Immunisation and the law: compulsion or parental choice?


Summary

A debate has been developing in Nursing Standard on the issue of childhood immunisations. This article adds to the discussion by considering the likelihood of legislation being introduced to make immunisation compulsory in the UK. It also discusses how the courts approach an application for childhood vaccination against the wishes of a parent and the implications for nursing practice of that approach.

Immunisation has become a key tool in disease control and is the main instrument in the government’s campaign for achieving the World Health Organization (WHO) target for interrupting indigenous measles, poliomyelitis, neonatal tetanus, congenital rubella and diphtheria transmission (Spika et al. 2003). However, immunisation rates have dropped as a result of public concern about vaccine safety. Recent statistics show that immunisation uptake at 78 per cent is much lower than the 95 per cent rate required to achieve population immunity in line with WHO targets (Carlowe 2003).

A number of legal tools such as compulsory vaccination, treating a refusal to vaccinate as a child protection issue or making state benefits conditional on vaccination could be employed to achieve these targets. One approach gaining popularity is to follow the lead of the United States, where school entry is dependent on prior vaccination and where the supreme court has held that compulsory vaccination was not unconstitutional (Harpwood 1999).

Compulsory UK immunisation

Compulsory immunisation for smallpox was introduced by the Vaccination Act of 1853. The legislation was extremely unpopular and strongly resisted by the Victorians, who saw compulsory vaccination as an extreme example of class legislation with its enforcement carried under Poor Law provisions. The policy and administration implicitly targeted working class infants and inflicted multiple penalties on a public who considered themselves conscientious objectors. In 1867 a more elaborate administration system was established that allowed repeated fining of parents who refused to comply, the seizure of goods to pay such fines or even imprisonment. This ‘cat-and-mouse’ procedure was extended by the Vaccination Act (1871). Public outcry continued, however, and, faced with election defeat, the government was eventually forced to repeal the Vaccination Acts. No modern government, even when facing a deadly disease like diphtheria and possessing a certain vaccine, has dared to force vaccination on the population. Given its history, it is unlikely that compulsory vaccination would ever be reintroduced in the UK. The Department of Health has recently restated its position on immunisation. ‘None of the childhood vaccinations available in the UK are compulsory. They are offered on a voluntary basis. There are no plans to alter this policy’ (DoH 2003).

The courts

Immunisation is not compulsory in the UK and therefore the courts cannot insist that children are vaccinated. As with any case involving a child, they are obliged to follow the provisions of the Children Act 1989 and consider the best interests of the welfare of that child.

The courts have recently had occasion to consider the question of childhood immunisation in a case that was heard by the High Court (A&D v B&E [2003] EWHC Fam) and subsequently by the Court of Appeal (B (A Child) [2003]). The case concerned two girls aged four and ten years whose mothers had fundamental objections to immunisation and refused to allow their daughters to receive any of the usual childhood vaccinations. Their fathers made an application to the court seeking the immunisation of their children. The two girls lived with their respective mothers. Both fathers were in contact with their daughters and had parental responsibility through court orders. The fathers argued that the immunisations were in the children’s best interests.

This case concerns a dispute between parents on a fundamental issue of parental responsibility. The High Court heard the case under the provisions of section 8 of the Children Act 1989, which provides private law remedies to settle matters of parental responsibility concerning a child. Unlike the public law child protection procedures of the 1989 Act, the threshold criteria for state intervention, namely a risk of significant harm, does not have to be met and the court may settle any matter as long as it has to do with the parental responsibility of a child.

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Key words

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The specific issues order

The specific issues order is ‘an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child’ (Children Act 1989 s 8(1)). The order does not give one parent or other a general right to make a decision in a particular matter, rather it enables a specific issue to be settled. In this case it was the immunisation of the children in question. In previous cases such matters as education (A (Children) (Specific Issue Order: Parental Dispute) [2001] 1 FLR 121), emergency medical treatment (Camden LBC v R (A Minor) (Blood Transfusion) [1993] 2 FLR 757) and witness interviews (Re F (Specific Issue: Child Interview) [1995] 1 FLR 819)) have been settled using the order.

As with all cases concerning children, the court must adopt the paramount principle under section one of the Children Act 1989. Courts are required to consider what is in the best interests of the child, taking into account the welfare checklist, and then consider if there are other good reasons why an order should not be made.

Best interests of the welfare of the child

In this case Mr Justice Sumner (Sumner J) made it clear that although this was a dispute between the parents, his only concern was for the best interests of the welfare of the children. He recognised that to reach a conclusion on best interests the case of each child would have to be considered individually on the facts. Then he would assess the impact any order would have on the relationship between each child and his or her mother, as the main carer, if it were granted.

In taking each case on its merits, Sumner J heard opinion from three expert witnesses on each of the immunisations being considered in the case. The advantages and disadvantages of diphtheria, tetanus, whooping cough, poliomyelitis, Haemophilus influenzae type b (Hib), meningitis C, tuberculosis (TB), and measles, mumps and rubella (MMR) were all evaluated in detail in a case covering 13 days over an eight-month period.

