

***M v M* (1988) 166 CLR 69; [1988] HCA 68 (8 December 1988) – High Court of Australia**

‘Allegations of sexual abuse’ – ‘Custody order’ – ‘Risk’ – ‘Test to be applied’ – ‘Unacceptable risk’

Proceedings: Appeal against custody order.

Facts: The trial judge made an order giving the wife guardianship and custody of the child. The wife alleged that the father had sexually abused the child and that the child’s welfare would be put at risk in allowing the father custody. The trial judge was not satisfied that the father had abused the child. However, His Honour considered that there was a possibility that the child had been sexually abused by the father. Accordingly, in the interests of the child, His Honour held that he should eliminate the risk of such abuse by denying access to the father. The father appealed this decision.

Issue/s: What is the correct approach in dealing with sexual abuse allegations and unacceptable risk?

Reasoning/Decision: The appeal was dismissed. The approach to be taken in these matters is not one of competing rights of the parents or ever purely a finding for or against either based on the evidence in support of the allegations. The approach is to determine on all of the evidence what is in the best interests of the child.

The Court concluded and held at [25]:

‘Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm", "an element of risk" or "an appreciable risk", "a real possibility", a "real risk", and an "unacceptable risk". This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse’.

With regards to the consideration of risk, it is in “achiev[ing] a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access”. A finding of sexual abuse need not be made to make a finding of unacceptable risk.