Neutral Citation Number: [2020] EWCA Civ 664

Case No: B4/2020/0323 & 0326

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)
MR JUSTICE HAYDEN
[2020] EWHC 220 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

- -

Re H (A Child)(Parental Responsibility: Vaccination)

- -

Michael Bailey (instructed by **Lillywhite Williams & Co.**) for the **1st and 2nd Appellants**
Alison Grief QC, Chris Barnes and Harry Langford (instructed by **London Borough of Tower Hamlets Legal Department**) for the **1st Respondent Local Authority**
Rob Littlewood (instructed by **Freemans Solicitors**) for the **2nd Respondent Child's Guardian**

Hearing date: 2nd April 2020

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Approved Judgment

Lady Justice King, with whom Lord Justice McCombe and Lord Justice Peter Jackson agree:

Introduction

1. On 23 January 2020, Hayden J made care and placement orders in respect of a baby, T, who was then aged 9 months. The events which had led up to the instigation of the care proceedings, the basis upon which the threshold findings were made, and the welfare reasons which ultimately led to the making of the orders can be found in *London Borough of Tower Hamlets v M, F and T* [2020] EWFC 4, one of three judgments given by the judge in respect of T.

2. The parents also objected to T receiving the various vaccinations which are routinely administered to babies in this country in accordance with Public Health England's guidance found in *"The Green Book: Information for public health professionals on immunisations".* This refusal has led to a significant delay and has necessitated the local authority seeking orders from the court that T be vaccinated.

3. Vaccination is the administration of a vaccine to help the immune system develop protection from a disease. Immunisation is the process of becoming immune to the disease following vaccination. I shall refer to the two concepts interchangeably.

4. In the judgment with which this court is concerned, dated 7 February 2020 and found at [2020] EWHC 220 (Fam), Hayden J said that the parents, but more particularly the father, are "driven by the fundamental belief that neither the court nor the State, through the arm of the Local Authority has any jurisdiction to take decisions in relation to his children". To this end they had also declined to register T's birth, leading the local authority to bring this issue before the court (see [2019] EWHC 1572 (Fam)) and to Hayden J approving the local authority's plan to act as a qualified informant under the Births and Deaths Registration Act 1953 to ensure compliance with this mandatory step in a baby's life.

5. The judge held a discrete hearing at which to determine the vaccination issue. Having had the benefit of extensive evidence from Dr Neil Douglas, Speciality Doctor in Community Paediatrics and Named Doctor for Looked After Children, as to the benefits of immunisation in general and in relation to T in particular, the judge held:

> "20….It is, to my mind, self-evident that for T, as a healthy, young infant, the risks contingent upon not vaccinating him significantly outweigh the benefits. The conditions identified include potential for catastrophic consequences which, as illustrated, involve paralysis, seizure, learning disabilities, visual loss and cancer. T's Guardian comes to the clear conclusion that, "*as a healthy, well-grown baby*" there are "*no contra-indications for T from the vaccines proposed*."

6. The judge accordingly made the following orders, now the subject of this appeal:

i) He declared that the local authority had lawful authority pursuant to s.33(3) Children Act 1989 to consent to and make arrangements for the vaccination of T notwithstanding the objections of his parents; and

ii) "Further, for the avoidance of doubt" he declared that it was lawful and in the best interests of T to be vaccinated as recommended by Dr Douglas in accordance with the revised scheme found within the guidance for babies of T's age where they have not been given their vaccinations at the optimum age of under 6 months.

7. The judge, it can therefore be seen, made the order for the vaccination of T under two possible jurisdictional routes, either:

i) s.33(3) Children Act 1989 (CA 1989); or

ii) By way of declaration under the inherent jurisdiction of the court, with permission granted under s.100 CA 1989.

8. The judge had been specifically requested by Mr Barnes on behalf of the local authority to consider whether the local authority could authorise the vaccination of T under s.33(3). The judge held that they could.

9. The judge held at paragraph [12] that vaccinations should not be characterised as "medical treatment" but as "a facet of public preventative healthcare intending to protect both individual children and society more generally". He recognised that had the local authority signalled its intention to have T vaccinated under the authority of s.33(3) CA 1989, this would have led to an immediate application on behalf of the parents to invoke the inherent jurisdiction, but said:

> "16……Nonetheless, I for my part, can see no reason why what are ultimately routine vaccinations should not fall within the scope of the interventions contemplated by s33(3) CA. Indeed it strikes me as disproportionate to expect a Local Authority to be required to apply to a High Court Judge to initiate proceedings, the result of which has been in every case to authorise vaccination."

10. Notwithstanding his clear and unequivocal view, the judge "for the avoidance of doubt" made declarations under the inherent jurisdiction of the court. His reasoning is contrary to that expressed in *Re SL (Permission to Vaccinate)* [2017] EWHC 125 (*Re SL).* In that case, MacDonald J had characterised the issue of vaccinations as being one of "gravity" and he was therefore of the view that the immunisation of a child is a matter in relation to which it is inappropriate for a local authority to give its consent under s.33(3) CA 1989, and that the proper course is for a local authority to apply to the court for leave to invoke the court's inherent jurisdiction under s.100 CA 1989.

11. Because of this conflict of authority at High Court level, Hayden J gave permission to appeal his decision pursuant to the Family Procedure Rules (rule 30.3(7)(a)-(b)) on the basis of "contradictory decisions on the substantive issue".

12. There are two grounds of appeal. Ground 1 is that the judge was wrong to declare that the local authority had power under s.33(3)(b) to consent to the vaccinations notwithstanding the parent's objections; Ground 2 is that the judge was, in any event, wrong to give the local authority permission to arrange for T to be vaccinated.

13. It became apparent during the course of the hearing of this appeal, that Ground 2 had fallen away. Mr Bailey, on behalf of the parents, no longer asked the court to consider the merits of the order made by Hayden J permitting the local authority to arrange T's vaccination. The vaccinations will now take place.

14. The issue before this court, therefore, relates solely to the identification of the proper procedural route to be adopted by a local authority where a dispute in relation to vaccination arises with parents in relation to a child in their care.

15. In order to determine that issue, it is necessary to unravel certain elements which, over the years, have become somewhat entwined. In particular, I will consider the key question of whether vaccination is to be considered a serious or grave matter and also make some reference to whether it is to be regarded as medical treatment. Further, consideration needs to be given to whether there is a difference in parental responsibility as it arises in public law proceedings as opposed to in private law proceedings.

Parental Responsibility: Parents and Local Authorities

16. During his or her childhood every child has to be fed, clothed, accommodated, educated and nurtured. This requires innumerable, often mundane, decisions to be made on behalf of that child on a daily, if not hourly, basis. The nature and type of those decisions will vary and alter with maturity. Whilst many decisions are prosaic – "it's bedtime now" – there are also decisions to be made which are of the utmost importance and may have a significant effect on a child's future health and/or welfare.

17. It is both right, and unsurprising, that parents place a high value on their rights and duties in respect of their children. Provided that the child has not come to, and is not likely to come to, significant harm, the law respects the right of the parents to bring up their child as they think best, and the State, in the form of local authorities and courts, should be, and is, slow to interfere with their exercise of parental responsibility.

18. Parental responsibility is defined at s.3 CA 1989 as:

> "**3 Meaning of "parental responsibility"**
>
> (1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

19. By s.2 CA 1989, a mother has parental responsibility for her child from the time of giving birth. Sections 2 and 4 go on to set out the circumstances in which a father has parental responsibility, either from birth or by its subsequent acquisition. For the purposes of this judgment it is not necessary to further analyse those sections as it is common ground that this father has parental responsibility.