The judge concluded that immunisation would be in the best interests of the welfare of each child. Having considered each case on its facts, however, the judge did not order all the requested immunisations for each child. The ten-year-old girl would not have vaccinations for whooping cough and Hib as they were not licensed for use on children older than seven. The four-year-old would not have the TB vaccination because she was too young.

Sumner J then considered arguments on why, despite his finding of best interests, he should not issue an order as required under section 1(5) of the Children Act 1989. One argument he was particularly anxious to consider was the impact of an order on the relationship between the child and the mother. He was satisfied it would have little impact in this case. Each mother had said she would accept the judge’s decision. Each would be happy to go on caring for her child. The judge granted the order that the vaccinations must be given.

Medical intervention

Although an order was issued in this case, it should not be seen as a trend. There could be circumstances where it would not be in the best interests of the child to be immunised – for example, if the relationship with a caring parent would be significantly affected. This case cannot, therefore, be seen as precedent for authorising immunisation in all cases. Each case would have to be considered based on its own particular facts.

The judge accepted that, in general, there is wide scope for parental objection to medical intervention. He viewed medical interventions as existing on a scale. At one end there are what he described as obvious cases where parental objection would have no value in child welfare terms – for example, urgent life-saving treatment such as a blood transfusion. At the other end of the scale are cases where there is genuine scope for debate and the views of the parents are important. Immunisation, he held, was an area where there was room for genuine debate.

Immunisation is voluntary and generally it is for those who have parental responsibility for a child to decide on immunisation. It is not a question of neglect or abuse, which would trigger child protection proceedings. Although medical authorities can obtain leave to apply for a specific issues order, it is unlikely that leave would be granted in the face of unified parental opposition. In this case the parents disagreed on the issue of immunisation. Even though the children lived with their mothers, it was stressed by the court that absent parents are entitled to be consulted on major decisions in the child’s life.

Parental consent

The issue of consent and parental responsibility was considered further by the Court of Appeal. Lord Justice Thorpe held that although people with parental responsibility were generally free to act alone, this freedom was not unfettered. He held that there are a small group of decisions about a child – such as changing a child’s surname, sterilisation and circumcision – that require the agreement of both parents. This small group, he said, now included immunisation. It is essential, therefore, that the consent of both parents is obtained before immunisation can proceed and where there is disagreement, immunisation will not proceed.
without a court order (Re B (Child) [2003] (Thorpe LJ [15]-[17]) EWCA Civ 1148).

**Practice implications**

Whether or not to give childhood immunisations is an emotive issue that gives rise to strong feelings, both for and against. Carlowe (2003) reports that the Health Protection Agency is concerned about the decline in immunisation. It is necessary to achieve population immunity of 95 per cent to protect public health. In the first six months of this year the immunisation rate was 78.9 per cent (Carlowe 2003). Given its history, it is unlikely that this fall can be resolved by compulsory vaccination and the government has restated that there are no plans to introduce compulsion.

The Health Protection Agency argues that health visitors and nurses who ‘hand on heart’ cannot recommend the MMR vaccine are in the wrong job (Carlowe 2003). We have seen from this case, however, that the approach of the court is not an unquestioning ‘hand on heart’ recommendation of immunisation but a careful consideration of each case on its facts. Immunisation may not be appropriate in every case. The court views immunisation as a voluntary process that both parents are entitled to be consulted on. Indeed the Court of Appeal ruled it essential that the consent of both parents is given before you proceed.

In terms of the advantages and disadvantages of a wide range of immunisations the judgment of Sumner J provides an excellent summary of the arguments for and against. In the tradition of the law it has reason without emotion and is of considerable value to doctors, nurses and parents involved in immunisation. The whole of his judgment can be found at the British and Irish Legal Information Institute (2003) (www.bailii.org/ew/cases/EWHC/Fam/2003/1376.html) and is an excellent, independent resource that highlights the modern-day approach of the courts to this contentious topic. Rather than an unequivocal ‘hand on heart’ approach, nurses must recognise that the law allows parents to make a choice about childhood vaccinations. The nurse’s role must be to present to both parents unbiased information for and against immunisation, allowing them to make that choice.

**Conclusion**

Compulsory vaccination was used for smallpox in the late 19th century. It was extremely unpopular and eventually repealed. The Department of Health has recently stated that all childhood vaccinations offered in the UK are voluntary. Both parents must consent to the vaccination of their child and the courts will intervene where there is a dispute between parents. Medical authorities are unlikely to be granted an order forcing vaccination in the face of unified parental objection. Nurses should adopt a similar approach to the courts and consider each case on its individual facts and give unbiased information on vaccination to assist parents in their decision. Nurses should read the whole of Mr Justice Sumner’s judgment, where the pros and cons of a wide range of childhood vaccinations have been considered by the court.

**REFERENCES**


