EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT WHAKATANE

I TE KŌTI WHĀNAU
KI WHAKATĀNE

FAM-2011-087-000239
[2022] NZFC 251

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ANDREA LONG] Applicant
AND	[DOUGLAS STEINE] Respondent

Hearing:	20 December 2021
Appearances:	A Brown for the Applicant A Kershaw for the Respondent J Kay as Lawyer for the Child
Judgment:	14 January 2022

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO DISPUTE BETWEEN GUARDIANS (COVID-19 VACCINATION) AND INTERIM PARENTING ORDER]

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[1] [Charles Steine] (known as [Charlie]) was born on [date deleted] 2009; as at the date of hearing he was aged 12 years and five months. His parents are Ms [Long] and Mr [Steine] and [Charlie] is currently in the parties' shared care pursuant to a final parenting order made on 24 September 2019.

[2] Ms [Long] applied without notice for an order that [Charlie] be in her interim care until he received his two COVID-19 vaccinations, and on notice (but to proceed on a *Pickwick* basis) application pursuant to s 46R requiring [Charlie] to receive the COVID-19 vaccination. The applications were placed on notice by the eDuty Judge recording that Mr [Steine] had a right to be heard, and particularly noting that given [Charlie]'s age, he similarly had a right to be heard. The eDuty Judge declined to direct a *Pickwick* hearing, but instead directed that the matter was to be set down for a submissions only hearing prior to Christmas in either the Whakatane or Tauranga Family Court.

[3] Ms [Long] seeks an order pursuant to s 46R directing.

(a) That [Charlie] receive the COVID-19 vaccinations.

(b) That the parties are not to discuss anti-vaccination views around [Charlie].

(c) That any information provided to [Charlie] about the vaccinations is to be medically approved information presented in a child-friendly form.

(d) That Mr [Steine] resume communication via the "OurFamilyWizard" application.

[4] It appears that that last order is no longer sought as in the interim communications via OurFamilyWizard have resumed.

[5] If those applications are granted, then Ms [Long] seeks that [Charlie] be in her care until he has had his second vaccination, at which point a shared care arrangement will be reverted to.

[6] Mr [Steine] does not consent, but also does not oppose, the s 46R vaccination application; rather he will abide and support the decision of the Court. All other applications are opposed by Mr [Steine] and by [Charlie].

The Legal Position

[7] The starting point in these proceedings is s 4 of the Care of Children Act 2004. Section 4 provides that the welfare and best interests of [Charlie] in his particular circumstances must be the first and paramount consideration. Any assessment as to [Charlie]'s welfare and best interests is an individualised assessment and cannot be the subject of any formulaic approach.[1]

[8] Pursuant to s 4 I also need to consider the relevant principles in s 5. The Supreme Court in *Kacem v Bashir* has held that I need to identify not only those principles that are relevant, but also those that are irrelevant and to set out why I have come to that conclusion.[2] On the facts of this case principles in ss 5(b) to (e) inclusive are relevant. While Ms Brown submitted that s 5(a) is relevant, I disagree. In Ms Brown's submission s 5(a) is centred in [Charlie]'s safety and that without the vaccination [Charlie] will be unsafe due to potential consequences should he become affected with COVID-19. She also submitted that he would be psychologically unsafe because he is being exposed, in Mr [Steine]'s household, to an anti-vaccination worldview. For the reasons that I will set out below, I disagree with those submissions.

[9] I also do not accept that s 5(f) is relevant. Whilst reference has been made to religious views informing the anti-vaccination stance, I have no evidence that for [Charlie] aspects of his religious denomination and practice are important to him. Section 5(f) is centred in [Charlie]'s identity and not that of the adults.

[Charlie]'s Views

[10] Section 6 of the Act requires [Charlie] to be afforded reasonable opportunities to express views on the issues before the Court, and if those views are expressed, the

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1 See *Brown v Argyll* [2006] NZFLR 705.
2 *Kacem v Bashir* [2010] NZSC 112.