20. Section 2 sets out the parameters of parental responsibility. By s.2(6), a person does not cease to have parental responsibility solely because some other person subsequently acquires parental responsibility. Significantly, in respect of the issues in this case, by s.2(7), where more than one person has parental responsibility, each may act alone in meeting that responsibility (unless the consent of more than one person is required). Further, by s.2(8), the fact that a person has parental responsibility does not entitle him or her to act in a way which is incompatible with any order made under the Act

21. It goes without saying that the giving of consent to having one's child vaccinated is an exercise of parental responsibility. Whilst, for the reasons rehearsed in the report of Dr Douglas and referred to below, it cannot be doubted that it is both reasonable and responsible parental behaviour to arrange for one's child to be vaccinated in accordance with the Public Health England guidelines, there is at present no legal requirement in this country for a child to be vaccinated. It follows that, *taken in isolation*, a failure to arrange for an otherwise healthy child to be vaccinated would be unlikely to amount to 'significant harm or the likelihood of significant harm' such as to satisfy the threshold criteria necessary in order for a care order to be made pursuant to s.31 CA 1989. By contrast, a failure by parents to obtain vaccinations for their children may feature as one of a series of wider threshold allegations in support of a more generalised case of neglect.

22. Issues concerning the vaccination of a child may arise in two circumstances: where there is disagreement between the child's parents, or where, as in this case, a child is in care and there is disagreement between the child's parents and the local authority. The question that arises here is 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.

23. What, then, is the position of a child who has been placed in the care of a local authority? The starting point is s.33 CA 1989.

> **33 Effect of care order.**
>
> (1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.
>
> (2) …
>
> (3) While a care order is in force with respect to a child, the local authority designated by the order shall—
>
> (a) have parental responsibility for the child; and
>
> (b) have the power (subject to the following provisions of this section) to determine the extent to which
>
> (i) a parent, guardian or special guardian of the child; or
>
> (ii) a person who by virtue of section 4A has parental responsibility for the child,

may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in subsection (3)(b) shall prevent a person mentioned in that provision who has care of the child from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

(6) While a care order is in force with respect to a child, the local authority designated by the order shall not—

(a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made; or

(b) have the right—

(i) …

(ii) to agree or refuse to agree to the making of an adoption order, or an order under section 84 of the Adoption and Children Act 2002, with respect to the child; or

(iii) to appoint a guardian for the child.

(7) While a care order is in force with respect to a child, no person may—

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom,

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(8) Subsection (7)(b) does not—

(a) prevent the removal of such a child, for a period of less than one month, by the authority in whose care he is; or

(b) apply to arrangements for such a child to live outside England and Wales (which are governed by paragraph 19 of Schedule 2 in England, and section 124 of the Social Services and Well-being (Wales) Act 2014 in Wales).

(9) The power in subsection (3)(b) is subject (in addition to being subject to the provisions of this section) to any right, duty, power, responsibility or authority which a person mentioned in

> that provision has in relation to the child and his property by virtue of any other enactment."

24. T is in the care of the local authority. The local authority has parental responsibility for him by virtue of s.33(3)(a) and accordingly the power under ss.(3)(b) to "determine the extent to which the parent may meet his parental responsibility". Whilst the local authority can 'overrule' a parent's view in relation to decisions in respect of the child, there are a number of safeguards are in place, namely:

    i) By s.22(3)(a), the exercise by the local authority of its parental responsibility under s.33 is subject to its general duty in relation to a child who it is looking after, namely to "safeguard and promote his welfare".

    ii) By s.22(4), before making any decision with respect to a looked-after child, the local authority must, so far as is reasonably practicable, ascertain the wishes and feelings of the child and his parents regarding the matter to be decided.

    iii) By s.33(4), the local authority may not exercise its overriding parental responsibility unless it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

    iv) By s.33(6)-(8), the local authority may not change a child's religion, agree to his adoption, appoint a guardian for him, change his surname without written agreement or (without going through prescribed procedures) remove him from the United Kingdom for more than a month without written agreement.

25. It should be noted that s.33 applies equally to interim care orders as it does to final care orders: s.31(11). The approach to vaccination does not depend upon whether a child is subject to an interim care order or a final care order. Many children who are subject to interim care orders are of an age where they would be expected to be vaccinated.

26. On a strict reading of s.33(3)(b), and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.

27. However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in *Re C (Children)* [2016] EWCA Civ 374; [2017] Fam 137 (*Re C),* the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child.

28. At first blush, the rather difficult terms of s.100 CA 1989, would seem to preclude a local authority from using the inherent jurisdiction of the High Court as an alternative route to its powers under s.33(3)(b) CA. Section 100 provides:

> "(2) No court shall exercise the High Court's inherent jurisdiction with respect to children—
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that—
>
> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order—
>
> (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
>
> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave), that leave is granted."

29. The use of the inherent jurisdiction by a local authority, with permission granted under s.100, is nevertheless the route which is now approved and adopted in certain difficult cases, although in most serious medical treatment cases the local authority with care of a child will encourage/request the relevant NHS Trust to initiate proceedings. In *Re C*, when approving the use of the inherent jurisdiction by a local authority as opposed to its powers under s.33(3) CA 1989, I said:

> "90. Whilst I may not necessarily agree with the precise way that jurisdictional issues have been approached or expressed in these very difficult cases, what is clear is that there is a cohort of cases where the common theme is that a party (whether it be a local authority or, often, an NHS Trust) has sought to bring an issue before the court, believing it to be of too great a magnitude to be determined without the guidance of the court, and without all

those with parental responsibility having an opportunity to express their view as a part of the decision making process.

91. Most commonly, examples are found in the so called 'medical treatment' cases where, either an NHS Trust seeks a declaration from the court that they would not be acting unlawfully in pursuing or desisting from a form of treatment notwithstanding the parent's refusal to consent, or alternatively, a local authority seeks to invoke the inherent jurisdiction of the court and thereby to submit to the court's jurisdiction notwithstanding that care proceedings may have been open to them.

92- 95 …

96. … the court did not specifically consider the restriction found in *section 100 CA 1989*, which prevents the High Court from exercising its inherent jurisdiction:

> "…for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."

97. In my view it was not necessary to do so. In the medical treatment cases, where a local authority either itself applies to invoke the jurisdiction of the court in relation to a serious medical issue or, as in *Re T*, declines to consent to medical treatment and asks the NHS Trust to seek a declaration of the court, the court is not being asked to *confer* a power upon the local authority in respect of an aspect of parental responsibility. On the contrary, the local authority already has the power to consent to medical treatment under *section 33(3)(b) CA 1989*. Far from being asked to *confer* a power on themselves, the High Court was being asked to use its inherent jurisdiction to *limit, circumscribe* or *sanction* the use of power which the local authority already has by virtue of *section 33(3)(b) CA 1989* .

