Parental Responsibility, Vaccinations, and the Role of the Court

The vast majority of children in the UK receive standard vaccinations against a range of infectious diseases, as set out in what is called the routine immunisation schedule contained within the *Green Book: Immunisation Against Infectious Diseases* (M. Ramsay (Ed), Public Health England / Department of Health, 2017). The minority of children who do not fall into two groups. One group contains children who, because of particular medical conditions termed contra-indications, would be placed at heightened risk from the vaccination itself, where that risk on balance outweighs the risks from the diseases covered by the vaccines. These children's health depends, to a significant extent, on a critical mass of the population being immunised, to prevent the diseases taking hold. The other group have no individual medical reason not to be immunised, but one or both parents, as holders of parental responsibility, object to some or all vaccinations for their children.

The authorisation for a child to receive a vaccination is undoubtedly within the scope of parental responsibility ('PR'). PR is defined in the Children Act 1989, s. 3(1) as being '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'. While that definition does little more than beg the question, it is clearly settled that deciding on any form of medical treatment, from the most mundane to those involving life-or-death decisions, are within the scope of parental responsibility.

The Children Act provides, in s. 2(7), that each holder of PR 'may act alone and without the other (or others) in meeting that responsibility' Where, as is usual, both parents hold PR for a child, this provision would seem to imply that the consent of only one parent is required for medical treatment to be authorised. However, the courts have long made clear that 'significant decisions' about children's upbringing should not be made without consultation between the holders of PR, which in practice means agreement of all holders of PR (J. Eekelaar, 'Do Parents Have a Duty to Consult?' (1998) 114 L.Q.R. 337; on immunisation, see *Re C (Welfare of Child: Immunisation)* [2003] EWHC 1376 (Fam), [2003] 2 F.L.R. 1054). A question arises, therefore, as to whether authorising routine vaccinations is a significant decision or not; the courts have offered no definition.

It is nonetheless clear that if both parents are in agreement, they are free either to authorise or to refuse to authorise their child's immunisation as an exercise of their PR. Where they are in dispute, the Family Court has power to resolve the issue by making an order under s. 8 of the Children Act, whether a Prohibited Steps Order to prevent vaccination or a Specific Issue Order to permit it. These orders, along with some others not relevant to this issue, are collectively termed 's 8 orders'.

While all of this is settled law, two questions arise. First, is there any scope for a third party to seek court orders to over-ride the parents' unanimous decision not to vaccinate their child?

And second, what happens if the child in question is the subject of child protection orders and is, on either an interim or a long-term basis, in the care of a local authority?

A child comes to be in the care of a local authority when a care order is made under s. 31 of the Act, or an interim care order is made under s. 38. While the criteria for these orders are different, both require that the child be suffering or be at risk of suffering significant harm which is attributable to the care being given by the parents. When any care order is made, the local authority obtains PR for the child. While the local authority is required to consult with the parents, they may control the extent to which the parents exercise their own PR and thus, in effect, make the decisions about the child's upbringing. When any care order is in force, the court is forbidden from making either of the s. 8 orders referred above (s. 9(1)). The purpose of this restriction is to stop parents or the courts from seeking to interfere with local authorities' decisions about children in their care. The local authority itself would have no need for such an order, as it has PR already which it can exercise to override the parents' wishes.

Before the Children Act was passed, local authorities often invoked the inherent jurisdiction of the High Court, having children made wards of court, rather than seeking statutory remedies. To avoid this, any application by a local authority for inherent jurisdiction orders requires the court's permission (s 100(3)). The threshold for leave is set out in s. 100(4) and (5):

> (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).

