FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

Unpacking Unacceptable Risk

Queensland Family Law Practitioners Conference

14 June 2024

Austin J

The three cases to know

- *M v M* (1988) 166 CLR 69
- *Isles & Nelissen* (2022) FLC 94-092
- *Eastley & Eastley* (2022) FLC 94-094

Three principal features of *M v M* (1988) 166 CLR 69

1. The difference between historical factual findings and prognostications of risk
2. Factual findings should not be made unless the judge is impelled to do so
3. Risk is tolerable, but “unacceptable” risk is not

Three principal features of *Isles & Nelissen* (2022) FLC 94-092

1. Historical findings are made on the civil standard of proof, but prognostications of risk are not
2. The tendency rule under the Evidence Act has no work to do
3. Concentrate on the current mandatory legislative provisions rather than the High Court guideline judgment of 35 years ago

1. Historical findings are made on the civil standard of proof, but prognostications of risk are not

[7] …courts exercising jurisdiction under Pt VII of the *Family Law Act 1975* (Cth) must protect children from credible risks of harm due to sexual abuse. Such risks…are capable of classification…possibilities, probabilities, or certainties. Once it is accepted courts should (and do) react to dangers in the form of risks of harm which may merely be possibilities, it is an oxymoron to expect such possibilities to then be forensically proven on the balance of probabilities according to the civil standard of proof. By definition, possibilities are not, and could never be, probabilities. Risks of harm are not susceptible of scientific demonstration or proof (*CDJ v VAJ* (1998) 197 CLR 172 at [151]), but are instead postulated from known historical facts and present circumstances.

…

[53] …while conjecture about the future is based on historical facts and circumstances, it is only the relevant historical facts which need be proven on the balance of probabilities.

Do not conflate those two separate enquiries

[83] Though both are evidence-based the primary judge correctly approached the two separate questions without conflation: on the one hand, whether or not allegations of abuse are proven on the balance of probabilities; and on the other, whether or not an unacceptable risk of harm is demonstrated, regardless of the finding made in respect of the frank allegations of abuse.

Both enquiries are factually based and neither involves an exercise of discretion

[85] …a discretionary decision is one in which no single factor or combination of considerations will necessarily dictate the result (*Norbis v Norbis* (1986) 161 CLR 513 at 518). The finding about whether an unacceptable risk exists, based on known facts and circumstances, is either open on the evidence or it is not. It is only the overall judgment, expressed in the form of orders made in the children's best interests, which entails an exercise of discretion. That discretionary judgment is influenced by the various material considerations enumerated within s 60CC of the Act, of which the evidence-based finding made about the existence of any unacceptable risk of harm is but one.

2. The tendency rule under the Evidence Act has no work to do

- Most of Chapter 3 of the *Evidence Act 1995* (Cth) does not apply in child-related proceedings unless the judge makes a contrary order (at [88]-[92])
- If not applied, all evidence is admissible, so long as it meets the basal requirements of relevance and some marginal probative value (at [88])
- If applied, the tendency rule governs the admissibility of evidence adduced to prove material facts (at [102]-[103]), but it does not apply to the ancillary question of risk (at [104]-[110])

3. Concentrate on the current mandatory legislative provisions rather than the High Court guideline judgment of 35 years ago

- Federal courts are creatures of statute and their jurisdiction and powers are governed by statute (at [57])
- Relevantly, now apply s 60CC(2)(a) – which concerns the need to promote the child's **safety** (including safety from being subjected or exposed to family violence, abuse, neglect or other harm) together with the safety of each person who cares for the child (at [59])

Three principal features of *Eastley & Eastley* (2022) FLC 94-094

1. The trial judge is not obliged to make positive/negative findings
2. The trial judge is not obliged to quantify any established risk of harm beyond whether or not the risk is “unacceptable”
3. The assessment of risk is established (or not) by an evaluation of the whole of the evidence. Prognostications of risk are premised upon the comprehensive synthesis of facts and circumstances

1. Trial judges are not obliged to make positive/negative findings

[18] … the assertion the primary judge was obliged by law to settle certain nominated factual controversies is rejected. …the primary judge was not required by law to definitively resolve even the pivotal factual disputes when assessing the risk of harm within the wider context of the discretionary determination of the particular orders which would best promote the children's interests.

…

[31] There could be no error in abstaining from making a definitive factual finding when the primary judge explained why he was not convinced on the balance of probabilities the incident occurred as the maternal grandmother alleged. However, the primary judge's enduring suspicion the incident might have occurred as the maternal grandmother alleged was still legitimately available to take into account as part of the matrix of evidence upon which the finding of "unacceptable risk" was premised. It is well accepted that an accumulation of factors, not individually proven on the balance of probabilities, can still be enough to demonstrate the existence of an unacceptable risk of harm to children.

2. Trial judges are not obliged to quantify any established risk of harm beyond whether or not the risk is “unacceptable”

[26] …The possibility of the children’s sexual abuse by the father was plainly evident from the reasons for judgment. The primary judge did not need to “evaluate” or rate the possibility by any numerical standard, but rather only determine whether or not the risk was “unacceptable”…[t]he reasons explained how the finding of unacceptable risk flowed from an accumulation of facts and circumstances…”

…

[39] …As was open once the totality of the evidence was assimilated, the primary judge found the risk of harm posed by the father to the children was unacceptable. His Honour need not have done more, as the father now asserts he should have, by making more intricate findings about the “nature and strength” of the possibility. The assessment of whether or not a risk if “unacceptable” is a judgmental step which does not easily admit of elaboration (*Athens v Randwick City Council* [2002] NSWCA 83 at [16]).

3. The assessment of risk is established (or not) by an evaluation of the whole of the evidence. Prognostications of risk are premised upon the comprehensive synthesis of facts and circumstances

[33] …the law did not require the primary judge to assess the potency of the risk of harm posed to the children by reference to the evidence concerning individual events in isolation from the remainder of the evidence. On the contrary, the primary judge was required to assess the level of risk posed to the children on the whole of the evidence, since the strength of the evidence lies in its cumulative effect, much like how the strength of rope derives from the combination of its individually weaker strands…