

The Vulnerability Jurisdiction: Equity, *Parens Patriae*, and the Inherent Jurisdiction of the Court

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This paper describes how the English courts, in the “heroic act of judicial invention”, have developed a distinct vulnerability jurisdiction, separate and apart from the ancient jurisdiction of parens patriae, through the exercise of the inherent jurisdiction of the court. This new jurisdiction provides a legal basis and mechanism for the disruption of exploitative relationship contexts. The objective of that disruption is not protection per se (the parens patriae objective), but the safeguarding of individual autonomy rights in situations where those rights cannot be effectively exercised without intervention. The paper concludes with a discussions of implications of the English “invention” in Canadian jurisprudence.

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- I. INTRODUCTION
 - II. PARENS PATRIAE AND THE INHERENT JURISDICTION OF THE COURT
 - A. Parens Patriae
 - B. The Inherent Jurisdiction of the Court
 - III. THE CASES: *IN RE F* AND AFTER
 - A. *In Re F*
 - B. After *In Re F*: Developing the Inherent Jurisdiction
 - IV. RE *SK* TO *DL v A LOCAL AUTHORITY*: DEVELOPMENT OF THE VULNERABILITY JURISDICTION
 - A. *Re SK*
 - B. *DL v Local Authority*
 - V. IMPLICATIONS FOR CANADIAN LAW
 - VI. CONCLUSION
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I. Introduction

This paper describes how the English courts, in a “heroic act of judicial invention”,¹ have developed a distinct *vulnerability jurisdiction*, separate and apart from the ancient jurisdiction of *parens patriae*, through the exercise of the inherent jurisdiction of the court. This new jurisdiction provides a legal basis and mechanism for the disruption of exploitative relationship contexts. The objective of that disruption is not protection *per se* (the *parens patriae* objective), but the safeguarding of individual autonomy rights in situations where those rights cannot be effectively exercised *without* intervention. In doing so, the court is responding to relationship vulnerability, a particular quality of vulnerability that is not dependent on or derived from personal characteristics such as age, gender, or mental disability, although the relationship between these factors (together with others such as economic status) may intensify relationship

1. Sir James Munby, “Protecting the Rights of Vulnerable and Incapacitous Adults – The Role of the Courts: An Example of Judicial Law-making” (2014) 26 *Child & Family Law Quarterly* 64 at 77 [Munby].

vulnerability so as to justify intervention in a particular case.² This response is founded on the understanding that legal/public intervention is not the only possible source of autonomy restriction. In this way, the vulnerability jurisdiction is conceptually rooted in the doctrine of equitable fraud (in particular, the doctrine of undue influence), and the new jurisdiction is most coherently understood as an extension of the equitable doctrine (rather than the resurgence of a new *parens patriae*) in situations outside of the contractual/testamentary context and at the instigation of third parties (public or private).

The process of “judicial invention” through which the jurisdiction has developed has been lengthy and non-linear, generating confusion about its source and nature. In terms of both language and origin (the decision in the case of *In Re F*³ (“*In Re F*”), a response to the disappearance of *parens patriae* with regard to mentally incapable adults in England), the new jurisdiction has been tangled up with the old to the extent that it has been described (mistakenly) as a rebirth and extension of *parens patriae*, “the invention ... by the family judges of a full-blown welfare-based *parens patriae* jurisdiction in relation to incapacitated adults” and to other “vulnerable persons”.⁴

One source of confusion has been the nebulous and ill-defined nature of the “inherent jurisdiction of the court” as distinct from *parens patriae* (which is occasionally described as “the inherent jurisdiction”). The distinction between the two is explained below. The language of “vulnerability”, as used in the law generally and the cases discussed here in particular, is a further source of confusion. The new jurisdiction and *parens patriae* each enable public response to private vulnerability; vulnerability is not one idea, but several. Understanding the distinctions between these ideas is essential to understanding the nature of the new jurisdiction and how it differs from *parens patriae* in purpose and effect.

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2. See MI Hall “Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable” in Israel Doron, ed, *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Berlin: Springer Publications, 2008) at 107.
 3. [1990] 2 AC 1 (HL) [*In Re F*].
 4. Munby, *supra* note 1 at 77.

Parens patriae describes the state's responsibility to protect the members of identified "vulnerable populations": persons who are deemed incapable of protecting their own interests by reason of their particular personal characteristics. Children and mentally incapable adults are "vulnerable populations" of this kind and are, on this basis, the subjects of both *parens patriae* and specific legislation such as the *Mental Capacity Act 2005*⁵ ("*Mental Capacity Act*") discussed below. The new vulnerability jurisdiction described in this paper responds to a more universal, mutable vulnerability that waxes and wanes in connection with personal and other contextual circumstances, including the "quality and quantity of resources we possess or can command".⁶ The distinction is significant, providing a coherent theoretical and principled basis for the new jurisdiction *and* delimiting the kind and scope of intervention it justifies; not a capacious or amorphous power of protection (the *parens* paradigm), but a more specific intervention for the purpose of creating a space in which autonomy can be developed and exercised.

The first part of this paper describes in more detail the origin and nature of the *parens patriae* jurisdiction and the inherent jurisdiction of the court, respectively, together with a discussion of the distinctions between them. The second part of this paper describes the cases through which the new jurisdiction was developed prior to the *Mental Capacity Act* which filled the gap left by the removal of *parens patriae* with respect to

5. (UK), c 9.

6. Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20 *Yale Journal of Law and Feminism* 1 (while "undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the "quality and quantity of resources we possess or can command" at 8) and ("[v]ulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise. Individuals can attempt to lessen the risk or mitigate the impact of such events, but they cannot eliminate their possibility. Understanding vulnerability begins with the realization that many such events are ultimately beyond human control" at 8).

mentally incompetent adults in England. A declaration of lawfulness on the basis of the common law doctrine of necessity is used by the English courts in these cases to establish best interests and to justify interventions for the purpose of protecting the rights and interests of incapable adults. The third part of this paper describes the development of a distinct vulnerability jurisdiction (*i.e.* not a replacement for *parens patriae*) through a series of cases decided after the *Mental Capacity Act* (which filled the *parens patriae* gap *vis a vis* incapable adults), culminating in *DL v A Local Authority*.⁷ This new jurisdiction provides a basis on which the courts can respond to vulnerability arising through relationship contexts (in respect of which no legislation applies), as opposed to the “protection-needs” of vulnerable populations. The declaration of lawfulness in these later cases is rooted in the equitable doctrine of undue influence as opposed to the common law doctrine of necessity. This distinction is important and marks a decisive conceptual break from the earlier cases. The final part of this paper considers the implications of the English “invention” in the Canadian legal context.

II. Parens Patriae and the Inherent Jurisdiction of the Court

The *parens patriae* jurisdiction of superior courts, while occasionally referred to as an inherent jurisdiction, is very different in source and purpose from the inherent jurisdiction of said superior courts. The *parens patriae* jurisdiction originated in the personal authority and responsibility of the King. The inherent jurisdiction of the court, in contrast, has been described as the “essence” of the superior court — its “immanent attribute” and “very life-blood”; a “peculiar concept ... so amorphous and ubiquitous and so pervasive in its operation that it seems to defy

7. [2012] EWCA Civ 253 [*Local Authority*].

the challenge to determine its quality and establish its limits”.⁸ Thomas Cromwell, writing extra-judicially, referred to the “inherent jurisdiction” as an “original jurisdiction in any matter unless jurisdiction is clearly taken away by statute”,⁹ inherited by the Canadian superior courts of general jurisdiction as the descendants of the Royal Courts of Justice.

A. *Parens Patriae*

Parens patriae refers to the state’s authority and responsibility to protect the best interests of vulnerable persons (defined, for this purpose, as members of vulnerable populations). The source of the *parens patriae* jurisdiction was described by the Supreme Court of Canada in *Re Eve*¹⁰ as “lost in the mists of antiquity”, although the most probable theory was that Edward I had assumed the authority from the feudal lords “who would naturally take possession of the land of a tenant unable to perform his feudal duties”.¹¹ Such persons were known as “lunatics” (persons who had become mentally disordered and so lost mental capacity) or “fools”

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8. Jacob, below note 20; see also Keith Mason, “The Inherent Jurisdiction of the Court” (1983) 57 Australian Law Journal 449; MS Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 Law Quarterly Review 120 (“[t]here is no clear agreement on what [the inherent jurisdiction] is, where it came from, which courts and tribunals have it and what it can be used for” at 120) [Dockray]; see also *Shreem Holdings Inc v Barr Picard*, 2014 ABQB 112 (“[j]ust as the existence of the inherent jurisdiction of superior courts is indisputable and certain, the theoretical basis and scope of it are debatable” at para 26) [*Shreem Holdings*].
 9. TA Cromwell, “Aspects of Constitutional Judicial Review in Canada” (1994-1995) 46 South Carolina Law Review 1031; see e.g. *Dominion Canners Ltd v Costanza*, [1923] SCR 46 at para 61; *In re Sproule*, [1886] 12 SCR 140.
 10. [1986] 2 SCR 308 [*Re Eve*].
 11. *Ibid* at para 32, the case involved a mother’s application requesting that the court consent to the sterilisation of her mentally incapable daughter as an exercise of its *parens patriae* jurisdiction. The mental health legislation in the province at the time did not provide for substitute consent to the procedure. The Court declined to exercise the jurisdiction on the basis that it had not been established that it was in Eve’s best interests.

