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MEDICAL LAW REVIEW

RE H (A CHILD) (PARENTAL RESPONSIBILITY: VACCINATION): THE MERITS OF ADOPTING A SOFTER APPROACH TO VACCINATION OF A CHILD IN CARE?

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SUMMARY

In *Re H (A Child) (Parental Responsibility: Vaccination)*, the Court of Appeal decided that vaccination did not represent 'grave' or 'serious' medical treatment and determined that, in the case of a child under the care of a Local Authority, court authorisation for consent to and arrangement of vaccination is no longer required. This is due to the strong medical evidence in support of vaccination. Thus, with due reference to 33(3)(b) Children Act 1989 and while considering proportionality and, particularly, the proportionate response to interference with the parents' right to respect for private and family life under Article 8 of the European Convention on Human Rights, the court held that vaccination is in line with the best interests of the child. This commentary supports this judgment but identifies a slight prospective anomaly in the approach adopted to children in care and those who are not in care. The resolution of this dichotomy lies in broadening the scope of King LJ's approach in this case.

KEY WORDS

Best interests, Children, Local Authority, Parents, Rights, Vaccination,

I. INTRODUCTION

A concerned parent considering the advantages and disadvantages of vaccination will weigh up different variables: the pain and trauma experienced by the child, the potential side effects of the vaccination and/or apprehension about these side effects. This anxiety on the part of parents, which can be well meaning, is balanced against the advantages that attach to vaccination, which, according to most scientific evidence and the benefit of history, are largely irrefutable. There are cases when one or both parents conflict with the opinion of another in relation to their stance on vaccination. These contentions can land in the courts and the practice has been for the courts to decide that vaccination is in line with the best interests of the child and with widely accepted medical opinion. A new case, *Re H (A Child) (Parental Responsibility: Vaccination)* (hereafter *Re H*),¹ has arisen where the parent(s) of a child who is in the care of a Local Authority (LA) disagree with vaccination. In this case, the Court of Appeal has found that there is no need for seek court approval for vaccination when a child is in care and the vaccination is the subject of dispute. The litigious step is not now deemed to be necessary in this specific context: it is this case that is the focus of the following commentary.

II. FACTS OF THE CASE AND HAYDEN J'S HIGH COURT DECISION

The parents of a child (T), specifically the father, did not want their child, who was under the care of a LA, to be vaccinated. In the High Court case (*Re T (A Child)*), Hayden J ordered that the LA had the authority to consent to and arrange for T to be vaccinated. He also categorically stated that it was in T's *best interests* to be vaccinated.² He was able to make this order via one of two routes: section 33(3) of the Children Act (CA) 1989 or the inherent jurisdiction of the

¹ *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA 664.

² *Re T (A Child)* [2020] EWHC 220.

court. This High Court judgment differed from *Re SL (Permission to Vaccinate)*, where it was stated by McDonald J that Section 33(3) CA 1989 was an inappropriate course of action in the context of vaccination of children in care. McDonald J said that it was inappropriate for a LA to consent to the vaccination of a child under the care of LA, due to the ‘gravity’ of the issue, under Section 33.³ Hayden J did not agree with McDonald J’s view that vaccination was an issue of ‘gravity’ and a vaccine was not regarded by him as ‘medical treatment’.⁴ He said that vaccines are ‘a facet of public preventative healthcare intending to protect both individual children and society more generally’.⁵

This High Court decision was appealed by the T’s parents due to the conflict of authority.⁶ There were two grounds for the appeal: (1) the judge was wrong to declare that ss 33(3)(b) could be used to allow for a LA to consent to the vaccination of T, contrary to the wishes of T’s parents and (2) the judge made a mistake in allowing the LA to arrange for the vaccination of T. However, the main focus of the appeal was on ground (1), as it was accepted that ground (2) would not succeed.

