Family Court of Australia

MAINS & REDDEN	***[2011] FamCAFC 184***

FAMILY LAW – APPEAL – Appeal against decision of a Federal Magistrate to make orders for the immunisation of the child of the parties – Not established that the Federal Magistrate erred in findings of fact with respect to evidence of the mother or the expert medical evidence as to the potential risks to the child of immunisation – Not established that, on the evidence before him, it was not open to the Federal Magistrate to find as he did with respect to the magnitude of the risk of the child suffering a significant reaction to immunisation – Not established that the Federal Magistrate erred in the weight given to the evidence.

FAMILY LAW – APPEAL – Point of law – Not established that the Federal Magistrate erred in not applying the Medical Procedure Application Rules.

FAMILY LAW – APPEAL – Further evidence – Where the Federal Magistrate's finding of an "extremely remote" risk to the child from immunisation was, if not pivotal to his ultimate conclusion, material to it – Whether the further expert medical evidence, if accepted, would render erroneous a finding that the risk was extremely remote – Further evidence admitted and appeal allowed.

Family Law Act 1975 (Cth) s 93A
Family Law Rules 2004 (Cth) r 4.08; 4.09

Banque Commerciale SA En Liquidation v Akhil Holdings Pty Limited (1990) 169 CLR 279
CDJ v VAJ (1998) FLC 92-828
Coulton v Holcombe (1986) 162 CLR 1
De Winter v De Winter (1979) FLC 90-605
Gronow v Gronow (1979) 144 CLR 513
Re Marion (No 2) (1994) FLC 92-448
Metwally (No 2) v University of Wollongong (1985) 60 ALR 68
Re Alex: Hormonal Treatment for Gender Identity Dysphoria (2004) FLC 93-175
Re Inaya (Special Medical Procedure) [2007] FamCA 658
Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293 (*Marion's case*)
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Appellant:	Ms Mains

Respondent:	Mr Redden				
File Number:	PAC	4550		of	2009
Appeal Number:	EAA	11		of	2011
Date Delivered:	9 September 2011				
Place Delivered:	Sydney				
Place Heard:	Sydney				
Judgment of:	Coleman J				
Hearing date:	12 August 2011				
Lower court jurisdiction:	Federal Magistrates Court				
lower court judgment date:	9 December 2010				
LOWER COURT MNC:	[2010] FMCAfam 1338				

REPRESENTATION

COUNSEL FOR THE Appellant:	Mr Hogg
SOLICITOR FOR THE Appellant:	Mackenzie & Vardanega
COUNSEL FOR THE RESPONDENT:	Ms Barnett
SOLICITOR FOR THE RESPONDENT:	G & D Lawyers

Orders

(1) That the application to adduce further evidence in the appeal filed on 8 August 2011 be allowed.

(2) That the Notice of Appeal filed on 10 January 2011 against the orders F M Dunkley at Parramatta of 9 December 2010 be allowed and Order 10 be set aside.

(3) That the matter be remitted for re-hearing before a Federal Magistrate other than FM Dunkley.

(4) That an Independent Children's Lawyer be appointed for the re-hearing before the Federal Magistrate.

(5) That the Court grants to the Appellant Mother a costs certificate pursuant to the provisions of s.9 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the Appellant Mother in respect of the costs incurred by the Appellant Mother in relation to the appeal.

(6) That the Court grants to the Respondent Father a costs certificate pursuant to the provisions of s.6 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the Respondent Father in respect of the costs incurred by the Respondent Father in relation to the appeal.

(7) That the Court grants to each party a costs certificate pursuant to the provisions of s.8 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to each party in respect of such part as the Attorney-General considers appropriate of any costs incurred by each party in relation to the new trial granted by these orders.

IT IS NOTED that publication of this judgment under the pseudonym ***Mains & Redden*** is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE Family Court of Australia at SYDNEY

Appeal Number: EAA 11 of 2011

File Number: PAC 4550 of 2009

Ms Mains
Appellant

And

Mr Redden
Respondent

REASONS FOR JUDGMENT

Introduction

1. By Notice of Appeal filed 10 January 2011 Ms Mains ("the appellant") appealed against an order made by Federal Magistrate Dunkley on 9 December 2010 which provided that the child of the former relationship of herself and Mr Redden ("the respondent"), the child, who was born in May 2005:

   > 10. … shall be immunised for Measles, Mumps, Rubella, Diphtheria, Tetanus, Pertussis, Varicella and Papaloma [sic] Virus, with the appropriate number of doses recommended by the Australia Government Department of Health and Aging.

2. In lieu of that order the appellant sought an order that she and the respondent be restrained from permitting the child "to be given any immunisation, unless with the written consent of both parents".

3. The respondent resisted the appellant's appeal and sought to maintain the orders of the learned Federal Magistrate.

4. On 8 April 2011 the appellant filed an application seeking leave to adduce further evidence in the appeal. The respondent resisted that application, but sought leave to rely upon further evidence in the event that the Court was minded to receive the further evidence advanced by the appellant.

5. By the conclusion of the hearing of the appeal it was common ground that a successful appeal would necessitate a re-hearing of the immunisation application.

Material facts

6. Some matters of background will assist an understanding of the Court's decision. These matters emerge from the reasons for judgment of the learned Federal Magistrate and are not controversial for present purposes.

7. As noted earlier, the parties' child the child was born in May 2005. She is accordingly 6 years of age.

8. The orders of the learned Federal Magistrate, which have not been challenged, preserved the statutory presumption of equal shared parental responsibility, and provided that the child live with the appellant, but spend extensive defined time with the respondent.

9. The child has not been immunised. The respondent sought orders from the Court to facilitate the child being immunised. The appellant opposed the child being immunised.

10. It was conceded before the learned Federal Magistrate, and before this Court, that immunisation of the child was an issue relevant to parental responsibility, and that the Court had jurisdiction to entertain the respondent's application. It was also conceded that the Court had power to make orders which provided that the child be immunised.

11. The appellant is currently aged 34. The respondent will soon be aged 34.

12. The parties cohabited in a de facto relationship from June 2004 to late 2004.

13. Parenting orders were made in the Federal Magistrates Court by consent on 7 April 2006, including an order that "neither the father or any other person shall have the child immunised during any of the fathers [sic] contact periods".

14. The respondent remarried in March 2008. In February 2010, a child was born of the relationship between the respondent and his wife.

15. Before the learned Federal Magistrate, each party adduced evidence, lay and expert, with respect to the immunisation issue.

16. Under the heading "Is [the child] to be immunised?" the learned Federal Magistrate extensively considered the evidence before him in relation to the issue, ultimately concluding that it was in the child's best interest that the child undergo a regime of immunisation in the terms of the order which gives rise to the present appeal.

The appeal to this court

17. Although represented before the learned Federal Magistrate, the appellant was unrepresented at the time she filed her Appeal Books and her application for leave to adduce further evidence in the appeal. When the appeal was heard, the appellant was represented. The respondent has been represented at all material

times.

18. At the commencement of the hearing of the appeal, Counsel for the appellant presented a document headed "Summary of appeal points". The five paragraphs of that document articulated the grounds of appeal which Counsel for the appellant sought to agitate before this Court.

