



Neutral Citation No: [2022] EWCOP 15

Case No: 13868265

IN THE COURT OF PROTECTION
SITTING IN LEEDS

Date: 30th March 2022

Before:

MR JUSTICE POOLE

North Yorkshire Clinical Commissioning Group v E (Covid Vaccination)

Between:

**NORTH YORKSHIRE CLINICAL
COMMISSIONING GROUP**

Applicant

- and -

(1) E (By his litigation friend, the Official Solicitor)

(2) F

(3) G

(4) H

Respondents

Laura Twist (instructed by the Solicitor for NHS North Yorkshire CCG) for **the Applicant**
Ella Anderson (instructed by Cartwright King Solicitors on behalf of the Official Solicitor) for
the First Respondent

Francis Hoar (acting under the Bar's Direct Public Access Scheme) for **the Second
Respondent**

The Third and Fourth Respondents in person

Hearing date: 18 March 2022

APPROVED JUDGMENT

Mr Justice Poole:

1. The North Yorkshire Clinical Commissioning Group has applied for an order that it is in the best interests of E to receive Covid-19 vaccinations. E is a man in his mid-60's who has moderate to severe learning disability which has for many years been presumed to be due to organic brain damage following the administration of the whooping cough (pertussis) vaccine in infancy. There is no dispute that he lacks capacity to make decisions for himself about whether or not to receive Covid-19 vaccinations because of

an impairment of, or disturbance in the function of, the mind or brain. The Official Solicitor, as E's litigation friend, indicated that she was broadly of the view that vaccination was likely to be in E's best interests and confirmed that position on conclusion of the oral evidence. E's parents died some time ago. He has four siblings: two - the third and fourth respondents, G and H - strongly support the application. One, who is not a party, initially opposed the proposal that E be given the vaccine but has now withdrawn that objection. The fourth sibling, F, the second respondent, strongly opposes the application.

2. There are several reported judgments addressing the administration of Covid-19 vaccinations for individuals who lack capacity to make such decisions for themselves including *E (Vaccine)* [2021] EWCOP 7, *SD v Royal Borough of Kensington and Chelsea* [2021] EWCOP 14, and *SS v London Borough of Richmond upon Thames & Anor* [2021] EWCOP 31, all judgments of Hayden J, Vice President of the Court of Protection. The principles to be applied are established but, since those judgments, as F points out to the court, there have been significant changes in the course of the pandemic. The circumstances of each individual case will be unique and in the present case an important feature is that E's organic brain damage appeared to follow the administration of the pertussis vaccine when he was an infant in the 1950's.
3. I have determined this application by applying the MCA 2005 principles regarding best interests, and the approach set out in the judgments of the Vice President, to the facts of this case.
4. I received written evidence from Dr J, E's general practitioner and from F, G, and H. I received oral evidence from Dr J and F.
5. A Transparency Order was made on 13 January 2022 directing that the parties and their representatives are prohibited from publishing or communicating material or information that identified or was likely to identify that E is the subject of these proceedings or where he lives. It remains in force. During the hearing I determined that Dr J's name should not be published or communicated because to do so would be liable to lead to the identification of E given the small number of patients Dr J has who would meet the description of E that is included in this judgment.

Expert Evidence

6. The Second Respondent made an application to rely on evidence of Dr Eccles relating to "treatments that would be available to E were he to contract SARS Cov-2." It was said that the evidence of alternative treatments would assist the court in "putting itself in E's shoes (as it must do) when making its judgment." I heard and dismissed that application at an earlier hearing on 2 March 2022. I gave my reasons at that hearing but indicated that I would incorporate them in the written judgment to follow the substantive hearing.
7. Part 15 of the Court of Protection Rules 2017 provides:

References to expert

15.1. A reference to an expert in this Part—

(a) is to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings; but

(b) does not include any person instructed to make a report under section 49 of the Act.

...

Duty to restrict expert evidence

15.3.—

(1) Expert evidence shall be restricted to that which is necessary to assist the court to resolve the issues in the proceedings.

(2) The court may give permission to file or adduce expert evidence as mentioned in rule 15.2(1) and 15.5(1) only if satisfied that the evidence—

(a) is necessary to assist the court to resolve the issues in the proceedings; and

(b) cannot otherwise be provided either—

i. by a rule 1.2 representative; or

ii. in a report under section 49 of the Act.

Court's power to restrict expert evidence

15.5.—

(1) Subject to rule 15.2, no party may file or adduce expert evidence unless the court or a practice direction permits.

(2) When a party applies for a direction under this rule, that party must—

(a) identify the field in respect of which that party wishes to rely upon expert evidence, and the issues to which the expert evidence is to relate;

(b) where practicable, identify the expert in that field upon whose evidence the party wishes to rely;

(c) provide any other material information about the expert;

(d) state whether the expert evidence could be obtained from a single joint expert;

(e) provide any other information or documents required by a practice direction;

and

(f) provide a draft letter of instruction to the expert.