98. In the medical treatment cases the decisions to be made may well be a matter of life and death. In the present case, the limitation on the exercise of parental responsibility proposed by the local authority, whilst not life threatening, is life affecting. Further such a decision potentially involves such a serious invasion of the *Article 8* rights of the mother that I am satisfied that the court should invoke its inherent jurisdiction in order that it may either sanction the local authority's proposed course of action as in the interests of the children or, alternatively, to refuse to sanction it as for example being in breach of *Article 8.*

99. In reaching that conclusion I have not overlooked *section 100(4) & (5) CA 1989*:

"(4) The court may only grant leave if it is satisfied that—

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

5) This subsection applies to any order—

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

100. I am satisfied that the result which the local authority wish to achieve cannot be achieved either:

i) through the making of an order to which *section 100(5) CA 1989* applies in the absence of a provision (or requirement) in *section 33 CA 1989* for the local authority to make an application in relation to the giving or changing of a forename of a child or

ii) by way of a prohibited steps order or a specific issue order.

101. That leaves the question of "whether there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm"?

102. The judge reached the conclusion that *section 100(4)(b) CA 1989* was not satisfied; in his judgment, the giving to the babies of the names contemplated by the mother did not give the court "reasonable cause to believe that if the court's inherent jurisdiction is not exercised" they would suffer significant harm. Further, the judge appeared to be of the view that a single issue relating to the naming of a child, is not, without more, capable of satisfying the *section 31 CA 1989* threshold criteria. With respect I disagree; in my judgment, although it will only rarely be the case, the giving of a particular name to a child can give a court reasonable cause to believe that, absent its intervention, the child in question is likely to suffer significant emotional harm. In my judgment this is one such case and there is every reason to believe that if the court's inherent jurisdiction is not invoked in order to prevent the girl child from being named “Cyanide”, she is likely to suffer significant harm.

> 103. In my judgment, the local authority took the correct procedural route when they made an application under *section 100 CA 1989* seeking "the intervention of the High Court in order to exercise its powers pursuant to section 100 Children Act (CA) 1989 and/or its Inherent Jurisdiction" *(sic).”*

30. In *Re C* therefore it was held that:

    i) Certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an opportunity to express their view to a court as part of the decision-making process;

    ii) Section 100 CA 1989 is available to a local authority *in serious medical treatment cases* because it is not seeking to *confer* a power on itself; the High Court is instead being asked to use its inherent jurisdiction to *limit, circumscribe* or *sanction* the use of power which the local authority already has by virtue of section 33(3)(b);

    iii) As the section provides, leave to apply can only be granted where the court has reasonable cause to believe that, if the inherent jurisdiction was not exercised with respect to the children, they would be likely to suffer significant harm.

The issue in this case

31. This court is now faced with determining whether the routine vaccination of healthy children in care is a matter which a local authority can properly consent to and arrange pursuant to its powers under s.33 CA 1989 or whether, where a parent opposes it, the issue is of such magnitude, seriousness or gravity that it necessitates an application to the High Court for leave to invoke its inherent jurisdiction.

32. It seems to me that the issue has to be determined against the backdrop of two matters:

    i) Current scientific and medical thinking in relation to vaccination;

    ii) The current state of the law in relation to the court’s approach to cases involving serious medical treatment generally and specifically to the giving of consent for vaccination.

33. If consenting to vaccination properly falls within the scope of a local authority’s exercise of parental responsibility under s.33(3), that is not altogether the end of the matter. It is important to note that in each case, the local authority must make what has been termed an ‘individualised’ welfare decision in relation to the child in question prior to arranging his or her vaccination.

Vaccinations

34. The current established medical view is that the routine vaccination of infants is in the best interests of those children and for the public good. The specific immunisations which are recommended for children in this country are set out in *The routine immunisation schedule* which is found in the *Green Book: Immunisation against infectious disease*, published in 2013 and updated since.

35. Dr Douglas, in a report commissioned in these proceedings, set out a proposed programme of immunisation for T which is in compliance with that recommended in the guidance in relation to "*Children from first up to second birthday"*. T, who has no contra-indications, will now be vaccinated in accordance with this programme

36. Dr Douglas summarised the consequences of failing to vaccinate a child by reference to a detailed consideration of the main characteristics of the diseases against which children in the UK are vaccinated and set that against an analysis of the potential side-effects in each case. I summarise Dr Douglas' analysis below, not in order to determine whether it is in the best interests of T to be vaccinated – that has been conceded and is obviously the case – but as context against which to consider whether the giving of vaccinations can be properly classified as serious medical treatment:

    i) Diphtheria, tetanus and whooping cough are all serious bacterial infections, each of which are potentially fatal and each of which are now rare in the UK due to the success of the vaccination programme;

    ii) Polio is serious viral infection, also rare as a consequence of the vaccination programme;

    iii) Pneumococcus and meningitis B and meningitis C are each contagious bacterial infections which can lead to meningitis which can be fatal and with many who survive having serious permanent problems including learning difficulties and loss of limbs;

    iv) Haemophilus influenzae is a contagious bacterial infection that causes meningitis and a number of other serious illnesses. Although rare, due to the vaccination programme, 1 in 20 of those who contract the disease will die.

37. Three well known childhood infectious viral diseases are vaccinated via the well-known MMR vaccine (Mumps, Measles and Rubella):

    i) Measles can cause pneumonia and encephalitis and, rarely, death. Due to the fall in the uptake in the MMR vaccination it has become more common in the UK with 991 cases confirmed in 2018;

    ii) Mumps can be complicated by meningitis, encephalitis, hearing loss, and pancreatitis;

    iii) Rubella can cause a flu-like illness and rash. If contracted by a non-immune pregnant woman it can cause miscarriage and severe birth defects.

38. Dr Douglas set out the recognised side-effects of vaccination. It is unnecessary to set them out in detail here as Hayden J quoted the relevant evidence in full at paragraph [18] of his judgment. Most commonly, the relevant vaccines can cause minor side effects in the form of short lived fever, irritability and pain and swelling at the injection site.

39. The MMR vaccine is slightly different in that it is comprised of a combination of attenuated live measles, mumps and rubella viruses which can, a little time after the injection, lead to the child getting a mild form of measles or mumps which lasts a couple

of days. Certain rare complications exist but these are less likely to occur from the effects of the vaccination than from the natural virus infection.

40. Finally, when considering vaccinations, Dr Douglas makes a further three points:

    i) Extensive research has not shown any link with the MMR vaccine and autism;

    ii) Vaccinations in the UK no longer contain thiomersal (a compound containing mercury) and there is no evidence that the small amounts of aluminium in some vaccines cause problems such as dementia or autism;

    iii) Single vaccinations for the various diseases which are given in combined vaccinations are not recommended as there is no evidence that they are either more effective or safer in terms of side effects.

41. For the purposes of this judgment, it is only necessary to consider the first of these points, namely the absence of any link between the MMR vaccine and autism. Some consideration of this issue is required in order to provide the context against which a determination can be made by this Court as to whether vaccinations are of themselves of such 'gravity' or 'seriousness' that a local authority cannot grant consent pursuant to its powers under s.33(3) CA 1989.

42. Most, although not all, of the concerns about the safety of vaccinations which have led to the courts' involvement in decisions as to whether a child should be vaccinated relate to the MMR vaccination. This vaccination was introduced in this country in 1988 and became part of the routine immunisation programme carried out through the primary care programme and, particularly, health visitor services.

The Wakefield paper

43. The nationwide vaccination programme in the United Kingdom was significantly undermined in 1998 as a consequence of the publication of a paper in *The Lancet* which purported to link the MMR vaccination with autism in children who had been vaccinated.

