

Elder Law in Canada: A Country Without A Flag

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This is a short paper. Moreover, and given the multi-disciplinary nature of the conference and the varying backgrounds and expertise of those in attendance, it is not at all technical. To make a short paper even shorter, my suggestion is a simple one. Elder law in Canada is undoubtedly making progress particularly in addressing the need for statutory and regulatory regimes to offer sensible procedures and real protections to older adults in matters such as substitute decision-making and rights and obligations in public and private residential facilities. Overall, however, I would suggest that the progress of elder law is slow. One problem is that the legal profession has yet to come to a view as to whether this is indeed a 'legitimate' area of law or merely a marketing opportunity. I would suggest that it is critical that elder law do more to capture the imagination of the legal profession, and engage practitioners more fully in this area of law. Towards that end, I believe that it is important to identify a core set of values over time and to construct a conventional conceptual framework in which to develop doctrine. I believe this would assist in meeting the objections that one hears from practitioners and others. For my part, I have a small suggestion that is probably an obvious one. I would suggest that *dignity* is and should be an important part of this framework. Despite legitimate criticisms of its limitations as a decision-making criterion in individual cases, it enjoys broad support as a meaningful standard especially amongst older adults. It is already at the core of many individual parts of an elder law practice, particularly treatment of unjustified age-related discrimination. The challenge, then, is to develop it more fully.

Introduction

Elder law is a new subject on the curricula for Canadian law schools and is attempting to establish a foot hold in the legal profession. Some lawyers now market themselves as

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'elder law practitioners', usually as a complement to advertised practice in other traditional areas. They practice in areas such as wills and estate planning and litigation, health law, and in general practice. They appear before the civil courts and more specialized administrative tribunals such as the Consent and Capacity Board. The work might involve a practitioners building substantial expertise in substitute decision-making, informal advocacy for placement in an appropriate health care facility or to receive appropriate health-related supports, or dealing with the aftermath of physical and financial exploitation. Elder law focussed conferences, such as this one, have been held at which a variety of legal issues are discussed. The excellent papers completed for the Law Commission of Ontario by Margaret Hall,¹ Charmaine Spencer,² and Lisa Romano and Jane Meadus on behalf of the Advocacy Centre for the Elderly³ are meticulously researched and detailed accounts of some of the most salient issues facing older adults and the fact the LCO commissioned such outstanding research is itself significant. All of these are positive and encouraging developments.

And yet the progress of elder law is slow. For my part, and based admittedly on my subjective impressions and principally in a large part of the province in which small firms and sole practitioners predominate, I am not at all convinced that the legal profession accepts elder law as anything more than a new marketing platform to entice older adults to retain particular law firms to as a means to portray the firm in question as one associated with social justice issues. I don't intend to criticize lawyers for failing their profession or the community in some way. Rather, elder law as subject of law has failed to spark the imagination of the general membership of the profession thus far, and, in that respect, the progress of elder law remains somewhat disappointing. These are precisely the practitioners that are best situated to offer advice to older adults and to contribute to policy-making based on their experiences with clients.

Indeed, it seems odd that one question still asked with equal vigour in Canada and elsewhere is whether elder law is an 'area of law' in the conventional sense of that term at all, or 'merely' an area of legal practice. The 'merely' isn't pejorative, the question isn't

¹ 'Developing an Anti-Ageist Approach Within Law' (2009), available at <http://www.lco-cdo.org>.

² 'Ageism and the Law: Emerging Concepts and Practices in Housing and Health' (2009), available at <http://www.lco-cdo.org>.

³ 'Congregate Living And The Law As It Affects Older Adults' (2009), available at <http://www.lco-cdo.org>.

inappropriate, and those that ask it should not be regarded as cynics. The usual answer is something along the lines of 'well, it doesn't *really* matter does it? The interests of those affected are important and we ought not concern ourselves with abstract points.' While partially true (the interests of older adults are unquestionably important) this answer isn't really satisfying and I think that such an attitude slows the acceptance and evolution of elder law to a very large extent. Certainly it leads to at least two objections.

The first objection, to employ some language that features in constitutional analysis, is that the principles that that are said to be at the heart of this area are insufficiently distinct and are not so well regarded as there might be an informed legal debate about how the law should develop. This objection might be said to be one of conceptual or institutional integrity; *elder law is too fuzzy*, and vague law undermines what we call 'fundamental justice' or the 'rule of law'. This is a serious objection when made by lawyers.

