



## The vulnerable adult experiment: Situating vulnerability in adult safeguarding law and policy☆



Kirsty Keyword

University of Manchester, United Kingdom

### ARTICLE INFO

#### Article history:

Received 18 May 2017

Accepted 23 May 2017

Available online 27 June 2017

#### Keywords:

Vulnerability

Abuse

Neglect

Safeguarding: Adult protection

Mental disability

### ABSTRACT

This article explores the intersection of English adult protection law and policy as it impacted on the lives of people with mental disabilities. It evaluates developments that were premised on the notion of the 'vulnerable adult', in light of recent theoretical interrogation of vulnerability and the normative shifts in law and policy advocated by the UNCRPD. I argue that the policy and legal conceptions of vulnerability developed in England and Wales, if reworked, have the potential to transform our understanding of what it is to be vulnerable into a more radical and socially-grounded framework for adult safeguarding. This article concludes with some reflections on what further conceptual and policy work must be done in order to effect that transformation.

Crown Copyright © 2017 Published by Elsevier Ltd. All rights reserved.

### 1. Introduction

The abuse and neglect of adults with mental disabilities in England and Wales has a long history. Surprisingly, however, the regulatory tools to combat abuse has remained largely unchanged until the mid-twentieth century; focusing on registration, inspection, monitoring, reporting and prosecution of ill-treatment of people looked after outside the family home.<sup>1</sup> It is a matter of speculation whether regulatory

failure was in part responsible for the institutional care scandals of the latter part of the 20th century, but their occurrence heralded a return to the traditional methods of regulatory control.<sup>2</sup> Further reform was considered following the death of Beverley Lewis, a deafblind woman who had a learning disability who had died in conditions of squalor while in the care of her mother. The Health Secretary, Stephen Dorrell, indicated that he would refer to the Law Commission the question of whether new powers were needed to combat the incidence of abuse experienced by people with mental health problems and learning disabilities (HC Deb 26 July 1990 vol 177 cc431–2W). In response, and following lengthy public consultation, the Law Commission proposed a series of reforms to address the failings in adult protection to sit

☆ This paper forms part of a special edition of the International Journal of Law and Psychiatry devoted to Article 16 of the Convention on the Rights of Persons with Disabilities. For a full view of the contents of this special edition, go to <http://www.journals.elsevier.com/international-journal-of-law-and-psychiatry/>. My thanks to Laura Pritchard-Jones, Paul Skowron and the anonymous reviewers for their helpful advice and suggestions. Any errors are, of course, my own. This article is dedicated to the memory of Connor Sparrowhawk and to his family.

<sup>1</sup> Allegations of abuse were typically uncovered by those charged with the responsibility to identify and record those described as lunatics' (see, e.g. Madhouses Act 1774; Lunacy Act 1845), 'idiots' (Idiots Act 1886) and the 'feeble-minded' (Mental Deficiency Act 1913 s.25). Judicial bodies too would occasionally be alerted to the ill-treatment, whether through the exercise of powers under Chancery law to manage the property of individuals suffering from lunacy (Lunacy Act, 1890; Suzuki, 1999: 126), or through their power to authorise confinement in private madhouses, licenced premises or asylums. There is voluminous literature on the institutional 'care scandals' that took place during the eighteenth and nineteenth century, in large part because inspection reports were publicly recorded and the subject of frequent discussion and debate in Parliament. Documented instances of neglect in the family home during the same period are few, although it has been noted that instances of abuse and neglect at home are referred to in political discourse that supported the development of asylum provision (Melling, Forsythe, & Adair, 1999).

