

IN THE COURT OF PROTECTION

Case No: 12219141

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTER OF DA

BETWEEN:

AN INTEGRATED CARE BOARD

Applicant

-and-

(1) DA

(by his litigation friend the Official Solicitor)

(2) AC

Respondents

**[Anonymised] SUBMISSIONS OF THE INTEGRATED CARE BOARD IN
SUPPORT OF ITS APPLICATION DATED 1 JULY 2024**

Introduction

1. These submissions are filed by the Integrated Care Board (“ICB”) in accordance with paragraph 9 of the Order dated 6 November 2023¹ (“the November Order”) [B240] primarily in support of the ICB’s application dated 1 July 2024 [B253] for authorisation of the administration to DA of further doses of the Covid-19 vaccine on an ongoing basis.
2. Paragraph 8 of the November Order granted the ICB permission to make the application in light of the administration of the primary and booster doses (in respect of which the court had consented to on behalf of DA).

¹ The time limit for the filing and service of these submissions was extended by paragraph 2 of the Order of 6 December 2023 [B251]. The application made by the ICB on 22 August 2024 seeks to extend that time further to 30 August 2024 (see paragraph 5 of the draft order). That application has not yet been determined but the parties are agreed as to the timetable contained therein.

3. These submissions also respond, where relevant, to assertions made by AC (DA's mother) in submissions filed on her behalf on 29 July 2024 [A100]. AC's submissions contain a number of wide-ranging, incorrect and serious assertions, including purported claims of assault, negligence and failure to comply with national guidance by persons (who are not parties to the proceedings in the Court of Protection), in respect of which the Court of Protection does not have jurisdiction to determine.
4. The issue for the Court of Protection is whether it should consent (on DA's behalf²) to the administration of further doses of the Covid-19 vaccine (if offered to him). A draft care plan has been prepared, dated 28 June 2024 [F79].
5. It is important to note, from the outset, that the Court of Protection has no power to decide whether to offer the Covid-19 vaccine to DA (or any other individual, whether capacitous or not). The decisions whether to offer a Covid-19 vaccine to DA and, if so, which type are matters of clinical judgment for the relevant healthcare professionals, having regard to the applicable national guidance. Further, any order which the Court of Protection makes (consenting on behalf of DA) to a further dose or doses of the Covid-19 vaccine does not require any healthcare professional to offer DA that dose or doses (or associated sedation and analgesia). Those are solely matters of clinical judgment and determination by the relevant healthcare professionals.
6. The draft care plan will therefore be amended in due course to reflect that:
 - a. It is a matter for the clinical judgment of the healthcare professionals to decide whether to offer booster vaccines to DA having had regard to any national guidance applicable at the relevant time;

² There is no dispute that DA lacks capacity to consent to medical treatment, including the administration of a Covid-19 vaccine,

10. The relevant history in relation to DA (up until the November Order) is set out in the preamble: recitals A-K [B234-236]. These proceedings have been ongoing since April 2021. AC has objected throughout to DA receiving the Covid-19 vaccine. HHJ Brown has provided two judgments (the first on 7 May 2021 [B72] and the second on 5 May 2023 [B199]) in which she concluded that it was in DA's best interests to receive the Covid-19 vaccine and for him to receive oral sedation to enable the vaccine to administered safely. On the first occasion, HHJ Brown was prepared to consent to the primary doses³ only, but by the time the matter had returned (two years later), she consented to the administration of both primary and booster doses.
11. Following the May 2021 judgment and order [B66], there was an unsuccessful attempt to administer the vaccine on 10 May 2021 [G39]. There was then a delay whilst alternative arrangements were explored for the provision of sedation and analgesia to enable the administration of the vaccine to DA.
12. Following the May 2023 judgment and order⁴ [B188], administration of the primary dose was attempted on 12 May 2023. But, contrary to the assertion made by AC, DA was not sedated on 12 May 2023 (he poured the drink down the sink) and the vaccination was not attempted [G56].
13. A further attempt could not be made at that time as DA changed residence.
14. Arrangements were then made to administer the vaccine within the Autumn 2023 Covid-19 Vaccination Programme. As the November Order records, DA fell in to the category of individuals recommended to be offered the vaccine on the basis that he fell within a "clinical risk group" as a person with a "chronic neurological disease". This is clearly recorded at recital K of the November

³ At that time, the primary dose consisted of two separate doses

⁴ Contrary to AC's assertion, DA fell within the scope of the "evergreen offer" national protocol for the administration of the primary dose: see first witness statement of Charlotte Blake at paragraph 19 [E327].

Order [B236]. The only error contained in the recital is the reference to Table 4 in the JCVI guidance. It should have read Table 3 which clearly refers to individuals over the age of 16. In the ICB's submission, it is clear that this was merely a typographical error.