Court is then required to consider those views. However, as Randerson J held in *C v S* [Charlie]'s views need to be weighed against his age and maturity.[3] That is also consistent with Article 12 of the United Nations Convention on the Rights of the Child.

[11] Mr Kay filed a memorandum dated 13 December 2021 in which he sets out the views of [Charlie]. In that memorandum he records he met with [Charlie] on both 6 and 13 December 2021. [Charlie]'s views to Mr Kay were that he did not want to be vaccinated and at [6.6] to [6.13] of that memorandum Mr Kay sets out [Charlie]'s views. Mr Kay, after the 6 December meeting, sent [Charlie] a letter together with some articles around the issue of child vaccination for [Charlie] to consider. In response to that letter Mr Kay records [Charlie] had started what Mr Kay describes as a "pros and cons chart", but it is clear that at the 13 December meeting [Charlie] still remained of the view that he did not wish to be vaccinated.

[12] [Charlie] also made it clear to Mr Kay that he wanted to meet with me as the decision-maker. Prior to the submissions only hearing commencing I accordingly met with [Charlie] in my chambers in the presence of Mr Kay and a Court registrar. I explained to [Charlie] that I was meeting his parents later that morning, and that I then had to make a decision as to what I thought was best for him in relation to the vaccination issue. I explained to him that I would make that decision after listening to his parents (through their lawyers) and to what [Charlie] had to say to me. I therefore explained to [Charlie] that what he had to say to me was very important, but I told [Charlie] that I could not promise that I would necessarily do what [Charlie] wanted me to do as I would not know the answer to the issue around the vaccination issue until I had heard from everyone and made a decision as to what I thought was in [Charlie]'s welfare and best interests. [Charlie] understood this.

[13] [Charlie] made it clear to me that he did not want the COVID-19 vaccination. His reasons were:

(a) He thought that his father had told him that the vaccine companies were not liable for "stuff" if anything went wrong. I asked [Charlie] to explain what he meant by "liable"; [Charlie] explained that this might

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3 *C v S* [2006] 3 NZLR 420.

mean they have to pay money or "some stuff" if there were problems with the vaccine.

(b) He told me that his father had told him that no one knows what is in the vaccine.

(c) His third reason was the effectiveness of the vaccine. His [stepmother][4] had told him that Israel and Japan had concerns around the effectiveness of the vaccine not working as quickly as it used to.

(d) His fourth reason was that [his stepmother] said that she had been told the vaccine had been tested on aborted foetus cells.

(e) In response to a question from me as to what he meant in telling Mr Kay that he had religious objections, he said that his father had told him that a vaccine is "foreign stuff" and that the Bible says not to have "foreign stuff" in one's body.

[14] Like Mr Kay, I discussed with [Charlie] the consequences of not being vaccinated. [Charlie] told me they included no longer being able to go to [an extracurricular group activity], to cafés or to the [local] Hot Pools. However, [Charlie] noted he could still go to [a different] Hot Pools as they allowed non-vaccinated people. He also explained that he would be unable to go with his mother camping over Christmas in [location deleted] as the campground banned non-vaccinated people. I discussed with [Charlie] his mother's suggestion about meeting with an independent person to receive information about the vaccine from a number of different sources. [Charlie] saw some benefit in that but indicated he would be unlikely to change his mind.

[15] I also asked [Charlie] that if I decided he needed to be vaccinated that this would mean he would need to have the vaccination injection, and I asked him what he would do if he turned up to the vaccination clinic. [Charlie]'s response was that he would tell them that he did not want the vaccination and did not agree with it. As all

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4 Mr [Steine]'s wife.

counsel accepted, the issue I need to consider [Charlie]'s age and maturity, and consequently what weight should be placed upon his views.

[16] I also note Mr Kay, in his letter to [Charlie][5] dated 7 December 2021 set out:

> The science view is that the risk of harm for children from COVID-19 is generally low. However, children do get COVID-19 and pass it onto others who become ill and die, including older people, grandparents, children who are Down Syndrome, children with weak immune systems and organ transplant children.
>
> We have a discussion about how you would feel if you had COVID-19 and passed it onto someone else. He told me that if you got COVID-19 and passed it onto someone who became very ill or worse you would feel bad.