19. The "Summary of appeal points" provided:

> A. The Federal Magistrates [sic] misunderstood and or failed to give appropriate weight to the mother's and Child's medical history as it relates to the implications and or potential consequences of the child being immunised.
>
> B. That the Federal Magistrate misunderstood the nature of the evidence of Dr [W], Dr [D] and Dr [S] and erred by relying upon [sic] as being expert in nature.
>
> C. That the Federal magistrate incorrectly exercised his discretion in ordering the immunisation of the child.
>
> D. That the Federal Magistrate made Orders which were inconsistent with the decision.
>
> E. That the Federal Magistrate failed to conceive that the immunisation of a child falls into the class of cases in which rule 4.08 & 4.09 of the Family Law Rules ought to apply or in the alternative forms a class of determination that a Federal Magistrate must exercise with the same care and diligence as expressly required under rule 4.09 in that all the completing evidence must be weight individual [sic] and in accordance with the best interest of the child. [Summary of appeal points, pars A to E].

20. Unlike much of the material which the appellant had prepared whilst unrepresented, the "Summary of appeal points" engaged with what are clearly the real and substantial issues requiring determination in this appeal. The Court concluded that, provided that any prejudice to the respondent could be addressed, leave to amend the grounds of appeal in the terms articulated in the "Summary of appeal points" should be granted.

21. Sensibly and fairly, Counsel for the respondent did not oppose leave to amend the appellant's grounds being granted, provided, as the Court ordered, that the opportunity to make further written submissions on behalf of the respondent was preserved. On 19 August 2011 further submissions on behalf of the respondent were filed pursuant to leave reserved on 12 August 2011.

22. Sensibly in the Court's view, Counsel for the appellant informed the Court that,

whilst the appellant persisted with her application for leave to adduce further evidence in the appeal, the affidavit of Dr S sworn 9 August 2011, which comprised approximately 320 pages of the Supplementary Appeal Book was not pressed.

23. Although a literal reading of paragraph B of the "Summary of appeal points" suggests that it involved a challenge to the learned Federal Magistrate's rejection of the evidence of Dr S, who was a witness in the appellant's case in the proceedings before him, no such challenge materialised. The learned Federal Magistrate's conclusions with respect to Dr S's evidence were abundantly open to him. No challenge to any of his Honour's findings or conclusions with respect to Dr S's evidence could have succeeded having regard to the basis of the learned Federal Magistrate's reasons for judgment in relation to them and the evidence which was before him. The further evidence of Dr S could not have rendered erroneous the decision of the learned Federal Magistrate. Counsel for the appellant's election to abandon Dr S's further evidence was sensible and correct.

Summary of appeal points

Ground A:

24. Ground A of the "Summary of appeal points" provided:

> A. The Federal Magistrates misunderstood and or failed to give appropriate weight to the mother's and Child's medical history as it relates to the implications and or potential consequences of the child being immunised. [Summary of Appeal Points, paragraph A].

25. As is apparent from its terms, this ground in part raised a "weight" challenge to the decision of the learned Federal Magistrate. The obstacles to the success of such challenges are substantial, and well recognised (see particularly Stephen J in *Gronow v Gronow* (1979) 144 CLR 513). The term "misunderstood" implies a challenge to a finding of fact.

26. As articulated in the course of his oral submissions however, Counsel for the appellant clarified the thrust of the challenge to be somewhat different. The discretion of the learned Federal Magistrate was asserted to have been vitiated by his Honour's reliance upon an impermissibly adverse material finding of fact with respect to the appellant. The asserted erroneous finding was that his Honour was "not certain" that the appellant would "seek appropriate medical treatment and allow a Tetanus injection" if, as a result of the child stepping "on a dirty or rusty object… that were to cut her", such a course was indicated.

27. In support of this submission, Counsel for the appellant relied upon a number of findings of the learned Federal Magistrate which were submitted to support

this challenge. The first such reference was to paragraph 95 of his Honour's reasons for judgment. Having referred, critically, to the evidence of Dr S, the learned Federal Magistrate there recorded:

> 95. That the mother called her as part of her case gives rise to a significant concern, in that it indicates the propensity to go to any length to support her view that immunisation is not in [the child]'s best interest. In Dr [D] she had a perfectly compelling, reasonable and experienced medical expert.

28. It was submitted by Counsel for the mother that, whilst no challenge to the learned Federal Magistrate's findings or conclusions with respect to the evidence of Dr S was maintained before this Court, his Honour had unfairly criticised the appellant by visiting upon her the adverse view he had formed of Dr S's evidence. Although Dr S's evidence had been criticised by the learned Federal Magistrate, as was open to him, it was submitted to have been unfair to criticise the wife for having called her as a witness in her case, particularly having regard to Dr S's qualifications.

29. Counsel for the appellant disputed that it had been open to the learned Federal Magistrate to find that the appellant was "clearly anti-immunisation". His Honour's finding in that regard was expressed in the following terms:

> 100. In viewing the Human Papillomavirus vaccination in that way, Ms [Mains] is clearly indicating that she is unable to make that decision. That is undoubtedly because she's clearly anti-immunisation. To present her otherwise is contrary to all the evidence.

30. Reliance was also placed upon paragraph 108 in which his Honour recorded:

> 108. Dr [D] agreed with Dr [W], that it does not follow that if a mother had problems with immunisation, that that would automatically flow through to [the child].

It was submitted that such finding was inconsistent with the finding which gives rise to this challenge. With respect to Counsel for the appellant, the finding made by the learned Federal Magistrate in this paragraph was not adverse to the appellant, as its terms confirm. The Court cannot accept that it was inconsistent with his Honour's finding in relation to "certainty" which is at the core of this challenge. In any event, the finding appears to relate more to the matter raised by the appellant in an affidavit (para 22) to which the Court will shortly refer.

31. In further support of this challenge, Counsel for the appellant relied upon the mother's affidavit evidence-in-chief in which she said:

> 20. … I have never said "Not vaccinating [the child] has been ingrained

> into me". I simply told [the father's new wife] that it was my decision and that I had researched the area thoroughly and made the decision in [the child]'s best interests. I have never said that the Australian government is corrupt. I have never said that vaccinations cause Mad Cow's Disease. I believe vaccinations on the whole are beneficial for our society however, in the circumstances of [the child]'s health I have overwhelming reasons not to vaccinate. I refer to the expert opinion of Dr. [S] and to her Affidavit sworn herein.
>
> …
>
> 22. I strongly oppose [the child] being immunised. I am extremely concerned and I have grave fears that [the child] will become sick or disabled if she is immunised. This is based on reactions [the child] has already had to potential trigger factors and also reactions I had as a child to immunisation.

32. The proceedings before the learned Federal Magistrate were overarched by the best interests of the child. The attitude of the appellant to immunisation was relevant to determining the child's best interests, both as a matter of law, and of common sense. It was submitted that the appellant's evidence in that regard, which was asserted to have been unchallenged, was inconsistent with a conclusion that the appellant was "anti-immunisation". The appellant clearly, as she articulated in her affidavit evidence-in-chief, opposed immunisation of the child.

33. Counsel for the appellant also relied upon a passage in the report of Dr D in which he said:

> Clearly, [the mother] is not a "crank" who rejects all medical advice and information. On the contrary, she is well read on the risks and benefits associated with vaccination, and has sought medical advice and implemented prescribed treatment whenever necessary for [the child]. She is providing a healthy and loving environment for her daughter, and [the child] is a healthy, happy, and normal developing child as a result of this effort.

34. Dr D is a general medical practitioner with 27 years experience in clinical practice who, whilst not a paediatrician, had seen and documented in excess of "100 cases of adverse reactions to vaccinations in the patients who have sought my care". Dr D was a witness in the appellant's case before the learned Federal Magistrate. The Court has not been directed to any finding of fact made by the learned Federal Magistrate which was other than in accordance with the evidence of Dr D to which the Court has referred.