15. Following the November Order (in which the court consented to the administration of primary⁵ and booster dose and it was envisaged that the booster would be given three months after the primary dose⁶):

- a. DA received a primary vaccine dose on 6 November 2023 [G67] during the course of Autumn 2023 Programme. DA was given oral sedative (lorazepam) to enable the administration of the vaccine;
- b. An attempt to administer the booster vaccine took place on 17 June 2024 (not 11 June 2024 as asserted by AC), but did not proceed because the oral sedative (lorazepam) was not effective [G69];
- c. DA received the booster vaccine on 24 June 2024. He was given oral sedative (lorazepam) to enable the administration of the vaccine [G71]. It appears that he was offered the booster during the course of the Spring 2024 Covid-19 Vaccination Programme although he was not within a group recommended to receive the booster dose. This was a matter recognised by DA's healthcare professionals (see email dated 24 June 2024 from Ms. C (acting lead nurse for Covid Vaccination Programme for The Acute Trust [J274]⁷). Ms. C however appears, erroneously, to consider that the court directed the administration of the booster dose (the words "to taking the court order aside"). She also appears to have taken into account that DA is likely to be recommended to be

⁵ By this time, the primary dose was a single dose

⁶ See recital O to the November Order

⁷ Although this is a response to an email eliciting views on whether DA should receive a booster on an ongoing basis rather than setting out her rationale for the administration of the booster dose that day

administered the booster as part of the Autumn 2024 programme (as he was in the Autumn 2023 Programme). That was a matter which she was entitled to consider in deciding whether to offer him the booster within the Spring 2024 programme although he was not within a category of people recommended in that guidance to receive it.

16. DA has not suffered any complications or side-effects following the administration of the vaccine and/or sedation. Notwithstanding AC's assertion to the contrary⁸, there is no evidence that DA has suffered any damage from the administration of the vaccines.

ICB's application dated 1 July 2024

17. With the court's permission, the ICB issued an application dated 1 July 2024 [B253] seeking an order consenting to the administration to DA of further doses of the Covid-19 vaccine.
18. A draft order is attached to these submissions. That order sets out clearly the fundamental distinction between (i) the offer of the booster vaccine to DA (which is a matter for the relevant healthcare professionals having regard to the national guidance applicable at the relevant time) and (ii) the consent to the administration of any vaccine offered to DA (which is a matter for the Court of Protection in DA's best interest). The order also makes clear that any attempts at administering the vaccines are included within the court's consent (even if those attempts are unsuccessful) but that no physical restraint is to be used (as has always been the case) and the level of sedation should be no greater than 30mg of temazepam, 4mg of lorazepam or 10mg of diazepam (as has also been the case previously).

⁸ Paragraph 55 of her submissions [A115]

19. The ICB has consulted the healthcare professionals engaged in DA's care. All save for his social worker (Ms. B) consider that it is in his best interests to (a) receive further booster doses on an ongoing basis and (b) be administered sedation and analgesia to enable those booster doses to be given. The court is referred in particular to the views of Mr. Z, senior community learning disability nurse, who sets out the various factors in the balancing exercise [J275-276]. It is clear that the professionals envisage DA being offered⁹ on an ongoing basis the booster vaccine in line with the recommendations in the national guidance. That is likely to be on an annual basis in the autumn/winter.
20. The legal approach is well-established. It is set out in a number of authorities. The most succinct summary is to be found in *Re RN* [2022] EWCOP 41 at paragraph 24ff. In short, an individualised assessment of the person's best interests. Although the "landscape has changed"¹⁰ that does not warrant a different approach being applied. In particular, as Hayden J made clear in *SD* [2021] EWCOP 14 at paragraph 31:
- "... it is not the function of the Court of Protection to arbitrate medical controversy or to provide a forum for ventilating speculative theories. ... [the] task is to evaluate [P]'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 [P]'s best interests."
21. The same point was made by both the Court of Appeal¹¹ and MacDonald J¹² (in relation to the MMR vaccine) in cases involving children.

⁹ Although it is a matter for their clinical judgment and not a consideration within the best interest assessment

¹⁰ The phrase used by Hayden J in *RN* [2024] [there is no neutral citation] at paragraph 21 [A126] where he made it clear that an individualised assessment was required. Although there is no evidence for AC's assertion that everyone has had Covid-19 and that if there were going to get seriously ill they would have done so already. (see paragraph 57 of the submissions [A115])

¹¹ *Re H (a Child)(Parental Responsibility: Vaccination)* [2020] EWCA Civ 664

¹² *M v H and P & T* [2020] EWFC 93, it was "very difficult to foresee a case in which a vaccination approved for use in children, including vaccinations against the coronavirus that causes COVID-19, would not be endorsed

22. AC opposes the application for a number of reasons. She makes two central points: first that the risk assessments underpinning the best interests assessment are out-dated and second there is substantial evidence which calls into question the reliability of the national guidance relating to the transmission of Covid-19, the risks of contracting Covid-19 and the safety and efficacy of the Covid-19 vaccines.
23. In the ICB's submission, both points are misconceived. Mr. Z's analysis (see paragraph 19 above) (with which the other professionals concur) relies upon a current appraisal of DA's circumstances.
24. As the Court of Protection has made clear, repeatedly, it is not part of its function to second-guess national guidance or adjudicate on the merits of medical theories. In any event, the professionals have all made clear that they envisage DA being offered¹³ the booster vaccine on an ongoing basis in line with the recommendations in the national guidance.
25. The Official Solicitor makes two points upon which it seeks the ICB's assistance: first, the likely frequency of the implementation of the care plan and second the arrangements for the review of the implementation of the care plan and its amendments going forwards. In relation to the first, although that will depend upon the situation at the time, it is expected to be on an annual basis (in autumn/winter). In respect of the second, the ICB will address that in the amended care plan which it will file in due course.
26. Lastly, the ICB does not need to address whether its application warrants consideration by a Tier 3 judge. That has been considered by both the Vice

by the Court as being in the child's best interests absent a credible development in medical science or peer reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine or a well evidenced medical contraindication specific to the subject child"

¹³ although it is a matter for their clinical judgment and not a consideration within the best interest assessment

President, Theis J, and Senior Judge Hilder. Neither consider that the matters raised within the application requires re-allocation to a Tier 3 judge.

Parishil Patel KC

Counsel for the ICB

30 August 2024