(3) When deciding whether to give permission as mentioned in paragraph (1), the court is to have regard in particular to—

(a) the issues to which the expert evidence would relate;

(b) the questions which the expert would answer;

(c) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings;

(d) any failure to comply with any direction of the court about expert evidence; and

(e) the cost of the expert evidence.

(4) Where a direction is given under this rule, the court shall specify—

(a) the field or fields in respect of which the expert evidence is to be provided;

(b) the questions which the expert is required to answer; and

(c) the date by which the expert is to provide the evidence.

...

Contents of expert's report

15.8.—

(1) The court may give directions as to the matters to be covered in an expert's report.

(2) An expert's report must comply with the requirements set out in the relevant practice direction.

(3) At the end of an expert's report there must be a statement that the expert—

(a) understands his or her duty to the court; and

(b) has complied with that duty.

(4) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

8. Those rules are clearly predicated on an application being made prior to instructions being given to a proposed expert and prior to their report being obtained. However, in this case the Second Respondent, who was not then legally represented by Mr Hoar, instructed Dr Eccles and obtained a report from him prior to the application being made and heard. The other parties opposed the admission of evidence from Dr Eccles.
9. Dr Eccles' c.v. was provided to the other parties and the court only very shortly before the hearing of the application. His c.v. shows that Dr Eccles has been a registered medical practitioner since 1993 with membership of the Royal College of Physicians in 1997 and GP registration the same year. For 10 years thereafter he did one to two sessions per week in local GP practices. He undertook Naturopathic training in the Czech Republic in 1999, obtained certification for Clinical Thermography in 2005, and became a Director of the World Academy of Anti-Aging Medicine in 2007. He was listed in a publication called Great Minds of the 21st Century, 5th Edition, and is the holder of two pending patents for discoveries in non-surgical hair restoration and computerised breast thermal imaging. He is a medical and research director for the Natural Dr Limited, 69 Harley Street, London W1. He says that his primary interest is in nutritional support of cancer patients and in "non-invasive methods for the restoration of cell health in general and in particular as this relates to breast and prostate health." He is also medical director of HB Health Anti Aging Medicine at Beauchamp Place London SW6 and Medical Director to ThermoClock Limited. He says he is "one of the UK's leading experts in magnetic therapy", advising manufacturers of magnets including Ladycare which uses a magnetic device to relieve dysmenorrhoea – severe menstrual pain. Previously he was Senior Clinician in charge of the Harley Street Stress Clinic on Mondays and Wednesdays conducting consultations with patients on lifestyle advice and counselling on more efficient stress coping strategies.
10. Over the last 20 years he has published articles on the effectiveness of static magnets in healing chronic leg ulcers, knee osteoarthritis, endometriosis, pain, dysmenorrhoea and restless leg syndrome, and papers on thermography for the early detection of breast cancer. The only "publication" on his c.v. concerning Covid-19 is a YouTube video in 2020 entitled Vitamin D and Covid-19.
11. In his report, which he has titled "Witness statement" he says,

"I also make the statement as an independent practising clinician having treated several hundred patients who have presented in the early stage with SARS Cov2 symptoms and positive PCR test."

He says treatment was mostly with vitamins "There has been uniform improvement and/or resolution of symptoms in most cases within 5 days." He described these as "uncontrolled observations" meaning they were not part of a controlled study, but "no patients have required hospital in-patient treatment". He continues,

“furthermore I make the statement as an expert in preventative medicine as the author of a review paper to provide practical information in how doctors working on the SARS Cov2 frontline in hospitals could protect themselves against potential infection and harm caused by SARS Cov2.”

The exhibited review paper to which he refers is by him as sole author. It is not published in a journal, let alone a recognised medical or scientific journal. It contains information about Vitamin D by reference to an article he also wrote on his own website in 2012.

12. Dr Eccles then cites a number of studies regarding Vitamin D and Vitamin C before turning to the use of Covid-19 vaccines. He says that “It has become very clear in recent months that the existing vaccines do not prevent illness, nor do they prevent transmission.” To support this opinion he cites two sources: a news article for Israel National News which is itself about a television interview with a single medical practitioner; and an article from an online publication called The Exposé which says it was “set up due to a lack of alternative to the lying mainstream media”. Dr Eccles then addresses evidence of complications of the vaccines before advising that not only are the vaccines “not working” but they “carry risk of potential life-changing side effects.” He then concludes, “based on these findings E is unlikely to gain any real benefit...” and “E is a person at significant risk from vaccine damage.”
13. The substantive issues for the court to consider in this case include ways, other than by vaccination, in which E might be protected from Covid-19 (if protection is needed at all), his susceptibility to complications from vaccination, and the efficacy of the vaccine. To that extent it can be argued that Dr Eccles’ report addresses some of the relevant issues. However, there are four principal difficulties with the proposal that Dr Eccles can give expert evidence to assist the court:
 - i) Dr Eccles’ c.v. and report do not reveal that he has a field of expertise which would enable him to assist the court in this case. An expert witness ought to have qualifications, knowledge, and experience in a relevant field to enable them to give opinion evidence with some measure of authority such that the court can rely on it. A certain level of familiarity with the relevant state of knowledge, learning, and practice within the field of purported expertise is required. By his c.v. and report Dr Eccles purports to have expertise and experience in counselling for stress, diagnosing breast cancer, anti-aging treatments, hair restoration, magnetic therapy, and preventative medicine. He does not have any specialisation in virology, epidemiology, or any other field of practice that would be recognised as relevant to the issues that the court has to determine in this case. The fact that he may have given vitamins to individuals does not make him an expert in the treatment of Covid-19. There is no analysis of that cohort of his patients and their health profiles, nor any comparison with patients who had not received vitamin treatments. He has not published any relevant research or papers related to Covid-19 in recognised medical or scientific publications
 - ii) An expert should use their particular knowledge and experience to put before the court relevant material in an independent, unbiased and fair manner. Dr Eccles’ evidence is not objective or balanced in any way. His report is wholly