The second objection follows naturally from the first and is both pragmatic and the more powerful for its pragmatism. If indeed elder law has not yet coalesced around articulable principles that are sufficiently clear to elevate the debate to one of law rather than something else, is 'elder law' merely an exercise in special pleading? The objection is one relating to fairness and valid claims on scarce resources; that elder law is less about principle and more about elevating the claims of a chosen group (in this case, older adults) to a larger share of public attention and resources than is warranted at the expense of another less fortunate group (not older adults). Those that think that younger adults do not recognize the resource implications of an elder law agenda are, in my opinion, wrong. I teach law students who are principally in the mid-twenties, regularly make presentations on these issues to high school and post-secondary school students, and present seminars to professional and the general public on elder law issues. Aside from questions of abuse and neglect, it's not my experience at all that entitlements to resources are a given. Younger adults are well aware that resources dedicated to one age cohort are not available to another. Young adults suspect that dollars put into seniors' centres are the same dollars not placed into lowering university and college tuition. Whether this is accurate, in my opinion, is less important than the reality that budgetary constraints cause everyone to reflect on priorities for the expenditure of public funds. If older adults are to be able to claim as of right, and through law, a share of

public attention and resources that is greater than enjoyed presently, a case has to be made, it has to be principled, and it has to be persuasive.

Clearly one can't merely wave one's hands at these objections and hope for them to go away merely on some dictum like 'older adults are important too'. If elder law is to move forward, it must meet these objections with if not precise answers then at least with a framework for analysis that puts the area on a more conventional footing and provides the necessary room for 'informed debate'.

I don't pretend for a moment that the question of the nature of elder law has not been considered by others,⁴ and indeed there is growing scholarly activity⁵ that will almost certainly offer more cogent insights than some of the meagre thoughts that I might offer in this short paper. Equally I don't suggest that elder law arises on merely one principle or policy interest; like any area of law, the foundational values may be varied but interconnected and it our task to identify individual elements that can feature in the analysis. On the other hand, some degree of simplicity would be beneficial in two respects, to promote the area amongst the legal profession and to make the law meaningful and accessible to the public generally.

Elder law needs a flag for its supporters to rally around.

Dignity

I would suggest that two propositions are useful from the outset in thinking about elder law and at least help to begin an analysis. The first is an obvious one; that aging does not operate to lessen a person's rights, freedoms, or responsibilities in law necessarily. Age and aging may certainly be relevant in how rights, freedoms, or responsibilities are articulated or understood in a given context but neither age or aging *diminishes* one's

⁴ For example, Lawrence H. Frolik, 'The Developing Field of Elder Law: A Historical Perspective' (1993), 1 Elder LJ 1; Amelia E. Pohl, 'Introduction: What Is Elder Law Anyway?' (1995), 19 Nova LR 449; Lionel Brazen, 'A Brief History Of Elder Law' (1996), 84 Ill. B. J. 16; Lawrence H. Frolik, 'The Developing Field Of Elder Law Redux: Ten Years After' (2002), 10 ELDLJ 1; Israel Doron (ed), *Theories On Law And Ageing: The Jurisprudence Of Elder Law* (Springer, 2009); Jonathan Herring, *Older People in Law and Society* (OUP, 2009).

⁵ Professor Kohn has done a nice job of surveying activity in the field, see Nina Kohn, "Elder Law Teaching And Scholarship: An Empirical Analysis Of An Evolving Field" (2010), 59 J. Legal Educ. 414 .

status as a matter of law. If elder law is to exist without parasitic reliance on other areas, this assists at least in dividing conceptually those legal and policy issues that may account for age or aging and necessarily fall to elder law and those that do not; but of course that may be easier said than done. Thus, for example, an older adult may marry and divorce. Aging may become relevant in the determination of whether a form of marriage entered into by an older adult is valid itself and which becomes relevant thereafter for the purposes of the automatic revocation of an existing Will.⁶ Does the legal issue fall within elder law, family law, contract law, or succession law conceptually? It's not apparent what the answer ought to be. Certainly Parliament designed the matrimonial law regime, a provincial legislature acted to apportion property rights upon the termination of the relationship by death or separation and the consequences of the fact of the new marriage for the purposes of succession law, and a court may have something to say about the matter through some common law or equitable doctrine. If, as I suggest, elder law involves only issues that spring necessarily from aging alone and necessarily only involve interests that are implicated from aging alone, then its principles (if sufficiently developed) may help to determine where this question lies and how doctrine in areas that are 'not elder law' may take account for aging issues in a principled way.