35. It was also submitted by Counsel for the appellant that the unchallenged

evidence of Dr Y, upon whom the appellant also relied before the learned Federal Magistrate, was inconsistent with his Honour's findings. That evidence revealed:

> I have known [the child] and [the mother] since [the child] was born. Over this time I and the other GPs in the practice have found [the mother] to be a caring and consciencoius [sic] mother who brings [the child] for appropriate and timely medical care.
>
> [The mother] is concerned not only for [the child]'s physical care but also for her mental well being and emotional health. To this end she has had numerous consultations over the years about these domains of [the child]'s health, and is currently seeing a counsellor thru [N] community counselling about [the child]'s behaviour and the challenges to all coping with two households.
>
> [The mother] has discussed vaccination on various occasions with myself, has full knowledge of medical benefits and has extensively investigated the pros and cons of vaccination and decided personally not to vaccinate [the child].
>
> The doctors at The Practice may not agree with this decision but we respect [the mother]'s personal right to treat her daughter according to her own beliefs. We feel that it is our job to support [the mother] with her decision although do still from time to time ask her if she is still comfortable with this decision.

The Court has not been referred to any finding of fact of the learned Federal Magistrate which is at variance with Dr Y's evidence.

36. It was also submitted that the absence of any evidence before the learned Federal Magistrate that the appellant had neglected any aspect of the child's health militated against the finding made by the learned Federal Magistrate. The Court has not been referred to any finding made by the learned Federal Magistrate critical of the appellant's parenting of the child. Nor has the Court been referred to any finding that the appellant's opposition to immunisation was other than genuine. These findings involve no logical inconsistency. They involved unrelated topics.

37. The respondent's consent in 2006 to the non-immunisation order, to which reference has earlier been made, was also submitted to raise a significant impediment to the learned Federal Magistrate's finding. The respondent's consent to that order could only be construed as an acknowledgment of the appellant's capacity to care for the child, and an admission by the respondent, at least at that time, that not being immunised was in her best interests.

38. Counsel for the respondent effectively submitted that, whilst other findings of

fact may have been open to the learned Federal Magistrate, the appellant had not demonstrated that the finding made by his Honour was not reasonably open to him. Moreover, the respondent submitted that the findings of the learned Federal Magistrate were not pivotal to his decision and that, as such, even if they were shown to have been erroneous, they could not have vitiated the exercise of his discretion.

39. In her further written submissions, Counsel for the respondent submitted:

> 6. Given that it appears that the transcripts provide [sic] in the Appeal Books is incomplete I am unable to finalise my submissions on this point at this time. The recollection of my instructing solicitors is that there is evidence that the mother was clearly anti-vaccination. I would seek the indulgence of the court for further time in which to finalise the submissions for the Respondent Father. I understand that the other side does not oppose an extension of the timetable.

40. As the Court concludes that the evidence before the learned Federal Magistrate reasonably established that the appellant was "anti-immunisation", and that the finding which gives rise to this complaint was accordingly open to him, it is unnecessary to accede to Counsel for the respondent's request.

41. The appellant's case before the learned Federal Magistrate was that she opposed immunisation for the child the child. That is to say, she was anti, or against the child being immunised. Had she not been, this issue would not have required determination by the learned Federal Magistrate. In reality, the question is whether the learned Federal Magistrate's finding with respect to lack of certainty that the mother would do what she said she would with respect to Tetanus was reasonably open to him. If it was not, the issue is whether that finding was material to the exercise of his Honour's discretion. If it was, appellate intervention would be enlivened.

42. The terms in which the learned Federal Magistrate recorded the finding which gives rise to this challenge are significant. His Honour did not find that the mother would not do what she said she would in relation to Tetanus immunisation if that were advised. His Honour's finding was that he was not "certain" that she would. It is unnecessary for this Court to second guess exactly what was actually intended by the finding his Honour made. It is significant, however, that his Honour did not find that the appellant would not have the child immunised in the circumstances to which he referred. Nor did his Honour find that, if ordered to do so, the appellant would not comply with immunisation orders if the Court made them. If, as her counsel submitted, the learned Federal Magistrate was unfairly critical of the appellant for relying upon the evidence of Dr S, his finding of fact in relation to the relevant issue

was clearly not influenced by any adverse view he had formed in that regard.

43. Nothing to which this Court has been referred establishes that the learned Federal Magistrate's finding was not reasonably open to him. Moreover, as is clear, from reading his Honour's reasons for judgment, his ultimate decision was based upon other, and more significant factors in relation to the child's best interests.

44. This challenge is accordingly not made out.

Ground B

45. Ground B of the "Summary of appeal points" provided:

> B. That the Federal Magistrate misunderstood the nature of the evidence of Dr [W], Dr [D] and Dr [S] and erred by relying upon [sic] as being expert in nature. [Summary of appeal points, par B].

46. As is apparent from its terms, there is, even without needing to have any regard to the evidence of Dr Sc, an internal inconsistency in this challenge given that Dr W, a staff specialist in paediatrics at Westmead Hospital was a witness in the respondent's case, and supportive of immunisation being in the child's best interests whilst, as noted earlier, Dr D, the appellant's expert, supported the appellant's opposition to immunisation of the child.

47. Counsel for the appellant clarified this challenge to be that, having regard to the findings of fact made by him with respect to the competing expert opinion evidence of Drs W and D, it was not reasonably open to the learned Federal Magistrate to find, as he did, that the risk to the child of suffering a significant reaction to immunisation was "extremely remote".

48. It was submitted that so finding was, if not pivotal to the exercise of his Honour's discretion, at least material to it and that, his discretion having been based upon erroneous findings of fact, the learned Federal Magistrate's decision could not stand (see *De Winter v De Winter* (1979) FLC 90-605 at 78,092). Having regard to the learned Federal Magistrate's reasons for judgment, there is little doubt that the risk to the child represented by immunisation was material to the exercise of his discretion.

49. This challenge potentially requires consideration in two contexts. The first is by reference to the evidence before the learned Federal Magistrate. The second is by reference to the further evidence sought to be adduced by both parties. Just as it was open to the appellant to seek to adduce further evidence in order to impugn the decision of the learned Federal Magistrate, so was it open to the respondent to seek to adduce further evidence to buttress his decision. (see *CDJ v VAJ* (1998) FLC 92-828).

50. The finding of the learned Federal Magistrate which gives rise to this challenge

was that:

> 115. Having regard to each of the medical experts evidence, the risk to [the child] of suffering a significant reaction to immunisation is extremely remote.

51. The learned Federal Magistrate referred to the evidence of Dr D, who he found to have given "balanced and helpful evidence", and recorded that Dr D appeared to have accepted that the risk of catching Meningococcal C was "one in a million" and "not what most people would regard as an unacceptable risk".

52. His Honour also recorded:

> 103. Dr [D] made similar observations with respect to Measles, Mumps and Rubella, noting that the statistic indicated that there were two cases of reported Measles a month on the Far North Coast of New South Wales, and that basically Measles, Mumps and Rubella were under control. He gave evidence that Measles presents as the most difficult disease for females but that incidence of Measles is reported widely and vaccination can then be given successfully and effectively at that time. He said that the vast majority of cases of Measles come from overseas. He gave evidence that Diphtheria and Tetanus occurrences are virtually zero in Australia.
>
> 105. [Dr D] noted the risk of vaccination [for Whooping Cough or Patussis] for [the child] to be local inflammation at the site of the injection and perhaps a teary and upset child for a couple of days. In rare cases there can be a more severe reaction. He assessed that risk of that severe reaction to be "very very" rare and probably less than 1 in 100,000. He gave evidence that a risk of severe reaction to the Measles, Mumps and Rubella vaccination to again be about 1 in 100,000.
>
> 106. He gave evidence that there is a zero risk of any child in Australia contracting polio as it stands currently.
>
> 107. With respect to the Papillomavirus, what he said was that the immunisation is now given before girls are sexually active. Dr [D] said that there was no large scale population study as to the effectiveness of the vaccine. He conceded that the projections are that it would significantly reduce the incidence of cervical cancer in women who have multiple sexual partners, and who are infected with Papaloma virus [sic].

