yet as with all material-discursive analyses, this does not mean that such a position *inevitably* results, but provides an understanding from which we can most effectively target responses. I argue throughout this thesis (and have set out the reasons why in Chapter Two) that targeting situational causes of vulnerability should be prioritised and I set out specific ways in which this can be achieved in Chapter Seven.

3. Methodological Underpinning of Mixed Methods

I now analyse this material-discursive approach in light of my choice of methods – observation and review of COP cases and social worker interviews. There were four main reasons why I chose to use these methods: to understand how the law operated in practice; to understand mental capacity law as a hidden site of power; to understand the culture of protection and empowerment; and, to strengthen the validity of the findings.

Firstly, doing observation alerts you to the materiality of presence; that your norms and understandings prior to the observation occupy a physical space (Jacob, 2012, p. 18). Carrying out observation heightened my awareness of the material reality of the cases. Similarly, interviewing social workers who work with the law on a daily basis brings into clear focus the stakes of legal critique. As with reflections following

the Feminist Judgments Project (Hunter, McGlynn and Rackley, 2010), I realised that mental capacity law requires material actions which have material consequences for living beings. It is not sufficient to just critique, because law necessitates a judgment, a decision, within certain constraints. Therefore analysing and subjecting law to critique necessitates an understanding of the "living history" (May, 2011, p. 162) in which law operates. Criticising it from the outside without proposing an alternative or understanding the practicalities of suggestions for improvement is something I wanted to avoid.

A second important underpinning of both methods was to shine a light on hidden locations of power in mental capacity law (Jacob, 2012, p. 25); this is important because key to power's effectiveness is its secrecy of operation (Foucault, 1978, p. 86). The COP has long been a concealed site of power and there has to date been limited qualitative empirical research published relating to it. It was only during this project in 2016 that the COP opened up access and, even then, those attending would not have access to the court files or case history that I was able to access. In considering sites of power I have drawn on feminist analyses of power (Smart, 1989; Bell, 1993). Smart explains that law's power is no longer solely or primarily situated in its juridical form but is tied up with disciplinary forms of power. This means that the formal power of law as control over individuals exercised through the judiciary and courts has changed and developed to define truth through more decentralised forms of regulating behaviour (Smart, 1989, p. 8). The methods I chose reflect this distinction; at one end observations of the COP provide an insight into the controlling nature of power in this context. Conversely, the social worker interviews provide insight into how disciplinary power is deployed by non-lawyers. There have long been critiques of looking at law through the doctrinal aspects or through courtroom analyses, in contrast to the social impact of law on the lives of those affected by it (Smart, 1989, p. 24). However, there is enormous value in analysing courts as a site of power, particularly as

their decisions have an impact on the lives of individuals and have an ability to produce and shape the realities of social work practice, something explored further in Chapter Seven. This thesis therefore provides an original contribution to this area by uncovering the hidden reality of mental capacity law in practice from the perspective of legal proceedings and social work practice.

Yet a material-discursive analysis recognises that both juridical and disciplinary power can be used to create harm. I made a similar argument in Chapter Two about vulnerability being created by legal interventions (Fineman, 2008; Fineman, 2010). Whilst important, if law failed to regulate behaviour in this context, the exercise of power by those who abuse adults with mental disabilities could arguably be seen to have the same, or worse, effect. There are good reasons why the power of law should be resisted at times, but similarly the power of law could be reframed as a counter power to the exercise of power by the (often male) abuser. For example, if a person with learning disabilities was in a relationship with another person who it was known was sexually abusing them then that abuser's power over P could be more damaging than law's exercise of their power of intervention. So in choosing two methods which represent different sites of power, I consider whether law's power is a negative, dominating form of power when compared with the disciplinary exercise of power by others in everyday life. In this regard I consider the inclusion of P in the legal process (Chapter Five) and the need to respond to vulnerability in non-coercive ways (Chapter Seven).

Interviews were chosen to provide an insight into the culture and practices of social workers. Rather than trying to elicit their knowledge of specific laws, I used a semi-structured approach (see Appendix two) to build up a qualitative picture and to allow interviewees to elaborate in detail beyond pre-defined themes (May, 2011, p. 134). The intention was to find out what social workers' experiences were of using mental capacity law and how their stories reflected, or differed from, other

understandings. Elite interviews were chosen to explore the cultural systems relating to the social worker's use of mental capacity law which outsiders, such as lawyers and academics, may not fully appreciate (Spradley, 1979; Kvale and Brinkmann, 2009, p. 147). However, as a lawyer interviewing social workers about their use of law it was important that I established my own understanding of their profession to gain their trust (Kvale and Brinkmann, 2009, p. 147). Building on initial questions to build up a rapport, the interview data obtained was co-constructed between us to produce accounts of their use of law in this context (Spradley, 1979; Kvale and Brinkmann, 2009, p. 17; May, 2011, p. 144) rather than necessarily being an entirely objective account. In this sense social workers were discursively constructing their own understandings of the issues we discussed. However, they were conveying stories that had a material reality behind them which I have used as a basis for claims of how social workers actually behave, albeit not necessarily observing such behaviour first hand.

Observational research at the COP was undertaken to allow me to become immersed within the culture of proceedings (Jacob, 2012). Similarly to interviewing, observation provided a greater insight into the language used in the courtroom, the procedure of the case and the way in which the decisions were made. For example, in Chapter Six I explore the importance of expert evidence in proceedings. Furthermore, observation provided a particularly revealing insight into the extent to which P was involved in decision-making processes. Yet my position as observer was neither neutral nor static; similar to Barad's analogy of scientific apparatus, my observations were an interaction with the material-discursive practices of the COP (Barad, 2003, p. 816) and this was evident in my discussions with court officers, judges and case participants.

A final important underpinning of the research methods was the need to strengthen the validity of the findings. As Geertz's thick description explains, recognising the complex, interwoven, and relational nature of social phenomena is

fundamental (Geertz, 1973, pp. 9-10). Qualitative research methods allowed me to unpick the multi-dimensional aspects of the observed situation compared to that which a doctrinal analysis would allow. I was able to recognise and give value to particular observations and attempted to build an informed picture without necessarily having all of the information to make it whole. In this sense, the social worker interviews and observational research were complementary; they enabled the results from one data set to illustrate or elaborate the results from the other, sharpening an otherwise hidden picture (Greene, Caracelli and Graham, 1989, p. 266). Similarly, using mixed methods helped to triangulate the findings. Triangulation refers to using different approaches each with different limitations or biases with the expectation that they will counteract to strengthen the resulting claims (Greene, Caracelli and Graham, 1989, p. 256). This was achieved not only by adopting different methods but also by taking a material-discursive approach which values a wider paradigm of knowledge (Greene, Caracelli and Graham, 1989, p. 257).

I expected the data from the observation and interviews to provide different findings and have different limitations; firstly, the experiences of the social workers and the cases observed would not inevitably match up. Many social workers would never have been to the COP and those who had might have had very different experiences. In fact, it may be that only social workers with particular experiences, or those within particular local authorities, had the opportunity to bring cases to court. As such, it was a weakness of the methodology to not have been able to interview the social workers from the observed cases. However, when similar themes did occur as a result of both methods, this could be used to support assertions about the reliability of that theme given the quite different sources of data (Greene, Caracelli and Graham, 1989).

A weakness of the observational method was that it was more likely to be biased towards my own interpretations and preconceptions, particularly in light of my background having acted for NHS professionals as a solicitor. In contrast, the interview

data was more likely to be biased towards social workers' perceptions as I was reliant on their stories rather than being able to test them against independent evidence. Immediately it is clear that any bias towards P's experiences or understandings is missing. Interviewing P would therefore have strengthened the triangulation of the findings and I would have had an additional insight into how P perceived the law. Similarly, whilst I had the opportunity to speak to many of the judges involved in the cases observed, they were not formally interviewed and I did not have their permission to use quotes from our private discussions. However, the constraints of carrying out PhD research meant that I had to be selective in the methods used. I did not have the time nor the funding to carry out interviews with P, judges and other participants in addition to the research carried out. Whilst this is a weakness, it is reflective of the reality of doctoral research. Despite these methodological constraints, as I explain in Chapters Four, Six and Seven, similar themes were identified through inductive analysis of the observational and interview data. In this sense triangulation in using these different methods was used to strengthen the validity of my research findings (Greene, Caracelli and Graham, 1989, p. 256) and, therefore, my claims to how the law might be improved.

The research was further strengthened by obtaining a purposive sample of cases for observation rather than only attending those that were most convenient or at an interesting stage (Kvale and Brinkmann, 2009, p. 250). Of the 20 case files reviewed (see Table 3.1 below for summary of case information) I observed eight over 11 separate hearings. The observed cases were selected based on those which most reflected the sex/marriage/contact theme underpinning the thesis as well as those where cases proceeded to a hearing, as a number of the cases did not.

Table 3.1: Summary of COP case files

	Anonymised case name	**Sex**	**Age**	**Disability**	**Capacity domains reviewed**
1.	*K County Council v SL*	Female	20	Mild learning disability	Marriage, Sex, Proceedings, Travel abroad
2.	*ML v (1) TL and (2) D County Council*	Male	82	Dementia	Contact
3.	*Z County Council v FY*	Female	66	Dementia	Residence, Proceedings, Care, Contact
4.	*Y County Council v (1) LC (2) GK (3) SC*	Female	23	Autism and mild learning disability	Marriage, Sex, Proceedings, Residence, Contact
5.	*W County Council v ZR*	Female	37	Learning disability	Sex
6.	*C Borough Council v (1) DY (2) B Council*	Female	20	Learning difficulties	Care, Residence, Contact, Proceedings, Sex
7.	*A County Council v (1) MT (2) KZ*	Male	52	Mild to moderate learning disability	Marriage, Sex, Residence, Care, Proceedings
8.	*H County Council v XC*	Male	24	Learning disability and deafness	Marriage, Sex, Proceedings
9.	*M County Council v EV*	Male	21	'Mental health problems'	Marriage, Sex, Residence, Care, Contact, Finances, Proceedings
10.	*T City Council v CY*	Female	49	Mild to moderate learning disability, emotionally unstable personality disorder.	Contact, Care, Residence, Proceedings
11.	*J Council v RK*	Male	38	Down's Syndrome and learning disability	Sex, Medical treatment
12.	*K County Council v MW*	Female	20	Learning disability	Marriage, Sex, Proceedings
13.	*N County Council v (1) GI and (2) DQ*	Female	62	Korsakoff's syndrome,	Contact, Care, Residence,

				personality disorder, depressive disorder and cerebral atrophy	Proceedings
14.	*N County Council v CA*	Male	57	'Low intelligence'	Marriage, Sex, Contact, Proceedings.
15.	*YS v E District Council*	Male	52	Heavy alcohol consumption and brain injury	Care, Residence, Proceedings.
16.	*OD v R City Council*	Male	46	Mild learning disability and schizophrenia	Sex, Care, Residence, Contact, Finances
17.	*P County Council v (1) SE (2) TM*	Female	80	Dementia	Sex, Residence, Care, Contact, Proceedings, Property and affairs
18.	*V Borough Council v AY*	Male	35	Significant learning disability, autism and sensory processing disorder	Residence, Contact, Care
19.	*P CCG v QB*	Male	43	Mild learning disability and autism	Residence, Care, Proceedings
20.	*O City Council v (1) AW (2) FW (3) YW (4) TW*	Female	34	Emotionally unstable personality disorder, borderline learning difficulties and paranoid schizophrenia	Contact, Proceedings

As Table 3.1 shows, I was able to record data from case files of 20 cases referred to me during January to May 2016. I understand from COP staff that all of the sex and marriage cases that were issued at the London COP were referred to my sample during this approximately four month period, plus additional contact cases where issues around relationships, sex or marriage were raised. To put these numbers into

perspective, during quarters one and two of 2016, there were 20 and 21 applications for a 'one-off' personal welfare order respectively (Ministry of Justice, 2017a). Therefore the sample I reviewed was likely to be illustrative of the sex and marriage cases that reach the COP given the numbers of applications made during that same period.

Overall, using mixed methods and a hybrid methodology helped to create a more informed picture than a doctrinal approach. Inevitably certain perspectives were still left out, but a material-discursive methodology makes claims based on explanations of observed phenomena and therefore individual experience whilst important, is not determinative of a reliable outcome.

4. Methods

In this section I outline the methods chosen for the research which included interviews with social workers, case observation and case file reviews.

4.1. Interviews with social workers

I experienced some difficulty in recruiting participants for the social worker interviews, a common challenge with elite interviews (Kvale and Brinkmann, 2009, p. 147). My initial interviews were not with currently practising social workers, although they all had recent experience of working with the MCA. However, it proved challenging to locate practising social workers who were willing to take part. In the process of research I slowly realised that not everyone is quite so interested in the issues you want to discuss (Jacob, 2012, pp. 17-18). I contacted a number of social workers, including directly through local authorities, but each contact typically resulted in one or two

participants. Whilst this was challenging, it meant that I obtained a broad and varied sample of participants (see Table 3.2 below for summary of participants).

Table 3.2: Summary of interviewees

	Anonymised social worker name	Relevant experience
1.	Robert	Qualified social worker. Manager of a learning disability team in a local authority for six years during which time the MCA came into force and subsequently a manager for a transition social work team for a local authority for 18 months.
2.	James	Qualified social worker. 20 years experience working with adults with learning disabilities.
3.	David	Qualified social worker since 2009 with experience of working primarily with older adults with mental health needs.
4.	Thomas	Qualified social worker. Retired from full time social work for four years at the time of interview. Experience in management posts at various levels, mainly in mental health teams, with particular experience of implementing the deprivation of liberty provisions from when the MCA came into force until 2012.
5.	Julia	Qualified social worker. Experience as a local authority social worker with families where there was a child with a disability and role at time of interview was as a social worker at secure unit with inpatient and outpatient adults with mental health difficulties.
6.	Alice	Qualified social worker. Experience in an adult safeguarding team for four to five years.
7.	Sarah	Qualified social worker. Experience in an adult safeguarding enquiry team for four years.
8.	Andrea	Qualified social worker. Experience working with older adults and people with learning disabilities in three different local authorities. In role at time of interview for three years working with people with dementia.

Purposive sampling was used to select interviewees (Greene, Caracelli and Graham, 1989, p. 258). This meant that I had certain criteria to help determine who to include in the sample. As Table 3.2 shows, initially I was open to interviewing any qualified social worker with past or present experience of working with the MCA in relation to adults with mental disabilities. However, as the research progressed, I realised that the social workers that were best placed to participate were narrower than my initial criteria and

that those with experience in either learning disability teams or adult safeguarding teams were the most suitable candidates. This was because they tended to have the most relevant experience of capacity cases concerning sex, marriage and contact. A further important feature of purposive sampling was that I did not have a set number of interviews to carry out because it would be based on my perception of when sufficient data had been obtained. One important aspect was that I had to ensure I was analysing the data as the interviews progressed and I found that transcribing the data myself was particularly useful in this respect. It also enabled me to note the aspects of the discourse that was relevant to my particular mode of inquiry and based on my own recollections of the interview (Kvale and Brinkmann, 2009, p. 180).

Samples were self-selecting in that I approached a number of organisations and individuals to distribute my request.[81] The self-selecting nature of the social worker interviews meant that, in most cases, the social workers who were actively interested in participating had a specific interest, which meant they were engaged with the issues. The limit of self-selecting participants was that those who struggled most with implementing the MCA were left out or not as likely to want to participate. Furthermore, it may also have meant that those social workers experiencing the greatest resource pressures were also less likely to take part as they may have felt less able to spare the time. Having said that, in some senses this strengthens the validity of the data because it suggests that the social workers who I interviewed were on the more engaged end of the spectrum.

In depth interviews were carried out with eight social workers. All were either currently practising or had previous experience of working with the MCA. This was

[81] This included a university, local authorities in different parts of the UK and a number of other individuals who I contacted directly or through other contacts made. For two local authorities I had to go through a research governance framework process. For one this involved an application for research governance approval, for which I had to supply a copy of my research proposal, participant information sheets, consent forms, approach letters to social workers and complete an application form.

because I wanted to understand how the law post-MCA had been interpreted and applied in practice by non-legal professionals. All social workers interviewed were provided with a participant information sheet and consent form (see Appendix three). They were free to ask any questions before or after the interview and were free to withdraw from the research within six months following the interview date and no participants withdrew. Each social worker gave explicit consent for the interviews to be recorded using an audio device, transcribed and for quotes to be used in the research.

I carried out face to face interviews to allow for a better rapport to be developed with the aim of obtaining more detailed data. I was guided by an in depth semi-structured interview schedule (see Appendix two) (Kvale and Brinkmann, 2009, p. 130). Questioning was broken down into themes, including general questions about social workers' understanding of the legal frameworks, specific questions about cases concerning sex and relationships and questions about the court process and supported decision-making. Whilst the interview schedule did guide my questions, interviewees were asked different questions as the research progressed and based on individual experience. I also tried to keep the questions open by asking questions such as "can you tell me a little bit more about that case…?". This openness allowed for elaboration by interviewees where necessary whilst still maintaining a general structure to enable comparisons between different interviews (May, 2011, p. 135). The interviews were coded by hand based on emergent themes and according to my theoretical framework (Kvale and Brinkmann, 2009, p. 202). This was done during data collection as well as after all data had been collected. Themes were identified partially based on deductive analysis of themes identified in advance such as vulnerability. My own hypothesis at the start of the research that vulnerability is internalised in this context was confirmed by the data analysis. However, new themes also inductively emerged during the coding process such as the privileging of expert evidence (discussed in Chapter Six) and

social workers' perceived need to gain legal legitimacy for their actions (discussed in Chapter Seven).

4.2. Court of Protection observations

New COP rules came into force during the research which allowed court hearings to be held in public for the first time.[82] I think this assisted the parties in giving consent as the pilot scheme reversed the presumption that hearings would be held in private to hearings being held in public. Having the explicit support and approval of the COP was also positive. It enabled participants to understand my attendance and I was seen in a more 'official' capacity rather than as a stranger (May, 2011, p. 173). On occasions when my presence at the COP was questioned I informed solicitors or barristers that I had approval from the Vice President of the COP and the Ministry of Justice. This approval was helpful in that it appeared to allay any concerns these professionals had about my right to be present.

Confidentiality for all participants was the presumption except where this was waived by a judge, under which circumstances the information would already be in the public domain and therefore would not breach the Data Protection Act 1998 (DPA). Given the importance of confidentiality and anonymisation, all notes from the observation were typed at the time of the observation and stored in a drop box file, using boxcryptor to encrypt the data so that it was stored in a fully anonymised format. The data recorded was also anonymised immediately. Furthermore, I do not use any information in this thesis which, along with other information, would lead to P being identifiable.[83] Case names have been anonymised and participants have been given

[82] This changed during the course of my research, see Court of Protection Practice Direction – Transparency Pilot, which came into force on 29 January 2016.
[83] DPA Part 1 s 1 and s 33 (4).

pseudonyms. The names used should not be taken as the actual initials and/or names of participants and I have made no links with any reported COP cases.

I made contact with HMCTS to gain approval for the research and this involved a meeting with the Vice President of the COP, Mr Justice Charles, who was extremely supportive of the research. The Vice-President provided his written authorisation and allowed me to review the court records. Whilst he provided this authorisation, which could be given under Practice direction 13A, supplemental to the Court of Protection Rules 2007 (COPr),[84] he explained that it would still be at the discretion of each judge in an individual case to permit me to attend. This was because there may be objections from the parties and any approval given to me was subject to the direction of the court.[85] Once I had received the approval of Charles J, I had a number of meetings with COP staff. We discussed the bureaucratic practicalities, including how cases would be notified to me. These staff acted as the gateway to the information and they gave me access to the cases requested. Being an observational researcher therefore involved relying on people working behind the scenes to decide what I was able to access (Jacob, 2012, pp. 18-19). It was also agreed that it would be helpful for the COP judges to be aware of my research. I therefore gave a presentation to COP judges based in London in September 2015 at their monthly meeting. Furthermore, Charles J wrote to the regional hubs for the COP to inform them of my research and that it had his approval.

Alongside this process, I made the HMCTS Data Access Panel (DAP) application. Any research involving court files is required to have a Privileged Access Agreement (PAA) issued by the DAP, highlighting the duplication of consent that researchers have to go through. Whilst I already had the confirmed support of the

[84] In this thesis any reference to COPr means the Court of Protection Rules 2007 (as amended by the Court of Protection (Amendment) Rules 2015). These were the rules in force at the time of the research. The updated rules are referred to as the Court of Protection Rules 2017 and discussed briefly further in Chapter Eight.
[85] COPr 91 (2A).

COP, the DAP process was more challenging. After protracted discussions I was given approval to observe up to twenty cases relating to capacity to consent to sexual activity, capacity to marry and capacity for contact at the COP between November 2015 and December 2016.[86] These cases were chosen as they brought out issues of vulnerability and go to the core of the debate between protection and empowerment. Whilst sex and marriage capacity cases were my primary focus, contact cases draw out many of the same issues, with familial and friendship networks being in dispute. The reason for including these cases was because during my discussions with court officers it was believed that there would be relatively few cases relating to sex and marriage. However, in reality this was not a challenge I encountered as I easily reached the 20 case file limit within the research period.

Once the approval was received, the first case I attended was not until February 2016 showing how lengthy the processes were. The distinction between what was ideal and what was possible was a constant challenge, as with much observational research (May, 2011, p. 171). This had an impact on the number of cases that I was able to follow through to a final hearing. As such the outcome of the cases became less of an analytical focus as the research progressed, despite my own commitment to recognising the ends or outcomes of law, as well as the process or means by which justice is achieved (Riles, 2006, p. 61).

In terms of the practicalities of accessing cases, a court officer in the technical team in London was my contact. Cases that fell within the sample were set aside for me to review at regular intervals (approximately once a month). I made notes using a case file review template (see Appendix four) and then reviewed the information to make a decision about whether or not it would be suitable for inclusion in the project. Cases were then noted by the technical team who wrote to the parties to inform them

[86] The original period was until August 2016. However, this was extended by agreement from HMCTS to enable me to attend further hearings.

of my wish to attend the case, along with a copy of my participant information sheets and consent forms. Once the consent letters had been sent out, the technical team would liaise with me and the regional COP hubs to identify the hearing dates.

As the research progressed I realised that participant-observation is never simply a passive experience of being an objective observer (Flood, 2005). In drawing on ethnographic approaches when carrying out courtroom observations, I became aware of the possibility that my presence might affect the content of what was observed (May, 2011, pp. 170-171). This was a real possibility as my perception was that the judge in each case was very aware of my presence. In every case, the judge explicitly discussed the case with me or invited me to provide my own analysis or comments before, during or after the hearings. Having access to backstage knowledge such as this was invaluable but was not something I had foreseen at the start (May, 2011, p. 179). I became concerned that it had an impact on my perception of the court as I began to be treated as an insider by being invited to discuss the case with the judge in their chambers in a number of cases. Whilst my experience was positive, I found that I needed to detach myself to consider how open and accessible the court was from P's perspective. As a young, keen researcher and qualified solicitor, I felt that the judges were more open to my presence and interested in my views, often in stark contrast to P's role in the case. The impossibility of impartiality in observing is always challenging and whilst I strived to put aside my own often positive experiences, it inevitably shaped my outlook on the court as a site of power. However, this is a risk with all observational research which is not covert and the issue was how I managed it. This partly involved recording my reflexive views throughout and then critically reviewing them at a later date. Therefore whilst it is important to acknowledge the role of the researcher, in doing so I do not intend to make a purely subjective claim. I consider that the observational research I carried out provides particularly revealing

inductive insights which I do not suppose would be unique to my own research experience (May, 2011, p. 166; Jacob, 2012, p. 21).

Following each observation I reviewed my field notes and additional notes were made with my thoughts and reflections on the process. Coding of the observational data was a similar process to the social worker interviews. I initially analysed the data on a thematic basis with deductive themes such as vulnerability being predicted in advance. However, new themes inductively emerged from the data as a result of being a participant-observer (May, 2011, p. 163), for example the role of P in the court process and how her voice was often silent was something that became incredibly stark to me as the research progressed, which I explore further in Chapter Five. This is not as evident from case law which actually appears to put P at the centre, highlighting a weakness in analysing solely from legal texts presented as neutral and comprehensive. Being so immersed in the process of observation and actively acknowledging your role as a participant, can bring great insights, particularly if you are treated as part of that group (Flood, 2005, pp. 43-44).

5. Ethical Issues

This project involved thinking about difficult ethical issues including about my role as a currently non-disabled person in researching disability (Barnes, 2008). I found that whilst I did not want to exclude the participation of those with mental disabilities, unfortunately it would have been extremely challenging to obtain ethical approval of research which involved working directly with people who lacked capacity under the MCA. Under s 30 MCA, research carried out on or in relation to a person who lacks capacity is unlawful unless it has approval from the appropriate body. For my research this would have been the Social Care Research Ethics Committee (SCREC). The two questions that the SCREC considers in relation to research ethics applications are: (1)

whether the research is related to the 'impairing condition' that causes the lack of capacity, or to the treatment of those with that condition, and (2) whether the research can be undertaken as effectively with people who do have the capacity to consent to participate. Applying this to my project, the research could not be said to relate to the 'impairing condition', but it could have been argued that it relates to the treatment of those with that condition in that the research covers the law's treatment of that group. Secondly, it was arguable that the research could have been as effective if carried out with people who do have capacity to consent. Whilst this was not straightforward, the test for capacity to participate in research is very low; under s 1 (2) MCA, people are assumed to have capacity unless it is established that they lack it. Furthermore, the test for capacity under s 3 (1) MCA requires the person to understand the information relevant to the decision, retain that information and weigh or use it to make a decision. They are also required to be able to communicate their decision. Therefore the test for capacity should have been very low in relation to my project because the method of observation was simple to understand as somebody sitting in the room and taking notes. However, based on the perception that many of the cases I was likely to encounter were likely to relate to people who had sufficient capacity to participate, I decided not to apply to SCREC as research with people who had capacity would be as effective. Therefore in including only people who had capacity to participate, the approvals required were from the University of Birmingham Research Ethics Committee (REC) and Her Majesty's Courts and Tribunals Service (HMCTS).

As I had decided to exclude those who lacked capacity to participate in research, I made it clear during my observations that any participants being observed must have capacity to take part in observational research. I did this by setting this out in a covering letter (see Appendix five) where I asked P's professional representative to seek P's consent to participate in the research and if any concerns at all were raised about her capacity to do so then I would withdraw from observing that case. I also

enclosed simplified and non-simplified participant information sheets and simplified and non-simplified consent forms (see Appendix six). On the occasions where P did attend the COP, assessment of capacity was carried out by those closest to P, typically the Official Solicitor. My approach was based on a presumption that P had capacity, as required by the MCA, unless there was evidence that she lacked it. Therefore if there were any concerns raised by any person about whether or not P fully understood what he or she was participating in then I was available to answer further questions or withdraw from observing. However, that did not happen in any case. In most cases, the parties did not respond to my request for consent in advance of the hearing date and therefore consent was sought on the day of the hearing instead. However, even on the day, participants were so busy preparing for the case that in reality, they showed little interest in my consent form or information sheets. As many ethnographers have noted, the contrast between the requirements of ethics review rarely matches up with the reality on the ground (Jacob, 2012, pp. 43-45). In every case observed I had the approval of the judge who also ensured that all parties were aware of and consented to my attendance in court.

The primary ethical issue posed by the social worker interviews was the possibility of identification. This is a central issue when carrying out interviews, but particularly so given the sensitive nature of the subject matter (Kvale and Brinkmann, 2009, p. 62). Social workers were not so concerned about their own identity being revealed but the possibility of the identities of the individuals whose stories they were sharing. I also remained open to the possibility of having to respond to other ethical issues if they arose (Kvale and Brinkmann, 2009, p. 69). Issues around identification were addressed by removing identifying material at the point of transcription of the interviews. In particular I removed references to names, locations and employers but information such as age and factual scenario remained. I have therefore given each social worker a pseudonym to identify and distinguish between the different interviews.

6. Conclusion

In setting out the methodological underpinning of my research I have sought to highlight the reasons why the particular methods were chosen and how they interact to produce complementary, rigorous and original findings. In rejecting traditional epistemological positions, I have explained why I take a material-discursive approach (Barad, 2003; Garland-Thomson, 2011; Conaghan, 2013) to analysing this area of law. In particular, it allowed for an incorporation of the materiality of bodies, including what it means to live within the body of a mentally disabled adult, and how the material reality of their lives is affected by the practice of mental capacity law. I have drawn on the strengths of materialist analyses of the social and legal world alongside recognising the role that discourse plays in reflecting and shaping knowledge. In doing so my findings have a greater sense of complementarity and validity than taking a singular analytical approach.

Particular insights from carrying out the fieldwork have also been explained in this chapter. Carrying out fieldwork was a rewarding personal experience as it added physical reality to the stories and theories I was used to reading. Of particular significance was the desire on the part of the judiciary to open up the COP to scrutiny. In doing so, the judiciary and court officers were aware of their responsibilities towards protecting the confidentiality of the subjects of proceedings. The COP has come under scrutiny and critique for being seen as a private court with limited public or media access despite efforts to improve transparency (Series et al., 2015a). Yet my experience was that the judiciary and staff at the COP were extremely helpful and willing to facilitate the project from start to finish.

In the following chapter I build on my methodological approach to explore the meaning of vulnerability in mental capacity law by reference to my empirical data. I

argue that, materially and discursively, vulnerability is understood primarily as inherent to the individual, rather than in situational terms.

CHAPTER FOUR: THE MEANING OF VULNERABILITY IN PROTECTING ADULTS FROM ABUSE

1. Introduction

In this chapter I consider the interpretation of vulnerability in mental capacity law, specifically in cases concerning abuse. I argue that inherent approaches to vulnerability dominate the practice of mental capacity law, in contrast to understanding vulnerability situationally. The theoretical distinction between inherent and situational vulnerability (Mackenzie, 2014b; Mackenzie, Rogers and Dodds, 2014b; Lindsey, 2016a) and the approach I take in this thesis was explored in detail in Chapter Two. I apply this theoretical approach to the data obtained to show that social workers, psychiatrists, judges and legal professionals use the concept of vulnerability in ways that emphasise the inherent features that make a person vulnerable instead of the material, situational causes of vulnerability. I further argue that this has led to a paradox of under-protection and over-protection.

In this chapter I firstly explore how, during COP proceedings, vulnerability was discursively constructed as inherent and argue that, in many cases, this led to over-protection: that as a result of an inherent feature such as disability, P was seen to require 'special protection'. The material manner of protection was typically focused on restricting and controlling P rather than addressing the situational cause of her vulnerable position. I also explore the discursive construction of vulnerability by social workers and argue that where social workers understood vulnerability as inherent, this more commonly led to under-protection. This means that the individual was viewed as inherently vulnerable and, as such, little was done to challenge the harmful forms of situational vulnerability in her life. This under-protection was particularly evident in cases of sexual violence against women, where responsibility for the vulnerable

situation was often attributed to the victim rather than being viewed as a surplus pathogenic vulnerability. I conclude by arguing that viewing vulnerability more situationally will achieve a better balance between empowerment and protection.

2. Vulnerability in the Court of Protection

In this section I use CDA to show that participants in the COP constructed vulnerability as inherent. By this I mean that where vulnerability was recognised, it was done so in a way that linked that vulnerability to something inherent, such as disability or gender. I focus on the oral language of the judges, barristers, solicitors and witnesses, as well as written information from court files and one written judgment.

2.1. Vulnerability discourse in mental capacity law proceedings

Whilst judicial discourse is important, it is not the sole focus of this chapter. This is partly because I only heard two oral judgments and one written judgment. There have also been analyses of judicial discourse in COP judgments elsewhere (Harding, 2012; Pritchard-Jones, 2016). Furthermore, relying solely on judgments limits the extent of analysis; judges are likely to have a high degree of awareness of their language, notwithstanding critiques of judicial awareness of the impact of their discourse (Harding, 2012). Given that judgment writing, as well as the writing of legal submissions and applications, involves a process of reflecting and redrafting, the more ‘intuitive’ or ‘natural’ language used by participants within the courtroom might provide different insights into the construction of vulnerability. In this sense, it can shed light on the more ‘authentic’ thoughts and feelings in a way that analysing the revised, cautionary text of a judgment does not.

Firstly, many case files contained evidence that vulnerability was conceptualised as inherent rather than situational (see Table A1 at Appendix one). For example, in *C Borough Council v (1) DY (2) B Council,* the position statement of C Borough Council stated that DY had an IQ of 47 and a learning difficulty. They said her associated co-morbidities included short term memory issues and deficiencies in receptive and expressive language, sequencing, prediction and planning. The statement then explained "As such she is particularly vulnerable and in need of substantial support in all but the most elementary aspects of daily life in order to maintain herself safely." This shows that DY's vulnerability was linked to her mental functioning (an inherent vulnerability), albeit according to the local authority the matter was before the court because of concerns about an abusive relationship (a situational vulnerability). Similarly, in *OD v R City Council*, the expert psychiatric report stated:

> OD clearly lacks capacity regarding contact. He has no understanding of his disability and vulnerability and need for positive contact and care in either the short or longer term. His learning disability undermines his ability to understand the motivation of others who may not have his best interest at heart.

The expert went on to state "… OD is vulnerable to exploitation, this vulnerability is largely a result of his lack of capacity for sexual relationships..." Again, this related OD's vulnerability back to an internal characteristic rather than treating it as situational. This status based approach is widely used through COP proceedings because:

> For the courts, it is far easier to attribute vulnerability to something concrete, or medical, such as their age or psychiatric condition, than it is

to try and navigate through a more complex set of circumstances… (Pritchard-Jones, 2016, p. 9).

I now focus on one particular case, *Y County Council v (1) LC (2) GK (3) SC,* which concerned LC's capacity to marry and capacity to consent to sexual relations. I observed six days' worth of hearings for this case. This was separated into three separate hearings over a period of 5 months. The first was a review and directions hearing (hearing one), a hearing which was meant to be a trial which was put off to a later date (hearing two) and the final hearing which lasted four days (final hearing). LC was not present at any of these three hearings. I understand from the judge that LC had attended earlier interim hearings when the case first commenced, albeit she had not given formal evidence.

The case concerned LC, a young woman in her early twenties with autism and a mild learning disability. LC had a close relationship with her mother, SC, and lived with her. She had a relatively large degree of independence – she had her own bank account, a part time job (working three days per week in total) and used public transport alone. LC had entered into a relationship with a man, GK. The relationship had lasted for more than three years when the proceedings commenced in 2015. During that time, LC and GK married without the knowledge of LC's family. When, some months later, LC informed her mother that she had married GK in private, her mother informed social services as she was concerned that the marriage was just to enable GK to obtain a spousal visa to reside in the UK. Further, according to LC's social workers, LC expressed unhappiness with elements of her relationship with GK, particularly anal sex, from which she sustained an anal fissure. The social workers explained that LC was ambivalent about the marriage, articulating at times both fear of and love for GK. A criminal investigation into the possibility that GK had raped LC during their relationship was also ongoing alongside the COP proceedings. The

evidence before the COP was that criminal investigations were proceeding both on the basis of LC lacking capacity to consent and/or that GK ceased to stop anally penetrating LC when she asked him to stop.

The vulnerability of LC was mentioned on multiple occasions (in excess of 12 times at the final hearing). Yet throughout the case, it was never made explicit what LC was *vulnerable to* and needed *protecting from*. In some senses it was implied that LC was vulnerable to all possible threats. In other ways it was suggested that LC's naïve, trusting nature, alleged to be the result of her disability, made her vulnerable. For example, LC's mother said that she was worried about LC's vulnerability in relation to travelling. She explained that she would be happy for LC to travel on public transport locally, which she estimated to be a 20 mile trip, but that she thought LC would have problems with a longer journey from home. She was worried about such a journey because LC would have problems reading and with getting off at the right stop or making connections. However, in focusing on LC's perceived difficulties in negotiating long distance travel, the focus was shifted towards LC's *inabilities* and away from the material, situational reasons for her mother's concern - that another person might abuse or exploit her.

2.2. Act-specific versus person-specific approaches to capacity

The discourse of inherent vulnerability was particularly evident in the reluctance to directly address the relationship between LC and GK as the reason for the case being before the court. The tests for capacity to consent to sex and capacity to marry are, as outlined at p. 18 in Chapter One, act-specific rather than person-specific[87] and therefore do not allow for the broader context to be considered. Yet LC was vulnerable

[87] A principle that was affirmed in *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37.

within a specific context, to the alleged exploitation by her husband. Instead of addressing this, the legal representatives and judge repeatedly linked her vulnerability back to her disability, for example in the following extract from the judgment:

> 73. The evidence of the professionals is that [LC's] abilities have not improved over time… In the circumstances, I am satisfied on balance of probabilities that [LC] did not have capacity to consent to sexual relations in [year] (and, specifically, at the time of her marriage).
>
> 74. For the avoidance of doubt, her incapacity is due to her disability.

In contrast, LC's mother said "I wanted her to have experiences that most 20 year old women experience" and she explained that her concerns were the same as for any mother whose child is entering into a sexual encounter. LC's mother's comments implied that there was nothing inherent to LC that made her unable to understand sex and marriage, but that she was concerned about GK's treatment of LC. Yet these comments were not focused on because, in law, their relationship was not relevant. LC's vulnerability had to be characterised as inherent to fall within the ambit of the MCA which requires a "disturbance in the functioning of the mind or brain" for a finding of incapacity. In LC's case, the judge stated "I remind myself (perhaps particularly in this area) that GK's motivation is not relevant and I must consider only LC's understanding." Judicial interpretation of these tests are criticised for failing to take a person-specific approach which reflects the particular relational challenges (Herring, 2012; Clough, 2014; Herring and Wall, 2014; Series, 2014). Act-specific approaches to capacity do not allow for a consideration of the material pressures placed on a vulnerable adult by others. As Baroness Hale explains in *R v Cooper (Gary Anthony)*: [88]

[88] [2009] 1 W.L.R. 1786 para 27.

> it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.

Despite these comments, a person-specific approach has not been adopted under the MCA. However, as Clough explains:

> the situation specific approach advanced by Baroness Hale does *not* necessitate an evaluative focus on the suitability of a partner, or social engineering in the way feared. Baroness Hale is drawing attention to the situational factors which can impact upon a decision, echoing many of the concerns of vulnerability theorists. (Clough, 2014, p. 7).

If a person-specific approach to capacity had been taken in LC's case, this would have allowed the court to explore the factors that affected her ability to make a decision in relation to sex and marriage *with GK*. LC was not consenting to sex in general or entering into marriage in the abstract. LC could have been found to lack capacity on the basis that she was not able to understand, use and weigh the relevant information that GK was marrying her to further his own interests – namely to obtain the right to live in the United Kingdom. Similarly, it could have been argued that LC was unable to consent to sex with GK because she did not understand that she could say no.[89] In her grandmother's words, she felt that she had to "please my man". This could have led to a finding, within the confines of mental capacity law proceedings, that LC lacked the

[89] Also deemed to be part of the test for capacity to consent to sex in a number of recent cases, see *A local authority v H* [2012] EWHC 49, *London Borough of Tower Hamlets v TB* [2014] EWCOP 53 and *The London Borough of Southwark v KA* [2016] EWCOP 20, albeit this remains an unsettled area of law, see *Derbyshire County Council v AC* [2014] EWCOP 38.

capacity to consent to sex and marriage with GK on a person-specific approach, whilst maintaining the potential for her to have sexual relations and even marry in future.

During the final hearing, the court was also presented with evidence that LC had more recently shown greater insight into her "difficulties" than previously. Counsel for the local authority asked Dr Y, the independent expert psychiatrist, "do you think that change in her difficulties might correlate with not seeing [GK]?"[90] This question implied that LC's "difficulties" were affected by her situation and whom she had contact with. It was, indirectly, a situational analysis. Yet this, and other, suggestions were asked in a way that related back to LC's inherent vulnerability – her so-called "difficulties". Instead of characterising LC as inherently vulnerability, it would have been more appropriate to directly frame the problem as GK's situationally pathogenic influence. The question might more accurately have been phrased "do you think that LC's reduced vulnerability and general improvement in her wellbeing might correlate with her not seeing GK?" Using this approach could have led to a finding that LC lacked capacity to consent to marriage with this particular individual rather than that she lacked capacity in general with all of the resulting difficulties that accompany such a finding.[91] However, this is not possible within the constraints of the current law[92] and the outdated understanding of inherent vulnerability which informs it.

2.3. Failure to provide support to achieve capacity

As well as the problems with the act-specific approach to capacity, an inherent vulnerability analysis can lead to a failure to properly support a person to achieve

[90] The point being that when LC met with Dr Y she was still, or had recently, had contact with GK. Whereas the more recent account to her solicitor followed a period where she had no or very little contact with GK.
[91] For example, the potential for quite intrusive measures to be placed on LC should she wish to engage in any future relationship. For a further discussion see Series (2014).
[92] *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37.

capacity as required under the MCA and UNCRPD. For example, in LC's case counsel for the local authority asked "If a person finds things difficult to understand, would you accept that they could be described as vulnerable?" She went on to query if a person "has difficulty understanding things and needs things made simple, do you agree that they are vulnerable and need protection". This linked LC's difficulty in understanding to her vulnerability. Such an approach resulted from the language of s 2 MCA, which characterises disability as emanating from an impairment of or disturbance in the functioning of the mind or brain. However, suggesting that a person who finds it difficult to understand things is vulnerable, defines them as such in relation to their disability. It becomes their disability rather than another feature that makes them vulnerable. This ignores the multiple, material causes of vulnerability as well as the many reasons why a person may find things difficult to understand.

In framing understanding as causally linked to vulnerability, a medical model of disability was reinforced that did not take account of the situational barriers to furthering understanding. The distinction between the social and medical understandings of disability was outlined at p. 3 of Chapter One. Importantly for this chapter, medicalised discourse "situates the problematic aspects of disability firmly within the individual, and perpetuates the illusion that the state or society has no role in this" (Clough, 2015, p. 54). In contrast, the social model focuses on the social structures and environment that cause a person to experience disability, rather than their individualised, biological impairment (Oliver, 1990). As discussed in Chapter One, there are difficulties with both models. However, where a difficulty in understanding is treated as the *cause* of vulnerability, a medicalised approach is reinforced at the expense of considering how a person can be supported to achieve *better*, if not complete, understanding. For instance, if information was presented by a professional skilled in communication such as a speech and language therapist, or by a person close to the individual who they trust, their understanding is more likely to be

maximised. This is explored in Chapter Six where I advocate a relational approach to capacity assessments.

I now return to two observed cases where efforts were made by the local authority to facilitate understanding, suggesting a more situational and UNCRPD compliant approach. Interestingly, these two cases were initiated by the same local authority. *K County Council v SL* and *K County Council v MW* both concerned applications for findings in relation to capacity to litigate, capacity to marry and capacity to consent to sexual relations. Both SL and MW were subject to forced marriage protection orders. In SL's case, the report on capacity by the independent consultant psychiatrist explained:

> [SL] does not have capacity to litigate these proceedings, albeit this is borderline and it is recommended that she be involved in the main issues and decisions as much as possible… [SL] does have capacity to decide as to her care and support needs, does have capacity to decide where she lives, does not have capacity to have sexual relations and as a result of [SL] lacking capacity to consent to sexual relations, [SL] does not have capacity to marry.
>
> …
>
> However I would have to revise this opinion if a person [probably a woman speaking to her alone] was able to get her to describe the sexual act in simple terms and of the risks of infection. I do not think this is likely but am less certain in this case than I am in most cases.
>
> I would expect her to be able to learn this knowledge and gain capacity with a sex education course designed for those with mild learning disability, either as a group or 1:1.

Similarly in MW's case the expert recommended further educative work on the basis that she may be able to attain capacity. In both cases proceedings were delayed to allow for educative work to be carried out. In SL's case, following completion of further relationship education, it was found that SL had "acquired capacity" in respect of consenting to marriage and sexual relations and therefore proceedings were withdrawn. Similarly in MW's case, following educative work it was found that she had capacity to consent to sex but lacked capacity to marry "due to deficits in understanding the relevant information, and using and weighing it to make a decision." The relevant information being that "she did not understand that a marriage is a commitment for life". This reversal in findings in SL's case, and partial reversal in MW's, was rare from the files I reviewed. It supports the notion that some local authorities take seriously the need to facilitate understanding rather than assuming vulnerability because of the presence of a disability.

In the above sections I have highlighted that inherent approaches to vulnerability dominate COP discourse, which in turn can lead to a failure to provide support to achieve capacity. Rare cases show that a more UNCRPD compliant approach, attentive to the need to provide support to maximise understanding, is possible within the MCA.[93] However, such an approach is dependent on the sustained and effective provision of support to adults with mental disabilities, and this is more likely to be facilitated if they are seen to be vulnerable for situational reasons (i.e. because of a lack of support) rather than being viewed as inevitably vulnerable for reasons related to their inherent features.

[93] As well as the cases identified from my data, there are reported cases where educative work and the provision of support have overturned original findings of incapacity, for example see *CH v A Metropolitan Council* [2017] EWCOP 12.

3. Vulnerability in Social Work

Vulnerability is a prevalent concept in social work (Fawcett, 2009, Hollomotz, 2009, Department of Health, 2017) and has generally referred to inherent features; for example, the Department of Health *No Secrets* guidance defined a vulnerable adult in relation to their mental (or other) disability, age or illness (Department of Health, 2000). In contrast, what others have described as "hidden vulnerabilities", such as access to support and services, were not always exposed under previous legal frameworks (Clough, 2014, p. 372). In advance of carrying out the empirical data collection I expected that vulnerability discourse would be used in different ways from the more recent and nuanced theoretical understandings of vulnerability in feminist theory (Fineman, 2008; Fineman, 2010; Mackenzie, Rogers and Dodds, 2014a; Mackenzie, Rogers and Dodds, 2014b). Whilst this was to be expected, the interview discourse I explore in this section highlights the embedded nature of the inherent vulnerability approach. Furthermore, I argue that there is a fundamental link between social work understanding vulnerability inherently and material factors such as the rationing of access to adult social care.

3.1. A material-discursive approach to inherent vulnerability

The social workers I spoke to repeatedly related their understanding of vulnerability to inherent features, particularly disability, age or illness. For example, I asked James[94] "how would you decide if someone was a vulnerable adult?" and he said:

[94] See Table 3.2 at p. 78 for a summary of the social work interviewees. James told me that he had 20 years experience working as a social worker with adults with learning disabilities, followed by various practice management roles. At the time of the interview, James was no longer a practising social worker but had been working in an adult social care research role for the past five years.

> there's the new Care Act come in isn't there… previously you would decide by whether somebody fitted into one of your client group criteria… I guess the people who certainly had a profound learning disability, someone who had a mental health problem or if somebody was old and frail they would meet the criteria.

James appeared to answer with what he thought was the legal or resource criteria for determining eligibility for safeguarding. David, another social worker,[95] told me about a case where he was working with a 92 year old man who had been living with his son for eight years:

> and during that time there'd been several instances where son had assaulted his his Dad, erm, police reports and things like that had been, erm, submitted but throughout all that time Dad had had mental capacity to make those decisions so he wasn't considered a vulnerable adult…

In this quote David explained that vulnerability was linked to mental capacity, which relates back to disability through the "disturbance in the functioning of the mind or brain" requirement. Similarly another social worker, Julia,[96] described one case where

---

[95] David told me he had been a qualified social worker since 2009 and had always worked for the same local authority. He had experience of working with older adults with mental health needs in a district assessment team and in a multi-disciplinary team.

