Analysis

“Neither Midwives Nor Rainmakers” — why DL is wrong

Best interests; Constitutionality; Elderly persons; Human rights; Inherent jurisdiction; Non-molestation orders; Protection of vulnerable adults

The Court of Appeal ruling in DL is authority for a remarkable proposition of law: the High Court has an extensive “inherent jurisdiction” over the lives of adults with mental capacity. This decision is wrong and represents an example of impermissible judicial law-making, which undermines the separation of powers.

What is the inherent jurisdiction? It is subsumed in s.19(2)(b) of the Senior Courts Act 1981:

“(2) Subject to the provisions of this Act, there shall be exercisable by the High Court—
(a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and
(b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision).”

Reading DL brings to mind an earlier judicial debate about the limits of the inherent jurisdiction: The Siskina. That case was about whether a Mareva injunction could issue to freeze a foreign defendant’s assets (namely, proceeds of an insurance policy for a sunken ship), though no cause of action between the ship-owner and cargo-owners arose here. The problem was that, under existing rules of court, the foreign plaintiffs’ underlying claim for damages had to be struck out, leaving only the claim for interim injunctive relief.

Lord Denning M.R. invoked the inherent jurisdiction to approve the injunction as a free-standing legal remedy:

“I ask, why should the judges wait for the Rules Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts: and we can invoke it now to restrain the removal of these insurance moneys. To the timorous souls I would say in the words of William Cowper:

‘Ye fearful saints, fresh courage take,
The clouds ye so much dread
Are big with mercy, and shall break
In blessings on your head.’

2Owners of Cargo Lately Laden on Board the Siskina v Ditos Compania Naviera S4 [1979] A.C. 210. I am grateful to Dr Michael Forde S.C. of the Law Library, Dublin for drawing my attention to this line of authority, and for his comments on earlier drafts of this article. Any errors are mine.
Instead of ‘saints’, read ‘judges’. Instead of ‘mercy’, read ‘justice’. And you will find a good way to law reform.”

But the House of Lords unanimously disagreed, upholding a strong dissent by Bridge L.J. below. He observed:

“… this is a statutory and legislative field in which the court should exercise severe self-restraint to avoid the temptation, under the guise of construction, to engage in what is in fact legislation.”

He regarded Lord Denning M.R.’s approach as wrong in principle:

“… I am clearly of opinion that we should not allow the urgent merits of particular plaintiffs, whom we see in peril of being deprived of any effective remedy, to tempt us to assume the mantle of legislators. The clouds in Lord Denning M.R.’s adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers.”

Lord Diplock stated that, since the transfer to the Supreme Court of Judicature of the entire jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. The statutory power conferred on the High Court to grant injunctive relief, under what was then s.45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, presupposes the existence of a legal or equitable right in respect of which substantive relief could be granted. Absent an actual or threatened invasion of a claimant’s legal or equitable rights, an interlocutory injunction cannot issue.

He also rejected certain policy considerations which led Lord Denning M.R. to conclude that judges ought to be bold enough themselves to extend their powers, saying that it was not for judges to “jump the gun”.

By s.37(1) Senior Courts Act 1981, the High Court’s statutory power to grant injunctions when it appears “just and convenient” was later extended to the grant of final injunctions. Lord Denning M.R. interpreted this to mean that the power was far wider than before, and that The Siskina was effectively overruled. Again, the House of Lords disagreed with him.

In DL, we see judges taking protective measures by means of injunctions and, once again, invoking the inherent jurisdiction as a justification. The problem is the same: courts allowing urgent claims for relief by those who are not, strictly, entitled to it. In seeking to protect adults who are not under a disability, the courts have crossed a line, which defines the ambit of their jurisdiction and powers. It is salutary to recall the constitutional basis upon which judges are empowered to act. Chitty’s Treatise on the Crown’s prerogatives says that our monarchs have

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1 Siskina [1979] A.C. 210 at 236 A–B.
2 Siskina [1979] A.C. 210 at 240 H.
5 Siskina [1979] A.C. 210 at 259B, 260 B–C. The issue of whether courts had jurisdiction to grant Mareva injunctions was not argued before the House of Lords, who did not decide that question. The US Supreme Court has held that it had no power to craft a Mareva remedy: Grupo Mexican de Desarrollo, S.A v Alliance Bond Fund Inc (1999) 527 U.S. 508 at 327–333.
6 Chief Constable of Kent v J’ [1983] Q.B. 34 CA.
delegated their whole judicial powers to the judges of their several courts, which gained a “known and stated jurisdiction,” but whose decisions:

“must be regulated by the certain and established rules of law. It necessarily follows, that even our Kings themselves cannot, without the express sanction of an Act of Parliament, grant any addition of jurisdiction to such courts …”

Chitty also confirms the limits of the Crown’s *parens patriae* powers:

“The King … is entitled … to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.”