[17] I am concerned that the tenor of Mr Kay's advice/letter to [Charlie] in its emphatic term and its emphatic nature particularly stating "… children **do** get COVID and pass it to others who **become ill and die**". (emphasis mine)

[18] According to the World Health Organisation dashboard, as at 13 January 2021 315,345,967 people have been infected worldwide with COVID; of those 5,510,174 have died, or 1.7 per cent of those infected.[6] According to the same website the death rate in Australia is .02 per cent, and in New Zealand .03 of a per cent. Thus, the unequivocal nature of Mr Kay's statements is simply not borne out by World Health Organisation statistics.

[19] What is clear to me is that [Charlie] is opposed to being vaccinated, and that if I were to order that he was to be vaccinated, [Charlie] would advise the vaccination clinic that he did not consent to the vaccination occurring.

[20] Mr Kay, as [Charlie]'s counsel, with reference to *Dvorak v Yamamoto*, referenced Moore J describing the role of lawyer for child as having a hybrid function, which includes lawyer for the child acting independently of a child's wishes to promote a child's welfare and best interests.[7] Mr Kay has clearly adopted a welfare and best interests focus arising out of his belief that [Charlie] should be vaccinated,

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5 Attached to his memorandum.
6 https://covid19.who.int.
7 *Dvorak v Yamamoto* [2017] NZHC 1591.

but has also clearly set out the views of [Charlie] which are contrary to the welfare and best interests position advanced by Mr Kay.

[21] For Mr Kay has, in his written submissions, clearly advanced not only [Charlie]'s clearly expressed views that he not be vaccinated, but also the factors which in Mr Kay's submission should result in a conclusion that [Charlie] should be required to have the COVID-19 vaccine to ensure he is protecting not only himself against the severe adverse consequences of a COVID-19 infection, but also protecting his family and friends against the possibility of severe adverse consequences of a COVID-19 infection. Mr Kay recognised however, as [Charlie] indicated to me, that [Charlie] is adamant he will not be vaccinated irrespective of a judicial decision to the contrary; Mr Kay's submission that raises a "distasteful prospect" of [Charlie] actively resisting vaccination. He does not explain why such a prospect is distasteful, and for the reasons set out later in this judgment, I do not accept that [Charlie] expressing a non-mainstream view, or a view that Mr Kay disagrees with, is in any way "distasteful".

What weight is to be attached to [Charlie]'s views

[22] Ms Brown submits that although [Charlie] is 12 years old, and able to form a competent view, in her submission it is unlikely that [Charlie]'s opposition to the vaccine is an informed view. Furthermore, Ms Brown submits that [Charlie]'s "proximity to adults with stronger views against vaccination is likely to have swayed [[Charlie]'s] opinion."[8]

[23] [Charlie], it is accepted, is a good, sensible and intelligent young man. He has a particular scientific bent, and it is clear from Mr Kay's memorandum that [Charlie] has to some extent adopted a scientific analysis in that he has weighed up the pros and cons of the decisions that he has reached. In *Gillick v West Northwick & Wisbech Health Authority* the Court accepted that children with sufficient maturity and understanding may be capable of providing consent without requiring their parents' consent.[9] This is because those children are deemed responsible enough to make

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8 Written submissions of Ms Brown, 17 December 2021 at [31].
9 *Gillick v West Northwick & Wisbech Health Authority* [1986] AC 112.

authoritative decisions about their own body and health. That *Gillick* remains relevant in New Zealand has been affirmed by the High Court in *Moore v Moore* and *District Health Board v Dee*.[10]

[24] Similarly, Heath J in *Hawthorne v Cox* similarly referenced the *Gillick* decision.[11] At [60] his Honour set out the principles as:

> (a) The younger the child, the more likely it is that decisions about important matters will need to be *made* by his or her guardian.
>
> (b) As the child gets older and becomes more mature, the guardianship role changes to that of an advisor or a counsellor, endeavouring to assist the child to make good decisions.