[96] Julia told me that she had a number of years experience as a local authority social worker, originally working with children and families for around ten years, with a special interest in working with families where there was a child with a disability. She then moved to a forensic CAMHS (Child and Adolescent Mental Health Service) team, before moving to working with adults. Her role at the time of interview was as a practising social worker working within a secure unit with both inpatient and outpatient adults who have mental health difficulties and present some risk to other people.

she was working with a young woman with a cognitive impairment; she repeatedly described her as vulnerable. She explained:

> there was one young woman in particular that, erm, she was very vulnerable, and we, it was difficult because she was vulnerable and she was also she was also from the Asian community so the sort of culture around whose money is whose and at what point people you know, we could be quite individualistic and this idea that you know as soon as your of this age it's your money and it, so I think given that she was so vulnerable and, I felt it was important to protect, her rights over her her her money…

When I asked what her concerns were, Julia explained:

> …not that her family, that I thought her family exploited her it was really about making sure from the beginning it was clear she was gonna have some cognitive impairment as a result of her mental illness and that she was more than likely would take that with her and therefore I just wanted to start the way we should go on, so make sure she understood this was her money and she had rights, and the family understood that too.

I was surprised that Julia referred to this woman on more than one occasion as vulnerable if she was not suffering any harm. Julia appeared to focus on her vulnerability to harm caused by her cognitive abilities rather than any external threat of harm. Inherent characterisations of vulnerability such as this appeared repeatedly in my interviews and I suggest that understanding vulnerability inherently is a discursive response to the material rationing of access to local authority services. As Fawcett

explains, “The purpose of identification and assessment as a vulnerable adult is to guard against harm and generate support and access to services” (Fawcett, 2009, p. 474). As a result of the material pressure on resources in adult safeguarding, rationing is primarily performed based on a discursive framing of a person being inherently vulnerable. That is, only adults who fit a narrow definition of being inherently vulnerable are able to access support and those who are vulnerable for other, situational, reasons are not. James highlighted the importance of rationing in adult social care:

> …the thing is with social work because it’s a limited resource a lot of it historically has been about putting a boundary around access to that resource. If you say anybody is potentially vulnerable then that means everybody could have a safeguarding investigation but that would mean nothing would it so, you, well, you’ve gotta focus the safeguarding, safeguarding role on people who are most vulnerable therefore need most support.
>
> …
>
> when you become a, when you become a manager in social care, erm, a lot of it is about trying to make your resources go as far as you can and to fulfil your, core responsibilities, so you’re not really looking for more work.

In an interview with Andrea,[97] the issue of resources also came up repeatedly. She told me:

> Well you’ve got some people where it’s really clear that they’ve got capacity

[97] Andrea told me she had qualified as a social worker in 1987. On qualification she initially worked with children and families but later moved to working with older adults and people with learning disabilities in three different local authorities. She had been in her present role for three years where she worked in the community with people with dementia.

> or really clear that they haven't and it's the ones in, it's just those ones really where you could really make that difference to their whole experience if their capacity was, erm, facilitated and that takes a bit of resources so it kind of depends on your, what's going on for you, how many cases you've got like that, you know…

These quotes highlight the importance of directing resources at cases that most need support. However, the way in which judgements about who needs support are made are constrained by inherent constructions of vulnerability. Robert,[98] for example, explained when asked what makes an adult vulnerable:

> I mean, I suppose what it means to me probably is, a, catch all for the people that might get a social care service. I suppose, I mean I think one of the by-products of working for a local authority is that you inevitably draw a line, a too thick a line, between the people who are eligible for your support and people who aren't so vulnerable adults would just be a general catch all for the people we support. I guess it's who I instinctively think of although consciously many more people out there who are vulnerable even if they don't meet very high local authority thresholds.

I asked Robert about this eligibility criteria to interrogate further what these adults were vulnerable to and he explained:

---

[98] Robert was a qualified social worker with a number of years experience in frontline and managerial roles. He was a manager of a learning disability team in a local authority for six years during which time the MCA came into force. He was also subsequently a manager for a transition social work team for another local authority for 18 months before moving to his current role which was in practice development.

> …someone has to have a mental or physical impairment, erm, that they, as a result of that consequentially they are unable to achieve two or more of the prescribed eligibility outcomes and as a consequence of that they, erm, there is a significant impact on their wellbeing.

This statement reinforces an inherent vulnerability approach. Similarly, when asked what vulnerability means, Alice[99] explained:

> We use it really now in relation to the Care Act as having care and support needs…people are vulnerable for more than that to be fair. I mean, people are vulnerable because of their emotional experiences in their lives, erm, people are vulnerable because of an imbalance of all the traditional types of power, you know, gender, erm, sexuality, race.

She went on to tell me that those situational factors:

> don't hit the Care Act and our team, safeguarding enquiries are linked to, erm, people's eligibility through the Care Act. So it's care and support needs… and Care Act links that back to disability of some form or another.

S 13 Care Act 2014 requires that once it has been established that an adult has needs for care and support, the local authority must determine whether any of those needs

---

[99] Alice told me that she was a social worker in an adult safeguarding team and had been in that role for the past four to five years. Before that she had worked with older people with a physical disability. Previously she also had experience working with adults with learning disabilities and with people with drug and alcohol substance misuse problems.

meet the eligibility criteria, i.e. whether or not that support will be funded by the local authority. Both Robert and Alice were referring to the s 13 eligibility criteria and the related provisions under Regulation 2 Care and Support (Eligibility Criteria) Regulations 2015 (Eligibility Regulations). The Eligibility Regulations bind eligibility for support to a person's inherent features – their "physical or mental impairment or illness".[100] However, it is by no means clear that such an approach is required in the safeguarding context. The Care Act requires local authorities to undertake safeguarding enquiries where the adult (a) has needs for care and support, b) is experiencing, or is at risk of, abuse or neglect, and (c) as a result is unable to protect himself or herself.[101] S 42 (1) (a) makes clear that the safeguarding provisions apply even to those adults who are not receiving local authority support, possibly because they do not fall within the eligibility criteria under the Eligibility Regulations. Therefore the inherent understanding of vulnerability should not, legally at least, apply to adult safeguarding.

Understanding vulnerability beyond the inherent is important in adult safeguarding which is expressly about protection from abuse. It cannot be the case that local authorities only have obligations to safeguard adults with a physical or mental impairment or illness. Furthermore, in cases of abuse, only targeting resources at those deemed inherently vulnerable would not address James and Andrea's concerns about those who "most need support" or "where you could really make that difference". If material resources are allocated primarily on the basis of inherent vulnerability, as appears, then this points towards a privileging of disability (McRuer, 2010) as those who are seen to be the most inherently disadvantaged are able to access support and services that those who are in greater situational need cannot. In some ways this is justifiable on the basis that adults with disabilities, particularly those suffering mental

[100] Regulation 2 (1).
[101] s 42 (1) Care Act 2014.

illness, suffer higher rates of domestic violence (and violence generally) than others (Martin *et al.*, 2006; Hughes *et al.*, 2012; Plummer and Findley, 2012; Khalifeh *et al.*, 2013). However, it still excludes many other vulnerable adults who do not fit within the inherent vulnerability discourse.

In taking an inherent vulnerability approach, there is also a failure to properly interrogate what the person is vulnerable to and a failure to target resources most effectively. Furthermore, a person's vulnerability may be exacerbated by the interaction between their disability and their situation, for example if their ill health made them dependent on their abusive carer. It therefore ignores the complex interplay between inherent and situational vulnerabilities. If vulnerability were viewed more widely it may have the material effect of increasing social care demand at a time of decreased budgets (Humphries, 2013, Meakin and Matthews, 2015), but it may also lead to more targeted, efficient and preventative responses to abuse. For example, through better provision of sex and relationship education and early interventions which work with perpetrators of abuse. The importance of early preventative measures from a resource allocation perspective should not be underestimated.[102]

In this section I have highlighted that the language of inherent vulnerability dominates adult social work. In particular, I have shown that discourses of inherent vulnerability are linked to the rationing of access to material resources in adult social care. Yet by focusing on the inherent causes of vulnerability, the situational reasons for a person's vulnerable position are side-lined, meaning that there is a failure to respond to the source of the most harmful forms of pathogenic vulnerability. Therefore the language of inherent vulnerability is not only problematic for discursive reasons but also because it fails to target scarce resources at the root of the problem.

[102] The need for preventative investment is well established in the public health context, for example see Alistar *et al.* (2014) but there appears to be limited research on preventative work within social work, see Gray (2013).

4. Inherent Vulnerability: Under-protection and Over-protection

If, as I have identified above, the concept of inherent vulnerability dominates this area of law and is used to ration access to services, then it is both under and over inclusive. Many researchers are concerned about the prospect of over-protection. Hollomotz, for example, explains "overprotection is a hindrance to disabled people's self determination, while it does not prevent sexual violence" (Hollomotz, 2011, p. 45). Conversely, the House of Lords Select Committee report on the MCA explained:

> the presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non- intervention or poor care, leaving vulnerable adults exposed to risk of harm. (Parliament. House of Lords, 2014, pp. 50-51).

Constructing vulnerability as inherent can therefore lead to a paradox of under-protection and over-protection. In the following sections I explain the different instances in which this takes place. I further argue that to achieve a better balance between empowerment and protection, vulnerability must be characterised *situationally.* This will help to guide more appropriate legal and social work responses and will better enable the pathogenic sources of vulnerability to be addressed.

4.1. Under-protection and sexual violence

I first explore the problem of under-protection where responsibility for the abuse was attributed to the adult for not protecting herself. This was particularly prevalent in relation to sexual abuse of women with mental disabilities; they were seen to engage in 'risky' behaviour, and, as such, their vulnerability to sexual violence could have been

avoided if only *they* behaved differently. This characterisation of sexual vulnerability chimes with theoretical work on the intersection of female sexuality and people with disabilities (Doyle, 2010; Sandland, 2013a; Sandland, 2013b). Sandland, for example, argues that women and girls with learning disabilities are characterised as vulnerable and dangerous as a result of their sexual instinct (Sandland, 2013a; Sandland, 2013b). Such characterisations provide the discourse to "articulate and justify the need for legal-psychiatric, institutional, control of the dangerous/vulnerable sexuality of mentally deficient women" (Sandland, 2013a, p. 104). This vulnerable/dangerous dichotomy can also lead to under-protection. The sexual instinct analysis is central to under-protection because certain adults are not protected on the basis that they are perceived to desire, instinctively, the abusive sexual contact. Similarly, in feminist work on incest, girls within the family could be viewed as under-protected because the social order maintains and protects the status of their male abuser (Bell, 1993, p. 23). It is implied that if the victim did not desire the sexual contact then they would and should have avoided it like any other 'normal' person would do. The examples I provide in this section could similarly be viewed as "victim blaming", a phenomenon prevalent in understandings of rape and sexual assault (Whatley, 1996; Grubb and Turner, 2012). By blaming the victim, the pathogenic vulnerability to sexual abuse is obscured and instead she is seen to be inherently vulnerable as a result of her disability or gender.

Thomas' interview[103] provides the clearest example. He explained that he worked on a case about a young woman coming up to her 18th birthday which went to the inherent jurisdiction of the High Court. He said that there was incredible concern about her vulnerability to exploitation as she was approaching adulthood. When I

[103] Thomas had been retired from full time social work for four years at the time of the interview and was instead carrying out research into adult social care. He qualified as a social worker in 1977 and practised for 12 years in a local authority. He then commenced a series of management posts at various levels, mainly in mental health teams. He told me he had particular experience of implementing the deprivation of liberty provisions from when the MCA came into force until 2012.

asked him about this exploitation he said:

> Sexual exploitation… just broad kind of brush of her circumstances, horrifying self harming during from about she was what 18, so from about the age of 14, erm, she had inflicted awful wounds upon herself as well as taking overdoses and that kind of thing. Her own family circumstances were that she was part of a family that had been well known in [X location] and at the time when the decision was taken for her to come into care which as I say was 14, 15 the circumstances surrounding that were extremely tragic her mother killed herself… her father had been one of the principal suspects for the abuse that she had suffered, sexual abuse that she'd suffered… there was a very close relationship between them so it was a very difficult … it wasn't one where she didn't want to see him anymore in fact it was exactly the opposite.

Whilst Thomas referred to the situational factors which made the woman vulnerable, he focused on the things that she had done to herself, such as self-harming and overdosing. He later mentioned the likely reason for the vulnerability - the sexual abuse by her father – but still related it back to her. This woman presented as difficult to deal with because she still wanted to see her father and Thomas said there was a "very close relationship between them" and she kept "absconding to get contact with her father". He explained:

> she actively sought the people who were her own father as well as other men… you could've possibly thought about finding some way of preventing him having contact with her, it wouldn't a worked because well in our view it wouldn't have worked because then she was at a period where she was

> seeking something a relationship with… other men, another man, and with her father that we felt were, were the source of her vulnerabil- the source of her vulnerability lay in her as much as in any threat.

I was surprised that responsibility for the problems the woman faced were not directly attributed to her father. Perhaps unsurprisingly Thomas also said that the woman had later struck up a relationship with an:

> [o]lder man, erm, and who had a history was known to the agencies up in the area where he was from… so there were police, the police force in this county, the police force in the area where this person went to. It was quite easy to locate her because everyone knew where this man lived and she was there. They'd go and pick her up and either the police force there would bring her all the way down or the other police would come up…

Thomas' interview contained many references to this woman's failure to keep herself safe, suggesting a degree of victim blaming. For example, when asked about what vulnerability meant he said "…it's making decisions where your own safety and wellbeing are at risk I think that's what it means." He also said that "the source of her vulnerability lay in her as much as in any threat" despite the fact that she was a 17 year old woman who had been sexually abused by her father and was suspected of being sexually abused by another older man with a criminal history. Thomas attributed blame for her vulnerability to her. Grubb and Turner explain in relation to sexual assault that when responsibility is attributed to internal factors such as the victim's behaviour, victims are more likely to be considered to blame for their assault. In contrast when responsibility is attributed to external factors, blame is more likely to be attributed to the situational cause (Heider,

1958; Grubb and Turner, 2012, p. 444). This is important because, as I later explain from p. 118, if responsibility for sexual violence is seen to be caused by the victim's inherent features, this leads to under-protection as they are also viewed as to blame for engaging in risky activity and are therefore undeserving of material support from the state. This again highlights the link between the discourse of inherent vulnerability and the material rationing of resources.

Later, when asked about the response to this woman's situation, Thomas told me:

> it was always about bringing her back to her accommodation… in both areas the police would interview the young woman formally to establish if there were grounds for prosecution they certainly didn't proceed with any prosecution at the kind of young woman's end of things. The police in the man's originating area were concerned about him and I don't remember them proceeding with prosecution either but there had been concerns about his violent relationships with women in the past for which he had been convicted.

This passage suggests that this woman's pathogenic vulnerability to sexual abuse was not addressed in situational terms because the response focused on the individual woman by taking her back to her accommodation. Instead, viewing this woman's relationships through a lens of pathogenic vulnerability would have been more reflective of the reality of her situation. She was in a harmful, abusive and vulnerable situation which also undermined her autonomy to make decisions free from those oppressive influences. The abuse also likely exacerbated her other vulnerabilities such as her self-harm. Her apparent choices to return to her abusers were most likely influenced by the role of male power within the complicated dynamic of familial

relationships (Bell, 1993) and the cycle of abuse that can exist for those who suffer childhood trauma (Noll, 2005). In a similar example in the context of mental capacity law, Robert explained to me that there was a woman with:

> quite a mild learning disability…we feared we knew, I think, routinely kind of sexually abused by a host of local taxi drivers…as you know the Mental Capacity Act doesn't rule, you know, an unwise decision doesn't make it an incapacitated decision and…she…certainly wasn't protecting herself from the situation as much as we'd like
>
> …
>
> we decided that she wasn't capacitated to consent to the sexual relationship…we really wrestled with the notion of her you know, what was she consensually having sex with them or not and we concluded that she wasn't.

Robert told me that he didn't think this woman had capacity to engage in a sexual relationship with these men, and, furthermore, that it wasn't a consensual relationship. Yet he also emphasised that she wasn't protecting herself. I asked him what they did next and he explained:

> the police were very good, slow but, you know, we're all over stretched I guess, there was a lot of multi disciplinary work so social worker, MAPPA [Multi-Agency Public Protection Arrangements] were involved…a community nurse, she lived in a supported living scheme there so she had a big support package and you know there was a lot of general work around trying to give herself things to feel positive about so, you know, her only source of validation

> wasn't the odd tawdry gift she got off people after they slept with her… the plan was she had finally said she wanted to move away and the plan was to find her a flat…and, you know, get her slightly out of the region and, you know, the police were very heavily involved with that and were investigating the crimes but were convinced rightly that whatever else she did she was probably a long way off having the courage to fight so they weren't terribly optimistic on that.

The focus on moving her to another area and the suggestion that a criminal prosecution was a long way off highlights that the problem was not viewed in situational terms. Furthermore, describing this abusive situation as "her only source of validation" highlights the link between inherent vulnerability and victim blaming. The woman in question was putting herself at risk because she was seen as having received pleasure or gain from these sexual encounters. The implication being that if she had not desired them then she would not have had sexual encounters with these men. Similar to the "colluding mother" and "seductive daughter" in relation to incest (Bell, 1993, pp. 83-85), the woman with mental disabilities might also be described in terms that convey her 'sexually uncontrollable' nature as a way of attributing responsibility for any abuse to her.

This discursive understanding of sexual vulnerability as inherent to her further helps to push back against any claim this woman might have to state support. The material resources she might need so that she does not get validation from the men's 'tawdry gift[s]' need not be provided if she is viewed as inherently rather than situationally, and pathogenically, vulnerable to the harmful influence of these men. On one level Robert's answer, referring to the provision of a support package and general work on feeling positive is encouraging and suggests that at least some steps were

taken to support the woman. However, the failure to take any action against the abusive men implied an excusing of their behaviour or an understanding that the woman encouraged it. Whilst local authorities cannot address the failures of the criminal justice system, they could encourage greater focus on the behaviour of the perpetrators of abuse. Furthermore, if local authorities are concerned about resource allocation, it is simply ineffective to remove a victim of abuse to another area and do nothing to tackle the abuser; further victims of that same individual are highly likely to materialise again, thus suggesting a very short-sighted approach.[104] If local authorities want to both maximise resources and respond more appropriately to vulnerability on an individual level, only an understanding of both inherent and situational vulnerability can achieve that.

In contrast, cases involving food intake or financial management, were much more keenly discussed by social workers as requiring intervention. These 'non-abuse' cases are a useful contrast because they highlight the difference in understandings of vulnerability depending on the subject matter. For example, where unhealthy/unwise choices were made in relation to a sexual partner, the individual was held responsible for those choices and interventions were limited. Yet in cases where the individual apparently lacked the self-control to make healthy eating choices, those choices could be interfered with and the unhealthy/unwise food could be removed from her environment. Situational responses were therefore much more common in dealing with 'non-abuse' cases. For example, Julia told me about a vulnerable young lady she worked with that:

> there was also issues in relation to how much food she ate. I mean, she, she, she was never diagnosed with pica, you know that eating disorder, but it

[104] Evidence suggests that those involved in intimate partner abuse repeatedly reoffend, for example recidivism rates vary but are thought to at least be in the region of approximately 20-40% (Babcock, Green and Robie, 2004; Ministry of Justice, 2015).

seemed very, you know, it was almost like she could not stop herself eating if food was there she would eat it so I didn't do the capacity assessment for that but she was deemed not to have capacity, it was, it was more than unwise decisions she was pushing her, her weight was just rocketing up and I guess a lot of it was medication related but it was all the carby stuff she just couldn't stop herself eating.

I informed my interview participants that my research was also exploring issues of abuse, yet I was repeatedly given examples such as these which I would not identify as abuse in any ordinary understanding of the concept. For example, Robert told me about a case which concerned a young man who he described as having a "dominant mother". He didn't think there was any exploitation but explained that "she was a vegetarian and then this was where the battle was normally fought was over the vegetarian question because she was vegetarian and was adamant that he would be vegetarian". There was no question of abuse but there was an intervention to control this young man's food intake, in contrast to the limited intervention in relation to the woman being "sexually abused by a host of local taxi drivers". It appeared that the social workers I spoke to had very few examples of sexual abuse. This may be because they did not wish to share their stories. However, it felt that they had very little experience of intervening in such cases, suggesting a much greater willingness for involvement in cases of general welfare despite the high rates of sexual violence, particularly for adults with mental disabilities (Martin *et al.*, 2006; Plummer and Findley, 2012; Khalifeh *et al.*, 2013; Ellison *et al.*, 2015), many of whom should also fulfil the inherent vulnerability threshold criteria.

4.2. Under-protection and failures of the criminal justice system

Under-protection was also evident as a result of allegations not being pursued when raised by those with an inherent vulnerability. For example, Robert told me:

> if you are vulnerable you know, if you are elderly if you have a learning disability or whatever and someone commits a crime against you that gets investigated by the social workers…and the rest of the population get the police.

When adults with inherent vulnerabilities suffer violence there is a perception that the criminal justice system fails to take action. The interaction between the police and social workers was a recurrent theme from my data. Whilst the failures of the criminal justice system to properly tackle abuse against people with disabilities are not the focus of this thesis, the issue requires further attention to consider how this failure to take allegations seriously results in a paradox of under-protection and over-protection. This is particularly important because, as outlined in Chapter One, Article 16 UNCRPD requires the state to:

> take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

Yet my research suggests that adults with disabilities who were seen as inherently vulnerable did not receive sufficient protection from abuse. For example, in one

interview, Sarah[105] told me about a difficult case that she was in the early stages of taking to the COP. The case concerned:

> a girl in her twenties who's got a learning disability and she's married to a guy also in his twenties with a learning disability but this guy is known to be, he's got a significant criminal behaviour.

She went on to tell me that concerns arose when the woman:

> she'd presented in a and e, and said that he'd punched her on the arm and said she was worried coz she's got a contraceptive implant… but then the police had came out and spoke to her and she'd given a different story. She'd also said when she was in a and e that her husband punished her for something that she'd done and she said that she'd gone to another house, another man's house, and this man had paid her to perform a sexual act, her perform a sexual act on him so we were worried basically that she was involved in some kind of sexual exploitation. She'd gone back and told her husband what she'd done and he got her to strip off as punishment [laughs nervously] but when police came out, when they came out and spoke to her she basically backtracked and said none of this happened that she'd stripped off coz she was gonna have a bath [laughs nervously], that he hadn't punched her they were play fighting, but then when we kind of looked into it over back over like the last few years there's loads of similar incidents like this and when

[105] Sarah told me she was a qualified social worker and had been working in an adult safeguarding enquiry team for the past four years. She did not provide any further information about her previous experience.

> we spoke to all different agencies, then it was quite scary then what we'd uncovered and then we uncovered all this about his criminal history and these rape charges and we were thinking, oh crikey…

The local authority's enquiries revealed that this woman's husband had been charged with the rape of his sister and step sister and that he was also being investigated for raping another woman with a learning disability. Sarah went on to tell me that when the police attended to allegations of violence nothing was ever pursued, she said:

> … once they get there they always go out they always speak to her, but she never then makes the statement she always kind of like fizzles out because she never takes the next step… I think it fell apart from his sister, she withdrew early on and then it was due to go to court for his step sister in early January, apparently the court date was set and everything, but she said that she couldn't go through with it, through it all, so it didn't happen… so we're hoping that it'll happen with this other girl but it's one of our cases, like she's known to us coz she's got a learning disability and that's all kind of caught up in it so I don't know whether that will happen either.

The ineffectiveness of the criminal justice system appeared to make Sarah feel that she had to choose between doing nothing (under-protection) and pursuing a resolution that could prevent this woman from having a sexual relationship ever again (over-protection). Sarah's concerns are understandable in light of the failures of the criminal justice system. When adults with inherent vulnerabilities make allegations of sexual violence it often doesn't proceed to criminal investigation or prosecution (Benedet and Grant, 2014; Ellison *et al.*, 2015). Even where a complaint is made, there are high rates

of attrition throughout the criminal justice process. As Ellison *et al.* note, rape complainants with psychosocial disabilities:

> were significantly more likely to have their case no-crimed than complainants without…(11 per cent and 5 per cent, respectively) and significantly more likely to have their case dropped through a police NFA decision (45 per cent vs 38 per cent). (Ellison *et al.*, 2015, p. 236).

There is worryingly little research investigating the high attrition for rape complainants with disabilities. However, a number of reasons have been put forward. Firstly, attitudinal barriers exist in relation to sexual violence against people with disabilities. Meta-analysis evidence suggests that victims with a "less respectable" character are perceived to be more responsible for their sexual assault than those with a "more respectable" character (Whatley, 1996). Adults with mental disabilities, and more specifically women, have their character questioned and have been categorised as "dangerous" (Sandland, 2013b; Sandland, 2013a) and "over-sexed" (Doyle, 2010). It is possible therefore that some victims of sexual assault, particularly those with mental health diagnoses, are more likely to be blamed for their assault. This is more likely in relation to adults with mental health diagnoses because of their close links to other exacerbating factors such as poor housing, childhood abuse and addiction (Ellison *et al.*, 2015).

Relatedly, attitudes by those who work within the criminal justice system have been given as a reason for high attrition and low conviction rates. For example, Jordan explains, in a study of police responses to rape in New Zealand, that high levels of scepticism were found in relation to allegations made by victims with a psychiatric illness (Jordan, 2004). Similar concerns exist every step along the criminal justice process from police to prosecutors, judges to juries, albeit that evidence suggests "the

highest proportion of cases is lost at the earliest stages, predominantly during the police investigation" (Stanko and Williams, 2013, p. 209). Yet even if the individual officer or prosecutor does not share this scepticism, they may still attribute that belief to those who ultimately need to be convinced (i.e. judge and juries) and therefore conclude there is no realistic prospect of conviction (Ellison *et al.*, 2015, p. 234). Therefore the pervasive attitudes of disbelief about adults with inherent vulnerabilities appears to be a major factor in preventing them from receiving justice.

Furthermore, for many different reasons people with mental disabilities may choose not to pursue a criminal justice resolution. There is evidence to suggest that they may be less likely to come forward and report a crime (Ellison *et al.*, 2015, p. 230) and there is also evidence that people with a history of mental illness in particular are more likely to withdraw from the criminal justice process, albeit evidence on this latter point is mixed (Ellison *et al.*, 2015, p. 236). Some may not recognise their experiences as criminal. For example, if a person has only ever experienced abusive relationships in their lives then they may perceive it as acceptable behaviour. Similarly, poor sex and relationships education may mean they struggle to understand and articulate their experiences of sex, whether abusive or not (Hollomotz, 2011, pp. 49-51). This 'voluntary' withdrawal from the criminal justice system is also likely to be attributable to the widespread belief that the experience of giving evidence in a rape trial is not a pleasant one, and as Stanko and Williams explain "they cannot face such invasive scrutiny" (Stanko and Williams, 2013, p. 217). Perhaps this is exacerbated by the presence of inherent vulnerabilities as adults with mental disabilities in particular may feel less prepared, socially and mentally, to go through the potentially traumatic experience of being questioned and having one's own health explored in court. These attitudes are certainly prevalent in relation to giving evidence in COP proceedings as I later explain in Chapter Five. Therefore such attitudes are likely to be even stronger in relation to criminal proceedings given the personal and traumatic nature of the subject

matter.

The low reporting rates and high attrition of cases relating to people with mental disabilities is likely to be caused by a complex interplay of factors. However, the presence of inherent vulnerabilities appears to be an important factor as such adults are less likely to have their allegations validated. This repeats the recurring failure to respect and protect disabled adults because their bodies are not subject to the same protections as other bodies (Fletcher, Fox and McCandless, 2008; Garland-Thomson, 2011). It further leads to an over reliance on mental capacity law to solve the problems of abuse; when Sarah was faced with a situation where the criminal justice system failed to provide justice, she arguably had little choice but to turn to mental capacity law. Yet Sarah's choices were constrained within this paradox of under-protection (failure of the criminal justice system) and over-protection (reliance on mental capacity law interventions). That is not to say that dealing with abuse should be the sole domain of the criminal justice system, a multi-agency approach is clearly required. However, the persistent failures of the criminal justice system to take action where victims have an inherent vulnerability leads to an over reliance on mental capacity law which, as I now explain, too often leads to over-protection.

4.3. Over-protection and specific findings of incapacity

There was limited evidence from the COP proceedings of under-protection and this was to be expected because such cases would not have reached a courtroom. Yet when findings of incapacity were made under the MCA, the resulting interventions often resulted in over-protection. I describe over-protection here as more protection than is required to maximise P's autonomy and to support her to be free from abuse. In this sense, over-protection can also be pathogenic in that it can be harmful to the adult in question, undermine their autonomy and exacerbate other vulnerabilities.

Findings[106] of incapacity provided numerous examples of over-protection. 18 of the 20 cases accessed involved allegations of abuse[107] and 16 of the 20 contained findings (including interim findings) that P lacked capacity in at least one domain.[108] At least ten of these 16 appeared[109] to be final declarations. Seven of these ten final declaration cases were findings of incapacity to decide on care[110] and six of the ten were findings of incapacity to decide on contact with others[111] and incapacity to decide on residence.[112] These findings cover nine out of the ten cases where final declarations in relation to capacity were made. The tenth case was *Y County Council v (1) LC (2) GK (3) SC* and the findings in that case related to sex and marriage capacity. In all of these cases, an allegation of abuse was present and findings of incapacity appeared to be used as a way of intervening to protect against abuse. This was both to protect P from abuse by others (n=14) as well as restricting P because he was perceived to be a threat of abuse to another (n=4). This highlights that the majority of cases I accessed resulted in findings relating to capacity to decide on residence, care and contact rather than capacity for sex and marriage, despite the latter being the primary selection criteria for cases at the initial stage.

Findings of incapacity can result in wide-ranging decisions requiring varying degrees of monitoring. This is particularly likely if a person is found to lack capacity in relation to care and contact as this affects a person's everyday life. Similarly in relation

---

[106] By findings I mean court decisions rather than findings from the expert evidence.
[107] See Table A1, Appendix one.
[108] The four cases where there appeared to be no findings of incapacity were: *K County Council v SL*, *ML v (1) TL and (2) D County Council*, *W County Council v ZR*, *J Council v RK*.
[109] I use the term 'appeared' as it was not always clear from the case file whether findings of incapacity were interim or final. However, the figure of 10 is based on those cases which had either been closed, where it was expressly stated in a judgment that the order was final or where the finding of incapacity led to the matter being stayed for a lengthy period, for example to allow for an annual review of DOL.
[110] *P CCG v QB*, *Z County Council v FY*, *C Borough Council v (1) DY (2) B Council*, *M County Council v EV*, *T City Council v CY*, *OD v R City Council*, *P County Council v (1) SE (2) TM*.
[111] *Z County Council v FY*, *C Borough Council v (1) DY (2) B Council*, *M County Council v EV*, *OD v R City Council*, *V Borough Council v AY*, *O City Council v (1) AW (2) FW (3) YW (4) TW*.
[112] *Z County Council v FY*, *C Borough Council v (1) DY (2) B Council*, *T City Council v CY*, *OD v R City Council*, *P County Council v (1) SE (2) TM*, *V Borough Council v AY*, *P CCG v QB*.

to sex, once it is found that an adult lacks capacity the local authority is under a duty to protect them. The potential for over-protection in this context is therefore clear, as the judge explained in his judgment in LC's case:

> In reaching that conclusion [that LC lacks capacity], I am well aware that this decision will have a very significant effect upon LC's life and her freedom to engage in sexual relations. I take into account her ECHR [European Convention on Human Rights] rights. I have been told that she wishes to have a boyfriend or husband as other people do. Nevertheless, LC has very significant learning difficulties and is very vulnerable, and the court has a duty to protect her if she does not have the relevant capacity.

This same concern appeared in my interview with Sarah. She told me that she was reluctant to take her case to the COP because of concerns about the impact of findings of incapacity. She explained:

> It would put me off if they were gonna be, if it was gonna be something really restrictive like that, if they were gonna say blanket, she doesn't have capacity to make decisions… that she couldn't form relationships with people, that would be, that would really concern me.

Given her concerns, I asked what she thought a good outcome would be and she said:

> What I'd really like is to show her… that she's got, there is a life kind of beyond her husband, that there is there is basically there's a better world, because

> she'd be devastated if we removed, if we were to take her away from her husband but that's because all she ever knows, known, is her husband and her life is her husband because that's all she ever sees and all she ever spends time with, so what I'd like is for her to be able to get out of that and see that actually there is a world beyond her husband and actually there are some kind of nice people in the world that don't go about raping people and setting things on fire and that actually she could have a different life.

For me this was an acknowledgement that her service user was not inherently or especially vulnerable and therefore did not need protection through a finding of incapacity which could have been disempowering for her. Sarah did not want to remove this woman from all potential risks on the basis of her disability; she simply wanted to show her that she could live a better life. Yet Sarah was concerned about the potential for the COP to control her service user and prevent her from enjoying the benefits of even a healthy relationship ever again.

Similarly a COP case file highlighted that over-protection can result when using capacity law to respond to what is better characterised as a situational vulnerability. *AW v O City Council*, concerned a 34 year old woman, described as having emotionally unstable personality disorder, borderline learning difficulties and paranoid schizophrenia. The case concerned her capacity for contact with her family, in particular her father and brothers. The case was brought because there was a history of sexual abuse by her father and of inter-sibling sexual relationships. In notes of a best interests meeting shortly before proceedings begun it was said that:

> According to [AW] her dad and her brothers have recently started visiting [AW] after a long period of not being in contact. [Care manager

name] reports that [AW's] neighbour has reported being introduced to [AW's] dad.

However, it was expressed elsewhere in the file that AW did not wish to see her family and there appeared to be confusion as to AW's wishes. The court ordered that AW lacked capacity to conduct proceedings and make decisions about contact. As a result an order was made that it was in her best interests not to have any contact, directly or indirectly, with her father, brothers and sister. Yet rather than prosecute AW's father or siblings, or take legal measures which restricted *them*, the law facilitated protection in the form of restricting and coercing the innocent, vulnerable party. Whilst a capacity determination is a form of protection, in a case such as this it failed to address the specific and surplus pathogenic vulnerability in AW's life, namely the abusive family members. The approach taken risked undermining AW's autonomy and failed to empower her as a decision-maker. Furthermore, the social workers caring for her would have been responsible for deciding who AW could or could not have contact with. This is concerning as sexual violence is notoriously prevalent within institutionalised settings and it is well established that abusers often seek positions of authority over people with mental disabilities (Hollomotz, 2011; Plummer and Findley, 2012). Therefore, a blanket finding of incapacity in respect of contact was a form of over-protection which may also have exposed her to further pathogenic vulnerability; the court simply replaced one set of known risks with another set of unknown risks.

A different case, *NA v (i) GI (ii) DQ*, highlights that a better balance between empowerment and protection can be achieved where more situational responses are adopted. The case concerned the relationship between a 62 year old woman, GI, and her husband, DQ. An urgent application was made by the local authority, NA, in relation to GI's capacity to litigate, capacity to decide on her care, contact with others and where to reside. Since the couple's marriage in 2012, the local authority stated that

there had been “in excess of 50 domestic abuse allegations that [GI] has made against her husband”.[113] It was noted in the application that GI had Korsakoff’s syndrome due to alcohol consumption, personality disorder, depressive disorder and cerebral atrophy. In this case, as in most I reviewed, the local authority’s primary concern related to GI’s relationship with DQ, rather than her capacity in any general sense, although her health issues are likely to have had an impact on her cognitive abilities. An interim declaration of incapacity was made in relation to all of the mentioned domains[114] and therefore the same criticisms I had of AW’s case also apply here. However, the difference in this case was that at a subsequent fact finding hearing the judge also issued an injunction as follows:

> [DQ] is forbidden whether by himself or jointly with any other person:
>
> a) To use or threaten violence against [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> b) To intimidate, pester or harass [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> c) Enter or attempt to enter the grounds of or premises known as [X] or any other property in which [GI] may from time to time reside, save for the purpose of supervised contact agreed in writing in advance by the social worker on behalf of [GI].

[113] This statement was written in 2016 meaning there were over 50 allegations over a 4 year period.
[114] Unfortunately it was unclear from the documents that I accessed what the final declaration in relation to GI’s capacity was, if such a final declaration was even made.

This case is explored in more detail in Chapter Seven, but this approach more clearly focused on the situational cause of vulnerability in GI's life – her abusive partner. The injunction may be criticised on the basis that GI may have wished to maintain a relationship with DQ despite his abusive behaviour and we do not commonly intervene in the lives of adults without mental disabilities against their wishes when abusive relationships are identified.[115] However, the injunction did not prevent DQ from having any contact with GI, it required that contact be supervised. Yet, for me, the crucial aspects of this injunction were not the restrictions on contact but clauses (a) and (b); that DQ would be committing an offence in breach of a court order for being violent or intimidating to GI. These two aspects maintained GI's wishes to have some contact with DQ, if indeed this was what she wanted, whilst allowing for a civil law mechanism to protect GI should DQ's behaviour have become abusive. Therefore redefining vulnerability in situational terms better focuses responses that directly address the cause of vulnerability, particularly where it is surplus and pathogenic. They further pitch the level of protection more appropriately, for example through the provision of educative work on sex and relationships or through restricting contact with an abusive partner, rather than restricting the vulnerable adult herself.

[115] Although prosecutions where the victim does not give live evidence are now more common following guidance, see Crown Prosecution Service (2017). Similarly, non-molestation orders under s 42 Family law Act 1996 can be used, albeit they require initiation from the victim.

4.4. Over-protection and depriving a person of their liberty

The final example of over-protection that emerged from my data was in cases where a deprivation of liberty was ordered. Of the 20 case files reviewed, at least 11 expressly involved a DOL. Under the MCA, individuals can be deprived of their liberty in a care home or hospital for the purpose of being given care or treatment.[116] Para 15 Schedule 1A MCA states:

> The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment.

Furthermore, a person who may be deprived of their liberty outside of a hospital or care home, but with sufficient degree of state involvement, would also require court authorisation for that DOL.[117] The DOL framework was implemented in response to an ECHR decision[118] to enable care and treatment to be provided to adults who need it but cannot necessarily consent to being within a setting from which they are unable to leave. In many ways therefore it was intended as a protective mechanism against violations of the right to liberty rather than as a mechanism to facilitate control. The DOL framework has been widely criticised (Szerletics and O'Shea, 2012) and recently subjected to a Law Commission consultation (Law Commission, 2015; Law Commission, 2017). However, in the cases I observed, DOL authorisations appeared to be used as a way of managing P's abusive situation; if P was deprived of her liberty

[116] Part 1 s 1 (2) MCA.
[117] s 16 (2)(a) MCA, power confirmed in *W Primary Care Trust v B* [2009] EWHC 1737.
[118] *HL v United Kingdom* (2004) 40 E.H.R.R. 761.

within a particular care home or supported living arrangement, then care staff and others could restrict and/or monitor, her contact with abusive others.

A DOL, either under Schedule 1A or as part of the court's general welfare management powers, was authorised in at least 11 cases, all of which involved allegations of abuse.[119] In many of these cases the court authorisation included more than simply an authorisation that P could reside in a particular place for the purposes of care or treatment. In some cases the order had the effect of supervising P's contact during the period for which she was being deprived of her liberty, even where she had capacity to decide on contact. For example in *T City Council v CY* it was ordered that CY lacked the capacity to litigate, decide on residence, care and how her care needs should be met during times which she has contact with others. The order further stated that it was in her best interests to receive care in accordance with the contact plan, including during times which she had contact with SB. In effect, this meant that she was not allowed to leave or meet with others, particularly SB, without a carer. Similarly in *Z County Council v FY,* a hearing was scheduled to:

> determine what contact between the First [FY] and Second Respondents [FY's husband] is in the First Respondent's best interest and whether any conditions should be attached to the standard authorisation…

Furthermore, in another case it was ordered:[120]

---

[119] *Z County Council v FY*, *W County Council v ZR*, *C Borough Council v (1) DY (2) B Council*, *T City Council v CY*, *N County Council v (1) GI and (2) DQ*, *N County Council v CA*, *YS v E District Council*, *OD v R City Council*, *P County Council v SE*, *AY v V Borough Council*, *PR CCG v QB*.

[120] *C Borough Council v (1) DY (2) B Council*.

> That, reasonable and proportionate measures shall be taken by [CB] to place and to prevent [DY] leaving 'the Placement' and that in the event that she refuses to go to or leaves 'the Placement' that reasonable and proportionate measures are taken to place/return her to the same.

The mechanism for protecting P through the DOL framework was, therefore, centred on restricting her movements, even though she was more often than not the innocent party situated within a context of abuse and pathogenic vulnerability. The use of DOL authorisations as a method of responding to situational vulnerability was problematic because it restricted the victim, rather than the perpetrator, of abuse. I consider this issue further in Chapter Seven and instead argue for a different approach to intervening in cases of abuse using mental capacity law, which better balance protection and empowerment.

5. Conclusion

In this chapter I have explored how vulnerability is discursively applied in mental capacity law to safeguard adults from abuse. I have used CDA to argue that both law and social work still understand vulnerability in inherent terms, relating it back to features internal to the person such as disability. Furthermore, I have shown how such characterisations can lead to both under-protection and over-protection as the meaning of vulnerability is linked to material factors such as rationing of social care. As such, it is imperative that understandings of vulnerability are shifted away from inherent meanings, towards situational analyses of vulnerability. Whilst the language and understanding of inherent vulnerability may provide privileged access to support and services for some who fall within that norm, it channels legal and social work responses that control the individual rather than the situational cause of abuse in their

lives. This focus on inherent vulnerabilities shapes the types of interventions that are used and, as I have argued, often lead to over-protection.

In the following chapter I build on this argument that mental capacity law views its subjects as inherently vulnerable by considering P's participation in mental capacity law proceedings. Using the analysis of vulnerability outlined in this chapter, I argue that constructions of inherent and situational vulnerability lead to P's exclusion from participation in mental capacity law proceedings.

CHAPTER FIVE: GIVING EVIDENCE AND PARTICIPATING IN COURT OF PROTECTION PROCEEDINGS: P'S SILENCE AND TESTIMONIAL INJUSTICE

1. Introduction

In this chapter I draw on my COP data to highlight P's limited participation in mental capacity proceedings.[121] I present this as a form of testimonial injustice which is the failure to value a person in their "capacity as a giver of knowledge" (Fricker, 2007, p. 7). I firstly evidence P's bodily absence from proceedings. I then explore the absence of P's voice and identify, based on my data, the reasons for this. I argue that P's absence from COP proceedings is a form of testimonial injustice. Whilst the formal evidential rules do not prohibit P from giving evidence, P is routinely absent and silent because there is a persistent assumption that she is inherently and situationally vulnerable. As a result of this assumption, her experiential knowledge is pre-emptively excluded from mental capacity law. Finally, I argue that valuing P's experiential knowledge has important benefits, including empowering her as a decision-maker in her own life. Furthermore, giving P a voice is more likely to strike a better balance between under-protection and over-protection as the embodied consequences of the particular decision are more likely to be taken into account. I conclude the chapter with a discussion of the ways in which P's participation could be facilitated. However, I express caution about the increasing turn to special measures as a way of dealing with the problem I identify. By reinforcing the belief that P is especially vulnerable, there remains the likelihood that, even with special measures, her evidence will not be attributed the same credibility as others.

[121] I do not draw on the data from the social work interviews in this chapter.

2. Testimonial Injustice in the Court of Protection

In identifying the testimonial injustice (Fricker, 2007) that emerged from these data, I focus on P's silent voice and bodily absence from COP proceedings. [122] Fricker's concept of testimonial injustice gets to the core of the problem; that P is unable to engage in the social practice of conveying her knowledge. Being silenced is the most basic form of testimonial injustice – the inability to communicate your knowledge to another. Whilst knowledge can be gained independently of experience, having experience strengthens understanding of phenomena (Collins and Evans, 2008). This is particularly important when the setting in which she cannot convey her knowledge relates to her understanding of matters as intimate as sex and relationships. P therefore has a persuasive experiential knowledge claim to put forward, based on the reality of her lived experience.

Fricker's theory focuses on testimonial injustice as caused by prejudice, with such attitudes leading to the speaker's credibility being underestimated; this lack of (or reduced) credibility leads to their knowledge being ignored or devalued (Fricker, 2007). Fricker describes testimonial injustice to be the result of intentional prejudice, rather than of bad luck or "innocent error" (Fricker, 2007, p. 21; Sherman, 2016). Yet in this context it was more likely motivated by paternalism and concerns about P's vulnerability rather than prejudice. Most, if not all, individuals working in the COP were not knowingly or actively prejudiced against P, nor were they motivated by a desire to deny her the opportunity to speak. Those who raised concerns about P giving evidence expressed it in relation to the detrimental effect they perceived giving evidence might have on her. However, this reflected a paternalistic attitude; that P needed to be protected for her own good. Such concerns did not typically arise in response to P giving evidence and having that evidence discounted. Instead she was pre-emptively

[122] A summary of the cases are contained in Tables A1, A2 and A3, Appendix one.

silenced (Fricker, 2007, p. 130) because of paternalistic assumptions about her membership of a particular group – that she had a mental disability.

Concerns about the paternalistic nature of professional and judicial responses under the MCA are clear in judgments[123] and academic commentaries (Doyle, 2010; Cave, 2015; Taylor, 2016). In the previous chapter I also highlighted that over-protection can result from paternalistic attitudes. This is notwithstanding that paternalism might be justified where an individual's freedom to make voluntary choices is diminished (Herring and Goold, 2014, p. 14). Yet as a result of her vulnerability, P was paternalistically characterised as unable to provide evidence or attend proceedings. This finding suggests that those who argue that we should be wary of vulnerability might have legitimate concerns in this context. For example, Munro and Scoular have warned the language of vulnerability can be used to justify surveillance and intervention in the lives of those labelled vulnerable (Munro and Scoular, 2012). However, by interrogating what the individual is vulnerable to and why, a vulnerability analysis can still provide a useful insight into the reasons for P's silence.

I observed both inherent and situational attitudes towards vulnerability (Mackenzie, Rogers and Dodds, 2014a), drawing on my theoretical framework in Chapter Two. Inherent vulnerability was over-emphasised in the COP in contrast to acknowledging the universal vulnerabilities that we all share (Fineman, 2008; Fineman, 2010). P was perceived to be especially vulnerable when attending court and providing evidence can be a challenging experience for many adults. Vulnerability was also viewed as situational because it was acknowledged that the court setting was a scary place which was seen as (especially) harmful to P. Therefore the interaction between both types of vulnerability underpinned P's absence from proceedings. I consider the different ways that vulnerability was presented in relation to P's participation and argue

[123] *In re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 para 61, *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37 para 1, 42, 82.

that by labelling P as especially vulnerable (inherently and situationally), she was wronged in her capacity as a possessor of experiential knowledge.