The Mental Health Act 1959 was thought to have done away with these *parens patriae* powers, relating to the welfare of adult incompetents, but the courts later got round this by granting declarations under the inherent jurisdiction. Since October 1, 2007, the Mental Capacity Act 2005 has provided for incapacitated adults. It creates a new Court of Protection with jurisdiction over both property and personal welfare. Local authorities use it to take incompetent adults into care.

*DL* begs a fundamental question: what is the source of the power which the High Court now claims over adults with capacity? Is it a residual prerogative power? That seems unlikely. The Ministry of Justice’s recent review of the royal prerogative powers itemises 13 Archaic powers, noting:

“there are some powers which can be described as residual powers relating to small, specific issues or which are a legacy of a time before legislation was enacted in that area. It is unclear whether some of these prerogative powers continue to exist.”

The first Archaic power listed is Guardianship of infants and those suffering certain mental disorders. Others include such esoteric matters as the right to (wild and unmarked) swans and whales as casual revenue.

Munby L.J. has said, extra-judicially, that the judges of the Family Division invented a new jurisdiction to deal with incompetent adults, prior to the advent of the Mental Capacity Act 2005. He has also said that this applies to adults with capacity, citing his own ruling in *SA*, approved in *DL*. Again, one is reminded of Lord Diplock’s opinion of an earlier instance of judicial activism, this time in *Bremer Vulkan*:

“I find myself unable to accept as well-founded the general proposition by Lord Denning M.R. that ‘the High Court has an inherent jurisdiction to supervise the conduct of arbitrators. It is not confined to the statutory powers’. That such a general supervisory power was vested in the High Court had never been asserted until the judgment of the Court of Appeal delivered in June 1979 in *Japan Line Ltd v Aggeliki Charis Compania Maritima SA* (the...
Angelic Grace) [1980] 1 Lloyd’s Rep. 288 at 292, where, although in the result it was not acted upon, the claim that it exists is to be found in the judgment of Lord Denning M.R. himself.”

The course of DL

The case was initiated by a local authority against DL, the adult son of very elderly parents. GRL, his father, was aged 90 and ML, his mother, was aged 85. They all lived together. ML was physically disabled, and received some services from the local authority. It claimed that DL sought to impose terms on which carers could visit the house. It also accused DL of assaulting his parents, and treating them in a very controlling manner. Both parents had capacity to decide whether to take legal action against DL, but declined.

The facts of DL were not established at trial: they were assumed, for the purposes of a preliminary issue about jurisdiction. The local authority had originally gone before the President of the Family Division ex parte, citing the first instance decision of Munby J. in SA. The President described the case as highly unusual. He granted wide-ranging injunctions prohibiting DL from:

- assaulting or threatening to assault GRL or ML;
- preventing GRL or ML from having contact with friends and family members;
- seeking to persuade or coerce GRL into transferring ownership of the current family home;
- seeking to persuade or coerce ML into moving into a care home or nursing home;
- engaging in behaviour towards GRL or ML that is otherwise degrading or coercive, including: stipulating which rooms in the house GRL or ML can use; preventing GRL or ML from using household appliances, including the washing-machine; “punishing” GRL or ML, for example, by making GRL write “lines”; shouting or otherwise behaving in an aggressive or intimidating manner towards them;
- giving orders to care staff;
- interfering in the provision of care and support to ML;
- refusing access to health and social care professionals;
- behaving in an aggressive and/or confrontational manner to care staff and care managers.

It is unclear what evidence was before the court. The legal basis for the local authority’s claim against DL was also unclear, beyond asserting a wish to “protect” the parents from DL, which is not a cause of action. It purported to rely on Local Government Act 1972 s.222, but that does not give councils substantive powers.