(persons who had never had mental capacity).¹² As described in *Re Eve*, the court’s “wardship” jurisdiction in relation to children became merged or “assimilated” over time with this jurisdiction over “mental incompetents” to comprise the *parens patriae* jurisdiction in respect of both vulnerable population groups.¹³ The jurisdiction “continues to this day” (so long as it has not been supplanted by legislation) and remains applicable in specific situations not contemplated by legislation.¹⁴ So long as the *parens patriae* jurisdiction is exercised in the best interests of the individual:

the situations under which it can be exercised are legion ... and the categories under which the jurisdiction can be exercised are never closed ... the jurisdiction is a carefully guarded one. The courts will not readily assume that it [the *parens patriae* jurisdiction] has been removed by legislation where a necessity arises to protect a person who cannot protect himself. ... Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised.¹⁵

Sir James Munby, writing about *parens patriae* in connection with the development of the new jurisdiction in England, located the origins of *parens patriae* in the prerogative powers of the medieval kings to take “responsibility for those without the capacity to look after themselves”.¹⁶ In Munby’s account, the ancient power was “put on a statutory footing” with the creation of the Court of Wards and Liveries in 1540 which had jurisdiction over both children and the mentally incapable.¹⁷ That court was abolished in 1646 and following the Restoration the jurisdictions

12. Munby, *supra* note 1 at 66.

13. *Re Eve*, *supra* note 10 at paras 40, 42 (“Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way” at para 42).

14. See *Beson v Director of Child Welfare (Nfld)*, [1982] 2 SCR 716; *Re Eve*, *supra* note 10 (“[e]ven where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with unanticipated situations where it appears necessary to do so for the protection of those who fall within its ambit” at para 42).

15. *Re Eve*, *supra* note 10 at paras 74-75 (the jurisdiction was therefore “founded on necessity, namely the need to act for the protection of those who cannot care for themselves” at para 75).

16. Munby, *supra* note 1 at 66.

17. *Ibid.*

were separated: the *parens patriae* jurisdiction with relation to “infants” returned to the Chancery; the Crown’s *parens patriae* power with relation to persons of “unsound mind” was assigned to specific individuals (initially to the Lord Chancellor). In 1956, the power was assigned by warrant to the Lord Chancellor and to the judges of the Court of Chancery. That warrant was revoked in England in 1960, on the coming into force of the *Mental Health Act 1959*,¹⁸ effectively removing the *parens patriae* jurisdiction in respect of incompetent persons in England and creating the “gap” at issue in *In Re F* (a gap that was subsequently filled by legislation). In contrast, the *parens patriae* jurisdiction with respect to incapable adults, as discussed in *Re Eve*, was not removed in this way (or “swept away” in the language of the House of Lords in *In Re F*) in Canada.

B. The Inherent Jurisdiction of the Court

“Just as the existence of the inherent jurisdiction of superior courts is indisputable and certain, the theoretical basis and scope of it are debatable”.¹⁹

The inherent jurisdiction was described by Master IH Jacob as “a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial

18. (UK), 7 & 8 Eliz II, c 72.

19. *Shreem Holdings*, *supra* note 8 at para 26; see also Dockray, *supra* note 8 (“[t]here is no clear agreement on what it [the inherent jurisdiction] is, where it came from, which courts and tribunals have it and what it can be used for” at 20).

between them”.²⁰ These powers are derived

not from any statute or rule of law, but from the very nature of the court as a superior court of law ... This description has been criticised as being ‘metaphysical’ ... but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.²¹

The Supreme Court of Canada, drawing on Master Jacob’s definition, has described the inherent jurisdiction as both “inexhaustibly” various and as a “narrow core” of powers. Justice Binnie, quoting Master Jacob, observed in *R v Caron*²² (“*Caron*”) that the inherent jurisdiction may be invoked in “an apparently inexhaustible variety of circumstances and may be exercised in different ways ... even in respect of matters which

20. IH Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23 at 51 [*Jacob*] cited in *R v Caron*, 2011 SCC 5 at para 24 [*Caron*] (Jacob’s article has been cited on nine separate occasions by the Supreme Court of Canada: *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 SCR 549 at para 95 per Justice Wilson (granting leave to appeal to a non-party); *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at para 49 (issuing injunction on the court’s own motion to guarantee access to court facilities); *R v Morales*, [1992] 3 SCR 711 at para 87 per Justice Gonthier (discretion regarding bail); *R v Hinse*, [1995] 4 SCR 597 at para 21 per Chief Justice Lamer (stay of criminal proceedings for abuse of process); *MacMillan Bloedel v Simpson*, [1995] 4 SCR 725 at paras 29-31 per Lamer CJ (punishing for contempt out of court) [*MacMillan*]; *R v Rose*, [1998] 3 SCR 262 at paras 64, 131 per Justice L’Heureux-Dubé and Justices Cory, Iacobucci and Bastarache, respectively (discretion to grant a right of reply in a criminal trial); *R v Cunningham*, [2010] 1 SCR 331 at para 18 (authority to refuse defence counsel’s request to withdraw); *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 (“[t]he inherent jurisdiction of the court is limited by institutional roles and capacities” at para 24) [*Criminal Lawyers*]).

21. Jacob, *supra* note 20 at 27 cited in *MacMillan*, *ibid* at para 20.

22. *Caron*, *supra* note 20.

are regulated by statute or by rule of court, so long as it [the jurisdiction] can do so without contravening any statutory provision”.²³ A “categories approach” to the inherent jurisdiction, he concluded, was therefore inappropriate although this “very plenitude” required that the “inherent jurisdiction be exercised sparingly and with caution”.²⁴

Chief Justice Lamer, in *MacMillan Bloedel Ltd v Simpson*²⁵ (“*MacMillan*”) described a “core” or “inherent” jurisdiction that is beyond the reach of Parliament and the provincial legislatures in the absence of constitutional amendment”.²⁶ This “core”, he concluded, was made up of the court’s “essential and immanent attributes” (quoting Master Jacob) and therefore to “[r]emove any part of [it] emasculates the court, making it something other than a superior court”.²⁷ The content of that “core” is described in the case as comprising “those powers which are essential to the administration of justice and the maintenance of the rule of law”.²⁸ Justice Karakatsanis, giving the reasons for the majority in *Ontario v Criminal Lawyers Association of Ontario*,²⁹ described the “core” as “a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system”.³⁰

23. Jacob, *supra* note 20 at 23-24 cited in *Caron, ibid* at paras 29, 32.

24. *Caron, ibid* at para 30.

25. *MacMillan, supra* note 20 (giving reasons for the majority).

26. *Ibid* at para 8 (referring to the reasons given by Chief Justice McEachern in the British Columbia Supreme Court).

27. *Ibid* (“[t]he full range of powers which comprise the inherent jurisdiction of a superior court are, together, its ‘essential character’ or ‘immanent attribute’ . . . To remove any part of this core emasculates the court, making it something other than a superior court” at para 30).

28. *Ibid* (“[i]t is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* [at issue in the *Simpson* case] is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts” at para 38).

29. *Criminal Lawyers, supra* note 20.

30. *Ibid* at para 19, per Justice Karakatsanis (giving the reasons for the majority, quoting from *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186 at para 56 per Lamer CJ).

At once “inexhaustibly various” and “very narrow”, William H Charles concluded that “one might have thought” that “to attempt a definition ... of such a mysterious and unruly concept ... would involve a mission impossible”.³¹ Rosara Joseph has suggested that “the inherent jurisdiction of the High Court was better understood as being comprised of a number of separate jurisdictions, which have developed piecemeal and mostly in isolation” (rather than an “amorphous single source of jurisdiction”).³² These “jurisdictions” are identified by Joseph as including “*parens patriae*, punishment for contempt of court, judicial review, bail and jurisdiction over officers of the Court” and the “more shadowy category of inherent jurisdiction: the Court’s jurisdiction to revisit its own ‘null’ decisions”.³³

The apparently contradictory and “unruly” nature of the inherent jurisdiction may be resolved if the jurisdiction is understood as a single source from which two different *kinds* of powers may flow, powers which may subsequently be developed through the case law to comprise distinct jurisdictions³⁴ including those described by Joseph (with the exception of *parens patriae*, the origins of which lie in a very different source as described above). The first kind of powers flowing from the inherent jurisdiction source are those powers “essential to the administration of justice and the maintenance of the rule of law” as described in *MacMillan*.³⁵ These “core” powers, pertaining to the self-governance functions of the court, are essential to the court’s identity and as such are constitutionally protected. The inherent jurisdiction, as a residual source of power, may *also* be drawn upon “as necessary whenever it is just or equitable to do so” (to quote Master Jacob) to generate *non-core* exercises of power “as

31. William H Charles, “Inherent Jurisdiction and Its Application in Nova Scotia Courts: Metaphysical, Historical or Pragmatic?” (2010) 33 *Dalhousie Law Journal* 63 at 66.