53. His Honour further recorded**:**

> 108. Dr [D] agreed with Dr [W], that it does not follow that if a mother had

problems with immunisation, that that would automatically flow through to [the child].

As suggested earlier, this finding appears to relate more to physical than to emotional "problems" in the light of the appellant's evidence to which reference has earlier been made (para 31).

54. Referring to the evidence of Dr W, his Honour said:

> 110. Dr [W's] recommended immunisation on the basis that there was no unacceptable risk to [the child]. He asserted that the immunisation, as recommended by the Department of Health and Aging, should be implemented. He noted:
>
> > *"the likelihood of becoming infected with specific vaccine preventable disease is difficult to quantify, as there are many factors that influence risk, including conditions of living, environment, population mixing patterns, infection control practices, school infections, international travel and host immunity".*

55. Nothing to which this Court has been referred establishes that, on the evidence before him, it was not open to the learned Federal Magistrate to find as he did with respect to the magnitude of the risk of the child suffering a significant reaction to immunisation. As a reading of the paragraphs of his Honour's reasons to which this Court has referred confirms, such quantitative evidence as there was before his Honour suggested that the child suffering an adverse reaction to immunisation was extremely unlikely.

56. The Court will later consider this complaint in light of the appellant's further evidence application. If it is to succeed, it could only do so in reliance upon the further evidence sought to be adduced pursuant to s 93A of the Act.

Ground C

57. Ground C of the "Summary of appeal points" provided:

> C. That the Federal magistrate incorrectly exercised his discretion in ordering the immunisation of the child. [Summary of appeal points, par C].

58. As Counsel for the appellant sensibly conceded, that challenge could only succeed if one or other challenge raised on behalf of the appellant succeeded. It could not succeed in isolation.

Ground D

59. Ground D of the "Summary of appeal points" provided:

D. That the Federal Magistrate made Orders which were inconsistent with the decision. [Summary of appeal points, par D].

60. The inconsistency to which this challenge relates is between paragraphs 119 and 120 which provided:

> 119. Given that there is little likelihood of Diphtheria, Tetanus, Pertussis contracting Meningococcal C, Hepatitis B or Polio, on the same risk benefit analysis, such vaccinations are unnecessary.
>
> 120. By being immunised for Measles, Mumps, Rubella, Diphtheria, Tetanus, Pertussis and Varicella, [the child] will not need to be withdrawn from school, or from visits with her father, her step-mother and any potential further child they might have.

61. As Counsel for the respondent submitted, clearly, particularly having regard to his Honour's order (Order 10), the inclusion in paragraph 119 of Diphtheria, Tetanus and Pertussis was inadvertent. That there can be little doubt having regard to the terms of his Honour's orders and the clear terms of paragraph 120.

62. Paragraph 117 of his Honour's reasons for judgment is inconsistent with paragraph 120, and records his conclusion that:

> 117. In balancing the risk ratio it will be in [the child]'s best interest if she is immunised for Measles, Mumps, Rubella, Diphtheria, Tetanus, Pertussis, Varicella and Human Papillomavirus.

63. His Honour's findings in paragraph 118 of his reasons lend further support for concluding that paragraph 119 inadvertently included Diphtheria, Tetanus and Pertussis. Earlier paragraphs of the learned Federal Magistrates reasons for judgment, in which he considered the expert medical evidence of Drs D and W [para 101-16] also add some support for that conclusion.

64. This challenge fails.

Ground E

65. Ground E of the "Summary of appeal points" provided:

> E. That the Federal Magistrate failed to conceive that the immunisation of a child falls into the class of cases in which rule 4.08 & 4.09 of the Family Law Rules ought to apply or in the alternative forms a class of determination that a Federal Magistrate must exercise with the same care and diligence as expressly required under rule 4.09 in that all the completing evidence must be weight individual [sic] and in accordance with the best interest of the child. [Summary of appeal points,

pars A to E].

66. Rules 4.08 and 4.09 of the *Family Law Rules 2004* (Cth) ("the Rules") are contained in Division 4.2.3 which relates to "Medical Procedure", and which falls under Part 4.2 of the Rules which relates to "Specific Applications". Rules 4.08 and 4.09 provide:

4.08 Application for medical procedure

(1) Any of the following persons may make a Medical Procedure Application in relation to a child:

(a) a parent of the child;

(b) a person who has a parenting order in relation to the child;

(c) the child;

(d) the independent children's lawyer;

(e) any other person concerned with the care, welfare and development of the child.

(2) If a person mentioned in paragraph (1) (a) or (b) is not an applicant, the person must be named as a respondent to the application.

4.09 Evidence supporting application

(1) If a Medical Procedure Application is filed, evidence must be given to satisfy the court that the proposed medical procedure is in the best interests of the child.

(2) The evidence must include evidence from a medical, psychological or other relevant expert witness that establishes the following:

(a) the exact nature and purpose of the proposed medical procedure;

(b) the particular condition of the child for which the procedure is required;

(c) the likely long-term physical, social and psychological effects on the child:

(i) if the procedure is carried out; and

(ii) if the procedure is not carried out;

(d) the nature and degree of any risk to the child from the procedure;

(e) if alternative and less invasive treatment is available — the reason the procedure is recommended instead of the alternative treatments;

(f) that the procedure is necessary for the welfare of the child;

(g) if the child is capable of making an informed decision about the procedure — whether the child agrees to the procedure;

(h) if the child is incapable of making an informed decision about the procedure — that the child:

(i) is currently incapable of making an informed decision; and

(ii) is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out,

or within the foreseeable future;

(i) whether the child's parents or carer agree to the procedure.

(3) The evidence may be given:

(a) in the form of an affidavit; or

(b) with the court's permission, orally.

67. The remainder of the provisions contained in Division 4.2.3 (Rules 4.10 to 4.12) set out the procedures to be followed in relation to the filing of a Medical Procedure Application.

68. The definition of a Medical Procedure Application is provided in the Dictionary to the Rules and provides:

> ***Medical Procedure Application*** means an Initiating Application (Family Law) seeking an order authorising a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease.

69. The following example is provided along with the definition:

> *Example*
>
> An example of a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease is a procedure for sterilising or removing the child's reproductive organs

70. Counsel for the appellant submitted that the application for immunisation of the child in the present case fell within the ambit of the Medical Procedure Application Rules (the MPARs), involving "a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease". Counsel for the respondent submitted that the application for immunisation of the child in the present case was not a procedure governed by the MPARs.

71. Whether this challenge can be entertained by the Court depends upon the determination of a preliminary issue. Counsel for the respondent submitted that the appellant should be precluded from raising this challenge on appeal as, at trial, immunisation was not contended to be a medical procedure falling within the MPARs. It was submitted that both parties at trial dealt with the issue "as a subset of parental responsibility" and focussed on "best interests" considerations.

72. This challenge was not articulated in the appellant's initial summary of argument, but was contained in Counsel for the appellant's "Summary of Appeal Points" handed up in Court on the day of the hearing of the appeal, as recorded above. Consequently, Counsel for the respondent's written submissions did not address this point. The leave which was given for the respondent's Counsel to provide further written submissions would not necessarily remove any barriers to the challenge being agitated.