[25] Put in those terms, the Act is consistent with the philosophy underpinning *Gillick*, namely that a parent's interest in the development of his or her child does not amount to a "right" but it is more accurately described as "a responsibility or duty".[12]

[26] However, even if I find that [Charlie] has sufficient age and maturity such that his views should be given significant weight, Ms Brown urges me to adopt a welfare and best interests consideration and to override his views.

[27] In support of that proposition she relies upon the *District Health Board v Dee* decision.[13] In that case, the 14 year old young person (John) was diagnosed with HIV when young. In 2018 it was deemed appropriate to tell John of his condition and to obtain his views. John asked many questions seeking evidence to prove he did have the virus. He asked questions about the side effect of the medication he was taking and reached a view that he was adamant that he would like to stop the treatment. The decision records that John's lawyer's reports noted that the John did not appear to

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10 *Moore v Moore* [2014] NZHC 3213; *District Health Board v Dee* [2019] NZHC 834.
11 *Hawthorne v Cox* [2008] 1 NZLR 409.
12 Section 16(1) COCA 2004.
13 Ms Brown also referred to a number of Family Court decisions the facts of which were not analogous to this case; in any event they are only persuasive but not binding on me, and none of them appear to have considered any NZBOR issues.

relate the need for treatment to any concept that failure to treat his condition may result in dire consequences for him.[14] The High Court similarly recorded at [44]:

> …the fact that John did not appear to relate the need for treatment to any concept of the consequences that might follow if treatment were to cease suggests that John may not fully comprehend the magnitude of decisions around treatment.

[28] The High Court overruled the views of John and directed that John was to continue to receive treatment. That case can be distinguished from the facts of this case on the basis that if treatment was not continued for John, then he would have potentially died. In this case, if [Charlie] is not vaccinated it is not inevitable that he will die.

[29] There is not any data to support the inevitability of children who get COVID-19 dying from COVID-19. The UNICEF website records that .4 per cent of total deaths occurred in children.[15] A Nature article references various studies in which the statistics show that the overall risk of death or severe disease from COVID-19 is very low in children. One of those studies, for instance, found that COVID-19 caused only 25 deaths in people under 18 between March 2020 and February 2021 in the United Kingdom.[16]

Discussion

[30] It is accepted [Charlie] is an intelligent an articulate young man. I determine that his views should be given significant weight. I determine that he is *Gillick* competent. I have reached that view having met with [Charlie] and having had a conversation with him. He was thoughtful, intelligent, considered, and reasoned throughout. The central thrust of Ms Brown's submissions appears to be that because [Charlie] has formed a view which differs to that of Ms [Long] and/or is not "mainstream"[17] that his view cannot be an informed view. I reject that submission. For it is clear that [Charlie] has carefully considered the information provided by Mr

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14 *District Health Board v Dee* at [21].
15 https://data.unicef.org/topics/child-surival/covid-19.
16 https://www.nature.com/articles/d41586-021-01897-w.
17 "Mainstream" in the sense that the majority of New Zealanders are now vaccinated, and the only "mainstream' discourse by most media is pro-vaccine and supportive of the Government's position.

Kay, setting out a list of pros and cons in terms of being vaccinated or unvaccinated. He was able to articulate both to Mr Kay and to myself the clear consequences of not being vaccinated, including not being able to go on holiday over the summer period with his mother and not participating in [an extracurricular group activity], an activity in which he has been passionately involved.

[31] [Charlie] has considered those consequences, and yet remained of the view that he does not wish to be vaccinated. While his reasoning has been influenced by his father, what Ms [Long] seeks, as I will set out below, is to similarly influence [Charlie]'s views to the point where he can only be exposed to views which accord with that of Ms [Long].

[32] What Ms [Long] and Ms Brown do not appear to have considered is that [Charlie] disagreeing with them and holding an opinion different to that of his mother does not result in a conclusion that he does not have sufficient age and maturity and/or understand the consequences of the views that he has reached.