3. P's Embodied Absence From Proceedings

P's absence was the most striking, albeit not surprising, theme that emerged from the observations. Of the 8 cases observed over 11 separate hearings, P was present on 3 occasions. Of the case files reviewed, there was no evidence that P attended any of the hearings, gave evidence or spoke to the judge informally. I did not attend all hearings for each case observed, therefore cannot be sure that P did not attend others. However, it is widely accepted that it is unusual for P to attend or give evidence in the COP (Butler-Cole and Hobey-Hamsher, 2016; Series, Fennell and Doughty, 2017a, p. 98).[124] Accordingly I would have expected such attendance to be noted in the court files.

P's absence from proceedings was of concern because her embodied presence in the courtroom should remind participants that the case will have an impact on a living person. If COP participants, particularly judges, do not engage with adults with mental disabilities, if they do not understand the embodied context within which P lives, then their own experience about what constitutes 'normal' embodiment risks becoming normative (Scully, 2012, p. 140). This means there is a risk that if the judge does not meet with P or have regular interaction with adults like P they may not fully appreciate what it means when an expert says that P is "very childlike" and "uninhibited"[125] or that P has a "dementing illness of such nature and degree that she requires supervised care".[126] Furthermore, as a result they may use their own experience as the benchmark

[124] It was also noted in *CC v KK and STCC* [2012] EWHC 2136 that "it was unusual for the subject of proceedings in the Court of Protection to give oral evidence" para 51.
[125] *Y County Council v (1) LC (2) GK (3) SC.*
[126] *P County Council v (1) SE (2) TM.*

by which to compare others if they are not faced with the reality of differently embodied people. Therefore P's presence forces a shift from an exclusive focus on abstract legal doctrine towards also acknowledging the lived reality for those involved in the case (Fletcher, Fox and McCandless, 2008, p. 323).

Furthermore, the COP makes decisions that can have a profound impact on a person's life, perhaps to a greater extent than any jurisdiction, except possibly criminal law. This is exacerbated because of the relational subject matter of the cases I observed. Even the criminal law does not have the extensive powers of the COP to make a prospective statement that a person lacks capacity to engage in sexual activity or to marry. Furthermore, the criminal law cannot prevent a person from engaging in sex except to the extent that they are imprisoned.[127] The judge and participants should be compelled to face the reality that their decision might change P's life.

The importance of P's embodied presence was explored in *Shtukaturov v Russia*.[128] The case concerned an adult male with a history of mental illness who had inherited property from his grandmother. His mother applied to the court seeking to deprive her son of his legal capacity on the basis of a psychiatric report. The district court concluded that the applicant was legally incapable, despite the fact that he was not present for proceedings, was not aware of them and was only informed of the judgment by chance around a year later. The applicant subsequently wished to challenge this decision but was prohibited from having contact with his lawyer. The European Court of Human Rights (ECtHR) held unanimously that there had been a violation of Articles 5(1) and 5(4), 6 and 8. Whilst this case is different from many cases I observed in that the applicant did not have any representation, the ECtHR stated: [129]

[127] Or also possibly if the offender was subject to a sexual prevention order under s 104 (2) Sexual Offences Act 2003.
[128] (2012) 54 E.H.R.R. 27.
[129] para 73.

> In such circumstances it was indispensable for the judge to have at least a brief visual contact with the applicant, and preferably to question him. The Court concludes that the decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in art.6 (1).

Given the clear position under the ECHR,[130] the COP has attempted to increase P's participation. Rule 3A was enacted under the Court of Protection (Amendment) Rules 2015 and made provision to "ensure that in every case the question of what is required to ensure that P's "voice" is properly before the court is addressed".[131] The primary focus has been on joining P as a party and in all cases I observed P was a party to proceedings, albeit P has not always been a joined as a party (Green, 2016). I have written elsewhere about the importance of P being a party to proceedings in cases which involve her deprivation of liberty, given the human rights implications and infantilising comparisons to children (Lindsey, 2016b). However, rule 3A does not only allow for P to be joined as a party, but also for the judge to order that P addresses the judge.[132] Importantly, it does not rely on an application by a party but can be commenced at the initiation of the judge.[133] Yet this rule was not used to enable P's participation in any cases I observed. This was disappointing given that the COP appeared to, formally at least, be making progress towards addressing P's limited participation. However, it highlights that "some obstacles to political participation do not take the form of easily identifiable external barriers" (McNay, 2012, p. 234) but instead form part of the culture of the court process.

---

[130] For further detailed discussion of these issues at the ECHR see Series, Fennell and Doughty (2017a).
[131] COPr PD 2A para 2.
[132] COPr 3 (A) (2) (d).
[133] COPr 3 (A) (1).

Given the ECHR jurisprudence and the more inclusive approach taken in the criminal and family law jurisdictions (Brammer and Cooper, 2011), it was concerning to see P's absence from so many cases. This has also been noted in a recent report on P's participation in welfare cases in the COP (Series, Fennell and Doughty, 2017a). This absence was particularly clear in *Y County Council v (1) LC (2) GK (3) SC*. The case concerned LC's capacity to marry and capacity to consent to sexual relations. A detailed background to the case was set out in Chapter Four at p. 93. In summary, the case concerned LC, a young woman in her early twenties with autism and a mild learning disability, who entered into a relationship with a man, GK. During the relationship LC and GK married without the knowledge of LC's family and there were ongoing criminal investigations into GK's alleged rape of LC.

In hearing one counsel for the Official Solicitor explained that there was a letter from LC explaining that she did not wish to participate in the hearing and that she was stressed by it. In hearing two, counsel for the Official Solicitor explained that LC expressed a wish to attend court and speak to the judge but not to give evidence. However, as the hearing was adjourned this issue was not pursued. At the final hearing, on the morning of day three counsel for the Official Solicitor indicated that LC would like to see the judge in private "in order to express her wishes and feelings". In response the judge explained that this was a "grey area" as to what purpose seeing the judge would serve. He explained that the whole purpose is that he can't take evidence from her if he met her in private and that on the evidence he had heard, she might just say whatever was in her head at that particular time. He explained that it is clear from the rules that he should "encourage, allow and enable" a person who "hasn't got capacity" to express views to the judge as much as possible. Yet LC did not attend court, nor did she meet with the judge privately, because, according to her barrister, she feared the prospect of giving evidence in front of everybody. LC's physical embodiment was therefore never present at the crucial final stages of proceedings. It is

impossible to know the impact that LC's presence might have had on the outcome, something I explore further in this chapter at section 5.2.

In not facilitating LC's participation, her experiential knowledge of matters central to her life was not heard. LC was not present in court despite expressing (through others) a sustained, albeit inconsistent, wish to attend. The knowledge she had to convey would have gone to the core of the hearer's need to hear it; by this I mean that what LC would have had to say would likely have included her understanding of sexual relations, how she experienced them with GK, her understanding of marriage and the voluntariness within which she entered that marriage, and her general wishes and feelings for her own life going forward. Furthermore, she could have given an insight into the embodied impact of any decision.

Not only does her absence contradict ECHR jurisprudence but is also in tension with the provisions of the UNCRPD set out in Chapter One. For example, Article 12 requires the state to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".[134] Furthermore, the UNCRPD is guided by the "[f]ull and effective participation and inclusion in society"[135] of people with disabilities. Therefore this under-protection of P's right to participate and enjoy legal capacity may also contravene the UNCRPD. In addition, as Series *et al.* explain:

> it is difficult to see how a person's 'incompetence' as a witness could decrease the weight that should be attached to their evidence, since the matter to be determined is their own understanding and subjective experience. (Series, Fennell and Doughty, 2017a, p. 102).

[134] Article 12 (3).
[135] Article 3 (c).

Similarly, Donnelly explains that even where a person lacks capacity that individual is still likely to have an important contribution to make (Donnelly, 2009a). Yet despite case law and international human rights instruments requiring that people with disabilities participate in decisions, this has not sufficiently taken hold in practice in the COP.

4. P's Silence, Vulnerability and Impaired Credibility

In addition to concern over P's limited presence at court, P rarely gave witness evidence. There are many aspects of a case for which P could provide evidence, for example on her understanding of decision specific issues such as particular sexual relationships or marriages, or more broadly to enable the judge to gain a picture of her presentation. In civil law proceedings, it is for the judge to determine, at his or her discretion, whether or not to allow particular evidence to be heard.[136] Furthermore, every person is a competent witness unless they fall within certain categories (Halsbury's Laws, 2015) albeit that in *Enfield LBC v SA* MacFarlane J stated:[137]

> The difficulty faced in the present case, and it will be a difficulty which in varying degrees will be faced in the majority of capacity and best interest cases under the MCA 2005, Part 1, is that 'P' is unlikely to be a competent witness.

The legal approach to giving evidence is set out in a recent COP case. *A County*

[136] See for example Civil Procedure Rules 1998 rule 32.1 and COPr 95.
[137] [2010] EWHC 196 para 31.

Council v (1) AB (2) BB (3) CB[138] confirms that the test is whether or not the witness would understand (a) the solemnity of the occasion and (b) the responsibility to tell the truth. In that case, both the civil and criminal law approaches to witness evidence were considered. The criminal law test[139] requires a consideration of whether a person is (a) able to understand questions put to them and (b) give answers to them which can be understood. It was suggested by Counsel for AB (the subject of the proceedings) that this approach should be adopted because it was a lower threshold and "the civil test is too restrictive and is out of step with the modern approach, particularly in a jurisdiction such as the Court of Protection".[140] However, Rogers J declined to incorporate the criminal statutory framework into the COP jurisdiction as he stated that was a matter for Parliament.

Whilst the test for witness competence is not settled, *A County Council v (1) AB (2) BB (3) CB* suggests that the legal test is whether or not the witness would understand (a) the solemnity of the occasion and (b) the responsibility to tell the truth. In relation to the solemnity of the occasion, the witness must appreciate the nature and obligation of an oath or affirmation.[141] In relation to the second part, the court's focus is on whether or not the adult understands the moral duty to speak the truth. However, case law suggests that no inquiry is usually made into the understanding of such moral duty, suggesting it is interpreted very broadly.[142] The case law on this point is limited and much of it comes from the criminal law. For example, medical evidence may be adduced to show that a witness suffers from a mental disorder which may affect the

[138] [2016] EWCOP 41.
[139] s 53 Youth Justice and Criminal Evidence Act 1999.
[140] para 43.
[141] *R v Wade* (1825) 1 Mood CC 86, *R v Samuel Hill* (1851) 169 E.R. 495. Also see *Spittle v Walton* [1870] L.R. 11 Eq. 420 which found that a preliminary inquiry into a person's competence to give evidence in civil proceedings is required to determine whether they understand the nature of an oath.
[142] Ibid.

reliability of their evidence.[143] Despite the rejection of the lower criminal law threshold, *A County Council v (1) AB (2) BB (3) CB* maintains the view that P should participate in proceedings. Whilst general rules on competence apply, such rules do not have a high threshold and the civil law does not require expert evidence to support the giving of testimony.[144]

Given the relatively low test for competence to give evidence, in many cases it should not have been difficult to show that P was competent to testify. Yet P did not, in any case observed, give formal witness testimony, nor could I see any record of such evidence in any case files reviewed. Whilst it may be argued that the threshold should be lowered to match the criminal law provisions, in my observations these rules were not the primary obstacle to P having a voice as they were not discussed and no findings on competence were made. In the following sections I explore the three ways in which P's voice was silenced, with the reasons centred on her perceived vulnerability and resulting lack of credibility.

4.1. Inherent vulnerability and the pre-emptive lack of credibility

As outlined in Chapter Four, it was evident that P was perceived to be inherently vulnerable because of her disability which led to under-protection and over-protection. This stereotype of vulnerability operated to silence P and undermine her credibility as an experiential knowledge giver. In *Y County Council v (1) LC (2) GK (3) SC* expert psychiatric evidence was taken from Dr Y on P's capacity to give live evidence.[145] Dr Y was equivocal on LC's capacity essentially explaining that it would depend on how the questions were put to her. By this she did not only mean that if things were explained in

[143] *Toohey v Commissioner of Police of the Metropolis* [1965] A.C. 595.
[144] *Wigan Council v M, C, P, GM, G, B and CC* [2015] EWFC 8.
[145] *Y County Council v (1) LC (2) GK (3) SC*. I do not believe this is unusual and has also been done in reported cases, see *Enfield LBC v SA* [2010] EWHC 196.

simple language then LC might be able to understand better, but she also implied that LC could be easily led to answer questions in particular ways depending on how they were asked. Dr Y explained that "it's difficult to know her understanding of the truth" and that she would need some evidence to support the fact it's the truth because "she is too trusting". She explained that "most people I see are very worried about court cases" and "scared about the law" but that "She [LC] wasn't worried about the court and that it might result in outcomes that she didn't want." The expert said this "demonstrated her [LC's] trust in authority". However, as was suggested by Counsel for LC's husband, her trust in the authority of the court arguably strengthened LC's understanding of the requirement to tell the truth rather than undermined it; she appreciated the importance of giving evidence to a court, which could have lifelong consequences for her. Whilst one might expect a person to have some concerns about the court process, the fact that she did not express this to the psychiatrist assessing her should not have supported a conclusion that she lacked capacity. In fact, the psychiatrist went on to say when asked about the potential harm that LC was a "robust character" who was able to "bounce back from things".

Dr Y also explained that LC was very keen to please. She explained that girls and women with autism are keen to fit in and be socially accepted and that LC had a tendency to copy what other people were doing. These descriptions appeared to construct LC as not credible because, as a result of her disability, she would say anything to fit in, notwithstanding that this is not a part of the test for competence to give evidence. Rather than considering possible situational reasons why LC might want to fit in and ways of encouraging more authentic responses. Similarly, LC's social worker, KN, giving evidence explained that LC would often laugh when she couldn't answer the question or change the subject. The evidence that LC was likely to change her mind and give different answers depending on who she was speaking to came through in the judge's comment that from what he had heard LC might just say

whatever is in her head at that particular time. These comments worked to reduce LC's credibility and attribute it to inherent factors such as her mental disability, pre-emptively silencing her voice. No finding was made about LC's capacity to give evidence and she did not provide any oral evidence.[146] LC's solicitor explained "she has come to the understanding she would have to talk to everybody" and that whilst she had been informed that the request was to "see the judge in private", by the third day she had expressed a wish not to give evidence.[147] Yet many adults would find the prospect of giving evidence unsettling and the universal nature of vulnerability should have been emphasised instead of viewing P as especially vulnerable.

People with disabilities have long been understood as especially vulnerable, which has led to the silencing of their voice and over-protection. Of course 'people with disabilities' are not a homogenous group and particular voices have been silenced more than others. This is particularly so in mental capacity law as the logical, rational and legalistic voice the law requires is not typical of many people. Of course this is why legal representation is essential given the complexities of negotiating the legal process. However, when the court focuses on the exceptional reasons why P's voice should *not* be heard, "the law produces the very subjects it claims to protect" (Scott-Hill, 2002, p. 401). It does so by constructing, or allowing the evidence to construct, P as inherently vulnerable and therefore unable to give evidence. Consequently this is more likely to lead to a finding that P lacks capacity and result in her over-protection. In LC's case her disability was used as evidence that she was too vulnerable to attend court and that, even if she did, what she had to say could not be relied upon. LC was ultimately found to lack capacity to litigate, to consent to sex and to marry and I do not know whether hearing P would have changed the outcome. However, the limited number of

[146] Notes were made available to the court of her meetings with her solicitor at which she expressed various opinions, wishes and feelings.
[147] This was disappointing given that it was the only case observed which went to a full trial. Most cases never got that far as agreement between the parties was reached outside of court, typically in favour of P lacking capacity.

reported cases where P has been actively involved suggest having a voice does affect the outcome, something I return to in section 5.2.

Similarly, silencing P's voice through framing her as especially inherently vulnerable often resulted from comparisons with children. Power has long been used to silence those perceived to be vulnerable to prevent them from challenging their vulnerable status, for example, the silencing of children is well documented (James, James and McNamee, 2004; James, 2008, 61; Brammer and Cooper, 2011). As Murris explains "credibility deficit is related to age" (Murris, 2013, p. 248). Therefore the discourse in the COP which infantilised adults helped support a generalised opinion that P was unable to give evidence because what she had to say could not be relied upon to be truthful because of her childlike nature. As a result, her voice should not be heard and she could be silenced. Dr Y gave evidence describing LC as "very childlike" and that she functions at the age of 7 or 8. [148] Yet British Psychological Society (BPS) guidance states:

> In practice, some clinicians are known to use child development scales or children's intelligence tests to profile aspects of intellectual functioning of very disabled adults… attempts to derive extrapolated IQ scores from the use of developmental scales or child intelligence tests constitutes extremely dubious practice and is not recommended. Likewise, the practice of referring to 'mental age' when reporting on the level of intellectual or social functioning of adults should be avoided. (British Psychological Society, 2000).

[148] This was not the only case where infantalisation took place but it was the most striking, perhaps because of the oral testimony. The police statement in *K County Council v MW* also referred to MW as having the capacity of an 8 year old.

Whilst Dr Y was a psychiatrist and therefore this guidance would not have applied to her, it is concerning that such age comparisons are still being made as they only impact negatively on assessments of capacity (Herring, 2010) and can result in over-protection. It is perhaps not surprising that if Dr Y viewed LC as comparable to a 7 or 8 year old child that she concluded that LC lacked capacity to consent to sex and marriage. In fact, Dr Y went on to expressly link the two by stating that it was her understanding that it was illegal to have sex with someone who functions at the age of 7 or 8.

Furthermore, reference was made to LC's relationship with her teddies in excess of 17 times throughout the final hearing. Whilst on some occasions this was used to highlight flaws in LC's husband's case that he did not realise that LC had a learning disability until some time in to their relationship, at other times it was used to question LC's credibility. For example, counsel for LC asked her social worker whether the presence of her mother and her teddies would have been equally valid at her wedding. To which the social worker responded that whilst teddies are "very very important" she did not know that she could honestly say that they were as important as her mother. This attempt at silencing through infantalisation constructed LC as vulnerable and, as a result, undermined her credibility.

Infantilising adults with mental disabilities exacerbates their perceived lack of credibility, resulting in the silencing of their voice. However, there are many differences between adults with mental disabilities and children. Shoemaker gives three important distinctions (Shoemaker, 2010); firstly, mentally disabled adults are physically more mature than children. This will often mean they have been employed, have fallen in love and have had sexual experiences. This was the case for LC who had a job, had a large degree of independence and was in a sexual relationship. Secondly, the impact of physical and social factors should not be underestimated because they often lead to the adult developing greater emotional maturity as a result of life experience. For

example, LC had the experience of a serious adult relationship over a number of years at the time of the COP hearings. Furthermore, she had seen relatives and others marry and have children. Finally, they have greater cognitive maturity than children of a comparable developmental age. This means that because the adult has been at their level of development for a longer time period than children would be (because children move on to the next stage in adolescence) they have experienced that level of functioning on a daily basis for many years. As a result they have a more developed understanding of their own abilities, limits, likes and dislikes than a child would have at such an age.

Therefore whilst Dr Y described LC as comparable to a 7 or 8 year old, this was an unpersuasive comparison given that a young child would not be able to do the things LC had, such as be in regular employment, travel, go to college and have a sexual relationship. Drawing parallels between the two undermines the important distinctions that law draws between adults and children. It further serves to exclude P's voice on the basis that she lacks the credibility to speak that an adult normally possesses. The attempt at comparing adults and children by age, as well as the repeated reference to inherent and especial vulnerability, operates to undermine P's credibility, silence her voice and, ultimately, results in over-protection.

4.2. Situational vulnerability

As well as the attribution of vulnerability to inherent factors, there was evidence that those involved in proceedings were concerned that P was situationally vulnerable. Participants perceived P to be vulnerable within the courtroom and therefore they sought to avoid this by not calling her to give evidence. This was also achieved by speaking to P in private or outside of the court, which was viewed as less anxiety inducing. As made clear in *A County Council v (1) AB (2) BB (3) CB*, even if P is

deemed to lack competence, she can still provide *information* to the court. COPr 95 (d) gave the COP the power to admit evidence and COPr 95 (e) states that the court may:[149]

> admit, accept and act upon such information, whether oral or written, from P, any protected party or any person who lacks competence to give evidence, as the court considers sufficient, although not given on oath and whether or not it would be admissible in a court of law apart from this rule.

This may have been brought in to allow judges to speak with P separately for example by meeting with them outside of court, which has occurred in a small number of cases (Butler-Cole and Hobey-Hamsher, 2016). However, evidence given in this manner is usually unsworn, therefore limiting its weight. Case law has concluded that evidence, which would otherwise be deemed hearsay, can still be admitted from an otherwise incompetent witness under the Civil Evidence Act 1995 under COPr 95 (d).[150] Evidence under rules 95 (d) and (e) could be admitted by the judge informally speaking to P outside of the court or by the judge visiting P at another location. For example, Jackson J noted in *Re M*[151] that a district judge visited P in her care home and made a written record of the meeting to inform the court.[152] However, the fact that it does not carry the same weight can have important consequences. For example, in *Y County Council v (1) LC (2) GK (3) SC*, the judge noted that if he did not hear directly from P then if asked to rely on anything she has said to others, the weight given to such evidence would be very small. Furthermore, the judge explained that if LC spoke to him in

[149] Inserted by Court of Protection (Amendment) Rules 2015.
[150] *Enfield LBC v SA* [2010] EWHC 196 para 30.
[151] [2013] EWHC 3456.
[152] para 36.

private to bear in mind that "I won't be able to hear evidence from her" and that he will "only be able to tell people what she thinks". This suggests that it is in P's interests to give evidence in court otherwise her opinions will, perversely, be given less weight than those relaying the same information on her behalf. Therefore whilst the information provisions within COPr 95 (e) can prevent P's voice from being silent, her voice still has less power than others.

Another case I observed where P was characterised as situationally vulnerable was *T City Council v CY*. The case concerned a 49 year old woman's capacity to decide on residence, care and contact. CY was described as having a mild to moderate learning disability and emotionally unstable personality disorder. The case was brought due to concerns about CY's relationship with her male partner, SB. The local authority and CY's parents were concerned about his influence on her particularly in relation to her heavy alcohol consumption. It was also noted that there were previous concerns about CY being sexually exploited in exchange for alcohol.

In addition to the capacity declarations sought, CY was subject to a DOL under Schedule A1 MCA. CY objected to being placed under a DOL and was not happy with the restrictions on her ability to go out, again highlighting over-protection. However, CY's litigation friend accepted the advice of the expert that she lacked capacity to decide on matters of care and residence. The final hearing proceeded on the basis of agreement and primarily considered what CY's best interests were in relation to care and residence. Unusually, the judge spoke with CY directly in the courtroom at this final hearing, with counsel, her solicitor and her litigation friend present, but without the other parties (local authority and CY's parents). I was excluded from these discussions before the case commenced, which lasted for approximately five minutes. When CY came out of the courtroom she said that she did not want to go in for the rest of the hearing because the judge is "going up top now", implying that she did not want to be there when he was sitting in the typical judge's position, presumably in contrast to him

sitting at her level during their informal discussion. CY promptly left the building and the other parties and I were invited into the court.

On entering court, the judge explained that he understood that CY was quite frightened to come to court so he thought that speaking to her separately would be more appropriate. This is a clear example of a situational response to her perceived inherent vulnerability. He explained that he kept a note of what she told him and what he asked her. He explained that it wasn't to be evidence in the formal sense. He did not expand on what he meant. On reflection he must have been referring to COPr 95 (e). Yet it was not clear that P lacked competence to give evidence, nor was it clear why such informal measures could not have been taken alongside swearing her in and thereby enabling her voice to be given greater weight. There was also an attendance note in the court file that CY said to her litigation friend that she was frightened of court, but following lots of questions and answers between them she said "I'm going to do it, going to go" and "gave thumbs up" and "seemed quite enthused". This suggests that what CY needed, like many others, was reassurance, information and support to facilitate her attending court.

In reality, many reasons for P's limited participation can be attributed to situational vulnerability. It is well established that giving evidence can be stressful, both for 'vulnerable' people and others (Hunter, Jacobson and Kirby, 2013; Henderson, 2016). That is not to minimise any anxiety or distress that somebody with a mental disability may additionally experience. Dr Y explained in her report in LC's case that her attitude to the court process was "frivolous" and, as previously stated, that she was a "robust character" who can "bounce back from things". Therefore, it should not be assumed that a person's disability might make the court experience especially more difficult for them than anyone else. A lack of access to epistemic goods such as education (Fricker, 2013, p. 1318) about what the court process involves are arguably greater barriers for people with mental disabilities than others given their poor

educational experiences. Of course P, in many cases, is situationally vulnerable; if she does not know what to expect or has not been asked for her views then it is understandable that she may express fears or concerns about attending court. However, situational vulnerability should be addressed in terms that address that specific vulnerability factor whilst minimising the potential to undermine the credibility and weight of P's evidence. For example, in *A County Council v (1) AB (2) BB (3) CB*, a visit to the court was arranged as a way of preparing AB to participate in future hearings. Constructing P as inherently or especially vulnerable more often than not leads to P's absence from proceedings. This denies her the opportunity to be heard or, when she is heard, the value of her evidence is diminished.

4.3. Rejection of P's voice

Finally, I explore the testimonial injustice that occurs where P has a voice. Deflated credibility judgements involve rejecting a person's knowledge when it is heard (Wanderer, 2012). This rejection of knowledge can be seen in the rhetoric which references P's wishes but does not lead to any substantive difference in outcome. CY's case provides an example; this was the only case observed where P attended the final hearing and spoke directly to the judge, therefore giving her a voice and embodied presence. Whilst it was not formal witness testimony in that it was unsworn, it was still 'evidence' as it formed part of the information before the judge in the case. Furthermore, the judge attempted to allay CY's fears and concerns about attending by agreeing to meet with her separately with fewer people present. This was a commendable step given P's absence from other hearings I attended.

At the start of the hearing, the judge explained CY's wishes as she had expressed them; he explained that she said she didn't like "DOLS", because she didn't like people watching her one to one and didn't like going out with staff. He also said

she told him that she didn't understand the reason for the "DOLS". She said that SB was her boyfriend and that she sees him once a week. CY was asked by counsel why she was at court and she responded that she did not know. The judge said that he explained the reason was because he would be making a decision about her living arrangements. She was then asked if she wanted to stay for the hearing and she said no she didn't and then asked to leave, which the judge described as "understandable". Despite CY being physically present and having a voice to tell the judge what she did and did not want, the judge authorised the DOL, and ordered that it would become a standard authorisation under Part 4 Schedule A1 MCA, renewable annually. He also declared that CY lacked the capacity to litigate, to decide where to reside and to decide on her care. The judge noted that the expert evidence about CY's capacity to decide on matters of contact was "not sufficient". I took this to mean that the presumption that she had capacity to decide on contact had not been rebutted by the expert evidence. The judge then explained that restricting CY's contact with her partner, SB, through her lack of capacity to decide on matters of care "circumvents the entire problem". This meant that CY's wishes to no longer be subject to a DOL were ignored and she was to be subject to a care plan as she lacked capacity to decide on her care needs. This meant that she would always need a carer with her, even when spending time with SB, because he could not properly care for her.

Similarly in *P County Council v SE* P's expressed wishes and feelings were sidelined. The case concerned an 80 year old woman with dementia who had lived at home for a number of years with her partner, TM. The COP proceedings started following a police attendance at the property, where they raised concerns about SE's living conditions. SE raised no concerns and said she was happy with TM looking after her. SE was subsequently admitted to hospital in a confused and disorientated state. It appeared that SE had not seen her GP for 5 years although she had had some contact with district nurses. SE also had a daughter, LM, who it is said she had not seen for 5

years as TM didn't want LM to go to the flat. The case proceeded as the social workers had concerns about SE's living conditions and TM's ability to provide her with suitable care. There were concerns about TM's treatment of SE, although no findings of fact were made in that regard. However, the allegations of mistreatment by TM were the backdrop to the case.

Following the previous court hearing (4 months before the final hearing I observed) SE was moved to a care home with a DOL standard authorisation. Since removal from her home, contact with her daughter had been re-established. TM initially attended the care home to visit SE although it was understood that at the time of the final hearing he had not visited for 2 months. Both SE and TM opposed her removal to the care home. In the final hearing, which I attended, the judge held that SE lacked the capacity to make decisions about her care and residence and lacked the capacity to manage her property and affairs. However, it was held that SE did not lack capacity to decide on contact or sexual relations. The reasons for this are explored further in Chapter Seven. The judge went on to explain that under s 4 (6) (a) MCA when considering the best interests test she had to consider SE's wishes and feelings. These included SE's repeated expression of her wish to return home and be cared for by her partner. The judge noted that at the time of the final hearing that remained SE's wish. Furthermore, at a meeting shortly before the final hearing between SE, her litigation friend and her solicitor, SE was informed that the contents of an independent social work report indicated that it was not feasible for her to return home, to which SE apparently stated "well I could just die" and made reference to cutting her throat. The judge, in referring to this incident, noted that the solicitor and litigation friend were "unclear" about SE's wishes and feelings at that point.

The judge further explained that the litigation friend had raised concern about SE's deterioration in her physical and mental health following the last hearing. SE had become immobile, in need of hoisting and feeding by care home staff. In contrast, SE

had previously been described as chatty and had a good sense of humour. The judge said that it was not known if this was the result of her illness or a result of SE doing less for herself and losing her abilities because she had now effectively become “institutionalised”. Despite SE’s clear wishes and feelings being expressed through others, the judge held that it was in SE’s best interests to remain in the care home.

Both CY and SE had their knowledge and experience about living with their condition devalued. In particular, the fact that SE deteriorated following removal to a care home should have raised concern and arguably any final declaration that it was in SE’s best interests to remain in the care home should have been delayed for further evaluation. Furthermore, whilst understanding SE’s vulnerability in a situational sense to some degree, the approach taken ignored the other situational factors which impacted upon SE’s vulnerability, particularly institutionalisation. The harms that can result from institutionalised settings are well established (Hollomotz, 2011). This approach of ‘care home is best’ failed to take account of the many and multiple social and situational reasons for a person’s vulnerable position and highlighted the resort to over-protection that can result from particular characterisations of vulnerability.

The cases above highlight that even where P had a voice, it was less powerful than the voice of others. Furthermore, being given a voice alone was not always sufficient to change the case. My observations suggest this was partly the result of P’s lack of embodied presence throughout proceedings, suggesting a need for both voice and body to come together to be most effective in conveying experiential knowledge.

5. Facilitating P’s Participation

In this section, I outline the importance of facilitating P’s participation. I break this down into the intrinsic value in P’s participation and the impact it can have on the outcome of the case.

5.1. Intrinsic benefits

A participatory approach requires that a person is facilitated to take part in decision-making which affects them (Donnelly and Kilkelly, 2011). Participation does not require that the individual makes all decisions for themselves or has complete control of the decision-making process. Therefore in discussing participation I do not mean that the individual's decision-making autonomy should be respected in the substantive sense, because their wishes may ultimately be overruled. However, involving a person in decisions which affect them is still intrinsically important. It has positive psychological effects and enhances their sense of control over their life (Winick, 1994). Furthermore, securing participation is one way of *representing* to the person that they have some control over their own lives, even if the ultimate decision does not go in their favour.

For example, CY appeared happy with having attended court in her case, despite her initial reservations about doing so. It is difficult to know without being able to follow up with CY directly, yet my impression of her leaving the court that morning was certainly positive. In fact, evidence suggests that a person is more likely to respond positively to a decision in which they are involved even where it goes against their wishes (Dennis and Monahan, 1996). Furthermore, the degree of coercion that a person experiences is associated with the degree to which they feel they have been heard and treated during the process (Dennis and Monahan, 1996). Therefore I suspect that CY would have felt more empowered as a result of being able to attend proceedings and speak to the judge than if she had not attended, even though the outcome may have been the same.

Involving P is also important because, as Donnelly explains, a person's understanding is a matter of degree. In contrast, the law treats her as either having capacity or not. It is important that the person is involved in the decision-making

process, even if they are held to lack capacity, because they are still likely to have an important contribution to make (Donnelly, 2009a, pp. 11-12). For example, the possibility of physical restraint being used in a case where P strongly objects to a particular course of action suggests that P's views must be considered. Her embodiment should not be ignored when deciding what is in her best interests as different bodies may experience interventions differently. For example, in *In Re A (Capacity: Refusal of Contraception),*[153] discussed at p. 54 of Chapter Two, the High Court held that a woman lacked the capacity to make decisions about contraception because of the coercive pressure to refuse contraception from her husband. However, the court also held it was in Mrs A's best interests to receive contraception only if she consented to it,[154] thereby recognising that forced interventions are disempowering. Similarly, in *Wye Valley NHS Trust v B*[155] Jackson J refused to grant the Trust's application for foot amputation on the basis that even though Mr B lacked capacity to make the decision, he opposed having his foot amputated and therefore whilst his opposition continued it would not be in his best interests. Jackson J explained "a conclusion that a person lacks decision-making capacity is not an *"off-switch"* for his rights and freedoms".[156] Therefore, involving P is important because it respects and empowers P as a decision-maker and allows her to articulate to the court the consequences of any decision.

[153] [2010] EWHC 1549.
[154] para 77.
[155] [2015] EWCOP 60.
[156] para 11.

5.2. Improved outcomes

There are also instrumental benefits to participation. It is widely accepted that when the person about whom the decision is being made is involved the decision-making process is improved (Donnelly, 2009a). For example, hearing P can change the decision as it results in the provision of more accurate information. For instance *CC v KK and STCC*[157] concerned an 82 year old woman who lived in a nursing home but wanted to return to her bungalow. Baker J heard oral evidence from KK and, as a result, found that she had the capacity to make decisions as to her residence and care, contrary to expert evidence. In discussing KK's evidence he explained:[158]

> Overall, I found in her oral testimony clear evidence that she has a degree of discernment and that she is not simply saying that she wants to go home without thinking about the consequences.

Baker J clearly and repeatedly referred to KK's evidence in his judgment[159] and hearing P's evidence clearly made a difference to the outcome. In LC's case, counsel for the Official Solicitor noted that they were aware of *CC v KK* but that it was not appropriate in this case for LC to give evidence. No reason was given, other than that the facts were different, which is, of course, true for every case.

Similarly, in a number of observed cases it was said that P was reluctant to discuss intimate matters. This suggests that reliable knowledge about P cannot solely be obtained by other. For example, in *Y County Council v (1) LC (2) GK (3) SC*, Dr Y explained that when asked about sexual intercourse, there was a lot of giggling and embarrassment from LC. Similarly, her grandmother, giving evidence about a

[157] [2012] EWHC 2136.
[158] para 73.
[159] paras 64, 65, 69, 70, 73 in particular.

conversation where LC said that she has to have sex to "please my man", explained that she does not have to do anything she doesn't want to do, to which LC promptly changed the subject. Likewise, LC's social worker explained that she doesn't answer questions put to her, instead she just laughs or tries to cover it up by changing the subject. Similarly in *H County Council v XC*, evidence from the court file suggested that within weeks of educative work on relationships and marriage commencing, P refused to engage with staff and attend the sessions. There could be many reasons for this, but if P were reluctant to express his knowledge, one way of gaining further insight would have been for the court, or judge, to hear from P directly. It may be that P would express the same level of discomfort at speaking in a courtroom. However, that cannot be known in advance and more accurate information could have been obtained by hearing from P directly.

The problem with privileging expert evidence over hearing from P directly is that court decisions turn on the presentation of evidence. Evidence can be obtained and conveyed to the court by a barrister, solicitor, litigation friend, or expert. However, experiential knowledge is best conveyed by the individual herself. In fact, that is why hearsay evidence is given less weight – because it is based on indirect knowledge.[160] Yet if P is not given sufficient time, weight or credibility to put forward her evidence, the evidence of the expert will nearly always be preferred. This can be seen in reported cases where the judge has met with P, which have different outcomes from those where the expert evidence alone is relied upon.[161] It was therefore concerning in cases observed where it was suggested that the judge meet with P that such suggestions were not taken up. This occurred in LC and SE's case, both cases where the expert evidence was preferred and findings of incapacity were made.

[160] *Enfield LBC v SA* [2010] EWHC 196.

[161] *CC v KK and STCC* [2012] EWHC 2136, *Re M Best Interests: Deprivation of Liberty)* [2013] EWHC 3456, *A Local Authority v TZ* [2013] EWCOP 2322, *X v A Local Authority and another* [2014] EWCOP 29, *Wye Valley NHS Trust v B* [2015] EWCOP 60, *WBC v Z and others* [2016] EWCOP 4.

The focus of the case changed as a result of P's attendance in one case I observed - *K County Council v SL*. This was the only case where there was a complete reversal in findings of incapacity following educative work. The case concerned SL's, capacity to marry, have sex, decide on residence and litigate.[162] The case also included an application for a forced marriage protection order under s 63C FMCPA. The forced marriage element related to SL's capacity to enter into a marriage, albeit there were concerns about her relationship with her father as allegations of violence by him and her uncle had been made.[163] It was clear from the comments of counsel for the local authority that SL's attendance at the hearing was unexpected. Whilst SL did not give formal evidence (which was to be expected as it was a preliminary hearing), the judge addressed SL directly, asking her whether she was still at college and what her plans were. She explained, articulately, that she had recently quit but that she had attended college for three years. She further explained that she would like to start the same course again in travel and tourism. Only very shortly after this exchange and a few minutes into the hearing, the judge explained that as SL seemed to have a good idea of personal relationships he didn't want to commission something "unduly intrusive". He further explained that he didn't want somebody "investigating P's life" unless it was really necessary as she had a "right to be private". He ordered that the expert was only to investigate SL's capacity to marry, capacity to litigate and capacity to decide on care and residence.

The judge's direct engagement with SL appeared to be a central factor in his concern about being too intrusive. Having heard from an articulate, clear and engaging woman, the judge appeared reluctant to order investigations beyond those that were "live" issues i.e. there was no evidence of any sexual relationships that required investigating. However, when I later reviewed the case file again it appeared that the

---

[162] Full details of the case were first set out at p. 99.
[163] Although I understand he was later discharged as a party.

expert *did* provide an opinion on capacity to engage in sexual relations, following transfer of the case to a regional court. My perception was that SL's presence had a subtle impact on the direction of this case as it narrowed the issues and reminded those involved of the potential impact of a finding of incapacity. The High Court judge who heard the case is known for his attempts to include P, an opinion based on his fair and compassionate judgments. This may therefore have been why the case took a different turn. However, my view was that SL's attendance also enabled her barrister to convey her wishes more persuasively. For example, he explained her clear wish that she would like to get married in the future. Whilst lawyers often focus on formal legal rules, the result of something as simple as P's attendance, including the resulting ability of her barrister to put matters in context and for the judge to put a face to an otherwise abstract discussion, must have some impact on judicial decision-making. The extent to which this impacts on decision-making is controversial,[164] but at the least being able to draw on real life experiences and better understand the person is likely to have some impact.[165]

5.3. Reforms and special measures for 'vulnerable' witnesses

Finally, I discuss ways in which the testimonial injustice I observed could be addressed. One critique of a testimonial injustice analysis is that it relies on the virtues of individuals to become aware of their judgements and take action to put them right. As a result it is said to be unattainable in practice (Sherman, 2016); individuals, even if they had the ability to identify their prejudices, struggle to act correctively. However, this critique is less persuasive in relation to institutions such as the COP. The court

---

[164] There has been debate between legal formalists and legal realists on this point for some time, for further discussion see Frank (1949), Llewellyn (1960), Weber, Roth and Wittich, (1978).
[165] See comments of Jackson J in *Wye Valley NHS Trust v B* [2015] EWCOP 60, para 18 and extra-judicial comments by District Judge Eldergill (2015).

system can and should be able to take corrective measures (Anderson, 2012), for example through judicial and advocate training/guidance aimed at increasing P's participation (Butler-Cole and Hobey-Hamsher, 2016; Series, Fennell and Doughty, 2017a). One example of a corrective measure is the use of ground rules hearings to address the vulnerability of witnesses before they give evidence. In one observed case, a ground rules hearing was suggested,[166] showing that the COP are learning from other areas.

The increased use of special measures should also be considered (Charles, 2016; Series, Fennell and Doughty, 2017a). Special measures have been in place in the family and criminal courts for some time (Burton, Evans and Sanders, 2007; Brammer and Cooper, 2011; Ruck Keene, Cooper and Hogg, 2016). Special measures include the use of screens and curtains, live link so that the witness does not have to physically be in court, or allowing examination in chief to be pre-recorded. Such measures preserve the weight of evidence as it will generally still be sworn, but attempt to make the experience less anxiety inducing. The use of special measures and reasonable accommodations to facilitate P's participation has been recommended alongside the provision for additional funding (Series, Fennell and Doughty, 2017a, pp. 131-132). Whilst these recommendations are useful, I also consider some of the challenges with special measures.

Witnesses in the COP could give evidence remotely under COPr 98, albeit this is not something I saw used and one court clerk said that live links, when used, were "not the same".[167] Using a live link to give evidence still excludes P's body from court participants. The interaction between bodies and environment can provide many advantages which may be lost through giving evidence remotely. For example, a

[166] Ground rules hearings are required in criminal cases under Criminal Practice Direction 2013, 3E.3.

[167] This reflects the earlier discussion of the impact of physical presence on the case as whilst special measures such as video links have many benefits, there remains a barrier between participants in the court and the witness.

person's character and body language can become clearer in their physical presence (Burton, Evans and Sanders, 2007, p. 7). As such, giving evidence via a live link may lack the impact of giving evidence in court (Fairclough, 2017, p. 222). There are also challenges with the technology. For example, Munby P recently said in relation to special measures:

> None of this will work, as it should and must, unless our courts are fitted out with the necessary facilities and have the necessary 'kit'. The simple fact is that they are not and do not – and they must be. (Munby, 2017).

Special measures are not a worthwhile a solution if the facilities are not sufficient. Live link might provide comfort if P would be put off by the presence of their suspected abuser in court or would feel uncomfortable discussing intimate matters. Yet using live link when the technology is poor could harm the quality of evidence rather than strengthen it despite the comfort it may provide to P. Another 'special measure' that might be more useful are familiarisation visits. These are visits to the court building (and even courtroom) prior to the hearing at which P would give evidence, with the intention of alleviating any fears P might have and answering any questions (Burton, Evans and Sanders, 2007, pp. 4-5). However, even if a range of special measures were more clearly available, in other contexts there have remained barriers to their use in practice (Fairclough, 2017).

Special measures alone are unlikely to solve the problem of testimonial injustice unless the content of P's evidence is also given weight. This is because focusing on special measures risks maintaining the status quo assumption that there is something 'especially vulnerable' about P. Instead special measures should be used where there is evidence of specific, situational vulnerability and targeted against those concerns.

Such measures should not be seen as a way of avoiding the need for P to come to court at all but as a way of facilitating P's participation.

The COP should instead amend the Court of Protection Rules 2017 to include a clear presumption that P should give evidence in proceedings. A presumption that P gives evidence would help to ensure that P is assumed to have capacity to give evidence unless there is evidence that she lacks it. Whilst it is suggested elsewhere that it will be rare for P to have competence to give evidence (Charles, 2016; Series, Fennell and Doughty, 2017a), this assumption is premature. As highlighted above, in no observed case was a determination made about P's capacity to give evidence; it was simply *assumed* that she lacked capacity. This is despite the test for capacity to give evidence having a low threshold and not being the same test as capacity to litigate. A presumption that P should give witness evidence may also work to challenge persistent attitudes that P is especially inherently vulnerable so that when her voice is heard, it is not devalued. Routinely hearing the voice of mentally disabled adults may further help to reduce the marginalisation they experience and show that they also have an important contribution to make.

A presumption in favour of giving evidence should also result in more situational responses to vulnerability. For example, if P expressed a fear of court, this would have to be addressed through special measures rather than excluding P altogether. Some may argue that this risks placing P in a stressful situation against her will. However, sworn evidence need not always be given in court, despite the embodied benefits of doing so. Evidence can be submitted in written form through a witness statement[168] or given orally through live link. Yet any concerns should be addressed through amending the situation within which P would give that evidence rather than assuming she is not competent to do so.

[168] Albeit if this was done the parties would be able to cross examine her on the contents of the statement, see COPr 96 (1) (a).

The presumption that P would give evidence would be rebuttable. Therefore if evidence were presented that P lacked the competence to give evidence, bearing in mind the low threshold, then she would not have to do so. Any concerns that giving evidence might be harmful for P must be balanced against the evidence that it is in *P's interests* to have her voice heard. Yet involving P must not be a superficial exercise, for example in other contexts there have been concerns that involving children in decision making has been a way of disguising the lack of choice on offer (Donnelly and Kilkelly, 2011, p. 28). A clear presumption that P should give evidence in her case would go some way to rebalancing the weight of evidence in favour of P.

6. Conclusion

In this chapter I explored the reasons for P's absence from COP proceedings, despite moves to facilitate her participation. In light of this, I have framed P's absence, specifically her absence from giving sworn evidence, as a form of testimonial injustice underpinned by paternalistic attitudes which view adults with mental disabilities as especially vulnerable. Whilst P can, in some cases, appropriately be described as vulnerable, this routine characterisation without specific evidence as to why P is any more vulnerable that others is concerning. By attributing her vulnerability to the existence of a mental disorder, this works to exclude P's voice and body from proceedings and limits her participation in decision-making. Furthermore, such an attitude undermines her credibility in the exceptional cases where she does give evidence.

There remain many barriers to P conveying her experiential knowledge and I have briefly explored the role that special measures might play in addressing some of these barriers. However, focusing on special measures risks falling back into the trap of characterising P as especially vulnerable in respect of giving evidence. Therefore

whilst I support the increased provision for special measures, they must be implemented alongside changes in attitudes to P's participation. The risk in excluding her, as I explore in the following chapter, is that the case is determined by expert *psy* evidence.

CHAPTER SIX: EXPERT AND EXPERIENTIAL EVIDENCE IN THE COURT OF PROTECTION: COMPETING KNOWLEDGE CLAIMS ABOUT MENTAL CAPACITY

1. Introduction

In this chapter I build on Chapter Five where I investigated the role of P's evidence in COP proceedings. I now turn to the role of professional evidence in mental capacity cases. I argue that law views psychiatric knowledge as a form of objective technical expertise, and therefore as a reliable claim to truth about P's mental capacity. I criticise this characterisation and instead argue for greater weight to be placed on 'experiential' forms of knowledge such as that possessed by social workers, which is currently devalued in mental capacity law.

In Chapter Three I discussed the epistemological stance that I take in this thesis, arguing that there is a material reality to be discovered but that the ability of researchers to discover it is limited by their material-discursive intra-action with the world (Barad, 2003; Barad, 2007). Therefore when referring to 'knowledge claims' I mean each reliable claim to represent the likely reality of a situation. I understand a reliable knowledge claim to be one that has a persuasive claim to represent truths or, more likely, partial truths (Harris, 1995), albeit constrained by material-discursive factors such as bodies, resources and linguistic practices. In this chapter I build on this understanding of knowledge to consider the way that mental capacity law accepts expert knowledge and discounts knowledge drawn from experience.