III. COURT OF APPEAL JUDGMENT

At the Court of Appeal, King LJ (with whom McCombe LJ and Peter Jackson LJ concurred) recognised the role that parents play in the upbringing of children. She recognised that some decisions (e.g. ‘it’s bedtime now’) are quite simple, while others are very grave and may have a very significant impact on the health/welfare of a child.⁷ The law, quite rightly, allows parents to bring up their children in accordance with their beliefs and values and the state will be very ‘slow to interfere with their exercise of parental responsibility’.⁸ The Court of Appeal stated that there are two instances where the issue of a child’s vaccination history may come to the court’s attention: (1) the parents disagree or (2) the LA and the parents disagree.⁹ Thus, the main question at hand was ‘whether the local authority has the power to consent to vaccination in the best interests of the child, and thereby to provide lawful authority for something that is not compulsory’.¹⁰

The LA had parental responsibility for T. Under Section 33 CA1989, the view of parents can be vetoed by the LA. The court had to consider whether vaccination was of sufficient gravity or seriousness to warrant an application for approval from the High Court or if the LA could simply arrange for and consent to the vaccination under Section 33.¹¹ King LJ recognised that medical opinion is very supportive of the vaccination of children and weight was placed on the medical expert in community paediatrics in the original case, Dr Douglas, who set out the benefits and possible side effects of routine vaccinations.¹² Interestingly, King LJ also discussed the controversial article that was published in *The Lancet* in 1998 which claimed that a link existed between the Measles Mumps and Rubella (MMR) vaccine and autism in the context of children.¹³ This publication had a major negative impact on the rate of MMR vaccines.¹⁴ One of the authors, Dr Wakefield, was subsequently investigated by the General

³ *Re SL (Permission to Vaccinate)* [2017] EWHC 125 (Fam) at [32].

⁴ *Re T* (n 2) at [12].

⁵ *ibid.* at [12].

⁶ *ibid.* at [33].

⁷ *Re H* (n 1) at [16].

⁸ *ibid.* at [17].

⁹ *ibid.* at [22].

¹⁰ *ibid.* at [22].

¹¹ *ibid.* at [31].

¹² *ibid.* at [34]-[40] and [53]-[55].

¹³ *ibid.* at [43]

¹⁴ *ibid.* at [45]

Medical Council (GMC) and found guilty of over 30 charges.¹⁵ He was then struck off the medical register, and the paper was then subsequently retracted from *The Lancet*.¹⁶ Major research projects/publications have proven that no link exists between the MMR vaccine and the development of autism in children.¹⁷ At the High Court, Dr Douglas said that non-credible evidence exists that linked the MMR vaccine to autism.¹⁸ King LJ agreed with Dr Douglas that that the clear benefits of vaccination ‘outweigh the long-recognised and identified side effects’.¹⁹

It was argued by the parents that vaccination represented ‘serious medical treatment’ and that any disagreement between a parent and LA must be adjudicated on by the High Court.²⁰ King LJ considered a number of cases that related to care proceedings in the context of serious medical treatment, such as *Re C (Children)*, where the LA wanted to veto the mother’s choice of the names of her children.²¹ In relation to the issue of whether vaccination represented medical treatment, King LJ followed the approach adopted by Thorpe LJ in *Re C (Immunisation)*, where he said that routine vaccinations were not comparable with other cases that represented serious medical treatment, such as in *Re C (Children)*.²² However, King LJ diverged from Thorpe LJ because she said that there is no difference between preventative healthcare and medical treatment. For the purposes of vaccination, King LJ said that they overlap: ‘for our purposes vaccination might be described in either way’, but this was not a seminal issue in the case.²³

King LJ also asked if a difference exists between private law cases and those that involve a child who is in care.²⁴ In situations where parents live in different houses and one parent is the main carer, there will be no option but to seek resolution from the court if they cannot come to agreement.²⁵ King LJ said that the context is different when the child is in the care of the LA. Under Section 31(2) CA 1989, the child has been placed in care because that child has suffered harm or was likely to experience that form of harm.²⁶ The LA, in such a context, is, notwithstanding some exceptions, the care giver and the responsibility of parents is thus overridden.²⁷ Thus, according to King LJ, ‘[t]he situation of a child in care is therefore a far cry from those cases which arise in private law proceedings where parents who share parental responsibility cannot agree on what is best for their child’.²⁸

¹⁵ *ibid.* at [47].

