

THE VERDICT ON KENNON

Failings of a contribution-based approach to domestic violence in Family Court property proceedings

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The place of domestic violence in Family Court property proceedings under the *Family Law Act 1975* (Cth) ('FLA') has long been problematic. Owing to the no-fault philosophy underlying the Act, domestic violence is, in itself, irrelevant. However there are two sections of the FLA property provisions to which domestic violence may have relevance. In the first place, s 79(4)(c) (the 'contribution section') requires the Family Court to take into account the contributions of the parties to the welfare of their family. In this context, a history of domestic violence may result in a finding of an increased contribution by the victim. This is known as the 'increased contribution approach'. In the second place, s 75(2) (the 'financial needs section') requires the Court to consider a range of factors. These factors are broadly financial in nature comprising, amongst other things, the age and health of the parties, their physical and mental capacities for appropriate gainful employment, and their responsibility for the care and control of children of the marriage. In this context, domestic violence may have a bearing upon the victim's present and future financial needs. This is known as the 'financial consequences approach'. Neither of these two approaches has to date been effective in achieving increased property settlements for victims of domestic violence, leaving the law in an unsatisfactory state.

This paper argues that using the increased contribution approach to deal with domestic violence issues is fraught with difficulty and impracticalities. It proposes instead that the Court and legal profession should focus more fully on the financial consequences of violence, and that there should be legislative change to encourage this.

The history of the Family Court's approach to domestic violence

Since the early days of the FLA, the Family Court has accepted that domestic violence is relevant to the financial needs section. Yet despite the rhetoric, in the first 20 years of the FLA only a handful of reported cases gave consideration to the financial consequences of domestic violence. Moreover, these cases involved circumstances of severe physical injury to the victim, such as deafness and quadriplegia, where the implications for health and earning capacity could not easily be ignored. By the early 1990s, this situation had led to accusations that the Family Court was 'submerging' the problem of domestic violence in its

'no-fault discourse'.¹ Through the early to mid-1990s, criticism of the Court's approach gathered momentum.

In 1997, and against this backdrop, the Full Court of the Family Court handed down its decision in *In the Marriage of Kennon* ('*Kennon*').² In doing so it altered the Court's long-established approach, accepting that domestic violence may also be taken into account in assessing a victim's contributions to the welfare of the family.

In enunciating this new approach to domestic violence, the Full Court was clearly searching for a legal response to domestic violence in a context where the previous response had been inadequate. Indeed, their Honours expressly noted:

It is only in more recent times that the pervasiveness and destructiveness of domestic violence have been at least partly acknowledged in Australia. Whilst there is no reason to suggest that domestic violence is more prevalent in society now than it was in previous generations, until recently both the law and society generally cast a veil of silence over it, preferring to proceed on the basis that either it did not exist or that it was inappropriate for society or the law to intervene in disputes within the 'private' sphere of the home.

There has in more recent times been a marked and long overdue change in those attitudes and a greater social and legal awareness of and disapproval of domestic violence and past attitudes to it. The law, and society more generally, have begun to explore legal remedies which may be appropriate to prevent such behaviour or address its consequences.³

At this level, the decision was welcomed by commentators.⁴ However the many problems associated with the *Kennon* decision did not escape attention.⁵ Indeed, over time it has become clear that there are significant practical and conceptual difficulties in proving to the Court's satisfaction that domestic violence has had a relevant impact upon a victim's contribution to the welfare of the family. In explaining these difficulties and why the increased contribution approach has failed and should ultimately be abandoned, it is necessary to examine more closely the principles set down by the Full Court.

The *Kennon* principles

In a joint judgment, Fogarty and Lindenmayer JJ stated the contribution-based approach in these terms:

[W]here there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact

REFERENCES

1. J Behrens, 'Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse' (1993) 7 *AJFL* 9.
2. (1997) FLC 92-757.
3. *Ibid* at 84290-84291.
4. See, R Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Re-opening the Debate' (1998) 12 *AJFL* 3 at 17.
5. See, P Nygh, 'Family Violence and Matrimonial Property Settlement' (1999) 13 *AJFL* 10, 31-2; J Behrens, 'Kennon: A Big Step Forward?' in Law Council of Australia, *Eighth National Family Law Conference Handbook*, Television Education Network, Melbourne, 1998, 72.

upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial Judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of 'negative contributions' which is sometimes referred to in this discussion.⁶

This statement of principle was then qualified in several respects.⁷ First, their Honours stressed that this approach is not confined in application to domestic violence. Rather, they spoke of domestic violence as 'the most obvious example of a wider and more general category of conduct which may be relevant within s 79'. They did not, however, provide any examples of other potentially relevant conduct. Second, their Honours held that these principles should encompass only 'exceptional cases', expressing concern that these principles may otherwise 'become common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this Court to fault and misconduct in property matters'. Their Honours commented further:

It is essential to bear in mind the relatively *narrow band of cases* to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a *discernible impact* upon the contributions of the other party.