[33] My decision is to give [Charlie]'s views significant weight. However, as Priestley J set out in *Brown v Argyle*, the views of children, even if given significant weight, are not automatically determinative of the outcome of proceedings. Rather, I need to reach a decision considering all of the evidence, including the views of [Charlie], as to what is an outcome that is reflective of [Charlie]'s welfare and best interests.

Bill of Rights Consideration

[34] Section 11 of the New Zealand Bill of Rights Act 1990 states "everyone has the right to refuse to undergo any medical treatment". No doubt, in recognition of this, vaccination in New Zealand has not been made mandatory by the New Zealand Government. Mr [Steine] and his wife are entitled to decline the vaccination, a right enshrined in s 11 of the NZBOR. Although this choice restricts their movement, freedoms and activities, it is simply reflective of the fact that there are consequences for the exercise of rights. [Charlie] similarly has a right enshrined in s 11 of the NZBOR to refuse the vaccination.

[35] The Ministry of Health's "COVID-19 Vaccine Informed Consent for Young People aged 12 to 15 Years" policy statement states:[18]

> While children aged 12 and above have the right to give their own consent, we recommend young people discuss vaccination with their parents, whānau or a trusted support person.
>
> A health professional will also discuss the vaccine with them before they get vaccinated and answer any questions they have. If they have a good understanding, they can say yes or no to getting the vaccine. If they would prefer, a parent or caregiver can provide consent instead.

[36] I suggest that that policy document is reflective of s 11 of the NZBOR and of the *Gillick* principles. On the face of it, therefore, [Charlie] has an absolute right under s 11 of the NZBOR to refuse the vaccination, provided that the Court determines that he is competent to have reached that view, and that such a view accords with his welfare and best interests.

[37] However, because of the transmissibility and the risks associated with COVID-19 there are some fetters on the rights under s 11 of the NZBOR. Those tensions have been recently considered by the High Court, its decision in the *Four Aviation Security Service Employees v Minister of Covid-19 Response et al* case.[19] In that case four employees of the Aviation Security Service sought judicial review, unsuccessfully challenging an order made by the Minister for COVID-19 response requiring Aviation Security workers who interact with arriving or transiting international travellers to be fully vaccinated. The applicants did not want to be vaccinated and were dismissed from their employment as a consequence.

[38] From that case a number of principles can be distilled:

(a) Where a fundamental right in the Bill of Rights Act is sought to be limited, the Courts have an important role to ensure that the rule of law is observed.[20]

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18 *Ministry of Health, COVID-19 Vaccine Informed Consent for Young People aged 12 to 15 years* policy statement (31 August 2021).

19 *Four Aviation Security Service Employees v Minister of Covid-19 Response, Associate Minister of Health, and Attorney General* [2021] NZHC 3012, Cooke J.

20 At [23] and [24].

(b) An acceptance by the High Court that the Pfizer vaccine has been approved by Medsafe and used in New Zealand for therapeutic, not experimental, purposes.[21]

(c) An acceptance by the High Court that the Pfizer vaccination is likely to contribute to reducing the risk of transmission of the Delta variant[22] and is also likely to materially contribute to minimising the risk of outbreak or spread.[23] The Court stated:

> "…the existence and spread of COVID-19 within the New Zealand community would have profoundly adverse health implications for the country as a whole, profound adverse impacts for those who are killed or are made severely ill from it, and profound adverse effects from a social or economic perspective."[24]

(d) The High Court found that "…the vaccine is safe and effective, is significantly beneficial in preventing symptomatic infection of COVID-19 including the Delta variant, and that it significantly reduces serious illness, hospitalisation and death."[25]

[39] The rights under the New Zealand Bill of Rights Act 1990 can pursuant to s 5 of the NZBOR be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The relevance of that issue fell for consideration in the Aviation Security case due to the narrow issue of whether the measure requiring Aviation Security workers who interact with international travellers to be vaccinated is demonstrably justified in terms of s 5.[26]

[40] Justice Cooke accepted that the mandatory vaccination of border workers who had contact with potentially infected people travelling to New Zealand from overseas is a legitimate measure to reduce the risk of an outbreak or spread of the virus, and therefore the restrictions are a demonstrably justified measure.[27]

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21 At [34].
22 At [67].
23 At [69].
24 At [99].
25 At [143].
26 At [83].
27 At [112].

