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COVID-19 vaccination: capacity and best interests – the first reported Court of Protection judgment

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On 20 January 2021 in the matter of *Re E (Vaccine)* [2021] EWCOP 7, the Vice-President of the Court of Protection Mr Justice Hayden, delivered the first reported judgment in a vaccination dispute. Mrs E, the 80 year old dementia sufferer at the centre of the dispute (and who had been diagnosed with schizophrenia some 20 years ago), was living in a care home where there had been several cases of COVID-19.

Background

On 8 January 2021, the London Borough of Hammersmith and Fulham informed Mrs E's Accredited Legal Representative that she was to be offered a COVID-19 injection on 11 January, however her son, Mr W, objected to this. Due to the risk of Mrs E succumbing to COVID-19, her legal representatives urgently sought a declaration, pursuant to s.15 of the

Mental Capacity Act 2005 ('MCA 2005'), that it would be lawful and in her best interests to receive the vaccine at the next possible date (the appointment on 11 January having been missed due to the son's objection).

In oral evidence, her son explained that Mrs E had led a full life, was well respected in the community and a devout Christian. Following a spell in hospital in 2018, she did not return home (against his wishes) but was placed in local authority care due to her care requirements. Court of Protection proceedings had previously been instigated in respect of her capacity to make decisions relating to her care and residence and on 22 October 2020, the court declared pursuant to section 15 MCA she lacked the capacity to conduct proceedings and make decisions regarding her residence and care. The son believed that his mother was in receipt of neglect and ill-treatment and it was against this background that he raised his objection to his mother receiving the COVID-19 vaccine.

Mrs E's capacity to decide whether she should be vaccinated against COVID-19

Hayden J was directed to a recent attendance note of a video conversation between Mrs E, her Legal Representative and her GP, Dr Wade. During the conversation, Mrs E stated that she was not aware of a dangerous sickness called Coronavirus and she did not reply when asked if she had any recollection of a visit to her care home by a GP in order to vaccinate her. However, when asked if Mrs E would like the injection, she replied "*Whatever is best for me. What do I have to do?*" and asked again by her GP to hear what she wanted, again she replied "*Whatever is best for me*". Dr Wade concluded that Mrs E did not have the capacity to determine whether she should receive the COVID-19 vaccine offered to her.

Acknowledging the informality of the assessment of Mrs E's capacity to decide whether to receive the vaccine, Hayden J was nonetheless satisfied that the assessment was "*sufficiently rigorous*" to comply with section 2 and section 3 of the MCA 2005: whilst Dr Wade's assessment was "*in short order*" it nevertheless focussed with "*professional clarity on the salient issues ... her enquiries respected Mrs E's autonomy and delicately assessed her range of understanding.*"

He concluded that Mrs E was:

1. unable to understand the information concerning the existence of the COVID-19 virus and the potential danger it posed to her health;
2. unable to weigh information relating to any advantages or disadvantages of receiving the vaccine; and
3. unable to retain information long enough to use it to make a decision due to her dementia.

Accordingly, Hayden J found that she lacked the capacity to decide for herself whether to receive the COVID-19 vaccine.

Best interests

Mrs E's wishes

In respect of Mrs E's wishes, Hayden J was obliged to consider Section 4(6) MCA 2005: "*as far as reasonably ascertainable, her past and present wishes and feelings, the beliefs and*

values that would be likely to influence her decision if she had capacity, and any other factors she would be likely to take into account if she were able to do so."

Notably, prior to her diagnosis of dementia, Mrs E had willingly received the influenza vaccine and, in 2009, had received a vaccine for swine flu. Hayden J noted *"the fact that, when she had capacity, Mrs E chose to be vaccinated in line with public health advice, to be relevant to my assessment of what she could choose in relation to receiving the COVID-19 vaccine today."* Whilst she lacked the capacity to consent to receiving the COVID-19 vaccine, she had articulated a degree of trust in the views of the health professionals who cared for her by stating and repeating to her GP that she wanted *"Whatever is best for me"*. Her repetition of this statement was of significance and Hayden noted that *"her straightforward and uncomplicated approach resonates with the trust that she placed in the medical profession in the course of her life"*.

Views of Mrs E's son, Mr W

Her son was deeply sceptical about the efficacy of the vaccine, the speed at which it was authorised, whether it had been adequately tested on the cohort to which his mother belonged, whether the tests incorporated issues relating to ethnicity and whether his mother's true wishes and feelings had been properly canvassed.

By virtue of section 4(7) MCA 2005, Hayden J was obliged to take W's views into account, as a person interested in Mrs E's welfare. However, whilst W was particularly concerned about the rapid authorisation of the COVID-19 vaccines he submitted that he did not object to the vaccination in principle, it was just not the right time for his mother to receive it. The Judge respected that W was entitled to his views but he found that *"they strike me as a facet of his own temperament and personality and not reflective of his mother's more placid and sociable character. It is Mrs E's approach to life that I am considering here and not her son's."*

Particular risk presented by COVID-19 to Mrs E

Hayden J took judicial note of the particularly high risk of serious illness and death to the elderly living in care homes and found that for Mrs E, there was a real and significant risk to her health and safety were she not to receive the vaccine. *"The risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequences. On the contrary, there is for Mrs E and many in her circumstances a real and significant risk to her health and safety were she not to have the vaccine administered to her."*

Hayden J identified the following characteristics which compounded her vulnerability to becoming seriously ill or dying from COVID-19:

1. she was in her eighties;
2. she was living in a care home;
3. the care home where she resided had confirmed recent positive cases of COVID-19;
4. she had been diagnosed with Type II diabetes; and
5. she lacked the capacity to understand the nature and transmission of COVID-19 and was inevitably challenged, as so many living with dementia in care homes, by the rigours of compliance with social distancing restrictions.

Further, the fact that England has one of the highest death rates per capita due to COVID-19 and by virtue of her particular vulnerabilities *"the prospects for her if she contracts the virus are not propitious; it is a risk of death and it is required to be confronted as such. The*

vaccination reduces this risk dramatically and I have no hesitation in concluding that it is in her best interests to receive it.” Hayden J made the declaration sought by Mrs E’s representatives pursuant to section 15 MCA 2005 and delivered an ex tempore judgment in order that Mrs E could receive the vaccine without further delay.

Comment

These judgments are clearly fact-specific and should be treated as such, however, it is helpful to see Hayden J’s approach in determining issues of capacity and best interests in the specific context of the COVID-19 vaccine. In considering Mrs E’s capacity to make the decision whether to have the vaccine, the attendance note of the video call was deemed sufficient to demonstrate Mrs E’s autonomy and her level of understanding on this issue. It was also significant that in the past, Mrs E had willingly consented to public health vaccinations. Taken together, it was clear to Hayden J that had Mrs E possessed the requisite capacity, she would have consented to the COVID-19 vaccination. Further, her particular vulnerabilities were such that she faced the risk of death without the vaccination and whilst it was right to hear the son’s views, the court was ultimately concerned only with the determining what was best interests of Mrs E.

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