Medical Law Review, **11**, Autumn 2003, pp. 377–403 © Oxford University Press 2003; all rights reserved.

UNITED KINGDOM

DISPUTES BETWEEN PARENTS, IMMUNISATION AND THE WELFARE OF THE CHILD

Re C (Welfare of Child: Immunisation)

Court of Appeal; Thorpe and Sedley L.JJ., Sir Anthony Evans; [2003] E.W.C.A. Civ. 1148; [2003] 2 F.L.R. 1095.

Two girls—aged 4 and 10, lived with their mothers. Neither child had received any form of immunisation as both mothers were radically opposed to it. Both fathers had parental responsibility and contact and both had sought a specific issue order under section 8 of the Children Act 1989 for the full range of immunisation of their daughters (to include diphtheria; tetanus; whooping cough; polio, Hib B; meningitis C; TB and the MMR jab). The fathers argued that there was convincing medical evidence supporting immunisation and the risks were heavily outweighed by the benefits. The mothers opposed the applications on the basis that the immunisation presented unacceptable risks and the medical evidence in support of immunisation was uncertain. CAFCASS Legal represented each child and supported the application made by each father.

At first instance, Sumner J. granted the fathers' applications and declared that immunisation was in the best interests' of both girls (save that he excluded whooping cough and Hib B for the older child). Under section 1 of the Children Act 1989, the court had to reach a conclusion based on what is in the children's best interests as their welfare is the court's paramount consideration. If it is in their best interests, the court will then consider whether there are good reasons not to make a declaration (*Re C (Welfare of Child: Immunisation)* [2003] 2 F.L.R. 1054). Having considered the medical evidence as well as the views of both sets of parents and the older child, Sumner J. concluded that the children's welfare was best served by the making of a declaration ordering immunisation as set out in his judgment. Both mothers appealed against this decision. They argued that Sumner J. had misdirected himself in law in applying the wrong test. It was submitted that he had erroneously adopted a two-stage test: first, establishing, on the basis of medical evidence, that immunisation was in the girls' best interests, and then asking whether there were sufficient non-medical reasons for refusing to order immunisation.

Held, dismissing the appeal,
The submission that the judge reached the wrong conclusion by adopting the wrong test was without foundation. In all cases where the outcome of the application was dependent upon the judge's resolution of divergent expert opinion, the judge's assessment of the expert evidence was likely to be crucial to the outcome. The judge's function was to consider all relevant factors and to give each its due weight. The order in which such relevant factors were considered was a matter for the judge to decide. The applications were decided according to a consideration of the welfare of the children, and the judge's approach was above criticism.
Where parents were in dispute about the immunisation of a child against infectious disease, neither parent had the right to make the decision alone and immunisation should be carried out only where a court decided that it was in the best interests of the child.
There was no general proposition of law that a court would not order non-essential invasive medical treatment in the face of strong opposition from the child's primary carer.

Commentary. This is the first occasion on which the court has been asked to adjudicate between disputing parents on the issue of immunisation. Previous applications have frequently arisen in relation to medical treatment such as sterilisation and circumcision; choice of schools; religious upbringing and change of surname. This case has established that where there is a dispute between those with parental responsibility about immunisation, the matter must be referred to the court, for determination in accordance with the principles in section 1 of the Children Act 1989.

The Court of Appeal acknowledged that the case had attracted a great deal of publicity and public interest, because the issue in dispute was both topical and contentious in the wider society. In particular, the controversies surrounding the combined MMR vaccine had attracted considerable media attention and were fuelled by the impending civil action about the links between autism and the MMR jab. However, Thorpe L.J. (at 23) was at pains to point out that this was a standard section 8 application and:

> . . . that wider dimension must not distort the forensic processes leading to the determination of whether the application should be granted or refused.

The Court of Appeal (at 25) confirmed that the approach adopted by Sumner J. in the High Court was 'manifestly conscientious . . . comprehensive' and correct. So let us first consider the first instance judgment of Sumner J.

1. The first instance decision: Sumner J. carried out a meticulous review of the expert evidence as well as the views of both sets of parents and the older child. Indeed, his lengthy and clear judgment was commended to parents and carers by Sedley L.J. in the Court of Appeal (at 39). The law in this area is well established (see *Re A (Minors) (Conjoined Twins: Separation)* [2000] Lloyd's Rep. Med. 425; *Re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 W.L.R. 242; *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421) Sumner J.'s task was to consider each of the two children separately in respect of each of the proposed vaccinations and carry out a balancing exercise to ascertain whether immunisation was in each of their best interests. In doing so, he appraised the medical evidence, the views and wishes of both sets of parents and the impact of his decision on the mothers' ability to care for their children. The reliable medical evidence

was firmly in support of immunisation and Sumner J. concluded with respect to each child and each procedure, that the benefits of the procedure outweighed the risks (save for the Hib and whooping cough jabs for the older child, which were not perceived as being of benefit to her). Sumner J. was particularly concerned about the harm which each of the children was at risk of suffering if they remained unvaccinated (at 301). However, the benefits from immunisation should not be considered in isolation and the children's emotional needs were also important, in particular the bond they had with their main carer, their mothers. Adopting the same approach as the Court of Appeal had in *Re T supra*, Sumner J. considered with great care the impact upon each mother of the order sought and the capacity of each mother to accept the court's conclusion and its subsequent implementation. On the evidence, he found that both mothers would be able to accept and cope with the decision (at 285, 338 and 339). Consequently, Sumner J. felt that the impact on the mother/daughter relationship was not in either case of such potential as to deter him from reaching his decision (at 332).