¹⁶ *ibid.* at [47]. Wakefield et al article, ‘Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive development disorder in children’ (1998) 351 *The Lancet*, 637-641, retracted on 10 February 2010.

¹⁷ For example, see Medical Research Council, *Review of Autism Research: Epidemiology and Causes*, (Medical Research Council, 2002); N A Halsey and S L Hyman, ‘Measles-mumps-rubella vaccine and autism spectrum disorder: report from the New Challenges in Childhood Immunizations Conference convened in Oaks Brook, Illinois 12-13, 2000’, (2001) 107(5) E84, *Paediatrics*.

¹⁸ *Re T* (n 2) at [20].

¹⁹ *Re H (A Child) (Parental Responsibility: Vaccination)* (n 1) at [55]

²⁰ *ibid.* at [57]

²¹ *Re C (Children)* [2016] EWCA Civ 374. Also see *In re AB (A Child) (Care Proceedings: Medical Treatment)* [2018] EWFC 3; *Re Jake (A Child)* [2015] EWHC 2422 (Fam).

²² *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148

²³ *Re H* (n 1) at [83] and [84].

²⁴ *ibid.* at [94]

²⁵ *ibid.* at [94]

²⁶ *ibid.* at [95]

²⁷ *ibid.* at [95]

²⁸ *ibid.* at [96].

King LJ rightly points out that, under Section 33, LAs must not ‘ride roughshod over the wishes of parents whose children are in care’.²⁹ Parental views are still very important in the determination of what is in the best interests of the child.³⁰ However, the weight that is given to parental views ‘depends not upon the vehemence with which they are expressed but upon their substance’.³¹ She referred to Theis J’s statement in *F v F*: ‘with due consideration for established contraindications to vaccination in an individual case, it is otherwise in every child’s interest to be protected’.³² Thus, objective evidence must be presented in order to demonstrate that ‘a genuine contra-indication to the administration of one or all of the routine vaccinations’ exists.³³ In the context of this case, King LJ stated that a challenge by the parents would likely fail and that it would only result in the vaccination being delayed, as well as adversely impacting upon public finances and court resources. She said that this case has acted as a catalyst to ensure that future cases will not need to go down this judicially challenging path.³⁴

IV. ULTIMATE FINDINGS AT THE COURT OF APPEAL

In summary, therefore, the Court of Appeal came to the conclusion that (i) the medical evidence says that immunisation is in the medical best interests of children and this is the position of the court unless proved otherwise; (ii) when a child is in the care of a LA, under Section 33(3)(b) Children Act 1989 the LA can consent to the child being vaccinated if the court agrees that it is in the child’s best interests, even if the parents disagree; (iii) standard/routine vaccines are not ‘serious’ or ‘grave’ matters. It is not necessary for the LA to receive approval from the High Court except for when there is unusual evidence that the vaccine is not in the child’s best interests; and (iv) the view of parents must be considered but ‘the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child’s welfare’.³⁵ Thus, the CA dismissed the appeal and declared that the LA could, under Section 33(3) CA 1989, consent to and arrange for T’s vaccination.

V. COMMENTARY

A. Best interests and compulsory vaccinations

The decision in *Re H* strongly endorses the idea that vaccinations are in the best interests of children. Vaccinations are not regarded as serious or grave medical treatment and it will be up to the parents to apply for an injunction under Section 8 of the Human Rights Act 1998 or to apply to invoke the court’s inherent jurisdiction if they disagree with their child’s inoculation. However, parents are likely to fail unless there is very convincing evidence to prove that the vaccination does not support the child’s best interests.