<sup>2</sup> That regulatory apparatus was largely dismantled with the advent of the Mental Treatment Act 1930; as the person of unsound mind was recast as 'mental patient', with the hospital as a locus of care and support when community or outpatient support was not appropriate. Health professionals and their professional organisations expressed resistance to the notion of regulation and inspection of care standards when hospitals fell under the central governance of the National Health Service (Bevan, 2008, 87)). The classificatory and supervisory functions of the Board of Control were abolished by the Mental Health Act 1959 (s.2) and hospital inspections were performed at will by Regional Hospital Boards. The Inquiry into the abuse at Ely Hospital (Cmnd. 3975) prompted the creation of the Hospital Advisory Service, whose role was to undertake periodic inspection of hospitals (HL deb 27 March 1969 vol 300 cc1357–1490). Subsequently, the publication of the Longcare Inquiry report (Buckinghamshire Council, 1998) was reported to have "strongly influenced" (Pring, 2011, 302) the passing of the Care Standards Act 2000 (HC Deb 2 June 1997 vol 295 cc1314–1728; HL Deb 28 March 2000 vol 611 cc 774). The Act created a national framework for hospital and regulated services inspection and the compulsory registration of professionals seeking to work with vulnerable adults.

alongside its proposals on mental incapacity.<sup>3</sup> These powers and duties would apply in respect of a vulnerable adult who was suffering or likely to suffer significant harm or serious exploitation.

Rejecting the need for law reform, the Government stated its intention to develop a safeguarding policy for England and Wales, with a view to making better use of existing legal powers and establishing coherent processes to investigate and address allegations of abuse and neglect (Cm44654, 8.6). Significantly, however, the policy drew on the Law Commission's concept of the vulnerable adult as the conceptual basis for this policy (Department of Health, 2000; Welsh Assembly, 2000). Some years later, the concept of the vulnerable adult received further endorsement in the High Court's expansion of its inherent jurisdiction. That jurisdiction broadened the range of legal powers that could be utilised by the Court to safeguard individuals against the abusive influence of others (*Re SA* [2005]).

At around the same time, academic scholarship renewed its theoretical interest in the concept of vulnerability. Vulnerability has emerged as a significant theoretical lens through which we might reframe ethico-legal relations (MacKenzie, Rogers, & Dodds, 2014; ten Have, 2016); and re-examine the basis of state obligations to secure equality (Fineman & Grear, 2013). Its emergence in legal, philosophical and bio-ethical literature stems from a dissatisfaction with dominant liberal formulations of the individual (e.g. Anderson, 2014; MacKenzie, 2014). This dissatisfaction is wide-ranging and embraces discontent with its failure to acknowledge the embodied subject (e.g. Grear, 2013) or the structural inequalities that generate political disadvantage and social exclusion for a range of populations who are prevented from enjoying legal and political agency on equal terms (e.g. Fineman, 2008, Fineman, 2013a, 2013b); others have criticised the liberal legal subject for its failure to conceptualise not only our relation to the broader societal structures and organising ideology, but also our relation to and interdependence on one another (e.g. Herring, 2016). Such a perspective yields an appraisal of agency and obligation in the material contexts in which people live, mindful of the impacts that broader social arrangements have on these. Given the legal and policy focus on vulnerability in England and Wales at that time, vulnerability scholarship offers an important vantage point from which to examine the conceptual coherence of adult safeguarding and the operational implications of this.

This article reflects on the success of the concept of the vulnerable adult as the basis of adult protection law and policy in England and Wales. In addition, it considers the potential of the theoretical work on vulnerability to have practical and normative purchase in the lives of people who are at risk of abuse, coercion and exploitation. I suggest that the conceptual linkage of impairment and vulnerability advocated by safeguarding policy was highly problematic, since both adhere to a model of vulnerability which is firmly anchored to notions of bodily and psychological deficit that fail to account for the broader structural factors that render us vulnerable. In reviewing the unsatisfactory efforts of mental health and mental incapacity law to act as safeguarding tools, I assess the impact of the High Court's 'vulnerable adults' jurisdiction. Despite some initial concerns that the judicially conceived notion of the vulnerable adult would be subject to the same conceptual flaws as safeguarding policy, case law can be read as promoting an altogether more robust and convincing account of vulnerability. I argue that the model of vulnerability suggested by more recent English legal developments, has the potential to transform our understanding of what it is to be vulnerable into a more radical and socially grounded-framework for adult safeguarding. Importantly, these developments also offer a way forward that is consistent with State obligations under the UNCRPD. I

conclude with some reflections on what conceptual and policy work must be done in order to effect that transformation.