one-sided. It reads as polemical rather than as a disinterested expert report. There is no weighing of evidence. There is no hint that there might be a range of reasonable expert opinion. There is no recognition that there is any available evidence to support the contrary view that vaccination might be effective in preventing or reducing the symptoms caused by Covid-19, or that there may be medical opinion that vitamins are not effective in preventing the contraction of Covid-19, reducing the symptoms, or in preventing hospital admissions from Covid-19, for example. When determining whether to give permission to rely on expert evidence it is not for me to say whether Dr Eccles' opinions are correct or incorrect, but it is clear that he has not acted objectively or in balanced way when purporting to advise the court.

- iii) An expert should apply their particular knowledge and experience to analyse the relevant material and evidence. In contrast, Dr Eccles' report does not provide any kind of informed analysis of the evidence about Covid-19. He does not examine any evidence in support of the national immunisation programme. That is not to say he is not free to criticise such evidence but he should at least recognise its existence and then apply his knowledge and experience to analyse it. His uncritical reliance on a news article from Israel and another in an online magazine to support his assertion that "It has now become very clear in recent months that the existing vaccines do not prevent illness, nor do they prevent transmission" is far below the standard of analysis that the court is entitled to expect from an expert witness.
 - iv) An expert should ensure that they have considered all evidence relevant to their opinions in the specific case. Where the expert opinion concerns an individual, then their individual circumstances will be relevant. There is a lack of specificity to the case of E in Dr Eccles' report. There is no mention in the body of his report that Dr Eccles has seen any documentation in this case. He does not refer to any medical records in the body of his report, but he does say, in what appears to be a standardised statement possibly for Data Protection Act purposes, that he has seen "the patient's medical records". He does not state what records or other documentation he has been provided with or the nature of his instructions. I do have an email from Mr F, husband of the Second Respondent who says that he sent Dr Eccles the two statements of Dr J, E's GP which exhibit the mental capacity assessment identifying E by name. He does not appear to have sent to Dr Eccles any medical records but he did annotate Dr J's statements and provided those notes to Dr Eccles. Dr Eccles does not refer to them and I do not know what they said. Save for a single reference to a proposal to give E statins, Dr Eccles does not refer to E's medical history or current condition. He does not refer to E's general health, his weight, or even his age. He does not refer to his vitamin levels which may have been relevant to the proposed treatment. He does not refer to, let alone discuss, E's learning disability or how treatment would be given to him. He does not refer to his capacity to make decisions about the proposed treatment. He does not say that he needs to see E's medical records before giving an opinion.
14. In addition to these fundamental concerns, I take into account that the procedural rules have been disregarded by the Second Respondent. She has obtained the report having instructed the expert unilaterally without the agreement of the other parties and before

seeking permission from the court. Therefore, there has been no opportunity for consideration of the letter of instruction to be sent to Dr Eccles. There has been no opportunity to consider what issues an expert should address and no opportunity for joint instruction of an expert. The premature instruction of Dr Eccles led to breaches of the Transparency Order because non-anonymised information identifying E was given to Dr Eccles without permission of the court. The other parties to this case are entitled to expect at least some compliance with the rules so that the proceedings are fair. The court is entitled to expect compliance with the rules so that it can manage cases proportionately, efficiently and to do justice. The disregard for Part 15 of the COP Rules would in itself be a strong reason not to permit this evidence to be admitted.

15. Even without permission to rely on Dr Eccles as an expert witness, the Second Respondent has the benefit of some of the freely available evidence that Dr Eccles has referred to and she can rely on that as part of her case.
16. The Second Respondent's application for expert evidence states that the report is necessary to assist the court to put itself in E's shoes. I cannot see how this statement or report from Dr Eccles can assist in that manner. Insofar as it is contended that E would, if he had capacity, have been opposed to vaccination, that does not make it necessary for the court to hear from a doctor with Dr Eccles' practice and experience. This evidence will not tell the court what E would have wanted or consented to if he had capacity to make the decision in question. Indeed, Dr Eccles does not purport to do so, and his evidence gives the court no insight into what E wants or would have wanted had he not had his impairment or disturbance in the functioning of his mind or brain.
17. Had a suitably qualified expert able to address the relevant issues objectively and with relevant expertise been identified then at least the court could have considered whether such evidence might be necessary to assist the court to resolve the issues in the proceedings either as general evidence about vitamin treatment for Covid 19 or evidence specific to E's case. But Dr Eccles is not that expert and his evidence will not assist the court. Had I not seen his report but only his c.v. I would not have considered Dr Eccles to be a suitable expert witness for this case. Having read his report that view is confirmed.
18. I made no separate order regarding the apparent breach of the Transparency Order by providing information to Dr Eccles. No sanction against F or her husband would be appropriate even if found to have been in contempt of court. The breach is a serious matter, but I have a full explanation from Mr F which I accept. He and F were acting as lay persons at the time albeit now represented. There was no malicious intent and it appears that no harm has been caused to E. However, I have directed that Dr Eccles destroys all hard and electronic copies of the material sent to him and confirms to the CCG and Official Solicitor in writing that he has done so.