The second proposition is one that seems to me to be equally obvious, but to my mind it is strangely provocative. Moreover, in making the point I apologize if I depart from the conventions of pure academic legal analysis by which one avoids the inclusion of personal views or experience. If academics were as important as judges, we might at least claim the high ground and say that our own personal experiences are *necessarily* a part of our appreciation of the law in a given set of facts. In my life as a practising lawyer, my clients who are older adults are of two specific types, mentally capable of making important decisions (whether that capacity fluctuates or not, whether that capacity is consistent or not), and, those that are not so capable. The distinction is hugely significant as incapacity raises gives rise to a host of special vulnerabilities. Even in respect of fully capable individuals, I suggest that there are general vulnerabilities that increase with age and, for my part, I suggest that it would be counter-productive for the law to deny the significance of age-related vulnerabilities. Indeed, my clients often appear annoyed that state actors like the Public Guardian and Trustee or the police don't

⁶ *Banton v Banton* (1998), 164 D.L.R. (4th) 17 (Ont. Gen. Div.).

more vigorously protect older adults who are vulnerable to exploitation and neglect and don't start from the proposition that this group is more vulnerable because of aging. This is very much a value judgement; not a judgement that older adults are less fully autonomous actors necessarily, but deserve the law's protections and accommodations that arise from vulnerabilities tied to aging certainly. In my view, elder law proceeds directly from the law's account for those general and special vulnerabilities. This is not to say that elder law necessarily descends into some sort of *parens patriae* equitable jurisdiction designed to protect older adults from themselves; this would be to assume inability to act autonomously and narrow the potential scope of elder law unnecessarily.

At the 3rd Annual Canadian Conference on Elder Law held in 2007, no less a person than Chief Justice McLachlin presented a paper in which her Honour discussed aspects of elder law.⁷ Obviously, the very fact that the Chief Justice of Canada presented a paper on the importance of elder law is good evidence both of its existence as an area of practice and policy concern and the importance of coming to grips with the subject as a matter of legal principle. More to the point though, McLachlin C.J. said some significant things; she spoke of three interests bordering on 'entitlements' (that is, 'rights' and 'freedoms' to use some familiar language): freedom from unjustifiable discrimination based upon age, security against abuse, and the provision of adequate care and support to preserve and enhance individual independence and autonomy. Her Honour wrote:⁸

Every person, regardless of age, is entitled to live in dignity, free from discrimination and abuse. Every person, regardless of age, is entitled to live in security. And every person, regardless of age, is entitled to make their own choices and to remain autonomous and independent to the maximum degree possible. The law has an important role to play in ensuring that the fundamental principles of dignity, security and autonomy are translated into the reality of the lives of our elder citizens.

May I suggest that of the phrase *dignity, security and autonomy*, one element stands out as different from the others. Certainly security and autonomy are familiar goals of law; they represent at least two important interests that can indeed become rights dependant on context. Sometime we qualify or elevate one or other of the interests, or both;

⁷ Beverley McLachlin, 'Elder Law: An Emerging Practice' (2009), 3 Journal of International Aging, Law & Policy 1.

⁸ Ibid., 14.

'security of the person' is a Charter-protected interest. 'Autonomy' is at the heart of criminal law, civil wrongs, and contract. Dignity, on the other hand, is different.

The theme of this conference is anti-ageism; that is to say, equality of treatment for older adults absent justifiable discrimination based on age. It is trite law in Canada that human dignity is a core value in the protection against unequal treatment as contemplated by the Charter and unjustifiable discrimination on the basis of age was accepted from early on in equality cases.⁹ After reviewing the jurisprudence linking equality with dignity and such values as 'concern, respect and consideration,'¹⁰ Justice Iacobucci held in *Law*:¹¹

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

I would suggest that dignity has not been captured by the equality rights provisions of the Charter such that its principal features - 'the realization of personal autonomy and self-determination... self-respect and self-worth' - are important values only for the purposes of s.15. Certainly dignity as a Charter value makes its presence known in the

⁹ *McKinney v University of Guelph*, [1990] 3 S.C.R. 229; *Miron v Trudel*, [1995] 2 S.C.R. 418; *Egan v Canada* [1995] 2 S.C.R. 513; *Vriend v Alberta*, [1998] 1 S.C.R. 493; *Law v. Canada*, [1999] 1 S.C.R. 497.

¹⁰ *Law v Canada*, [1999] 1 S.C.R. 497, para. 49.