32. Rosara Joseph, “Inherent Jurisdiction and Inherent Powers in New Zealand” (2005) 11 *Canterbury Law Review* at 220.

33. *Ibid.*

34. This approach is consistent with Master Jacob’s description of the inherent jurisdiction as a “residual source of powers” and with Justice Binnie’s rejection of the kind of “categories-approach” suggested by Joseph.

35. *MacMillan*, *supra* note 20 at para 38.

and when the need arises”.³⁶ These non-core powers may subsequently be reduced or even replaced by legislation without “emasculating” the court; in such a case the actions of the legislature will remove the “necessity” for the inherent jurisdiction to be used in a particular way. It is therefore right for the power (derived from the inherent jurisdiction source) to recede. Through the development of this second kind of power, the inherent jurisdiction acts as a “great safety net” to be expanded or retracted in connection with legislation and through which the superior court exercises its “metaphysical” function: to prevent “improper vexation or oppression” and to effect justice and equity between the parties.

The first set of cases discussed below show the courts drawing on the “source” of the inherent jurisdiction to apply the common law doctrine of necessity in a series of increasingly “new” circumstances using the declaration as a means of doing so. The second set of cases discussed below show the courts developing that power further as a means of implementing the principles of equitable fraud outside of the traditional transactional and testamentary contexts. Crucial in both sets of cases is the existence of a justice gap caused by the absence of legislation; as demonstrated in these cases, the inherent jurisdiction provides the authority and the means (the declaration) on the basis of which such gaps *must* be filled by the courts, drawing on the principles of equity and the common law to do so. The power drawn from the inherent jurisdiction must retreat where the gap has been filled by legislation, as in the kinds of circumstances at issue in the necessity cases, discussed below.

II. The Cases: *In Re F* and After

A. *In Re F*

In the case of *In Re F*, the House of Lords interpreted and applied the common law doctrine of necessity to fill a gap left by the disappearance of *parens patriae* in relation to mentally incapable adults. The court drew on the inherent jurisdiction of the court, as a residual source of power, to enable the principled exercise of that doctrine through the mechanism of

36. Dockray, *supra* note 8 at 124.

the declaration.

In Re F concerned a “momentous and irrevocable”³⁷ medical decision with significant public policy implications: whether a sterilisation procedure could be lawfully performed on a mentally disabled woman, “F”. F was unable to consent to the procedure by reason of her disability, nor could anyone else consent on F’s behalf (the applicable mental health legislation did not provide for substitute consent to the procedure).³⁸ The medical professionals involved in F’s care, together with F’s mother, agreed that pregnancy and birth would be a “disaster” and “catastrophic” for F; and F (through her mother) asked the court either to provide consent to the procedure or to make a declaration that the procedure could be lawfully performed without consent.³⁹ The *parens patriae* jurisdiction of the court applying to mentally incompetent adults (which would have provided a basis on which the court could consent to the operation) had been “swept away”⁴⁰ by legislative reform some years before, leaving no basis on which the court could give consent to the procedure.

The House of Lords, like the Court of Appeal before it,⁴¹ found that the procedure proposed (being in the best interests of F) was justified on the basis of the common law doctrine of *necessity*, which essentially provided a policy-based rationale for dispensing with the requirement of consent where an interference that would otherwise comprise a trespass (to person or property) is “justified *summa necessitate*, by the

37. See *Re S (Hospital Patient: Court’s Jurisdiction)*, [1996] Fam 1 (CA (Civ) (Eng)) at para 4.

38. *In Re F*, *supra* note 3 at 22 citing *Collins v Wilcock*, [1984] 1 WLR 1172 (QB (Eng))(without consent, medical treatment (like any other interference with the body of another) would constitute a trespass to the person: the tort of battery).

39. *In Re F*, *supra* note 3 at 2-3.

40. *In Re B (A Minor)(Wardship: Sterilisation)*, [1988] AC 199 (HL)(Lord Brandon noted that no difficulty would arise regarding the Court’s current jurisdiction to consent to the procedure if F were a minor suffering from a comparable mental disability, in which case the court would exercise its wardship jurisdiction to make a decision based on the best interests of the minor).

41. *Re F (Sterilization: Mental Patient)*, [1989] 2 FLR 376 (HL).

immediate urgency of the occasion, and a due regard for the public safety or convenience”.⁴² Necessity provided a justification for medical treatment without consent in situations of emergency, as where a surgeon amputated the limb of an unconscious passenger to free him from the wreckage of a railway accident. E, as a person with a disability, could not coherently be regarded as existing in a “permanent state of emergency”, but a “clear and logical connection” *did* exist between the position of a person unable to consent by reason of emergency and a person unable to consent by reason of lasting mental incapacity.⁴³ In both cases, disallowing medical treatment that was in a patient’s best interests would effectively deprive that person of the care that he or she would receive if able to give consent; that deprivation was more meaningful to the individual than the corresponding abrogation of the right to non-interference protected by the doctrine of trespass.⁴⁴ It was the court’s obligation to fill the gap left by the legislature’s removal of *parens patriae*. Using the common law (the “great safety net which lies behind all statute law”)⁴⁵ to “fill gaps, if and in so far as these gaps have to be filled in the interests of society as a whole” was described by Justice Donaldson in the Court of Appeal as “one of the most important duties of judges”.⁴⁶

Lord Goff of Chiveley distinguished between situations of true emergency (the unconscious passenger in a railway accident) and situations involving a “permanent or semi-permanent state of affairs”.⁴⁷ Necessity justified intervention in both situations, but the permissible scope of intervention was different in each. The medical intervenor in a true emergency situation could lawfully do no more than what was reasonably required in the best interests of the patient until the patient regained the ability to consent. This limitation had no rational basis where the “state of affairs” precluding consent was “permanent or semi-permanent”: a person in this situation will likely *never* be able to consent

42. *Morey v Fitzgerald* (1884), 56 Vt 487 (Sup Ct (Vermont)) at 489.

43. *In Re F*, *supra* note 3 at 17.

44. *Mallette v Shulman* (1990), 72 OR (2d) 417 (CA).

45. *In Re F*, *supra* note 3 at 13.

46. *Ibid.*

47. *Ibid* at 25.

or, if so, will only be able to do so after a lengthy and indeterminate period of time. In the meantime:

the need to care for [such a patient] is obvious and the doctor must then act in the best interests of his patient, just as if he had received his patient's consent to do so. Were this not so, much useful treatment and care could, in theory at least, be denied to the unfortunate.⁴⁸

Unlike the emergency situation, “humdrum” or “routine” care, including “simple care such as dressing and undressing and putting to bed”,⁴⁹ would also be justified on the basis of necessity (with no requirement of legal authorisation) where the inability to consent was a permanent or semi-permanent state.

A majority in the House of Lords, as in the Court of Appeal, found that the sterilisation procedure was justified on the basis of necessity and therefore lawful without the approval of the court (in the same way that approval was not required before emergency treatment could be lawfully given). Nevertheless, the special nature of the procedure, involving potentially competing interests (between F, her mother, and the physicians) and the fundamental personal rights of F engaged, made the involvement of the court *desirable* (and also practicable, as no emergency “on the spot” medical decision making was required). The Court of Appeal had concluded that a new rule of court, requiring a determination by the court that a procedure of this kind was in the best interests of the patient, was needed. A mere declaration that the operation would be lawful would “change nothing” and merely declare that “had a course of action been taken without resort to the court, it would have been lawful anyway”.⁵⁰ This was inadequate:

[i]n the context of the most sensitive and potentially controversial forms of treatment the public interest requires that the courts should give express

48. *Ibid* at 26.

49. *Ibid* (“[w]hen the state of affairs is permanent, or semi-permanent, action properly taken to preserve the life, health or well-being of the assisted person may well transcend such measures as surgical operation or substantial medical treatment and may extend to include such humdrum matters as routine medical or dental treatment, even simple care such as dressing and undressing and putting to bed” at 26).

50. *Ibid* at 9.

approval before the treatment is carried out and thereby provide an independent and broad based third opinion.⁵¹

In the meantime (pending formulation of this new rule) the court was “fortunately” able to draw on its “inherent jurisdiction to regulate its own proceedings”, which meant that approval of the court was required before the sterilisation could proceed.⁵²

The House of Lords held that the court had no jurisdiction to create the new rule proposed by the Court of Appeal, as this would effectively replicate the *parens patriae* jurisdiction with respect to mentally incapable adults that the legislature had removed:

[i]f [the *parens patriae* jurisdiction], or something comparable to it, is to be re-created, then it must be for the legislature and not for the courts to do the re-creating. Rules of Court can only, as a matter of law ... prescribe the practice and procedure to be followed by the court when it is exercising a jurisdiction which already exists. They cannot confer jurisdiction, and, if they purported to do so, they would be *ultra vires*.⁵³

A declaration could not be *required* in a situation of this kind,⁵⁴ but it was “open to the court under its inherent jurisdiction to make a declaration that a proposed operation was in a patient’s best interests” and in the current case it was “highly desirable”⁵⁵ that such a declaration should be sought by those caring for the woman. A declaration would, as Lord Donaldson noted, “change nothing” in the sense that it could not “make lawful that which would otherwise be unlawful”.⁵⁶ A declaration would establish by judicial process, however, “whether the proposed operation is in the best interests of the patient and therefore lawful, or not in the patient’s best interests and therefore unlawful”.⁵⁷ In order to make

51. *Ibid* at 13.