I frame my analysis in section two below by reference to notions of objectivity and specifically question whether psychiatric knowledge has a reliable claim to be uncovering objective truths about mental capacity. I argue that experiential knowledge,

gained both from personal and professional experience, is instead more likely to be a reliable knowledge claim about mental capacity because of the importance of knowing how particular individuals think and make decisions in situated contexts. Relying on experiential knowledge is also more likely to facilitate situational responses to vulnerability in cases of abuse because a broader range of factors about P's life are likely to be considered. In section three I show based on my empirical data that mental capacity law treats psychiatric experts as possessing superior evidential knowledge, privileging *psy* expert evidence over evidence from experience. Finally in section four I argue for an embodied relational approach to assessing capacity, which values the experiential knowledge of those professionals who have a relationship with P.

2. Knowledge Claims About Mental Capacity

In this section I outline the difference between expert and experiential knowledge. I focus on the expert knowledge of the *psy* professions (Smart, 1989) because, from my data, this was the expertise that was most often relied upon in mental capacity cases. *Psy* professionals include, but are not limited to, psychiatrists, psychologists, psychiatric nurses and psychotherapists. In contrast to expert *psy* knowledge, I consider social work knowledge as a form of experiential evidence, based on the professional experience of social workers. Drawing on the distinction between expert and experiential knowledge, I argue that a person's mental capacity to make decisions is not best understood through *psy* knowledge because it does not have a persuasive claim to represent objective knowledge about P's mental capacity. Instead, the more reliable way of understanding P's capacity is through eliciting a range of experiential forms of knowledge about her, gaining partial truths and insights into her decision-making.

2.1. Expert knowledge and the *psy* professions

In this thesis 'expert knowledge' is used to describe specialist technical knowledge. An individual can gain specialist technical knowledge based on research, learning, skill or practice. Whilst there may be various sub-categories of expertise such as contributory or interactional (Collins and Evans, 2002; Collins and Evans, 2008), I focus on technical knowledge claims. One of the ways law identifies expert knowledge is where the expert has historical legitimacy and support from respected bodies. For example, medical knowledge is seen as a form of expertise and the General Medical Council and the British Medical Association both list in the region of 50-60 specialisms (British Medical Association, 2017a; General Medical Council, 2017). If a party in legal proceedings sought to rely on a new or less well-established domain of expertise then they would have to convince the court this was necessary. For example, this occurred with forensic psychiatry experts in criminal trials (Loughnan and Ward, 2014). Smart argues that law gives power to *psy* experts and, for example, in cases where law steps back it allows the *psy* professions to intervene instead. This occurred in criminal trials where women who had been subjected to domestic abuse had then killed their abusive partner. In those cases where law chose not to imprison the "battered woman" (Walker, 2009) it instead constructed their situation in *psy* terms requiring them to undergo psychiatric treatment (Smart, 1989, p. 47; Armstrong, 1999). This highlights law's determinative role in deciding who is recognised as an expert.

Expert knowledge claims are claims to objectivity; they are claims to likelihoods of truth informed by specialist, technical knowledge that represents society's best understanding of phenomena. Technical expertise is, in many cases, a reliable form of objective knowledge.[169] For example, an experienced surgeon likely has an objectively reliable claim to possessing technical surgical expertise. This is because she has

[169] In so far as it is possible to be so, see my discussion in Chapter Three.

learned and practised the skills required to perform a specific, technical task. However, knowledge treated by law as technical expertise is, in many cases, founded upon highly subjective knowledge about the world. For example, McKenna and Graham argue that "[t]echnocratic discourse appears to be objective and rational because of its pseudoscientific appearance. But it is precisely the opposite in most cases" (McKenna and Graham, 2000, p. 224). By this they mean that in using language that appears objective, the communicator is obscuring the many value judgements contained within.

Psy professionals are often appointed in capacity cases to provide technical expertise, framed by the COPr as "objective evidence".[170] Whilst expert evidence is restricted to "that which is reasonably required to resolve the proceedings",[171] an expert is appointed in proceedings to provide an "objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate." [172] However, I argue throughout that the phrase "objective, unbiased opinion" is misplaced in the context of *psy* knowledge about mental capacity. This is because mental capacity is not a concept best understood through the application of technical expertise. As I explain in section 2.3 below, the uncertainty within and beyond *psy* knowledge about mental disorder impacts on the validity of the technical claim to objectivity that *psy* professionals make about mental capacity.

Considering the test for mental capacity in more detail, evidence under the diagnostic threshold of s 2 MCA could fall within the definition of expert *psy* knowledge if it is accepted that technical expertise is required to establish an impairment or disturbance in the functioning of the mind or brain. Diagnosis and treatment are at the core of medical expertise. Psychiatry is the branch of medicine that deals with diagnosis and treatment of mental disorder. Therefore if a diagnosis of mental disorder

[170] COPr PD 15A.
[171] COPr 121.
[172] COPr PD 15A.

is deemed required under s 2 MCA[173] then psychiatry, being the specialist branch of medicine concerned with mental disorder, is likely to be the authority sought (Royal College of Psychiatrists, 2017).[174] The leading authority on medical expertise, the *Bolam* test, was also centred on the expertise of diagnosis and treatment. In that case it was held that a person "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."[175] Whilst this test has been modified in recent years,[176] it still represents the cornerstone of how medical (and other) expertise is received by law. For example, Foster and Miola argue:

> There are many examples of the law abdicating responsibility for ethical issues to professional medical ethics, particularly in the context of *Bolam*isation, and it must be acknowledged that in some cases this is now being reversed. Nevertheless several examples remain, and we would not wish to overstate the extent or significance of de-*Bolam*isation—*Bolam* is still there and the law still contains a (medically) paternalistic streak. (Foster and Miola, 2015, p. 510).

This analysis is important because it highlights law's continued deference to medicine in the realm of their expertise and indicates why *psy* professionals are appointed in mental capacity cases. Yet Ruck Keene *et al.* explain:

[173] I accept that there is some dispute over the labelling and even existence of mental disorder, which is not explored in this thesis, for further discussion see Foucault (1965) and Fennell (1996).
[174] In the UK to become a fully qualified psychiatrist can take up to 13 years, a period which includes completing a medical degree, foundation training and then specialist training in the different branches of psychiatry.
[175] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 587.
[176] For example by *Bolitho v City and Hackney Health Authority* [1998] A.C. 232.

> It is not necessary for the impairment or disturbance to fit into one of the diagnoses in the ICD-10 or DSM-V… therefore, the term “diagnostic” test is misleading – the important thing is that there is a proper basis upon which to consider that there is an impairment or disturbance. (Ruck Keene *et al.*, 2016, p. 10).

Therefore the framing of ‘diagnosis’ as a requirement under s 2 MCA is misleading as a diagnosis of disorder is not strictly required. There are also concerns that having a diagnostic threshold at all is discriminatory and that the MCA framework is incompatible with Articles 5 and 12 UNCRPD in this regard (Bartlett, 2012; Harding, 2015; Disability Rights UK, 2017; UK Independent Mechanism, 2017). However, it is this ‘diagnostic’ framing that encourages the use of *psy* expert evidence about capacity. This is because, in practice, assessment under a diagnostic test *is* routinely viewed as a clinical question. Evidence is most likely to be provided by a *psy* professional (Ruck Keene *et al.*, 2016, p. 10) as a result of their perceived technical expertise in diagnosing mental disorder. Whilst s 2 MCA remains in force, it is therefore likely to continue to encourage the adducing of *psy* evidence about mental capacity even though their technical expertise in determining mental (in)capacity can be challenged, as I explain further in section 2.3 below.

2.2. Experiential knowledge and social work

Experiential knowledge by contrast emanates from a person’s own perception of things. It is more obviously subjective than knowledge of technical matters. Having experience of something does not automatically equate to having knowledge, but experience can strengthen a knowledge claim as it usually provides an increased understanding of phenomena. Whilst evidence given in legal proceedings based on

personal experience is often viewed as a less persuasive knowledge claim, experience can enable a person to provide more realistic examples to strengthen their claim. A knowledge claim based on personal experience need not possess evidential certainty to be reliable, but should have "sufficient rigour for proceeding" (Lee, 2017, p. 12). For example, it should not be an untruth as proven by a more objective source such as an image recording.

I further categorise experiential knowledge as personal or professional. One of the missing aspects of personal experiential knowledge that differentiates it from both expert and professional experiential knowledge is the absence of formal learning or certification (Collins and Evans, 2002). Professional experiential knowledge is similarly gained from the individual's personal interaction with the world, but it relates to matters in their professional lives for which they may also have professional certification. Lee suggests that evidence from professional experience is a category of knowledge itself, distinct from technical knowledge, arguing that it relies heavily on personal perception and professional judgement (Lee, 2017). To some extent this has similarities with personal experiential knowledge as it is based on subjectivity, but is couched in professionalised language. Part of professional experiential knowledge is therefore having the experience to make judgement calls, drawing on experience.

Professional experiential knowledge can only be gained from putting professional skills into practice and is therefore not a persuasive knowledge claim "until it has been used for a professional purpose" (Eraut, 1994, p. 120). For example, a trainee doctor may have a persuasive claim to expert technical knowledge, but she may lack professional experience given that she has not put her knowledge into practice. In contrast an experienced practising doctor is both a technical expert and possesses professional experiential knowledge. Social workers fit more clearly within this typology of professional experiential knowledge. To qualify as a social worker

requires completing an undergraduate degree course in social work integrated within a practice setting. Undertaking a social work qualification includes learning about:

> …the variety of legislation which is applicable to social work, social work theory, research, ethics and values. There is a big emphasis on practical learning… Social workers need skills in problem-solving, communication, working with others and patience. (British Association of Social Work, 2017).

Many of these skills are not technical but are based on a situational and material-discursive understanding of human life. That is not to deny that social work is informed by evidence based practice; social workers do draw on evidence about what interventions or strategies work in what contexts, notwithstanding how some have questioned the usefulness of evidence based practice for social work (Petersen and Olsson, 2015). However, social work often involves dealing with multiple, layered and long-standing different social (and other) issues in a person's life, rather than one single issue (Trevithick, 2008, p. 1215). This is important because, in contrast, a doctor typically specialises in an area and is therefore dealing with a single problem to a much greater extent than social workers.[177] A social worker may be able to point to different evidence bases for different 'problems' in a person's life, but solutions to those problems might conflict in ways that are less obvious for the *psy* professions, which in turn impacts on the knowledge claim that can be put forward. Furthermore, social workers draw on their personal judgement about what works in a given case, rather than advancing a technical solution.

[177] Whilst this is not the case for all doctors such as General Practitioners (GPs) who cover a broader range of health problems, although even GPs can become accredited with a specialist interest (Royal College of General Practitioners, 2018).

Whereas the *psy* disciplines have developed an exclusive claim to possessing expert technical knowledge about the diagnosis of mental disorder, social work has "difficulty articulating and demarcating an exclusive knowledge base" (Trevithick, 2008, p. 1213). Social workers struggle to make knowledge claims about mental capacity based on objective, technical reasoning, making it more difficult for them to frame their knowledge as a claim of expertise. Instead, the knowledge claim of social workers is experiential; it is based on their experience of working with service users through their perception and understanding of the relational and situational factors at play in their service users' lives.

2.3. Expert versus experiential evidence and the test for mental capacity

I argue that greater value should be placed on experiential, rather than expert, evidence about mental capacity. This includes the professional experiential knowledge of social workers and the personal experiential knowledge of P, as argued in Chapter Five. This is because "overdependence on medical expertise contributes to the minimisation of the voice of individuals whose capacity is being assessed" (Kong, 2017, p. 21). Furthermore, whilst the discourse of subjectivity around social work has the effect of delegitimising their experiential knowledge, expert *psy* knowledge about mental capacity can equally be subjected to a critique of subjectivity. For example, there are reasonable disagreements about diagnosis of mental disorder, within and beyond the medical field. Despite this being the primary technical basis upon which *psy* evidence on mental capacity is sought. In fact, "[c]ompeting schools within the psy-complex hold divergent beliefs regarding the existence of specific conditions" (Romelli, Frigerio and Colombo, 2016, p. 1). There are also debates over the extent to which psychiatric expertise has a legitimate claim to a biomedical foundation. For example, Romelli *et al.* undertook an analysis of the discursive strategies used in the Diagnostic

and Statistical Manual of Mental Disorders (DSM), one of the leading manuals used by the *psy* professions, published by the American Psychiatric Association (APA) (Romelli, Frigerio and Colombo, 2016). They argue that the use of empiricist and biomedical language in relation to the classification of mental disorder, which is often referred to as "the empiricist repertoire" (Burchell, 2007; Romelli, Frigerio and Colombo, 2016), has contributed to the legitimation of psychiatric discourse. In claiming that the diagnosis of mental disorder is empirically based, the *psy* professions imply "the existence of a knowledge base about mental disorders that is valid, regardless of beliefs in etiology or treatment" (Cermele, Daniels and Anderson, 2001, p. 229). However, this medicalised, seemingly objective, language obscures the hidden value judgements and the often-present disagreements and uncertainties that lay behind the classification and diagnosis of mental disorder. Such classification is reinforced over time to give those *psy* disciplines a legitimate claim to expertise.

The Chair of the British Psychological Society also highlights difficulties with the DSM approach including the challenges in agreeing definitions of mental disorder, the limits of neuroscience and the problems in elucidating an epistemology of mental disorder (Frances, 2010; Frances and Widiger, 2012). Frances and Widiger further explain:

> the scientific data underlying descriptive psychiatry never provide a clear and unique right answer about where to set diagnostic boundaries…by far the most important deciding factor should always be whether this change… is more likely to help or hurt patients. (Frances and Widiger, 2012, p. 114).

Therefore, the seemingly objective and technical nature of the knowledge claims made about mental capacity by *psy* experts can be challenged on the basis that diagnosis of

mental disorder is not without reasonable disagreement within and beyond the field. Therefore if *psy* expertise about mental capacity is not as technically objective as it appears, then much of its value, as with any other profession, comes from the experience of having a professional relationship with P.

A further reason why *psy* expertise should be given less weight in mental capacity law is that the test for mental capacity is a legal one developed through the MCA 2005, informed by case law,[178] and which aims to determine whether P is able to make decisions for herself. Mental capacity is therefore a legal concept, which does not require specific technical expertise to understand. As explained in section 2.1 and discussed further above, it is arguable whether *psy* experts have a valid knowledge claim about diagnosis of mental disorder and, even if they do, a medical diagnosis is not required under s 2 MCA. Furthermore, if the intention in creating the MCA was to import a technical psychiatric approach to understanding capacity then one would expect the legislative and psychiatric language to align, but it does not. Case, in analysing the role of psychiatrists in evaluating the functional test, argues that it is "fairly common for expert witnesses to make reference to P's 'lack of insight'" (Case, 2016, p. 364). Whilst 'insight' is not the focus of this chapter,[179] Case shows that much of *psy* expertise extends beyond the requirements of the MCA, highlighting that the legal test for mental capacity is not predicated on *psy* technical expertise.

If specific technical expertise is not legally required, it must be considered whether there is any normative value in appointing a technical expert. In relation to the functional test under s 3 MCA, I argue that the value of a technical expert is limited. Firstly, being able to identify whether P understands the relevant information (criteria

[178] See *Re C (Refusal of Medical Treatment)* [1994] 1 F.L.R. 31 and *Re MB (Caesarean Section)* [1997] 2 F.L.R. 426.
[179] Although it was used in at least two of the cases that were included as part of the COP sample, for example in *Y County Council v (1) LC (2) GK (3) SC* the word 'insight' was mentioned at least 15 times at the final hearing. The term was also used in the case file in *H County Council v XC*.

a)[180] or is able to communicate her decision (criteria d) requires little or no technical expertise. It should be open to any person who has an interpersonal relationship with P to determine whether or not she can understand information. Furthermore, given that it is typical for the expert in COP cases to have only one meeting with P, it is difficult to see how such a meeting could accurately reflect P's understanding of any topic, let alone more complex domains of capacity. Most people who become the subject of capacity proceedings will require information to be presented in an accessible format and their understanding is likely to be facilitated by communication with those with whom they have a developed relationship (Hollomotz, 2011; Harding, 2012). Despite the relational benefits of capacity being assessed by those with a pre-existing relationship with P, "some judges appear to prefer the evidence of independent experts who do not have an immediate relationship with the person whose capacity is at issue" (Donnelly, 2010, p. 153). In contrast, adducing the knowledge of any professional who has experience of working with P is more likely to facilitate her understanding of the relevant information and encourage her to communicate her decision.

I now turn to the criterion of being able to retain information (criteria b). Whilst in principle this is something that a *psy* expert *could* comment on, it is not something that necessarily *requires* their technical expertise. Retention of information is a simple test; it requires a person to have the ability to recall information, implying a timeframe into the criteria. In fact, s 3 (3) MCA states:

> the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

[180] Which also includes understanding the reasonably foreseeable consequences of a decision, s 3 (4) MCA.

Provided that P could recall and recite the information at a later date, or at the end of the conversation, it is unclear why a *psy* expert is best placed to comment. Again, if *psy* expertise is sought on one occasion, then the expertise in identifying retention of information is limited because the expert is relying on a small snapshot of P's abilities. For example, P may feel uncomfortable speaking to a person she does not know or have a rapport with. In contrast, a person with professional experiential knowledge is more likely to gain accurate information because they should have a developed relationship with P. This undermines the *psy* expert's technical knowledge claim to represent the objective truth about P's capacity because their knowledge is incomplete compared to a person with experiential knowledge about P.

In relation to the final criterion, 'being able to use or weigh the information' (criteria c), the subjectivity of *psy* knowledge is particularly clear. It is also a more confusing test, partly because the words 'use' and 'weigh' might pull in different directions. For example, using information to make a decision does not necessarily involve weighing it up because information could be accepted unthinkingly. Furthermore, the use or weigh requirement is more normative because it implies that there is a mechanism of being able to tell whether or not a person has used or weighed the information. Given that no person is yet able to enter a person's brain, they will have to make their judgement based on what P tells them and/or does. The test allows for a value judgement about how a person *ought* to respond/behave when weighing up or using information (Banner, 2012, p. 1040). Therefore if the decision does not fall within a particular set of outcomes that *implies* a lack of using or weighing. Therefore "[a]n unreasonable conclusion is highly likely to be viewed as evidence of incapacity" (Donnelly, 2010, p. 116). This is despite the MCA being clear that unwise decisions should not be treated as incapacitous decisions.[181] In this sense, technical experts making an 'objective' judgement may be more likely to work backwards from the

[181] s 1 (4) MCA.

decision to a finding of incapacity. Basing this judgement on technical knowledge contrasts with considering how the individual weighs and uses information by reference to experiential knowledge about past decisions, which is likely to reflect a more accurate understanding of P's mental functioning.

The final reason that expert *psy* evidence should not be valued over experiential evidence is that, in this context, it typically starts from an inherent vulnerability approach. *Psy* professionals are more likely to focus on the internal factors that impact on decision-making rather than considering the situational reasons underpinning a person's impaired capacity. This is important for the reasons outlined throughout this thesis including that many capacity cases are brought because of abuse. The focus on inherent features can be seen in the training and professional requirements of the *psy* professions. For example, to practice psychiatry requires a medical degree and psychiatrists must be able to assess a person's state of mind, diagnose mental illness, use treatments and medication, and help a person recover (Royal College of Psychiatrists, 2013). To become a clinical psychologist requires a psychology degree, a period working in a healthcare setting and completion of a three-year professional doctorate. Psychological expertise involves using psychological mechanisms to understand the mind using a "variety of methods available including psychometric tests, interviews and direct observation of behaviour. Assessment may lead to advice, counselling or therapy" (British Psychological Society, 2017). In mainstream psychiatry and psychology, emphasis is placed on understanding the internal workings of the mind or brain and carrying out interventions to address individual, inherent vulnerabilities. This is in contrast to taking the situated body as the starting point and considering the impact of wider factors in a person's life.

Social work by contrast is inherently relational and situational. It does not start from an assumption of inherent vulnerability but instead social workers are encouraged to seek out the diverse reasons for a person's vulnerable position. By focusing on her

environment and taking a holistic approach, social workers are likely to have a more informed understanding of P than a technical expert who will typically only meet P on one occasion. In a context of abuse, this means that social workers might be more likely to pick up on the situational causes for impaired decision-making, rather than attributing impairment to the internal workings of the individual's mind. As a result, social workers can advocate solutions to address P's situational vulnerability, such as the provision of support or the targeting of measures against situational causes of risk.

For all of the reasons outlined above, experiential knowledge is often more informed than expert knowledge in this context and allows for embodied, situational and relational factors to be considered, which leads to more nuanced responses to vulnerability. I therefore argue that law should value experiential forms of knowledge about mental capacity, which is a concept best understood through relational and situated knowledge about P.

3. Hierarchies of Expert and Experiential Evidence

In the sections below I show that there is a hierarchy of evidence in mental capacity law. I focus on the status of *psy* evidence (characterised as expert knowledge) contrasted with social work evidence (characterised as professional experiential knowledge), having considered the role of P's evidence (personal experiential knowledge) in the previous chapter. Despite my arguments above, my data suggested that the technical and 'objective' *psy* evidence was placed above evidence from others such as social workers whose evidence was viewed as more 'subjective'. This is noteworthy for two reasons. Firstly, preferring *psy* knowledge over social work knowledge reinforces an inherent vulnerability approach in the evidence base for capacity decisions. This is problematic for the reasons identified throughout this thesis including that it discounts the multi-faceted situational causes for a person's

vulnerability which, in turn, can lead to situational solutions such as the provision of support being ignored. Secondly, the way that the COP treats evidence on capacity is likely to have a 'trickle-down' effect on capacity assessments carried out outside of legal proceedings. By this I mean that if experiential evidence is devalued by the COP, then it is also likely to be devalued in non-legal settings. It is therefore important to acknowledge the prospect of law-making not being confined to the COP but also to those (usually psychiatric) experts who have the authority to shape capacity judgements outside of formal legal processes through "hidden law-making" (Montgomery, Jones and Biggs, 2014).

3.1. *Psy* evidence

Of the 20 case files reviewed, as outlined in Table A3 Appendix one, six contained expert reports from psychiatrists and three from clinical psychologists. There were two cases in which independent social work reports were obtained, with a further six cases where social work evidence was also included, usually being a report on capacity used as evidence in the local authority's COP3 application form. A further two cases contained reports from other disciplines (sexual health counsellor and learning disabilities nurse), although one case (*H County Council v XC*) also included an independent report from a clinical psychologist which was the main report used to determine P's capacity. These data also suggest that clinical psychology reports are used in some cases instead of psychiatric reports, highlighting that further analysis is needed as to the differences between the two disciplines and what this might mean for findings in capacity cases.

There is no longer[182] any requirement for a capacity assessment to be carried out by a person with specific medical expertise, albeit as suggested above medical professionals are more likely to be used. Whilst Donnelly explains that "[c]ourts have long relied heavily on expert medical evidence regarding capacity" (Donnelly, 2009b, p. 469), this reliance is not required by case law or statute. For example in *A Local Authority v SY* it was stated by Keehan J: [183]

> I am told by counsel that it is more usual for the assessment of capacity to be undertaken by a medical practitioner or a psychiatrist. The assessment in this case demonstrates that an appropriately qualified social worker is eminently suited to undertake such capacity assessments.

Furthermore, Sir Nicholas Wall P, giving judgment in *G v E*, confirmed that psychiatric evidence is not required in every capacity case:[184]

> Provided there is credible expert evidence upon which the court can be satisfied that the individual concerned lacks capacity that, in our judgment, is sufficient. It would simply be unreal to require psychiatric evidence in every case, quite apart from the fact that it would, in some cases, be irrelevant.

Evidence from the COP cases reinforced the value attributed to expert (particularly psychiatric) evidence in legal proceedings. For example, in all of the 10 cases that

[182] Under a previous Practice Direction (declaratory proceedings: incapacitated adults) [2002] 1 All ER 794 annex A, it was stated that "[e]vidence from a psychiatrist or psychologist who has assessed the patient . . . is generally required".
[183] [2013] EWHC 3485 para 22.
[184] [2010] EWCA Civ 822 para 61.

reached a final capacity determination, the outcome in seven of those cases was consistent with the capacity recommendations of the expert (see Table A3 Appendix one which also shows the outcome of the cases by the end date of the research). Of the remaining three it was unclear from the case file whether or not an additional medical expert was appointed, rather than the expert evidence being disregarded.[185] In a number of cases, even where P disagreed with the decision of the expert on capacity, her representative accepted the expert evidence and the case proceeded on the basis of agreement and deference to the expert opinion, for example *T City Council v CY* (expert discipline unknown), *OD v R City Council* (psychiatric report), *P County Council v (1) SE (2) TM* (psychiatric report) and *P CCG v QB* (psychiatric report).

In some cases judicial discourse also reinforced the perception that law remains deferential to psychiatric experts. For example, in *P County Council v (1) SE (2) TM* the judge explained at the final hearing that the psychiatric report stated that it was likely that SE had dementia, that she was cognitively impaired and that she needed further investigation. The judge later stated that there was "no clear challenge to her [the psychiatrist's] evidence by [TM] and [SE's] litigation friend and the local authority accepts it." The judge concluded that she would accept the psychiatrist's conclusions, as they were thorough and conducted over a number of meetings. There was no analysis of the substance of the conclusions or their appropriate categorisation as matters of psychiatric expertise, and the evidence appeared to be accepted uncritically.

In only one case reviewed did the psychiatric evidence hold, contrary to the social work evidence, that P did have capacity and proceedings were withdrawn.[186] In that case the social worker's statement concluded that SL lacked the capacity to marry and to consent to sexual relations on the basis of her learning disability and concerns that she was being placed under undue influence by her boyfriend and/or father.

[185] *Z County Council v FY*, *V Borough Council v AY*, *O City Council v (1) AW (2) FW (3) YW (4) TW*.
[186] *K County Council v SL*.

However, the social worker's statement in that case was made before a period of educative work had been carried out. The psychiatrist's initial view was that SL lacked the capacity to consent to sexual relations, and therefore marriage, but that because he was "less certain in this case" than in most cases, he explained "I would have to revise this opinion if a person [probably a woman speaking to her alone] was able to get her to describe the sexual act in simple terms and of the risks of infection". The psychiatrist's subsequent report found that SL had gained capacity and therefore proceedings were withdrawn.

In only one other case was there was a partial reversal of the social worker's initial findings that P lacked capacity. In *K County Council v MW*, the psychiatrist concluded, and it was accepted by the judge, that P had capacity in respect of sex but not marriage. As noted in Chapter Four, these two cases both originated from the same local authority, which was highly supportive of facilitating P's understanding, and this may explain the shift in outcome. These data suggest that evidence from *psy* professionals was therefore repeatedly adduced, even though in only one case did it completely overturn the original social work finding on capacity (and only following a period of educative work). This could be interpreted simply as a corroboration of the social workers' original capacity assessments in the majority of cases. However, I argue it suggests something stronger: that evidence from *psy* professionals was perceived to have greater authority than the evidence of others, particularly social workers. This occurred even where it was expressly acknowledged that the *psy* expert misinterpreted the test. For example, in his judgment in LC's case the judge stated:

> I wholly accept that the professionals misunderstood the legal test in their initial reports. However, in my judgment the medical experts approached the issues in a fair and objective way and were not "overprotective" in their views. The reasoning of both Dr [Y] and Dr [S]

> (who dealt with fewer issues) was convincing and based on the evidence available to them, and upon thorough testing I found their assessments to be balanced and convincing.

Therefore despite the fact that the *psy* expert 'misunderstood' the legal test, authority was still accorded to the *psy* evidence. The status of *psy* evidence was similarly affirmed in *H County Council v XC*. In that case the judge, and XC's family, were clearly unhappy with the amount of time that it was taking to conclude the matter. I observed the first hearing in February 2016 and at the second hearing in September 2016, which I also observed, no expert had yet been instructed. My observational notes show that the judge said to the local authority representative:

> J – I have to do care cases in 26 weeks and 12 weeks reports done as absolute maximum. Going to have a further hearing in 1 week. You will find someone who can do the work in a shorter period of time, it's just ludicrous.
>
> LA– Some difficulties. Requirement for female expert to undertake the report. Have copy of Dr J CV here. [handed up to judge]
>
> J – Nothing particularly special. Spent 12 years in special educational needs disability tribunal, huge no [number] of professionals to do this kind of work. COP spending far too long to do cases for far too long. Need to get these cases resolved quickly. All we need is somebody with expertise in LD [learning disabilities] with adults, huge no [number] of consultant psychiatrists with availability.

The judge went on to qualify this by saying “I promise you there are a huge number of experienced clinical psychologists available” and ultimately a clinical psychologist, rather than a psychiatrist, was instructed in that case. There was already social work evidence available upon which the interim decision on capacity was based, albeit it was not perceived to be independent by XC’s family. The fact the judge was so insistent on broadening the range of experts shows the engrained hierarchy in appointing experts in the COP, despite there being no statutory requirement for this. However, the fact that he suggested a clinical psychologist rather than another professional such as a social worker reinforces the status of the *psy* professions in respect of capacity judgements.

My observations confirm the perception that psychiatric experts outweigh any other in the COP (Suto, Clare and Holland, 2002; Case, 2016, p. 261; Series *et al*., 2017b, p. 65) even though this is not required by law. Other professionals, including clinical psychologists, social workers and learning disability nurses, also provided evidence on capacity (see Table A3, Appendix one). However, psychiatrists and clinical psychologists were predominantly appointed as the independent expert witness and preference for their evidence was reinforced through the way the COP received their evidence.

3.2. Social work evidence

In contrast to the above, it was clear from my interviews and COP data that social work evidence had a lower status. For example, David told me about a case where he said he was really proud of his preparation but explained that when it came down to doing the capacity assessment:

> I'd gone out with a consultant psychiatrist and looked at what I'd got and he said no don't worry about that I'm gonna do it, so that was a bit irritating… it was the department's responsibility to follow the law in relation to this vulnerable chap but obviously it was then deemed that the health professional would be more senior and more expert than I would in assessing capacity… so he did the assessment, which I was quite frustrated about.

The lower status attributed to social work evidence by the COP was firstly made clear in that social work evidence was predominantly used on the COP3 application to support the local authority's position on capacity rather than social workers being appointed as independent experts in their own right. In the majority of the cases where the social worker provided evidence on the COP application, further evidence was then sought, usually from a psychiatrist (see Table A3, Appendix one). The fact that the social work evidence was more often than not treated as insufficient as a basis for a capacity determination supports my argument that professional experiential social work knowledge (framed as subjective) was attributed lower evidential value than expert *psy* knowledge (framed as objective). This was the case even when reaching the same conclusion. However, this observation is complicated by the issue of independence (discussed in more detail at section 4.2 below), as it could be argued that a social worker completing a COP3 form to bring the case to court has already made up their mind about capacity. It is therefore likely to be in P's interests to have an independent expert review the evidence on capacity in the hope that they will come to a different decision from the social worker. Whilst this is persuasive in theory, I question whether this is, in fact, the reason why social work evidence was devalued and, in any event, adducing independent psychiatric evidence did not usually assist P's claim to make her own decisions.

A review of recent case law suggests this phenomenon of appointing an independent *psy* expert occurs less frequently where the expert providing evidence as part of the application to the COP is a psychiatrist. For example, *Re QQ*[187] concerned an application brought by a psychiatric hospital in relation to a 26 year old patient's capacity to make an advance decision and to decide on medical treatment. In that case Mr Justice Keehan explained:[188]

> Dr G, QQ's responsible and treating clinician for the last 12 months, has prepared three reports, which I have read, and she has given brief oral evidence before me today… Without hesitation I accept entirely the evidence of Dr G, that throughout the time that she has been involved with QQ she has lacked capacity to make decisions on the issue of her treatment in relation to receiving anticoagulation medication.

There is no evidence from the judgment that an independent capacity assessment was obtained or relied upon. Yet I suggest that had the person responsible for QQ's care been someone other than a *psy* professional, an independent expert would very likely have been appointed to provide evidence on capacity. Whilst in some cases independent experts will still be appointed even where psychiatric evidence is relied upon in the COP application, QQ was not the only case where the treating clinician's evidence was deferred to.[189] The fact that this case concerned medical treatment should not change the position. If the primary reason why an independent *psy* expert is appointed in welfare cases is the need for independence then the same approach

[187] [2016] EWCOP 22.
[188] para 3.
[189] See also *AN NHS Trust v A* [2015] EWCOP 71 and *Cambridge University Hospitals NHS Foundation Trust v BF* [2016] EWCOP 26. *Royal Free NHS Foundation Trust v AB* [2014] EWCOP 50 and *Cheshire & Wirral Partnership NHS Foundation Trust v Z* [2016] EWCOP 56 are both similar cases where the treating clinicians' evidence was given weight, albeit in both cases an opinion from another expert was also obtained.

should be taken in medical treatment cases too. Yet it is less likely precisely because treating clinicians can more easily characterise their evidence as objective, technical expertise than other professionals such as social workers.

This hierarchy of evidence was also clear from the language used from the COP and interview data. When analysing these data using CDA, the framing of social work as subjective appeared to influence this hierarchy. For example, in the judgment in *Y County Council v (1) LC (2) GK (3) SC* the judge explained:

> I do accept that there is almost inevitably some element of subjectivity in the approach taken by social workers who are trying to protect the welfare of a vulnerable adult, and that is so in the present case – where the concern of the local authority was concentrated upon the marriage and the relationship between [LC] and [GK] (the specifics of which are not relevant to the general questions this court must answer). Nevertheless, on factual issues and when assessing [LC]'s ability to understand and process information and deal with issues, I considered [social worker's] evidence to be fair and balanced.

In addition to judicial discourse, the social workers I spoke to viewed their own role as based on their subjective judgement. All of my interviewees explicitly talked about their own judgement in specific cases. However, they were not able to point to a specific technical basis for their decisions, instead consistently referring to their experience. In doing this, and in referring to matters such as perception and judgement rather than diagnosis and treatment, the social workers presented their own knowledge using subjective discourse. For example, James talked about how he would decide whether or not a particular decision was a good one:

> … partly discussing with other professionals, with the individual if they can, that sort of thing. I know that's not a, I mean I don't know if there is now but there certainly wasn't when I was there a particular framework to decide what the outcome was, it was much more subjective.

David also felt that he did not always have the time to make judgements or make them with the same confidence that he thought a judge would be able to:

> I think again because the, the actual the applied sense of the law feels different to how a judge might unpick it… in that, for example, a judge could sort of have confidence in establishing, you know, what is an appropriate timeframe or… a judge could sort of feel or give the impression of feeling confident about something.

It became clear from analysing the discourse of mental capacity law that social workers viewed themselves, and were viewed by law, as having a large degree of subjectivity in their decisions about mental capacity. This construction of subjectivity meant that social workers' knowledge was valued less than that of *psy* professionals. This may have been additionally caused by their lack of knowledge about law, the courtroom and evidence giving. For example, Robert said "it's scary and inaccessible the law, you know". James told me "it was deemed to be time consuming, lengthy". David explained about his experience with the court process saying "I had to write the court report and that was a really chastening experience for me". Julia said "I get a little bit confused when it comes to the Court of Protection part of things so the higher level stuff and what you would take there and what you wouldn't." Sarah told me about a case (discussed in more detail in Chapter Four, p. 119) that she was in the initial stages of bringing to the COP, she said

"I'm worried that, I don't want to feel underprepared or that they're gonna ask us a question that we just don't know, or that we're gonna look yeh, silly in some way." I did not interview psychiatrists so it is difficult to know their experience of the COP. However, most of the social workers I spoke to felt intimidated by and unsure of the process of applying to the COP. Perhaps it is unsurprising that if social workers found the process of giving evidence in COP proceedings challenging, this further weakened their evidential claims compared to the *psy* professions.

Similarly, in *P County Council v (1) SE (2) TM* the judge noted that the findings of the IMCA (Independent Mental Capacity Advocate) were that SE showed full understanding of all matters discussed and appeared to show capacity and clear expression of wishes and feelings. However, my observational notes record that the judge went on to state:

> I am not satisfied the assessor took into account her ability to weigh up info as part of process. Part of that is her limitations on mobility and ability to look after herself. BIA [Best Interests Assessor] reports that ward sister and colleagues considered, each time felt she had capacity to understand her situation and agree to her stay on the ward. Not clear how thorough. What is clear are that P's wishes and feelings are important in making a BI [best interests] decision.

She then contrasted this evidence with that of the psychiatrist, my notes record:

> Think likely that she has dementia. She is cognitively impaired, needs further investigation as part of clinical care. Goes on to deal with discussions of P, gives her opinion that P lacks capacity to litigate,

> decide on care and residence and to manage property and affairs. She does not lack capacity in relation to contact or sexual relations. In so far as latter, insufficient evidence to rebut the presumption of capacity. No clear challenge to her evidence by [other parties], accepts it. I accept her conclusions, thorough conducted over no [number] of meetings.

In addition to the discursive positioning of *psy* as objective expert knowledge and social work as subjective experiential knowledge, a further reason why social work evidence had less authority was the role of the judge. Quite apart from their technical legal expertise, judges also display a high degree of professional experiential knowledge. The majority of judges have extensive professional experience as barristers,[190] which informs their perception of cases. Similarly, in a number of reported cases, discussed at section 5.2 of Chapter Five, judges have highlighted how meeting with P or attending her care home has changed their perception of the case, for example see my discussion of *CC v KK and STCC*.[191] In *Wye Valley NHS Trust v B*[192] Jackson J held that whilst B lacked the capacity to make decisions about his leg amputation, it was not in his best interests to have his leg amputated against his wishes, going against the medical expert evidence in the case. This is a case where Jackson J personally visited B, stating "there is no substitute for a face-to-face meeting where the patient would like it to happen".[193] As a result, Jackson J appeared to get a sense of his personality, reinforcing in the judgment his perceptions about B's independence,[194] clearly informed by his own meeting with B.

---

[190] For example, statistics from 2017 confirm that 66% of court judges in England and Wales were former barristers (Judicial Office, 2017).
[191] [2012] EWHC 2136 at p. 159.
[192] [2015] EWCOP 60.
[193] para 18.
[194] paras 21, 43, 45.

Therefore if judges view themselves as possessing similar subjective knowledge to social workers based on their material, relational experiences with mental capacity law's subjects, both from professional experience generally and from meeting P in individual cases, it is perhaps unsurprising if they place less weight on social work evidence. In contrast, the validity and hierarchy attributed to expert knowledge means that judges are still deferential to the technical expert claims of medicine (Woolf, 2001; Donnelly, 2009b, p. 487). Furthermore, "medical law has traditionally been overly deferential to the medical profession, and… this has led to a medicalisation of non-technical issues" (Foster and Miola, 2015, p. 512). This is despite the diminishing judicial deference to medicine in areas such as clinical negligence following *Bolitho*. However, this phenomenon of diminishing deference appears not to have taken hold to the same extent in other areas such as consent and best interests (Foster and Miola, 2015, p. 518). This extends to decisions about mental capacity, particularly where expertise can be claimed in relation to the traditional domain of medical skill – diagnosis.

3.3. The contrast between *psy* and social work evidence in the COP: *Y County Council v (1) LC (2) GK (3) SC*

The hierarchy of evidence was clear from my observations of *Y County Council v (1) LC (2) GK (3) SC*, which is discussed in detail as it provides an example of the contrast between the different types of knowledge and evidence in the COP. In that case, a psychiatrist, Dr Y, a clinical psychologist, Dr S and a social worker, BC, each gave written and oral evidence. BC carried out the initial capacity assessment following a safeguarding alert, which led to the COP application five months later. As part of the COP proceedings, BC made three witness statements and was orally cross-examined. BC concluded that LC lacked the capacity to consent to sex and to marry. It was stated

that LC had met with BC on around 15 occasions, with Dr S for around four hours over three sessions and with Dr Y on one occasion for two and a half hours. Therefore the extent of contact with P had an inverse correlation with the authority attributed to the capacity opinion.

The local authority, as part of their initial assessment, instructed Dr S to provide a further assessment of LC. Dr S worked for a local NHS Trust. On the first two occasions LC attended the meeting with Dr S with her mother and was assessed alone for around one to one and a half hours. On the final meeting Dr S met with LC for around one hour with the aim of feeding back on the assessment and on that final occasion a community learning disability nurse was present. In relation to the functional aspect of capacity, Dr S explained that she felt LC would not be able to understand the psychological effects of pregnancy and had difficulty reporting her own emotions. She explained that in LC's case it would be difficult for her to consider how a situation might impact on her emotionally and imagine the future. Dr S further explained that the "lack of depth" to LC's knowledge (of sex and pregnancy) was "of concern" and that "her responses didn't match the rest of her presentation that made it have a textbook feel". Dr S concluded that LC lacked the capacity to marry and in her initial report concluded that LC may have had the capacity to consent to sex. However, in light of seeing Dr Y's report on capacity, Dr S concluded that LC lacked the capacity to consent to sex. Dr S said that LC "had demonstrated very limited insight into her learning disability" and therefore she deferred to Dr Y's (later) assessment that LC lacked capacity in relation to sex and marriage. Dr Y was appointed as the independent expert following the commencement of COP proceedings. Dr Y provided three written reports to the court as well as oral evidence. Dr Y concluded at all stages that LC lacked the capacity to consent to sex and to marry.

The psychiatrist's opinion was given the most weight by the judge. In considering how much weight to attach to the evidence he initially stated in his

judgment:

> The opinion of independently instructed experts is likely to be of considerable importance, but the court must look at all of the evidence. It is the decision of the court (and not the expert) as to whether there is capacity in any particular area.

However, he went on to state:

> That has particular relevance in the present case, where the experts initially applied tests of capacity which were incorrect; and in which I have been asked by the OS to concentrate upon their evidence in Court on [LC]'s understanding of particular issues.

Therefore even though the judge acknowledged that the experts used the incorrect legal tests, he still applied weight to their oral evidence, particularly the psychiatric evidence. For example, the judge phrased his analysis in discursive terms that relegated the non-psychiatric evidence to secondary status by emphasising the psychiatric evidence and referring to the other evidence in brackets, writing "In oral evidence, the view of Dr [Y] (and of Dr [S] and Ms [BC])". On this point the judge quoted only from Dr Y's (psychiatric) report and not any of the others. My observational notes further reinforced this hierarchy:

> SW [social work] evidence was persuasive, felt like she had a much better grasp of LC's character and was able to draw on her meetings in a way that seemed much more genuine than the experts. She appeared to have been criticised for not knowing the law and clearly valid to some

> extent, but she sought it out and was more accurate than the other two [experts]. Yet SW evidence seemingly less important, submitted to judge that they are experts on issues of contact, care and residence by OS, but clearly judge did not find persuasive from his comments in his case management judgment.

I found the social work evidence in this case to be more persuasive and on reflection this was because it was based on detailed experiential knowledge; the social worker drew on her numerous meetings with LC and conveyed her personality and character with depth, whilst also highlighting the impact of her abusive relationship with GK. Yet the judge placed greater weight on the psychiatric evidence even though, as I explain next, the psychiatrist's technical expertise was difficult to identify, particularly in relation to the functional approach to assessing capacity.

The use of technical, seemingly objective language by Dr Y and Dr S was evident in relation to the diagnostic threshold. Dr S explained that she carried out what is commonly known as an IQ test based on the Wechsler Adult Intelligence Scale (WAIS) test, and that on this assessment LC had an IQ of 57, which represents the lowest 2 percentile of the population. Similarly, Dr Y explained that LC had a mild learning disability and explained what this meant given the differences between psychology and psychiatry. She said that psychiatrists have to consider "what level of functioning within the learning disability range" which doesn't take away from the fact that LC was in the "extremely low range" but that in terms of learning disability it is "helpful to know whether mildly, moderately or severe". To which my notes summarise that Counsel for the Official Solicitor asked "is it fair to say someone with mild learning disability as you've used might be able to travel and have a job whereas with severe would need constant one to one input from another adult?" and Dr Y responded "absolutely". This diagnostic evidence was an important part of the case for capacity

because of the need to satisfy the court that LC had an impairment of or disturbance in the functioning of the mind or brain, an example of the inherent vulnerability focus. This was presented, particularly by Dr Y, in objective discourse; she was able to go through the tests carried out in detail, seemingly to convince the court that the approach was rigorous and scientific and part of her medical expertise.

Yet on a deeper critical discourse analysis, the technical basis for Dr Y's evidence was much less clear. For example, at the start of her evidence she explained "when I was thinking through [LC's] level of understanding, I would estimate her to be functioning around [age] 7 or 8". As outlined at p. 147 of Chapter Five, the use of infantilising language about LC was present throughout, challenging the presentation of evidence on the diagnostic threshold as legitimately technical. Furthermore, a situational understanding of LC's (in)capacity would have focused instead on the influence of GK in negatively impacting LC's decision-making. This is different from arguing that it was LC's autism or learning disability that impaired her capacity under the diagnostic test. This is because any adult, with or without a diagnosis, can be influenced by an abusive partner which may impair or disturb the functioning of their mind or brain.

Dr Y took a seemingly more situational approach when considering the functional test, which does have the potential to allow for a more nuanced, situational analysis because it requires the individual to understand information relevant to the decision and the reasonably foreseeable consequences. In turn this means that there should be some focus on external factors and not solely the internal workings of the individual's brain. In this case, Dr Y was asked about LC's ability to weigh up information about contact with GK under the functional test and she said "I think that's quite difficult to assess as when he's not in contact with her she's able to talk things through with people who have her best interests at heart but as soon as he's back in contact with her he's a persuasive character". This resonates with much of the

discourse throughout proceedings about LC's acquiescence. Counsel for the Official Solicitor explained "The psychiatric and social work evidence does go to [LC]'s capacity to weigh matters because of suggestibility, comply and acquiesce, and inability to understand motives". Counsel repeatedly tried to bring the evidence back to the legal test by using the language of weighing and retaining because the experts were not doing this. My observational notes record that Dr Y did not mention the words weigh or retain once in her oral evidence. Dr S only mentioned weigh three times and did not mention the word retain at all. Therefore the language of the functional approach was not used in the oral *psy* expert evidence at all, even if she did focus on the more situational elements of LC's vulnerability under this aspect of the legal test.

In relation to LC's understanding of the relevant information, Dr Y explained that she "understands by having sex you can get pregnant, when asked about how many times she said she thought you'd have to be having sex every day to get pregnant". She further explained that in LC's mind, you have sex and then you have a baby. She said "I don't think she has any idea what happens in between. She knows you have to have a midwife, but she doesn't know what the midwife is for, what tests you might have to have etc." In relation to LC's understanding of marriage Dr Y explained that LC did not understand the social aspects. She said "she has a slightly old fashioned concept" and this was because she believed that [GK] would go to work and buy the house and that she would stay at home and do the cooking. Dr Y went on to explain that LC thought that once married she wouldn't be allowed to speak to other men. None of these factors were part of the relevant information LC needed to understand to fulfil the functional threshold, albeit it arguably does represent a more situational understanding of LC's vulnerable position.