Accordingly, their Honours confirmed the need for a link between the perpetrator's violence and the victim's contribution. However they failed to provide any further guidance on how to demonstrate such 'discernible impact'. Finally, and in terms of the financial needs section, their Honours confirmed the continued relevance of the financial consequences approach, but paid it little more than lip-service.

Some of the uncertainties generated by *Kennon* were given further definition by unreported judgments handed down in the years immediately following.⁸ For example, these cases treated the majority statement of principle as consisting of two discrete limbs, with domestic violence most likely to be taken into account as making the victim's contribution *significantly more arduous* and thus *increasing* the contribution *beyond* that of a normal homemaker and parent, rather than as crediting the victim with a *normal* contribution in circumstances where the violence has created a *significant adverse impact* upon those contributions. They indicated that conduct in the nature of alcohol abuse or child abuse (at least in conjunction with domestic violence) may lead to the

finding of an increased contribution. They established that violence may make a victim's contributions more difficult to render, thereby increasing them, in either a physical, emotional or practical sense. Moreover they demonstrated that domestic violence may be taken into account both as an aspect of contribution and in relation to the assessment of financial needs in the one case.

However, more fundamental problems with the *Kennon* formulation were not so easily overcome and remain problematic today.

Difficulties with 'discernible impact'

Difficulties associated with the requirement to show a 'discernible impact' are immediately apparent, and were evidenced in the unreported cases. First, there is the hurdle of proving the violence alleged. Domestic violence, of its very nature, occurs in a private setting and is generally not witnessed by other adults. Thus, violence, even of a severe physical nature, can be difficult to prove in the absence of police records or medical evidence documenting injuries. Moreover, for non-physical forms of violence, including psychological abuse, evidentiary difficulties are compounded by the absence of observable bodily injury. Second, and more importantly, there is the problem of demonstrating the impact of any proven violence on contributions. The *Kennon* approach supposes a nexus between the violence of one spouse and the increased contribution of the other which is logical and provable. In theory this should be so, for there can be little doubt that domestic violence must make the task of the homemaker and parent a more difficult one to perform. However, proving that domestic violence has impacted upon contributions over a period of time, perhaps even the course of a long marriage, can be problematical in practice. It will generally only be possible to prove with particularity the detrimental impact of individual incidents of violence on contributions: for example, carrying out the role of homemaker and parent with a broken arm or leg, or being forced to seek safety for oneself and any children in a women's refuge. In these sorts of situations, the impact which can be shown is temporal only and thus of limited relevance.

To avoid such difficulties, and in the absence of further guidance from the Full Court, some trial judges have been prepared to infer an impact on the victim's contributions during the marriage from evidence of longstanding and severe physical violence. In *In the Marriage of E*, for example, the husband argued that

6. (1997) FLC 92-757 at 84, 294.

7. *Ibid* at 84, 290-84, 295.

8. See S Middleton, 'Domestic Violence, contributions and s 75(2) Considerations: An Analysis of Unreported Property Judgments' (2001) 15 *AJFL* 230.

... the increased contribution approach has proved to be unwieldy, unpopular and unsuccessful in improving financial outcomes for victims of domestic violence.

there was no evidence to establish that his conduct, which included a history of abuse against the wife and the children, had any discernible impact upon the wife's contributions. Justice O'Ryan, however, agreed with the submission of counsel for the wife that there was 'ample evidence to permit an inference that the wife's non-financial contribution was made more arduous by the husband's conduct'.⁹ Whilst this may represent a commonsense approach to the problem, it does reduce the requirement of a 'discernible impact' to a mere legal fiction; it becomes sufficient simply to prove the violence in order to establish the increased contribution. On this basis, the approach is unlikely to find favour. There would be concern that it could open the floodgates to claims of violence-related increased contributions. Moreover, it is not an approach finding support in any reported decision. Indeed *Kennon* makes clear that the increased contribution argument should be limited to a 'narrow band of cases'.

Questions of quantification

Further difficulties exist when it comes to *quantifying* the 'discernible impact' of domestic violence on a victim's contribution. The Full Court in *Kennon* failed to provide any guidance on this matter and unreported judgments handed down since show little consistency in approach.¹⁰ In most cases, the violence has been taken into account as increasing a victim's contribution without any attempt to ascribe a precise percentage value to it. Thus it is taken into account either with a number of other factors all said to increase the wife's contribution, or just generally in the assessment of her contribution. In cases where a percentage value has been ascribed (usually 5%) there has been no attempt to explain how that figure has been reached. In no case have the difficulties with quantification been expressly acknowledged or addressed. Rather, it seems that trial Judges have done the best they could with the *Kennon* principles, pending further guidance from the Full Court.