52. *Ibid* at 10.

53. *Ibid* at 12, per Lord Brandon of Oakwood.

54. *Ibid* (“[t]he rule [pertaining to the court’s power to make declarations] does no more than say that there is no procedural objection to an action being brought for a declaration whether any other kind of relief is asked for or available or not” at 13).

55. *Ibid* at 5.

56. *Ibid* at 23.

57. *Ibid* at 13, per Lord Brandon of Oakwood.

a declaration of lawfulness (because it is in the patient's best interests), the court would be obliged to make an inquiry and "reasoned decision" *about* those best interests, "substantially the same" process as if the court's approval were required through a new rule.⁵⁸ In effect, the mechanism of the declaration would provide the "independent and broad based third opinion" sought by the Court of Appeal through the new rule. "If the old *parens patriae* jurisdiction were still available ... there would be no difficulty", Lord Brandon noted:

[but] having regard to the present limitations on the jurisdiction of the court, by which I mean its inability to exercise the *parens patriae* jurisdiction with respect to adults of unsound mind, the procedure by way of declaration is, in principle, an appropriate and satisfactory procedure to be used in a case of this kind".⁵⁹

Lord Goff concluded that there seemed "little, if any, practical difference between seeking the court's approval under the *parens patriae* jurisdiction and seeking a declaration as to the lawfulness of the operation".⁶⁰

In the opinion of Lord Griffiths, the involvement of the court in these circumstances was not only desirable, but should be required, not by a rule of court, but by the doctrine of necessity itself. "The law ought to be that [medical providers] must obtain the approval of the court before they sterilise a woman incapable of giving consent. I believe that it is open to your Lordships to develop a common law rule to this effect".⁶¹ The common law had proved sufficiently flexible in the past to develop public interest based exceptions to the general rule "that the individual is the master of his own fate" by placing "constraints on the harm that people may consent to being inflicted on their own bodies".⁶² "The time has now come", Lord Griffiths concluded, "for a further development to forbid, again in the public interest, the sterilisation of a woman with healthy reproductive organs who, either through mental incompetence

58. *Ibid.*

59. *Ibid* at 14.

60. *Ibid* at 32.

61. *Ibid* at 19-20.

62. *Ibid* at 20 citing *Attorney General's Reference (No. 6 of 1980)*, [1981] QB 715 (CA (Crim)(Eng)); *Rex v Donovan*, [1934] 2 KB 498 (CA (Crim) (Eng)).

or youth, is incapable of giving her fully informed consent unless such an operation has been enquired into and sanctioned by the High Court”.⁶³ As “second best” to a new common law rule, Lord Griffith accepted the declaration procedure described by Lords Brandon and Goff.

B. After *In Re F*: Developing the Inherent Jurisdiction

A series of cases following *In Re F* applied the interpretation of necessity developed in that case (itself an extension through analogy of the necessity justification in emergency settings to non-emergency medical treatment for persons unable to consent by reason of mental disability) to justify both medical and non-medical interventions. In both medical and non-medical settings, intervention could be justified on the basis of necessity only if in the best interests of the individual; outside of the medical context this has been interpreted as a requirement that intervention is necessary for the purpose of safeguarding the *rights* of an individual who, by reason of mental incapability, is incapable of doing so herself. The mechanism of the declaration was used in both contexts to enable a “third opinion” on the question of whether the intervention proposed was in the best interests of the individual concerned and, therefore, lawful.

Sir Stephen Brown, in a case involving a mentally incapable person (to whom the old *parens patriae* jurisdiction would have applied) and “special category”⁶⁴ medical treatment, described the inherent jurisdiction “discovered” in *In Re F* as a “patrimonial” jurisdiction, “not strictly *parens patriae* but similar in all practical respects to it”.⁶⁵ In *In Re S (Adult Patient: Sterilisation)*⁶⁶ (another case, like *In Re F*, involving a mentally incapable patient and a proposed sterilisation procedure), Lord Thorpe referred to the relationship between this “patrimonial jurisdiction” and *parens patriae* as:

a distinction without a difference ... By which I mean that the *parens patriae* jurisdiction is only the term of art for the wardship jurisdiction which is alternatively described as the inherent jurisdiction. That which is patrimonial

63. *In Re F*, *supra* note 3 at 20.

64. Involving competing interests, fundamental rights and the public interest.

65. *Re G (Adult Patient: Publicity)*, [1995] 2 FLR 528 (Fam (Eng)) at 530.

66. [2001] Fam 15 (CA (Civ)(Eng)).

is that which is inherited from the ancestral past. It therefore follows that whilst the decision in *Re F* signposted the inadvertent loss of the *parens patriae* jurisdiction in relation to incompetent adults, the alternative jurisdiction which it established, the declaratory decree, was to be exercised upon the same basis, namely that relief would be granted if the welfare of the patient required it and equally refused if the welfare of the patient did not.⁶⁷

The distinction between the necessity-based declaration and the old *parens patriae* emerges with greater clarity in a subsequent series of cases concerning the rights and best interests of incapable individuals outside of the medical context.

*In Re C (Adult Patient)*⁶⁸ (“*Access: Jurisdiction*”) concerned a situation where one parent was restricting the access of another to their mentally disabled adult child (who was herself unable to consent to or to refuse the restriction). Justice Eastham found that the child had a common law right to freedom of association and that the conduct of the parent was in violation of that right. A declaration in such a case could be granted. It would not work to *make* the restriction of access illegal, but simply recognise it as such (because it was in violation of the adult child’s right). *In Re S (Hospital Patient: Court’s Jurisdiction)*⁶⁹ concerned a patient (“S”) who had become mentally incapable following a stroke. S was currently being cared for in a hospital in England, where he had lived for many years, but his estranged wife now wished to move S to Norway. S’s long term English mistress sought a declaration from the court, on the basis of its inherent jurisdiction, that it would be unlawful to remove S from England. This case raised the question of who was entitled to bring an application for a declaration on the basis of the rights of a mentally incapable person who was unable to consent to the intervention.⁷⁰ The mistress in *In Re S*, unlike the parent in *In Re C*, did not have a recognised legal basis on which to seek the declaration with regard to the rights of S. The court held that the jurisdiction could be invoked by any party whose past or present relation with the incapable person gave him a genuine and legitimate interest in obtaining a decision (and not a “stranger” or

67. *Ibid* at 29-30.

68. [1994] 1 FCR 705 (Fam (Eng)) [*In Re C*].

69. [1996] Fam 1 (CA (Civ)(Eng)).

70. Pending a determination of S’s best interest.

“officious busybody”) and that the matter in question — S’s residence — was one in respect of which a declaration of lawfulness could be made.⁷¹ In *Cambridgeshire County Council v R and Others*,⁷² an application for a declaration was brought by a local authority (as a body with a legitimate interest in the rights of “R”). The application was not successful for two reasons. First, it had not been established that R was incapable of making her own decision about the proposed intervention (and therefore the doctrine of necessity did not apply);⁷³ second, it had not been established what rights of R, if any, were in need of safeguarding.⁷⁴ R was a 20 year old woman with a learning disability who had been taken into care at the age of 10. R’s father had been sentenced to four years’ imprisonment after admitting to serious sexual offences committed against R when she was a child; the other members of R’s family, including her mother, had always denied that the offences took place. At the time the application was brought, R was living in supported accommodation provided by the local authority. The authority was now worried that R’s mother was trying to persuade R to leave her current housing and return to live with her family — a move the authority believed would have very negative consequences for R. The authority asked the court, on the basis of necessity and the inherent jurisdiction recognized in *In Re F*, to make a declaration that the authority could lawfully prevent R’s family from removing or attempting to remove R from her present accommodation and from contacting R without the authority’s consent.

The local authority had maintained that R was not capable of making this decision, proposing that the following test of decision-making capability was appropriate in this case:

- i. if unsupervised contact would be damaging to R’s welfare,
- ii. the court should consider the intention likely to be held by a person of proper understanding in respect of it, and
- iii. if such a person would be likely to object to it, then

71. *In Re C*, *supra* note 68 at 2.

72. [1994] 2 FCR 973 (Fam (Eng)).

73. *Ibid* at 975.

74. *Ibid*.