In this time of the COVID-19 pandemic, it is timely to consider those who argue that, from a national security and public health perspectives, vaccinations ought to be compulsory. We are in a brave new world and the importance of vaccinations is ever growing. Cave, for example, argues that when there is a heightened risk to public health the criminal law should potentially be used to punish citizens whose ‘rejection of vaccination leads to transmission or even risk of

²⁹ *ibid.* at [99].

³⁰ *ibid.* at [100].

³¹ *ibid.* at [101].

³² *ibid.* at [102]; *F v F* [2013] EWHC 2683 (Fam) at [9]; *LLC v A, B, C and D* [2011] EWHC 4033.

³³ *ibid.* at [102].

³⁴ *ibid.* at [103].

³⁵ *ibid.* at [104].

transmission of preventable disease'.³⁶ She refers to the fact that, in England and Wales, parental disputes in the courts have been decided from a pro-vaccination perspective, even in cases where children have objected to the vaccine.³⁷ She argues that as long as the approach of voluntary vaccination exists, the courts have little power to enforce the immunisation of children, except when there is a conflict between the parents, where the courts have unanimously decided in favour of vaccination to date.³⁸ If the courts decide that it always in the best interest of the child to be vaccinated, does it not follow, then, that the normal course of action should be for mandatory vaccination, even in situations where there is no conflict between parents? The autonomy of parents to make decisions for their child, especially when those decisions are perceived to be irrational and founded on spurious medical evidence, should be outweighed by the strong scientific base in favour of immunisation.

B. Proportionality and Article 8 ECHR

This Court of Appeal's decision in *Re H* applies the concept of *proportionality*. Even though the parents did not argue that the actions of the LA breached their right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR), for completeness, King LJ stated that, following *Bank Mellat v HM Treasury*,³⁹ even if the vaccination of T did represent a breach of the parents' Article 8 rights, the interference was proportionate and, therefore, justifiable.⁴⁰ A key question was identified by Lord Reed in *Bank Mellat v HM Treasury* as to 'whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure'.⁴¹ To apply this to vaccination, it is obvious that any perceived infringement of Article 8 rights is disproportionate to the benefits to the child of being vaccinated against diseases which, if contracted, would be likely to lead to injurious harm or death.

The role of Article 8 ECHR was also discussed in the context of immunisation in *LCC v A, B, C and D*.⁴² In this case the parents, who opposed inoculation due to purported fears about the connection between the MMR vaccine and autism and risks associated with the swine flu vaccine, argued that children who were in care should not be treated differently from those who were not in care. Theis J disagreed with the parents and referred to the language of rights, especially Article 24 of the UN Convention on the Rights of the Child which ensures that children enjoy 'the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'.⁴³ Using the logic of Article 24, she said that parents' views ought to be taken into account, they had to be evaluated in the context of their disregard for the health of their children and lack of cooperation with healthcare professionals.⁴⁴ She also stated that there was a 'necessary and justifiable' breach of the parents' Article 8 ECHR rights.⁴⁵ So, to bring the discussion back to *Re H*, King LJ had to counterbalance the different rights but, at

³⁶ E Cave, 'Voluntary vaccination: the pandemic effect' (2017) 37(2) *Legal Studies*, 279-304. Also see Cave's discussion of vaccination and children in a private law context in E Cave, 'Adolescent Refusal of MMR Inoculation: M (Mother) v M (Father)' (2014) 77(4) *The Modern Law Review*, 619-640.

³⁷ *ibid.*

³⁸ *ibid.* p. 299

³⁹ *Bank Mellat v HM Treasury* [2014] AC 700.

⁴⁰ *Re H (A Child) (Parental Responsibility: Vaccination)* (n 1). Also see *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190 at [44].

⁴¹ *ibid.* at [74].

⁴² *LLC v A, B, C and D* (n 30).

⁴³ *ibid.* at [17].

⁴⁴ *ibid.* at [17].

⁴⁵ *ibid.* at [17].

all times, give paramountcy to the welfare of T. It seems to me that her response was proportionate and appropriate: the decision respects the welfare of the child – given the strong medical evidence in favour of vaccination – at the expense of respect for the parents’ wishes.