73. Counsel for the respondent submitted that, since neither of the parties to the proceedings at trial had purported to make a Medical Procedure Application under the MPARs, or referred to the immunisation of the child in those terms, the learned Federal Magistrate need not, and correctly did not, turn his mind to those provisions of the Rules. Counsel for the respondent submitted that the learned Federal Magistrate was thus "tied by the fact that no one had made an application". It was further submitted that, for the learned Federal Magistrate to have "turned to this section of the Rules, when everyone was carried on before him as a parental responsibility, places quite a large onus on his Honour to turn his mind to this particular section of the Rules when no one had made that application."

74. Counsel for the respondent also submitted that, had the topic been agitated before him, the learned Federal Magistrate may have looked at authorities or, given there were conceded to be no cases that dealt with immunisation by reference to the MPARs, other aids to assist his interpretation of those provisions. Counsel for the respondent suggested that, had the topic been raised before him, his Honour may, for example, have turned his mind to the "interplay" between provisions of Part VII of the Act and the MPARs.

75. In support of her submission that the appellant should be precluded from agitating the issue on appeal, Counsel for the respondent relied upon *Coulton v Holcombe* (1986) 162 CLR 1 and *Metwally (No 2) v University of Wollongong* (1985) 60 ALR 68. Those cases embraced earlier decisions of the High Court, such as *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, in which the High Court said (at 438):

> The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.

76. In *Metwally (No 2) v University of Wollongong* (1985) 60 ALR 68 the High Court per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ said (at 71):

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

77. In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ said (at 7):

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

78. In *Banque Commerciale SA En Liquidation v Akhil Holdings Pty Limited* (1990) 169 CLR 279, Mason CJ and Gaudron J said (at 284):

> Some aspects of that rule appear to derive from public policy considerations directed to ensuring the finality of litigation. On the other hand, some aspects of the rule may have their genesis in estoppel by election in the conduct of litigation, although, if so, the relevant consideration is not that the other party is put in a worse position but that he or she may have been so placed. See, for example, *Moustakas*, where the refusal to allow the appellant to raise a new case was rested on "the possibility that the [other party] may, if it had been raised below, have wished to call evidence in response to it". So far as the rule may derive from public policy, the relevant consideration is that the case sought to be made on appeal is a new or different case from that which emerged at the trial. See *Browne v Dunn*, cited with approval in *Rowe v Australian United Steam Navigation Co Ltd*; *Moustakas*. (footnotes omitted)

79. That the matter was not, at trial, submitted to be a Medical Procedure Application falling within the MPARs is not in doubt. Nor is it in doubt that the learned Federal Magistrate did not, in his reasons for judgment, consider the issue of whether the matter was a Medical Procedure Application under the Rules. His Honour could hardly have done so in the circumstances.

80. Not having raised the topic at trial, the Court would be reluctant to allow the issue to be agitated if so doing could unfairly prejudice the respondent. The nature of the further evidence which the respondent may have adduced at trial, had the appellant then asserted that immunisation fell within the ambit of the MPARs has not been identified, but would be likely to include the further evidence sought to be adduced by the respondent in the appeal. Determining whether or not the course adopted on appeal offends *Coulton v Holcombe* and the other authorities of the High Court is not easily determined.

81. Whilst the issue is less than entirely clear, the Court is persuaded on balance that the decisions of the High Court, to which reference has earlier been made,

ought not preclude the appellant from agitating this complaint. It is difficult to see, on the threshold issue which this complaint raises, how, had the spectre of the MPARs been raised before the learned Federal Magistrate, the respondent could have adduced further evidence which would have impacted upon his Honour's determination of that issue, other than the further evidence now sought to be adduced. It can reasonably be inferred that each party adduced all the relevant expert opinion evidence each then had in relation to the advantages and disadvantages of the child being immunised. It is relevant in this context that the affidavit of Dr W relied on by the respondent in the proceedings before the learned Federal Magistrate appears to traverse the provisions of the MPARs, as it is set out under subheadings referable to those factors. The Court is not persuaded that the respondent would be prejudiced by allowing the appellant to now agitate a different case to the case she presented at trial.

82. The authorities suggest that "most exceptional circumstances" are required before an appellant can be allowed to advance a case on appeal which was not agitated at trial. The Court accepts that the issues in this case are of such magnitude as to constitute "most exceptional circumstances".

83. It is necessary then to consider the substance of Counsel for the appellant's assertions that the immunisation of the child in the present case was a medical procedure which required the application of the MPARs, and that the failure of the learned Federal Magistrate to proceed in accordance with the Rules should enliven appellate intervention.

84. Counsel for the appellant conceded that there was a dearth of authority in relation to the MPARs with respect to immunisation of a child. Counsel for the appellant conceded that most of the cases in which the Rules have been applied related to the sterilisation of a minor (see eg *Re Marion (No 2)* (1992) 17 Fam LR 336; (1994) FLC 92-448; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) FLC 92-293 (*Marion's case*) ("*Marion's case*")), or other interventions which by their nature were clearly "major medical procedures".

85. Counsel for the appellant referred the Court to *L & B* [2004] FMCAfam 312. The case concerned whether the child the subject of the proceedings should receive a cochlear implant, in circumstances where both parents were deaf and the mother wanted the child to receive the implant, whilst the father did not. It was submitted that the case was an example of the Court being "willing to look beyond the classical range of procedures that have been covered by those relevant rules".

86. It is clear that in *L & B*, whilst the learned Federal Magistrate was satisfied that the application for the cochlear implant was a "major medical procedure", his Honour found that it was designed to treat a "bodily malfunction", and

therefore did not fall within the MPARs. Whilst an illustration of what does not fall within the ambit of the MPARs, the case does not assist determining whether immunisation does.

87. Counsel for the respondent also conceded that the case law has limited application to the present case, and did not direct the Court to any authorities directly in support of her submissions. Counsel for the respondent submitted that the sterilisation cases have limited application to the circumstances of the present case as, in each of those cases the child the subject of the proceedings already had a special medical condition at the time of the application, which condition would, in the future, create a situation that would need to be addressed, and which could instead be addressed preventatively by carrying out the medical procedure sought to be approved by the Court. The implication of Counsel's submission appears to be that, since in the present case the child has no underlying medical condition (although the appellant may dispute this), those cases differed materially from the present case, and, as such, the principles arising from those cases were not readily applicable to the present case.

88. With respect to the ingenuity of Counsel for the respondent's submissions, the Court is not sure that it provides an accurate summary of the distinction between the sterilisation cases and the present case. In those cases, the jurisdiction of the Court was enlivened as the special medical procedure involved was deemed to be one to which parental authority to provide consent on behalf of the child did not extend, irrespective of the underlying condition of the child. Both those cases and the present could be said to involve medical procedures which were intended to prevent a future outcome, rather than to "treat" an existing condition. Conversely, some of the authorities involving major medical procedures which only the Court could authorise may not have fallen within the operation of the definition of a Medical Procedure Application.