- iv. (on the assumption that the right not to have contact is a right protected by the common law) the law should afford a person who is not legally competent the same protection as it would afford the legally competent.⁷⁵

Rejecting this test, Lady Hale observed:

[t]hat it provides no help in deciding who is or is not legally competent and comes dangerously close to asserting that someone who decides to do things which others consider are not in their best interests is for that very reason incompetent. That has never been the law in this country. The test of competence in other areas has always been the capacity to understand the nature and effect of the transaction or other action proposed.⁷⁶

Furthermore, Lady Hale described the declaration sought as one which would effectively transform a lawful activity (R's communication with her family members) into an unlawful one, and not a "mere" declaration of the lawfulness or unlawfulness of the activity in question:

[i]t is necessary to ask what legal right there is for R to be protected against the actions which the local authority seeks to control or prohibit in this case, and also what legal right the authority has to be appointed in effect as her protector. It is access, or freedom of association, rather than harassment, or freedom from association, which is protected under English law. ... Far from supporting a legal right, the declarations sought would interfere with one, and in circumstances in which it has not been argued before me that a legal justification for doing so exists.⁷⁷

Six years later, a similar situation was considered in *Re F (Adult: Court's Jurisdiction)*.⁷⁸ *Re F* concerned a young girl ("T"), now 18, who was described as having an intellectual age of 5 to 8 years old. T had been placed in local authority accommodation for persons with mental disabilities at the age of 16 with the consent of her mother. Prior to that, T's home life with her parents was described as abusive and neglectful (such that the local authority eventually placed T's seven younger siblings in care). The mother had subsequently withdrawn her consent to T's accommodation placement; T had also expressed a desire to live with her mother. When T turned 18 the local authority had succeeded in

75. *Ibid* at 977.

76. *Ibid* at 975-76.

77. *Ibid* at 976-77.

78. [2000] EWCA Civ 192 [*Re F*].

obtaining an order for guardianship, but that order was overturned by the Court of Appeal⁷⁹ on the basis that recent legislative amendments had “radically restricted” the “categories of people who could be received into guardianship” excluding persons in the position of T:

[g]uardianship cannot now be used for clients who suffer from any form or arrested or incomplete development of the mind unless it is associated with “abnormally aggressive” or “seriously irresponsible” conduct. Unless the meaning of these words is distorted, the vast majority of those with a learning disability (mental handicap) will be excluded from guardianship. The benign side of the guardianship coin was nowhere in evidence in the new legislation. The present state of the statute books therefore reflects a single-minded view of personal guardianship as a method of restricting civil rights and liberties rather than as a method of enhancing them.⁸⁰

Applying this restrictive construction of the legislation to T, her desire to return to the family home was not “seriously irresponsible” in the sense required, and the guardianship order was overturned.

The local authority now sought a declaration on the basis of the inherent jurisdiction of the court that it could lawfully restrict T’s contact with her natural family (principally her mother) and that T should remain in the local authority accommodation. The court found that T was *not* capable of making the decision of whether to have contact with her family (unlike R in the *Cambridgeshire County Council* case) and that doing so would be deleterious to her rights (which T was unable to protect herself). Lord Sedley opined that “T is so unable to judge what is in her own best interests that no humane society could leave her adrift and at risk simply because she has reached the age of 18”.⁸¹ T’s situation was, in this sense, analogous to that of the young woman in *In Re F*: unable (in the opinion of the court) to make the crucial decision herself with no-one able to consent on her behalf (the guardianship order in respect of T having been overturned).

As in *In Re F*, the court found that the common law doctrine of

79. *Re F (Mental Health Act: Guardianship)*, [2000] 1 FCR 11 (CA (Civ) (Eng)).

80. *Ibid* at 17, citing UK, Law Commission, *Mental Incapacity* (Law Commission Report 231)(London: Her Majesty’s Stationary Office, 1995) at para 2.2.1.

81. *Re F*, *supra* note 78 at 48.

necessity was the basis on which the court could make the declaration that was being sought. “If there is no recourse to the doctrine of necessity, the court has no jurisdiction to make any declarations to enable the local authority to ... regulate future arrangements for T”.⁸² In *In Re F*, necessity “filled the gap” left by the disappearance of *parens patriae* regarding the decision in question without legislative replacement. This case raised the question of whether an analogous gap was created by the legislature’s “radical restriction” of guardianship legislation (prior to which the local authority could have acted as T’s guardian) *or* whether the legislature had intended to create a law-free space for individual autonomous choice (a space to remain un-filled rather than a gap). Would the court, in making the declaration requested, be “assuming an inherent power to restore what parliament had removed” through its “deliberate and wholesale curtailment” of guardianship?

The court concluded that the reform of guardianship legislation had created

[a]n obvious gap in the framework for care of mentally incapacitated adults. If the court cannot act and the local authority is right [regarding the abusive home environment] this vulnerable young woman would be left at serious risk with no recourse to protection, other than the future possibility of the criminal law. This is a serious injustice to T who has rights which she is, herself, unable to protect. ... [quoting Lord Donaldson at the Court of Appeal in *In Re F*] The common law is the great safety net which lies behind all statute law and is capable of filling gaps in that law, if and in so far as those gaps have to be filled in the interests of society.⁸³

The restriction of the legislation, coupled with T’s inability to protect her own interests, meant that, without the intervention sought by the local authority, T would be effectively deprived of rights to which she would otherwise be entitled (either because T could have protected her rights independently or because a guardian could have done so on T’s behalf). Lord Justice Thorpe concluded his reasons by cautioning that his judgment should *not* be understood as “restoring more or less the *parens patriae* jurisdiction, albeit re-labelled”,⁸⁴ referring to Lord Goff’s

82. *Ibid* at 39.

83. *Ibid* at 41-42.

84. *Ibid* at 47.

discussion in *In Re F* of the “wider range” of care justified by necessity in cases involving persons with permanent or semi-permanent mental disorder (the implication being that the contact restrictions were an extension of the kind of non-medical “hum-drum” or everyday care decisions Lord Goff described).

*In Re A Local Authority (A Restraint on Publication)*⁸⁵ concerned a group of individuals characterised as “vulnerable” and “adults under a disability”. The mental capability of these individuals, or lack thereof, is never established, although they are treated by the court as mentally incapable persons to whom the *In Re F* jurisdiction applies (and to whom the *parens patriae* jurisdiction would have applied prior to its demise).⁸⁶ This case is an important turning point in the development of the jurisdiction through the case law. Unlike the previous cases discussed, the doctrine of necessity and declaration mechanism are used here to justify a protective order — an injunction — and not merely to declare the lawfulness (or unlawfulness) of a proposed course of action.

The “adults under a disability” whose rights were in issue in this case had all lived in a particular foster home as children and had returned to live in the home as adults. The foster home had been the subject of an inquiry carried out by the local authority, and the public solicitor representing these “vulnerable” adults now sought a ban on publication of the inquiry report on the grounds that the ensuing media scrutiny would cause upset and stress.⁸⁷ Dame Butler-Sloss agreed,⁸⁸ noting that,

85. [2003] EWHC 2746 (Fam).

86. *Ibid* at paras 86-97.

87. *Ibid* at paras 41-42.

88. *Ibid* (“[t]hey have now returned to live at the Home. They have had consideration and distressing disruption of their lived and are, as set out in the Report, vulnerable. A period of peace, stability and a chance to settle down again after the very real upset of their lives is threatened by the likely intense media cover if this Report is published. They are all under some disability but not such, as far as I know, as to prevent possibly all of them, but certainly at least 4 of them, from understanding the impact of press and other media intrusion. That intrusion would affect their daily lives and would be very likely to be disruptive, distressing and contrary to the need for them to settle back in the Home” at para 98).

following the decision in *In Re F*:

the circumstances within which a court will exercise the inherent jurisdiction through the common law doctrine of necessity are not restricted to granting declarations in medical issues. It is a flexible remedy and adaptable to ensure the protection of a person who is under a disability. It has been extended to questions of residence and contact. Until there is legislation passed which will protect and oversee the welfare of those under a permanent disability the courts have a duty to continue, as Lord Donaldson said in *Re F (Mental Patient: Sterilisation)*, to use the common law as the great safety net to fill gaps where it is clearly necessary to do so.⁸⁹

The new question in this case was whether the inherent jurisdiction could be exercised for the purposes of making a positive order that would ban publication of the report (justified on the basis of necessity):

[i]n the previous cases about adults under a disability, the issues have been the lawfulness of the proposed course of action and considerations as to their best interests. That cannot be the correct approach in the present case. The application of the inherent jurisdiction would seem more appropriately to be treated as the exercise of a protective jurisdiction rather than a custodial jurisdiction.⁹⁰

Dame Butler-Sloss granted an injunction preventing the authority from publishing the report.

The “flexible” remedy described in *In Re A Local Authority* was developed further in *Re G (An Adult)*,⁹¹ in which the court relaxed (if it did not yet abandon) the requirement of mental incapability which, through analogy to the inability to consent in emergency medical situations, had provided the conceptual basis for the application of the common law doctrine of necessity from *In Re F* onwards.

Re G concerned a young woman (“G”) who was not mentally incapable at the time the application was brought, although she had been incapable in the past by reason of her mental illness. G’s condition had stabilised under psychiatric care and for the last ten years she had been residing in supportive housing provided by the local authority. The local authority now sought a declaration that it could lawfully restrict contact

89. *Ibid* at para 96.

90. *Ibid* at para 97.