Pre and post-MCA studies have also found a failure to use the functional approach to assess capacity (Suto, Clare and Holland, 2002, p. 48; Emmett *et al*., 2013). Nine years after the coming into force of the MCA some psychiatrists appear not

to use the language of the functional approach, instead determining capacity in relation to social factors such as understanding of ‘normal’ social expectations and by making comparisons with children. Yet in allowing a psychiatrist to discuss social factors, those factors are effectively “redefined using clinical euphemisms… to remove or neutralise the moral character of the issues at stake” (Case, 2016, p. 375). Dr Y’s comments about the functional approach were in fact comments on normative moral matters that had little to do with Dr Y’s ‘objective’ psychiatric expertise. Despite that, the judge placed greater weight on the psychiatric evidence, using it to support his finding that LC lacked capacity in respect of sex and marriage. This approach of uncritically valuing expert *psy* evidence over experiential evidence undermines its value in other contexts and further fuels conflict between professionals and law’s subjects in mental capacity law. This is despite evidence on the functional threshold not needing to be given by a *psy* professional to be a reliable knowledge claim.

4. Valuing Relational, Experiential Evidence

Lee makes the important point that “expert or technical knowledge claims… are best defeated by challenges expressed as competing technical knowledge claims” (Lee, 2017, p. 21). Therefore the ‘independent’ *psy* evidence will typically be preferred in cases where it is framed as expertise. I conclude this chapter by arguing for a relational approach to determining capacity, which values experiential, rather than expert, knowledge. A relational approach to assessing capacity involves removing the need for an expert capacity assessor who is an “objective outsider” (Donnelly, 2010, p. 113) and instead focuses on understanding P’s situated position. This should further enable more situational responses where P’s decision-making is found to be impaired.

4.1. Relational capacity assessments: valuing experiential knowledge

As outlined in Chapter Two, my embodied, relational approach draws on the work of feminist scholars (Nedelsky, 1990; Mackenzie and Stoljar, 2000; Nedelsky, 2011). Relationality acknowledges that choices cannot be properly understood without seeing them in context – without taking account of the multi-dimensional social, economic, political and geographical features of the person's life. This is in contrast to understanding the world as composed of atomistic, rational actors. Embodied relationality further grounds this recognition of context within an understanding that humans live and navigate the social world through their bodies (Fletcher, Fox and McCandless, 2008, pp. 157-158; Mackenzie, Rogers and Dodds, 2014a). However, as Harding explains, there is a "lack of definitional interrogation of what relationality means in the everyday, situated, lives of individuals" (Harding, 2012, p. 431).

Therefore an embodied, relational approach to assessing capacity would foremost involve recognising that a capacity assessment is itself the product of a relational interaction. As Donnelly states, "Regardless of who carries out an assessment of capacity, at a fundamental level, the assessment must be recognised as a personal encounter between two people" (Donnelly, 2009b, p. 477). Therefore a relational approach accepts that where that encounter is based on a positive relationship, it is likely to be more facilitative of P's autonomy. In this sense a relational approach to capacity assessment recognises the benefits of relationships to facilitating capacity and responding to situational vulnerability.

However, relational theory also recognises the harm that relationships can create (Mackenzie and Stoljar, 2000). Exploitative relationships might be less common in the professional context,[195] but a poor or non-existent relationship with the capacity

[195] By this I mean that legal proceedings should identify allegations of abuse by the professionals working with P and therefore abuse by the psychiatrist or social worker is

assessor can undermine P's understanding. For example, if an independent psychiatrist was appointed to assess P's capacity and made that judgement based on a single meeting of no more than a couple of hours, as in most cases I observed, the lack of a developed relationship between the two could be a major factor underpinning a finding of incapacity. This is firstly because of the need to have information presented in an accessible format, ideally over more than one occasion (Donnelly, 2010, p. 112). Secondly, P may feel unable to express her 'true' feelings or may feel untrusting of a person in authority. That is why there has been such a focus in the literature on involving those around P in the decision-making process (Arstein-Kerslake and Flynn, 2016).

As well as the material benefits of facilitating capacity and strengthening P's autonomy, having a capacity assessment carried out by a person who has experiential knowledge about P is more likely to get to the material reality of P's understanding. This is for all of the reasons identified above – that where P does not understand or attempts to resist the professional's line of communication they are less likely to gain accurate information about P's understanding. Experiential knowledge is strengthened by having direct experience of how P functions and by having a good relationship with P from which accurate information can be obtained. The need for a relational approach is also important because of the need to understand the material, embodied consequences of a decision of (in)capacity. Those who are familiar with the person, whether professionals or family members, are therefore likely to have a valuable contribution to make (Chan, 2004; Herring, 2013). They may better understand what assistance P needs to be able to understand and retain information, how she comes to her decisions, what factors she values and what support might be needed to facilitate her capacity.

---

probably less common, albeit there are cases of abuse by professionals and abuse by family members should similarly not be underestimated, for further discussion see Hollomotz (2011) and Plummer and Findley (2012).

The unfortunate reality of capacity assessments is that "the issue of P's capacity will often comprise a value judgement, informed by the decision-maker's perspective on where the line between autonomy and best interests decisions should be drawn" (Case, 2016, p. 376). This is because the subject matter of the case, and therefore the outcome (Donnelly, 2010, p. 114), is likely to influence the capacity judgement that is made by all involved. For example, in LC's case I question whether the outcome would have been that she lacked capacity were it not for the allegations of abuse by GK. In fact, reported cases support this observation. For example, *A NHS Trust v DE, FG, JK, C Local Authority, B Partnership Trust*,[196] concerned whether or not DE had the capacity to decide whether to have a vasectomy. In that case, the COP did not prevent two learning disabled individuals from consenting to sex in the situational context of their loving relationship. Instead it was respectful towards the relationship between two adults who, in different relational contexts, may well have been deemed to lack the capacity to consent to sexual activity.

When cases involve allegations of abuse it is not surprising that such judgments fall on the side of incapacity because of the imperative to protect. However, this is partly the result of not having P's embodied presence at court and also the limited use of situational interventions both under the MCA and other jurisdictions. Furthermore, by failing to prioritise the opinions of those who know her best, it is easier for the COP to ignore the implications of findings of incapacity. As I explore in the following chapter, in cases of abuse if the imperative is in favour of protecting the vulnerable adult then this also risks her being controlled through law. A central way of challenging this is by limiting the value attributed to the knowledge claims of those who do not have a relationship with P. Instead, by viewing capacity in relational, embodied terms, the evidence of those professionals (typically social workers) and P's family and friends is likely to be given greater value.

[196] [2013] EWHC 2562.

4.2. The case for independence?

One of the primary critiques of a relational approach to capacity assessments is that there is value in an independent assessment. Those closest to P may have strong views about what they think is best and may even be acting for personal gain. Therefore a professional or family member may seek to persuade P of a particular outcome, rather than truly facilitating P's own decision-making. Therefore in some cases independence is necessary to avoid bias, both real and perceived.

More often than not, independence was raised as an issue by the family or P rather than any other party.[197] It is understandable that those subject to mental capacity law proceedings may not feel comfortable with the evidence of their social worker being used for a finding of incapacity. This is because in most cases social workers will have brought the matter to the COP and therefore may be perceived to have already 'made up their mind'. This perception of bias must be addressed. However, appointing a technical *psy* expert raises a number of other concerns as identified above and does not provide a solution to this challenge.

Instead, it must firstly be reinforced that the judge is an independent arbiter and is best placed to determine the weight to be attributed to the social worker's evidence. Secondly, whilst social workers need to be empowered to put forward their opinions, in some cases it may still be necessary to appoint an independent assessor. For example, where P raises concerns about their social worker or where the judge decides that the evidence is not reliable in some way. Therefore where there are concerns about the professionals involved in the case (or at the initiation of the judge)

[197] For example, this occurred in *H County Council v XC* and was a clear undertone of the cases where P challenged their deprivation of liberty under s 21A MCA including *YS v E District Council*, *OD v R City Council* and *T City Council v CY*.

an independent social worker,[198] should instead be appointed to step in and assess P's capacity. Importantly, this should not be a one-off assessment but needs to involve a regular period of work with and review of P's situation from a holistic, rather than a purely *psy* perspective. The purpose of this extended interaction would be to enable the independent party to understand P's position more comprehensively than a one off assessment allows. Alternatively, the role of the IMCA could be expanded. At present, IMCAs can only be appointed where the person is found to lack capacity and in relation to specific decisions.[199] The role could be strengthened by involving IMCAs at an earlier stage. However, this may change the nature of the role of an advocate beyond what is desirable given the need for P to have a trusted person who can advocate on their behalf.

Some may raise material, resource concerns about engaging additional professionals to work with P on a longer-term basis. However, firstly this would only happen in cases where there were concerns about a lack of independence. Secondly, the cost of instructing psychiatric experts is also high.[200] Whilst s 49 MCA reports can be ordered, which require an NHS Trust to provide a report at no cost to the parties,[201] this does not always occur.[202] Furthermore, given that s 49 also makes provision for a local authority employee to provide a report, there is no legal reason why a social worker from another local authority could not be instructed. This would involve no

[198] Or another professional who is regularly involved in P's life. I refer to social workers here as they were the professionals that most often brought the COP proceedings. However, a speech and language therapist might be appropriate, or if P's main contact was with a learning disability nurse then they may be the best professional etc.
[199] Those are decisions for serious medical treatment by an NHS body, provision of accommodation by an NHS body, provision of accommodation by a local authority or where the person is subject to Schedule A1, see s 35-41 MCA and Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006.
[200] There is no set fee that can be charged for reports of this nature. However, by way of comparison, fees charged to the Crown Prosecution Service for a Consultant's day rate would be £298.25, plus other expenses such as travel or compensation for absence from practice (British Medical Association, 2017b). In reality, the fees associated with assessing P, preparing a reports and ultimately attending a trial are likely to be significantly higher.
[201] As affirmed in *RS v (1) LCC (2) AB and (3) AL* [2015] EWCOP 56.
[202] For further detail about the use of s 49 reports in the COP see Series *et al.* (2017b).

overall additional resource burden and may actually be cheaper given the respective costs of a psychiatrist and social worker's salary. However, rebalancing the evidence in mental capacity cases so that it is based on experiential, relational knowledge about P is essential for all of the reasons explored here and in Chapter Five – it is more likely to provide accurate information about P, it values the experience of P and those around her and provides a better understanding of P's material, embodied position. In those cases where there is a concern about independence then alternative measures can be taken which do not involve privileging expert knowledge claims.

5. Conclusion

In this chapter I have outlined the different forms of evidence that emerged from my data, dividing them into expert and experiential knowledge claims. I argued that experiential knowledge provides a more informed understanding of P's mental capacity. However, the COP received *psy* knowledge claims on mental capacity as objective and superior to other, experiential forms of evidence. This is despite *psy* professionals starting from an assumption of inherent vulnerability by focusing on the internal workings of the mind and/or brain. I have argued that, instead, the COP should place greater value on relational approaches to assessing capacity, valuing the experiential knowledge claims of those professionals who have an established relationship with her.

In the following chapter I build on my analysis of knowledge claims by contrasting the legitimacy of social work and law. I argue that social workers are seen to have limited legitimacy to intervene in the lives of vulnerable adults. In the same way that social workers struggle to articulate their knowledge claim because they are perceived to be too subjective, social workers also struggle to establish their legitimacy

to intervene. However, I argue that seeking legal legitimation in challenging cases leads to controlling interventions being authorised by the COP.

CHAPTER SEVEN: LEGITIMACY, SOCIAL WORK AND INTERVENTIONS TO SAFEGUARD VULNERABLE ADULTS FROM ABUSE

1. Introduction

Mental capacity assessments are regularly carried out in community, hospital and other settings.[203] The vast majority of these assessments are not disputed and do not reach the COP for a determination. However, it is still important to identify why particular cases reach court and analyse the types of interventions that result. In this chapter I demonstrate that high-risk abuse cases dominate the COP in the sex/marriage/contact context. I further argue that the types of interventions that result are likely to be controlling rather than empowering of P.

In the first half of this chapter I explore the meaning of legitimacy, contrasting the different ways that social work and law are seen to be legitimate. I argue that because social work interventions are perceived to have less legitimacy than legal interventions, social workers resort to law in the most challenging, high-risk cases. Whilst social workers may benefit from the use of law to legitimate their decisions, I raise concerns about the coercive power of law in this context. I argue that in referring mental capacity law cases to the COP, social workers reinforce the use of controlling interventions against P. This is because my data show that the types of interventions authorised by the COP are routinely controlling rather than empowering.

In the second half of this chapter I argue that social workers need to be given greater legitimacy to intervene through support based and situational interventions. I further question whether the MCA should be used in cases of abuse and instead argue

[203] It is difficult to obtain data on the prevalence of capacity assessments, partly because of the criticism that many capacity assessments are not properly documented, see Ramasubramanian, Ranasinghe and Ellison (2011). This difficulty was also noted by the Law Commission report on mental capacity and deprivation of liberty at paras 1.36, 5.32 and 10.33, see Law Commission (2017).

for the safeguarding adults legal framework to be strengthened. As explained in Chapter One, a duty to safeguard adults from abuse is contained within the Care Act 2014. However, the safeguarding provisions do not compel local authorities to consider what might be done in cases where abuse is identified. This means that a local authority will have fulfilled its statutory duty merely by carrying out a safeguarding enquiry, even where that enquiry finds abuse. The intersection of the MCA and adult safeguarding is further complicated by the presence of other intersecting legal frameworks, including the FMCPA, which also applied to a number of the cases, as well as the potential for criminal justice interventions. Negotiating these different legal regimes was, perhaps understandably, not an easy task for social workers. Therefore, I argue that clarification and strengthening of the safeguarding adults legal framework is required to enable social workers to better support and empower rather than resort to legal coercion of the vulnerable adult.

2. The Meaning of Legitimacy and the Resort to Law in High-Risk Cases

In this section I explore the meaning of legitimacy and consider how law's legitimacy can be contrasted with the legitimacy of social work. I argue that the limited legitimacy of social work results in the turn to the COP in high-risk welfare cases. This is primarily because social workers have concerns about their duty of care to service users who make unwise or risky decisions. I argue that social workers may benefit from this legal validation but doing so also undermines their legitimacy to intervene in less coercive ways. Furthermore, referring cases to the COP allows for an inherent vulnerability approach to be reinforced, which can lead to control and coercion of P, rather than empowering her to live a life free from abuse.

2.1. The contrasting legitimacy of law and social work

If an institution is seen as legitimate then it is more likely to have authority over others as people feel that they "ought to obey" (Tyler, 2006a, p. 377). Legitimacy is therefore a form of influence or power. In other words, it provides a "right to rule and the recognition by the ruled of that right" (Jackson *et al.*, 2012, p. 1051). As Steffek explains "[l]egitimacy in the empirical sense is the phenomenon that a social order enjoys 'the prestige of being considered binding'" (Steffek, 2009, p. 314). Legitimation is the process by which an individual, group or institution obtains such legitimacy for their actions. Law has long been theorised as a source of legitimate power (Foucault, 1979; Smart, 1989; Hart, 1997), with the court being a key manifestation of that power. I suggest that in so far as law is commonly depicted,[204] its legitimacy stems from two key features – its enforceability and objectivity.

Enforceability of law is central to its authority. Law is enforced through the courts, being the organs of the state with the authority to punish backed up by force. Citizens might follow law in order to avoid the real consequences, such as the use of force, if they fail to do so. In this sense, many accept law as a necessary part of the functioning of a social order and fear the coercive consequences of contravening legal rules. Whilst enforceability is a key facet underpinning law's legitimacy, as without enforceability law's power would be diminished, more is required to fully understand the nature of law. People comply with law not only because they fear the consequences of failing to do so, but for normative reasons; that they perceive the law, and those who make and enforce it, to be legitimate (Tyler, 2006b). Hart similarly argues that the threat of sanctions is not sufficient as a complete understanding of law (Hart, 1997, p. 82). Focusing on the internal aspect of legal rules, he explains that law

[204] In this sense I mean the way that law is ideologically or rhetorically constructed rather than arguing this is a normatively valid way of understanding law's legitimacy.

gets its authority from people feeling that they ought to follow it (Hart, 1997). In this sense law's legitimacy comes from:

> the belief that the law and agents of the law are rightful holders of authority; that they have the right to dictate appropriate behaviour and are entitled to be obeyed; and that laws should be obeyed simply because *that is the right thing to do* (Jackson *et al.*, 2012, p. 1053).

Law's legitimacy therefore at least partly emanates from it being a standard that people generally believe ought to be complied with. Taking this further, I suggest that people believe law ought to be complied with if they perceive it to be objective, irrespective of whether they agree with the content of the law. Objective laws treat like cases alike. Relatedly, and as Tyler argues, the objectivity of law is reflected in its procedural fairness (Tyler, 2006b). Law is seen to be legitimate because people believe that they will get a fair hearing before an impartial and objective judge. Even in cases where individuals or institutions do not necessarily agree with the court decision, they more often than not comply with it, particularly where the individual respects the court's authority (Tyler, 2006a, p. 379). Therefore ideologically at least, law's legitimacy stems from both its enforceability and its objectivity.[205]

If law is followed because it is believed to be fair and objectively applied, then courts, as enforcers of the law, are also likely to be seen as exercising power legitimately. Law's legitimacy therefore allows its institutions "to be viewed as normatively or morally appropriate by the people within the system" (Tyler, 2006a, p. 378). The submission of disputes to court exemplifies my understanding of legitimacy;

[205] This is despite challenges from anti-positivists that it is law's moral content that confers legitimacy. The debate as to whether or not the legitimacy of law is linked to its moral content is an area I do not have the space to explore within this thesis. The point here is to suggest how law is perceived, rather than being a normative claim that this is how law ought to be understood. For further on this point see Dworkin (1986).

courts are not proactive, they rely on cases being brought to them in order to develop the common law. Therefore if people did not believe they would get a fair hearing or their case would be treated objectively, then they would likely not expend their resources submitting their dispute to court in the first place. Similarly, there is little point in having a fair hearing without the possibility of enforcement. However, enforcement without fairness is perhaps equally less desirable, particularly in a context such as social work where overt perceptions of coercion could be problematic. Thus the interaction of enforceability and perceived objectivity underpin law's legitimacy and, therefore, the legitimacy of court interventions.

Social workers' legitimacy fits less clearly into these parameters. They do not have the same historical and rhetorical claim to objectivity and enforcement that law displays. This historical legitimacy usually developed as a result of jurisdictional claims of authority and "scientific and ethical superiority" (Thomson, 2013, p. 194). As discussed in Chapter Six, other professions, such as medicine, have a strong claim to possessing authority and legitimacy, hence why law is relatively deferential to the *psy* professions. In contrast, social work, being a profession centred on the provision of social support, has been seen to have a less valid claim to objectivity and impartiality than law and medicine. In fact, social workers are often seen to be 'biased' in that they have a particular outcome in mind for the person which may reflect their own values and beliefs rather than those of the person. To achieve change social workers engage in an art of discursive persuasion and negotiation, as well as using material pressures to encourage the service user to act in a particular way. Furthermore, social workers' interventions are not based on technical claims of expertise but instead on experiential knowledge and their ability to support a service user in multifaceted ways. These understandings of social work are very different from the perception of law as an authoritative and objectively applied body of rules. These fundamental differences in construction between law and social work likely contribute to social work's perceived

limited legitimacy.

Social work interventions also lack the enforceability of law. This can be seen in the characterisation of the social work profession, which is defined as:

> …a practice-based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people… social work engages people and structures to address life challenges and enhance wellbeing. (International Federation of Social Workers, 2014).

The core elements of social work are that it: is "person-centred", is "personally and socially contexted", is "relationship-oriented", "follows an integrated process" and is "values based" (Whittington, 2016, p. 1953). Being person-centred and focusing on empowerment suggests social workers do not have the power of enforcement. They cannot compel service users to act in a particular way; in fact, attempts to do so would arguably contradict the appropriate role of adult social workers. Part of social workers' legitimacy stems from the fact their decisions can be challenged. By this I mean that social workers' legitimacy is based on their ability to develop a relationship of trust with their service user, to support them and to only intervene within clear statutory boundaries. Where a social worker is perceived to overstep that role, service users can challenge their decisions. As Braye and Preston-Shoot write:

> …the core tension is between social work and service users, and the dialogue is about professional power. Service users invite government to intervene when professionals are experienced as oppressive. Social work relies upon its statutory mandate to justify its actions, in return for continued endorsement of its existence. (Braye and Preston-Shoot,

1993, p. 119).

Given the possible tension between social worker and service user, and the lack of enforceability of social work interventions, perhaps it is not surprising that social workers turn to law to legitimate their proposed interventions. Whilst this resort to law might be disempowering in certain ways, social workers do not always view it that way. In fact, resort to law can be seen as a useful tool for those who lack law's perceived legitimacy but believe that law can help them to achieve a particular result. For example, David told me:

> There's something to be said about decisions made in court, that people will, you know, respect and maintain it…

Robert explained when asked about how he found the court process:

> I think good that the full majesty of the law would be exerted on behalf of vulnerable people…

Similarly David said:

> …I think that any, any decision that is made in the community is, it's legally binding we're using a legal tool to do it even though we're not legal professionals, rightly that has consequences for people so it's gonna come under potentially come under scrutiny you know and the scrutiny of a judge is quite impressive, it's quite withering at times you know and I would, I would

> be… wanting to be able to demonstrate that I'd done everything that I thought that I could in accordance with the law as it stands…

Therefore even though social workers are seen to have less legitimacy to intervene than law, social workers do not necessarily resort to law reluctantly. The social workers I spoke to were aware of the usefulness of law to legitimate their decisions, for example with family members, deflecting difficult matters away from social work judgement into the jurisdiction of law. For example, talking about his views on the MCA Robert told me that:

> …from a personal view it was just terribly useful to have that framework so that if you did have a discussion… with a parent of a person with a learning disability… and they were saying are you telling me that I don't get to make decisions for my son and it was very nice to have a freshly minted law to say no actually you don't…

Furthermore, in many cases the local authority, as well as individual social workers, benefit from referring a case to the COP. For example, if an individual was making a perceived 'risky' choice to stay within an abusive relationship, the local authority would be better served by having a court authorise their decision not to intervene because of the risk of harm that might result. This delineating of professional boundaries is not necessarily a problem for social workers as they too can resort to law to justify their decisions. However, one social worker I spoke to was also sensitive to the difficulties that can be caused by legal legitimation. For example, I asked Sarah whether she thought applying to the COP would give her decisions more authority and she said:

> I think it would help us, in a way and feel more confident that we were backed up by something that was authoritative, and definite and coming from that place. In another way I would worry that we would then have to… we're committed to it and we've got to go with it… there's no way back once we've gone down that road, that's my worry…

The finality of a court decision reinforces its authority; a court decision must be enforced because it is seen to be based on an objective analysis of the facts. However, a court decision commits the social worker to a particular course of, often coercive, action. In contrast the interventions of a social worker might be more fluid and changeable. Therefore because social work interventions are more responsive to situational factors, that seemingly also makes them less authoritative and less objective, which in turn is perceived to undermine their legitimacy. This highlights that framing law as the objective enforcer of legal rules also impacts on those professions, such as social work, which lack a similar rhetorical claim to legitimacy.

2.2. Duty of care and vulnerability in high-risk cases of abuse

Given the contrast between the legitimacy of the court and the legitimacy of social work, it was unsurprising that social workers sought legal legitimation of their decisions in challenging cases. The MCA Code of Practice states that an application to the COP may be necessary for:

- particularly difficult decisions
- disagreements that cannot be resolved in any other way

- situations where ongoing decisions may need to be made about the personal welfare of a person who lacks capacity to make decisions for themselves. (Office of the Public Guardian, 2016, p. 139).

My research found that it was in cases of abuse where legitimation through the COP was most valuable to social workers. This is because they were concerned that they had a ‘duty of care’ towards the service user and needed to manage the high risks. Yet they felt constrained by the notion of empowerment underpinning the MCA; that is, that the MCA was passed to provide protection for those (inherently) vulnerable adults who were *unable* to make decisions, rather than to allow interventions in relation to *unwise* decisions.[206] This was felt most strongly where abuse was present because in abuse cases there is a conflict between protection and empowerment, as identified at p. 8 at the start of this thesis. The social workers I spoke to said they found this balance challenging and it has been identified elsewhere that this conflict is too often resolved through prioritising protection (Cave, 2015).

The cases where controlling and coercive interventions were used in the welfare context[207] were those that were viewed as ‘most risky’. For example, when I asked Sarah about her current role she explained that she was an investigating worker on a safeguarding team and they:

> complete a section 42 enquiry report… the idea being that we are hoping to identify what risks there are to the person and then hopefully come up with some kind of plan to reduce the risks to the people and then we keep them in

[206] Albeit that some have rightly questioned where this ‘empowering ethos’ came from given what the MCA actually does is to allow courts to intervene and make decisions on a person’s behalf, even against their wishes, see Series (2015a).
[207] Excluding property and affairs and medical treatment decisions as different considerations apply.

> this process until we feel that the risks are kind of identified and being managed and then pass it back to the district or just kind of close it out if we're happy that they're now ok…

Sarah went on to tell me about the case she was working on (discussed in more detail in Chapter Four, p. 119) that was her first experience of taking a case to the COP. I asked her what it was about this case that made her consider taking it to court, she said:

> I think it was because we just felt that the risks were so high and we were just so worried about her… We just kinda kept coming back to thinking this is just so, risky, and that we just wouldn't be happy just leaving it, we just couldn't think of a plan that we would be happy with and thinking right we've put that place, ok, we can leave this now and just think, no. It just needed to go somewhere higher that was above us…

Not only does she reinforce the perceived legitimacy of the COP but her comments highlight that concerns about risk were the reason for bringing the case to court, despite her earlier concerns about the finality of a legal decision. This discourse of risk reinforces my finding that welfare interventions in mental capacity law are more likely to be used in cases of abuse.[208] This is because the highest risk cases are those where serious harm might result. This is most likely to occur when another individual causes

[208] Risk of abuse was also a major factor in the forced marriage cases, which formed a sizeable part of the sample. Either there were concerns from the local authority that P was going to be taken abroad for marriage without consent or there were allegations of abuse within the family, often from parents.

harm to the person, albeit self-neglect might also be a source of risk.[209] My interviews reinforced the pervasiveness of concerns about "duty of care" and "risk" that have been identified elsewhere (Jingree, 2015). For example, Julia and Andrea repeatedly explained that they had a duty of care towards their service users, Julia said:

> we have had situations where people will come in and get the service user to try and sign something but I think the nursing staff are now alerted to the fact they should never let anyone sign anything they that people coming in without having some- given some thought to whether that person's got capacity, we have got a duty of care…

Similarly, I asked Andrea for her views on supported decision-making rather than substituting their decision with the professional's view through a court decision, she said:

> I feel really strongly about keeping, letting people have autonomy and things but I also deal with lots of risk, and I think a lot of people going to have support needs met and go into care for example, because it's, because of all, perhaps they're physically at risk and maybe they might want to just still take that risk. Maybe they'd rather die at home and fall down the stairs. It's a real, it's a real dilemma, it's something that I struggle with in certain cases at certain times when people's feelings are really strong, when they're not so strong it tends not to worry you so much… But… people worry then about

[209] It could also be argued that interventions are common in relation to self-neglect. This was not the focus of the research so could not be investigated further here.

> being negligent don't they, I think that's what you'd worry about not fulfilling your duty of care and being negligent...

I went on to ask her then if supported decision-making would be a big change in mindset and she said:

> Yeh it would, yeh, because I think you know we've got this duty of care always underlying everything so people don't like to take risks… it's really hard, you know, I try to take risks but there's certain pressures that can be applied at times. You know, people just badger you and badger you and get everybody on to you.

The discourse of risk that permeates mental capacity law in some ways reflects the situational vulnerability approach that I advocate in this thesis. As Andrea and Julia's comments highlight, it is when others make decisions to abuse or where individuals want to live at home in a risky environment, that they, as social workers, are most concerned about their duty of care and the material risks to P. Therefore most concerns in the welfare context relate to the material situation that P finds herself in rather than being concerns about her inherent abilities. Sarah also highlighted this when, as discussed at p. 125, she told me that she wanted to show her service user that she could have a different life away from her abusive husband. Yet somewhat paradoxically, the resort to the jurisdiction of the COP in these high-risk cases can reinforce that the abuse is attributable to an inherent vulnerability of the individual. This can be seen in the following section where I identify the types of interventions ordered by the COP.

Whilst high-risk abuse cases dominated my data, the cases were predominantly

those where the adults in question were ‘non-compliant’ with social worker advice, rather than *all* high-risk cases. This included cases both where P was non-compliant and where a family member was non-compliant because they disagreed with the decision. By non-compliant I mean cases where P or another disagreed with and was not willing to go along with the social worker’s opinion. For example, in seven of the COP case files reviewed P was non-compliant in that she either challenged the decision or made it clear that she did not agree with it,[210] in five cases the male partner of P was non-compliant with the local authority decision,[211] in at least two of the forced marriage cases the local authority decision to intervene was based on a concern that parents would take P abroad for marriage against social work advice,[212] and in two other forced marriage cases the local authority clearly disagreed with P’s own non-compliant behaviour in respect of marriage describing her actions as “risky”.[213] These cases suggest it was typically where P or somebody close to her challenged social work advice that the case reached the COP. Therefore those cases where P did not have anyone to advocate on her behalf, or where P was compliant, were less likely to have court scrutiny. This is problematic because, in cases of abuse, the motives of those who challenge the local authority’s decision should be questioned as in many cases they were the alleged abusive party. Furthermore, COP interventions in abuse cases can be controlling rather than empowering of P. Therefore if challenge by the abuser is the primary reason that such cases are reaching court, this should be of concern because it means that P is in a no-win situation; she is faced with pathogenic control by the court or pathogenic control by the abuser.

Social workers, particularly in high-risk cases, respond to their own lack of

---

[210] *W County Council v ZR*, *C Borough Council v (1) DY (2) B Council*, *T City Council v CY*, *N County Council v CA*, *YS v E District Council*, *OD v R City Council*, *PR CCG v QB*.
[211] *ML v (1) TL and (2) D County Council*, *Z County Council v FY*, *Y County Council v (1) LC (2) GK (3) SC*, *N County Council v (1) GI and (2) DQ*, *P County Council v SE*.
[212] *H County Council v XC*, *M County Council v EV*.
[213] *K County Council v SL*, *K County Council v MW*.

legitimacy by resorting to the COP. In doing this they may 'trade in' some of their power, but in return they are shielded from having to make the final decision in what they perceive to be the most challenging cases. In seeking legal legitimation, social workers' decisions were protected and reinforced whilst also enabling them to deflect any resulting coercion on to the legal process. However, in doing so, social workers also participate in the acceptance of coercive and controlling interventions against vulnerable adults. Yet the value of social work is precisely in its situational and holistic approach to supporting vulnerable adults. Therefore, by actively participating in this process the value of social work may be further undermined as they reinforce the legitimacy of the court enforced, 'objective' intervention over more 'subjective' support-based approaches. Instead, if social workers can be given the legitimacy to intervene in more supportive ways, focusing on situational causes of vulnerability, this will help to both avoid the coercive nature of court interventions and to strengthen the legitimacy of the social work profession.

3. The Use of Controlling Interventions in Mental Capacity Law

Given the contested legitimacy of social work interventions, I now explore the types of interventions authorised in COP cases. I argue that my data show that the interventions in COP cases were typically controlling and coercive of P. I consider the possible reasons why such an approach has taken hold when, as discussed from p. 41 in Chapter Two, these cases were primarily about surplus pathogenic vulnerability; that P was subject to a harmful form of situational vulnerability (abuse by a partner or family member) in excess of that needed to maximise her autonomy (and in many cases undermines her autonomy). I further challenge the use of controlling interventions in cases where P is at risk of, or experiencing, abuse, and instead argue for the use of empowering, situationally focused interventions.

3.1. The types of cases before the COP

As set out at Table 7.1 below, my sample of 20 COP cases provides an indication of the types of cases that reach the COP within the sex/marriage/contact bracket. It highlights that high-risk welfare cases dominate this area of mental capacity law. These data are important because they provide an insight into this area of law, where cases are not always reported. Furthermore, those cases that are reported are predominantly from London courts. Series *et al.* also highlight the issue of regional differences in publication of judgments in their report on the COP's welfare jurisdiction and similar findings were made in research into the family court jurisdiction (Doughty, Twaite and Magrath, 2017; Series *et al.*, 2017b). This is exemplified in my own data. For example, one of my sample of 20 cases was heard at the Royal Courts of Justice (RCJ) and one was heard at the Central London COP, whereas all 18 others were heard in regional courts. In the one RCJ case in my sample, the final judgment was still made in a regional court by a Circuit judge. In contrast, a review of the 2016 COP cases reported on BAILII, taken on 13 September 2017, shows that 28 of the 63 reported cases were from the RCJ, whereas 35 were from a range of other regional courts (see Table A4, Appendix seven). However, 12 of those 35 were from cases at the London COP, which is more likely to be aware of the issues associated with transparency given their proximity to the judges and administration of the High Court. Given that the cases that have been reported on BAILII appear to be skewed by RCJ and London cases, my data provide an original insight into a different sample of cases from the regions.

Table 7.1: Outcome of capacity cases.

	Anonymised Case name	Keyword summary	Capacity domains reviewed	Outcome
1.	*K County Council v SL*	Forced marriage	Marriage, Sex, Proceedings, Travel abroad	Has capacity. Proceedings withdrawn.
2.	*ML v (1) TL and (2) D County Council*	Domestic abuse	Contact	ML died before final hearing.
3.	*Z County Council v FY*	Domestic abuse	Residence, Proceedings, Care, Contact	Final order. FY lacks capacity to: conduct proceedings, make decisions as to residence, care and contact.
4.	*Y County Council v (1) LC (2) GK (3) SC*	Domestic abuse Forced Marriage	Marriage, Sex, Proceedings, Residence, Contact	Final order. LC lacks capacity to: consent to sex, to marry and to litigate. Case ongoing in relation to contact and residence.
5.	*W County Council v ZR*	Domestic abuse	Sex	Proceedings stayed as ZR detained under s3 Mental Health Act 1983.
6.	*C Borough Council v (1) DY (2) B Council*	Disruptive behaviour	Care, Residence, Contact, Proceedings, Sex	Final order. DY lacks capacity to: conduct proceedings, make decisions as to residence, care and contact.
7.	*A County Council v (1) MT (2) KZ*	Forced Marriage	Marriage, Sex, Residence, Care, Proceedings	Ongoing. Interim decision that MT lacks capacity to: conduct proceedings, decide on residence and care, consent to sexual relations and to marry.
8.	*H County Council v XC*	Forced marriage	Marriage, Sex, Proceedings	Ongoing. Interim decision that XC lacks capacity in all domains.
9.	*M County Council v EV*	Forced marriage	Marriage, Sex, Residence, Care, Contact, Finances, Proceedings	Final order. EV lacks capacity in all domains.
10.	*T City Council v CY*	Relationship with partner	Contact, Care, Residence, Proceedings	Final order. CY lacks capacity to: conduct proceedings, decide on

				residence and care. She does have capacity to decide on contact.
11.	*J Council v RK*	Alleged abuse by wife (solely on basis of lack of capacity)	Sex, Medical treatment	Transferred to High Court judge for final hearing as case concerns consent to medical treatment. Awaiting expert evidence and final resolution at time of research end.
12.	*K County Council v MW*	Forced marriage	Marriage, Sex, Proceedings	Ongoing. Interim finding that MW had capacity in relation to sex but lacked capacity in relation to marriage.
13.	*N County Council v (1) GI and (2) DQ*	Domestic abuse	Contact, Care, Residence, Proceedings.	Ongoing. Interim findings of incapacity in all domains.
14.	*N County Council v CA*	Sexual offences	Marriage, Sex, Contact, Proceedings.	Ongoing. Interim declaration that CA: lacks capacity to conduct proceedings; but has capacity to consent to sexual relations. Separate proceedings alongside considering CA's partner (NF)'s capacity to make decisions about residence and care, capacity to marry in the future, capacity to consent to sexual relations, capacity to make decisions about contraception and capacity to decide what contact to have with other relevant individuals.
15.	*YS v E District Council*	Sexual offences	Care, Residence, Proceedings.	Ongoing. Interim declaration that YS lacks capacity in all domains. At end of research transfer of placement was due to take place with further review 4 months after date of order.
16.	*OD v R City Council*	Sexual offences	Sex, Care, Residence, Contact, Finances	Order that OD lacks capacity in all domains.

17.	*P County Council v (1) SE (2) TM*	Domestic abuse	Sex, Residence, Care, Contact, Proceedings, Property and affairs	Final order. SE lacks capacity to: conduct proceedings, make decisions about care and residence and manage her property and affairs. Capacity evidence indicated she does not lack capacity to decide on contact and sexual relations.
18.	*V Borough Council v AY*	Domestic abuse	Residence, Contact, Care	Order that AY lacks capacity to: decide where to live and decide on matters of care and support. Order that it is in AY's best interests to have contact with his mother and any other members of extended family in accordance with wishes and feelings.
19.	*P CCG v QB*	Sexual offences	Residence, Care, Proceedings	Order that QB lacks capacity in all domains. Order that it is in QB's best interests to reside at placement and receive care package. Matter stayed until DOLS expires in 2017.
20.	*O City Council v (1) AW (2) FW (3) YW (4) TW*	Domestic abuse Sexual offences	Contact, Proceedings	Final order. AW lacks capacity to: conduct proceedings and make decisions about contact. Order that it is in P's best interests not to have any contact, either directly or indirectly, with father and brothers.

3.1.1. Cases involving interventions to protect the abused adult

Turning first to the interventions to protect P, FY concerned a 66 year old married woman with a diagnosis of dementia. *Z County Council* determined that she lacked capacity to decide where to reside and that it was in her best interests to live in residential care. FY's husband wanted her to return home. The local authority's case

was that it was in FY's best interests to remain in residential care because she was at risk of abuse from her husband. It is not clear what FY's wishes were. The court held that FY lacked the capacity to conduct proceedings and to make decisions as to her residence, care and contact. The hearing was then listed for a final hearing to:

> determine what contact between the First and Second Respondents is in the First Respondent's best interest and whether any conditions should be attached to the standard authorisation, so as to ensure that the First Respondent's deprivation of liberty within X Care Home represents the least restrictive care package…

Similarly, *V Borough Council v AY* concerned a 35 year old male described as having a significant learning disability, autism and sensory processing disorder. The local authority applied for a declaration that AY lacked capacity to decide on residence and care as there were concerns that AY was being sexually and physically abused at home. Witness evidence from the local authority suggested that AY was afraid of returning home and the local authority said that he was "voting with his feet" by refusing to see his mother whilst in residential care. The court declared that AY lacked the capacity to decide where to live and to make decisions as to his care and support. The court held that it was "[i]n [AY]'s best interests to have contact with [mother] and any other members of his extended family, in accordance with his wishes and feelings," albeit that those contact arrangements would be kept under review.

These two cases, and the others summarised in Table 7.1 above, suggest that COP interventions are made in cases where the primary reason for the case being brought to court is abuse. Yet these cases are not viewed through a lens of surplus pathogenic vulnerability, with the abusive situation being the harmful cause of P's vulnerability and contributing to the impaired decision-making. Instead, the MCA and

COP jurisdiction encourage an inherent vulnerability approach, leading to restrictions against the vulnerable adult. For example, *T City Council v CY*, discussed in more detail in Chapter Five, concerned a 49 year old woman described as having a mild to moderate learning disability complicated by harmful alcohol misuse and an emotionally unstable personality disorder. In that case it was held CY lacked the capacity to conduct proceedings, and to make decisions as to residence, care and how her care needs should be met during times which she has contact with others, particularly her partner, SB, about whom there were significant concerns. It was held to be in her best interests to:

> receive care in accordance with the contact plan dated X during times which she has contact with [SB], the plan shall be subject to review every twelve weeks in accordance with the recital above.

The difficulty with CY's case was that the judge expressly stated that capacity for care was being used to restrict contact. In discussing the evidence of CY's father, my observational notes summarise the judge's comments as follows:

> I've read [Mr Y's] statement. Just going to look at it again. [Mr Y], I read this with some interest because it raised a point which hadn't even occurred to me. You say that [SB] lacks the ability to competently care for your daughter when spend time away, talk about having been abandoned when drinking alcohol. You say you have no concern about time together at [care home] or under supervision. You put it that [SB] not the problem but unable to care for your daughter. That seemed to me a very interesting point. The local authority picked up on it, suggesting for two reasons, don't think medical evidence to agree on

> contact is sufficient. They say not only is that a legal problem but actually not much to do with [SB] himself, to do with fact she needs care providing to her. That circumvents the entire problem, has nothing to do with [SB] whether he has unsuitable characteristics, more to do with the global picture.

The judge was saying here that there was insufficient medical evidence to conclude that CY lacked the capacity to decide on contact with others. However, she did lack the capacity to decide on her care needs. Therefore, her care needs would need to be met at all times, including when having contact with others, meaning that, indirectly, her contact with others would have to be supervised. As the judge said directly, "that circumvents the entire problem". However, the problem with this is that it authorises a highly interventionist and controlling measure for an adult who was held to have capacity to decide with whom she has contact. Yet, in practice, she would not be able to decide with whom to have contact because this would always be subject to her care plan. Such an approach was, I suggest, only authorised because of concerns about her situational vulnerability in relation to SB. If her vulnerability had been characterised in situational terms, CY would have been free to decide when and with whom she had contact but might have been offered support to help her to leave SB and to get help with her alcohol problem. If there were specific concerns about SB's behaviour then measures such as conditions during visits to CY's accommodation or ultimately an injunction could have been taken against SB rather than requiring that CY, a 49 year old adult, be supervised.

Similarly, *N County Council v (1) GI and (2) DQ*, also discussed in Chapter Four, p. 127, concerned a married 62 year old woman described as having Korsakoff's syndrome due to alcohol consumption, personality disorder, depressive disorder and cerebral atrophy. The local authority brought an urgent application for declarations in

relation to capacity for care, contact, residence and litigation and a request for approval of a DOL. The application was described as urgent because of GI's risk of domestic abuse by her husband. According to the local authority, since their marriage in 2012 there had been "in excess of 50 domestic abuse allegations that [GI] has made against her husband".[214] The court ordered that GI lacked the capacity to litigate and to decide on residence, care and contact with people (including DQ). As discussed in Chapter Four, the injunctive intervention authorised by the COP in this case was the most nuanced and situational of all the cases I reviewed:

> [DQ] is forbidden whether by himself or jointly with any other person:
>
> a) To use or threaten violence against [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> b) To intimidate, pester or harass [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> c) Enter or attempt to enter the grounds of or premises known as D or any other property in which [GI] may from time to time reside, save for the purpose of supervised contact agreed in writing in advance by the social worker on behalf of [GI].

Therefore whilst I broadly agree with the use of an injunction, I have two concerns. Firstly, whether this outcome was best achieved through mental capacity law. Findings of mental incapacity in relation to very broad domains (litigation, residence, care and contact) can lead to the authorisation of controlling rather than empowering interventions. A similar outcome could have been achieved using the more nuanced

[214] This report was made in 2016 therefore the figures relate to a 4 year period.

inherent jurisdiction as GI would appropriately be described as situationally and pathogenically vulnerable, as discussed at Chapter Two. Secondly, and more importantly, I question whether capacity determinations would have been made about GI were it not for the abuse. It would seem unlikely given that the entire proceedings were materially and discursively shaped by her abusive relationship and this was the reason given for the local authority's application to the COP. It could be argued that GI *de facto* lacked capacity in relation to these matters but it simply would not have been identified were it not for the abuse. I do not comment on the likelihood of GI lacking capacity in relation to those specific domains, having not met or spoken to her. However, it cannot be a fair application of the MCA if those who are subjected to abuse are more likely to be found to lack capacity by a court not because they are more likely to lack capacity, but because those cases are more likely to reach a courtroom.

This duplication of oppression means that not only was GI abused by DQ but that she had to deal with surveillance, restriction and coercion in the name of her own protection. I do not doubt that GI needed protection from DQ. However, the better approach would have been either to use criminal law measures against DQ or, with GI's consent, apply for a non-molestation order against DQ. If GI's consent was not obtainable then, as noted above, the local authority could have considered using the inherent jurisdiction to provide her with some relief, at least to enable her capacity to be assessed within a safer and more supportive environment away from DQ. Being a victim of abuse who also lacks capacity intensifies the scrutiny where it is arguable that all that GI required was to be supported to live a life away from DQ's abusive and pathogenic vulnerability inducing influence.

In the cases identified here, the situational element of the adult's vulnerability was ignored and responses were focused on control and surveillance of her. In Chapter Two I explored the concerns of other scholars who contend that vulnerability discourse is unhelpful because of its stigmatising effects and its potential to authorise

wide-ranging interventions (Dunn, Clare and Holland, 2008; Hollomotz, 2009; Munro and Scoular, 2012). However, as outlined in Chapter Four, the concept is so discursively embedded in mental capacity and adult safeguarding practice that abandonment of the concept altogether seems unlikely. Furthermore, I have argued throughout that there are clear benefits from applying a vulnerability analysis. Feminist literature, as highlighted throughout this thesis, provides an alternative way of viewing vulnerability as universal, embodied and situational (Fineman, 2008; Fineman, 2010; Clough, 2014; Mackenzie, Rogers and Dodds, 2014b; Mackenzie, Rogers and Dodds, 2014a). In contrast, in mental capacity law, capacity and vulnerability are understood as inherent and unique to the individual. In refocusing on the situational causes of vulnerability, there is scope for minimising controlling interventions whilst still responding to abuse.

Concerns about intervention also ignore the fact that the COP is already doing the thing that people are uneasy about; it routinely authorises wide-ranging interventions which use a person's incapacity for decisions about care or residence to restrict their interaction with abusive others, even where they have capacity. Controlling interventions in the name of protection are, therefore, already happening. The question is how the use of coercive interventions can be reduced whilst not leaving that adult under-protected. Reformulating interventions so they consider capacity and vulnerability in more situational ways should result in less controlling interventions, particularly if social workers are also given the legitimacy to be responsive to such support needs in their day to day practice.

3.1.2. Cases involving interventions to control the abuser

I now turn to the interventions which were aimed at preventing P from abusing others, this occurred most clearly in four cases, *N County Council v CA*, *YS v E District Council*, *OD v R City Council* and *P CCG v QB* (see Table 7.1 above and for more detail see Table A1, Appendix one). I focus here on YS and OD's cases.

YS v E District Council concerned a 52 year old male whose disability was described as "heavy alcohol consumption and brain injury as a result of road traffic accident". The case was brought by YS under s 21A MCA to challenge his DOL and also considered his capacity to decide where to reside and his capacity to make decisions about care. The case file explained the background to the case: YS had been released from prison where he was on remand pending a decision not to charge him for alleged sexual offences committed at a previous residential placement. On his release he was moved to a care home and the proceedings arose from that move. On the face of it, this was not an obvious mental capacity case; YS had a brain injury and heavy alcohol consumption but the extent of his injury and how it impacted on his decision-making was not clear. The case appeared to be motivated by YS' wish not to have his liberty restricted and to make his own choice as to his preferred care home. Given his history of alleged sexual offences, the local authority were concerned about placing him in a care home with other vulnerable adults, again suggesting concerns about their duty of care but in this case to others rather than to YS. It also highlights the complexities of vulnerability, with YS being viewed as inherently vulnerable and therefore falling within the jurisdiction of the MCA, as well as being seen as the situational cause of vulnerability in others.