## 2. The dawn of the vulnerability experiment

English and Welsh Adult protection policy (Department of Health, 2000; Welsh Assembly, 2000) claimed as its goals the prevention of abuse and the investigation of allegations of abuse. It adopted the Law Commission's gateway concept of the vulnerable adult, save that it set the age threshold at 18 rather than 16. A vulnerable adult was thus defined as a person "in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation" (Department of Health, 2000, 2.2). In short, a person would not fall within the scope of the policy and be eligible for adult protection interventions unless they were deemed 'vulnerable' and the concept of vulnerability was inextricably to tie to a person's need for social care support because they are disabled, or ill, or elderly.

### 2.1. Essentially vulnerable?

At the heart of the policy lay a tension concerning the nature of vulnerability and its association with impairment and needs for support. Indeed, the definition of vulnerability was criticised from the outset for its adoption of a medical model of disability which identified the individual as the locus of their vulnerability (ADASS, 2005, 4). Locating a model of vulnerability to abuse within a framework of care needs arising from physical or intellectual impairment is intensely problematic for two reasons: Firstly, it has the potential to obscure the commonality of experience shared by disabled and non-disabled individuals and to assume that a person's vulnerability is an escapable facet of their impairing condition. Disability scholars have been vociferous in their criticism of viewing disability solely through the prism of 'personal care needs', since such perspectives underscore corporeal difference in the disabled body (e.g. Oliver & Barnes, 2012, 136) and that difference is in turn represented as a justification for legal or policy intervention. Second, a focus on a person's need for care as representing the source of their vulnerability hides from critical examination the diverse and distinct impacts of social organisation, theory and culture on the lives of disabled people. Disability is not a homogenous phenomenon: not all disabled people are vulnerable to the same things and in the same ways. The Cartesian foundations of the medical norm that underpins disability law and policy (Shildrick, 2002), for example, have impacted on people with mental disabilities in distinct ways (e.g. Godley, 2001; Keywood, 2002; Penson, 2015 Penson, 2015) that have not always been attended to by mainstream disability scholarship. Undoubtedly, academic challenges to the medical model of disability are diverse,<sup>4</sup> though they have in common a commitment to challenging the model of deficiency and vulnerability that is represented as arising solely through personal need. Such perspectives are critically important in challenging contemporary models of care provision, which entrench dependency by orienting state responses to meeting a very narrow set of personal support needs rather than focusing on strategies that would increase people's empowerment beyond the rhetoric of choice that currently underpins social care policy.

Indeed the conceptual linkages between unwell-ness, disability, dependency and non-autonomy are currently so firmly embedded in legal, social and cultural discourses of disability (e.g. Clough, 2015a, 2015b; Leach Scully, 2014) that treating the correlation between disability and vulnerability as inevitable may prove irresistible. The effect of the

<sup>3</sup> These included a statutory duty to investigate suspected abuse (Law Comm 231, 9.16); the creation of judicial powers to authorise the assessment or placement of a person in protective accommodation; (Law Comm 231, 9.19, 9.24, 9.28) and the creation of a criminal offence of obstruction for third parties who hinder the operation of these new powers (Law Comm 231, 9.36).

<sup>4</sup> Note for example the ongoing debate of repositioning the material body within the social model by those seeking to advance a sociology of (embodied) impairment (e.g. Coleman-Fountain & McLaughlin, 2013; Hughes & Paterson, 1997; McKenzie & MacLeod, 2012).

Download English Version:

<https://daneshyari.com/en/article/6462949>

Download Persian Version:

<https://daneshyari.com/article/6462949>

[Daneshyari.com](https://daneshyari.com)