In this respect, real objections can be raised. As Parkinson argues, judicial decision-making may be discretionary, but it cannot be arbitrary. Family property law must have not only cogent principles of justification, but cogent principles of quantification. It is not enough to justify why one spouse should get more or less than the other. That must flow through to a principle of quantification which explains in general terms how the respective shares have been reached.¹¹ Following from this, if a wife is awarded 5% more because of violence, it should be possible to

offer an explanation for such a figure. If it is not, then the question may be asked, why does the history of violence justify a 5% greater share of the property than if there had been no violence? And why does it not justify a 10%, 50% or even 100% adjustment? Without coherent principles of quantification it is possible that an increased contribution claim, even when successfully proved, will have little impact on financial outcomes. While trial judges must demonstrate proper deference to *Kennon*, if no quantification of the claim can be made, the question arises whether the money spent on legal fees to run the domestic violence part of the case achieves an outcome any greater than that which the victim would have obtained without running the claim.

Conceptual concerns

Problems with the increased contribution approach are not limited to the precise formulation set down by Fogarty and Lindenmayer JJ in *Kennon*. Rather, criticism can be directed at the substance of an approach which takes domestic violence into account by treating the victim as having made a greater contribution so as to increase her property entitlement. The artificiality of this approach flows from the Family Court squeezing the violence issue into existing jurisprudence on contributions. Hence, as contributions must be positive, not negative, the Court can look to the positive impact of violence on the victim's contribution but not to its negative impact on the perpetrator's contribution (if any) to the welfare of the family. Moreover, in order that the victim of violence receives a greater share of the property than if she had not suffered domestic violence, the increased contribution approach tends to credit her with having made a contribution beyond that of any ordinary homemaker/parent. Yet, in reality, violence is just as likely to lead to a diminution in physical and or emotional capacity to make a contribution, either financially or to the welfare of the family. This would occur where, for example, the victim was hospitalised or unable to perform usual tasks owing to injuries. Furthermore, the increased contribution approach expects the court to assess the wife's contribution as greater than the husband's in circumstances where, mostly, the court does not assess contributions to the marriage at all, at least in the sense of comparing the respective efforts of the parties during the course of the marriage. While there is no presumption as such, equality of contribution is a conclusion readily reached in the great majority of cases.¹²

9. Family Court of Australia, unreported, DN374 of 1997, 15 June, 1999, O'Ryan J.

10. See also the reported case of *In the Marriage of Doherty* (1996) FLC 92-652.

11. P Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) *Federal Law Review* 2.

12. See *In the Marriage of Mallet* (1984) 156 CLR 605; *In the Marriage of Ferraro* (1993) FLC 92-335; *In the Marriage of Waters and Jurek* (1995) FLC 92-635.

Comment

Given the problems arising out of *Kennon* it is remarkable that the Full Court has not re-examined the issue of domestic violence in property proceedings during the past eight years. In both the cases of *In the Marriage of Rosati*¹³ and *In the Marriage of C*,¹⁴ the Full Court simply affirmed the *Kennon* principles, neither case involving any finding of an increased contribution. Indeed, no subsequent reported cases have applied the *Kennon* principles, nor taken account of the 'financial consequences' of violence. Given the known high incidence of domestic violence in the community there is no doubt that this issue is grossly under-represented in the reported case law. There is a lack of empirical evidence as to the reason for this. On the one hand it may be explicable on the basis that unreported cases involving increased contribution claims are not being reported. This was certainly the case in the years immediately following *Kennon*, notwithstanding a request from the then Chief Justice that cases involving violence be more widely circulated within the Court and, where appropriate, forwarded to legal publishers Butterworths and CCH with a recommendation that they be reported.¹⁵ On the other hand, it may reflect the fact that the violence issue is not being raised before trial judges. In this regard, anecdotal evidence suggests that many family law practitioners and Family Court judges are reluctant to deal with allegations of domestic violence in property proceedings and will only countenance an increased contribution claim if there is incontrovertible evidence of a connection between the perpetrator's violence and the victim's contribution.

In all, the current state of the law is unsatisfactory. While it is self-evident that domestic violence must impact adversely upon the role of the homemaker, the increased contribution approach has proved to be unwieldy, unpopular and unsuccessful in improving financial outcomes for victims of domestic violence. Moreover, the *Kennon* judgment has done little to encourage greater use of the financial needs section in taking account of the financial consequences of violence. Dissatisfaction with *Kennon* may also help to explain why draft amendments to the *FLA* property provisions which sought, among other things, to incorporate the increased contribution approach were dropped from the Family Law Amendment Bill 2002 and ultimately abandoned. In particular, a desire to prevent the increased contribution approach being given legislative force may explain the opposition of key stakeholders who had previously given in principle

support to the inclusion of express reference to domestic violence.