44. Dr Andrew Wakefield was a Senior Lecturer in the Departments of Medicine and Histopathology at the Royal Free Hospital. In 1996, he submitted an application to the Ethics Committee of the Royal Free Hampstead NHS Trust in which he sought approval for a project involving a number of children, entitled: *'A new paediatric syndrome: enteritis and disintegrative disorder following measles/rubella vaccination'*. He stated that the project would involve carrying out investigations on children who had been vaccinated with the MMR vaccine and who had manifested disintegrative disorder, and symptoms of intestinal disease or dysfunction. On the basis of the information provided in the application, the Ethics Committee granted approval for the project (Project 172-96). Dr Wakefield's study/project, however, expanded, without approval, to involve children who had received the MMR vaccine, and who had autism/suspected autism, in addition to gastrointestinal problems. His investigations were written up in a paper entitled *Ileal-Lymphoid Nodular Hyperplasia, Non-Specific Colitis and Pervasive Developmental Disorder in Children.* The paper, which was co-written by 12 authors including Dr Wakefield, was published in 1998 in the general medical journal *The*

Lancet (1998) 351. The paper claimed to have established a potential link between the MMR vaccine and autism.

45. After widespread publicity followed the publication of Dr Wakefield's claims, there was a drastic reduction in MMR vaccination rates and a corresponding increase in cases of measles. By 2005, the MMR vaccination uptake had fallen to 81% in the UK.

46. It subsequently transpired that Dr Wakefield had omitted to declare a number of conflicting interests when he submitted the paper for publication; for example, that he and the parents of some of the children in the study were involved in a legal dispute attempting to show that MMR vaccination was linked to autism. By 2004, 10 of the 12 co-authors of the 1998 paper had withdrawn their support for the claimed link with autism.

47. In June 2006, the General Medical Council (GMC) began an investigation into the alleged misconduct of Dr Wakefield and two of his former colleagues who had also been involved in the study. The allegations, and subsequent findings, ranged from Dr Wakefield's undisclosed conflict of interest when publishing the research, to the use of unethical treatment of autistic children. The GMC found Dr Wakefield guilty of more than 30 charges, and in May 2010 he was struck off the medical register. Dr Wakefield's paper has since been wholly discredited and on 2 February 2010 *The Lancet* formally retracted it.

Subsequent research

48. It has subsequently been confirmed that there is no link between autism and the MMR vaccine. The NHS England website states that

> "…there has not been a single credible study that has shown a risk of MMR causing autism, despite tens of millions of children around the world receiving the vaccine. On the contrary, numerous high-quality research studies support the safety of MMR".

49. A paper in May 2014 (*Vaccines are not associated with autism: an evidence-based meta-analysis of case-control and cohort studies*, Taylor and others, Vaccine 32(29)) analysed cohort studies involving over 1.2 million children and showed no link between vaccination and autism, and no relationship between autism and MMR, or thiomersal, or mercury.

50. A major study in March 2019 (*Measles, Mumps, Rubella Vaccination and Autism*, Hviid and others, Annals of Internal Medicine 170(8)) again found no link between MMR and autism. This study, conducted by researchers from Statens Serum Institut and the University of Copenhagen in Denmark, and Stanford University School of Medicine in the United States, involved 657,461 Danish children, born between 1999 and 2010, who were monitored until they were 8 years old. Of the children, 95% had received the MMR vaccine, and only around 1% of them (6,517) developed autism. Critically, there was no difference in the rates of autism between those who had, and had not, been vaccinated. Further, there was also no link found between the MMR vaccine and those children who may be at higher risk of developing autism, such as those who had an autistic sibling. The researchers thus concluded:

> "The study strongly supports that MMR vaccination does not increase the risk for autism, does not trigger autism in susceptible children, and is not associated with clustering of autism cases after vaccination. It adds to previous studies through additional statistical power and by addressing hypotheses of susceptible subgroups and clustering of cases."

51. Most recently, on 20 April 2020, an updated Cochrane review (*Does the measles, mumps, rubella and varicella (MMRV) vaccine protect children, and does it cause harmful effects?* Di Pietrantonj and others, Cochrane Database of Systematic Reviews 2020, Issue 4. Art. No.: CD004407) considered 138 studies with more than 23 million children. It concluded that MMR vaccines are effective in preventing the infection of children by measles, mumps, rubella and chickenpox, with no evidence of an increased risk of autism or encephalitis and a small risk of febrile seizure.

52. Whilst vaccination rates have recovered in recent years, they have not achieved the pre-Wakefield rates, with the inevitable risk to the children that the vaccinations are designed to protect and the child population as a whole who previously had the protection brought about by herd immunity.

53. It follows that, no matter what legitimate concerns parents may have had following the publication of Dr Wakefield's discredited paper, there is now no evidence base for concerns about any connection between MMR and autism. On the contrary the evidence, as set out in the unchallenged report of Dr Douglas in this case, overwhelmingly identifies the benefits to a child of being vaccinated as part of the public health initiative to drive down the incidence of serious childhood and other diseases.

54. I have, in (relatively) short form, rehearsed the history in relation to the MMR controversy and summarised Dr Douglas' mainstream analysis in relation to the other vaccinations which are habitually given to children. I do so as it is my hope that it will serve to bring to an end the approach which seems to have grown up in every case concerning vaccinations, whereby an order is made for the instruction of an expert to report on the intrinsic safety and or efficacy of vaccinations as being "necessary to assist the court to resolve the proceedings" (FPR 2010 r.25.4(3)).

55. In my judgment, subject to any credible development in medical science or peer-reviewed research to the opposite effect, the proper approach to be taken by a local authority or a court is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects. Any expert evidence should ordinarily, therefore, be limited to case where a child has an unusual medical history and to consideration of whether his or her own circumstances throw up any contra-indications, as was the case in relation to one specific vaccine in *Re C and F (Children)* [2003] EWHC 1376 (Fam) *(Re C and F)* (see paragraph [320]).

56. I should be clear that I am here dealing with the purely medical issues which may arise in any specific case, and am not seeking to narrow the broader scope of a child's welfare and of any other relevant considerations which it may be appropriate for a local authority or a court to take into account when considering his or her best interests when considering the question of vaccination.

Care proceedings in the context of serious medical treatment

57. It is the parents' case that immunisation is serious medical treatment and that any dispute between a local authority and a parent as to whether a child in care should be vaccinated must be brought before the High Court pursuant to the court's inherent jurisdiction for determination. For this, they rely on recent authority, and in particular the decisions in *In re AB (A Child)(Care Proceedings: Medical Treatment)* [2018] EWFC 3 *(Re AB)* and in *Re SL* (above).

58. For some time, the courts have been concerned with the interrelation of care proceedings and serious medical treatment. *A Local Authority v SB, AB and MB* [2010] EWHC 1744 (Fam), [2010] 2 FLR 1203 concerned an application by a local authority to withdraw care proceedings in relation to a 6 year old child who had a rare progressive brain disease. The local authority accepted that the threshold for care proceedings could not be satisfied. The NHS Trust had declined to intervene in order to make any applications for declarations in relation to medical treatment, notwithstanding their considerable concerns at the lack of co-operation by the parents. The Trust wished to continue to attempt to work with the parents. It followed that the "risk of significant harm" criterion necessary to invoke s.100 by the local authority could not be satisfied in that case. Sir Nicholas Wall P said that in those circumstances the court's only function was to determine whether to give the local authority permission to withdraw the care proceedings:

> "[28]… The decision whether or not MB should undergo surgery is for his parents, not for the court. They are the only people with parental responsibility. Section 100 of CA 1989 prohibits the LA from inviting me to adjudicate on the issue."