[41] The High Court however noted that at that time the issue of the transmissibility of the Delta variant and the efficacy of the vaccine was unknown. Justice Cooke noted:

> Whether the challenged measure would remain demonstrably justified on the basis that it contributes to addressing the spread of the virus in circumstances when the virus is endemic in at least parts of New Zealand is an open question.[28]

[42] Since the hearing before me New Zealand has achieved over a 90 per cent vaccination rate, and the rates of the spread of the Delta variant are low. What is of course looming on the horizon is the Omicron variant which appears to be more transmissible, although to have less serious consequences[29]. As I understand the current position in most countries (except Australia) the rates of serious illness have declined with Omicron and whilst the hospitalisation rates are increasing, as are in some countries the death rate, that is more reflective of the sheer volume of numbers infected with Omicron rather than the increased morbidity of that particular variant. What is clear is that vaccination remains the best defence against COVID-19.

[43] It also appears to be accepted that the efficacy of the Pfizer vaccine wanes over time hence the direction by the Government over the Christmas period to shorten the time for a booster shot from six months to four months.

[44] What is clear from the Aviation Security decision therefore is that for those in employment situations where there is a high risk of infection arising out of ongoing interaction with overseas travellers, restrictions through mandatory vaccination are demonstrably justified so as to prevent the wider spread of COVID-19 within Aotearoa. But what the High Court emphatically recognises is that there is a fundamental right to refuse medical treatment under the Bill of Rights Act, and that that right can only be curtailed by law if demonstrably justified.[30]

[45] It is significant that the Government has not made vaccination mandatory for all citizens. It remains, as enshrined in the Bill of Rights Act, an issue of choice,

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28 At [128].

29 Although I accept the research data on that issue is evolving.

30 See also *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] 2 NZLR 795 where the Court of Appeal recognised a right of freedom of expression could be curtailed only if there was a justified limitation on that right.

although in exercising that choice there are consequent restrictions on the type of activities that non-vaccinated can participate in. [Charlie] is well aware of those restrictions, such as not being able to go to cafés, no longer attending [the extracurricular group activity], and not going on holiday with his mother. If [Charlie] were an adult, he could freely choose to not have the vaccination. He has the same rights as a young person, but his ability to consent or waive those rights, as opposed to his parents and/or guardians making the decisions for him, depends upon him being *Gillick* competent and/or the Court determining that he has sufficient age and maturity such that his views should be given significant weight. Overarching those considerations is the need to consider the welfare and best interests of [Charlie].

[46] For the reasons set out above, I have determined that [Charlie]'s views should be afforded significant weight. Given that determination, I need to consider whether there is a justification to limit those rights. The only justification can be on public interest/ welfare considerations. The High Court has accepted that there are public health/ welfare benefits from vaccination.[31] But that is not the answer in and of itself; for as the High Court accepted in the Aviation Security case, the restriction on the right to refuse medical treatment can only be curtailed if it was demonstrably justified. In that case the "no vaccination; no job" mandate was only accepted as being a legitimate curtailed of that right because of the nature of that employment, the exposure to travellers arriving from overseas, and the consequent axiomatic risks of transmission to and within the wider New Zealand community.

[47] The New Zealand Government has clearly decided that only those in occupations who have high probability to the potential for exposure are to be subject to the "no vaccination: no job" mandate. The Government has not, for instance, decided that all school children must be vaccinated. There is no evidence of a similar correlation of risk such as that which existed in the *Aviation Security* decision, and in [Charlie]'s day-to-day life. I have no evidence before me to justify a conclusion that [Charlie]'s rights should be curtailed pursuant to s 5 of the NZBOR.

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[31] At [22] above.