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17 Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corp Ltd [1981] AC 909 per Lord Diplock at 979B–C. See also 977D–980D.
18 A Local Authority v DL [2011] 3 W.L.R. 445 at [1].
This was not a case where the authority was acting in aid of the criminal law, or to restrain a public nuisance.

A social care expert later interviewed the parents, but not DL. He considered that they were under DL’s “undue” influence, to the point where their capacity to make balanced and considered decisions was compromised or prevented. He thought that DL’s influence was not so strong that ML was unable to give instructions reflecting her own wishes, though they were subject to DL’s influence, and that GRL had resisted pressure from DL.\(^{20}\)

When the preliminary point was heard, the local authority argued that the European Convention on Human Rights and the 1998 Act required the court to retain the inherent jurisdiction to comply with its obligations, in particular under arts 3 and 8; that the common law has to develop for the positive obligations imposed by the 1998 Act to be given effect, and that if DL’s argument succeeded, there would be a new “Bournewood gap”.\(^{21}\)

Theis J. accepted these arguments, without analysing them in any detail.\(^{22}\) So it is not clear, unfortunately, how the obligations contended for can be derived from any particular ruling of the Strasbourg court, or from any single principle to be found in the jurisprudence.

Theis J. ruled that the High Court’s “inherent jurisdiction to protect adults” (she appears to mean adults generally) had survived the advent of the Mental Capacity Act 2005, and that it had jurisdiction to make orders in respect of both DL’s parents, notwithstanding that one or both of them continued to retain capacity.\(^{23}\) She held:

“its primary purpose is to create a situation where the person concerned 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.”\(^{24}\)

The Court of Appeal dismissed DL’s appeal, invoking “elder abuse” by way of public policy justification.\(^{25}\) McFarlane L.J. described the court’s approach as “facilitative, not dictatorial.”\(^{26}\) Using somewhat colourful language, Maurice Kay L.J. suggested that it would be most unfortunate if judges could not protect people from “unscrupulous manipulation” by an “oppressor.”\(^{27}\)

The court did not address human rights arguments in any depth, though McFarlane L.J., who gave the lead judgment, said:

“Any interference with the right to respect for an individual’s private or family life is justified to protect his health and or to protect his right to enjoy his

\(^{20}\) Using an expert to make delegated findings of fact like this is unorthodox. Undue influence is a doctrine of equitable fraud, developed by courts to relieve parties from transactions into which they have knowingly entered. The usual panacea for undue influence is independent legal advice.

\(^{21}\) DL v A Local Authority [2011] EWHC 1022 (Fam); [2012] 1 F.L.R. 1119 at [35], and see [46(5)–(10)]. The reference to a “Bournewood gap” must allude to HL v United Kingdom (45508/99) (2005) 40 E.H.R.R. 32. The European Court concluded that art.5 was breached when an incompetent adult was detained as an informal patient in a mental hospital. How this is relevant to DL is unclear. Counsel cited Laskey, Jaggard and Brown v United Kingdom (1997) 24 E.H.R.R. 39 and Pretty v United Kingdom (2346/02) (2002) 35 E.H.R.R. 1, cases where individuals sought dispensation from the criminal law (unsuccessfully). He cited no cases where the state intervened after an adult declined to sue a relative.

\(^{22}\) DL v A Local Authority [2012] EWCA Civ 253; [2012] 1 F.L.R. 1119 at [53(6)].

\(^{23}\) GRL had lost capacity by the time of Theis J.’s decision, and was in a residential home.

\(^{24}\) DL v A Local Authority [2012] EWCA Civ 253; [2012] 1 F.L.R. 1119 at [53(7)].

\(^{25}\) DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [63].

\(^{26}\) DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [67].

\(^{27}\) DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [79].
Article 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party.”

Davis L.J. cited Shiloh Spinners29 (a case about whether a court of equity could grant relief against forfeiture of a lease, where the right of entry was equitable), to support an argument that the Mental Capacity Act 2005 did not cut down the inherent jurisdiction of the High Court, in relation to adults with capacity.30 This begs the question of what that jurisdiction was.

The ratio of DL appears to be that the High Court may investigate adults whose ability to make decisions for themselves is, or may be compromised by matters outside the Mental Capacity Act 2005. The court approved Munby J.’s ruling in SA,31 in particular [76]–[77].