In future, the relevance of domestic violence in the contribution context should be limited to use as a defence by a victim to any claim that s/he has made less of a contribution than would normally be expected. In other words, violence should be relied upon only where it has had a *significant adverse impact* upon a victim's contributions to the welfare of the family. In this way, the perpetrator is unable to gain any financial benefit in property proceedings by relying on the victim's reduced physical or emotional capacity to contribute. This sits well with the legal maxim that 'no man shall profit from his own wrongdoing'. Moreover, problems of quantification are minimised, in that the violence defence would simply bring a victim's contribution back to what it would otherwise have been, but for the violence.

The alternative approach

Apart from the limited use of domestic violence as a defence to a reduced contribution, as suggested above, the consequences of domestic violence should be dealt with, for the purposes of property settlement purely through a financial needs adjustment.

The well documented adverse effects of domestic violence for a victim are directly relevant to the matters contained in the financial needs section. For example, physical or psychological injury is relevant as an aspect of the victim's 'health'. Lowered self-confidence and loss of self esteem will impact upon the victims 'physical and mental capacity for appropriate gainful employment'. The requirement for physiotherapy or counselling may be relevant to the victim's 'financial commitments'. Lost earnings and medical expenses will be a relevant 'fact or circumstance'. Social isolation may reduce the victim's access to 'financial resources', including unpaid childcare. And the need to ameliorate the negative consequences of domestic violence for children may be relevant to 'the need to protect a party who wishes to continue that party's role as a parent'.

Taking account of violence through a financial needs adjustment avoids the sorts of difficulties associated with the increased contribution approach. First, owing to the direct relationship between the consequences of domestic violence and the financial needs factors, the financial consequences approach lacks the artificiality of the increased contribution approach.

13. (1998) FLC 92-804

14. (1998) FLC 92-824.

15. A Nicholson, 'Foreword' (1995) 9 *AJFL* 1, 2.

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Second, as the focus is squarely upon the consequences of the violence alleged, with the cause being regarded as irrelevant, the victim need only establish impairment to health, earning capacity, or the like, to receive an adjustment. This is particularly relevant in light of empirical research which establishes a strong correlation between women's experience of domestic violence and post-separation poverty, but which cannot say whether the spousal violence caused the financial disadvantage or was merely a symptom.¹⁶

Third, violence-generated financial needs for the victim can be proven by objective evidence. Medical evidence of short or long term injury will be relevant, as will evidence on the likely prognosis, the time required for rehabilitation and implications for earning capacity. Furthermore, such financial needs are capable of quantification. A monetary figure can be attached to the costs of physiotherapy, counselling, lost income, medical expenses, lost earning capacity and so forth. Moreover, in this regard, useful guidance can be obtained from tort law and criminal compensation schemes.

Finally, there is no reason why the financial needs section could not be utilised to a greater extent in future, than it has to date, to achieve more just and equitable financial outcomes for victims of domestic violence. The Court no longer exhibits an over-zealous approach to the exclusion of evidence of marital conduct. Moreover bringing to an end the increased contribution approach would direct the focus of attention back to the financial consequences approach. Indeed, this could be ensured by legislative amendment to provide expressly for the relevance of domestic violence in the financial needs section.¹⁷ This would also sit well with a judicial shift since the early 1990s towards the greater use of s 75(2) adjustments to redress the economic disadvantages accruing to women generally upon marriage breakdown.¹⁸

Admittedly, abandoning the increased contribution approach in favour of the financial needs approach, at either the judicial or legislative level, will not necessarily translate into improved outcomes for all victims of domestic violence. Indeed, there are many reasons why victims may be unable to obtain a just and equitable property settlement unrelated to judicial pronouncements: they have fewer options for formal assistance in negotiating a settlement; they may be discouraged from pursuing property entitlements by lack of confidence or fear for their own safety and that of any children; there may be little property

available for redistribution; the expense, stress or even embarrassment involved in pursuing the domestic violence aspect of a property claim may not be worth the potential gain. Accordingly there is little doubt that reform in this area should also be concerned with access to justice issues. This might include ensuring access to legal aid in property matters for victims of domestic violence. It might also include securing the matrimonial home in settlements for women who have had to flee the home to escape violence.

Nonetheless, there can be little doubt that reforming the substantive law to give a renewed focus to the financial consequences approach would draw attention to the issue of domestic violence and go at least some way towards improving outcomes for victims.

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16. G Sheehan and B Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *AJFL* 102.

17. See S Middleton, 'Matrimonial Property Reform: Legislating for the Financial Consequences of Domestic Violence' (2005) 19 *AJFL* 9.

18. M Watt, 'The Shifting Centre of Gravity in Property Awards: The Focus on s 75(2) Factors' in Law Council of Australia, *Eighth National Family Law Conference Handbook*, Television Education Network, Melbourne, 1998, 297.

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