¹¹ *Ibid.*, para. 53.

jurisprudence respecting freedom of conscience and religion,¹² freedom of expression,¹³ freedom of association,¹⁴ the right to vote,¹⁵ mobility rights,¹⁶ the right to liberty¹⁷ and security¹⁸ of the person and the construction of limitations thereof in accordance with the principles of fundamental justice,¹⁹ the right to be secure from unreasonable search and seizure,²⁰ the right against self-incrimination,²¹ and protection from cruel and unusual punishment.²² In all of these areas human dignity as a legal value has been identified with a specific right or freedom. I hope that readers will forgive me for not setting out a detailed treatment of dignity in each of these areas; indeed I would suggest that nothing much would really come from such a presentation given that dignity is bound up in each and every case with the specific right or freedom at issue without revealing a 'golden thread' that can extend effortlessly and elegantly into elder law.

On the other hand, that dignity is referenced extensively in the Charter jurisprudence is hardly surprising; use of dignity as a 'supreme' constitutional value is mirrored in other evolved legal systems.²³ Outside national constitutions, dignity is central as an international human rights norm. The term appears five times in the *Universal Declaration on Human Rights* and permeates international and regional human rights instruments.²⁴ Given the need for contextual attenuation of dignity, some dismiss human

¹² *R v Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295; freedom of religion flows from dignity concepts.

¹³ *R v Sharpe*, 2001 SCC 2, para. 107; freedom of expression engages 'self-fulfilment and self-actualization' and the inherent dignity of the individual.

¹⁴ *Reference re Public Service Employees Relations Act (Alberta)*, [1987] 1 S.C.R. 313, para. 28; *Delisle v Canada*, [1999] 2 S.C.R. 989; *R v Advance Cutting & Coring Ltd*, [2001] 3 S.C.R. 209; *Dunmore v Canada*, 2001 SCC 94.

¹⁵ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158.

¹⁶ *Canadian Egg Marketing Agency v Richardson*, [1998] 3 S.C.R. 157.

¹⁷ *R. v. Jones*, [1986] 2 S.C.R. 284; *R v. Morgentaler*, [1988] 1 S.C.R. 30; *Reference re s.193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 S.C.R. 307.

¹⁸ *R v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (A.G.)*, [1993] S.C.R. 519; *R v Stillman*, [1997] 1 S.C.R. 607.

¹⁹ *Reference re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979 (Motor Vehicles Reference)*, [1985] 2 S.C.R. 486.

²⁰ *R v Dyment*, [1988] 2 S.C.R. 417; *R v Greffe*, [1990] 1 S.C.R. 755; *R v Golden*, 2001 SCC 83.

²¹ *R. v. White*, [1999] 2 S.C.R. 417; *R v Amway Corp.*, [1989] 1 S.C.R. 21.

²² *R v Smith* [1987] 1 S.C.R. 1045; *Kindler v Canada*, [1991] 2 S.C.R. 779.

²³ Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009), 2 *European Human Rights Law Review* 190, 191.

²⁴ I have not reviewed the international human rights treatment of older persons in this paper though dignity features in many proposals and plans. There is no binding international instrument dedicated to the legal treatment of older adults although several international instruments either refer to older adults in some explicit form or have implications for the rights and treatment of older

dignity in the legal context as a 'mere rhetorical device'²⁵ or worse.²⁶ Yet that dignity is such powerful rhetoric is telling. Dignity is a concept that resonates in the public consciousness even if some deride its imprecision and its inability to be used as a predictable legal standard in individual cases. In other words, it's useful *because* people regard its elegant simplicity as particularly appropriate notwithstanding that it requires careful contextualization. It's useful because it speaks to commonly shared values, with the capacity to cross cultures and legal systems. We might do better to understand and protect dignity as a legal value rather than jettisoning it for the familiar comforts of either discretionary decision-making by courts or tribunals or less rhetorically-rich concepts like 'autonomy' that somehow we regard as less prone to intellectual corruption.²⁷

Dignity and Older Adults

Dignity, despite or perhaps due to the vagaries of its precise meaning, is the subject of an enormous literature over many centuries that examines the concept historically, philosophically, ethically, theologically, sociologically, and jurisprudentially.²⁸ It's beyond