59. In *Re Jake (A Child)* [2015] EWHC 2422 (Fam); [2015] All ER (D) 1112, Sir James Munby P considered the case of a gravely ill child in relation to whom the local authority held an interim care order and therefore parental responsibility pursuant to s.33(3) CA 1989. The NHS Trust applied for urgent declarations to the effect that it would not be in the best interests of the child to continue to receive medical treatment. Sir James made the declarations sought and in the order, included the following recital:

> "(2) It *(the local authority)* considers that it is appropriate that the court makes the decision as to the withholding of serious medical treatment for Jake;
>
> (3) It actively encouraged the Hospital to make the application to the court for a declaration regarding the withholding or not of medical treatment not as an abrogation of its shared parental responsibility but rather as an acknowledgment that it is not appropriate for a local authority to give its consent to such serious medical intervention and also to relieve the parents of some of the burden of having to make such a painful and momentous decision as to their son's health (regardless of whether or not they have capacity to make such a decision)."

60. In *Re AB*, the court was concerned with a little boy aged 4 who was profoundly disabled as a consequence of a life limiting neuro-degenerative disorder. Unhappily, the

relationship between the local authority and the parents broke down and care proceedings were issued and a care order was made.

61. The parents appealed. At the appeal hearing, reported at *An NHS Trust v AB (A Child)* [2016] EWCA Civ 899, I raised with the parties the question as to whether care proceedings were in fact the appropriate route in a case of this nature. The appeal was allowed and the application for a care order was remitted for rehearing. It was anticipated that at the retrial, the issue of jurisdiction would be a matter for consideration. In the light of further medical evidence, the local authority revised its position at the rehearing and it no longer sought to establish the threshold criteria or to remove AB from the care of his parents.

62. It was in this context, and against this unusual and extreme background, that Sir James Munby P disposed of the case by consent 'on paper'. He gave a judgment saying:

> "24. In the circumstances, I have not had occasion to consider the important jurisdictional and other questions identified by the Court of Appeal. Further consideration of these matters must await another day. I think I can, however, properly make four observations:
>
> (i) Cases such as this (*In re Jake (A Child)* [2015] EWHC 2442 (Fam); [2016] 2 FCR 118, is another example) raise very complex issues, as yet little explored in the authorities, as to whether the appropriate process is by way of application for a care order or application under the inherent jurisdiction. Local authorities need to think long and hard before embarking upon care proceedings against otherwise unimpeachable parents who may justifiably resent recourse to what they are likely to see as an unnecessarily adversarial and punitive remedy.
>
> (ii) A local authority does not need any specific locus standi to be able to invoke the inherent jurisdiction: see *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185; [1976] 2 WLR 279. Section 100 does not prevent a local authority invoking the inherent jurisdiction in relation to medical treatment issues: see *In re C (Children) (Child in Care: Choice of Forename)* [2016] EWCA Civ 374; [2017] Fam 137, para 97.
>
> (iii) Whatever its strict rights may be, a local authority will usually be ill-advised to rely upon its parental responsibility under section 33(3)(a) of the 1989 Act as entitling it to authorise medical treatment opposed by parents who also have parental responsibility: see *Barnet London Borough Council v AL* [2017] EWHC 125 (Fam); [2017] 4 WLR 53, para 32, and the discussion in *In re C (Children) (Child in Care: Choice of Forename)*, paras 92–95. For a local authority to embark upon care proceedings in such a case merely to clothe it with parental responsibility is likely to be problematic and may well turn out to be ineffective."

63. Sir James Munby's observations in *Re AB* were picked up by Recorder Howe QC in *Re T (A Child)(No 2)* [2018] EWFC B7. In that case, the Recorder was concerned with a local authority's application to administer various drugs on the recommendation of a psychiatrist to a disturbed child currently living in secure accommodation. The Recorder, not surprisingly on the facts of the case, concluded that it would be inappropriate for the local authority to give consent to the administration of the drugs concerned. At paragraph [32] he relied on the observations of Sir James Munby at paragraph [62] above in support of his decision.

64. I agree with Sir James that the use of care proceedings as a route to bring such difficult and sensitive cases before the court is to be deprecated in circumstances where parents are otherwise unimpeachable: see *E (A Child)* [2018] EWCA Civ 550 at where I said:

> "107. Care proceedings in serious medical treatment cases will, and should, be issued only where there are significant additional issues of concern in respect of the care given by the parents to the child over and above a disagreement with the clinicians as to future care and treatment…"

65. In such circumstances, the more appropriate, and more usual, way in which to bring such matters before the court is, as in *Re Jake,* by the NHS Trust responsible for treating the child to institute proceedings by invoking the court's inherent jurisdiction and seeking declarations in respect of the future treatment of the child. In such inherent jurisdiction proceedings, where the applicant is not a local authority but an NHS Trust, the threshold criteria have no role and the sole criterion is the best interests of the child: *E(A Child)* at paragraph [62] onwards. The requirement in s.100(4)(b) for reasonable cause to believe that there will be a likelihood of significant harm is designed to prevent a local authority from circumventing the ordinary requirements of s.31. Where an NHS Trust is the applicant, there will inevitably be a serious medical issue to decide and the requirement for a threshold condition is not therefore necessary.

66. By contrast, where a child is already in care, the s.31 threshold criteria have been satisfied and the welfare of the child has necessitated the making of a care order (as opposed to care proceedings being used as a vehicle to bring the matter before the court). It was in those circumstances that Sir James said (see paragraph [62] above) that, notwithstanding a local authority's strict rights under s.33(3)(b) CA 1989, it would be "ill-advised" to rely upon those rights as entitling it to "authorise medical treatment".

67. It must be borne in mind that Sir James had not heard argument on the s.33(3)(b) issue and was making, at first instance, an "observation". It is unclear whether, in making his general observation, he meant to include all medical treatment of whatever nature, or only of the type with which he (and all the other cases in this section of the judgment) were concerned, namely a desperately ill child. In the unlikely event that Sir James' view that a local authority should not use its powers under s.33(3)(b) CA 1989 related to *any* medical treatment, then, with the greatest of respect, I would disagree

68. I turn, therefore, to consider how the courts have approached cases where the dispute has related to the vaccination of a child. I note before proceeding further that Counsel have been unable to find any reported case, whether in the public or private law sphere, where, following a contested hearing, an application for vaccination has been refused.

Private law vaccination cases

69. In *Re C and F*, Sumner J granted applications for specific issue orders sought by two fathers in respect of their daughters requiring each of them to be given age-appropriate immunisations. Each of the mothers opposed the applications on the basis that immunisations posed an unacceptable risk to the health of children. The hearing lasted for over two weeks. The judge heard extensive medical evidence and analysed each of the vaccinations proposed to be given to the children in minute detail in a judgment running to 370 paragraphs before concluding that it was in the best interests of each of the healthy children to be vaccinated.