The Evidence

19. There are no significant disputes about the salient evidence in this case. E is now in his mid-60's. When he was an infant he was administered vaccines for whooping cough (pertussis) after which he was noted to have developmental delay. His parents were dedicated to his care, alongside his siblings. They understood that E had suffered brain

damage due to his pertussis vaccinations. F told me that he was given the vaccine in three stages and suffered some signs of an adverse reaction particularly after the second, but the advice was to go ahead with the third. After that third vaccine, E began to suffer severe neurological problems. E has twice been awarded compensation under the Vaccine Damage Payments Act 1979 on the basis that he did suffer “vaccine damage”.

20. E’s parents both died within a short time of each other nearly 20 years ago. E has resided at his current care home for over 30 years. A number of the staff there have known him for several years. He is well cared for. He has four siblings who also care for him and with whom he enjoys a variety of activities. He has interests in football, previously horse-riding and now riding in a horse-drawn carriage, music, holidays, and animals. He loves food but cannot foresee the unhealthy consequences of over-consumption which means that he has to be monitored and, even so, he can sometimes put on too much weight. It takes time to develop an understanding with E so that he can make his preferences known. Mr A of the solicitors instructed by the Official Solicitor, has provided a statement of his visit to E on 8 February 2022. He gives a vivid description of E who was in a buoyant mood at the visit. He communicated using Makaton sign language. He showed Mr A number of animal figures within the room, naming them and making a sound that each animal would make. He mentioned each of his siblings and an activity he associated with them, such as “park” for F, or horse shows associated with H. He communicated a love of watching football. He showed some understanding of what an injection was by giving a simplified Makaton sign for injection by hitting his left arm with the side of his closed right fist when injection was mentioned to him. He did not give any indication, when asked, whether he thought injections were good or bad. In her oral evidence F said that she smiled with recognition of E when she read Mr A’s account of his meeting.
21. F was an articulate and thoughtful witness who used to be a nurse but who, for several years now, has taken a lay interest in diet, vitamins and minerals and how they can benefit health. She has had an input into the management of E’s nutrition and believes that the use of vitamins, minerals and pro-biotics can prevent the more harmful effects of Covid-19. However, she encapsulated her objection to E being administered the Covid-19 vaccine by saying that since he has once been bitten – by the pertussis vaccine causing him brain damage – why should he be offered up to be bitten again? Why take the risk of catastrophic consequences a second time? F is the closest of E’s siblings to him in age, and she urged the court to accept that had E the capacity to make the decision himself, his values and beliefs would be like hers and would lead him to elect not to be vaccinated. F had not been fully aware of the annual influenza vaccines received by E.
22. I have written evidence from G and H, brother and sister of E. Although their evidence was in writing and they were not required to give oral evidence as did their sister F, their evidence is no less important for that. They strongly agree that it is in E’s best interests to be vaccinated against Covid-19. They believe that were E to have capacity he would elect to welcome scientific developments to counter Covid-19 and would have chosen to be vaccinated. They are concerned that some activities which E would otherwise enjoy, such as going to an indoor theatre, may not be open to him whilst he remains unvaccinated because his care home will consider it too much of a risk to him.
23. Dr J tells the court that E has received an annual flu vaccination since 2007. The only other vaccination listed in his medical record is for tetanus in 1990. He has always accepted the flu vaccination without any issue. He has had bloods taken without

incident. E witnessed another resident in his care home being given the Covid-19 vaccine by Dr J and offered up his own arm and was apparently confused as to why he was not receiving the vaccination. Dr J would administer the vaccine if it were ordered to be in E's best interests.