[48] I am also not satisfied that it is in [Charlie]'s best interests and welfare to require him to have the vaccination. A number of cases have made it clear that in relation to younger children, where vaccination is recommended by the Ministry of Health Guidelines (such as for Polio, Rubella and Measles) that the Courts will require young children to be vaccinated.[32] But [Charlie] is of an age where his views need to be given weight, and this case can therefore be distinguished from those cases which consider a dispute between guardians in relation to the vaccination of much younger children.

[49] I note that Ms Brown did raise the potential for [Charlie], if he were to obtain COVID-19, to infect elderly relatives and/or a sibling who is said to have particular health issues. However, as Ms Brown conceded there is no evidence before the Court in relation to those familial health issues and I do not take them into account. However, those concerns can be met, as already occurred by agreement, through [Charlie] having a RAT test before transitioning to his mother's household.

Conclusion

[50] I determine that [Charlie] should not be compelled to have a COVID-19 vaccination against his wishes. I have reached that view on the basis that I have held [Charlie] as being *Gillick* competent. He is able to refuse, pursuant to the Ministry of Health's own guidelines for young people aged 12 to 15 and giving effect to his views is reflective of his s 11 NZBOR rights.

[51] I am also aware that if I were to order him to be vaccinated, [Charlie] has made it clear he would tell the health professional giving him the vaccination that he refused to have the vaccination. I cannot accept that any health professional would in those circumstances hold [Charlie] down and force him to have a vaccination. Ms Brown's response was that it is an order of the Court and that the health professional would have to comply. If they do not the only remedy would be to hold the health professional in contempt of Court. In my view that would be a disproportionate response by the Courts to a situation where the health professional vaccinating

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[32] See for example *Stone v Reader* [2016] NZFC 6130; *Sudworth v Lovell* [2019] NZFC 2584; *Bullock v Elliston* [2019] NZFC 10254.

[Charlie] would simply be applying the Ministry of Health guidelines which state that a child of [Charlie]'s age is able to either consent **or refuse** to have a vaccination (emphasis mine).

[52] For the reasons set out above, this is quite a different factual situation to the *District Health Board v Dee* decision as the young person in that case (John) had a known life-threatening illness. It would appear from the statistical information freely available that the risks of COVID-19 for [Charlie] being life-threatening are low.

[53] Accordingly, Ms [Long]'s application for an order pursuant to s 46R of COCA that [Charlie] is to receive the COVID-19 vaccination is dismissed.

Interim Parenting Order Application

[54] As a consequence, the subsequent application for an interim parenting order providing for [Charlie] to be in Ms [Long]'s care until he has received his second dose of the vaccination is also dismissed.

[55] I agree with Ms Kershaw's submissions that such an application was in any event untenable, particularly in circumstances where there is no evidence that Mr [Steine] has flouted lockdown rules or has otherwise not complied with public health directions and measures to keep him, his household and the community safe. There is no suggestion that Mr [Steine] has ever been anything but a caring, loving and protective father to [Charlie], and there are no other safety allegations. Rather, the application is centred in ensuring [Charlie] is only exposed to Ms [Long]'s views on vaccination, and for the reasons set out below in relation to the other s 46R orders sought, I do not accept that [Long] being exposed to only a sole narrative is a principled approach.

Other s 46R Orders

[56] Ms [Long] also seeks orders pursuant to s 46R that the parties are not to discuss anti-vaccination views around [Charlie] and that any information provided to [Charlie]

about the vaccinations is to be medically approved information presented in a child-friendly form.

[57] I come back to the opening comments of Cooke J in the *Aviation Security* decision where his Honour stated at [23]:

> In recent times there has been a very strong emphasis on vaccination, and the benefits of as many New Zealanders as possible being vaccinated for the overall public good. It is a matter of observation that in public discourse those who are not in favour of vaccination can be subject to criticism, and at times public condemnation. Within that environment the Court plays an important role…the function of the Court is to ensure that the rights of minority groups are properly protected when measures such as those in issue are implemented, including measures that appear to have widespread public support. The Court must ensure that the rule of law is observed.