Article 8 ECHR was also considered in the related case of *Re B (A Child: Immunisation)*, where Judge Bellamy asked, if there were an interference with the parents’ rights, was this interference proportionate?⁴⁶ The judge referred to *F v F* where Theis J held that vaccinations were a proportionate interference with Article 8 ECHR. Judge Bellamy stated that the views of the parents were extremely important in the ‘balancing exercise’ and these views had to be considered in light of other evidence, such as the medical evidence in favour of vaccination.⁴⁷ Judge Bellamy decided that vaccination was in the child’s best interests and the breach of the parents’ Article 8 ECHR rights was proportionate. It was concluded that:

...this is now the sixth occasion when the court has had to determine whether a child should be vaccinated in circumstances where a birth parent objects. On each occasion the court has concluded that the child concerned should receive the recommended vaccine (save that in *Re C and F (Children)* Sumner J decided that the older child, aged 10, should not have the HIB vaccine, because the danger for her had past, or the Pertussis vaccine, because there was no approved vaccine for a child of her age). With respect to the vaccines with which I am concerned, in the absence of new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one of those vaccines, it is difficult to see how a challenge based on efficacy or safety would be likely to succeed.⁴⁸

King LJ in *Re H* referred to the fact that there have been changes in medical law at the Supreme Court in *XX v Whittington Hospital Trust*⁴⁹ and *An NHS Trust v Y*⁵⁰ and that it might be time to move away from Thorpe LJ’s view that vaccinations should be adjudicated upon by the courts in private law contexts.⁵¹ This would allow for cohesion between private cases and those that concern the care of children by LAs. In the era of COVID-19 and the potential for future mass-vaccination, it will be interesting to see if there will be any further change in the law.

C. Private vs. public landscape

While the result in *Re H* is to be welcomed, its generalisation into other contexts should be watched carefully. In the future, it is possible that this decision will have an impact on private law cases. Is it appropriate that a divergence of approach exists now in relation to children who are in care and those who are not?

Let us consider the private law case of *F v F*.⁵² The parents had separated, and the mother opposed the vaccination of their children. The father was worried about the fact that the children were not inoculated following the retraction of Wakefield et al’s paper in *The Lancet*. Theis J declared that the welfare of the children was paramount and held that it was in their best interests to be inoculated with the MMR vaccine. She said that each case is fact-specific,

⁴⁶ *Re B (Immunisation)* [2018] EWFC 56.

⁴⁷ *ibid.* at [84].

⁴⁸ *ibid.* at [94].

⁴⁹ *XX v Whittington Hospital Trust* [2020] UKSC 14.

⁵⁰ *An NHS Trust v Y* [2018] UKSC 46.

⁵¹ *Re C Welfare of Child: Immunisation* (n 20) at [17].

⁵² *F v F* (n 30).

but emphasis was placed on the medical evidence in favour of vaccination. A similar approach was adopted by the Family Court in *Re B (A Child: Immunisation)*.⁵³ Again, the court gave considerable weight to the medical expert, Dr Elliman, who strongly endorsed immunisation, notwithstanding the fact vaccines are never '100 % risk free'.⁵⁴ The doctor referred to the 'risk/benefit analysis' and, in relation to the question of 'why vaccinate?', he discussed, on one hand, 'the immunisation status of the individual' and, on the other hand, the concept of 'herd' immunity.⁵⁵ (e.g. 'For measles and whooping cough, it is estimated to be 92-95%; for rubella it is 85-87% and for diphtheria 80-85%'.⁵⁶) In this private law context, Judge Bellamy had to decide upon what was in the child's best interests – immunisation or not – and found in unquestionable favour of inoculation.