24. E has high blood pressure which is well controlled and has a BMI of 31 which puts him in the obese category. He has no other significant health issues. Individuals with learning disability are known to be at a higher risk for hospital admission and mortality but E is not considered to be in a highest risk category and has not been required to shield.
25. Dr J reported to the court that the staff at E's care home are in favour of him being vaccinated. They have concerns, as does Dr J, of how E would cope if he had to go to hospital due to symptoms from Covid-19. He enjoys familiar surroundings and staff and would be greatly troubled by unfamiliarity in a hospital setting.
26. Dr J's view is that whilst an association between learning disability and pertussis vaccine damage to E was made "many years ago ... I am not sure if [it] could be proven if the case was looked at today." Indeed, I have been referred to a World Health Organisation position paper on Pertussis vaccines dated August 2015 which authoritatively reviews the evidence for a link between pertussis vaccination and neurological problems and concludes that it is now long established that there is and was no such association.
27. E's learning disability means that he is unable to understand and act upon advice to maintain social distance. He is therefore accompanied by an additional member of staff from his care home when he engages in outdoor activities. Dr J reports that E has missed out on trips to see football matches and the pantomime because of concerns about his safety. His status as an unvaccinated person is taken into account by staff caring for him within the home when they make risk assessments about his involvement in activities.
28. Dr J advises that it is likely that E would receive the Pfizer COMIRNATY vaccination followed by a second dose at least 21 days later and a booster after a further three months. Vaccination would be administered by intramuscular injection into the upper arm. Dr J would administer the vaccine to E.
29. E is at no greater or lesser risk of side effects from vaccination than the general population according to Dr J. Aside from short-lived side effects such as tiredness and headaches, rare cases of myocarditis or pericarditis in younger individuals have been noted after second doses of COMIRNATY. There are no contradictions to E receiving the vaccine.
30. The evidence provided shows that nearly 163,000 people are recorded as having died within 28 days of a positive Covid-19 test. Many more have suffered symptoms ranging from unpleasant to debilitating and life-threatening. The Omicron variant has proved to be more transmissible but less harmful than earlier variants. The daily rate of deaths and new hospitalisations has reduced from its peak, but many continue to be hospitalised and die having contracted Covid-19. Vaccination is shown to reduce the severity of disease.

31. Dr J advises that national recommendations for the booster vaccine to supplement first and second doses for adults of E's age have now been in place since September 2021. In cross-examination Dr J confirmed that he relies on research and analysis by others such as the UK Health Security Agency, rather than carrying out detailed research and analysis into the data himself.
32. I found Dr J to be a sensible, caring witness who had taken full account of the whole range of circumstances when making his own assessment that it was in E's best interests to have the vaccine. He had made that assessment in a timely fashion but opposition within the family has prevented him from administering the vaccinations to E.
33. I have been provided with the UK Health Security Agency's Covid-19 vaccine surveillance report for 10 March 2022. The report covers effectiveness against symptomatic disease, hospitalisation, and mortality. As to effectiveness against symptomatic disease,

After 2 doses of the AstraZeneca vaccine, vaccine effectiveness against the Omicron variant starts at 45 to 50% then drops to almost no effect from 20 weeks after the second dose. With 2 doses of Pfizer or Moderna effectiveness dropped from around 65 to 70% down to around 10% by 25 weeks after the second dose. Two to 4 weeks after a booster dose of either the Pfizer or Moderna vaccine, effectiveness ranges from around 60 to 75%, dropping to 25 to 40% from 15+ weeks after the booster. Vaccine effectiveness estimates for the booster dose are very similar, irrespective of the primary course received. Vaccine effectiveness is generally slightly higher in younger compared to older age groups.

In relation to hospitalisation,

Two doses of either AstraZeneca (ChAdOx1-S) or Pfizer (BNT162b2) vaccines was associated with a vaccine effectiveness of approximately 25 to 35% against hospitalisation following infection with the Omicron variant, after 25+ weeks. After a Pfizer booster (after either primary vaccination course), vaccine effectiveness against hospitalisation started at around 90% dropping to around 75% after 10 to 14 weeks. After a Moderna booster (mRNA-1273) (after either primary vaccination course) vaccine effectiveness against hospitalisation was 90 to 95% up to 9 weeks after vaccination.

As for effectiveness against mortality,

“High levels of protection (over 90%) are also seen against mortality with all 3 vaccines and against both the Alpha and Delta variants with relatively limited waning (6, 10, 11). Vaccine

effectiveness against mortality with the Omicron variant has been estimated for those aged 50 years and older by combining the risk of becoming a symptomatic case with the risk of death among symptomatic cases in vaccinated (all vaccines combined) compared to unvaccinated individuals (Table 1). At 25-plus weeks following the second dose, vaccine effectiveness was around 60% while at 2 or more weeks following a booster vaccine effectiveness was 95% against mortality.”

34. Dr J’s evidence is that on the most recent and best information available,
- a. E’s risk of catching Covid-19 and being admitted to hospital:
 - i. Unvaccinated – 1 in 284;
 - ii. Vaccinated – 1 in 5208.
 - b. E’s risk of catching and dying from Covid-19:
 - i. Unvaccinated – 1 in 1927;
 - ii. Vaccinated – 1 in 6944.

He accepted that the evidence on which this risk information is based is historical and pre-dates the spread of the Omicron vaccine but it is the best evidence available.