70. In *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148; [2003] 2 FLR 1095) *(Re C (Immunisation)),* the Court of Appeal dismissed the appeal from Sumner J's decision. In his judgment, Thorpe LJ said:

> "15. Section 2 deals with parental responsibility. Section 2(7) provides:
>
> > "Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child."
>
> 16. The apparent freedom of each to act alone is not, however, unfettered. As the President said in the case of *Re J* [2000] 1 FLR 571 at 577:
>
> > "There is, in my view, a small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by one parent carer although she has parental responsibility under section 2(7) of the Children Act 1989. Such a decision ought not to be made without the specific approval of the court. Sterilisation is one example. The change of a child's surname is another."
>
> 17. In that case the court held that the circumcision of the child should only be carried out where the parents agree or where a court, in settling the dispute between them, decides that the operation is in the best interests of the child. In my opinion this appeal demonstrates that hotly contested issues of immunisation are to be added to that 'small group of important decisions'."

71. More recently, in *F v F (MMR Vaccine)* EWHC 2683 (Fam); [2014] 1 FLR 1328 (*F v F),* Theis J made specific issue orders, having held that it was in the best interests of two children to receive the MMR vaccination.

> "[9] This issue has come before the court on two occasions before. In *Re C (Welfare of Child*: *Immunisation)* [2003] EWCA]

> Civ 1148, [2003] 2 FLR 1095 the Court of Appeal dismissed the mother's appeal against the decision of Sumner J to order her to have her child immunised with the MMR vaccine. This issue was between two parents. Sumner J heard from a number of experts in paediatric immunology and infectious diseases and he concluded that the benefits of having the vaccinations outweighed the risks. He made it clear that each case was fact specific. In the Court of Appeal Thorpe LJ rejected the 'repeated categorisation of the course of immunisation as non-essential invasive treatment. It is more correctly categorised as preventative healthcare', (at para [22]). In *Re A*, *B*, *C and D (Welfare of Children: Immunisation)* [2011] EWHC 4033 (Fam), (unreported) 26 May 2011, I considered the issue of vaccinations in the context of children who were the subject of final care orders where there was a dispute between the local authority and the parents as to whether the children should be vaccinated. I concluded the children in that case should be vaccinated. The expert in that case, Dr Ward, comprehensively addressed the link between the MMR vaccine and autism and the consequences of getting these diseases. I set those out at para [16] of that judgment:
>
> > (a) Measles, mumps and rubella are serious infections, each of which carried an appreciable risk of dangerous complications in healthy individuals. Vaccination is the only practical way to prevent an individual from contracting infection, and all the evidence is that it is effective and has a very low level of side effects, which are generally mild and transient …
> >
> > (d) With due consideration for established contraindications to vaccination in an individual case, it is otherwise in every child's interest to be protected."

72. In *Re B (A Child: Immunisation)* [2018] EWFC 56, HHJ Clifford Bellamy, sitting as a Deputy Judge of the High Court, ordered the immunisation of a child in private law proceedings.

> "2. The issue is properly categorised as an issue of preventative health care rather than medical treatment. In the UK the vaccination of children is not compulsory. The vaccination of very young children, though strongly recommended, is a decision which the State entrusts to parents to determine as part of their parental responsibility. Such a decision would not be brought to court if the parents were agreed that the vaccination should not be given."

73. Once again, in *Re B* an eminent expert had been instructed in the proceedings. The expert, in addition to considering the child in question and concluding that there were no contra-indications which would militate against her being vaccinated, trawled through each of the diseases subject to vaccinations. The Deputy High Court Judge

reviewed each of the reported cases in relation to vaccinations noting that in each case expert evidence had been commissioned. In making the orders for immunisation, he concluded:

> "93. In making that order, like MacDonald J, I make it clear that my judgment is not a commentary on whether immunisation is a good thing or a bad thing generally. I am not saying anything about the merits of vaccination more widely. I do not in any way seek to dictate how this issue should be approached in other situations. I am concerned only to determine what is in B's best welfare interests.
>
> 94. That said, it is, in my judgment, appropriate to make the point 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 passed, 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."

74. I completely agree with the views of the Deputy High Court Judge as to future challenges to the efficacy/safety of the relevant vaccines. In my judgment, by 2010 at the very latest, when Dr Wakefield had been struck off and *The Lancet* had unequivocally retracted his article, there has been no evidential (or other basis) for suggesting that there is a link between MMR and autism. The contrary was established in the 2014 and 2019 research papers and summarised in the latest Cochrane review. The other vaccinations which are routinely given to children have not been the subject to the same high-profile concerns as to their safety. In case after case however, they too have been the subject of detailed lengthy and expensive expert testimony whenever there has been a dispute as to whether a child should be vaccinated.

Public law vaccination cases

75. *Re A*, *B*, *C and D (Welfare of Children: Immunisation)* [2011] EWHC 4033 is the public law case to which Theis J referred in *F v F* (see paragraph [71] above). This was a case where a local authority had invoked the inherent jurisdiction of the court in relation to children in respect of whom they had care orders and where the parents objected to the proposed immunisation of the children. Theis J was not asked to consider whether s.100 CA 1989 was the appropriate jurisdictional route but rightly noted that once the inherent jurisdiction had been invoked, the welfare of the children concerned is paramount (paragraph [9]).

76. Theis J's unequivocal conclusion, having heard medical evidence which dovetailed entirely with that heard by Sumner J, is that "with due consideration for established contraindications to vaccinations in an individual case, it is otherwise in every child's best interest to be protected against mumps, measles and rubella".

77. It was not until *Re SL* came before MacDonald J that the issue of vaccinations in the context of s.33(3) CA 1989 came to the fore. The local authority had been granted an interim care order in respect of a 7 month old baby. An order granting a declaration in the care proceedings that it was in the best interests of the baby to receive the recommended vaccinations was made in the context of the local authority "acknowledging that it would be inappropriate to unilaterally exercise their conferred parental responsibility where a parent objected to the baby being vaccinated". Against the backdrop of that concession, MacDonald J did not have the benefit of the s.33 issue being argued before him in the way it was before Hayden J. It goes without saying that the decision in *Re SL*, that the child should be vaccinated, was undoubtedly right.

78. It is this difference in view as between Hayden J in this case and MacDonald J in *Re SL* that has brought this matter before the court, notwithstanding that the parents no longer seek to appeal the order for vaccination made by the judge.

79. The key elements of Hayden J's judgment were that:

i) Vaccinations are not medical treatment but a facet of public preventative healthcare;

ii) Such applications should be regarded as being 'at the least intrusive end of the scale of intervention';

iii) There is no reason why routine vaccinations should not fall within s.33 CA 1989;

iv) The risks contingent upon not vaccinating a healthy young infant significantly outweigh the benefits (of not vaccinating);

v) Each child must be considered individually with his welfare as the paramount consideration. His or her health record should be taken into account to ensure that there are no relevant contra-indications before a decision is taken by the local authority to vaccinate.