The Court of Appeal judgment in *Re H* represents a significant change in the law and heralds further judicial support for the inoculation of children. As such, it brings a certain clarity to the debate surrounding vaccination. It is very hard to disagree with the Court of Appeal's decision. It seems very sensible and is based on good scientific, medical and societal evidence. It is now timely, however, to focus on a key element in this case that merits consideration and that raises some disquiet. This concern centres around the fact that a key player in the case was a LA, rather than a parent. It seems that a dichotomy exists between the approach adopted to a child who is under the care of the LA and the child whose parents have traditional parental responsibility. Is it possible that this approach, where the views of the parents of a child in care are side-lined and the option of recourse to the courts is removed, is a bridge too far? King LJ placed a focus on the fact that Parliament has given LAs the power to override parental wishes under Section 33(3)(b) CA 1989 because children are placed into care due to a failing on the part of the parent(s). I think that the context in which the child finds himself or herself in care is important. If it is the case the child has suffered harm or was likely to suffer harm while under the care of his/her parent(s), the law must act in way that puts the child's welfare first, and, consequently, allow for the child to be inoculated, even if this means departing from the wishes and beliefs of parents. However, not every situation is black and white – some are grey and much more nuanced.

There is, thus, one caveat here. Is it enough that the 'greater good' is served if there is also potential for an individual right to be diluted? The notion that children who are in care are approached differently to those who are not in care is somewhat worrying. There is a moral and a just reason for vaccination, which means that the decision, in this case, to allow for the vaccination of T is sound, but if such a blanket approach were adopted to other contexts relating to children in care where the moral justification would not be as strong, then there is the potential for the creation of an inequity and the possibility of interference with Article 8 rights. The anomaly lies in the disparity of approach taken towards children who are in the care of a LA and those who are not. It is only when the issue of parental dispute exists that best interests is used to defend vaccination in private law contexts. Proportionality is something that has a degree of subjectivity in application and caution is required in taking a blanket approach to the vaccination of children in care. The point here is that the finding of *Re H* was proportionate and should now be extended to cover children who are not in care. This could have a dual advantage: it would prevent injurious litigation about vaccination throughout the population and, arguably, increase the rate of vaccination, which is laudable. It could also have the effect

⁵³ *Re B (Immunisation)* [2018] EWFC 56.

⁵⁴ *ibid.* at [62].

⁵⁵ *ibid.* at [62].

⁵⁶ *ibid.* at [62].

of ensuring that the same approach to rights, entitlements and responsibilities exists for children who are in care and those who are not.

This judgment is highly topical in today's era and brings to light ethical questions about potential future legal change in private law contexts. In relation to the current pandemic, there may be a societal need for mass vaccinations and courts will have neither the time nor the inclination to be overly concerned about the interference of rights where an interference with these rights has been determined to be proportionate.

VI. CONCLUSION

Children who are in care do not have it easy. This is particularly true when contention at the level of the courts comes into force and when the parent is at odds with the local authority who have assumed parental responsibility for the child. Parents may decide to challenge some decision made on behalf of their child arising from a number of factors: they may just want to be vexatious or have one last stab at being seen to be a good parent. Parents may, equally, have serious and deeply held reservations about actions being made or decisions being taken purportedly in favour of acting in line with their child's best interests. They may, in fact, not believe that such decisions are being made with the child's welfare in mind. The conflict between the decision-making role of the parent in the context of an in-care situation and the LA's decision-making capacity has come into play in *Re H*. The findings in this case have lent ammunition to those who argue in favour of mandatory and compulsory vaccination. It has confirmed that vaccination is not 'grave' or 'serious medical treatment' and is such a routine medically-sound intervention that disputes concerning vaccination should not occupy the time of the court unless there is strong evidence to the contrary.

Thus, a number of conclusions are being made here: the judgement in *Re H* is sound and supports vaccination; it has potential to be helpful and to suppress unnecessary use of court resources; it has also called into question, however, the diminished role of the parent in an LA/parent dispute. Ultimately, the findings of the court are found to be proportionate and sensible. The infringement to the right of the parent is counterbalanced by the positive impact on the health of the child by the inoculation. But a certain infringement does exist and not should totally be ignored. This is something to ponder. The answer to this conundrum might be to apply the approach in *Re H* to the context of all children.