The Law

35. As noted, there is no dispute that E lacks capacity by virtue of his learning disability to make a decision whether to receive the Covid-19 vaccine. The evidence establishes his lack of capacity in relation to such decision-making. There is no prospect of his gaining capacity in the future. There being no agreement amongst those who may make decisions about vaccination on E’s behalf, the court is asked to make the decision, in his best interests, by way of an order pursuant to s.16 of the Mental Capacity Act 2005 (MCA 2005). The order sought is in relation to two doses followed by booster jabs. There is no application in relation to the winter flu or other vaccines. I have to consider the factors set out at section 4 of the MCA 2005. I must consider all the relevant circumstances – s.4(2) MCA 2005. Further, s.4(6) and (7) require of a decision-maker that,

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

36. In summarising the correct approach to the statutory provisions, Lady Hale held at [39] of *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67

“...in considering the best interests of this particular patient at this particular time, decisionmakers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.”

Insofar as Mr Hoar’s submission on behalf of the Second Respondent suggested that the *only* requirement was for the court to put itself in the place of E, I reject it – that is but one of the matters that the court, as decision-maker, has to take into account.

37. There is no presumption in favour of vaccination. Each case must be considered on its own facts. The relevant circumstances will include those specific to an individual’s case but also facts and matters that apply to all, such as the availability of vaccines, and data as to their general effectiveness and risks of side-effects. There is a mass of medical and scientific evidence potentially available to the parties and the court including that which has formed the justification for the national vaccination programme, but the programme is not without its opponents. Where, as in the present case, a party rejects the established, national approach to vaccination and the analysis of the evidence which has been used to justify the national vaccination programme, I adopt the position articulated by Hayden J in *SD* (above) where he held that,

it is not the function of the Court of Protection to arbitrate medical controversy or to provide a forum for ventilating speculative theories. My task is to evaluate V's situation in light of the authorised, peer-reviewed research and public health guidelines, and to set those in the context of the wider picture of V's best interests.

Analysis

38. The Covid-19 pandemic is at a different stage from when Hayden J gave his three judgments referred to at the opening of this judgment. Restrictions have now been largely lifted. The Omicron variant has proved to be less harmful than previous variants. Nevertheless, Covid-19 is still being transmitted within the community with tens of thousands of new cases reported daily and, at the time of the hearing, numbers of new, reported Covid-19 cases and numbers of people in hospital with Covid-19 are increasing again after a recent reduction. The virus continues to cause significant harm and death. Earlier in the pandemic it could more reasonably be said that Covid-19 vaccines were “new” and that, if not “untested”, the evidence for effectiveness and complications was not the same as it would have been for more established vaccination programmes. Now, millions of doses have been given and the evidence base is much larger albeit the vaccines have not been in use for long enough for longer term studies to be performed.
39. Nevertheless, despite these changes in the general circumstances, the approach adopted by the Vice President remains valid. In particular it is not feasible for this court to make rulings about the reliability of the evidence on which national vaccination guidelines are based, or the validity of the analysis of that evidence which has led to those national guidelines being developed and adopted. For F, Mr Hoar contends that the evidence from the UK Health Security Agency demonstrates that the Covid-19 vaccines are now ineffective at reducing transmission, that their general effectiveness against harm from the Omicron variant is much more uncertain, that complications and side-effects are alarmingly high, and that the evidence does not support the contention that it is in E's medical best interests to be administered Covid-19 vaccination. Nevertheless, I proceed on the basis the national guidance is that it is for the health benefit of someone of E's age to be vaccinated against Covid-19 and that further it is established guidance that a person with learning disability is at a greater risk than those of a similar age in the general population.
40. In certain cases the particular circumstances or history of an individual might establish that, exceptionally, the national guidance does not apply to them. Focusing on the particular case before me, the evidence from Dr J and evidence from the UK Health Security Agency relevant to E, is that:
 - i) E is more vulnerable to the effects of Covid-19 due to his age, sex, learning disability, and weight.
 - ii) Covid-19 vaccination by way of first and second doses and booster, would afford him good (but not absolute) protection against hospitalisation and death

from Covid-19. His risk of suffering from debilitating symptoms or death from the virus would be markedly reduced were he to have the vaccines administered.