91. [2004] EWHC 2222 (Fam) [*Re G*].

between G and her father.⁹² G's father had been violent towards G and her mother in the past and the local authority was concerned about the strongly negative impact that contact with her father had on G. Following a previous period of contact with her father, G's condition regressed to the point that she became mentally incapable. Justice Bennett agreed with the experts involved in G's care that "[i]f the restrictions [on G's contact with her father] were lifted, G's mental health would deteriorate to such an extent that she would again become incapacitated ... Such a reversion would be disastrous for G".⁹³

Justice Bennett dismissed as "unattractive" the proposition that the court's jurisdiction would be "entirely dependent on the shifting sands of whether or not G did, or did not, have the requisite mental capacity at a particular time".⁹⁴ The doctrine of necessity therefore applied here, as in *In Re F*, to justify the restrictions the authority sought to impose. Quoting extensively from *In Re F*, Bennett J agreed with Lord Justice Sedley in that case that the doctrine of necessity was not restricted to "medical and similar emergencies".⁹⁵ "The concept of necessity has its role to play in all branches of our law of obligations — in contract ... in tort ... in restitution ... and in our criminal law. It is therefore a concept of great importance".⁹⁶ The common law doctrine of necessity justified the intervention sought by the local authority (restricting G's contact with her father) for the purpose of safeguarding G's rights — in this case, her right to not be deprived of her mental capability:

If the declarations sought are in G's best interests, the court, by intervening, far from depriving G of her right to make decisions...will be ensuring that G's now stable and improving mental health is sustained, that G has the best possible chance of continuing to be mentally capable, and of ensuring a quality of life that [she had previously been] unable to enjoy.⁹⁷

92. *Ibid* at para 1.

93. *Ibid* at para 86.

94. *Ibid* at para 91.

95. *Ibid* at para 102.

96. *Re G*, *supra* note 91 referring to the statement of Lord Goff of Chieveley in *R v Bournemouth Community and Mental Health Trust*, [1999] AC 458 (HL).

97. *Ibid* at para 104.

[...]

In my judgement, the common law demands that ... the court act by investigating, and if it is in G's best interests, making the declarations sought ... the 'focal point of the inquiry must be the situation which ... has led to the application for declaratory relief under the inherent jurisdiction'.⁹⁸

IV. *Re SK to DL v A Local Authority: Development of the Vulnerability Jurisdiction*

A series of cases decided after *Re G* apply the *In Re F* declaration (*i.e.* a declaration used as a means of determining the substantive lawfulness of a proposed intervention and thereby requiring a determination of whether the intervention is in the best interests of the individual) in situations involving the rights of individuals who, while identified as "vulnerable", are indisputably mentally capable. The source of vulnerability described in each case is an oppressive or exploitative relationship context from which the individual cannot separate herself⁹⁹ and by reason of which she cannot safeguard her rights independently. *Re G* can be seen to form a bridge between these later cases and the cases coming before it. The ultimate objective of the intervention proposed by the local authority in *Re G* was the prevention of G's regression to her earlier state of mental incapacity; the source of the threat both to G's physical wellbeing (the resurgence of her mental illness) and to her rights (her right to mental capability and therefore autonomy) was her relationship with her abusive father; the disruption of that relationship was the immediate objective of the proposed intervention.

The missing element of mental incapability in these cases changes the legal (common law and equity) basis on which the declaration is made in these cases and, thereby, the kind of intervention that can be justified. The medical intervention proposed in *In Re F* was lawful on the basis of necessity *because* F was mentally incapable and for that reason unable to consent, with no one else able to consent on her behalf (establishing, through analogy to the emergency cases, the common law justification of

98. *Ibid* at para 112.

99. All of the cases discussed here involve women.

necessity *if* the intervention could be shown to be in F's best interests). The cases discussed in the previous section, whether within or outside of the medical context, retain the fundamental premise of that analysis: in situations where a person's mental incapacity makes consent impossible, and where substitute consent is not available, necessity justifies an intervention that is in the person's best interest (and to which he or she would be entitled if able to consent).

The cases discussed in this section could be explained as a further development-through-analogy of the *In Re F* necessity analysis, extending the justification of necessity to situations where an oppressive and/or exploitative relationship context deprives the individual of her ability to consent in a way that is analogous to the incapacity of the unconscious train-wreck survivor (the original emergency exception). The analogy to emergency medical treatment is stretched thin, however, in a way that is inconsistent with the situation of necessity within the wider framework of tort law as a limited *exception* to the rule that the individual is, in the words of Lord Griffiths, the "master of her fate". It has also been suggested that the characterisation of a new "vulnerable persons" category as equivalent to unconscious victims or permanently consent-disabled persons (as described in By Lord Goff in *In Re F*) reduces the "vulnerable" to a bundle of faulty personal characteristics or risk factors and deprives individuals so labelled of the free choice to which they would otherwise be entitled.¹⁰⁰

I propose that it is more coherent (and less problematic in terms of autonomy) to understand these cases as marking a decisive conceptual break from the earlier necessity based cases following *In Re F*. In the case of a mentally *capable* adult in a non-emergency situation, the doctrine of necessity (with regards to intervention without consent) does not coherently apply. The "lawful" basis of the interventions sought in the cases involving vulnerable but capable persons is more correctly understood as the equitable doctrine of undue influence and the principles underlying it; through the mechanism of the declaration, drawing on the inherent

100. Michael C Dunn, Isabel CH Clare & Anthony J Holland, "To Empower or to Protect? Constructing the 'Vulnerable Adult' in English Law and Public Policy" (2008) 28:2 Legal Studies 234 at 241.

jurisdiction of the court, these cases show the court giving effect to the principles underlying the doctrine in novel situations¹⁰¹ (as the court used the mechanism of the declaration to interpret and give effect to the doctrine of necessity in the novel situation presented by *In Re F*). The use of the declaration as a mechanism through which the court may exercise its inherent jurisdiction in the way described in *In Re F* and subsequent cases is not limited to situations involving the common law doctrine of necessity; rather, the necessity cases provided the context in which this particular means of exercising the inherent jurisdiction originated, but to which it is not contained.

The language of “capacity” in the vulnerable-but-capable cases is potentially confusing but the mere word “capacity”, like vulnerability, has more than a single meaning; the more sensible meaning of “capacity” in the context of these cases relates to the nature of free choice as explained by the doctrine of undue influence. That idea is not the same as the cognitive ability described as “mental capacity” in the necessity cases. The fact that the declaration cases applying the doctrine of necessity outside of the medical context (discussed in the previous section) also concern relationships of oppression/exploitation, is another source of confusion. The objective of the proposed interventions in the vulnerable-but-capable cases is crucially different, however, in a way that is consistent with the distinct basis of their “lawfulness”: not the protection of rights and interests (as in the necessity-based non-medical cases) but the facilitation of free choice through the disruption of oppressive/exploitative relationship context.

A. *Re SK*

With the exception of *Re G* (involving fluctuating mental capacity), *Re SK (Proposed Plaintiff)(An Adult by way of her Litigation Friend)*,¹⁰² is the first case in which the court, drawing on its inherent jurisdiction, declared

101. The doctrine of undue influence developed in the transactional context, including gifts (and wills), although its theoretical framework has also been applied to consent in other contexts; see *Norberg v Wynrib*, [1992] 2 SCR 226.

102. [2004] EWHC 3202 (Fam).

as lawful a proposed non-medical intervention regarding an individual who, while characterised as vulnerable, was clearly mentally capable.

Re SK involved a female British citizen (“SK”) who, consular officials suspected, was being kept in Bangladesh for the purposes of a forced marriage. A solicitor in the Community Liaison Unit at the Foreign and Commonwealth Office brought an application asking that the court make an order, on the basis of its inherent jurisdiction, for the purpose of “protect[ing] and secur[ing] the well-being and best interests of SK and to ensure that she may freely express her wishes concerning her country and place of residence and concerning her marital status”.¹⁰³ The order requested would require SK’s family to “assist and allow” SK to visit the British High Commission and be interviewed alone. It did not cause SK to undergo a marriage ceremony and did not “threaten, intimidate ... harass” or use violence towards SK.¹⁰⁴

There was no doubt that SK was mentally capable; nor had she ever been mentally incapable. Nevertheless, Justice Singer concluded that, if the “gravely disquieting” information received by the consular offices in Bangladesh and London proved to be substantially well-founded,

[t]here would be serious cause for concern about her capacity to control her own life and destiny at the moment. This notwithstanding that she is an adult and is emancipated, at least in terms of English law, and should not be the subject of duress or force or be deprived of the ability to make her own decisions.¹⁰⁵

If, in truth, she were forced to marry or if, in truth, that is the outcome which she may contemplate and fear, then steps taken in furtherance of those ends would be a series of acts to which she did not consent. Indeed her very capacity to consent would have been overborne by fear, duress or threat. If therefore she has been through or faces the prospect of going through a ceremony of marriage with which she is, in fact, not in agreement it would be a voidable marriage, but nevertheless one which might engender irreparable and severe physical and emotional consequences for its victim.¹⁰⁶

The court concluded that “the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with

103. *Ibid* at annex.

104. *Ibid* at paras 2-4.

105. *Ibid* at para 3.