89. Cases such as *Re Inaya (Special Medical Procedure)* [2007] FamCA 658, though instructive in relation to the scope of parental power and the jurisdiction of the Court with respect to medical procedures, whether or not they fall within the MPARs, do not assist determination of the present case. In that case, as in others such as *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) FLC 93-175 and *Re GWW and CMW* (1997) FLC 92-748, there was little scope for contest that the procedure in question constituted a major medical procedure. Whether they fall within the meaning of that term in the MPARs was not, and did not need to be determined. In *Re Alex*, Nicholson CJ referred to other types of procedures for which the Court's authorisation was required (at FLC 78,976):

- the surgical gender reassignment of a 14-year-old with a congenital disorder – *Re A* (1993) FLC ¶92-402;
- the performance of cardiac surgery on an 11-year-old boy where parental consent was refused – *Re Michael* (1994) FLC ¶92-471; *Re Michael (No 2)* (1994) FLC ¶92-486; and
- the harvest of bone marrow blood cells from a physically and intellectually healthy 10-year-old boy for transplant to the child's aunt who was suffering from leukemia – *Re GWW and CMW*. (1997) FLC ¶92-748.

90. In the light of those cases, it is difficult to accept, in the absence of evidence of a significant risk to the health of a child of so doing, that immunisation could readily be accepted as constituting a procedure which fell within the ambit of the MPARs.

91. Counsel for the appellant submitted that the immunisation of the child in the present case would "be deemed to be a medical procedure just by way of the definition in the dictionary", as "a matter of interpretation." In support of his submission that immunisation is a medical procedure which falls within the ambit of the MPARs, Counsel for the appellant drew the attention of the Court to several aspects of those Rules which, it was submitted, confirmed his interpretation. Accepting that immunisation is a medical procedure, to attract the operation of the MPARs, it must be "major", and not excluded by the definition provided by the Dictionary to the Rules.

92. The second requirement of the definition of a Medical Procedure Application is that the procedure "is not for the purpose of treating a bodily malfunction or disease". Counsel for the appellant submitted that, given that immunisation is generally carried out as a preventative measure, rather than in treatment of "a bodily malfunction or disease", it must fall within the definition. Counsel for the appellant submitted that the Court should construe the definition as pointing specifically to the necessity for the procedure to be with respect to a prospective, rather than an existing "disease" or "bodily malfunction". Accepting that proposition eliminates one impediment to the application of the MPARs, but does not necessarily mean that other requirements to invoking the MPARs are necessarily met.

93. In support of his contention that immunisation constituted a "major medical procedure", Counsel for the appellant urged the Court to consider the potential implications of a negative reaction to the immunisation by the child, submitting that "the possible consequences that may flow if this child does have a sensitivity, are irrevocable." It was thus submitted that, as the potential negative consequences may be irreversible, the procedure should be seen as a "major medical procedure" which thereby falls within the definition provided in the

Rules.

94. As this submission recognises, determining whether or not a medical procedure is "major" logically includes reference to the implications of it for the child upon, or to whom it is proposed that the procedure be performed or administered. Whilst there can be little doubt, having regard to the expert opinion evidence before the learned Federal Magistrate, that for the majority of children immunisation is not a major medical procedure, the question in this case was whether it was for the child.

95. The findings of fact made by the learned Federal Magistrate suggest that, had he been asked to, his Honour would not have concluded that immunisation was a major medical procedure for the child and thus would not have applied the provisions of the MPARs. The further expert opinion evidence relied upon by neither party would seem, on its face, to advance the appellant's contention that, for the child of these parties, immunisation represented a major medical procedure. Further tests of the kind referred to in the further evidence could provide support for so concluding. The results of the tests could also preclude so concluding.

96. The "irreversibility" of a procedure is one characteristic, along with numerous other factors which the Court has weighed in deciding similar cases, which has assumed some significance in the jurisprudence with respect to "special medical procedures", discussed above. Once a child has been immunised, the process itself is irreversible. It is also likely that the consequences of immunisation may be irreversible. Unless the process has irreversible adverse consequences, "irreversibility" does not appear to have the same potential significance which it clearly had in the authorities to which reference has earlier been made. Adverse consequences would be a relevant consideration irrespective of their reversibility or irreversibility.

97. Counsel for the appellant submitted that, had he had regard to Rule 4.09(2)(f) of the MPARs, which refers to the "necessity" of the procedure, his Honour would not have been able to have made the decision he did because it would have been against the evidence before him. That may well be so, but the consequences of concluding that a procedure falls within the ambit of the MPARs cannot advance a consideration of whether the procedure does or does not fall within them.

98. Counsel for the appellant submitted that, even if the Court does not accept that the immunisation of the child in the present case was a procedure falling within the definition provided in the Dictionary to the Rules, the "test" to be applied to evidence supporting such applications, as set out in the MPARs, is nonetheless "a test which a prudent Federal Magistrate would apply, because the rules are reflective of the legislative framework, which is always in the best interests of

the child". Counsel for the appellant thus submitted that his Honour needed to be satisfied "that the procedure is necessary for the welfare of the child", even if it did not fall within the ambit of the MPARs. In further support of his contentions, Counsel for the appellant submitted that, though the issue of immunisation "has classically been an area of clear public policy", in more recent times there has been "growth in debate in relation to the consequences".

99. Whilst there appears no reason in principle why, when considering best interests of a child, a Court may not have regard to the provisions of the MPARs, the Court cannot accept that it should, when the procedure in question does not constitute a major medical procedure. Logic suggests that the "necessity" or degree of necessity of any proposed medical procedure would be material to determining whether it was in the best interests of a child. There more invasive the procedure, or the more far-reaching its implications, the more a Court would need to be satisfied of its necessity. The converse would also be true.

100. In support of her assertion that the immunisation of the child in the present case was not a medical procedure which required the application of the MPARs, Counsel for the respondent submitted that "the immunisation question does not sit comfortably with the Rules as drafted". It was submitted that "the intention of the legislation is to deal with significant medical procedures in which… immunisation or vaccination is not one." This submissions focuses on the procedure itself, and the implications for the majority of children who may be subjected to it. The issue however is more how the procedure would impact upon a particular child.

101. In support of her contentions, Rule 4.10 was relied upon by Counsel for the respondent. It provides:

> The persons on whom a Medical Procedure Application and any document filed with it must be served include the prescribed child welfare authority.

It was submitted that the Rule's requirement of service upon a prescribed child welfare authority indicates "that the provision is envisaged to deal with something that occurs less frequently than immunisation." There is force in that submission.

102. Rule 4.09(2)(b) was also raised by Counsel for the respondent. That provision requires that the evidence filed in support of the application must include evidence that establishes "the particular condition of the child for which the procedure is required". It was submitted that this also indicates that the MPARs are intended to apply to "procedures that are needed for a specific child, and not something that is done on a routine basis". There is force in that submission, but it is limited, as the reference to "need" of a "specific" child

acknowledges. The proposition could with equal force in logic be restated as the "risk" to a specific child of undergoing the procedure.

103. Counsel for the respondent submitted that, if the Court accepted the interpretation of the MPARs contended by Counsel for the appellant and found that the learned Federal Magistrate was required to apply the MPARs to his consideration of the proceedings before him, "looking at the judgment as a whole, many of those considerations, if not all, although not specifically discussed, have been ventilated by his Honour." There is no doubt that his Honour was not referred to the "necessity" for the child to be immunised. The case before him concerned the desirability of immunisation. Having not been addressed in relation to "necessity", it is difficult to know what his Honour might have concluded in that regard. It cannot however be presumed that, on the evidence before him, his Honour would have made a finding of "necessity". As is not in doubt, the case before the learned Federal Magistrate essentially involved a risk-benefit analysis in which the major focus of inquiry related to risk.

104. With respect to Rule 4.09(2)(e), Counsel for the respondent submitted that Dr Wood's evidence considered "alternative treatments" briefly, by reference to alternative homeopathic treatments. Counsel for the respondent conceded that alternatives were not discussed in any detail by the expert witnesses, which is unsurprising when one considers that the case was argued in terms of immunisation versus non-immunisation, rather than immunisation versus alternative treatments, such as homeopathic remedies. Counsel for the respondent also suggested that there was evidence from one of the experts about testing the child for antibodies prior to immunisation, as a potential step to be taken, so as to identify whether some vaccinations were unnecessary for the child.