- iii) E does not have any condition, nor is there anything in his history, that would render him more prone to suffer side-effects from Covid-19 vaccination than the general population.
 - iv) E's history of organic brain damage in infancy may or may not be related to the pertussis vaccination administered to him at that time, but even assuming that the vaccination caused brain damage, that is not a medical contraindication to having the Covid-19 vaccination.
41. As for possible alternatives to vaccination, I note with interest the evidence relied upon by F in relation to the use of vitamins. However, I can find no reliable evidence by way of peer-reviewed controlled studies or otherwise, to demonstrate that the effectiveness of administering vitamins in protecting E would match the effectiveness of vaccination. Hence I have no satisfactory evidence that reliance on vitamins alone would effectively protect E from the harmful consequences of Covid-19 were he to contract the virus.
42. E has a learning disability that renders him unable to understand and weigh information even in relation to very basic decisions, let alone a decision about having medical treatment. Because of the severity and duration of his learning disability, it is impossible to ascertain what E's own present wishes and feelings about Covid-19 vaccination are. The fact that he has complied with annual flu vaccinations and it is likely that he would be compliant were the Covid-19 vaccine administered to him, is a relevant consideration to an assessment of best interests but it cannot be relied upon to infer what his wishes and feelings are about the vaccine in question.
43. Given the evidence I have about E's character, his activities and how he enjoys spending his time, it is clear that E would wish to stay at the care home with his present carers and to enjoy the full range of activities open to him and the other residents, including trips to indoor activities, which he has always enjoyed in the past.
44. There is a dispute about whether his unvaccinated status has and will restrict E's activities including outings. F says that he has visited the Yorkshire Wildlife Park and an Abba concert in 2021 but she accepts that these activities were out of doors. She accepts that E has previously enjoyed visits to the pantomime and other indoor activities. She maintains that reductions in E's visits to church clubs and elsewhere has been due to restrictions imposed on everyone, whether vaccinated or not. However, the evidence from Dr J is that the care home staff carry out risk assessments in relation to E's participation in activities and those assessments take into account his unvaccinated status. As such he appears to be precluded from attending indoor activities off site which would risk him being exposed to a crowd of people some of whom may transmit the virus to him. The vaccine would give him good protection against the more harmful effects of Covid-19 and so change the risk assessment to one that is more in favour of his participation. E may not understand the risks and benefits of vaccination but he likes to participate in the full range of activities.
45. Mr Hoar suggested that I should disregard restrictions on E engaging in activities without supervision because it was at least strongly arguable that they would amount to a deprivation of his liberty which would require authorisation, and that any

authorisation would have to take into account Article 14 of the European Convention on Human Rights and s13 of the Equality Act 2010. I am not persuaded that restrictions based on risk assessments that took into account E's unvaccinated status would be arguably unlawful, but in any event it seems to me that I have to consider, and should not disregard, the relevant facts as they are and the outcomes as they are likely to be.

46. I cannot know from anything E has done or said in the past what his values and beliefs relevant to the decision in question would have been had he had capacity – he has never been able to form or express views on issues of the complexity of the decision under consideration – nor am I helped to discern what his values and beliefs would have been from the evidence provided by members of his family. Firstly, there is a wide divergence of values and beliefs relevant to the proposed vaccination amongst his siblings. Accordingly, I consider that it would be too speculative to suppose that E would have shared the values and beliefs of one sibling rather than another. F cannot legitimately argue that E would have been likely to share her values and beliefs any more than G and H can do so. Moreover, I treat with considerable circumspection bare assertions by members of his family as to what E's values and beliefs would have been – with respect, this is simply projection on their part.
47. It is possible to conduct a thought experiment, as it were, to imagine E having capacity but knowing that he had a learning disability and required full time care. He would have spent most of his life believing that his learning disability was due to brain damage caused by the pertussis vaccine in infancy. However, by now, given the state of scientific knowledge, he might well have understood that his brain damage was not caused by the vaccine – that appears to be the current scientific consensus. He might not have accepted that consensus – F does not appear to do so – or he might have done. Even if he had maintained a belief that he had been injured by the pertussis vaccine, would that have been likely to inform his values and beliefs such that he would have elected not to have the Covid-19 vaccine? I am unable to find that it would:
- i) I do not accept that it necessarily follows that someone who has suffered severe damage as a result of one vaccine given many years ago would reject the offer of the Covid-19 vaccine. These are different vaccines designed to give protections against different viruses. Dr J told the court that they work in very different ways. There is no evidence at all that E is more vulnerable to side-effects from the Covid-19 vaccine because of the damage (which may have been) caused by the pertussis vaccine. It might be said that had E, with capacity to make a decision about vaccination, applied an evidence-based approach to decisions about his health, he would have elected to be vaccinated against Covid-19 notwithstanding his previous vaccine damage. F departs from the scientific and medical consensus that vaccination is protective against the harm of Covid-19 and invites the court to assume that E would have done the same, but I cannot make that assumption – I have no evidence to suggest that he would have rejected the established evidence and government advice.
 - ii) It is noteworthy that his siblings, brought up by the same parents as E and in similar general circumstances, and all brought up to believe that E suffered vaccine damage, have developed widely different opinions about Covid-19 vaccination. E has positive relationships with all his siblings. They all care for him deeply. The fact that two of his siblings, knowing that E may have suffered severe damage as a result of the pertussis vaccine, are nevertheless strongly in

favour of the Covid-19 vaccine being administered to him, tends to show that it cannot be assumed that E would have become risk averse in his own decision making about medical procedures in general or about Covid-19 vaccination in particular. G has told the court that it is precisely because of E's disability and vulnerability that he is so anxious that he should be protected. Perhaps E would have felt the same had he the capacity to understand and weigh the relevant information.