No final decision had been made by the time my research ended as the local authority was still seeking a suitable placement. However, in the interim the COP held that YS lacked the capacity to conduct proceedings and to decide on care and

residence. The COP order further authorised YS' DOL. As a result, the local authority was permitted to find a residential placement it felt met YS' needs, rather than allowing him to choose where to live and therefore enabling them to manage his risk to fellow residents.

OD v R City Council concerned a 46 year old male, OD, described as having mild learning disability and schizophrenia (with no recent psychotic symptoms). His case concerned a challenge of his DOL in a care home where he had been living for two years, which was brought by his relevant person's representative appointed under Part 10 Schedule A1 MCA. OD had been physically and sexually abused as a child and at 19 he was convicted for the rape of his younger brother. He had further convictions for gross indecency in a public place and indecent assault, as well as two convictions for indecent exposure against females. More recently it had been reported that OD had worked as a prostitute and had been financially exploited by pimps. OD's wishes and feelings were that he wished to live independently. He accepted he would need carers but wanted a lower level of supervision. The case file noted that, as a result of his deprivation of liberty, he was also in effect being treated as if he lacked capacity to consent to sex and to decide on contact with others. I attended court for the final hearing which was vacated at the last minute as the parties had agreed a way forward based on the expert evidence. However, at court I discussed the case with the judge and reviewed the final order and case file, including the expert evidence on which the case concluded.

The expert report of Dr L, Consultant Psychiatrist, concluded that OD lacked capacity to make decisions about residence, care, finances, contact and litigation, but had capacity to make decisions about sex. The expert evidence was based on one interview with OD, during which OD told Dr L that he didn't like where he lived because of the "staff and residents, mainly the staff". He told Dr L "they don't treat me like a proper adult, they treat me like a kid". Dr L asked for an example and OD said, "they

say to me like go and get a shower", "they ask me to have a shower at 9am" whereas he would prefer to shower "in the middle of the day". OD also told Dr L that his social worker "looks after my money she doesn't care for me she treats me like a kid. I don't like her she's keeping my money". OD also told Dr L that he was gay and that "I used to sleep around and blokes in [R] would pay me lots of money for sex". He would like to have a relationship with a man at the care home but said he couldn't because he didn't know who was gay there. Dr L further noted:

> [OD] clearly lacks capacity regarding contact. He has no understanding of his disability and vulnerability and need for positive contact and care in either the short or longer term. His learning disability undermines his ability to understand the motivation of others who may not have his best interest at heart.
>
> …
>
> historical information contained in the court bundle suggests that in the past [OD] has worked as a male prostitute and has probably been sexually and financially exploited. [OD] is vulnerable to exploitation, this vulnerability is largely a result of his lack of capacity for sexual relationships and lacks capacity regarding contact then contact with others will require careful risk assessment and management.

Despite this comment, Dr L found that OD had capacity to make decisions about sexual relations, but lacked capacity to decide on residence, care, finances, contact and litigation and this finding was upheld in the court order.

This type of case suggests that social workers turned to mental capacity law where there were high risks of vulnerability created by perceived failures elsewhere in the system such that P (or others) needed protecting. This included cases where social

workers felt that the criminal law had failed to protect P from abuse, as in GI's case discussed earlier. However, this was also clear in YS' case where those involved were concerned that the criminal law had failed to deal with his threat of abuse to others. As such, social workers resorted to legal legitimation through the COP in cases where they perceived an intervention was needed [215] but not being provided by other protective mechanisms.

Similarly, in OD's case, the local authority's position statement explained:

> It remains the position of the LA that [OD] continues to require constant supervision and control, such that it amounts to a deprivation of liberty, in order for his needs to be met and to protect him from significant harm. It is the position of the LA that such measures are necessary, proportionate and in [OD]'s best interests.

This highlights that it is not only (if at all) that OD needed to be deprived of his liberty to meet his treatment or care needs,[216] but also to protect him from harm. This is despite protection from harm not being a reason to deprive somebody of their liberty under the MCA. [217] OD was viewed as both victim and abuser given his complex history, highlighting his perceived inherent vulnerability as well as his situational and pathogenic threat to others. The local authority's turn to mental capacity law was arguably only appropriate to the extent that they could argue that he lacked capacity in specific domains. Yet in both YS and OD's cases, capacity decisions about care and residence were used as ways of controlling P in respect of much broader issues, such

[215] Notwithstanding my critique of under-protection in certain types of cases in Chapter Four.
[216] Which is the lawful justification for a deprivation of liberty under schedule A1 para 1 MCA.
[217] Protection from harm is not a reason to deprive somebody of their liberty under the MCA. However, it does fall within the 'general defence' contained within s 5 MCA. This provision protects those who carry out an act based on a determination that P lacks capacity where that act is carried out in P's best interests to prevent harm to P and is a proportionate response, see s 6 (2) – (3) MCA.

as contact with others. The underpinning justification where P was a threat to others does not fit the presumption of capacity required by the MCA and the need to respect unwise decisions. Whilst I do not question the local authority's motives in wanting to protect others within their care, it needs to be carried out within an appropriate jurisdiction. Arguably the criminal law, specifically sexual harm prevention orders (SHPO),[218] might be more appropriate. Yet the weaknesses in other areas of law, as discussed in Chapter Four, may mean that local authorities view mental capacity law as their only option; the MCA provides a lower burden of proof than the criminal law, has flexibility in the types of interventions that can be ordered, and maintains the legitimacy of a court authorised intervention.

The central concern arising from this comparison between abused and abuser cases is that there is a risk of cross-fertilisation of interventions. By this I mean that interventions under the MCA are controlling and coercive partly as a result of the presence of abusers within the mental capacity law jurisprudence. In turn, this reinforces a controlling approach for victims of abuse. Whilst controlling and coercive legal interventions need to be replaced with interventions which address the situational causes of abuse, more fundamentally I question whether mental capacity law is the appropriate jurisdiction where the primary reason for a case reaching court is to safeguard a vulnerable adult from abuse. This is partly because the MCA intrinsically focuses on inherent causes of vulnerability because of the language of s 2 MCA for example, rather than the situational reasons for vulnerability which may include a much wider range of factors. Of course capacity issues should not be ignored because a person is being abused, but it does not seem fair that mental capacity law is used

[218] A SHPO can be ordered under s 103A Sexual Offences Act 2003 where a person has been convicted of a criminal offence listed in schedules 3 and 5 of the act (or has been found not guilty by reason of insanity or where the defendant is found to be under a disability and has done the act charged, s 103 (2) (a)). The purpose of a SHPO is to protect the public from sexual harm by the defendant or to protect vulnerable children or adults from sexual harm by the defendant outside of the UK, s 103 (2) (b).

because a person is being abused. Instead, a strengthened, non-discriminatory safeguarding adults framework is required.

4. Interventions to Safeguard Vulnerable Adults From Abuse

In this section I argue that a strengthened safeguarding adults legal framework would assist in limiting the coercive interventions authorised by mental capacity law. Furthermore, any changes to the safeguarding framework must empower social workers to intervene in supportive ways rather than mandating recourse to law. Some argue that there is danger in recourse to the courts (Merry, 1990, p. 3) and that interventions based in law can create harm (Smart, 1989). For example, as discussed at p. 55 of Chapter Two, law can create and exacerbate derivative vulnerability. This is not inevitable but depends on the type of intervention mandated by law. If the social work profession can be given greater legitimacy to intervene through supportive and situational measures, then this may limit recourse to formal law. This is important not only because of the potential for coercion in mental capacity law, but also because of the high material costs of bringing capacity cases to court (Series *et al.*, 2017b).

4.1. Strengthening social work legitimacy through a safeguarding adults framework

By comparison with the FMCPA discussed in Chapter One, a clear and strengthened framework for intervention to safeguard vulnerable adults from abuse would increase social workers' legitimacy to better protect and empower vulnerable adults. I make this comparison with the FMCPA because the forced marriage cases that were brought to the COP were generally narrower in scope than those brought solely under the MCA (see Table 7.1 above). For example, the only two cases where there was a reversal in capacity findings were brought under the FMCPA. Furthermore, the FMCPA cases had

fewer DOL applications attached to them (see Table A1, Appendix one). It is difficult to draw direct comparisons because, for example, in the majority of the forced marriage cases the adult still lived with their family therefore perhaps explaining why a DOL authorisation was less common.[219] However, if a case is brought under the safeguarding legislative framework, even where capacity issues are considered alongside it, then by comparison with the FMCPA cases it is more likely to narrow the scope of capacity decisions.

A non-discriminatory and support based safeguarding framework would assist in deflecting attention away from mental capacity law because social workers could be legitimated to intervene without wide-ranging or coercive interventions. Whilst the Care Act 2014 put safeguarding on a statutory footing, the safeguarding provisions are limited and lack detail about how to respond to abuse. Furthermore, there is a lack of clarity as to how adult safeguarding interacts with the MCA, an area which requires further investigation than this thesis allows. Therefore strengthening the Care Act 2014 safeguarding provisions would help to guide local authorities about when and how to intervene where abuse is suspected, empower social workers to take supportive, situationally focused action and legally enshrine the importance of working in partnership with the person to empower them to be free from abuse. I argue here that an amended safeguarding framework authorising interventions to protect vulnerable adults must, as a minimum, meet four criteria: it must be applicable to all citizens; it must take account of the individual's wishes; it must not result in more harm than the adult was already living with, and; the agencies or individuals who intervene must be accountable for their interventions.[220]

---

[219] This is something that the Law Commission have picked up on as they provisionally propose that deprivations of liberty at home would also require authorisation, see Law Commission (2017, p. 53).

[220] These criteria are different from but influenced by those set out by Mackenzie (2014b). The criteria also take into account the principles set out in similar Scottish legislation, see s 1 Adult Support and Protection (Scotland) Act 2007 which states "The general principle on intervention

One of the central ways that an amended safeguarding framework would be fairer would be for it to apply to all 'vulnerable adults'. The MCA's diagnostic threshold has been widely criticised as including only those with mental impairments.[221] As a result of treating P as inherently vulnerable, controlling responses are adopted against people with disabilities. However, as identified throughout this thesis, much of this turns on how vulnerability is viewed. Using the MCA to authorise interventions in cases of abuse against or by mentally disabled adults relates the abuse to their inherent vulnerability. Whereas using a non-discriminatory framework focused on safeguarding *all adults* vulnerable to abuse is likely to be more sensitive to the range of factors, both inherent and situational, that make a person vulnerable. As Clough explains, the MCA creates a "stark dividing line between those who have a cognitive impairment, who can thus be capable of being deemed to lack capacity, and those without a cognitive impairment, who cannot" (Clough, 2017, p. 476). As identified in Chapter Four, this sharp distinction can lead to over-protection of those who have particular disabilities and under-protection of those who are seen as choosing to put themselves at risk, such as women in abusive relationships. A non-discriminatory framework would provide the opportunity for a more nuanced response.

To some extent this is already captured within the safeguarding provisions of the Care Act 2014, as discussed in more detail in Chapters One and Four. S 42 (1) (a) makes clear that the safeguarding provisions apply even to those adults who are not receiving local authority support. Unlike the MCA therefore, the safeguarding

---

in an adult's affairs is that a person may intervene, or authorise an intervention, only if satisfied that the intervention— (a) will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and (b) is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom." However, the principles I set out here are narrower and focused on responding to abuse as a situational vulnerability rather than incorporating what is, essentially, a proportionality approach which risks overriding the wishes of P and coercing her in cases where the risks are sufficiently high.

[221] The reasons for this are explored by Clough who considers the perpetuation of the liberal idea of autonomy as reinforcing this vulnerable/invulnerable and protection/autonomy dichotomy, for further discussion see Clough (2017).

provisions do not state that an impairment or disability is required for the safeguarding duty to be triggered. Whilst whether an adult with care needs is *able to protect themselves* is an important way of encompassing those who might be vulnerable as a result of their disability, it does not restrict safeguarding to that group. The language within the Care Act has therefore changed, but this could be made more explicit so that local authorities are compelled to change their safeguarding approach rather than resorting back to historic practice where safeguarding only applied to particular (inherently) vulnerable adults. This issue is complicated by material constraints on resources available to local authorities, highlighting that even where legal discourse changes, material factors may still constrain practice. However, if COP interventions go down as a result of a strengthened safeguarding framework and increased social work legitimacy, then those resources could be diverted to frontline social work practice.[222]

Secondly, any safeguarding process and resulting interventions must be carried out in partnership with the person, taking into account their own experience and desires. The importance of taking into account the embodied wishes and feelings of those affected by a decision have been emphasised throughout this thesis and more specifically in Chapter Two, section 5 of Chapter Five and section 4 of Chapter Six. Failing to hear and take into account the wishes and needs of the individual is less likely to result in a successful outcome, whatever the intervention. Similar to my arguments about judicial interaction with P at p. 159 of Chapter Five, if social workers fail to take into account P's own experiences then their understanding of what constitutes 'normal' embodiment risks becoming the standard (Scully, 2012, p. 140). Furthermore, there is intrinsic value in involving P; she is valued as an individual and is encouraged to develop the capacity to make decisions about her future based on her own values. This is, to some extent, captured in the approach known as "making

[222] For example, Series *et al*. (2017b) estimate that each COP welfare case costs in the region of £13,000.

safeguarding personal" (Association of Directors of Adult Social Services, 2017).[223] However, this rhetoric needs to be strengthened within the legal framework to ensure the individual is *always* consulted and involved at every stage about decisions which will affect her. Explicitly enshrining this principle in law strengthens the discursive pressure on local authorities to translate that into their practice and strengthens social work legitimacy if they are formulating interventions in cooperation with P.

Thirdly, any safeguarding intervention must not result in more harm in the adult's life than they were living with before the intervention. This is important because many of the COP interventions discussed earlier in this chapter at p. 227 and p. 123 of Chapter Four would not fulfil this test. Protecting P by removing her from her home and restricting her liberty could be seen as putting her at greater risk of harm and does little to empower her as a decision-maker. As discussed in Chapter Two, state intervention can create further, pathogenic vulnerability, something we must seek to avoid. Mackenzie, Rogers and Dodds explain that pathogenic vulnerability can arise "when a response intended to ameliorate vulnerability has the paradoxical effect of exacerbating existing vulnerabilities or generating new ones" (Mackenzie, Rogers and Dodds, 2014a, p. 9). Pathogenic vulnerability is so undermining of autonomy or exacerbates other vulnerabilities to such a great extent that it is always undesirable. For example, in my discussion at Chapter Two, section 3.2, I explained how in *In Re A (Capacity: Refusal of Contraception)*[224] the court held that whilst it was in Mrs A's best interests to receive contraception, it should not be forced on her without her consent. Not only would this undermine her autonomy but would likely have exacerbated her other vulnerabilities in that she may have avoided contact with professional agencies in the future thus making her more isolated and vulnerable to her husband's influence.

[223] Making safeguarding personal is a Local Government Association initiative which brings together various local authorities to agree on an approach which, in essence, ensures that safeguarding is done with the person rather than following a procedural approach.
[224] [2010] EWHC 1549.

Whilst we must therefore be alive to the possibility for pathogenic vulnerability to be created by the state, in the context of abuse we must not ignore the pathogenic vulnerability created by the abuser.

A further principle that must guide any change is the need for accountability. Two major strengths of the legal process are the possibility of appeal and open justice. The latter has arguably been limited in this context up until COP cases were routinely held in public as part of the transparency pilot and maintaining this openness is important for accountability and procedural fairness. Furthermore, COP decisions can be appealed if there are grounds to do so, albeit in practice they rarely are. Conversely, the decision-making processes of local authorities, and more specifically social workers, are seen to be less accountable. The Health and Care Professions Council hold social workers to professional standards. However, if social workers are to be given greater legitimacy to intervene in safeguarding cases then additional review mechanisms may also be warranted to ensure both an image and reality of fairness and accountability (Platt, 2008, p. 304).

Accountability can partly be promoted through rigorous professional ethics standards, which usually hold professions to a higher standard than the civil law. Placing ethics at the heart of social work may even be more effective in improving safeguarding practice than the traditional resort to law. Montgomery makes a similar argument in relation to the demoralisation of medicine (Montgomery, 2006). He emphasises the value of professional ethics to healthcare practice in contrast to what he described as the “amoral commitment to choice and consumerism” facilitated by legal activity (Montgomery, 2006, p. 186). Professional ethics therefore has an important role to play in maintaining standards in health and social care. Giving social workers greater legitimacy to intervene might be usefully balanced against the stronger promotion and protection of professional ethical values to ensure social workers are also held accountable. The case for this is even greater in a context of limited

resources where resort to the COP is rare. Regulation of the social work profession is currently undergoing a period of transition. The Children and Social Work Act 2017 sets out the development of a new regulator for social workers and may therefore provide a useful opportunity to review professional standards to ensure they are sufficiently robust, particularly in relation to adult safeguarding. Promoting ethical practice in social work is especially important if social workers are to be given greater legitimacy to intervene.

Another way of ensuring accountability that has been suggested in the COP context is the possibility of a clear review mechanism for cases where P disagrees with a decision, similar to that available under the DOL provisions (Series *et al.*, 2017b). A similar review mechanism could be contained within the amended safeguarding provisions such that the person affected by the decision has a clear route to challenge. This level of review would require an independent body and it is not clear at present who would be best placed to carry out that function. However, one option would be to make it part of the role of Safeguarding Adults Boards (SABs), created under s 43 Care Act 2014. They may be well placed to make such decisions given their statutory function to protect adults in their area, albeit their lack of independence from local authorities may be a concern.[225]

4.2. Specific legal reforms to safeguard situationally vulnerable adults

Two situationally focused interventions I briefly explore here are a power of entry to access the person vulnerable to abuse and the right to apply for an injunction against the perpetrator of abuse. Both of these interventions would strengthen the legitimacy of local authorities (and specifically social workers) to intervene in cases of abuse but in ways that support and empower rather than coerce the situationally vulnerable adult.

[225] Schedule 2 Care Act 2014.

The first situational intervention is the right for local authorities to apply for a civil injunction against a person suspected of abuse. The power would be related to the local authority's Care Act duty to undertake a safeguarding enquiry and could provide a solution for social workers in cases of abuse where other injunctive remedies are not appropriate. For example, non-molestation orders under s 42 Family Law Act 1996 can only be initiated by the victim of abuse. The most recent family court statistics show that there were 6,692 domestic violence remedy order applications in July to September 2017, 81% of which were for non-molestation orders (Ministry of Justice, 2017b). Similar orders are also available to the criminal courts, for example under s 5 Protection from Harassment Act 1997 a court can issue a restraining order against a defendant to protect victims of violence. Yet existing injunctive remedies lack the specificity of a safeguarding jurisdiction intervention, being viewed more as family or criminal law matters; those who do not see their case as falling within those categories may not be willing to use those remedies.

Furthermore, civil non-molestation orders require the consent of the person being abused, which is not always easy to gain on a consistent basis to facilitate a court application. There are objections to intervening without the continued consent of the victim. Perhaps most persuasive being that it is harmful to a victim's recovery to take the decision out of their hands. However, this ignores the reality of abusive relationships and the difficulty many will experience in resisting their abuser. This is particularly so for those adults whose abuser is also their care-giver, a problem for many adults with mental disabilities (Benedet and Grant, 2014, p. 143). As Benedet and Grant also explain, "Feminist theory also offers an important understanding of the male power exercised by those who commit acts of sexual violence. Such acts are more than the individual decisions of abnormal men" (Benedet and Grant, 2014, p. 136) and it is this power imbalance that needs to be addressed by the state. I argue elsewhere (Lindsey, 2016a) and in Chapter Two that the inherent jurisdiction and the

Care Act 2014 might be used together to provide such nuanced and situational responses. Yet the inherent jurisdiction can only achieve so much; it lacks the legitimacy and widespread knowledge of a statutory framework and is not widely used within adult social care.[226]

Mental capacity law interventions do not require consent and are typically more interventionist than a limited power to grant an injunction to restrict the abuser, rather than the victim of abuse. Any new safeguarding injunction that could be applied for without initiation by the victim would need to be narrowly defined to avoid becoming coercive rather than empowering. Firstly, this would be achieved by limiting the scope of the injunction to prohibiting abusive behaviour by the perpetrator and restricting his access to the home of the vulnerable adult. The injunction should not be analogous to mental capacity law in that it should not limit or prohibit the victim's right to contact the abuser; it should focus on prohibiting the abuser from carrying out further abusive behaviour. Secondly, an application for an injunction should require the participation of the victim, placing any objection they might have and likely compliance with the order as a factor to be taken into account, as is the case with FMPOs (Clark and Richards, 2008, p. 514). However, requiring a vulnerable adult to initiate an application for an injunction is unrealistic and places the material burden on them rather than the professional.

In relation to remedies for breach of a safeguarding injunction, a similar approach to that originally introduced by the FMCPA should be taken. Breach of a FMPO is contempt of court and a warrant for arrest can be issued[227] with a penalty of up to two years imprisonment.[228] Previously a power of arrest would also be attached

[226] Of my interviewees five were aware of the inherent jurisdiction because they or a member of their team had been involved in an inherent jurisdiction case. The remaining three interviewees were not aware of it and had not been involved in such a case.
[227] s 63J (3) (b) Family Law Act 1996 (as amended).
[228] s 14 Contempt of Court Act 1981.

to a FMPO.[229] However, s 121 Anti-social Behaviour, Crime and Policing Act 2014 introduced the criminal offence of forced marriage thereby making a power of arrest unnecessary. I advocate maintaining the civil law approach in the safeguarding context by making a breach of any safeguarding injunction a contempt of court and requiring a power of arrest to be attached to any orders. This would mean that the court could still take action against the abuser swiftly for any breach, thereby bypassing the need for the victim to provide evidence in a criminal trial with all of the difficulties that entails (as discussed at Chapter Four). Attaching a power of arrest to a safeguarding injunction is also important because a power of arrest cannot be ordered under the High Court's inherent jurisdiction or attached to non-molestation orders under the Family Law Act 1996.[230] Whilst the Care Act 2014 statutory guidance importantly makes clear that safeguarding is not a substitute for "the core duties of the police to prevent and detect crime and protect life and property" (Department of Health, 2017), given the lack of protection currently provided by the criminal law, civil law solutions should be used to avoid injustice and to minimise further abuse.

The second intervention, a power of entry to access the vulnerable adult, was considered but not adopted in the Care Act 2014 (Samuel, 2012; Norrie *et al.*, 2016). A power of entry would have given local authorities a direct power to enter the property where they suspected a vulnerable adult was at risk of abuse or neglect to enable them to speak to the adult on their own. The power could have been linked to protection orders such as the possibility to apply for an injunction as above. A power of entry was ultimately rejected as it was felt that it was not necessary despite, according to the now defunct College of Social Workers, a survey of over 300 social workers showing that 84% supported being given a power of entry (Samuel, 2012). Leaving aside neglect,

---

[229] Under the now repealed s 63H Family Law Act 1996.
[230] *In Re D (Vulnerable Adult) (Injunction: Power of Arrest)* [2016] EWHC 2358. Albeit the criminal offence of breaching a non-molestation order was introduced by s 1 Domestic Violence, Crime and Victims Act 2004.

which has not been explored in this thesis, I argue that a power to access the person at risk of abuse should be included in any new safeguarding framework. However, the power must only be exercised in situations where (1) access has been attempted through voluntary means but has been refused, (2) there are reasonable grounds to suspect that the abuser, rather than the vulnerable adult, is impeding access, and (3) there are reasonable grounds to suspect that abuse has recently or is imminently going to take place.

Giving social workers a power to enter an adult's home might appear to be more coercive than even the MCA. Whilst such a power appears popular amongst professionals, it has more limited support from the public, seemingly because of concerns around privacy and interference with family life (Stevens *et al.*, 2017). However, how a power of entry is viewed is dependent on how the power is framed and what can result from it. In my view, a power of entry should not allow social workers (or others) to remove the vulnerable adult from their home or otherwise coerce them into any course of action, and this should be made explicitly clear. This is therefore distinct from the approach taken in Scotland where removal orders, which allow the adult to be moved to a place of safety, are linked to the power of entry under the Adult Support and Protection (Scotland) Act 2007 (Stevens *et al.*, 2017). Instead, a narrow power, centred on accessing the vulnerable adult to assess her needs is a more situational response to dealing with suspected abuse. Failing to give social workers this power merely entrenches the power of the abuser to keep the vulnerable adult withdrawn from support services. Provided that such a power is framed narrowly and focuses on access and assessment, it can empower social workers to intervene in ways that view vulnerability as situational rather than inherent. A scheme piloting a power of entry should be funded, with a subsequent review of its effectiveness, taking into account the views of those who experienced its use.

Other amendments to the Care Act 2014 that should be considered are: a clear right of challenge or appeal to any intervention; the provision of greater clarity on the interaction between the MCA and adult safeguarding; and a clearer outline of how supported decision-making should be implemented in abuse cases. This latter issue will not easily be resolved given the MCA's primary focus on capacity such that if an adult is deemed to lack capacity it will always be applicable. However, strengthening safeguarding powers may mean that social workers feel that they have more options open to them to help protect a non-compliant vulnerable adult at risk of abuse, without the need to resort to mental capacity law.

Any changes to safeguarding adults law must strike an appropriate balance between protection and empowerment. As permeates this whole thesis, that balance is particularly difficult to achieve in the context of abuse. However, the four minimum criteria I have identified here (applicable to all; takes account of the individual's wishes; not result in more harm; accountability) alongside the specific examples of types of intervention, will help to better achieve this balance.

5. Conclusion

In this chapter I have highlighted that referring welfare cases to the COP can result in controlling interventions that coerce rather than empower P. This is, perhaps, understandable in high-risk cases of abuse where social workers feel caught between their duty of care to protect and wanting to empower the vulnerable adult. It is further likely exacerbated by social workers' limited legitimacy to intervene in supportive ways which may lack the enforceability and apparent objectivity of law. However, where social workers resort to COP interventions in abuse cases, more often this results in over-protection rather than empowerment because P is controlled as a result of wide-ranging capacity decisions.

In light of the use of controlling interventions, I have argued that social workers need the legitimacy to intervene in more supportive, situational ways. I have suggested this could be achieved through stronger safeguarding provisions, the aim of which would be to facilitate a move away from the MCA. The aim in my challenging the use of mental capacity law is not to leave adults unprotected. However, interventions need to be targeted and be attentive to situational vulnerability. Whilst the MCA undoubtedly provides local authorities with some flexibility and provides court authorisation to legitimate their decisions, because of its generalist application, diagnostic threshold and binary capacity decisions, it too often controls victims of abuse without considering more situational responses. In the concluding chapter to my thesis, I look forward to future improvements that might be made to mental capacity law and adult safeguarding.

CHAPTER EIGHT: CONCLUDING REMARKS

1. Introduction

In this thesis I have explored mental capacity law in practice. I have done this through observing and reviewing COP cases and carrying out interviews with social workers. I have focused on the real stories of peoples' lives, which has provided original material to enable me to answer my central research question about how mental capacity law empowers and protects vulnerable adults in practice. I have argued that the practice of mental capacity law needs to improve in various ways to better empower and protect vulnerable adults. Firstly, by understanding individuals as situationally rather than inherently vulnerable; secondly, by facilitating and prioritising the individual's participation (and the participation of those who know her) in decisions about her life; and thirdly, where interventions are warranted in the name of protection, they should empower rather than control the vulnerable adult.

This thesis has explored a difficult area as the subject matter of the cases explored so often concerned details of abuse. However, these are the cases at the margins of mental capacity law, where the imperative to protect is high but can often result in the control of adults vulnerable to abuse. I have analaysed this area of law and practice through vulnerability theory, which I have argued enables a better balance between protection and empowerment than an analysis predicated on the concept of autonomy. I have argued that vulnerability must be understood as situational, rather than solely inherent, and that interventions addressing the situational cause of the adult's vulnerable position must be preferred over those that control and coerce. In this chapter I bring these different conclusions together to show how this thesis has made

an original contribution to these debates and to provide future suggestions for law reform and further research possibilities.

2. Empowering and Protecting Vulnerable Adults

In this section I set out how I have answered the four questions which have guided this thesis. These four questions are: 1) Who is understood to be vulnerable in mental capacity law and why? 2) To what extent do vulnerable adults participate in mental capacity law proceedings? 3) What forms of knowledge are valued in mental capacity law? 4) How do mental capacity law interventions balance protection and empowerment in relation to adults vulnerable to abuse? Centrally, I explain how my vulnerability analysis underpins this thesis and supports my claim that a better balance between protection and empowerment can be achieved in mental capacity law.

2.1. The meaning of vulnerability

The first substantive question that I answered, and that permeates the entire thesis, concerned the meaning of vulnerability. Drawing on case law, my observational research and interview data, I considered who is understood to be vulnerable in this context and why. This analysis is central to this thesis as I have argued that a situational understanding of vulnerability should be applied throughout mental capacity law.

Firstly, using vulnerability theory in Chapter Two I argued that whilst vulnerability should be viewed as universal and part of the human condition, it also varies individually over time and within different contexts. In making this argument for a more nuanced conception of vulnerability, I drew on the work of Mackenzie, Rogers

and Dodds (Mackenzie, Rogers and Dodds, 2014a; Mackenzie, Rogers and Dodds, 2014b) who distinguish inherent from situational forms of vulnerability. Whilst mental capacity law disproportionately focuses on inherent vulnerability as it applies to adults with mental disabilities, I argued for a shift away from the focus on the inherent towards the situational causes of vulnerability to enable vulnerability to be a useful legal device.

Secondly, I evidenced from my original data that law, social work and the *psy* professions focus on inherent vulnerability. In Chapter Four I provided examples to show that inherent approaches to vulnerability dominate the practice of mental capacity law. I used my data to demonstrate that a range of participants emphasised inherent vulnerability instead of material, situational causes of vulnerability. I argued that this framing of vulnerability underpinned both under-protection and over-protection of adults, particularly those at risk of abuse. My analysis of these data led to a conclusion, supported by much research from the domestic and sexual violence context, that the cause of vulnerability was attributed to the victim of abuse – in most cases mentally disabled women. Furthermore, I argued that mental capacity law was used in cases concerning abuse where the criminal law (and other mechanisms) failed to provide sufficient protection. Conversely, over-protection primarily occurred in cases that were referred to the COP. This was particularly prevalent in relation to specific findings of incapacity which led to P being deprived of her liberty or having her contact with others restricted. I argued that the clear focus on inherent vulnerability contributed to a paradox of under-protection and over-protection, which underpinned my findings in later chapters.

In applying a vulnerability analysis throughout this thesis, I have highlighted the importance of understanding vulnerability as situational, relational and embodied. Some argue that a vulnerability approach could be disempowering and lead to widespread interventions in the lives of vulnerable adults (Dunn, Clare and Holland, 2008). However, I highlighted specific examples of how taking an embodied, relational

and situational approach can better balance protection and empowerment of vulnerable adults. For example, in Chapter Five I explained how a shift in the presumption that P should give evidence in mental capacity would help to view P as situationally rather than inherently vulnerable, thereby valuing her as a knowledge giver. Similarly, I showed in Chapters Four and Seven that different types of interventions could be mandated under a situational vulnerability analysis. For example, I explained that injunctions could be ordered to protect and empower in cases of abuse, which focus on removing or restricting perpetrators rather than the vulnerable adult. Additionally, in Chapter Six I highlighted how the focus on inherent vulnerability can lead to the privileging of certain forms of evidence in mental capacity law, which, in turn, leads to the situational reasons for her vulnerable position being sidelined. Instead, having capacity assessments carried out by an individual who knows and understands P's position is more likely to lead to situation sensitive responses, which I have advocated throughout.

All of the above arguments stem from the underpinning finding that mental capacity law focuses on inherent causes of vulnerability, such as mental disability or gender, rather than the situational causes of vulnerability, such as a lack of support or the presence of an abuser. To facilitate any meaningful improvement in the balance between protection and empowerment, there must be a wider shift in focus from the inherent to the situational causes of vulnerability, which I have argued is possible even within the current legal framework.

2.2. Participation of vulnerable adults

The second question I answered in this thesis was to what extent do vulnerable adults participate in mental capacity law proceedings. My original empirical data confirmed the widely held belief that P rarely participates in mental capacity law proceedings

(Butler-Cole and Hobey-Hamsher, 2016). As explained in Chapter Five, I presented P's absence as a form of testimonial injustice and argued that P was not valued in her "capacity as a giver of knowledge" (Fricker, 2007, p. 7) for reasons related to her perceived inherent and situational vulnerability. Reinforcing my argument that mental capacity law views its subjects as vulnerable for inherent rather than situational reasons, P was assumed to be inherently vulnerable such that she was unable to participate or have her experiential knowledge heard. Viewing P as too inherently vulnerable to participate in proceedings meant that she was not empowered as a decision-maker in her own life.

In addition to P being viewed as inherently vulnerable, a finding that pervades mental capacity law, P was also seen as *especially* situationally vulnerable as a knowledge giver in the courtroom, despite a lack of evidence in individual cases as to why P was any more situationally vulnerable than anyone else. These persistent assumptions that P was inherently vulnerable led to her voice being pre-emptively silenced and her experiential knowledge was excluded from mental capacity law. Therefore the meaning of vulnerability in mental capacity law fundamentally shapes the course of each case, showing why it is important to articulate a more nuanced, situational understanding of the concept.

In Chapter Five I also explained why P's participation is so important, focusing on valuing her as an experiential knowledge giver and understanding the embodied consequences of decisions. In arguing for a strengthening of P's voice I provided specific recommendations for reform and discussed the use of special measures as a way of dealing with P's situational vulnerability. However, I expressed caution about the turn to special measures because they risk reinforcing the persistent belief that P is especially vulnerable, and that, even with special measures, her evidence would not be accepted with the same credibility as others. Any solutions need to take into account the impact on how vulnerable adults are viewed more broadly in mental capacity law.

The resort to special measures as a way of dealing with P's limited participation risks reinforcing the persistent assumption of inherent vulnerability rather than viewing vulnerability as situational.

2.3. Hierarchies of evidence in mental capacity law

In Chapter Six I discussed other evidential claims in mental capacity law, having considered the role of P's evidence in Chapter Five. I argued that law categorises *psy* knowledge in relation to capacity as objective expert evidence, privileging it over the experiential evidence of others such as social workers. This reflects the wider findings in this thesis that mental capacity law focuses on inherent causes of vulnerability rather than considering the situational reasons for an individual's vulnerability. This is because *psy* professionals articulate a technical knowledge claim about capacity which focuses on the inherent features that impact on decision-making whereas social workers are more likely to view P's situation holistically, taking into account a wider range of material-discursive, relational and embodied reasons for vulnerability.

My data confirmed that mental capacity law treated *psy* expertise as superior, privileging it over evidence from professional and personal experience. I criticised this hierarchy and argued that experiential knowledge is more likely to be relevant to issues of capacity because of the importance of knowing how particular individuals make decisions and what they value. In concluding Chapter Six, I argued for an embodied relational approach to assessing capacity, which places greater value on experiential rather than expert knowledge. I did this by drawing on the work of feminist scholars (Nedelsky, 1990; Mackenzie and Stoljar, 2000; Nedelsky, 2011) and combining empirical data with the need for a relational analysis. A relational approach to capacity assessment would recognise the positive benefits of relationships to facilitating capacity and to gaining more reliable knowledge about P, particularly in light of her

routine, material absence from COP proceedings identified in Chapter Five. It would further facilitate the turn to situational interventions in the typology of cases throughout this thesis and help to break down the persistent assumption of inherent vulnerability within this area of law.

2.4. Interventions to protect and empower vulnerable adults

The final empirical chapter of this thesis considered the legitimacy of law contrasted with social work and how this related to the use of controlling interventions in mental capacity law. In Chapter Seven I argued that social works' limited legitimacy compared to law led to them seeking legal legitimation of their decisions in high-risk abuse cases. This commonly resulted in interventions in COP proceedings which restricted and controlled victims of abuse because of their inherent vulnerability, in contrast to the use of interventions that addressed the situational vulnerability factors in P's life.

I showed throughout this thesis, but most specifically in Chapter Seven, that the COP case files I reviewed most commonly involved allegations of abuse. This finding was strengthened by the fact that I did not specifically seek out cases of abuse when asking the COP to select case files for the project. Given the problematic response of the criminal justice system to allegations of abuse identified in Chapter Four, perhaps it is unsurprising that the MCA has become a tool for dealing with abusive behaviours. However, I questioned whether the MCA is the appropriate jurisdiction for dealing with cases of abuse. I instead argued for a strengthening of the safeguarding adults legal framework, setting out the principles that should guide any new framework and focusing on balancing empowerment and protection. I also outlined specific examples of reforms that might assist in giving social workers the legitimacy to intervene in more empowering and situational ways to protect vulnerable adults from abuse. Chapter Seven reinforced the pervasive theme in this thesis that abuse needs to be reframed

as a situational vulnerability to minimise the use of controlling interventions against mentally disabled individuals in the name of their own protection.

3. Future Possibilities for Reform

In this section I set out the future possibilities for reform that arise from my thesis findings and arguments.

3.1. Mental capacity law reforms

Throughout this thesis I have identified a number of changes that need to be made to mental capacity law to address the challenges identified. In this section I provide suggestions for reform including the need for mental capacity law to be non-discriminatory, for it to focus on the situational cause of the adult's vulnerable position and for a relational understanding of capacity. Whilst some changes to mental capacity law have been made since the research was carried out, these have had a limited impact on my findings. For example, the new Court of Protection Rules 2017 have consolidated the existing provisions under the COPr that applied to this research. However, they make no substantive changes to the provisions relating to participation and evidence that I analysed in Chapters Five and Six.[231] Therefore there remains scope for further reforms to improve the balance between protection and empowerment in mental capacity law.

---

[231] For further analysis of these changes see Ruck Keene *et al.* (2017).

3.1.1. Diagnostic threshold

This thesis has contributed to the argument that the diagnostic threshold contained within s 2 MCA is discriminatory and should be removed. This reform has been discussed in the literature for some time, particularly in light of the Article 5 UNCRPD requirement for non-discrimination on the grounds of disability (Bartlett, 2012; Essex Autonomy Project, 2014; Clough, 2014). I have further contributed to this debate by highlighting some of the problems associated with a discriminatory legal framework which allows intervention on the basis of mental disability. Whilst it is a limitation of this thesis that I have not been able to fully explore the impact and relevance of the UNCRPD, removing s 2 MCA would contribute to ensuring England's UNCRPD compliance.

In Chapter Four I explained how the MCA reinforces inherent vulnerability which, in turn, allows for under-protection of those vulnerable adults who do not fit that norm. Conversely, those adults who are seen as inherently vulnerable and therefore fall within the MCA can be subjected to over-protection. I built on this argument in Chapters Five and Six where I showed how this inherent vulnerability norm excludes P's voice and privileges the evidence of the *psy* professions. If, in practice, some form of diagnosis of mental disorder or impairment is required because of the wording of s 2 MCA this undermines the experiential evidence of P and social workers. In Chapter Seven I further showed how the COP authorises coercive and controlling interventions in cases where adults are found to lack the capacity to make decisions for themselves. At present therefore, the law reinforces an inherent vulnerability approach, which means that adults with mental disabilities can be over-protected on the basis of their inherent vulnerability – their mental disability. Such an approach does little to empower individuals as decision-makers in their own life. Therefore this thesis adds weight to the argument that the diagnostic threshold of the MCA should be abolished, which should

in turn encourage mental capacity law to place greater value on experiential evidence and provide vulnerable adults with a more appropriate balance between empowerment and protection.

3.1.2. Situational responses

Secondly, the mental capacity law framework should be amended to ensure that situational responses to vulnerability are routinely adopted. For example, in Chapters Four and Seven I highlighted how decisions about capacity were used to protect the vulnerable adult from abuse. However, interventions typically restricted P rather than empowered her to live a life free from abuse. Instead, mental capacity law interventions need to shift their focus from restricting the vulnerable adult towards addressing the situational cause of the adult's vulnerable position. This did occur in some observed and reported cases (for example, *N County Council v (1) GI and (2) DQ* and *In Re A (Capacity: Refusal of Contraception)*). However, a broader shift in understanding vulnerability is required so that interventions can be more nuanced and empowering, whilst still providing protection.

Relatedly, understanding vulnerability more situationally will help to secure P's participation in mental capacity law proceedings. For example, in Chapter Five I considered how P is viewed as situationally vulnerable within the courtroom, notwithstanding the universal vulnerability of the witness experience (Hunter, Jacobson and Kirby, 2013; Henderson, 2016). If we move away from understanding vulnerability exclusively in inherent terms, we can begin to address the specific situational vulnerability that is created by legal proceedings. For example, in Chapter Five I suggested the use of special measures in response to specific concerns about the experience of giving evidence. However, I also argued for a change in evidential practice in the COP to ensure that P gives evidence more often and that her evidence

is given sufficient weight. In particular I recommended that the Court of Protection Rules 2017 be amended to include a rebuttable presumption that P gives witness evidence in welfare cases. This is an important step in moving away from the assumption that P is inherently vulnerable which currently persists in mental capacity law.

3.1.3. Relational reformulation of capacity

The final reform I suggest draws on my arguments about the need for a relational reformulation of mental capacity law. Firstly, I argue that mental capacity law should take a person-specific rather than act-specific approach to capacity in welfare cases. This already occurs in respect of capacity to decide on contact, but, as outlined in Chapters One and Four, the tests for capacity to consent to sex and capacity to marry are act-specific. I argue that the MCA should be amended to make clear that decisions about welfare should take a person-specific approach to capacity. The reasons for this were set out in detail in Chapters One and Four. However, the additional findings in Chapter Seven - that controlling interventions have become legitimated in mental capacity law - reinforce the need for a change in this respect. If the law is unable to provide protection for P in relation to a specific partner on an act-specific approach, then it is highly likely that controlling interventions will continue to be used to protect P from abuse. By moving to a person-specific approach, P's relational context can be taken into account, whilst still allowing for a low overall threshold for capacity.

Secondly, a relational approach to capacity involves treating the capacity assessment itself as a relational interaction, as argued for in Chapter Six. This is because the capacity assessment is the product of an encounter between two people (Donnelly, 2009b, p. 477). Where capacity assessments are carried out underpinned by a positive and well-developed relationship, they are more likely to facilitate P's

autonomy and gain reliable information about her abilities, wishes, feelings and values (Arstein-Kerslake and Flynn, 2016). I therefore argue that capacity assessments should only be carried out by a person who has a relationship with P, in contrast to the current situation where a person carries out a one-off assessment having never met P before. As argued in Chapter Six, the issue of independence may need to be addressed in individual cases, but any independent assessor would need to establish a working relationship with P before any capacity assessment. Understanding mental capacity law in these terms values the relational aspect of P's life, improves knowledge and better responds to situational vulnerability.

3.2. A strengthened safeguarding framework

In Chapter Seven I argued for a strengthened safeguarding adults legal framework. This is for two reasons. Firstly, and as explained throughout this thesis, mental capacity law is too often used in cases of abuse because of failures elsewhere in legal and societal responses to abuse. Therefore mental capacity law has, in the context of my research at least, become a forum for managing abusive behaviours in ways that coerce rather than empower the vulnerable adult. To facilitate a movement away from this approach, I argue for a strengthened safeguarding adults legal framework, which is likely best achieved through amending the Care Act 2014.

Secondly, the legal frameworks currently operating in this area do little to empower social workers to intervene in the lives of vulnerable adults in supportive and situational ways. A strengthened safeguarding adults legal framework can reinforce the value of social work to support, empower and protect vulnerable adults, in ways that social workers are currently discouraged or fearful of doing in high-risk cases. If, as I have argued in Chapters Six and Seven, social workers are seen to lack the legitimacy or objectivity required to make decisions, the prevalence of coercive interventions is

unlikely to diminish. In Chapter Seven I therefore argued that there is a need to strengthen the safeguarding provisions in the Care Act 2014 but in ways that encourage situationally focused, supportive and empowering interventions.

4. Future Research Possibilities

My research has strongly suggested that legal reform is needed, particularly in relation to abuse cases which are not appropriate for the MCA legal framework. In addition to the proposed legal reforms identified above, I also suggest three areas where further research is required.

4.1. Methodology

Law has been criticised for relying too heavily on doctrinal analyses and analysis of reported judgments rather than the social impact of law on people's lives (Smart, 1989, p. 24). This critique can similarly be applied to mental capacity law, which is an area that undoubtedly requires further empirical research. This is even more stark at mental capacity law's intersection with adult safeguarding. Whilst there is empirical research on the health and welfare jurisdiction of mental capacity law (Emmett *et al.*, 2013; Series *et al.*, 2015b; Bartlett *et al.*, 2016; Harding and Tascioglu, 2017; Series, Fennell and Doughty, 2017a), and also on its intersection with adult safeguarding law and practice (Hollomotz, 2011; Keeling, (2017)), further empirical data is needed to elucidate the reality of the law in this area rather than relying predominantly on doctrinal analyses, reported judgments and evidence from *psy* practice. I was informed that I was one of the first researchers to carry out research at the COP, the project by Series *et al.* being one of the only others (Series *et al.*, 2015a; Series *et al.*, 2015b; Series, Fennell and Doughty, 2017a). With the recent transparency changes to the

COP following the transparency pilot, it should now be an easier site for researchers to access and I hope that more data will soon be available. However, the COP is not the only site of mental capacity law and how it operates in the everyday lives of individuals similarly requires further empirical analysis, of which there is little.

As set out in my methodology chapter, there is also a need to approach research from a wider methodological perspective. I have valued a range of sources and evidentiary material to enable me to get as close to the material reality of the practice of mental capacity law as possible, including observations, interviews and traditional legal case analysis. These diverse socio-legal methods have helped to triangulate my findings and uncover partial truths about mental capacity law in practice. Furthermore, by using a material-discursive methodology I have focused on both the material conditions and discourse that shapes mental capacity law. I have also highlighted the way that law, and its institutions such as courts and lawyers, value particular forms of evidence and interventions over others. Therefore despite law's claims to objectivity, the material-discursive intra-action between law and its subjects influences the cases that reach court and the outcomes that result.

There have been a number of methodological limitations to this project, for example P's absence, the limited range of social workers I spoke to and the incomplete nature of the information I was able to access at the COP. However, in carrying out a project which triangulated data from a range of sources and which valued both material and discursive factors, I hope to have made persuasive arguments that make an original contribution to this field. Further socio-legal research into the practice of mental capacity law, taking a broad and inclusive methodological approach, would strengthen our understanding of this area.

4.2. Facilitating P's participation

Firstly, there needs to be further research into the most effective ways of facilitating P's participation in mental capacity law. This is both in respect of participating in legal proceedings and participating in capacity assessments. Whilst there have been some analysis of these issues (Series, Fennell and Doughty, 2017a), further interrogation is required so that P is valued as a decision-maker in her own life and capacity (and best interests) decisions are based on reliable information. Series *et al.* recommend the setting up of various working groups to explore some of these issues (Series, Fennell and Doughty, 2017a, p. 13). Going beyond that, further research is also required into the ways that participation can best be achieved. For example, there is research in the family and criminal contexts about the use of special measures (Burton, Evans and Sanders, 2007; Brammer and Cooper, 2011; Fairclough, 2017). However, there is limited research into how this might translate into mental capacity law and, whether or not, different considerations should be taken into account. This thesis contributes to this debate but it is also an area that requires further research.