105. The learned Federal Magistrate's findings with respect to the evidence of Drs D and W suggest that immunisation of the child was for the purpose of "preventing disease", rather than "treating" disease. As such, it is difficult to accept that immunisation necessarily could not enliven the operation of the MPARs. The Rules suggest a material distinction between "treating" a disease or condition which currently exists, and one which may exist in the future if the procedure is not undertaken or performed. A narrow interpretation of the definition suggests that many medical procedures which were clearly "major" might not fall within the ambit of the MPARs, although they were clearly medical procedures to which parental authority did not extend. The learned Federal Magistrate's reasons for judgment with respect to Tetanus illustrate the distinction. As his Honour found, immunisation could prevent Tetanus or, if administered after the child was injured in the circumstances to which he

referred [para 113], treat it.

106. A number of authorities to which reference has earlier been made involved cases where, but for the medical intervention which was sought to be approved by the Court, the welfare of the child would be likely to be seriously compromised. In the present circumstances, the evidence did not establish that, but for immunisation, the best interests of the child would necessarily, or more probably be compromised. The issue was clearly whether such benefits as would have resulted from immunisation were outweighed by the likely risk of the child having a significant adverse response to immunisation.

107. On the undisturbed findings of the learned Federal Magistrate, it would be difficult to conclude that immunisation constituted a medical procedure within the provisions of the MPARs. Had different findings of fact been made in relation to the issues which have been discussed above, a different conclusion may have been reached. Had different findings of fact been made in relation to the risk of an adverse reaction to immunisation by the child, a different conclusion may also have been reached.

108. In many cases, the medical procedure under consideration could be readily identified as falling within, or beyond, the scope of the MPARs, without the necessity for findings to be made with respect to contested issues. In a case such as the present, the question can probably only be decided once all the evidence has been presented, and findings of fact made. If the findings of fact enlivened the MPARs, the matters referred to in them would need to be addressed. The evidence before the Court would almost certainly provide the basis for the Court determining that issue in the context of determining the child's best interests. As no finding of fact made by him has been disturbed, this Court does not conclude that, had their operation been raised before him, the learned Federal Magistrate should have applied the MPARs.

The further evidence application

109. Having regard to the absence of success of any of the "appeal points" which became the grounds of appeal, it is necessary to consider the further evidence filed by each party.

110. For the benefit of the appellant, it might be recorded that, although unsuccessful, the "appeal points" identified, articulated and agitated by her learned Counsel reflected the only arguable grounds revealed by the reasons for judgment of, and record of proceedings before, the learned Federal Magistrate, unlike those previously advanced by the appellant whilst representing herself.

111. As this Court explained in *Lint & Lint* [2011] FamCAFC 115, the applications to adduce further evidence involve a consideration of the effect of evidence

which is accepted for the purpose of the further evidence application. Acceptance of evidence for the purpose of a further evidence application does not have implications beyond the further evidence application itself.

112. If the further evidence sought to be relied upon by the appellant is admitted, and demonstrates that the decision of the learned Federal Magistrate is erroneous, thereby necessitating the re-hearing of the proceedings, it is not in doubt that the further evidence may be contested, and ultimately may not be accepted by the Court which re-hears the proceedings.

113. On behalf of the appellant, leave was sought to adduce further evidence from two medical practitioners. If accepted, that evidence was submitted to "render erroneous" the decision of the learned Federal Magistrate (*CDJ v VAJ,* par 109).

114. Dr U, a consultant paediatrician wrote a report on 8 December 2010 which the appellant sought to adduce by way of further evidence in the appeal. As is clear from its terms, accepting Dr U's evidence would not render erroneous the decision of the learned Federal Magistrate, having regard to the grounds of appeal which have been agitated before this Court.

115. The appellant also relied upon expert opinion evidence from Dr C, a legally qualified general medical practitioner of 20 years standing. Dr C is not a specialist clinical immunologist, but deposed in her affidavit to having extensive experience in the field of immunology, albeit she does not suggest that to be her particular area of expertise.

116. In her affidavit, Dr C relevantly deposed.

> 12. Given the family history and my examination of [the child], it is highly probable that [the child] would suffer adverse vaccine reactions, taking the form of a worsening of eczema, recurrent infections and/or fevers and possibly the development of a behavioural disorder. While it is impossible to say exactly what reactions(s) [the child] would have to vaccination, it could also induce more serious adverse reaction(s), such as an autoimmune condition, cardiac damage, severe anaphylaxis, gastrointestinal disorder, neurological disorder, or respiratory condition.
>
> 13. I am particularly concerned about the administration of a DPT vaccine at this point in time as [the child] has only recently suffered serologically proven natural Pertussis

117. Dr C articulated the reasons which led her to the conclusions which she had earlier expressed in her report. Under the heading "Recommendations", Dr C suggested that the child undergo five tests which she identified. In subsequent paragraphs of her affidavit, Dr C recorded the implications of the possible

outcomes of the tests which she had suggested.

118. Later in her affidavit, Dr C said:

> 25. Undertaking the tests I have ordered as set out above and then fully treating [the child] for any underlying disorders or sensitivities that become apparent as a result of those tests should, in my professional opinion, occur before any vaccination regimen is undertaken or even considered. It will depend upon the test results and success of any treatment as to whether or not in the future vaccination can be considered for [the child] without her suffering a significant adverse reaction.

119. Dr C also suggested:

> 26. As [the child] is now over six years old, she is no longer in the age bracket where measles or varicella are dangerous diseases so there is no urgency to vaccinate in the near or distant future.
>
> 27. I would advise against the administration of the DTP vaccine being given to [the child] at this time as she has only recently had serologically confirmed pertussis, and to vaccinate in the near future would increase the risk of an adverse reaction.
>
> 28. I would also recommend that the Gardasil (HPV) vaccine be withheld until [the child] is at least 16 years old to enable maximal maturation of her nervous system, assuming of course she shows no sign of being sexually active before that time or smokes, as the other risk factor for cervical cancer is smoking. Recent studies have indicated that nutritional supplementation reduces the risk of cervical cancer by approximately 50 percent. I am aware of girls who have suffered serious neurological damage from the human papillomavirus vaccine (HPV). I have personally treated several girls with neurological side effects who have suffered same as a result of the human papillomavirus vaccine.

120. Counsel for the respondent sought to rely upon the evidence of Dr M, a paediatric clinical immunologist and immunopathologist with specialist post graduate qualifications in those fields who has practiced "at a consultant level" at the Children's Hospital at Westmead since 1998. Dr M's evidence was sought to be relied upon by Counsel for the respondent to "buttress" the decision of the learned Federal Magistrate (*CDJ v VAJ*, par 109).

121. Without expressing, or needing to express any concluded view in relation to the issue, Dr M's relevant expertise, at least in a formal sense having regard to her report and the affidavit of Dr C, may be superior to that of Dr C. The matter of significance for present purposes is whether, whichever of the two doctors may

be thought to have the greater expertise, they expressed different opinions, and the impact of them on the decision of the learned Federal Magistrate.