[58] The remedies sought by Ms [Long] contravene both [Charlie]'s rights under UNCROC,[33] and [Charlie]'s and Mr [Steine]'s rights pursuant to s 13 of the NZBOR which states that:

> Everyone has the right to freedom of thought, conscious, religion, and belief, including a right to adopt and to hold opinions without interference.

[59] What Ms [Long] is concerned about is that in Mr [Steine]'s household [Charlie] is being exposed to views which could be characterised as anti-vax. Some of those views are accurate. For example, the efficacy of the Pfizer vaccine has been shown to wane over time, hence requiring booster shots. Other aspects of the information imparted to [Charlie] by Mr [Steine] are plainly wrong. For example, the second reason [Charlie] gave to me as to why he did not want the COVID-19 vaccination is that his father had told him no one knows what is in the vaccine. It is well-known and documented what components make up the vaccine, and that it is safe.[34]

[60] The fifth reasons given by [Charlie] is that Mr [Steine] has told [Charlie] that the vaccine is "foreign stuff" and the Bible says not to have "foreign stuff" in one's body. There are some Christians within Aotearoa who oppose the vaccine for religious reasons. They are entitled to do so pursuant to s 13.

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33 See paragraph [61] below.

34 As accepted by the High Court in the *Aviation Security* decision at [143].

[61] What in effect Ms [Long] is asking the Court to do is to ensure that [Charlie] is only exposed to one discourse and narrative in relation to the vaccine, being a narrative which is that held by the majority and the only narrative universally promulgated by the mainstream media and health professionals commenting through the media. In short, rather than letting [Charlie] be exposed to, as Mr Kay sought to do, albeit clumsily, a range of views, Ms [Long] is seeking that [Charlie] be exposed to a singular narrative. That is the type of response that could be expected in a totalitarian or communist regime, but not in a free and democratic society. It is not the function of the Courts to make orders, the effect of which is to expose children and young people to only the mainstream narrative. Rather, as Cooke J opined, the role of the Courts is to ensure that the rule of law is observed.[35]

[62] [Charlie] should be free to be exposed, in relation to any issue, to a plurality of views, so that he can eventually make his own decisions as to what values and beliefs he chooses to live by. To restrict [Charlie]'s parents and guardians to discussing only anti-vaccination views is a direct trampling of [Charlie]'s rights under s 13 of NZBOR, and his rights pursuant to Articles 2.1, 12.1 and 13.1 of UNCROC. [Charlie] has been exposed to a range of views already in his father's house, his mother's house and in the articles forwarded to [Charlie] by Mr Kay. He has weighed and considered those views and had reached his own conclusion that he does not want to be vaccinated. The fact that [Charlie]'s views are contrary to the mainstream societal and scientific views is not a reason for the Court to intervene and to make orders pursuant to s 46R seeking to indoctrinate [Charlie] with the mainstream views and/or the views of his mother.

[63] [63] I would have thought both of [Charlie]'s parents should be encouraging [Charlie], particularly with his enquiring and scientific mind, to consider a full range of issues and facts and to encourage [Charlie] to make his own decisions. After all that is what parents do day in day out. Despite the best of intentions and the best of information being imparted to young adults, they at times make decisions of their own which horrify their parents and guardians. It is not for the Court to sanction the indoctrination of children of one parent's worldview and/or a majority worldview to

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35 *Aviation Security* at [23].

the exclusion of other points of view. Ms [Long]'s applications for subsequent s 46R orders are accordingly dismissed.

The Result

[64] Accordingly, all of Ms [Long]'s applications are dismissed.

[65] Mr Kay's appointment as lawyer for [Charlie] is terminated with thanks of the Court, although that is to not take effect until 14 days so as to enable Mr Kay to report back to [Charlie] about this decision and the reasons why the decision has been reached.

[66] Finally, given that Mr [Steine] has been entirely successful, if he seeks costs against Ms [Long] then the following directions are to apply:

(a) Mr [Steine] is to file his costs submissions within 21 days of the day of this judgment.

(b) Ms [Long] is to then have a further 21 days to file a response.

(c) The matter should then be referred to me for a chamber's decision in relation to the issue of *inter partes* costs.

S J Coyle
Family Court Judge