- iii) The majority of people in this country have elected to be vaccinated against Covid-19; they have, as G puts it, "embraced the advancement of medical science and follow the undeniable evidence and recommendations as presented by HM Government Scientists and Medical Experts." E may not have followed the majority approach, but I do not accept that the fact that he (may have) suffered damage due to a vaccine administered over 60 years ago would mean that he would be in the minority.
48. Articulating F's case as favourably as I can, it is that were E to have capacity then, knowing of his history, he would have been very cautious about accepting the medical consensus. His parents had been assured that the pertussis vaccine had been safe. He would be slow to accept similar assurances made now about the Covid-19 vaccine. The longer term effects of the Covid-19 vaccines cannot be known. It is an mRNA vaccine and that type of vaccine has not been in use long enough to know whether there could be adverse effects several years after administration. Clearly there is a substantial number of individuals whose values and beliefs cause them not to be reassured by the current scientific and medical evidence and consensus. However, for the reasons already given I am not persuaded that I can assume that E would have been within that group. There is no dominant set of values and beliefs within his family or any wider culture or group to which he belongs that would have influenced him to reject vaccination. It is much too speculative to suppose what his values and beliefs would have been. He has never been able to form or express any values and beliefs relevant to the decision in question and there is no consensus within his family from which I can infer that he would have adopted a certain position. In this case the evidence does not allow me to make any findings as to his likely values and beliefs if he had had capacity to make the relevant decision.
49. There is a dispute amongst E's siblings as to whether their parents would have opposed Covid-19 vaccination. They both died nearly twenty years ago, long before the Covid-19 pandemic. Evidence about their views might be relevant to the question of what E's values and beliefs would have been had he had capacity to make decisions about the issue in question, but I do not read the MCA 2005 as requiring the court to take into account the (possible) views of deceased relatives. In any event the evidence does not allow me to infer what their views would have been given that the pandemic and vaccines in question have come about so long after they died.
50. In my judgement it is not possible to know what E's own values and beliefs would have been had he capacity nor is it possible to ascertain his present wishes and feelings about the issue in question except to note that he is likely to want to participate in the full range of activities available for residents at his home. He has been compliant with vaccinations in the past and would be likely to be compliant in the future. It is unlikely that he will resist being vaccinated. Two of his close relatives are strongly in favour of him being vaccinated, one is strongly against it. His GP is strongly in favour as are the

staff at his care home. The court takes those views into account – no one voice has a veto but neither is the fact that more relatives support the application than oppose it determinative of best interests. Administering the Covid-19 vaccine involves some degree of risk. Very rarely, some individuals suffer from severe side-effects. However, these risks are far outweighed by the risks to E of not having the vaccine. The benefits to E of being vaccinated are considerable. It will afford him good protection against the more harmful effects of Covid-19, even death, should he contract the virus. It will enable him to be risk assessed as a vaccinated individual for activities which should open up to him the same opportunities to participate in the full range of activities that he has enjoyed in the past.

51. Balancing all the circumstances I have come to the firm conclusion that it is in E's best interests to be administered the Covid-19 vaccine – the first, second and booster doses in accordance with the clinical judgment of Dr J. This would mean that if there is some concerning side-effect of the first does, Dr J would make a clinical judgment about whether further doses should be administered.
52. Dr J assessed E's capacity to make a decision whether to accept the Covid-19 vaccine in June 2021 and a best interests assessment was concluded many months ago. It is now well over a year since the vaccination programme began. It is regrettable that the decision about E being protected by vaccination is only being made now due to the division of views within the family. It would be highly regrettable if there were further costly and time-consuming proceedings in relation to vaccinations that are part of a national programme. The MCA Code of Practice encourages collaborative decision making and the use of an advocate or mediation in certain cases. Routine vaccinations are not serious medical treatment that necessitates application to the Court of Protection. Disagreements amongst family members about vaccination should be resolved without the need for court proceedings. The appointment of a personal welfare deputy would be possible in principle where there is a history of disputes within a family, but such an appointment would be a last resort and an unsuitable solution to disputes about routine medical treatment. The MCA Code of Practice states that deputies for personal welfare decisions will only be required in the "most difficult cases where important and necessary actions cannot be carried out without the court's authority, or there is *no other way* of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions." [emphasis added].
53. The parties in this case and in all similar cases should know that the principles articulated by the Vice President in *SD* (above) are now very well established and will be applied by the Court of Protection in vaccination cases – both Covid-19 vaccines and other vaccines offered under national vaccination programmes.
 - i) The best interests assessment is not confined to evidence of the health benefits and risks of vaccination but involves a wide review encompassing all the relevant circumstances including those set out at s.4(6) and (7) of the MCA 2005;
 - ii) In relation to the benefits and risks to the health of P from vaccination, it is not the function of the Court of Protection to "arbitrate medical controversy or to provide a forum for ventilating speculative theories." The Court of Protection will "evaluate P's situation in the light of the authorised, peer-reviewed research

and public health guidelines.” It will not carry out an independent review of the merits of those guidelines.

- iii) There may be exceptional cases where P’s condition, history or other characteristics mean that vaccination would be medically contra-indicated in their case but in the great majority of cases it will be in the medical or health interests of P to be vaccinated in accordance with public health guidelines.
- iv) Hence, disagreements amongst family members about P being vaccinated which are at their root disagreements about the rights and wrongs of a national vaccination programme are not suitable for determination by the court. It will be in P’s best interests to avoid delay and for differences to be resolved without recourse to court proceedings.

54. For the reasons given I shall make the order sought by the Applicant.