106. *Ibid* at para 4.

social needs and social values” and granted the order sought.¹⁰⁷

A similar situation was considered one year after *Re SK* in *Re SA (Vulnerable Adult with Capacity: Marriage)*.¹⁰⁸ That case concerned a British woman age 18 (“SA”) whose family was of Pakistani Muslim origin. SA was profoundly deaf and communicated through British Sign Language, which neither of her parents understood; SA’s communication with her family was therefore extremely limited as she could not understand, lip-read or sign in Punjabi or Urdu (the main languages spoken in the family). SA also had significant visual loss in one eye and had been assessed as having the intellectual level of a 13 or 14-year-old child. The local authority was worried that the family of SA planned to arrange, or possibly even force SA into a marriage in Pakistan. SA had expressed that she was happy to have an arranged marriage but would want to approve her parents’ choice of husband for her. She also wanted any future husband to speak English and to come and live in the UK; she did not want to go live in Pakistan.¹⁰⁹

SA had recently been assessed by a Forensic Psychologist (working for the local authority) as having the mental capacity required for marriage. The assessor also noted that if SA married a person who could not communicate with her, or if she was moved to an environment where she was entirely surrounded by people who could not communicate with her, it was very likely that SA would become extremely distressed and isolated, posing a significant risk to her future well-being and mental health.¹¹⁰ On this basis, the local authority sought an order similar to the

107. *Ibid* at para 8.

108. [2005] EWHC 2942 (Fam).

109. *Ibid*.

110. *Ibid* at para 15.

order sought and granted in *Re SK*.¹¹¹

Sir James Munby, giving judgment in the case, explained the basis for exercising the inherent jurisdiction “rediscovered” in *In Re F* in this case.¹¹² While it had always been recognised that the “jurisdiction is exercisable in relation to any adult who is for the time being, and whether permanently or merely temporarily, either disabled by mental incapacity from making his own decision or, although not mentally incapacitated, unable to communicate his decision”¹¹³ the immediate question was “whether the jurisdiction extends further”.¹¹⁴ Surveying the case law Sir Munby concluded that, “[i]n my judgment, it does. I must now explain why”:¹¹⁵

[i]n the light of these authorities it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.¹¹⁶

It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or

111. *Ibid* (the order made in *Re SA* prohibited her family from threatening, intimidating or harassing SA; using violence on SA; or preventing SA from communicating alone with her solicitor. SA’s family was also prohibited from applying for any travel documents for SA; removing or attempting to remove SA from the jurisdiction of England and Wales; and from causing, making arrangements for, or permitting SA to be married without her express written consent. The order also provided for undertakings from a groom that he will return to live in England if SA wished, and that, if SA were to remain in Bangladesh after marriage, a visit with an official from the British High commission would be arranged for the purpose of establishing her free consent to remain).

112. *Ibid* at para 46.

113. *Ibid*.

114. *Ibid* at para 48.

115. *Ibid*.

116. *Ibid* at para 76.

mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.¹¹⁷

This inherent jurisdiction would apply to all persons whose “capacity” (as described by Sir Munby) has been impaired in one of the senses, and for one of the reasons, referred to in the passage above but was “not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction”.¹¹⁸

The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable. That is all.¹¹⁹

Sir Munby’s reference to the “concept of the vulnerable adult” seems in relation to members of vulnerable populations, who are only more likely to be “incapacitated or disabled from giving or expressing a real and genuine consent”.

Granting the order sought (“designed to provide a practical solution to the concerns raised by the local authority and other professionals and, very importantly, to reflect what SA herself wants and expects from her husband”),¹²⁰ Sir Munby stated that:

[b]y taking this course, far from depriving SA of her right to make decisions I am ensuring, as best I can, that she has the best possible chance of future happiness. I am taking these steps to protect, support and enhance SA’s capacity to control her own life and destiny in the way she would wish.¹²¹

The analysis developed in *Re SK* and *Re SA* was applied outside of the arranged marriage context in the case of *A Local Authority v A*,¹²² regarding

117. *Ibid* at para 77.

118. *Ibid* at para 83.

119. *Ibid*.

120. *Ibid* at para 27.

121. *Ibid* at para 133.

122. [2010] EWHC 1549 (Fam).

a “vulnerable” 29 year old woman with severe learning difficulties and an assessed IQ of 53 (“A”) who was found to be incapable of making decisions in relation to contraception, “not to a small extent due to her husband’s negative influence on her decision-making capacity”.¹²³ Before her marriage A had given birth to two children, both of whom had been removed from her care after birth. The local authority was concerned that her husband was putting her under pressure to refuse contraception, and provided evidence that A had complained that her husband had hit her and that she did not wish to have a baby.¹²⁴ A is *not* described in the case as “mentally incapable”; rather, the court ascribes A’s inability to make her *own* decision regarding contraception to the totality of her “cognitive limitations”, “social impairment”, and “personal characteristics, associated with both her learning disability and her personality, in connection with her ‘ambivalence (including mixed feelings and confusion) about her husband and the pressure he seems to place on her to have a family’”.¹²⁵ In the opinion of a consultant retained by the local authority, the “pressure” experienced by A from her husband was contributed to “by Mrs. A’s personal characteristics” and by “Mr. A’s personal characteristics, including a suspicious and hostile stance in relation to support services, leading to his giving Mrs. A mixed messages about what is in her interests, thereby ‘confusing her’ more and therefore incapacitating her further”.¹²⁶ On the basis of the “completely unequal dynamic in the relationship between Mr. and Mrs. A” the court concluded that “her decision not to continue taking contraception is not the product of her free will”¹²⁷ and that “[w]here such circumstances pertain ... the court has a wide inherent jurisdiction to prevent conduct by the dominant party which coerces or unduly influences the vulnerable party from making free decisions”.¹²⁸ Regarding the question of whether the *Mental Capacity Act*, a comprehensive legislated scheme regarding mentally incapable

123. *Ibid* at paras 36-38.

124. *Ibid* at paras 18, 32, 34.

125. *Ibid* at para 51.

126. *Ibid*.

127. *Ibid* at para 73.

128. *Ibid* at para 79.

adults, had removed the need/justification for exercising the inherent jurisdiction the court in regards to an “incapacitated person” (incapacity here referring to A’s inability to make her own decisions due to the matrix of factors described above), the court concluded that the “wide inherent jurisdiction” of the court applied to an incapacitated person in the same way as to a person *with* capacity, “except that the aim of providing him or her with relief from the coercion is first to gain capacity and, if achieved, then to enable him to reach a free decision”.¹²⁹

B. *DL v A Local Authority*

The case of *DL v A Local Authority* provides the most complete articulation of the equitable doctrine of undue influence as providing the doctrinal justification for the exercise of the inherent jurisdiction in the vulnerable-but-capable cases.

In that case, a local authority sought and was granted an injunction (on the basis of the inherent jurisdiction of the court to make a declaration that the injunction was lawful) against a 55 year old son (“DL”) for the purpose of “regulating” his controlling, threatening and coercive conduct towards his (mentally capable) 85 year old mother. The mother, wishing to preserve her relationship with her son, did not want any proceedings taken against him.¹³⁰

The decision was appealed on the question of “whether, despite the extensive territory now occupied by the [*Mental Capacity Act 2005*], a jurisdictional hinterland exists outside its borders to deal with cases of ‘vulnerable adults’ who fall outside that Act and which are determined

129. *Ibid* at paras 79-80 (in the event, as Mr. A had given assurances to the court that he would not block A’s communication with professionals who could advise her in an “ability-appropriate way” about contraception, the court decided not to make an order restricting contact or conduct but to rely on Mr. A “to honour his assurances to the court ... in a spirit of co-operation in trying to enable A to reach contraceptive capacity” at para 80); see also *Local Authority X v MM, KM*, [2007] EWHC 2003 (Fam); *Re A (Male Sterilisation)*, [2000] 1 FLR 549 (CA (Civ)(Eng)); *LBL v RYJ and VJ*, [2010] EWHC 2665 (Fam) [*RYJ and VJ*].

130. *Local Authority*, *supra* note 7 at para 8.

under the inherent jurisdiction”.¹³¹ The appeal was dismissed. The court defined the scope and purpose of the existing “jurisdictional hinterland” as limited “to facilitat[ing] the process of unencumbered decision-making” rather than “imposing a decision upon [a person] whether as to welfare or finance”.¹³² The court continued:

I do not accept that the jurisdiction ... is extensive and all-encompassing, or one which may threaten the autonomy of every adult in the country. It is ... targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the *Mental Capacity Act 2005*. I, like Munby J before me in *Re SA*, am determined not to offer a definition so as to limit or constrict the group of ‘vulnerable adults’ for whose benefit this jurisdiction may be deployed ... The appellant’s submissions rightly place a premium upon an individual’s autonomy to make his own decisions. However this point, rather than being one against the existence of the inherent jurisdiction in these cases, is in my view a strong argument in favour of it. The jurisdiction ... is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity.¹³³

In the circumstances of this case, the conclusion that the “inherent jurisdiction remains available for use in cases that fall outside the [*Mental Capacity Act 2005*]”¹³⁴ was further justified on a “sound and strong public policy basis”¹³⁵ the “sadly all too easy to contemplate ... existence of elder abuse” although “the use of the term ‘elder’ in that label may inadvertently limit it to a particular age group whereas, as the cases demonstrate, the will of a vulnerable adult of any age may, in certain circumstances, be overborne”.¹³⁶

Where the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes. The young woman in *Re G* who would, as Bennett J described, lose her mental capacity if she were once again exposed to the unbridled and adverse influence of her father is a striking example of precisely

131. *Ibid* at para 1, per Lord Justice McFarlane.