people. A treaty dedicated to such issues has been on the international agenda for over 60 years and truly became a subject of interest for international law through the 1973 Resolution of the General Assembly of the United Nations calling for better treatment of older people in a number of discrete areas and for member states to combat unjustified discrimination based on age; *Question of the Elderly and the Aged*, G.A. res. 3137 (XXVIII), UN GAOR, 28th Sess., 14 December 1973. Since 1978, the work of the United Nations around aging has focussed on the preparation for and subsequent implementation of the action plan decided during the 1982 World Assembly on Aging (the 'Vienna International Plan of Action on Aging'); General Assembly in its resolution 37/51 of 3 December 1982. See Israel Doron and Itai Apter, 'The Debate Around the Need for an International Convention on the Rights of Older Persons' (2010), 50 *The Gerontologist* 586; Jaclynn M. Miller, 'International Human Rights and the Elderly' (2010), 11 *Marq. Elder's Advisor* 343; Arlene S. Kanter, 'The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law' (2009), 55 *Georgia State ULR* 527; Kwong-leung Tng, 'Taking Older People's Rights Seriously: The Role of International Law' (2007), 20 *J of Aging & Social Policy* 99; Israel Doron, 'From National Law to International law' (2005), 1 *J of Int'l Aging, Law and Policy* 43; Helen Meenan, 'The Future of Ageing and the Role of Discrimination in the Global Debate' (2005), 1 *J of Int'l Aging, Law and Policy* 1; Diego Rodriguez-Pinzon and Claudia Martin, 'The International Human Rights Status of Elderly Persons' (2003), 18 *Am U Int'l LR* 915.

²⁵ Cf. R. James Fyfe, 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007), 70 *Sask. LR* 1, 14.

²⁶ Steven Pinker, 'The Stupidity of Dignity' (May 28, 2008) *The New Republic*, available online at: <http://www.tnr.com/article/the-stupidity-dignity>.

²⁷ Cf. Ruth Macklin, 'Dignity is a Useless Concept' (2003), 327 *British Medical Journal* 1419.

²⁸ Recent explorations from a lawyer's perspective include Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st century' (2009), 2 *European Human Rights Law Review* 190; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights"

the scope of this paper to attempt a review. However, I would suggest that it is generally accepted that dignity is a form of short-hand that operates to identify those values in a given culture and at a given time relative to the innate importance of the individual and the extent to which his or her individual worth and esteem are valued. It's no accident that out of the ashes of a Europe almost fully destroyed in the Second World War that human dignity emerged as the foundational value of our modern human rights movement; dignity speaks to the importance of the individual and the rights and obligations of others and the state flowing from an individual's very humanity in a way that is a complete answer to Nazi Germany. Rather than regard dignity as more than of symbolic importance, one might equally regard such formalistic criticism as sidestepping matters of principle for simple solutions.

In a recent journal article that masterfully surveys the history of dignity in the history of ideas through its inclusion in contemporary human rights jurisprudence,²⁹ Professor Christopher McCrudden writes that dignity is so commonplace a term within international and national discourse that it is difficult to isolate an irreducible core that exists without necessary contextual attenuation. However, he writes of dignity's core features:

This basic minimum content seems to have at least three elements. The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth. The first element is what might be called the 'ontological' claim; the second might be called the 'relational' claim. This minimum core of the meaning of human dignity seems to be confirmed both by... the historical roots of dignity, and by the ways in which it has been incorporated into... human rights texts... The human rights texts have gone further and supplemented the relational element of the minimum core by supplying a third element regarding the relationship between the state and the individual. This is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim).

(2008), 19 *European Journal of International Law* 655; R. George Wright, 'Dignity and Conflicts of Constitutional Values' (2006), 43 *San Diego LR* 528; Denise G. Reaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002), 28 *Queen's LJ* 61 and 'Discrimination and Dignity' (2003), 63 *LALR* 645; David Feldman, 'Human Dignity' [1999] *Public Law* 682, cont'd [2000] *Public Law* 61.

²⁹ Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008), 19 *European Journal of International Law* 655.

For elder law, then, dignity assists in evaluating the claims of the older adult as they proceed from entitlements bound up with intrinsic work, obligations founded upon respect, and responsibilities on the state to reasonably facilitate and not ignore these corresponding rights and obligations. The individual certainly has obligations to the state that continue regardless of age, but age may well cast obligations on the state to account for the interests of older adults that proceed from ageing as a part of human dignity.