The earlier cases of T, C and SA

The court took two of its earlier decisions into account, T32 and C,33 as well as relying heavily on Munby J. in SA. But T has no bearing on the issue. It was about whether the Court of Appeal should give guidance to hospitals on how to react to adult patients’ refusals of life-saving treatment.34 The case concerned an advance directive, the validity of which was disputed.35

C is a severely mentally handicapped man, whose parents had arranged for him to marry in Bangladesh. The case commenced before the 2005 Act came into force. It concluded afterwards. There was argument about where C should live in future and whether this should be dealt with under the inherent jurisdiction, or the new Act.36 It is not clear why this case was thought relevant in DL, as it concerned an obviously incompetent adult: it does not address what power (if any) courts have over competent adults.

So we come to SA. She is of Pakistani Muslim descent, and profoundly deaf. She was assessed as having capacity to marry, but not to litigate. It appears that there was no full argument, because counsel for the applicant local authority, and the solicitor appearing for SA were in agreement.37 Munby J. begins by saying that the case raises novel questions:

“I have before me a vulnerable young woman who has just turned eighteen and has therefore attained her majority. While she was still a child the court had exercised its inherent *parens patriae* and wardship jurisdictions to protect

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28 DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [66]. This is debatable. As Peter Duffy wrote, “it is inconceivable that positive obligations could ever be inherent in an effective respect for Article 8 rights under circumstances in which the State would be justified in interfering with those rights under paragraph 2”: quoted in Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Oxford: Routledge, 2012), p.119.
29 Shiloh Spinners Ltd v Harding [1973] A.C. 691 per Lord Wilberforce at 724H–725D.
30 DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [73]–[74].
31 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867.
32 Re T (Adult: refusal of treatment) [1993] Fam. 95.
34 Re T (Adult: refusal of treatment) [1993] Fam. 95 at 111D.
35 Butler-Sloss L.J. accepted that the issues of capacity and whether a genuine consent was given are separate: *Re T* (Adult: refusal of treatment) [1993] Fam. 95 at 117C–D.
37 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [27], [29].
her from the risk of an unsuitable arranged marriage. The question is whether I have jurisdiction to continue that protection now she is an adult.”

Munby J. concludes: “the inherent jurisdiction in relation to adults can be exercised for the protection of vulnerable adults who do not, as such, lack capacity.”

This contradicts a ruling by Butler-Sloss P., not long before. She had reviewed earlier case law going back to the 18th century, confirming that the inherent jurisdiction was only applied to benefit those under a disability. She concluded: “It is clear that the inherent jurisdiction of the High Court cannot be invoked to protect Ms A who is an adult and not under a disability.” Munby J. cites her ruling, but omits this passage.

Munby J. made a final order intended to last indefinitely, until SA married. It covered such matters as forbidding SA’s parents from harassing her; requiring the tipstaff to give SA’s passport to her solicitor, and not allowing SA to leave the country, unless her solicitor had received a notarised written consent from her.

He also attached powers of arrest to the orders, despite three Court of Appeal authorities (not cited to him) holding that the jurisdiction to attach a power of arrest is a statutory power, which may only be conferred by Parliament, because it affects the liberty of the subject: Re G, Harrison and M-B. Sir Roger Ormerod had described the point in Re G as “constitutionally fundamental.”

Munby J. held that an adult does not have to be vulnerable for the court to investigate him or her, under the inherent jurisdiction. This leads inexorably to the conclusion that any adult could be subject to this jurisdiction, which (he says) is theoretically limitless in its scope, like wardship. He set out whom he meant to include:

- people who are constrained;
- people subject to coercion or undue influence;
- people subject to other disabling circumstances such as: deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs.

“No doubt there are others.”

To support his conclusions, Munby J. cites reams of cases, most of which concern either an incapacitated adult or minors. Two of which, arguably, do not are a decision of Bennett J. in G, and of Singer J. in SK.