132. *Ibid* at para 32 quoting from the decision of Justice Macur in *RYJ and VJ*, *supra* note 130 at para 62; see also *Westminster City Council v C*, [2008] EWCA Civ 198.

133. *Local Authority*, *supra* note 7 at paras 53, 54.

134. *Ibid* at para 63, per Justice David.

135. *Ibid*.

136. *Ibid*.

this point.¹³⁷

DL had put forward the argument that the legislature had considered incorporating undue influence into the ambit of the *Mental Capacity Act* and decided against it as an “immensely complex” exercise in drafting” that would require “significant safeguards to avoid unnecessary intervention”.¹³⁸ DL’s contention was that the legislature had explicitly excluded undue influence induced “incapacity” and it was not for the court to reintroduce it by other means.¹³⁹ The omission was not a gap, but a deliberate space. That argument was unsuccessful; the legislature’s inability to codify undue influence confirms the court’s ongoing responsibility *vis a vis* identifying and responding to this particular source of harm. The non-legislatibility of undue influence reflects the varied nature of undue influence itself, requiring in each case a “meticulous examination of the facts”.¹⁴⁰ The nature of undue influence, and the particular inequity with which the doctrine is concerned, requires the kind of judicial response that is provided through the exercise of the inherent jurisdiction of the court.

V. Implications for Canadian Law

The interpretation and application of a distinct undue influence based exercise of the inherent jurisdiction in the English courts (the vulnerability jurisdiction described in *DL v A Local Authority*) is complicated in Canadian law by two factors. The first of these is the confusion, referred to above, between the new jurisdiction and *parens patriae*. Canada, never having excised the traditional *parens patriae* jurisdiction with regards to incapable adults (referred to in *Re Eve* as “a carefully guarded”),¹⁴¹ has no need for a “new” or revived *parens patriae*. The second complicating

137. *Ibid.*

138. *Ibid* at para 37, citing a joint committee report of both the Houses of Parliament considering the draft Mental Health Bill.

139. *Ibid* at para 39.

140. *National Westminster Bank v Morgan*, [1985] 1 AC 686 at 709 (HL).

141. *Re Eve*, *supra* note 10 (“[t]he courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself” at para 75).

factor is Canadian judicial interpretation of the inherent jurisdiction of the court, which has focused overwhelmingly on the “core” jurisdiction that is protected by section 96 of the Canadian *Constitution Act, 1982*.¹⁴²

The interaction between these two factors can be seen in the decision of the British Columbia Supreme Court in *Temoin v Martin*¹⁴³ (“*Temoin*”), considered the question of whether the inherent jurisdiction could be invoked for the purpose of ordering a medical examination in connection with an application for committeship pursuant to the *Patients Property Act*.¹⁴⁴ Declining to exercise the inherent jurisdiction for this purpose, Madam Justice Fisher described the “essential purpose” of the jurisdiction as

to maintain and protect its [the court’s] own adjudicative powers ... by way of regulating the practice of the court and preventing abuse of its process. This is demonstrated by the kinds of cases in which inherent jurisdiction has been invoked: see, for example, *MacMillan* (contempt of court) and *Caron* (interim costs).¹⁴⁵

Justice Fisher concluded that *parens patriae* was “more appropriate to the issues raised by the Petitioner”¹⁴⁶ but the *prima facie* incompetence required for the exercise of that jurisdiction had not been established (as *parens patriae* could not be exercised with respect to capable adults). The facts of *Temoin* are in fact suggestive of the more complicated form of impaired decision making capacity described in the case of *A v A Local Authority*,¹⁴⁷ an inter-section of relationship context, intellectual limitation, and personality (*Temoin* concerned an individual, M, who

142. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; see *e.g.* *Criminal Lawyers*, *supra* note 20; see also *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186.

143. 2011 BCSC 1727, *affd* 2012 BCCA 250 [*Temoin*].

144. RSBC 1996, c 349; see *Temoin*, *supra* note 143 at para 1.

145. *Temoin*, *supra* note 143 at para 44 (cases in which the court has ordered a medical examination for the purposes of providing evidence and facilitating a fair trial include *Kujawa v Kujawa* (1990), 87 Sask R 101 (QB); *Hayman v Criddle*, 2010 SKQB 94; *Barnes (Litigation Guardian of) v London (City) Board of Education* (1994), 34 CPC 3d 51 (Ont Sup Ct J (Div Ct)).

146. *Temoin*, *supra* note 143 at para 45.

147. [2002] EWHC 18 (Fam).

was suffering from cognitive decline and also “significant pressure” from his second wife to change his will and to make other transactions).¹⁴⁸ Once defined as a case about the appropriate exercise of *parens patriae*, however, the focus shifted solely to the issue of M’s bio-cognitive capacity and the case is replete with discussions of the various capacity tests which M had undergone and the scores or outcomes of those tests; in contrast to the English cases interpreting and applying the inherent jurisdiction, M’s relationship context and its impact on his decision-making is invisible.

The inherent jurisdiction of the court has been drawn on to grant a common law restraining order in two Alberta cases: *RP v RV*¹⁴⁹ (“*RP*”) and *ATC v NS*.¹⁵⁰ These cases suggest a broader interpretation of the jurisdiction¹⁵¹ (beyond the “core”) on the basis of its nature as “a residual source of powers, which the court may draw on as necessary whenever it is just or equitable to do so” (enabling “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner”).¹⁵² Justice Hughes in *RP* granted a common law restraining order (in a family law context) describing the order as an *injunction*, “an order, historically of an equitable nature, restraining the person to whom it is directed from performing a specific act”.¹⁵³ In doing so, Hughes J described the “common law jurisdiction to grant a restraining order” as

flow[ing] from the inherent jurisdiction of provincial superior courts to hear any matter properly coming before it, in combination with the general power of those courts to grant injunctive relief as equitable remedy ... [t]he discretionary power to grant all manner of injunctions is an equitable remedy

148. *Ibid* at paras 5-15.

149. 2012 ABQB 353. The applicant in that case sought a common law restraining order rather than a protection order pursuant to the *Protection Against Family Violence Act*, RSA 2000, c P-27, s 4.

150. 2014 ABQB 132 [*ATC*].

151. Although this is not explicitly stated; the implication is in the application, and the reasons given for it.

152. *ATC*, *supra* note 149 (Justice Hughes in *RP v RV*, *supra* note 148 referring to the passage from *Caron*, *supra* note 20 at para 17).

153. *ATC*, *supra* note 149 at para 15.

that dates back to English law.¹⁵⁴

RP was subsequently applied in the 2014 case of *ATC* Justice Lee concluding that the inherent jurisdiction of the court “must be more encompassing than its common law historical development and as well ... go beyond its present statutory limits”.¹⁵⁵ Granting a restraining order as an exercise of the inherent jurisdiction it was therefore necessary only for the court to determine:

[t]hat the parties genuinely do not get along and are a threat to each other, not necessarily in terms of their personal safety or property damage, but also in terms of the damage that can be done to their reputations and lives ... This harm is not physical harm involving one’s personal safety, or damage or property, but still is serious emotional harm carried out through the internet, or caused by stalking and other harassing behavior ... Accordingly ... the practical solution to the problem is simply to use the Court’s inherent jurisdiction in matters such as this to grant permanent mutual restraining orders in favour of each party against the other.¹⁵⁶

The Alberta cases show the inherent jurisdiction being exercised outside of its “core” and for a purpose unconnected to the court’s ability to control its own administration and operation; in these cases the jurisdiction is, indeed, being drawn upon to respond to a particular form of intensified vulnerability that is not recognized or provided for in legislation, drawing on the “great safety net” of the common law and equity to do so.

VI. Conclusion

Recognizing and articulating the “heroic judicial invention” of an “entirely novel jurisdiction” as an exercise of the inherent jurisdiction that is separate and distinct from *parens patriae* has the potential to facilitate future development of this “lusty child of equity” in the

154. *ATC*, *supra* note 149 at paras 16, 19 (the court’s inherent jurisdiction and authority to grant equitable relief has been codified in the *Alberta Judicature Act*, RSA 2000, c. J-2, ss 8, 13(2) but did not derive from it).

155. *ATC*, *supra* note 149 at para 18.

156. *Ibid* at paras 18-19; see also *R v Burke*, 2012 NSSC 119. In this case the Nova Scotia Supreme Court invoked the inherent jurisdiction to grant a common law peace bond, while recognising that the jurisdiction should be used “sparingly”.

Canadian courts.¹⁵⁷ This new vulnerability jurisdiction incorporates the idea of vulnerability as essential to the human condition, made more or less intense dependent on the interplay between social/relationship context and one's biological or embodied state of being (as opposed to the association of vulnerability with "vulnerable populations"). The objective of the "novel jurisdiction" is to provide a measured and coherent response to the vulnerability caused by relationships of oppression and exploitation which may then, as explained in *Re G*, increase physiological and/or cognitive resilience, and therefore autonomy. This is an exciting, and very modern, idea.

157. Munby, *supra* note 1. For Munby, of course, equity's newest child was a new *parens patriae* applying to vulnerable adults.