Secondly, further research is needed in respect of participating in the capacity assessment process. This is not necessarily solely a legal issue but interdisciplinary empirical data is required to explore what methods: 1) best achieve P's participation in capacity assessments; 2) best support and empower P; 3) value P's relational connections; 4) gain the most reliable information about P's decision-making abilities. There is research on capacity assessments and how they are carried out in practice (Harding and Tascioglu, 2017), but much of it takes a professional-centric view rather than focusing on how best to secure P's participation and empowerment (Cairns *et al.*, 2005; Owen *et al.*, 2009; Ramasubramanian, Ranasinghe and Ellison, 2011; Skinner *et al.*, 2011). Until we know how best to achieve participation, both in court and in everyday settings, participation must be facilitated based on the ways that are

perceived to be most effective. However, more reliable information is needed to maximise the opportunities to empower P and ensure that capacity judgments are well informed.

4.3. Remedies for dealing with abuse

Finally, this area of law would benefit from further studies into the impact of injunctive remedies in abuse cases. There has been research into the use of civil law remedies such as injunctions to respond to domestic abuse and Burton, for example, found that the number of applications for non-molestation orders under the Family Law Act 1996 fell following implementation (Kewley, 1996; Edwards, 2001; Burton, 2009; Wing-Cheong, 2017). There may be a number of reasons for this ranging from the increased use of criminal justice measures, the availability of legal advice and confusion about implementation, albeit it "is unlikely that a reduction in domestic violence itself accounts for the fall, since the British Crime Survey data suggest that the prevalence of abuse has remained fairly stable" (Burton, 2009, p. 114). Therefore whilst there has been research into the use of civil law remedies for abuse, it principally focuses on the current remedies available, for example non-molestation orders under the Family Law Act 1996. In contrast, I have advocated, in this thesis and elsewhere, the use of injunctive remedies that could be used without the initiation of the victim of abuse (Lindsey, 2016a). Whilst I have argued for the use of such remedies even without the ongoing consent of the victim, their engagement is still a crucial factor. However, if such an approach is to be expanded, further empirical research is needed into the impact of and differences in cases where the victim of abuse is not the person to initiate the remedy.

A critique of my approach might be that failing to obtain a woman's consent for intervention undermines her autonomy. As I explained in Chapter Two, many women in

abusive relationships have developed ways of navigating and developing autonomy within their abuse situation and remaining within an abusive relationship is, in some cases, an autonomous choice based on a risk analysis (Humphreys and Thiara, 2003, p. 200). However, as also explained, Humphreys and Thiara also attribute some of this risk to the law's failure to protect (Humphreys and Thiara, 2003). Therefore if, as I have argued, the law currently fails to protect women from abuse, then reform is needed to strengthen legal protection for abuse victims. In arguing for situational responses and civil law remedies, such as injunctions, I suggest the law can both empower and protect adults vulnerable to abuse. This is because they are not controlled or coerced in any way as happens under mental capacity law, but are still given a degree of legal protection to provide them with a safe space away from the abuser. Whilst this remains my view, further research is needed to gauge victims' understanding and experiences of such interventions.

5. Final Reflections

In concluding, I am aware that I have not been able to make claims to have uncovered objective truths in this thesis, if such claims are possible. However, in using a material-discursive epistemological approach I have argued for likelihoods of truth or partial truths (Harris, 1995; Barad, 2003; Barad, 2007) to make a persuasive case for my findings. In doing so I have accepted the role of material factors which shape the practice of mental capacity law, including resources and the difficulties in facilitating participation in court. I have further highlighted how the discourse of law and vulnerability can shape the legal interventions that result and ultimately have material, embodied consequences for individuals.

Whilst this thesis focuses on mental capacity law, I hope that I have also provided useful insights into the problem of abuse and adult safeguarding. It is clear

that balancing protection and empowerment is a difficult challenge in any context, but this is exacerbated where abuse is present because of the understandable desire to protect. Yet too often in the cases I reviewed and stories I heard, victims of abuse were subject to restrictions, control and surveillance when the primary reason their case was before the court was abuse by another. What has become clear to me in carrying out this research is that it is only once society views and responds to abuse as something caused by the abuser, rather than being the fault of the abused individual, that we will begin to tackle the immeasurable problem of domestic abuse and sexual violence in our society. Furthermore, the structural failures to respond to abuse across the criminal justice system, the police, local authorities and society more broadly require urgent attention, and the failures are particularly acute in respect of women with mental disabilities. As Robert said to me:

> if you are vulnerable you know, if you are elderly if you have a learning disability or whatever and someone commits a crime against you that gets investigated by social workers who, you know, are not qualified to do so. And the rest of the population get the police.

Learning from Robert and other participants about social work was one of the most rewarding aspects of the research. I was familiar with the COP having previously attended as part of my training as a solicitor, but had very little experience of working with social workers. Learning about their role and the difficult decisions they make proved insightful and humbling. Whilst I have been critical at points of decisions made or explanations given, I completed this research with enormous respect for the social work profession. All participants were clearly motivated by the desire to assist the adults with whom they worked but were sometimes constrained by the law, or their

perception of it, resources and their own pre-existing expectations of what would or would not be effective.

6. Conclusion

This thesis has focused on how to balance empowerment and protection of vulnerable adults in mental capacity law. I have explored how social workers, *psy* professionals and the court process shape this balance and I have made a number of suggestions for reform. In doing so, I hope I have conveyed the stories that I observed and had relayed to me with accuracy and sensitivity. I further hope that some of the 'legalism' that is no doubt present in this thesis will be counterbalanced by reading other 'non-legal' stories that permeate mental capacity law and adult safeguarding. However, the benefit of carrying out empirical research with real people is precisely that the stories that inform the analysis are much richer and deeper than would otherwise be possible. I am therefore grateful to all who shared their stories with me and allowed me an insight into their lives. Inevitably with law, things that seem central to a lay person can be ignored and therefore my retelling of events may be different from those who experienced it directly. However, I hope that future researchers will find my findings useful and that my contribution to these debates will have a lasting effect on the balance between protection and empowerment of vulnerable adults.

REFERENCES

Aday, L. A. (1994) 'Health status of vulnerable populations', *Annual Review of Public Health,* 15 (1), 487-509.

Alistar, S. S., Long, E. F., Brandeau, M. L., Beck, E. J. (2014) 'HIV epidemic control--a model for optimal allocation of prevention and treatment resources', *Health Care Management Science,* 17 (2), 162-81.

Anderson, E. (2012) 'Epistemic justice as a virtue of social institutions', *Social Epistemology,* 26 (2), 163-173.

Anderson, J. (2014) 'Autonomy and vulnerability entwined', in Mackenzie, C., Rogers, W. and Dodds, S. (eds.) *Vulnerability: new essays in ethics and feminist philosophy.* New York: Oxford University Press.

Armstrong, I. (1999) 'Women and their ‘uncontrollable impulses’: the medicalisation of women's crime and differential gender sentencing', *Psychiatry, Psychology and Law,* 6 (1), 67-77.

Arstein-Kerslake, A. and Flynn, E. (2016) 'Legislating consent: creating an empowering definition of consent to sex that is inclusive of people with cognitive disabilities', *Social and Legal Studies,* 25 (2), 225-248.

Association of Directors of Adult Social Services (2015) *Budget survey 2015: key messages*. Available at: https://www.adass.org.uk/media/4345/key-messages-final.pdf (Accessed: 20 July 2016).

Association of Directors of Adult Social Services (2017) *Making safeguarding personal*. Available at: https://www.adass.org.uk/making-safeguarding-personal-publications (Accessed: 19 July 2017).

Babcock, J. C., Green, C. E. and Robie, C. (2004) 'Does batterers' treatment work? A meta-analytic review of domestic violence treatment', *Clinical Psychology Review,* 23 (8), 1023-1053.

Banakar, R. and Travers, M. (2005) 'Law, sociology and method', in Banakar, R. and Travers, M. (eds.) *Theory and method in socio-legal research.* Oxford: Hart, pp. 1-25.

Banner, N. F. (2012) 'Unreasonable reasons: normative judgements in the assessment of mental capacity', *Journal of Evaluation in Clinical Practice,* 18 (5), 1038-1044.

Barad, K. (1998) 'Getting real: technoscientific practices and the materialization of reality', *Differences: A Journal of Feminist Cultural Studies,* 10 (2), 87-126.

Barad, K. (2003) 'Posthumanist performativity: toward an understanding of how matter comes to matter', *Signs: Journal of Women in Culture and Society,* 28 (31), 801-831.

Barad, K. (2007) *Meeting the universe halfway: quantum physics and the entanglement of matter and meaning.* London: Duke University Press.

Barnes, C. (2008) 'An ethical agenda in disability research: rhetoric or reality?', in Mertens, D. M. and Ginsberg, P. E. (eds.) *The handbook of social research ethics.* London: Sage, pp. 458-473.

Bartlett, P. (2012) 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law', *Modern Law Review,* 75 (5), 752-778.

Bartlett, P., Mudigonda, M., Chopra, A., Morriss, R., Jones, S. (2016) 'Planning for incapacity by people with bipolar disorder under the Mental Capacity Act 2005', *Journal of Social Welfare and Family Law,* 38 (3), 263-286.

Bartlett, P. and Schulze, M. (2017) 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)', *International Journal of Law and Psychiatry,* 53, 2-14.

Bell, V. (1993) *Interrogating incest: feminism, Foucault and the law.* London: Routledge.

Benedet, J. and Grant, I. (2012) 'Taking the stand: access to justice for witnesses with mental disabilities in sexual assault cases', *Osgoode Hall Law Journal,* 50 (1), 1-45.

Benedet, J. and Grant, I. (2014) 'Sexual assault and the meaning of power and authority for women with mental disabilities', *Feminist Legal Studies,* 22 (2), 131-154.

Berger, P. L. and Luckmann, T. (1971) *The social construction of reality: a treatise in the sociology of knowledge.* Middlesex: Harmondsworth.

Black, J. (2002) 'Regulatory conversations', *Journal of Law and Society,* 29 (1), 163-196.

Blommaert, J. (2009) *Discourse: key topics in sociolinguistics.* Cambridge: Cambridge University Press.

Brammer, A. and Cooper, P. (2011) 'Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems', *Criminal Law Review,* (12), 925-942.

Braye, S. and Preston-Shoot, M. (1993) 'Empowerment and partnership in mental health: towards a different relationship', *Journal of Social Work Practice,* 7 (2), 115-128.

British Association of Social Work (2017) Available at: https://www.basw.co.uk/social-work-careers (Accessed: 19 June 2017).

British Medical Association (2017a) Available at: https://www.bma.org.uk/advice/career/studying-medicine/insiders-guide-to-medical-specialties/nhs-career-choices (Accessed: 22 June 2017).

British Medical Association (2017b) Available at: https://www.bma.org.uk/advice/employment/fees/medico-legal (Accessed: 3 January 2018).

British Psychological Society. 2000. *Learning disability: definitions and context.* http://www.bps.org.uk/system/files/documents/ppb_learning.pdf. (Accessed: 6 January 2017) para 1.4.1.

British Psychological Society (2017) Available at: https://careers.bps.org.uk/area/clinical (Accessed: 15 June 2017).

Brown, K. (2011) "Vulnerability': handle with care', *Ethics and Social Welfare,* 5 (3), 313-321.

Burchell, K. (2007) 'Empiricist selves and contingent "others": the performative function of the discourse of scientists working in conditions of controversy', *Public Understanding of Science,* 16 (2), 145-162.

Burstow, P. (2014) 'Care Bill', Hansard: House of Commons debates, 21 January 2014, c. 252. Available at: https://publications.parliament.uk/pa/cm201314/cmpublic/care/140121/am/140121s01.htm (Accessed: 24 July 2017).

Burton, M. (2009) 'Civil law remedies for domestic violence: why are applications for non-molestation orders declining?', *Journal of Social Welfare and Family Law,* 31 (2), 109-120.

Burton, M., Evans, R. and Sanders, A. (2007) 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales', *International Journal of Evidence and Proof,* 11 (1), 1-23.

Butler-Cole, V. and Hobey-Hamsher, L. (2016) 'The assessment of capacity by judges of the Court of Protection', *Elder Law Journal,* 6 (2), 145-151.

Cairns, R., Maddock, C., Buchanan, A., David, A. S., Hayward, P., Richardson, G., Szmukler, G., Hotopf, M. (2005) 'Reliability of mental capacity assessments in psychiatric in-patients', *The British Journal of Psychiatry,* 187 (4), 372-378.

Case, P. (2016) 'Dangerous liaisons? Psychiatry and law in the Court of Protection - expert discourses of ‘insight' (and 'compliance')', *Medical Law Review,* 24 (3), 360-378.

Cave, E. (2015) 'Determining capacity to make medical treatment decisions: problems implementing the Mental Capacity Act 2005', *Statute Law Review,* 36 (1), 86-106.

Cermele, J. A., Daniels, S. and Anderson, K. L. (2001) 'Defining normal: constructions of race and gender in the DSM-IV casebook', *Feminism and Psychology,* 11 (2), 229-247.

Chan, H. M. (2004) 'Sharing death and dying: advance directives, autonomy and the family', *Bioethics,* 18 (2), 87-103.

Charles, J. (2016) *Facilitating participation of ‘P’ and vulnerable persons in Court of Protection proceedings*. Available at: http://www.familylaw.co.uk/system/froala_assets/documents/1334/Practice_Guidance_Vulnerable_Persons.pdf (Accessed: 2 August 2017).

Christman, J. (2004) 'Relational autonomy, liberal individualism, and the social constitution of selves', *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition,* 117 (1), 143-164.

Clark, B. and Richards, C. (2008) 'The prevention and prohibition of forced marriages: a comparative approach', *International and Comparative Law Quarterly,* 57 (3), 501-528.

Clough, B. (2014) 'Vulnerability and capacity to consent to sex - asking the right questions?', *Child and Family Law Quarterly,* 26 (4), 371-397.

Clough, B. (2015) ''People like that': realising the social model in mental capacity jurisprudence', *Medical Law Review,* 23 (1) 53-80.

Clough, B. (2017) 'Disability and vulnerability: challenging the capacity/incapacity binary', *Social Policy and Society,* 16 (3), 469-481.

Coggon, J. and Miola, J. (2011) ‘Autonomy, Liberty and Medical Decision-Making’, *Cambridge Law Journal*, 70 (3), 523-547.

Collins, H. and Evans, R. (2002) 'The third wave of science studies: studies of expertise and experience', *Social Studies of Science,* 32 (2), 235-296.

Collins, H. and Evans, R. (2008) *Rethinking expertise.* Chicago: University of Chicago Press.

Conaghan, J. (2013) 'Feminism, law and materialism: reclaiming the 'tainted' realm', in Munro, V. E. and Davies, M. (eds.) *Ashgate research companion to feminist legal theory.* Farnham: Ashgate, pp. 31-50.

Cooper, A., Lawson. J., Lewis. S., Williams. C. (2015) 'Making safeguarding personal: learning and messages from the 2013/14 programme', *The Journal of Adult Protection,* 17 (3), 153-165.

Craigie, J. (2015) 'A fine balance: reconsidering patient autonomy in light of the UN Convention on the Rights of Persons with Disabilities ', *Bioethics,* 29 (6), 398-405.

Crown Prosecution Service (2017) *Domestic abuse guidelines for prosecutors*. Available at: https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors (Accessed: 4 January 2018).

Dennis, D. and Monahan, J. (eds.) (1996) *Coercion and aggressive community treatment: a new frontier in mental health law.* New York: Plenum Press.

Department of Health (2000) *No secrets: guidance on protecting vulnerable adults in care*. Available at: https://www.gov.uk/government/publications/no-secrets-guidance-on-protecting-vulnerable-adults-in-care (Accessed: 27 July 2017).

Department of Health (2016) *Care Act factsheets* Available at: https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets#factsheet-7-protecting-adults-from-abuse-or-neglect (Accessed: 4 January 2018).

Department of Health (2017) *Care and support statutory guidance*. Available at: https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance (Accessed: 7 January 2018).

Disability Rights UK, Disability Rights Wales (2017) *Implementation of the United Nations Convention on the Rights of Persons with Disabilities in England and Wales shadow report*. Available at: https://www.disabilityrightsuk.org/sites/default/files/pdf/CRPD%20shadow%20report%20-%20England%20Wales%2026%20January%202017.pdf (Accessed: 4 January 2018).

Donnelly, M. (2009a) 'Best interests, patient participation and the Mental Capacity Act 2005', *Medical Law Review,* 17 (1), 1-29.

Donnelly, M. (2009b) 'Capacity assessment under the Mental Capacity Act 2005: delivering on the functional approach?', *Legal Studies,* 29 (3), 464-491.

Donnelly, M. (2010) *Healthcare decision-making and the law: autonomy, capacity and the limits of liberalism.* Cambridge: Cambridge University Press.

Donnelly, M. and Kilkelly, U. (2011) 'Child-friendly healthcare: delivering on the right to be heard', *Medical Law Review,* 19 (1) 27-54.

Doughty, J., Twaite, A. and Magrath, P. (2017) *An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people*. Cardiff: Cardiff University.

Doyle, S. (2010) 'The notion of consent to sexual activity for persons with mental disabilities', *Liverpool Law Review,* 31 (2) 111-135.

Dunn, M., Clare, I. C. and Holland, A. J. (2008) 'To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy', *Legal Studies,* 28 (2), 234-253.

Durkheim, E. (1966) *The rules of sociological method.* New York: Free Press.

Dworkin, R. (1986) *Law's Empire*. Cambridge: Harvard University Press.

Edwards, S. (2001) 'Domestic violence and harassment: an assessment of the civil remedies', in Taylor-Browne, J. (ed.) *What works in reducing domestic violence? A comprehensive guide for professionals.* London: Whiting and Birch, pp. 187-210.

Eisenstein, Z. (1988) *The female body and the law.* California: University of California Press.

Eldergill, A. (2015) 'Compassion and the law: a judicial perspective', *Elder Law Journal,* 5 (3), 268-278.

Ellison, L., Munro, V. E., Hohl, K., Wallang, P. (2015) 'Challenging criminal justice? Psychosocial disability and rape victimization', *Criminology and Criminal Justice,* 15 (2), 225-244.

Emmett, C., Poole, M., Bond, J., Hughes, J. C. (2013) 'Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: comparing practice with legal standards', *International Journal of Law and Psychiatry,* 36 (1), 73-82.

Enright, M. (2009) 'Choice, culture and the politics of belonging: the emerging law of forced and arranged marriage', *Modern Law Review,* 72 (3), 331-359.

Eraut, M. (1994) *Developing professional knowledge and competence.* London: Routledge Falmer.

Essex Autonomy Project (2014) *Achieving CRPD-compliance: is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?* Available at: https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-Position-Paper-FINAL.pdf (Accessed: 25 July 2016).

Fairclough, N. (1992) *Discourse and social change.* Cambridge: Polity.

Fairclough, S. (2017) ''It doesn't happen … and I've never thought it was necessary for it to happen': barriers to vulnerable defendants giving evidence by live link in

Crown Court trials', *The International Journal of Evidence and Proof,* 21 (3), 209-229.

Fawcett, B. (2009) 'Vulnerability: questioning the certainties in social work and health', *International Social Work,* 52 (4), 473-484.

Fennell, P. (1996) *Treatment without consent; law, psychiatry and the treatment of mentally disordered people since 1845.* London: Routledge.

Fineman, M. A. (2008) 'The vulnerable subject: anchoring equality in the human condition', *Yale Journal of Law and Feminism,* 20 (1), 1-23.

Fineman, M. A. (2010) 'The vulnerable subject and the responsive state', *Emory Law Journal,* 60 (2), 251-276.

Fineman, M. A. (2012) ''Elderly' as vulnerable: rethinking the nature of individual and societal responsibility', *The Elder Law Journal,* 20 (1), 71-122.

Fineman, M. A. (2013) 'Equality, autonomy and the vulnerable subject in law and politics', in Fineman, M. and Grear, A. (eds.) *Vulnerability: reflections on a new ethical foundation for law and politics.* Farnham: Ashgate, pp. 13-28.

Firestone, S. (1971) *The dialectic of sex: the case for feminist revolution.* London: Cape.

Fletcher, R., Fox, M. and Mccandless, J. (2008) 'Legal embodiment: analysing the body of healthcare law', *Medical Law Review,* 16 (3), 321-45.

Flood, J. (2005) 'Socio-legal ethnography', in Banakar, R. and Travers, M. (eds.) *Theory and method in socio-legal research.* Oxford: Hart, pp. 33-48.

Flynn, E. and Arstein-Kerslake, A. (2014) 'Legislating personhood: realising the right to support in exercising legal capacity', *International Journal of Law in Context,* 10 (1), 81-104.

Foster, C. and Miola, J. (2015) 'Who's in charge? The relationship between medical law, medical ethics, and medical morality?', *Medical Law Review,* 23 (4), 505-530.

Foucault, M. (1965) *Madness and civilisation: A history of insanity in the age of reason.* New York: Pantheon.

Foucault, M. (1978) *The history of sexuality: an introduction.* New York: Vintage Books.

Foucault, M. (1979) *Discipline and punish: the birth of the prison.* London: Peregrine.

Foucault, M. (1980) *Power/knowledge: selected interviews and other writings 1972-1977.* New York: Vintage Books.

Frances, A. (2010) 'The first draft of DSM-V', *British Medical Journal,* 340 (7745), 492.

Frances, A. and Widiger, T. (2012) 'Psychiatric diagnosis: lessons from the DSM-IV past and cautions for the DSM-5 future', 8 *Annual Review of Clinical Psychology,* 8, 109-130.

Frank, J. (1949) *Law and the modern mind.* London: Stevens.

Frankfurt, H. (1988) 'Freedom of the will and the concept of a person', in Frankfurt, H. (ed.) *The importance of what we care about.* Cambridge: Cambridge University Press, pp. 11-25.

Fricker, M. (2007) *Epistemic injustice: power and the ethics of knowing.* Oxford: Oxford University Press.

Fricker, M. (2013) 'Epistemic justice as a condition of political freedom?', *Synthese,* 190 (7), 1317-1332.

Galvez, J. F., Thommi, S. and Ghaemi, S. N. (2011) 'Positive aspects of mental illness: A review in bipolar disorder', *Journal of Affective Disorders,* 128 (3), 185-190.

Garland-Thomson, R. (2011) 'Misfits: a feminist materialist disability concept', *Hypatia,* 26 (3), 591-609.

Geertz, C. (1973) *The interpretation of cultures: selected essays.* New York: Basic Books.

General Medical Council (2017) Available at: http://www.gmc-uk.org/education/A-Z_by_specialty.asp (Accessed: 7 January 2018).

Giddens, A. (1984) *The constitution of society: outline of the theory of structuration.* Cambridge: Polity Press.

Gray, M. (2013) 'The swing to early intervention and prevention and its implications for social work', *British Journal of Social Work,* 44 (7), 1750-1769.

Green, S. (2016) 'Sarah's story: being 'P'- the importance of rule 3A', *Elder law Journal,* 6 (2), 168-174.

Greene, J. C., Caracelli, V. J. and Graham, W. F. (1989) 'Toward a conceptual framework for mixed-method evaluation designs', *Educational Evaluation and Policy Analysis,* 11 (3), 255-274.

Grubb, A. and Turner, E. (2012) 'Attribution of blame in rape cases: a review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming', *Aggression and Violent Behavior,* 17 (5) 443-452.

Hale, M. (1736) *The history of the pleas of the crown.* London: In the Savoy.

Halsbury's Laws (5th edn, 2015) vol 12.

Harding, R. (2012) 'Legal constructions of dementia: discourses of autonomy at the margins of capacity', *Journal of Social Welfare and Family Law,* 34 (4), 425-442.

Harding, R. (2015) 'The rise of statutory wills and the limits of best interests decision-making in inheritance', *Modern Law Review*, 78 (6), 945–970.

Harding, R. and Tascioglu, E. (2017). *Everyday decisions project report: supporting legal capacity through care, support and empowerment*. Available at: http://www.legalcapacity.org.uk/wp-content/uploads/2017/12/Everyday_Decisions_Project_Report.pdf (Accessed: 2 January 2018).

Harris, M. (1989) *Cows, pigs, wars, and witches: the riddles of culture.* New York: Vintage Books.

Harris, M. (1995) 'Anthropology and postmodernism', in Murphy, M. F. and Margolis,

M. L. (eds.) *Science, materialism and the study of culture.* Florida: University Press of Florida, pp. 62-77.

Hart, H. L. A. (1997) *The concept of law*. Oxford: Oxford University Press.

Health and Social Care Information Centre (2014) *Community care statistics, social services activity, England - 2013-14*. Available at: http://content.digital.nhs.uk/catalogue/PUB16133 (Accessed: 27 July 2017).

Health and Social Care Information Centre (2015) *Community care statistics, social services activity, England - 2014-15*. Available at: http://content.digital.nhs.uk/article/2021/Website-Search?productid=22118&q=community+care+statistics&sort=Relevance&size=10&page=1&area=both#top (Accessed: 27 July 2017).

Heider, F. (1958) *The psychology of interpersonal relations.* New York: Wiley.

Henderson, E. (2016) 'Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people', *Criminal Law Review,* (3), 181-205.

Herring, J. (2010) 'Commentary on: *Sheffield City Council v E*', in Hunter, R., Mcglynn, C. and Rackley, E. (eds.) *Feminist judgements: from theory to practice.* Oxford: Hart, pp. 346-350.

Herring, J. (2012) 'Mental disability and capacity to consent to sex: A Local Authority v H [2012] EWHC 49 (COP)', *Journal of Social Welfare and Family Law,* 34 (4), 471-478.

Herring, J. (2013) *Caring and the law.* Oxford: Hart.

Herring, J. (2016) *Vulnerable adults and the law.* Oxford: Oxford University Press.

Herring, J. and Goold, I. (2014) *Great debates in medical law and ethics.* London: Palgrave.

Herring, J. and Wall, J. (2014) 'Capacity to consent to sex', *Medical Law Review,* 22 (4), 620-30.

Hewson, B. (2013) '"Neither midwives nor rainmakers" - why DL is wrong', *Public Law,* (July), 451-459.

Hollomotz, A. (2009) 'Beyond 'vulnerability': an ecological model approach to conceptualizing risk of sexual violence against people with learning difficulties', *British Journal of Social Work,* 39 (1), 99-112.

Hollomotz, A. (2011) *Learning difficulties and sexual vulnerability: a social approach.* London: Jessica Kingsley Publishers.

Holmes, J. (2005) 'Power and discourse at work: is gender relevant?', in Lazar, M. M. (ed.) *Feminist critical discourse analysis: gender, power, and ideology in discourse.* Hampshire: Palgrave Macmillan, pp. 31-60.

Home Office and Foreign and Commonwealth Office (2017) *Forced marriage unit statistics 2016*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597869/Forced_Marriage_Unit_statistics-_2016.pdf (Accessed: 8 June 2017).

Hughes, K., Bellis, M. A., Jones, L., Wood, S., Bates, G., Eckley, L., McCoy, E., Mikton, C., Shakespeare, T. and Officer, A. (2012) 'Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies', *The Lancet*, 379 (9826), 1621-1629.

Hull, R. J. (2006) 'Cheap listening - reflections on the concept of wrongful disability', *Bioethics,* 20 (2), 55-63.

Humphries, R. (2013) *Paying for social care: Beyond Dilnot.* London: The King's Fund.

Humphreys, C. and Thiara, R. K. (2003) 'Neither justice nor protection: women's experiences of post-separation violence', *Journal of Social Welfare and Family Law,* 25 (3), 195-214.

Hunter, G., Jacobson, J. and Kirby, A. (2013) *Out of the shadows: victims' and witnesses' experiences of attending the Crown Court*. London: Victim Support.

Hunter, R., Mcglynn, C. and Rackley, E. (eds.) (2010) *Feminist judgments: from theory to practice.* Oxford: Hart.

International Federation of Social Workers (2014) *Global definition of social work*. Available at: http://ifsw.org/policies/definition-of-social-work (Accessed: 11 April 2017).

Jackson, E. (2008) 'Degendering reproduction?', *Medical Law Review,* 16 (3), 346-368.

Jackson, J., Bradford, B., Hough, M., Myhill, A., Quinton, P., Tyler, T. R. (2012) 'Why do people comply with the law?: Legitimacy and the Influence of legal institutions', *British Journal of Criminology,* 52 (6), 1051-1071.

Jacob, M-A. (2012) *Matching organs with donors: legality and kinship in transplants.* Philadelphia: University of Pennsylvania Press.

James, A. L. (2008) 'Children, the UNCRC, and family law in England and Wales', *Family Court Review,* 46 (1), 53-64.

James, A. L., James, A. and Mcnamee, S. (2004) 'Turn down the volume not hearing children in family proceedings', *Child and Family Law Quarterly* 16 (2), 189-202.

Jingree, T. (2015) 'Duty of care, safety, normalisation and the Mental Capacity Act: a discourse analysis of staff arguments about facilitating choices for people with learning disabilities in UK services', *Journal of Community and Applied Social Psychology,* 25 (2), 138-152.

Jordan, J. (2004) *The word of a woman? Police, rape and belief.* Hampshire: Palgrave Macmillan.

Judicial Office (2017) *Judicial diversity statistics 2017*. Available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf (Accessed: 4 January 2018).

Kant, I. (1998) 'Groundwork of the metaphysics of morals', in Gregor, M. (ed.) *Kant: Gorundwork of the Metaphsyics of Morals (Cambridge Texts in the History of Philosophy)*. Cambridge: Cambridge University Press, pp. 1-76.

Keeling, A. (2017) "'Organising objects': adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities', *International Journal of Law and Psychiatry*, 53, 77-87.

Kewley, A. (1996) 'Pragmatism before principle: the limitations of civil law remedies for the victims of domestic violence', *Journal of Social Welfare and Family Law,* 18 (1), 1-10.

Keywood, K. (2017) 'The vulnerable adult experiment: situating vulnerability in adult safeguarding law and policy', *International Journal of Law and Psychiatry*, 53, 88-96.

Khalifeh, H., Howard, L. M., Osborn, D., Moran, P., Johnson, S. (2013) 'Violence against people with disability in England and Wales: findings from a national cross-sectional survey', *PLoS ONE,* 8 (2), 1-9.

Kittay, E. F. (1999) *Love's labor: essays on women, equality, and dependency.* New York: Routledge.

Knauft, B. M. (2006) 'Anthropology in the middle', *Anthropological Theory,* 6 (4), 407-430.

Kong, C. (2017) *Mental capacity in relationship: decision-making, dialogue and autonomy*. Cambridge: Cambridge University Press.

Kvale, S. and Brinkmann, S. (2009) *InterViews: learning the craft of qualitative research interviewing*. Los Angeles: Sage.

Law Commission (1995) *Mental incapacity*. (Law Com No. 231). Available at: http://www.lawcom.gov.uk/app/uploads/2015/04/lc231.pdf (Accessed: 27 July 2017).

Law Commission (2015) *Mental capacity and deprivation of liberty: A Consultation Paper*. (Law Com No 222) London: Law Commission.

Law Commission (2017) *Mental capacity and deprivation of liberty*. (Law Com No 372) Available at: http://www.lawcom.gov.uk/wp-

content/uploads/2017/03/lc372_mental_capacity.pdf (Accessed: 7 January 2018).

Lee, M. (2017) 'Knowledge and landscape in wind energy planning', *Legal Studies,* 37 (1), 3-24.

Lindsey, J. (2016a) 'Developing vulnerability: a situational response to the abuse of women with mental disabilities', *Feminist Legal Studies,* 24 (3), 295-314.

Lindsey, J. (2016b) 'Streamlining the approach to depriving a person of their liberty: the Re X litigation', *Journal of Social Welfare and Family Law,* 38 (1), 79-82.

Llewellyn, K. (1960) *The common law tradition: deciding appeals.* Boston: Little Brown.

Loughnan, A. and Ward, T. (2014) 'Emergent authority and expert knowledge: psychiatry and criminal responsibility in the UK', *International Journal of Law and Psychiatry,* 37 (1), 25-36.

Mackenzie, C. (2014a) 'Embodied agents, narrative selves', *Philosophical Explorations,* 17 (2), 154-171.

Mackenzie, C. (2014b) 'The importance of relational autonomy and capabilities for an ethics of vulnerability', in Mackenzie, C., Rogers, W. and Dodds, S. (eds.) *Vulnerability: new essays in ethics and feminist philosophy.* New York: Oxford University Press, pp. 33-59.

Mackenzie, C., Rogers, W. and Dodds, S. (2014a) 'Introduction: what Is vulnerability and why does it matter for moral theory?', in Mackenzie, C., Rogers, W. and Dodds, S. (eds.) *Vulnerability: new essays in ethics and feminist philosophy.* New York: Oxford University Press, pp. 1-29.

Mackenzie, C., Rogers, W. and Dodds, S. (eds.) (2014b) *Vulnerability: new essays in ethics and feminist philosophy.* New York: Oxford University Press.

Mackenzie, C. and Stoljar, N. (eds.) 2000. *Relational autonomy: feminist perspectives on autonomy, agency, and the social self.* Oxford: Oxford University Press.

Martin, S. L., Ray, N., Sotres-Alvarez, D., Kupper, L. L., Moracco, K. E., Dickens, P. A.,

Scandlin, D.,Gizlice, Z. (2006) 'Physical and sexual assault of women with disabilities', *Violence Against Women,* 12 (9), 823-837.

May, T. (2011) *Social research: issues, methods and process.* Berkshire: Open University Press.

Mccarthy, M. and Thompson, D. (1997) 'A prevalence study of sexual abuse of adults with intellectual disabilities referred for sex education', *Journal of Applied Research in Intellectual Disabilities,* 10 (2), 105 - 124.

Mckenna, B. J. and Graham, P. (2000) 'Technocratic discourse: a primer', *Journal of Technical Writing and Communication,* 30 (3), 223-251.

Mcnay, L. (1992) *Foucault and feminism.* Oxford: Polity Press.

Mcnay, L. (2012) 'Suffering, silence and social weightlessness: Honneth and Bourdieu on embodiment and power', in Gonzalez-Arnal, S., Jagger, G. and Lennon, K. (eds.) *Embodied selves.* Hampshire: Palgrave Macmillan, pp. 230-248.

Mcruer, R. (2010) 'Disabling sex: notes for a crip theory of sexuality', *GLQ: A Journal of Lesbian and Gay Studies,* 17 (1) 107-117.

Meakin, B. and Matthews, J. (2015) *Service user and carer input into the review of the standards of proficiency for social workers in England*. Available at: http://www.shapingourlives.org.uk/wp-content/uploads/2016/01/10004ED9StandardsofproficiencyforsocialworkersinEngland-serviceuserandcarerinputintoreview.pdf (Accessed: 20 July 2016).

Merry, S. E. (1990) *Getting justice and getting even: legal consciousness among working-class americans.* Chicago: University of Chicago Press.

Miles, J. (2011) 'Family abuse, privacy and state intervention', *Cambridge Law Journal,* 70 (1), 31-34.

Mill, J. S. (1909) *On liberty*. Available at: https://ebookcentral.proquest.com/lib/bham/detail.action?docID=435870 (Downloaded: 3 January 2018).

Ministry of Justice, Home Office and the Office for National Statistics (2013) *An overview of sexual offending in England and Wales*. Available at: https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales (Accessed: 4 January 2018).

Ministry of Justice (2015) *An outcome evaluation of the Integrated Domestic Abuse Programme (IDAP) and Community Domestic Violence Programme (CDVP)*. Available at: https://www.gov.uk/government/publications/outcome-evaluation-of-idap-and-cdvp (Accessed: 2 August 2017).

Ministry of Justice (2017a) *Family court statistics quarterly*. Available at: https://www.gov.uk/government/collections/family-court-statistics-quarterly (Accessed: 4 January 2018).

Ministry of Justice (2017b) *Family court statistics quarterly: July to September 2017*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666627/family-court-stats-july-september-2017.pdf (Accessed: 4 January 2018).

Montgomery J. (2006) 'Law and the demoralisation of medicine', *Legal Studies*, 26 (2), 185-210.

Montgomery, J., Jones, C. and Biggs, H. (2014) 'Hidden law-making in the province of medical jurisprudence', *Modern Law Review,* 77 (3), 343-378.

Munby, P. (2017) *Children and vulnerable witnesses – where are we?, View from the President's chambers*. Available at: https://www.judiciary.gov.uk/wp-content/uploads/2014/08/view-from-the-president-of-family-division-16-jan-17.pdf (Accessed: 6 February 2017).

Munro, V. E. and Scoular, J. (2012) 'Abusing vulnerability? Contemporary law and policy responses to sex work in the UK', *Feminist Legal Studies,* 20 (3), 189-206.

Murphy, M. F. and Margolis, M. L. (1995) 'An introduction to cultural materialism', in Murphy, M. F. and Margolis, M. L. (eds.) *Science, materialism and the study of culture.* Florida: University Press of Florida, pp. 1-4.

Murris, K. (2013) 'The epistemic challenge of hearing child's voice', *Studies in Philosophy and Education,* 32 (3), 245-259.

Naffine, N. and Owens, R. (eds.) (1997) *Sexing the subject of law*. North Ryde: LBC Information Services and Sweet and Maxwell.

Nedelsky, J. (1990) 'Law, boundaries, and the bounded self', *Representations,* 30 (1), 162-189.

Nedelsky, J. (2011) *Law's relations: a relational theory of self, autonomy, and law.* New York: Oxford University Press.

Nemeroff, C. B., Kilts, C. D. and Berns, G. S. (1999) 'Functional brain imaging: twenty-first century phrenology or psychobiological advance for the millennium?', *American Journal of Psychiatry,* 156 (5), 671-673.

Noll, J. G. (2005) 'Does childhood sexual abuse set in motion a cycle of violence against women?: What we know and what we need to learn', *Journal of Interpersonal Violence,* 20 (4), 455-462.

Norrie, C., Manthorpe. J., Martineau, S. and Stevens, M. (2016) 'The potential uses and abuses of a power of entry for social workers in England: a re-analysis of responses to a government consultation', *The Journal of Adult Protection*, 18 (5), 256-265.

Nuffield Council on Bioethics (2015) *Children and clinical research: ethical issues*. Available at: http://nuffieldbioethics.org/wp-content/uploads/Children-and-clinical-research-full-report.pdf (Accessed: 28 July 2017).

Nussbaum, M. (1999) 'The professor of parody: the hip defeatism of Judith Butler', *The New Republic*, 220 (8), 37-45.

Office for National Statistics (2017) *Focus on violent crime and sexual offences, England and Wales: year ending Mar 2016*. Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/domesticabusesexualassaultandstalking#characteristics-associated-with-being-a-victim-of-intimate-violence (Accessed: 27 July 2017).

Office of the Public Guardian (2016) *Mental Capacity Act 2005 Code of Practice*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf (Accessed: 19 July 2017).

Office of the Public Guardian (2017) *Safeguarding policy: protecting vulnerable adults*. Available at: https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy (Accessed: 27 July 2017).

Oliver, M. (1990) *The politics of disablement.* Basingstoke: Macmillan.

Oshana, M. (2006) *Personal autonomy in society.* Aldershot: Ashgate.

Owen, G. S., David, A. S., Hayward, P., Richardson, G., Szmukler, G. and Hotopf, M. (2009) 'Retrospective views of psychiatric in-patients regaining mental capacity', *The British Journal of Psychiatry,* 195 (5), 403-407.

Parliament. House of Lords (2014) *Mental Capacity Act 2005: post-legislative scrutiny select committee report on the Mental Capacity Act 2005*. (HL 2013-2014 (139)). London: The Stationery Office.

Petersen, A. C. and Olsson, J. I. (2015) 'Calling evidence-based practice into question: acknowledging phronetic knowledge in social work', *British Journal of Social Work,* 45 (5), 1581-1597.

Platt, D. (2008) 'Care or control? The effects of investigations and iinitial assessments on the social worker–parent relationship', *Journal of Social Work Practice,* 22 (3), 301-315.

Plummer, S.-B. and Findley, P. A. (2012) 'Women with disabilities' experience with physical and sexual abuse: review of the literature and implications for the field', *Trauma, Violence, and Abuse,* 13 (1), 15-29.

Pritchard-Jones, L. (2016) 'The good, the bad, and the 'vulnerable older adult'', *Journal of Social Welfare and Family Law,* 38 (1), 51-72.

Ramasubramanian, L., Ranasinghe, N. and Ellison, J. (2011) 'Evaluation of a structured assessment framework to enable adherence to the requirements of Mental Capacity Act 2005', *British Journal of Learning Disabilities,* 39 (4), 314-320.

Riles, A. (2006) 'Anthropology, human rights, and legal knowledge: culture in the iron cage', *American Anthropologist,* 108 (1), 52-65.

Rogers, W. A. (2006) 'Feminism and public health ethics', *Journal of Medical Ethics,* 32 (6), 351-354.

Romelli, K., Frigerio, A. and Colombo, M. (2016) 'DSM over time: from legitimisation of authority to hegemony', *BioSocieties,* 11 (1), 1-21.

Royal College of General Practitioners (2018) Available at: http://www.rcgp.org.uk/clinical-and-research/clinical-resources/gp-with-a-special-interest-gpwsi-accreditation.aspx (Accessed: 7 January 2018).

Royal College of Psychiatrists (2013) Available at: http://www.rcpsych.ac.uk/healthadvice/treatmentswellbeing/faqshowtogethelp/faqdifferencesbetween.aspx (Accessed: 15 June 2017).

Royal College of Psychiatrists (2017) Available at: http://www.rcpsych.ac.uk/discoverpsychiatry/acareerinpsychiatry.aspx (Accessed: 3 May 2017).

Ruck Keene, A., Butler-Cole, V., Allen, N., Bicarregui, Edwards, S. (2014) *Mental capacity law newsletter November 2014*. Available at: http://www.39essex.com/content/wp-content/uploads/2015/01/mc_newsletter_november_2014_hwdol.pdf (Accessed: 27 July 2017).

Ruck Keene, A., Butler-Cole, V., Allen, N., Bicarregui, A., Kohn, N., Akhtar, S. (2016) *Mental capacity law guidance note: capacity assessments*. Available at: http://www.39essex.com/content/wp-content/uploads/2016/08/Capacity-Assessments-Guide-August-2016.pdf (Accessed: 2 August 2017).

Ruck Keene, A., Butler-Cole, V., Allen, N., Lee, A., Kohn, N., Scott, K. and Edwards, S. (2017). *Mental capacity report November 2017: practice and procedure*. Available at: http://www.39essex.com/content/wp-content/uploads/2017/11/Mental-Capacity-Report-November-2017-Practice-and-Procedure.pdf (Accessed: 4 January 2018).

Ruck Keene, A., Cooper, P. and Hogg, C. (2016) ''Special measures' in the Court of Protection', *Elder Law Journal,* 6 (1), 62-66.

Samuel, M. (2012) *Most social workers want powers of entry in safeguarding cases*. Available at: http://www.communitycare.co.uk/2012/10/11/most-social-workers-want-powers-of-entry-in-safeguarding-cases (Accessed: 19 April 2017).

Sandland, R. (2013a) 'Concubitu prohibere vago: sex and the idiot girl', *Feminist Legal Studies,* 21 (1), 81-108.

Sandland, R. (2013b) 'Sex and capacity: the management of monsters?', *Modern Law Review,* 76 (6), 981-1009.

Scott-Hill, M. (2002) 'Policy, politics and the silencing of 'voice'', *Policy and Politics,* 30 (3), 397-409.

Scully, J. L. (2012) 'Disability and the thinking body', in Gonzalez-Arnal, S., Jagger, G. and Lennon, K. (eds.) *Embodied selves*. Hampshire: Palgrave Macmillan, pp. 139-159.

Scully, J. L. (2014) 'Disability and vulnerability: on bodies, dependence and power', in Mackenzie, C., Rogers, W. and Dodds, S. (eds.) *Vulnerability: new essays in ethics and feminist philosophy.* New York: Oxford University Press, pp. 204-221.

Series, L. (2014) 'Sex, capacity and forensic cotton wool: IM v LM [2014] EWCA Civ 37', *Journal of Social Welfare and Family Law,* 36 (3), 317-319.

Series, L. (2015a) 'Power and the Mental Capacity Act', *The Small Places*, 18 February. Available at: https://thesmallplaces.wordpress.com/2015/02/18/power-and-the-mental-capacity-act (Accessed: 14 March 2017).

Series, L. (2015b) 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms', *International Journal of Law and Psychiatry,* 40, 80 - 91.

Series, L., Fennell, P., Clements, L. and Doughty, J. (2015a). *Transparency in the Court of Protection*. Cardiff: Cardiff University.

Series, L., Fennell, P. and Doughty, J. (2017a). *The participation of P in welfare Cases in the Court of Protection*. Cardiff: Cardiff University.

Series, L., Fennell, P., Doughty, J. and Mercer. A. (2017b). *Welfare cases in the Court of Protection: A statistical overview*. Cardiff: Cardiff University.

Series, L., Mercer, A., Walbridge, A., Mobbs, K., Fennel, P., Doughty, J., Clements, L. (2015b). *Use of the Court of Protection's welfare jurisdiction by supervisory bodies in England and Wales*. Cardiff: Cardiff University.

Shakespeare, T. (2006) *Disability rights and wrongs.* Abingdon: Routledge.

Sherman, B. R. (2016) 'There's no (testimonial) justice: why pursuit of a virtue is not the solution to epistemic injustice', *Social Epistemology,* 30 (3), 229-250.

Sherwin, S. (1998) 'A relational approach to autonomy in health care', in Sherwin, S. (ed.) *The politics of women's health: exploring agency and autonomy*. Philadelphia: Temple University Press, pp. 19-47.

Shoemaker, D. (2010) 'Responsibility, agency, and cognitive disability ', in Kittay, E. F. and Carlson, L. (eds.) *Cognitive disability and its challenge to moral philosophy*. Chichester: Wiley-Blackwell, pp. 201-223.

Skinner, R., Joiner, C., Chesters, L., Bates, L., Scrivener, L. (2011) 'Demystifying the process? A multi disciplinary approach to assessing capacity for adults with a learning disability', *British Journal of Learning Disabilities,* 39 (2), 92-97.

Smart, C. (1989) *Feminism and the power of law.* London: Routledge.

Spradley, J. P. (1979) *The Ethnographic Interview.* Belmont: Wadsworth.

Stanko, B. and Williams, E. (2013) ‘Reviewing rape and rape allegations in London: what are the vulnerabilities of the victims who report to the police?’, in Brown, J. and Horvath, M. (eds.) *Rape: challenging contemporary thinking.* Hoboken: Taylor and Francis, pp. 207-225.

Steffek, J. (2009) 'Discursive legitimation in environmental governance', *Forest Policy and Economics,* 11 (5–6), 313-318.

Stevens, M., Martineau, S., Manthorpe, J. and Norrie, C. (2017) ‘Social workers’ power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection’, *The Journal of Adult Protection*, 19 (6), 312-322.

Suto, W. M. I., Clare, I. C. H. and Holland, A. J. (2002) 'Substitute financial decision-making in England and Wales: a study of the Court of Protection', *Journal of Social Welfare and Family Law,* 24 (1), 37-54.