However, crucially, it has long been established that local authorities are able to apply for s. 8 orders where a child is not subject to an order under ss. 31 or 38 (*Re R (A Minor) (Blood Transfusion)* [1993] 2 F.L.R. 757). There are significant limitations on what such an order can do, set out in s. 100(2) of the Act. In short, the s. 8 order cannot be used to circumvent ss. 31 and 38 by placing a child in local authority care, nor to give the local authority the power to determine any issue of parental responsibility. However, as in *Re R* itself, these restrictions do not stop a local authority getting an order which permits a child to have a specified medical operation, for example. While a local authority always requires the court's permission to seek a s. 8 order, the threshold for obtaining leave is low. Some relevant considerations are set out in s. 10(9), but these are merely issues to consider alongside any other relevant factors (*Re B (Care Proceedings: Joinder)* [2012] EWCA Civ 737, [2012] 2 F.L.R. 1358, at [48]). Unlike applications for care orders or applications under the inherent

jurisdiction, the local authority does not need to show any actual or likely significant harm to the child before it can bring such an application.

It also follows, from the fact that a local authority can apply for a s. 8 order, that the court may not grant a local authority permission to apply under the inherent jurisdiction unless the aim which the local authority seeks to achieve cannot be met by the making of a s. 8 order. However, the courts have generally approached cases concerning serious medical treatment – and in some cases, less serious medical treatment – as justifying the invocation of the inherent jurisdiction. These cases rarely consider how they are overcoming the s. 100(4)(a) restriction.

Returning to the two questions posed earlier – can the parents' unanimous decision be over-ridden, and what happens when a child is subject to a care order – we come to *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664. In this decision, the Court of Appeal offers answers to these questions, albeit the answer to the first was clearly obiter. In a unanimous judgment given by King L.J. (McCombe and Peter Jackson L.JJ. agreeing), the court indicated that where parents are in agreement that their child should not be vaccinated, but are otherwise not in any way causing their child such harm as would justify a local authority in bringing care proceedings, there is no role for the court in over-riding that parental decision – at least, not at the instigation of a local authority. However, if a local authority has a child in its care for other reasons, and consequently has already gained PR for the child, it does not need a court order to use that PR to authorise a child's vaccinations, even over unanimous objection from the parents.

These two answers do not sit easily together. Where a local authority already has a child in its care, the benefits of vaccination are so clear (at [55]) and the issue so non-significant (at [85]) that the local authority is entitled, without risk of any breach of Article 8 rights (at [98]), to proceed with authorising the vaccination even over the explicit objection of the parents. Any court challenge by the parents would be 'unlikely to succeed' unless there was cogent medical evidence of risk to the particular child (at [102]).Yet, at the same time, if parents whose child is not subject to a care order do not get their child vaccinated, the local authority is said to have no basis for interference with that decision, despite those obvious benefits to the child, and to society more broadly, of vaccination.

King L.J.'s approach imposes a narrow conception of the role of the state in family life. While it is, of course, right that the Children Act grants PR, and thus the primary decision-making powers in relation to children, to the parents in the vast majority of cases, it does not follow that the state has no role to play. For the state, in the guise of a local authority, to intervene by taking a child into care, there is a threshold of actual or likely significant harm: Children Act 1989, s. 31. Likewise, if a local authority seeks orders under the High Court's inherent jurisdiction, it must satisfy the court of that same threshold of likely significant harm (s. 100(4)). However, here is where the difficulty comes. The court's seemingly unbreakable determination to invoke its inherent jurisdiction, rather than considering its statutory powers, leads the court in *Re H* to impose a threshold for state intervention by a local authority – and,

by a process of faultless logic, to hold indeed that there is no power for such intervention – where that is not in any sense an inevitable conclusion.

The court's argument is constructed in this way. First, considering the issue of vaccination, the court asks whether, by itself and without any other concerns, a failure to allow a child to be vaccinated can be said to amount to significant harm, which would justify the local authority in bringing care proceedings. King LJ answers this question in the negative (at [90]). That may be a matter of opinion given the risks that non-immunised children face, and in *Re SL (Permission to Vaccinate)* [2017] EWHC 125 (Fam), [2017] 4 W.L.R. 53, MacDonald J. reached just that conclusion; it is also notable that the court has previously held that disagreements about immunisation between parents must be resolved by the court (*Re C*, above). King L.J. expressly held that failure to immunise does not in itself amount to significant harm (at [90]), and the court has previously noted that seeking a care order when the local authority's concern relates to a narrow issue such as medical treatment is likely to be disproportionate (*Re AB (Care Proceedings: Medical Treatment)* [2018] EWFC 3, [2018] 4 W.L.R. 20, at [24(i)]).