122. Dr M frankly recorded:

> The only reliable way to objectively confirm or exclude chemical sensitivity, particularly to ingested chemicals is by blinded challenge with a series of the most implicated additives (preservatives, flavours and colourings). This is generally safe since most reactions are skin, gastro-intestinal or behavioural and self resolving over hours or days, and are usually performed over several weeks at home whilst keeping detailed symptom diary. When there are potential respiratory exacerbations such as asthma (which is not the case for [the child]) we perform the relevant challenges in hospital under direct medical supervision. Unfortunately at this point, there were many logistic issues which made this assessment near impossible to perform, particularly within the short time frame within which this report was required.

123. Dr M also recorded:

> Thus in summary, I could not find objective evidence based on my interview with [the child]'s father and stepmother, the medical records and letters from medical experts provided, discussion with and examination of [the child], of chemical sensitivity. In general, a thorough history is very sensitive in determining the potential existence of such sensitivity. However, I was unable to proceed with more definitive and objective testing because of logistic issues. At this stage I recommend continuation of a normal unrestricted diet.
>
> Acknowledging that there may be doubt about [the child]'s diagnosis, it is important to note that there are no benzoates or other typically implicated chemicals in the tetanus, diphtheria and acellular pertussis vaccine, measles, mumps and rubella vaccine, varicella vaccine or human papilloma vaccine being considered. It is not my routine clinical practice to recommend avoidance of vaccination in my patients with proven chemical sensitivities.

124. As is not in doubt, the learned Federal Magistrate did not have evidence of the matters traversed by Drs C and M. Sensibly, Counsel for neither party has submitted that the Court should exercise its discretion to reject the opposing party's further evidence on the basis that it was reasonably available before the learned Federal Magistrate. The focus thus becomes the impact which the evidence has upon the decision of the learned Federal Magistrate.

125. In order to assess the possible impact of the evidence, it is necessary to have

regard to the basis of the learned Federal Magistrate's decision to order the immunisation of the child the child. Having referred to the evidence of Drs W and D, the learned Federal Magistrate concluded that the risk to the child "of suffering a significant reaction to immunisation is extremely remote". That finding appears to have been of general application.

126. In subsequent paragraphs of his reasons, his Honour identified other benefits associated with ordering that the child be immunised, particularly with respect to the absence of need to be withdrawn from school or from visits with her father, step-mother and any "potential further child they might have".

127. The learned Federal Magistrate's finding of an "extremely remote" risk was clearly, and properly, if not pivotal to his ultimate conclusion, material to it. If the further evidence to which the Court has referred, if accepted, would render erroneous a finding that the risk was extremely remote, the evidence should be admitted and the appellant's appeal allowed.

128. If accepted, the evidence of Dr C, at its highest, would establish a high probability that the child would suffer adverse vaccine reactions, the form of which Dr C suggested. Dr C's evidence, if accepted, also establishes the possibility of more serious adverse reactions to immunisation of the kind which she also identified.

129. At its lowest, and as Dr C at least impliedly properly recognised, there is a possibility, the magnitude of which would depend upon the further testing which Dr C identified and recommended, of the child suffering a "significant reaction to immunisation".

130. If Dr C's evidence were the only evidence in relation to this issue, the Court would be satisfied that it met the requirements of admissibility under s 93A as the High Court has explained them in *CDJ v VAJ*. The learned Federal Magistrate's finding that "the risk to [the child] of suffering a significant reaction to immunisation is extremely remote" [para 115] could not stand in the face of that evidence.

131. As the High Court also made clear in *CDJ v VAJ*, and as the Counsel for the respondent submitted, further evidence may be adduced which, if accepted, would "buttress" the decision of the learned Federal Magistrate. It is in this context that the evidence of Dr M must be considered.

132. Dr M's measured report acknowledged that the only "reliable way to objectively confirm or exclude chemical sensitivity" was by testing which, through no fault of hers, Dr M was unable to undertake. Dr M could not find "objective evidence", based on the interviews she conducted, the medical records and letters from medical experts provided, discussion with and examination of the child, of chemical sensitivity. Dr M reiterated that she was

unable to proceed "with more definitive or objective testing because of logistic issues".

133. Quite properly, Dr M concluded her report by "acknowledging that there may be doubt about [the child]'s diagnosis" but that there were no "benzoates or other typically implicated chemicals in the tetanus, diphtheria and acellular pertussis vaccine, measles, mumps and rubella vaccine, varicella vaccine or human papilloma vaccine being considered".

134. Perhaps unsurprisingly, having regard to the terms of her report, Dr M did not express an opinion as to the risk of the child suffering a severe reaction after immunisation. It is reasonable to infer from her report, however, that Dr M did not have any reason to think that further assessment of the kind to which she referred would reveal any significant risk of that kind.

135. Dr M's opinion is not necessarily inconsistent with that of Dr C. Without the benefit of cross-examination of each of the doctors, which would provide the opportunity for clarification of a number of issues emerging from their reports, in ways which cannot occur in this Court, this Court can draw only what appear to be the safest inferences.

136. If accepted, Dr C's evidence would suggest that, whatever its magnitude, there was a measure of risk of the child suffering a significant reaction to immunisation, and certainly, a risk significantly greater than that found by the learned Federal Magistrate.

137. Accepting Dr M's evidence would not change that state of affairs. It may be that, once testing of the kind which Dr C suggested, which may or may not be of the kind Dr M contemplated, the medical experts would reach similar conclusions in terms of a risk assessment of the child suffering a significant reaction to immunisation. On balance, the Court is satisfied that the further evidence renders unsafe the critical finding made by the learned Federal Magistrate.

138. As the High Court acknowledged in *CDJ v VAJ*, s 93A is "remedial". The power it confers "exists to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures" (para 109). The learned authors of D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 7th ed, 2011) suggest that:

> Remedial or, as they are often called 'beneficial' statutes are interpreted having regard to the fact that they are intended to remedy a perceived injustice or provide a benefit to the persons to whom they apply. It is unlikely that their legislative purpose will be given effect if they are interpreted in a way that overlooks that intention. (at page 289).

139. As is clear, immunisation is an important issue for the parents of this child and,

necessarily thereby, the child herself. Through no fault of the parties, or the learned Federal Magistrate, the issue was determined in the Court below in reliance upon what can now be seen as something less than the best expert opinion evidence. That is not said critically either of the medical practitioners who gave evidence before the learned Federal Magistrate or, to suggest that in any re-determination of these proceedings the evidence of Drs W and D would not again have relevance.

140. Given the age of the child, and the years remaining during which this issue is likely to be of significance, beneficially applying s 93A to the further evidence before this Court has much to commend it. On a re-hearing of the proceedings, hopefully with the benefit of further testing, the results of which will better inform the expert opinion evidence of Drs C and M, the issue can be more effectively agitated, and hopefully determined in a way which finalises this long running dispute.

Costs

141. Having regard to the basis upon which the Court has determined the appeal, both parties should be entitled to a benefit of a costs certificate with respect to the appeal and the re-hearing of the proceedings.

Conclusion

142. The further evidence of Drs C and M should be admitted.

143. The appeal will be allowed, and Order 10 of the orders of the learned Federal Magistrate will be set aside. It would probably be preferable for both parties to have a fresh mind re-determine the dispute. So saying implies no criticism of FM Dunkley.

144. The practical effect of setting aside his Honour's order would seem to be to revive the consent order made on 7 April 2006 in relation to immunisation pending the re-determination of the respondent's application for an order for immunisation.

145. It is common ground, and sensible having regard to the issues which are likely to arise at the rehearing, to appoint an Independent Children's Lawyer pursuant to s 68L of the Act.

I certify that the preceding one hundred and forty five (145) paragraphs are a true copy of the reasons for judgment of Justice Coleman delivered on 9 September 2011.

Associate:

Date: 09.09.11