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38 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [2]; but note the slippery passage at [37] where Munby J. equates “incompetent adults” with “vulnerable adults.”
39 Re A Local Authority (Inquiry: Restraint on Publication) [2003] EWHC 2746 (Fam); [2004] Fam. 96.
40 Re A Local Authority (Inquiry: Restraint on Publication) [2003] EWHC 2746 (Fam); [2004] Fam. 96 at [62]–[63].
41 Re A Local Authority (Inquiry: Restraint on Publication) [2003] EWHC 2746 (Fam); [2004] Fam. 96 at [64], [66].
42 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [41].
44 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [83].
45 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [45].
46 Re SA (Vulnerable adult with capacity: marriage) [2006] 1 F.L.R. 867 at [78].
48 Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) [2004] EWHC 3202 (Fam); [2005] 2 F.L.R. 230.
G was a woman of 29 with borderline learning disability, with a long history of mental breakdowns and psychosis. Her relationship with her father was difficult. Proceedings were initiated to regulate contact between them, alleging that G lacked capacity. By trial, G had regained capacity.

Professionals feared that, without orders, she would relapse. Bennett J. thought that this would defeat the purpose of the court’s inherent jurisdiction over incapacitated adults. He adopted Thorpe L.J.’s observation in F, a case about an incapacitated adult, that it would be “a sad failure” if the law refused to intervene.

SK involved an ex parte application concerning a young adult abroad. As an ex parte determination, it is not a precedent in any real sense. SK’s litigation friend claimed that SK might be being forced into an unwanted marriage in Bangladesh. Again, the only cases cited in the judgment concern incapacitated adults or minors.

Singer J. accepted that the application was “novel”. He decided that he had power:

“to make orders and to give directions designed to ascertain whether or not she has been able to exercise her free will in decisions concerning her civil status and her country of residence.”

He said he was doing this by analogy with cases under the inherent jurisdiction concerning incapacitated adults. His justification was that “the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values.” He also attached powers of arrest.

**The judge in your living room**

Singer J.’s conflation of jurisdiction with remedy suggests a conceptual confusion, of the kind which the House of Lords tackled in The Siskina. A perceived need for a remedy does not thereby endow judges with power, however worthy their motives.

A problem, which neither Singer J. nor Munby J. addressed, is that Parliament reduced the age of majority for adults from 21 to 18 in 1969. If some quasi-wardship of competent adults were possible, then why had courts not used it in the past? The fact that they did not is, surely, because they could not. It is implausible to suggest that they could indulge in a category error like this, but failed to realise it.

Munby J.’s resort to the equitable doctrines of undue influence and duress (developed in private law litigation) is also contrived, as a pretext for state intervention in adult life.
SK and SA represent judicial attempts to tackle a minority social problem of forced marriage. But they (and G) also illustrate what Professor Jeffrey Goldsworthy calls well-meaning sloppy thinking:

“If rigorous argument is not pursued—if concepts are left conveniently fuzzy, and inferences sufficiently loose and slippery—then [judges] can reach a pragmatically desirable conclusion with a clear conscience.”

The Court of Appeal in DL seems to have found the appellant sufficiently unattractive that dismissing his appeal appeared the right course. But, to those who favour a fairly strict legalism, this ruling and its uncritical endorsement of SA should sound an alarm.

Pace McFarlane L.J., there is nothing “facilitative” about orders dictating what people can say to each other at home. Injunctions are coercive. The use of euphemism in this context only serves to heighten concern over the legitimacy of what is being done.

Cases like DL and SA are troubling because, as Lord Scarman said in Duport Steels Ltd, if the public and Parliament perceive judicial power as being confined by nothing more than what judges think is right, then confidence in the judicial system will be replaced by fear of it becoming arbitrary and uncertain in its application.

An argument, which the appellate decision in DL does not address, is whether the Human Rights Act 1998 empowered the High Court to act as it did. But:

“there is … a canon of construction that Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention.”

Does this Act override this canon, and allow the High Court to exert power over competent adults whenever it appears “just and convenient”: the statutory test for an injunction? This seems unlikely: s.7(1) only gives those with victim status the locus standi to assert human rights in legal proceedings. The Act does not give local authorities a right to regulate the lives of eccentric or wayward adults.

It is unfortunate that DL did not appeal to the Supreme Court: the issues raised by his case are of constitutional importance.

Barbara Hewson
Barrister, Hardwicke, Lincoln’s Inn


57 DL v A Local Authority [2012] EWCA Civ 253; [2012] 3 W.L.R. 1439 at [67], which seems to be immediately contradicted by [68].

58 Duport Steels Ltd v Sirs [1980] 1 W.L.R. 142 per Lord Scarman at 169C–D.