80. MacDonald J's contrasting approach can be seen from the following passage from his judgment in *Re SL:*

> "31. Thus, where there is a dispute between those holding parental responsibility (whether as between parents or between parents and a local authority holding a care order) as to whether such a vaccination or vaccinations should take place the court has jurisdiction to determine the dispute. In determining the question before the court, the welfare of the child is the paramount consideration of the court. Within this context, the court must accord appropriate weight to the views of the parent or parents having assessed those views and must exercise an

> independent and objective judgment on the basis of the totality of the evidence before it, including, but not limited to, the expert evidence.
>
> 32. In this case the court is concerned with the issue of vaccinations in the context of children who are the subject of care orders and thus the dispute is between the local authority sharing parental responsibility for the child and the parent with parental responsibility. In the circumstances where SL is in the care of the local authority, by virtue of s 9(1) of the Children Act 1989 the local authority cannot apply for a specific issue order with respect to the issue of vaccination. Further, **given the gravity of the issue in dispute, it is not appropriate for the local authority simply to give its consent to immunisation pursuant to the provisions of s 33(3) of the Children Act 1989** on the basis of its shared parental responsibility for SL under the interim care order (see *A Local Authority v SB, AB & MB)* [2010] 2 FLR 1203 and *Re Jake (Withholding Medical Treatment)* [2015] EWHC 2442 (Fam)).
>
> 33. In the circumstances, as in *Re A, B, C and D (Welfare of Children: Immunisation)* [2011] EWHC 4033 (Fam), and whilst the C2 application made by the local authority on 21 October 2016 is for an order in existing Children Act proceedings, the application the local authority pursues before this court must in fact be an application for relief under the inherent jurisdiction of the High Court. The local authority requires leave to make such an application, which application for leave is to be considered against the criteria set out in s 100(4) of the Children Act 1989. Being satisfied that the relief sought by the local authority does not contravene s 100(2) of the Children Act 1989 and that the criteria for granting leave to the local authority to make an application under the inherent jurisdiction set out in s 100(4) of the Act are met, I granted permission for the local authority to make an application for relief under the inherent jurisdiction of the High Court." [Emphasis supplied]

Is vaccination medical treatment?

81. During the course of argument, we indicated to Ms Grief QC on behalf of the local authority, that we did not think that the nomenclature attached to vaccinations mattered a great deal, that is to say whether they are categorised as 'medical treatment' or as 'preventative health care'. The critical issue was, we suggested, whether immunisations are to be regarded as 'grave' or 'serious' in the context of the exercise of parental responsibility by a local authority such as to require the sanction of the court when a dispute arises.

82. Following the hearing, in response to the handing down of our judgments in draft, the parties drew our attention to the terms of s.45E of the Public Health (Control of Disease) Act 1984, which forms part of a series of amendments to the 1984 Act that were enacted in 2008 and came into force in 2010. Section 45E appears in Part 2A, which concerns

public health protection. Powers are given to the appropriate Minister to make orders or regulations in response to the incidence or spread of infection in England and Wales. Section 45E provides that such regulations may not require a person to undergo medical treatment, and states that "medical treatment" includes vaccination and other prophylactic treatment.

83. Mr Bailey argues that this provision shows that Parliament regards vaccination as medical treatment, that we are bound to reach the same conclusion, and that this should lead us to the view that the vaccination of a child in care is a grave matter requiring court approval where a dispute exists. We do not accept this logic, for these reasons:

i) As Ms Grief contends, the test for whether a local authority could exercise its powers under s.33(3)(b) CA 1989 should be addressed through the prism of the relative seriousness or gravity of a particular decision; it does not depend upon whether vaccination is to be classified as medical treatment or not.

ii) I note, however, that this court has touched on the issue in *Re C (Immunisation)*, where Thorpe LJ said:

> "22. In any event I reject Miss Gumbel's repeated categorisation of the course of immunisation as non-essential invasive treatment. It is more correctly categorised as preventative health care. Mr Cohen in his response drew attention to the United Nations Convention of the Rights of the Child emphasising Article 6(2): 'States Parties shall ensure to the maximum extent possible the survival and development of the child'. More specifically he drew attention to Article 24:"
>
> "1. States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
>
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
>
> (a)-(e) …
>
> (f) To develop preventive health care, …"
>
> I would wholeheartedly follow this analysis insofar as it concerns the vital importance of preventative health care. It is important not to treat vaccination as comparable with the 'serious medical treatment' cases discussed above. Routine vaccinations are carried out all over the world and are a facet of the right of a child to "enjoy the highest attainable standard of health" pursuant to Article 6(2) of the UNCRC. However, I would not on reflection go so far as Thorpe LJ in identifying a dichotomy between medical treatment and preventative health care. It seems to me that the concepts overlap. There must be a place for preventative medical treatment and for preventative health care and for our purposes vaccination might be described in either way.

iii) I do not consider that s.45E requires us to reach the conclusion for which Mr Bailey contends. It is concerned with the definition of the rule-making power of the Minister and it does not purport to be a definition of universal application.

84. It follows that I would depart from that part of Hayden J's analysis which categorises vaccinations as being a facet of public preventative healthcare rather than medical treatment. As I have said, the concepts overlap, but in the end the question is irrelevant to the real issue, to which I now turn.

Is the giving of a vaccination to be regarded as 'grave' issue?

85. I cannot agree that the giving of a vaccination is a grave issue (regardless of whether it is described as medical treatment or not). In my judgment it cannot be said that the vaccination of children under the UK public health programme is in itself a 'grave' issue in circumstances where there is no contra-indication in relation to the child in question and when the alleged link between MMR and autism has been definitively disproved.

Can vaccinations be arranged by a local authority alone under s.33(3)(b) CA 1989?

86. MacDonald J, having categorised immunisation as an issue of gravity, relied on *A Local Authority v SB* and *Re Jake* as authority for the proposition that a local authority cannot give its consent pursuant to s.33 CA 1989. Both those High Court cases are at the opposite end of the spectrum from vaccinations. Further, in neither case was the use by a local authority of s.33(3)(b) to give consent to medical treatment an issue.

87. In *A Local Authority v SB* the powers under s.33(3)(b) were mentioned by Sir Nicholas Wall P only by a side wind with reference, at paragraph [31], to a judgment in *Re O (A Minor)(Blood Transfusion)* [1993] 2 FLR 149. In that case, Johnson J had accepted a submission that it is inappropriate for the court to make an interim care order and thereby activate s.33 CA 1989 where parents are "caring, committed and capable", with the only issue being their resistance to their child receiving a blood transfusion. That is a view with which I entirely agree: see paragraph [64] above.

88. Likewise, in *Re Jake* the position of the local authority, who held a care order, was that it would not be appropriate for it to consent to the serious medical intervention proposed by the Trust. The local authority position was reflected in a recital to the declarations which were made (see paragraph [59] above). The court did not hear argument, and the case did not turn on the proper interpretation of s.33(3)(b).

89. In *Re SL*, it was decided that the relief sought by the local authority did not contravene s.100(2) CA 1989. The judge said that the criteria for granting leave under s.100(4) were met and granted leave. He did not (I suspect because it was not argued before him) elaborate further, but it will be recollected that s.100(4)(b) requires the court to find that:

> "(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm."

90. If MacDonald J was of the view that a healthy child is likely to suffer significant harm simply because he is not being vaccinated, I cannot agree. In my judgment, here lies the ultimate difficulty in the use of the inherent jurisdiction by a local authority in a routine immunisation case via the portal of s.100 CA 1989. If a parent in respect of whom there are no care proceedings cannot be considered to be causing a child to be likely to suffer significant harm when they decide not to vaccinate their child, I cannot see how can it be said now, for the purposes of s.100(4)(b), that that very same refusal on their part provides reasonable cause to believe that the child is likely to suffer significant harm if the inherent jurisdiction is not exercised.

Private and Public law contrasted

91. MacDonald J did not seek to differentiate between those cases where there is a dispute between private law and public law proceedings, saying at paragraph [31] that the court has jurisdiction to determine the issue "whether as between parents or between parents and a local authority holding a care order" and that the court has jurisdiction to determine the dispute.