It can be accepted, therefore that the local authority cannot bring an application for a care order in order to obtain parental responsibility for a child where failure to vaccinate is the sole issue. It follows that the local authority cannot obtain and rely on its own parental responsibility in such a case, even though if it had parental responsibility already it could legitimately use that parental responsibility to authorise the child's vaccination.

The Court of Appeal then goes on to say, therefore, that the local authority cannot in fact obtain orders for vaccination *at all* if the child is not subject to a care order for other reasons, because the threshold under s. 100(4) cannot be met. King L.J. puts it this way:

> 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. (at [90])

That logic is impeccable, but it only arises because the court is asking the wrong question, premised on the court's need to invoke the inherent jurisdiction rather than making a statutory order. Why should the question be: can the local authority invoke the inherent jurisdiction? The only reason for doing so is if the remedy sought cannot be obtained in some other way under the Children Act: s. 100(4)(a) (see also *Re NY (A Child)* [2019] UKSC 49, [2019] 3 All E.R. and *Re N (A Child)* [2020] EWFC 35, [2020] All E.R. (D) 30 (May)). Is this such a case?

When a child is the subject of a care order or interim care order, it is indeed the case. The Children Act specifically bars the local authority from seeking the statutory remedies which might otherwise apply (s. 9(1)). If an issue arises where – unlike the case of vaccinations, as held by the Court of Appeal in this case – a court orders is needed, the local authority does indeed have no option but to seek an order under the inherent jurisdiction: *Re C (Child in Care: Choice of Forenames)* [2016] EWCA Civ 374, [2017] Fam. 137. This outcome appears to be an anomaly, resulting from the court's view that Article 8 rights under the European Convention on Human Rights prevent the local authority from relying on its PR where the decision involves a significant interference in family life (*Re DE (Care Order: Change of Care Plan)* [2014] EWFC 6, [2015] Fam. 145.

Where a child is not subject to a care order or interim care order already, however, the restriction in s. 9(1) does not apply. Anyone who can get the court's leave under s. 10 of the Act can apply for a specific issue order or a prohibited steps order under s. 8 including, as noted, a local authority. The threshold for obtaining leave to apply under s. 10 has no 'significant harm' element to it: it is a simple assessment by the court taking into account the factors highlighted in s. 10(9) and any other relevant considerations in the particular case (*Re B (Care Proceedings: Joinder)* [2012] EWCA Civ 737, [48]). There is no reason at all why even the most serious dispute about medical treatment cannot be resolved by way of a specific issue order or a prohibited steps order (*Re JM (A Child) (Medical Treatment)* [2015] EWHC 2832 (Fam), [2016] 2 F.L.R. 235), so the issue of vaccination can certainly be determined by the making of such an order. But because the court focuses only on its inherent jurisdiction, it seems to lose sight entirely of the more obvious remedy, and ends up imposing on local authorities an unnecessary and logically unobtainable threshold for intervention – significant harm.

The consequence of this is that children whose parents, for whatever reason, agree that their child should not be immunised are denied the hope of a remedy if a local authority wishes to assist, but the parents are otherwise unimpeachable. At first blush, this seems odd when a child in local authority care for other reasons can have vaccinations without the court's involvement and where parents will be 'unlikely to succeed' in challenging that decision in court (at [102]). It seems even more odd given that the same child might well end up in care if the vaccination issue happens to be 'one of a series of wider threshold allegations in support of a more generalised case of neglect' (at [21]).

Had the court started by asking about its statutory powers, rather than focusing on its inherent jurisdiction, the suggestion that the local authority has no role to play when a child is being denied vaccinations by his or her parents would not have been canvassed, and children whose parents stand in the way of the proven benefits of vaccination would be able to be properly protected by proportionate applications to the court by local authorities.

Rob George
University College London