Sumner J. was anxious to consider the decision in *Re T supra*. In that case, the Court of Appeal allowed an appeal against an order authorising life-prolonging surgery for a child as it was not in the best interests of the child to order surgery with which the mother did not agree and the management of which post-operatively she might not be able to support. That case seemed to suggest that there is a wide scope for parental opposition to medical intervention and Sumner J. acknowledged that this weighed heavily in his deliberations (at 345). As noted by Wilson J. in *Re C (A Child) (HIV Testing)* [2000] Fam. 48, a 'court invited to override parental wishes had to move extremely cautiously'. Even so, Sumner J. concluded that, on the particular facts before him, the medical evidence in favour of each immunisation was 'clear and persuasive' and there were no good reasons why the declaration should not be made (at 332). On that basis, the instant case is distinguishable from *Re T*, as the parents in that case were extremely concerned about their ability to cope with the post-operative care of their child.

It is important to note that Sumner J. did limit the ambit of his decision:

> This decision should not be seen as a general approval of immunisation for children. It does not mean that at another hearing a different decision might not be reached on the facts of that case.
>
> It does mean that I consider that I should make an order in this case. That is based solely on the evidence I have heard and the arguments presented to me. (at 347 and 348)

This was supported by Thorpe L.J. in the Court of Appeal (at 25).

Of course, no judgment in this area would be complete without some consideration of the impact of Article 8 of the European Convention on Human Rights. As we know, Article 8(1) protects the right to respect for private and family life, and could apply to protect the views of both mothers. Sumner J. quickly dispensed with Article 8(1) on the basis that there is an exception in Article 8(2) permitting the interference by the court for the protection of health. That exception clearly applies in cases such as this to justify interfering with the rights of both parents and the children, in order to protect the health and welfare of the child (see also *Re C (A Child) (HIV Testing) supra*).

2. *The decision of the Court of Appeal:* The main issue for the Court of Appeal was whether Sumner J.'s approach to determining the children's best interests was correct. Both mothers argued that the judge misdirected himself in law in applying the wrong test. First, he asked whether immunisation in a medical sense was in the girls' best interests. Having answered that question in the affirmative, he proceeded to ask whether there were sufficient non-medical reasons for rejecting the applications for immunisation orders. Counsel for the mothers argued that this elevated the expert medical issue above its due proportion and effectively created a presumption in its favour. This imposed a heavy

burden on the mothers to displace. The Court of Appeal disagreed. Thorpe L.J. congratulated Sumner J. on his painstaking and comprehensive judgment and concluded (at 25) that his approach was both 'permissible' and 'sensible':

> In cases [such as this] where the outcome of the application is dependent upon the judge's resolution of divergent expert opinion the judge's assessment of the expert evidence is likely to be crucial to the outcome. If the judge chooses to make his assessment of and findings on the expert evidence before coming to consider other relevant factors he is not to be criticised. His function is to consider all relevant factors and the order in which he takes them is surely for him provided that he keeps each in its proper proportion and ultimately conducts a comprehensive survey attaching to each relevant factor the weight that he deems it deserves. (at 24)

In the opinion of the court, Sumner J. was correct to have first addressed the conflict of expert evidence and then embark upon the wider review of all other relevant considerations. Indeed, if forceful expert opinion had indicated that immunisation was contra-indicated, then in this case, as well as almost all other conceivable cases, it would have been unnecessary for him to consider the application further. Should similar disputes arise in future and the expert evidence is powerfully opposed to immunisation, Thorpe L.J. seems to be suggesting that it is likely to be determinative on the issue.

Sedley L.J. agreed with Thorpe L.J. and added that in determining the welfare of the child, complete discretion should be left in the hands of the judge to reach a conclusion on the particular facts of the case before him/her:

> . . . how the judge is to go about this is not prescribed by law . . . no question of law arises about how he or she reached a conclusion. . . . All the law requires is a logical and practical approach to the issues and to the evidence. (at 34)

A final point to note is that, as discussed above, Sumner J. had given careful consideration to the application of *Re T*, *supra* to the instant case. But the Court of Appeal adopted a different approach and played down the significance of that decision. Indeed, Thorpe L.J. emphasised that the outcome in *Re T*, *supra*:

> . . . is unique in our jurisprudence and is explained by the trial judge's erroneous focus on the reasonableness of the mother's rejection of medical opinion thus excluding other relevant factors (at 21).

Moreover, the judgments in the case of *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 F.L.R. 571 expressly emphasise that *Re T* turned on its particular facts and that no general guidance was to be drawn from it. Accordingly, *Re T* does not support the general proposition that the court will not order non-essential invasive medical treatment in the face of rooted opposition from the child's primary carer. In any event, Thorpe L.J. rejected the proposition that immunisation should be equated with non-essential treatment, preferring to categorise it as 'preventative healthcare' (at 22).

So, what is the overall message from the Court of Appeal? First, it has confirmed that the ruling in *Re T* is based on the exceptional facts of the case. Secondly, it has confirmed that parental disputes about immunisation should be determined by the court. And finally, it has put beyond doubt the court's approach as to how these disputes should be resolved. Assessments of best interests are to be made on a case-by-case basis, involving a thorough appraisal of the expert evidence, followed by other relevant factors. The net effect of that would seem to be that reliable medical opinion is, once again, elevated above divergent parental opinion. [JL]