Szerletics, A. and O’Shea, T. (2012) *Deprivation of liberty safeguards.* Available at: https://autonomy.essex.ac.uk/resources/deprivation-of-liberty-and-dols (Accessed: 24 July 2017).

Taylor, H. J. (2016) 'What are 'best interests'? A critical evaluation of 'Best Interests' decision-making in clinical practice', *Medical Law Review,* 24 (2), 176-205.

Thomson, M. (2013) 'Abortion law and professional boundaries', *Social and Legal Studies,* 22 (2), 191-210.

Trevithick, P. (2005) *Social work skills: a practice handbook.* Maidenhead: Open University Press.

Trevithick, P. (2008) 'Revisiting the knowledge base of social work: a framework for practice', *The British Journal of Social Work,* 38 (6), 1212-1237.

Tyler, T. R. (2006a) 'Psychological perspectives on legitimacy and legitimation', *Annual Review of Psychology,* 57, 375-400.

Tyler, T. R. (2006b) *Why people obey the law.* Oxford: Princeton University Press.

UK Independent Mechanism (2017) *Disability rights in the UK: submission to inform the CRPD list of issues on the UK.* Available at: https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities (Accessed: 17 May 2017).

Van Dijk, T. A. (2015) 'Critical discourse analysis', in Tannen, D., Hamilton, H. E. and Schiffrin, D. (eds.) *The handbook of discourse analysis.* Chichester: Wiley, pp. 466-485.

Walker, L. E. (2009) *The battered woman syndrome.* New York: Springer.

Wanderer, J. (2012) 'Addressing testimonial injustice: being ignored and being rejected', *The Philosophical Quarterly,* 62 (246), 148-169.

Warriner, J. (2015) 'Gender oppression and weak substantive theories of autonomy', in Oshana, M. (ed.) *Personal autonomy and social oppression: Philosophical Perspectives.* New York: Routledge, pp. 25-47.

Weber, M., Roth, G. and Wittich, C. (1978) *Economy and society: an outline of interpretive sociology.* Berkeley: University of California Press.

Westlund, A. C. (2009) 'Rethinking Relational Autonomy', *Hypatia,* 24 (4), 26-49.

Whatley, M. A. (1996) 'Victim characteristics influencing attributions of responsibility to rape victims: A meta-analysis', *Aggression and Violent Behavior,* 1 (2), 81-95.

Whittington, C. (2016) 'The promised liberation of adult social work under England's 2014 Care Act: genuine prospect or false prospectus?', *British Journal of Social Work,* 46 (7), 1942-1961.

Williams, J. (2002) 'Public law protection of vulnerable adults: the debate continues, so does the abuse', *Journal of Social Work,* 2 (3), 293-316.

Wing-Cheong, C. (2017) 'A review of civil protection orders in six jurisdictions', *Statute Law Review,* 38 (1), 1-22.

Winick, B. J. (1994) 'The right to refuse mental health treatment: a therapeutic jurisprudence analysis', *International Journal of Law and Psychiatry,* 17 (1), 99-117.

World Health Organization (2018) *Disabilities*. Available at: http://www.who.int/topics/disabilities/en/ (Accessed: 7 January 2018).

Woolf, L. (2001) 'Are the courts excessively deferential to the medical profession?', *Medical Law Review,* 9 (1), 1-16.

APPENDIX ONE

TABLES OF CASE FILE DATA

Table A1: Summary of case files reviewed

	Anonymised case name	Sex	Age	Disability	Keyword summary	Summary of case	Public body	Applicant	DOL	Outcome
1.	*K County Council v SL*	F	20	Mild learning disability	Forced marriage	Investigation of capacity to marry and consent to sexual relations. Subject to a forced marriage protection order and concerns about abuse and control by her father and uncle.	Local authority	Local authority	No	Has capacity. Proceedings withdrawn.
2.	*ML v (1) TL and (2) D County Council*	M	82	Dementia	Domestic abuse	Investigation of capacity for contact with wife. Local authority were refusing for the wife to have contact with him following concerns of abuse by her towards him.	Local authority	Wife of P	Unkn own	ML died before final hearing.
3.	*Z County Council v FY*	F	66	Dementia	Domestic abuse	Investigation of capacity to decide on residence, care and contact. P in residential care but husband wants her to return home. Local authority refusing as believe she	Local authority	Local authority	Yes	Final order. FY lacks capacity to: conduct proceedings, make decisions as to residence, care and contact.

						is at risk of abuse from husband and concerned about their relationship.				
4.	*Y County Council v (1) LC (2) GK (3) SC*	F	23	Autism and mild learning disability	Domestic abuse Forced Marriage	Investigation of capacity to consent to sex and marriage, forced marriage protection order in place and issue over capacity to decide on residence and contact as well (although lives with mother and no concerns raised in that respect). Case brought due to concerns about her relationship with a man, GK, who she married without her family's knowledge.	Local authority	Local authority	No	Final order. LC lacks capacity to: consent to sex, to marry and to litigate. Case ongoing in relation to contact and residence.
5.	*W County Council v ZR*	F	37	Learning disability	Domestic abuse	Investigation of capacity to consent to sex. Local authority concerned about P re-establishing a relationship with a man who had sexually and financially abused her.	Local authority	Local authority	Yes	Proceedings stayed as ZR detained under s3 Mental Health Act 1983.
6.	*C Borough Council v (1) DY (2) B*	F	20	Learning difficulties	Disruptive behaviour	Investigation of capacity to decide on care, residence,	Local authority	Local authority	Yes	Final order. DY lacks capacity to: conduct

	Council					contact, consent to sexual relations and contraception. Concerns about safety, anti-social and disruptive behaviour and poor college attendance. Her association and co-habitation with her partner also a prominent concern in the reason for the case being brought.				proceedings, make decisions as to residence, care and contact.
7.	*A County Council v (1) MT (2) KZ*	M	52	Mild to moderate learning disability	Forced Marriage	Investigation of capacity to consent to sex and marriage, to conduct proceedings, decide on residence and care. No allegations of abuse (by family or others).	Local authority	Local authority	No	Ongoing. Interim decision that MT lacks capacity to: conduct proceedings, to decide on residence and care, to consent to sexual relations and to marry.
8.	*H County Council v XC*	M	24	Learning disability and deafness	Forced marriage	Investigation of capacity to consent to sex and marriage. Forced marriage protection order in place.	Local authority	Local authority	No	Ongoing. Interim decision that XC lacks capacity in all domains.

						No allegations of abuse (by family or others), although XC had been abused in the past.				
9.	*M County Council v EV*	M	21	'Mental health problems'	Forced marriage	Investigation into capacity to litigate, decide on residence, care and contact. Capacity to consent to sexual relations and marriage. Capacity to manage his finances. Concern that his father was going to take him abroad for marriage against his will, forced marriage protection order in place.	Local authority	Local authority	No	Final order. EV lacks capacity in all domains.
10.	*T City Council v CY*	F	49	Mild to moderate learning disability, emotionally unstable personality disorder	Relationship with partner	Investigation into capacity to decide matters of contact, care and residence. Concerns about exploitation as alleged that she sells her belongings and sex for alcohol. However, sexual capacity not investigated on basis that she was not in a	Local authority	Local authority (on basis that CY objected to her DOL)	Yes	Final order. CY lacks capacity to: conduct proceedings, decide on residence and care. She does have capacity to decide on contact.

						sexual relationship.				
11.	*J Council v RK*	M	38	Down's Syndrome and learning disability	Alleged abuse by wife (on basis of lack of capacity)	Investigation of capacity to decide on sexual relations and to receive fertility treatment. Safeguarding referral came from fertility consultant that P may be being sexually abused by his wife on basis that he lacks capacity to consent to sex with her.	Local authority	Local authority	No	Transferred to High Court judge for final hearing as case concerns consent to medical treatment. Awaiting expert evidence and final resolution at time of research end.
12.	*K County Council v MW*	F	20	Learning disability	Forced marriage	Investigation of capacity to conduct proceedings, consent to marriage and consent to sexual relations. Also subject to forced marriage protection order as concerns that she puts herself at risk with men and may travel abroad to marry.	Local authority	Local authority	No	Ongoing. Interim finding that MW had capacity in relation to sex but lacked capacity in relation to marriage.
13.	*N County Council v (1) GI and (2) DQ*	F	62	Korsakoff's syndrome, personality disorder, depressiv	Domestic abuse	Investigation of capacity to decide on contact, care and residence. At risk of domestic violence from her husband. There	Local authority	Local authority	Yes	Ongoing. Interim findings of incapacity in all domains.

				e disorder and cerebral atrophy		were previous court proceedings that resulted in declarations that she has capacity.				
14.	*N County Council v CA*	M	57	‘Low intelligence’	Sexual offences	Investigation of capacity to consent to sex and marriage. P in a relationship with a female resident at care home and he has a history of violence against women. Therefore local authority has concerns about the relationship.	Local authority	Local authority	Yes	Ongoing. Interim declaration that CA: lacks capacity to conduct proceedings; but has capacity to consent to sexual relations. Separate proceedings alongside considering CA’s partner (NF)’s capacity to make decisions about residence and care, capacity to marry in the future, capacity to consent to sexual relations, capacity to make decisions about contraception and capacity to

										decide what contact to have with other relevant individuals.
15.	*YS v E District Council*	M	52	Heavy alcohol consumption and brain injury	Sexual offences	P challenged his deprivation of liberty under s21A MCA. Investigation of capacity for contact, care, residence and treatment. P was released to a care home following discharge from prison following allegations he had committed sexual offences at previous residential placement.	Local authority	P	Yes	Ongoing. Interim declaration that YS lacks capacity in all domains. At end of research transfer of placement was due to take place with further review 4 months after date of order.
16.	*OD v R City Council*	M	46	Mild learning disability and schizophrenia	Sexual offences	Investigation of capacity to decide on care, residence and contact. Has history of sex offences against brother and women. Being treated as if lacks capacity for sexual relations.	Local authority	P	Yes	Order that OD lacks capacity in all domains.
17.	*P County Council v (1) SE (2) TM*	F	80	Dementia	Domestic abuse	Investigation of capacity for care, residence, contact and	Local authority	Local authority	Yes	Final order. SE lacks capacity to: conduct

						sexual relations. Alleged that partner/carer not looking after her properly.				proceedings, make decisions about care and residence and manage her property and affairs. Capacity evidence indicated she does not lack capacity to decide on contact and sexual relations.
18.	*V Borough Council v AY*	M	35	Significant learning disability, autism and sensory processin g disorder	Domestic abuse	Investigation of capacity to decide on residence. Allegations that P suffers serious abuse at home from family members and related allegations that P's family members involved in other criminality including paedophile ring.	Local authority	Local authority	Yes	Order that AY lacks capacity to: decide where to live and decide on matters of care and support. Order that it is in AY's best interests to have contact with his mother and any other members of extended family in accordance with wishes and

										feelings.
19.	*P CCG v QB*	M	43	Mild learning disability and autism	Sexual offences	Investigation of capacity to litigate, decide on residence and care. Alleged vulnerable to sexual assault and financial exploitation. History of paedophilia.	Clinical Commissioning Group	Clinical Commissioning Group	Yes	Order that QB lacks capacity in all domains. Order that it is in QB's best interests to reside at placement and receive care package. Matter stayed until DOLS expires in 2017.
20.	*O City Council v (1) AW (2) FW (3) YW (4) TW*	F	34	Emotionally unstable personality disorder, borderline learning difficulties and paranoid schizophrenia	Domestic abuse Sexual offences	Capacity for contact with family, in particular father and brothers. History of sexual abuse by father and inter-sibling sexual relationships. Family potentially contact P and therefore case brought to court due to these concerns.	Local authority	Local authority	Unknown	Final order. AW lacks capacity to: conduct proceedings and make decisions about contact. Order that it is in P's best interests not to have any contact, either directly or indirectly, with father and brothers.

Table A2: Cases where hearings observed

Anonymised case name	Sex	Age	Disability	Capacity domains reviewed	Was P present	Number of hearings attended in days
K County Council v SL	F	20	Mild learning disability	Marriage, Sex, Proceedings, Travel abroad	Yes	1
Y County Council v (1) LC (2) GK (3) SC	F	23	Autism and mild learning disability	Marriage, Sex, Proceedings, Residence, Contact	No	6
C Borough Council v (1) DY (2) B Council	F	20	Learning difficulties	Care, Residence, Contact, Proceedings, Sex	No	1
H County Council v XC	M	24	Learning disability and deafness	Marriage, Sex, Proceedings	Yes (on second occasion)	2
T City Council v CY	F	49	Mild to moderate learning disability, emotionally unstable personality disorder	Contact, Care, Residence, Proceedings	Yes	1
K County Council v MW	F	20	Learning disability	Marriage, Sex, Proceedings	No	1
OD v R City Council	M	46	Mild learning disability and schizophrenia	Sex, Care, Residence, Contact, Finances	No	1 – but hearing vacated
P County Council v (1) SE (2) TM	F	80	Dementia	Sex, Residence, Care, Contact, Proceedings, Property and affairs	No	1

Table A3: Summary of expert evidence from case files

	Case name	Sex	Age	Disability	Keyword summary	Expert evidence obtained	Manner expert evidence given	Other (professional) evidence	Outcome
1.	*K County Council v SL*	F	20	Mild learning disability	Forced marriage	Psychiatry	Written report	Social work (by way of statement in COP application) General practitioner	Has capacity. Proceedings withdrawn.
2.	*ML v (1) TL and (2) D County Council*	M	82	Dementia	Domestic abuse	Unknown	Unknown	Unknown	ML died before final hearing.
3.	*Z County Council v FY*	F	66	Dementia	Domestic abuse	Unknown	Unknown	Unknown	Final order. FY lacks capacity to: conduct proceedings, make decisions as to residence, care and contact.
4.	*Y County Council v (1) LC (2) GK (3) SC*	F	23	Autism and mild learning disability	Domestic abuse Forced Marriage	Psychiatry Clinical psychology	Written report and oral evidence from two expert witnesses	Social work (by way of statement in COP application)	Final order. LC lacks capacity to: consent to sex, to marry and to litigate. Case ongoing in

									relation to contact and residence.
5.	*W County Council v ZR*	F	37	Learning disability	Domestic abuse	None	N/A	Learning disabilities nurse (by way of statement in COP application)	Proceedings stayed as ZR detained under s3 Mental Health Act 1983.
6.	*C Borough Council v (1) DY (2) B Council*	F	20	Learning difficulties	Disruptive behaviour	Reference to both independent social work report and report of a doctor	Unknown	Unknown	Final order. DY lacks capacity to: conduct proceedings, make decisions as to residence, care and contact.
7.	*A County Council v (1) MT (2) KZ*	M	52	Mild to moderate learning disability	Forced Marriage	Psychiatry	Written report	None	Ongoing. Interim decision that MT lacks capacity to: conduct proceedings, to decide on residence and care, to consent to sexual relations and to marry.
8.	*H County Council v XC*	M	24	Learning disability and deafness	Forced marriage	Clinical psychology	Written report	Social work (by way of statement in COP application)	Ongoing. Interim decision that XC lacks capacity in all domains.

								Sex and relationships counsellor (report on educative work)	
9.	*M County Council v EV*	M	21	'Mental health problems'	Forced marriage	Expert appointed, discipline unknown	Unknown	Unknown	Final order. EV lacks capacity in all domains.
10.	*T City Council v CY*	F	49	Mild to moderate learning disability, emotionally unstable personality disorder	Relationship with partner	Expert appointed, discipline unknown	Written report	Unknown	Final order. CY lacks capacity to: conduct proceedings, decide on residence and care. She does have capacity to decide on contact.
11.	*J Council v RK*	M	38	Down's Syndrome and learning disability	Alleged abuse by wife (on basis of lack of capacity)	Expert appointed, discipline unknown	Unknown	Unknown	Transferred to High Court judge for final hearing as case concerns consent to medical treatment. Awaiting expert evidence and final resolution at time of research end.
12.	*K County*	F	20	Learning	Forced	Clinical	Written report	Social work (by	Ongoing. Interim

	Council v MW			disability	marriage	psychology		way of statement in COP application) Relationship and sexual health counsellor	finding that MW had capacity in relation to sex but lacked capacity in relation to marriage.
13.	*N County Council v (1) GI and (2) DQ*	F	62	Korsakoff's syndrome, personality disorder, depressive disorder and cerebral atrophy	Domestic abuse	Unknown	Unknown	Unknown	Ongoing. Interim findings of incapacity in all domains.
14.	*N County Council v CA*	M	57	'Low intelligence'	Sexual offences	Unknown	Unknown	Unknown	Ongoing. Interim declaration that CA: lacks capacity to conduct proceedings; but has capacity to consent to sexual relations. Separate proceedings alongside considering CA's partner (NF)'s capacity to make

									decisions about residence and care, capacity to marry in the future, capacity to consent to sexual relations, capacity to make decisions about contraception and capacity to decide what contact to have with other relevant individuals.
15.	*YS v E District Council*	M	52	Heavy alcohol consumption and brain injury	Sexual offences	Unknown	Unknown	Unknown	Ongoing. Interim declaration that YS lacks capacity in all domains. At end of research transfer of placement was due to take place with further review 4 months after date of order.
16.	*OD v R City Council*	M	46	Mild learning disability and	Sexual offences	Psychiatry	Written report	Unknown	Order that OD lacks capacity in

				schizophrenia					all domains.
17.	*P County Council v (1) SE (2) TM*	F	80	Dementia	Domestic abuse	Psychiatry	Written report	Independent social work Independent Mental Capacity Advocate	Final order. SE lacks capacity to: conduct proceedings, make decisions about care and residence and manage her property and affairs. Capacity evidence indicated she does not lack capacity to decide on contact and sexual relations.
18.	*V Borough Council v AY*	M	35	Significant learning disability, autism and sensory processing disorder	Domestic abuse	None	N/A	Social work (by way of statement in COP application)	Order that AY lacks capacity to: decide where to live and decide on matters of care and support. Order that it is in AY's best interests to have contact with his mother and any other members of extended

									family in accordance with wishes and feelings.
19.	*P CCG v QB*	M	43	Mild learning disability and autism	Sexual offences	Psychiatry	Written report	Unknown	Order that QB lacks capacity in all domains. Order that it is in QB's best interests to reside at placement and receive care package. Matter stayed until DOLS expires in 2017.
20.	*O City Council v (1) AW (2) FW (3) YW (4) TW*	F	34	Emotionally unstable personality disorder, borderline learning difficulties and paranoid schizophrenia	Domestic abuse Sexual offences	None	N/A	Social work (by way of statement in COP application)	Final order. AW lacks capacity to: conduct proceedings and make decisions about contact. Order that it is in P's best interests not to have any contact, either directly or indirectly, with father and brothers.

APPENDIX TWO

SEMI STRUCTURED INTERVIEW SCHEDULE

Introductory and background questions

1. Please can you provide me with your full name, current position and brief employment background.
2. Can you describe your typical caseload including how many people you are responsible for at any one time?

Questions around sexual activity and marriage cases

3. Have you got any cases at the moment or have you had previously any cases where you have had concerns around the adult engaging in sexual activity or marriage? If so, can you tell me a bit about those cases and what your concerns were?
4. What, if anything, did you do about your concerns?
5. Did you see the adult as vulnerable? If so, what do you mean by this?
6. What is your perspective on the position of men and women with learning or mental disabilities engaging in sexual activity?

Questions around the Court of Protection

7. Are you familiar with the Court of Protection and the inherent jurisdiction of the High court?
8. Have you ever had any cases which have gone to court? If yes, ask for details.
9. What were your experiences of the court process and did you think it was positive

for the subjects of the proceedings? For example, were they asked to give evidence and did you think they were sufficiently involved in the process?

10. Would or have you ever considered referring a case to Court? If yes why, if no why not?
11. What criteria do you think are relevant in identifying which cases can and should go to a court for a decision about a vulnerable adult?

Questions around supported decision making

12. Are you familiar with the concept of supported decision making? If so, please tell me your understanding of it. If not then I can provide you with my understanding.
13. What do you think of the concept of support being used in all scenarios of adult protection instead of court authorised interventions?
14. To what extent is supported decision making something you currently use in practice?
15. Do you feel that support as an approach to adult protection can get the same results as Court interventions? And what results do you want to achieve?

Concluding questions

16. Generally, do you have any comments or concerns about how the law relating to vulnerable adults operates? Whether the MCA, IJ or Care Act?
17. Have you always worked with vulnerable adults or have you worked in any other areas of social care?
18. Do you think there are many differences?
19. Do you have any questions for me?

APPENDIX THREE

SOCIAL WORK INTERVIEW PARTICIPANT INFORMATION SHEET AND CONSENT FORM

Social worker interview participant information sheet

A critical analysis of the test for mental capacity: autonomy, sexual activity and supported decision making

Aims of the research

This project, conducted by Jaime Lindsey (PhD candidate at the University of Birmingham), and supervised by Professor Rosie Harding (Professor of Law and Society at the University of Birmingham), explores the extent to which the current legal and social approach to mental capacity appropriately supports the autonomy of those who experience mental disabilities (this covers adults with learning disabilities, mental health issues and any other issue which may lead to an adult lacking mental capacity).

The study is focusing on the current legal framework, both in terms of the Mental Capacity Act 2005 (MCA) and the Inherent Jurisdiction of the High Court, which allows courts to intervene in the lives of vulnerable adults and adults who lack capacity in their "best interests". The research is particularly considering the issue of capacity to consent to sexual activity as this draws out some of the most challenging legal and ethical issues, but social workers with wider experience of using the MCA in welfare decision making are still encouraged to participate.

The study is also concerned with finding out how the concept of "vulnerability" is employed in this context and the researcher is interested to find out why social

workers think particular cases reach the court room when many other, similar cases do not.

The research will also be examining whether social work professionals have any particular perspectives or thoughts on the implementation of supported decision making as a way of enhancing the autonomy for those with reduced mental capacity. Data obtained in the interviews will also build upon observational research that the researcher is undertaking in the Court of Protection.

Invitation

You are being invited to consider taking part in the research study on the basis that you are a social worker who works with individuals who may be subjected to legal interventions in their lives under the MCA or Inherent Jurisdiction of the High Court.

Before you decide whether or not you wish to take part, it is important for you to understand why the research is being done and what it will involve. Please do take the time to read this information sheet carefully. Ask the researcher if there is anything that is unclear or if you would like more information.

Engagement in this particular aspect of the study involves participating in an interview with the researcher. The interview will last for approximately forty-five minutes, although it may take longer, depending on how much you would like to say.

Do I have to take part?

You are free to decide whether or not you wish to take part.

If I take part, what do I have to do?

You will be interviewed at your offices in relation to your experiences of dealing with individuals who potentially lack capacity to make health and welfare decisions.

Prior to participation, you will be asked to sign a copy of the enclosed consent form.

What are the benefits of taking part?

Participating in this research allows you to directly contribute to original research being conducted into a new and developing area of health and social care law, as well as enabling you to reflect upon your own practice.

What are the risks of taking part?

It is not envisaged that you will be exposed to any risk by partaking in this study. However, the University of Birmingham has in force a Public Liability policy, which provides cover for claims for 'negligent harm', and the activities here are included within that cover.

Am I free to withdraw from the study?

Yes, you are able to withdraw from the study without implication. You may withdraw either verbally during the interview itself, or afterwards by contacting the researcher by e-mail within 6 months of the interview date.

What if there is a problem?

If you have a concern about any aspect of this study, you should contact the researcher using the details set out below. She will do her best to answer your questions.

If you remain unhappy about the research and/ or wish to raise a complaint about any aspect of the way that you have been approached or treated during the course of

the study please write to Professor Rosie Harding, also at Birmingham Law School. You may alternatively contact her by e-mail at [redacted] or by phone on [redacted]

How will information about me be used?

The interviews will be audio-recorded. Upon their completion, the researcher will personally transcribe them. All potentially identifying data will be removed during the transcription process.

The researcher will prepare a summary of findings that will be presented at conferences relating to gender and health and social care law, as well as published in journal articles or books. The findings will also be used in order to produce the researcher's PhD thesis. Quotes from the hearings may be used in conjunction with pseudonyms, if you consent to this.

Who will have access to information about me?

Everything said within the interview will be kept confidential. Your confidentiality will be protected at all times, both during and after this study. Only the researcher will hear the entirety of the audio recording of your interview, although she may play excerpts from it to her supervisor. If you consent, audio recordings and transcripts will be retained for a period of 10 years as per the University of Birmingham code of practice on research. If you do not consent to this storage, audio recordings and transcripts will be destroyed at the end of this research project, when the researcher no longer needs access to the data.

The researcher will ensure that no identifiable data relating to you, your service users or any other party is published or otherwise shared.

Who is funding the research?

The researcher's PhD is being funded by way of a scholarship at Birmingham Law School.

Will I receive any feedback after the interview?

The researcher will seek to obtain your e-mail address, which she will subsequently keep separately from your interview data. Once the project is finished, the researcher will e-mail you with a summary of the findings.

Contact for further information

If you have any questions, please contact Jaime Lindsey by e-mail at . You can also write to her at Birmingham Law School, University of Birmingham, Edgbaston, Birmingham, B15 2TT. You can also contact Professor Rosie Harding by e-mail at or by phone on

Consent form – social work interview

Title of project: A critical analysis of the test for mental capacity: autonomy, sexual activity and supported decision-making
Name of researcher: Jaime Lindsey (supervised by Professor Rosie Harding)

Please initial each box to confirm whether or not you agree:

		Yes	No
1	I confirm that I have read and understand the information sheet for the above study entitled 'Social work interview participant information sheet' and have had the opportunity to ask questions.	☐	☐
2	I understand that my participation is voluntary and that I am free to withdraw at any time within 6 months of the date of this consent form.	☐	☐
3	I agree to take part in this study.	☐	☐
4	I agree to my interview with the researcher being digitally recorded.	☐	☐
5	I understand that the data collected about me during this study will be anonymised before it is submitted for publication.	☐	☐
6	I agree that anonymised quotes can be used.	☐	☐
7	I agree that audio recordings may be confidentially stored for 10 years	☐	☐
8	I agree that an anonymised transcript of the interview may be confidentially stored for 10 years	☐	☐
9	I agree to my identifiable data being transferred to, stored and analysed by the University of Birmingham	☐	☐

____________________ ____________________ ____________________

Name of participant Date Signature

____________________ ____________________ ____________________

Researcher Date Signature

APPENDIX FOUR

CASE FILE REVIEW TEMPLATE

Research Project: A critical analysis of the test for mental capacity: autonomy, sexual activity and supported decision making

Contact details

Case number:

Case name:

Details about P

Brief summary of the case/reasons why the case is being brought:

Gender:

Age:

Disability:

Marriage status:

Other relevant data (may include race, sexual orientation):

Procedural History

Was Rule 3A used and if so what order was made?

Did P provide written or oral evidence in advance of the final hearing?

APPENDIX FIVE

HMCTS APPROVED TEMPLATE COVER LETTER

UNIVERSITY OF BIRMINGHAM

Our Ref: [INSERT CASE NUMBER]

Your Ref: [INSERT]

[INSERT PARTY CONTACT DETAILS]

Dear [INSERT NAME]

[INSERT CASE NUMBER AND ANONYMISED CASE NAME]

I write to seek your consent to participate in a research project which I am carrying out with the approval of HMCTS, the Ministry of Justice and the Court of Protection. Please read the detailed information about the research which is contained within the enclosed participant information sheets. In summary, I am seeking your consent to attend and observe the hearing in this case scheduled for [INSERT DATE].

If you are a professional representative of one of the parties in this case, I should be grateful if you would also seek the consent of your client to this research. If you (and, if applicable, your client) decide to take part, please return the signed consent form in advance of the hearing preferably by email: or by post: Jaime Lindsey, University of Birmingham, School of Law, Edgbaston, B15 2TT. If you do not

wish to take part then please let me know in advance as if I do not hear from you before the hearing, I may also seek your consent on the day.

Please do not hesitate to contact me directly if you have any questions or concerns about the research. Otherwise I look forward to hearing from you.

Yours sincerely

Jaime Lindsey

Enc. Participant Information sheets (simplified and non-simplified)

Consent forms (simplified and non-simplified)

APPENDIX SIX

OBSERVATIONAL PARTICIPANT INFORMATION SHEETS (NON-SIMPLIFIED AND SIMPLIFIED) AND CONSENT FORMS (NON-SIMPLIFIED AND SIMPLIFIED)

Observational research participant information sheet
A critical analysis of the test for mental capacity: autonomy, sexual activity and supported decision making

Aims of the research

This project, conducted by Jaime Lindsey (PhD candidate at the University of Birmingham and practising solicitor), and supervised by Professor Rosie Harding (Professor of Law and Society at the University of Birmingham), explores the extent to which the current legal approach to mental capacity appropriately supports the autonomy of those who experience mental disabilities.

The study is focusing on the current legal framework, both in terms of the Mental Capacity Act 2005 (MCA) and the Inherent Jurisdiction of the High Court, which allows courts to intervene in the lives of vulnerable adults and adults who lack capacity in their “best interests”. The research is primarily focussed on cases in the context of capacity to consent to sexual activity, capacity to marry and capacity to decide on matters of contact as these cases draw out some of the most challenging legal and ethical issues relating to autonomy and supported decision making.

The observational research will also involve considering the extent to which the subject of the proceedings is involved in the court process and the language used in the court room which may point to underlying presumptions surrounding autonomy and the mentally disabled. Data obtained in the observational research will contribute to interviews that the researcher is also carrying out with social workers practising in this field.

Invitation

You are being invited to consider taking part in the research study on the basis that you are a person involved in Court of Protection proceedings relevant to the above study.

Before you decide whether or not you wish to take part, it is important for you to understand why the research is being done and what it will involve. Please do take the time to read this information sheet carefully. Ask the researcher if there is anything that is unclear or if you would like more information.

Do I have to take part?

No. You are free to decide whether or not you wish to take part.

If I take part, what do I have to do?

Prior to participation, you will be asked to sign a copy of the enclosed consent form. You will also be expected to liaise with your client (if a solicitor) to obtain their consent for the researcher to observe.

What are the benefits of taking part?

Participating in this research allows you to directly contribute to original research being conducted into a new and developing area of health and social care law, as well as enabling you to reflect upon your own practice.

What are the risks of taking part?

It is not envisaged that you will be exposed to any risk by partaking in this study.

Am I free to withdraw from the study?

Yes, you are able to withdraw from the study without implication. You may withdraw either verbally during the observation itself, or afterwards by contacting the researcher by e-mail within 6 months of the date of the consent form.

What if there is a problem?

If you have a concern about any aspect of this study, you should contact the researcher using the details set out below. She will do her best to answer your questions.

If you remain unhappy about the research and/ or wish to raise a complaint about any aspect of the way that you have been approached or treated during the course of the study please write to Professor Rosie Harding, also at Birmingham Law School. You may alternatively contact her by e-mail at or by phone on .

How will information about me be used?

The researcher will make notes during her observation of the Court proceedings. Upon completion, the researcher will personally review these notes and all potentially identifying data will be removed.

The researcher will prepare a summary of findings that will be presented at conferences relating to gender and health and social care law, as well as published in a journal article. The findings will ultimately be used in order to produce the researcher's PhD thesis. Quotes from the hearings may be used in conjunction with pseudonyms, if you consent to this.

Who will have access to information about me?

Everything said within the observation will be kept confidential. Your confidentiality will be protected at all times, both during and after this study. If you consent, transcripts will be retained for a period of 10 years as per the University of Birmingham code of practice on research. If you do not consent to this storage, transcripts will be destroyed at the end of this research project, when the researcher no longer needs access to the data.

The researcher will ensure that no identifiable data relating to you, your service users or any other party is published or otherwise shared.

Who is funding the research?

The researcher's PhD is being funded by way of a scholarship at Birmingham Law School.

Will I receive any feedback?

The researcher will seek to obtain your e-mail address and once the project is finished, the researcher will e-mail you with a summary of the findings.

Contact for further information

If you have any questions, please contact Jaime Lindsey by e-mail at You can also write to her at Birmingham Law School, University of Birmingham, Edgbaston, Birmingham, B15 2TT. You can also contact Professor Rosie Harding by e-mail at or by phone on

Participant information sheet

Research title: Does English Law support people with mental disabilities?

We are asking if you would join in a research project. Research is a way of answering a question or problem.

In this research we are looking into the law's approach to mental capacity and whether it supports people with mental or learning disabilities to live an independent life. The research is mainly looking at cases relating to sex, marriage and contact with friends and family.

What you are being asked?

Before any research is allowed to happen, it has to be checked by a group of people called a Research Ethics Committee. They make sure that the research is fair. Your project has been checked by the University of Birmingham Research Ethics Committee.

You are invited to take part on the basis that the Court is considering making decisions about your life and we want to know how and why the Court does this. The researcher would like to know how much you are involved in the Court process and how the Court takes into account your feelings and wishes about sex, marriage, contact with friends or family.

Before you decide if you want to join in, it's important to understand why the research is being done and what it will involve for you. So please consider this leaflet carefully. Talk to your family, friends or social worker if you want to.

The researcher will not contact or speak to you directly. She will be sitting in the Court room and writing notes about what she sees.

Do I have to take part?

No. You can decide whether or not to take part. If you do wish to take part you will be asked to sign a copy of the enclosed consent form.

What are the benefits of taking part?

Taking part in this research allows you to contribute to original research in a new and developing area of health and social care law. The researcher's aim is to improve the law in this area for people living with mental disabilities.

What are the risks of taking part?

We do not believe that you will be exposed to any risk in taking part in this research.

Am I free to withdraw from the research?

Yes, you are able to withdraw either by saying this to the researcher or your friends/family/social worker in the Court room or afterwards by contacting the researcher by e-mail within 6 months of the date of the consent form.

Who is conducting the project?

This project, conducted by Jaime Lindsey (PhD candidate at the University of Birmingham and practising solicitor), and supervised by Professor Rosie Harding (Professor of Law and Society at the University of Birmingham),

What if there is a problem?

If you have any problems with the research you should contact the researcher using the details set out below or speak to somebody that you trust.

If you remain unhappy about the research and/or wish to raise a complaint please write to Professor Rosie Harding, also at Birmingham Law School. You may alternatively contact her by e-mail at [redacted] or by phone on [redacted]

How will information about me be used?

The researcher will make notes on her computer while sitting in the Court room. The researcher will not use your name or any other information that another person could use to identify you.

The researcher will prepare a summary of findings that she will use in her work. Quotes of what you or others have said may also be used in conjunction with fake names, if you agree to this.

Who will have access to information about me?

Everything said within the observation will be kept confidential. This means that only the researcher will know that the information is about you. Your confidentiality will be protected at all times, both during and after this study. If you consent, the typed up notes will be kept for 10 years. If you do not consent to this storage, the notes will be destroyed at the end of this research project, when the researcher no longer needs access to the data.

Who is funding the research?

The researcher's PhD is being funded by way of a scholarship at Birmingham Law School.

Will I receive any feedback?

If you would like to you can provide the researcher with your contact details and once the project is finished the researcher can contact you with a summary of the findings.

Contact for further information

If you have any questions, please contact Jaime Lindsey by e-mail at . You can also write to her at Birmingham Law School, University of Birmingham, Edgbaston, Birmingham, B15 2TT. You can also contact Professor Rosie Harding by e-mail at or by phone on

Consent form – observational research

Title of project: A critical analysis of the test for mental capacity: autonomy, sexual activity and supported decision making

Name of researcher: Jaime Lindsey (supervised by Professor Rosie Harding)

Please tick box:

		Yes	No
1	I confirm that I have read and understand the information sheet for the above study entitled 'Observational research participant information sheet' and have had the opportunity to ask questions.	☐	☐
2	I understand that my participation is voluntary and that I am free to withdraw at any time within 6 months of the date of this consent form.	☐	☐
3	I agree to take part in this study.	☐	☐
4	I understand that the data collected about me during this study will be anonymised before it is submitted for publication.	☐	☐
5	I agree that anonymised quotes can be used.	☐	☐
6	I agree that any anonymised notes of the proceedings may be confidentially stored for 10 years	☐	☐

________________________	____________________	______________________
Name of participant	Date	Signature
________________________	____________________	______________________
Researcher	Date	Signature

Consent form

Title of project: Does English Law support people with mental disabilities?

Name of researcher: Jaime Lindsey (supervised by Professor Rosie Harding)

Please circle:

Do you understand what this project is about?	Yes / No
Have you asked all the questions you want?	Yes / No
Have you had your questions answered in a way you understand?	Yes / No
Do you understand it's OK to stop taking part at any time?	Yes / No
Are you happy for the researcher to use the information for her project?	Yes / No
Are you happy to take part?	Yes / No

If any answers are "no" or you don't want to take part, don't sign your name! If you do want to take part, you can write your name below:

______________________	________________	____________________
Name of participant	Date	Signature
______________________	________________	____________________
Researcher	Date	Signature

Please tick the box if you are happy for the researcher to keep

the information for 10 years after her project is finished ☐

APPENDIX SEVEN

TABLE OF REPORTED CASES

Table A4: Review of 2016 reported cases on BAILII at 13 September 2017

	Case name	Court	Judge	Level of Judge	Date	Summary
1.	*Re A*	London Court of Protection	Senior Judge Lush	Circuit Judge	12 January 2016	Contested application for property and affairs deputy
2.	*Birmingham City Council v D (by his litigation friend, the official solicitor) and W*	Royal Courts of Justice	Mr Justice Keehan	High Court Judge	21 January 2016	Deprivation of liberty for 16 year old
3.	*CS (Termination of Pregnancy)*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	22 January 2016	Termination of pregnancy
4.	*Re KJP*	London Court of Protection	Senior Judge Lush	Circuit Judge	14 January 2016	Property and affairs deputyship
5.	*North Yorkshire County Council, A Clinical Commissioning Group v MAG & Anor*	The Law Courts Newcastle upon Tyne	Mr Justice Cobb	High Court Judge	18 January 2016	Deprivation of liberty
6.	*PJV v (1) The Assistant Director adult social care Newcastle city council (2) The criminal injuries compensation authority*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection)	22 January 2016	Deputyship over criminal injuries compensation award
7.	*Re RP*	London Court of Protection	Senior Judge Lush	Circuit Judge	5 January 2016	Deputyship for property and affairs
8.	*Re SH*	London Court of Protection	Senior Judge Lush	Circuit Judge	8 January 2016	Revocation of Lasting Powers of Attorney for property and affairs and health and welfare
9.	*Re Z & Ors*	The Law Courts, Newcastle upon Tyne	Mr Justice Cobb	High Court Judge	18 January 2016	Capacity for residence, care, contact and litigation

10.	*Re AH*	London Court of Protection	Senior Judge Lush	Circuit Judge	2 February 2016	Revocation of Lasting Power of Attorney for property and affairs
11.	*Re Clarke*	Royal Courts of Justice	Mr Justice Jackson	High Court Judge	22 February 2016	Property and affairs deputyship
12.	*PB v RB & Anor*	London Court of Protection	District Judge Eldergill	District Judge	26 February 2016	Best interests as to residence
13.	*Re W (Medical treatment: anorexia)*	Not listed	Mr Justice Jackson	High Court Judge	26 February 2016	Medical treatment and care in respect of anorexia
14.	*Re FH*	London Court of Protection	Senior Judge Lush	Circuit Judge	1 March 2016	Deputy for property and affairs
15.	*JM & Ors*	Not listed	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection)	10 March 2016	Deprivation of liberty and Re X procedural issues
16.	*NHS Trusts v C (Medical Treatment and Reporting Restrictions Order)*	Royal Courts of Justice	Mrs Justice Theis DBE	High Court Judge	1 March 2016	Medical treatment in respect of pregnancy
17.	*Re QQ*	Northampton County Court	Mr Justice Keehan	High court Judge	7 March 2016	Advance decision and capacity in respect of medical treatment
18.	*The London Borough of Southwark v KA (Capacity to Marry)*	Royal Courts of Justice	Mrs Justice Parker	High Court Judge	23 March 2016	Capacity to decide on care, consent to sex, marriage and litigation
19.	*Re VE*	Not listed	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection)	10 March 2016	Appointment as 3A representative

20.	*Re YW*	London Court of Protection	Senior Judge Lush	Circuit Judge	24 March 2016	Revocation of lasting power of attorney for property and affairs
21.	*Re O*	Royal Courts of Justice	Mr Justice Hayden	High Court Judge	25 April 2016	Withdrawal of medical treatment
22.	*V v Associated Newspapers Limited & Ors*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection)	25 April 2016	Reporting restrictions order
23.	*Re W*	The Law Courts, Islington Street, Swindon	District Judge Ralton	District Judge	14 April 2016	Deprivation of liberty
24.	*A County Council v AB & Ors*	Not listed	His Honour Judge Rogers	Circuit Judge	31 May 2016	P's participation in proceedings
25.	*Cambridge University Hospitals NHS Foundation Trust v BF*	Royal Courts of Justice	Mr Justice Macdonald	High Court Judge	18 May 2016	Consent to medical treatment
26.	*Re RM*	London Court of Protection	Senior Judge Lush	Circuit Judge	12 May 2016	Revocation of Lasting Power of Attorney for property and affairs and health and welfare
27.	*Re S*	Royal Courts of Justice	Mr Justice Hayden	High Court Judge	16 May 2016	Withdrawal of medical treatment
28.	*Staffordshire County Council v SRK & Anor*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection	24 May 2016	Deprivation of liberty
29.	*University College London Hospitals NHS Foundation Trust v G*	Not listed	Mr Justice Jackson	High Court Judge	27 May 2016	Reporting restrictions order

30.	*Re DB*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	17 June 2016	Habitual residence
31.	*Devon County Council v Martins & Anor*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	10 June 2016	Capacity and best interests in relation to residence
32.	*M v Press Association*	Royal Courts of Justice	Mr Justice Hayden	High Court Judge	23 June 2016	Reporting restrictions order
33.	*Re R*	London Court of Protection	Senior Judge Lush	Circuit Judge	23 June 2016	Deprivation of liberty
34.	*V & Associated Newspapers Ltd & Ors*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection	14 June 2016	Costs orders
35.	*Re AG*	Not listed	District Judge Bellamy	District Judge	6 July 2016	Capacity for care and residence and deprivation of liberty
36.	*Re D*	London Court of Protection	Senior Judge Lush	Circuit Judge	1 July 2016	Executor for statutory will
37.	*The Friendly Trust's Bulk Application*	London Court of Protection	District Judge Eldergill	District Judge	29 July 2016	Deputies for property and affairs
38.	*Mrs P v Rochdale Borough Council & Anor*	Manchester Civil Justice Centre	District Judge Matharu	District Judge	18 July 2016	Deprivation of liberty, care, residence and deputyship for property and affairs
39.	*Re A (A patient) (No 2)*	Royal Courts of Justice	Sir Munby P	High Court Judge (President of the Court of Protection)	18 August 2016	Procedure, publication of judgment and permission to appeal

40.	*Re A (A patient)*	Royal Courts of Justice	Sir Munby P	High Court Judge (President of the Court of Protection)	10 August 2016	Property and affairs and associated applications
41.	*BHCC v KD*	Brighton Court of Protection	His Honour Judge Farquhar	Circuit Judge	30 August 2016	Care and deprivation of liberty
42.	*Re M*	Royal Courts of Justice	Mr Justice Newton	High Court Judge	18 August 2016	Contempt of court application
43.	*RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS)*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	4 August 2016	Deprivation of liberty and relevant person's representatives
44.	*AN NHS Trust v HN*	Not listed (out of hours application)	Mr Justice Jackson	High Court Judge	23 September 2016	Consent to medical treatment
45.	*A Local Authority v X*	Royal Courts of Justice	Mr Justice Holman	High Court Judge	25 October 2016	Capacity to decide on care and residence
46.	*Re Clarke*	Preston Combined Court Centre	Mr Justice Jackson	High Court Judge	11 October 2016	Jurisdiction of Court of Protection
47.	*Briggs v Briggs v Ors*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection	24 November 2016	Withdrawal of medical treatment, preliminary issue
48.	*Re J (A Protected Party)*	Not listed	Her Honour Judge Walden-Smith	Circuit Judge	18 November 2016	Authority for deputy to execute a statutory will and transfer land

49.	*Lincolnshire County Council v JK*	Nottingham Regional Court	His Honour Judge Rogers	Circuit Judge	17 November 2016	Capacity to decide on care, residence and litigation
50.	*N (Deprivation of liberty challenge)*	Not listed	Mr Justice Jackson	High Court Judge	21 November 2016	Deprivation of liberty
51.	*Newcastle City Council v TP & Anor (Capacity)*	The Law Courts, Newcastle upon Tyne	Her Honour Judge Moir	Circuit Judge	25 November 2016	Capacity for care, contact, residence and litigation, deprivation of liberty
52.	*Newcastle City Council v TP & Anor (Judgment findings)*	The Law Courts, Newcastle upon Tyne	Her Honour Judge Moir	Circuit Judge	22 November 2016	Capacity for care, contact, residence and litigation, deprivation of liberty – factual findings
53.	*Newcastle-Upon-Tyne City Council v TP & Anor (Best Interets of TP No. 1)*	The Law Courts, Newcastle upon Tyne	Her Honour Judge Moir	Circuit Judge	22 November 2016	Capacity for care, contact, residence and litigation, deprivation of liberty – best interests
54.	*Newcastle-Upon-Tyne City Council v TP & Anor (Capacity of TP No. 2)*	The Law Courts, Newcastle upon Tyne	Her Honour Judge Moir	Circuit Judge	25 November 2016	Capacity for care, contact, residence and litigation, deprivation of liberty
55.	*Newcastle-Upon-Tyne City Council v TP & Anor (Final No. 3)*	The Law Courts, Newcastle upon Tyne	Her Honour Judge Moir	Circuit Judge	21 December 2016	Best interests as to residence
56.	*Watt v ABC*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection	2 November 2016	Property and affairs deputy
57.	*X (No: 2. Declaration that X has capacity)*	Royal Courts of Justice	Mr Justice Holman	High Court Judge	21 November 2016	Capacity to decide on care and residence

58.	*Briggs v Briggs & Ors*	Royal Courts of Justice	Mr Justice Charles	High Court Judge (vice-President of the Court of Protection	20 December 2016	Withdrawal of medical treatment
59.	*Cheshire & Wirral Partnership NHS Foundation Trust v Z*	Royal Courts of justice	Mr Justice Hayden	High Court Judge	30 December 2016	Capacity to decide on care and treatment in relation to anorexia
60.	*MR v SR & Anor (Rev 1)*	Royal Courts of Justice	Mr Justice Hayden	High Court Judge	16 December 2016	Costs of proceedings relating to withdrawal of medical treatment
61.	*Newcastle-Upon-Tyne City Council v TP (Best Interests)*	Teeside Combined Court	Her Honour Judge Moir	Circuit Judge	21 December 2016	Best interests in relation to care, residence and contact
62.	*Re CA (Natural Delivery or Caesarean Section)*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	8 December 2016	Capacity to decide on medical treatment (caesarean section)
63.	*Re R (Serious Medical Treatment)*	Royal Courts of Justice	Mr Justice Baker	High Court Judge	14 December 2016	Withdrawal of medical treatment