92. This court has said that in private law cases where there is a dispute between the holders of parental responsibility about certain important decisions the matter should go before the court for determination by way of an application for a s.8 CA 1989 specific issue order: see Thorpe LJ in *Re C (Immunisations)* at paragraph [17]. He said, it will be recollected, that immunisations were to be part of the "small group of important decisions" where, in the absence of the agreement of those with parental responsibility, the decision should not be made without the approval of the court. In 2003, when Thorpe LJ expressed that view, Dr Wakefield and his proposition as to a link between vaccination and autism had not finally been discredited. Now in 2020, 17 years later, all the evidence presently available supports the Public Health England advice and guidance which unequivocally recommends a range of vaccinations as being in the interests both children and society as a whole.

93. This is not the case for this court to consider whether immunisation should properly continue to be a matter which must be brought to court where there is a private law dispute between the parents. It may be that time has moved on to the extent that Thorpe LJ's categorisation would now be revisited in the same way as the Supreme Court in *XX v Whittington Hospital Trust* [2020] UKSC 14 recently revisited the earlier decision in *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856. In *XX*, Baroness Hale held at paragraph [48] that in the light of developments in the law, medical science and social attitudes, and contrary to the Court of Appeal's view expressed in *Briody* 19 years earlier, damages can now be claimed in a medical negligence case for the reasonable costs of surrogacy using donor eggs. A similar instance is provided by the decision in *An NHS Trust v Y* [2018] UKSC 46, where the Supreme Court revised the requirements of good practice laid down in *Airedale NHS Trust v Bland* [1993] AC 789 in the light of greater understanding and experience of prolonged disorders of consciousness.

94. Regardless of whether immunisations should or should not continue to require court adjudication where there is a dispute between holders of parental responsibility, there is in my judgment a fundamental difference as between a private law case and a case concerning a child in care. In private law, by s.2(7) CA 1989, where more than one person has parental responsibility, each of them may act alone and without the other.

Section 2(7) does not however give one party dominance or priority over the other in the exercise of parental responsibility. Each parent has equal parental responsibility, even though the day to day realities of life mean that each frequently acts alone. This applies particularly where the parties live in separate households and one parent is the primary carer. As Theis J put it in *F v F* at paragraph [21], *"*in most circumstances [the way parental responsibility is exercised] is negotiated between the parents and their decision put into effect." As neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree.

95. The situation is, in my view, different in the public law sphere when a care order is in place. A care order is only made if the welfare of a child requires such an order to be made, it having been determined or conceded that pursuant to s.31(2) CA 1989, the child has suffered or is likely to suffer significant harm attributable "to the care given to him or her not being what it would be reasonable to expect a parent to give him". In other words, the child in question has suffered (or was likely to suffer) harm as a consequence of the care given to him or her by a person with parental responsibility. It is against that backdrop that the parent of a child in care holds parental responsibility. Parliament has specifically, and necessarily, given the local authority that holds the care order, the power under s.33(3)(b) to override the views of a parent holding parental responsibility. The local authority's view prevails in respect of all matters save those found in the statutory exceptions or where, as I identified in *Re C*, the decision to be made is of such magnitude that it properly falls within the provisions of s.100.

96. The 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.

97. For these reasons, I prefer the judge's analysis in the present case to the analysis in *Re SL*.

Proportionality

98. It has not been argued by Mr Bailey on behalf of the parents that allowing the local authority to consent to the immunisation would represent a disproportionate breach of their Article 8 ECHR rights. I merely say for completeness that if such an action on behalf of the local authority does represent an infringement of the parents' or child's rights under Art 8 ECHR, I am satisfied that, when considered through the prism of *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179 (as endorsed in a family context in *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190 at paragraph [44]), any interference is proportionate.

The position of parents

99. It is axiomatic that any local authority must involve parents in decision-making and take their views into account. Section 33 CA 1989 is not an invitation to local authorities to ride roughshod over the wishes of parents whose children are in care. As was recognised by the judge at paragraph [17], in the event that a local authority proposes to have a child vaccinated against the wishes of the parents, those parents can make an application to invoke the inherent jurisdiction and may, if necessary, apply for an injunction under section 8 Human Rights Act 1998 to prevent the child being vaccinated before the matter comes before a court for adjudication.

100. The conclusion I have reached in relation to routine immunisations does not in any way diminish the importance of parental views where there is a real issue about what decision will best serve the welfare of a child. In the course of his judgment Hayden J referred to *Re T (Wardship: medical treatment)* [1997] 1 FLR 502. In that case, the issue was whether a 1 year old boy should be given a life-saving liver transplant against the wishes of his parents, who were themselves health care professionals. The issue was a finely balanced one and this court overturned the judge's order in favour of a transplant. In doing so, Waite LJ said this:

> "All these cases depend on their own facts and render generalisations - tempting though they may be to the legal or social analyst - wholly out of place. It can only be said safely that there is a scale, at one end of which lies the clear case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind; and that at the other end lie highly problematic cases where there is genuine scope for a difference of view between parent and judge. In both situations it is the duty of the judge to allow the court's own opinion to prevail in the perceived paramount interests of the child concerned, but in cases at the latter end of the scale, there must be a likelihood (though never of course a certainty) that the greater the scope for genuine debate between one view and another the stronger will be the inclination of the court to be influenced by a reflection that in the last analysis the best interests of every child include an expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature."

101. The distinction drawn here between parental views that are inconsistent with the child's welfare and highly problematic cases where there is genuine scope for a difference of view remains a valuable one. It is a reminder that, while the views of parents must always be taken into account, the weight that is given to them depends not upon the vehemence with which they are expressed but upon their substance.

102. As must have become clear, I do not share the inhibition felt by the judges in some of the decided cases in expressing the view that the scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated. As Theis J said 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'

It follows therefore that in my judgment, an application to invoke the inherent jurisdiction or to seek an injunction with a view to preventing the vaccination of a child in care is unlikely to succeed unless there is put before the court in support of that application cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations.

103. Applying these conclusions to the present case, the local authority could have used its statutory power to consent to T receiving routine immunisations at the appropriate times

without the need to seek court approval. Any legal challenge the parents might have made would inevitably have failed. All that has been achieved by their opposition has been more delay and public expense. Fortunately, T's case offers the opportunity to ensure that this process need not be repeated in other similar cases.

Conclusion

104. Pulling together the threads of this judgment, I have concluded that:

i) Although vaccinations are not compulsory, the scientific evidence now clearly establishes that it is in the best medical interests of children to be vaccinated in accordance with Public Health England's guidance unless there is a specific contra-indication in an individual case.

ii) Under s.33(3)(b) CA 1989 a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child, notwithstanding the objections of parents.

iii) The administration of standard or routine vaccinations cannot be regarded as being a 'serious' or 'grave' matter. Except where there are significant features which suggest that, unusually, it may not be in the best interests of a child to be vaccinated, it is neither necessary nor appropriate for a local authority to refer the matter to the High Court in every case where a parent opposes the proposed vaccination of their child. To do so involves the expenditure of scarce time and resources by the local authority, the unnecessary instruction of expert medical evidence and the use of High Court time which could be better spent dealing with one of the urgent and serious matters which are always awaiting determination in the Family Division.

iv) Parental views regarding immunisation must always be taken into account 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.

105. It follows that the appeal will be dismissed and that the declaration made by the judge that the local authority has lawful authority, pursuant to s.33(3) CA 1989, to consent to and make arrangements for the vaccination of T, notwithstanding the objection of the parents, will stand.