The difficulty with dignity is that it tells us little on its own as to the nature of the individual's dignity interest to others nor to himself or herself. The fact that we live in an age cynical of high-sounding principles and more apt to gravitate to higher virtues of economic efficiency as a matter of legal values does not make matters any easier; the influence of the law-and-economics and legal realist movements lead to a certain discomfort with older conceptions of rights. Perhaps it is easiest, then, to separate the objective and subjective conceptions of dignity somewhat and term the objective aspect of dignity 'respect' and the subjective aspect 'autonomy'.³⁰ *Dignity as respect* speaks to the intrinsic worth of a person as a person, or, perhaps slightly differently, protection against degradation of one's personhood, one's value as a person. I realize that these are abstract concepts but I would suggest that their meanings are clear enough. If we accept a classically Kantian model such that a person is deserving of respect arising from his or her humanity alone, respect from other connotes a bar on actions which degrade personhood: intrusion on privacy and exploitation of vulnerabilities flowing from incapacity would be direct examples. *Dignity as autonomy* speaks to the ability of a person to control his or her own identity and implicates self-worth. Autonomy and independence are central concepts for how our law views individual responsibility and the state's proper role in sanctioning conduct or limiting interference with a person's choices and his or her independence: negative stereotyping and ageism and bars to participation in activities would be examples.

I would suggest that this approach to dignity is of utility as it accords with actual expectations; that is expectations of older adults and others respecting objective respect and subjective conceptions of self-worth and obligations to assert rights. There is a nice but large literature in the applied health sciences dealing with conceptions of dignity by

³⁰ Cf. David Feldman, 'Human Dignity' [1999] Public Law 682, 688.

older adults. This literature tends to be directed at those dealing with older adults in institutional settings or those that support older adults through programs and institutions. In these settings, health care providers have created data to assist in structuring programming to facilitate what their patients or clients regard as a 'dignified' existence; that is, their own subjective conceptions of how dignity applies to their lives and situations (but not how disputes should be resolved using some dignity standard). One 2004 American study³¹ is of assistance. Using focus groups, the researchers investigated how 'dignity' featured in respect of desired or undesired behaviour, acceptable or unacceptable modes of conduct. While dignity might be difficult to define as a philosophical or legal concept, it is much easier to deal with in terms of such conduct-related investigations. To the participants in the study, dignity meant actions that furthered self-respect and ensured consideration was shown by others in behaviour and communication with older adults. The American study sits very well with a British study published the same year.³² Again data was gathered consistent with preservation of one's own self-esteem and self-respect, preservation of autonomy and independence, and protection from others in respect of one's natural vulnerabilities tied to aging.

The implications for the law, I suggest, are helpful. If we regard law as the mechanism for giving effect to important social policy, then elder law can be seen as the vehicle to give effect to policies that foster objective respect and subjective autonomy that arise in contexts in which aging is necessarily implicated. That is to say, not merely those situations where state or private actors negatively affect the interests of older adults but situations in which older adults might reasonably make demands for positive assistance in vindicating rights or facilitating freedoms from public actors. Discrimination based on age that is unjustifiable is one aspect of such an exercise, but so too are other areas of legal treatment. These studies, and others,³³ provides one part of the context, that elder

³¹ Cynthia S. Jacelon, Thomas W. Connelly, Rana Brown, Kathy Proulx, and Thuy Vo, 'A concept analysis of dignity for older adults' (2004), 48 *Journal of Advanced Nursing* 76.

³² Gillian Woodhead, Michael Clanna, Paul Dieppe, and Win Tadd 'Dignity in older age: what do older people in the United Kingdom think?' (2004), 33 *Age and Ageing* 165.

³³ Milika R Matiti and Gillian M Trorey, 'Patients' expectations of the maintenance of their dignity' (2008), 17 *Journal of Clinical Nursing* 2; Patrice Anderberg, Margret Lepp, Anna-Lena Berglund, and Kerstin Segesten, 'Preserving dignity in caring for older adults: a concept analysis' (2007), 59 *Journal of Advanced Nursing* 6; Win Tadd and Antony Bayer, 'Dignity in health and social care for older Europeans: implications of a European project' (2006), 2 *Aging Health* 771; Michael Calnan, David Badcott, Gillian Woolhead, 'Dignity Under Threat? A Study Of The Experiences Of Older People In The United Kingdom' (2006), 36 *International Journal of Health Services* 355; Tony Bayer, Win Tadd, Stefan Krajcik, 'Dignity: The voice of older people' (2005), 6 *Quality in Ageing*

law might usefully focus on how others should be respectful of an older adult and how an older adult's autonomy and self-worth might feature in this area of law.

Creating a Structure for Elder Law

In my teaching in traditional areas of law, criminal law or trusts say, my students and I have a fairly easy time of it. The law in each of these areas has a defined, if not refined, structure. A set of institutional policies guide the development of individual rules. The larger issues of policy have usually long been resolved, although of course new issues always arise that require attention. Elder law is not in the same category at all or at least not yet. At present, there are few good teaching texts. In America, the books that are available are collections of statutes and cases that deal with a series of different problems linked to a large extent by eligibility for government or private benefits.³⁴ Ann Soden's book, *Advising the Older Client*,³⁵ usefully features chapters on a variety of issues including ethics and professional responsibility, case management, substitute decision-making, consent and capacity issues, discrimination, and family law issues by experts in these fields (many of whom are presenting at and/or attending this conference). Notwithstanding the utility of these individual works, and I intend no disrespect to any of the authors or editors in any way, what lacks still in the law itself is an over-arching structure that will lead at some point to the sort of structural cohesion that is found in more traditionally accepted subjects of law.

In my life as a practising lawyer or volunteer with organizations and charities devoted to older adults, I habitually come into contact with systems and bureaucracies that accept that older adults face challenges. Endless meetings are held in health networks or programs to raise awareness of issues like elder abuse and neglect; thus far, in my experience, I have yet to see adequate resources made available in programming or the creation of infrastructure to address these identified needs properly. The policy-makers, those balancing budgets, those professionals that must identify policy priorities, and

and Older Adults 22; David Stratton and Win Tadd, 'Dignity and older people: The voice of society' (2005), 6 *Quality in Ageing and Older Adults* 37.

³⁴ For example. Lawrence A. Frolik, *Elder Law: Cases and Materials*, 4th ed. (LexisNexis/Matthew Bender, 2007); Ronald J. Schwartz, *Law and Aging: Essentials of Elder Law*, 2nd Ed. (Prentice Hall, 2004).

³⁵ LexisNexis Butterworths, 2005. I understand that a new edition is to be published soon.

philanthropists in the community have yet to create the conditions on the ground that are reflective of the supposed societal commitment to the interests of older adults that I hear so much about in policy statements.

Clearly the law is under pressure, that is certainly only to intensify, to take greater account of the rights and obligations of older adults and others and the state in respect of older adults. Part of my reasons for presenting this as a short paper discussing basic considerations is to do away with any pretence that elder law has in fact a precise framework and set of guiding principles that are somehow already in place, just awaiting some elegant reconfiguration in the way that a trust can apparently lack beneficiaries but the words of the settlement can be cleverly to reveal a precise beneficial class can be immediately populated by ascertained individuals. This sort of magical transformation by reasoning alone would not seem in elder law's immediate future. No amount monkey-like researchers labouring away in any number of well appointed libraries can deduce the structure of the law merely from existing sources; that would be a sort of perverse formalism that I would not think very likely to succeed. Like a house, this structure must be planned and built. Like a house, the process involves many people not the least of whom is the person who intends to live in it upon completion. The core need for elder law is not detailed regulations respecting criteria for apportioning scarce long-term care places or cleaner procedures for contested guardianship applications (although both would be welcomed), but for a greater sense of what is at stake for the older adult which then guides the law's development of individually interests both at a level of public law and private law.

If we put at the centre of our attention the older adult, then it is reasonable to say that there needs to be an ongoing and evolving evaluation of public policy in respect of such a person. That is to say, a multi-disciplinary investigation and a transparent democratic dialogue in respect of the place of such an individual in society. Children's law exists as we accept certain propositions dealing with the social importance of protecting children. Disability law exists as we accept certain propositions dealing with the entitlement of disabled people to reasonable accommodation. Elder law, I suggest, needs to take greater account of the dignity of older adults.

I would suggest that part of the way forward is to recognize that taking account of the dignity interests of older adults may have some impact on well established areas of law; not to change fundamental tenets, but to create a principled set of social expectations that can be used to develop doctrine. I made passing mentioning above to the well known case of *Banton v Banton*. An elderly testator married when his mental capacity was disputed. The marriage had the effect of revoking his existing Will. A dispute arose following his death that required a judge to determine if the marriage was valid and if the Will was indeed automatically revoked under the provincial succession statute in consequence. This presented a conventional problem; a narrow and technical issue capable of resolution through traditional tools: capacity to marry, capacity to make and revoke a Will, the application of the equitable doctrine of undue influence, and perhaps more wide ranging equitable doctrine bound up with relief against unconscionable dealing or the protection of vulnerable persons based on the historical standard of conscience. At a broader level, however, the case involves the issue of apparently 'predatory marriages' between older adults and caregivers or people involved in personal care.³⁶ Within the Wills question lurks one of a conduct-based wrong, something short of breach of fiduciary duty that may allow for relief. At that broader level, it is also necessary to differentiate between predatory marriages in which a younger or more capable person takes advantage of an older adult, and what might be thought of as a more traditional form of predation that seems less socially offensive - reverse predatory marriages, or, more conventionally, marriages in which the wealthier older adult arranges for the care and attention of a younger adult based on the expectation of inheritance or immediate gifts (which the law has long fostered).³⁷ In what way does the law characterize the vulnerability of the older adult as deserving of protection against exploitation and the freedom of the older adult to exploit another by virtue of his or her

³⁶ (1998), 164 D.L.R. (4th) 17 (Ont. Gen. Div.). See also *Barrett Estate v. Dexter* 2000 ABQB 530; *Feng v Sung Estate*, 2003 CanLII 2420 (Ont. Sup. Ct.). There is a book that takes up the subject in admirable detail, see Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010).

³⁷ 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and [one] is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions, which the circumstances of his situation, and the course of the natural affections, dictated;' *Van Alst v. Hunter*, 5 Johns.Ch. 148 (N.Y.Ch. 1821), approved in *Banks v. Goodfellow* [1870] 5 Q.B. 549.

financial resources? The answer is far from clear and the jurisprudence on point is good evidence for the truth of that proposition.

I will resist what Lord Goff once described as the ‘temptation of the elegant solution’.³⁸ The point that I have tried to make at least in part is that the law and lawyers would do well to think holistically about older adults and take an account of broader interests that I suggest should include dignity as a legal value. In the *Banton* case, the backdrop that made the question between the litigants important has nothing whatsoever to do with the interest of older adults in forming intimate relationships despite problems or challenges of physical capacity but the prevention of what appeared to be financial exploitation that was worked not through an independent wrong of Mrs Banton but rather through the operation of law in respect of a rule that predated but found form in the first British Wills legislation enacted in 1837. The reasons for the rule are not important; surely the rule made sense in 1837 and spoke to valid social policies. Like many such rules, the law has tried through the intervening years to offer rationalisations that might fit more contemporary circumstances; sometimes even successfully, but probably not in respect of this particular rule.³⁹ Should Mr Banton’s marriage be considered valid and his Will revoked? Perhaps the better approach would be to separate the questions completely and consider the nature of the public interest inherent in each. John Rawls wrote that our ‘sense of justice’⁴⁰ goes beyond just the mere correct application of law to include some sense of a fair or just result. Self-respect and self-esteem, in my view at any rate, require that we respect the autonomous decisions of an older adult to form intimate relationships unless it can be demonstrated quite clearly that the person in question is incapable of comprehending the nature of that relationship; autonomy is implicated, is presumed, and we might (consistent with the attitudes shown in the studies) look to support a sort of moral integrity by which an older adult acts to maintain his or her own interest in self-esteem, self-worth, and a dignified existence. At the same time, we remain concerned with the potentially ‘predatory’ behaviour of others. Dignity necessitates a ‘relational claim’ that requires the law limit circumstances that would lead others to undermine the exercise of the right to marry with the conditions of exploitation. The vulnerability of Mr

³⁸ Lord Goff, ‘The Search for Principle’ (1983 *Maccabean Lecture in Jurisprudence*) 69 Proceedings of the British Academy, reprinted in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chievley* (OUP, Oxford 1999).

³⁹ See BCLI, *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Rep. 45, 2006), pp. 33-34.

⁴⁰ John Rawls, ‘The Sense of Justice’ (1963), 72 *Philosophical Review* 281.

Banton to exploitation doesn't arise from his incapable state but from the law's automated revocation of his Will based on 18th century succession doctrine. The point of raising dignity is not to force a choice upon the trial judge based on admittedly difficult principles but rather to force the law and its actors to take stock of the wider picture and its implications.

The context in *Banton v Banton* is quite narrow; certainly a better accounting of the interests of older adults would help to shape doctrine. I emphasize that I do not invoke dignity as some sort of self-executing principle that might be called upon by the parties any more than the parties might simply say to the judge that a judgement in his or her favour would be more 'just' than finding for the opposing side. Rather, I would suggest that an analysis that admits of a view of the older adult as an autonomous agent and tests the limits of that autonomy involving an inquiry that involves values bound up with dignity would open the door to a structure for elder law that would be more pleasing than its present state. While I have not gone through every section of the Charter that has been held to involve a protection of dignity in detail nor attempted to set out the many legal and equitable doctrines that have been held to be bound up with dignity, I would suggest that the law is strewn with contextualized discussions of dignity that are appropriate to the elder law context. Should we choose to use these tools as relevant in a given circumstance, I suggest that we hasten elder law emerging as a more coherent area of law.