DOMESTIC VIOLENCE AND MARRIAGE-LIKE RELATIONSHIPS

Social Security law at the crossroads

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The effects of living with domestic violence are well recognised in criminal law and even integrated into Victorian legislation.1 Its acceptance in other areas of the law has been slow and patchy. In respect of cases in which the battered woman may have been obtaining a pension or benefit as a single person while technically being in a ‘marriage-like relationship’ for the purposes of the Social Security Act 1991 (Cth) (‘SSA’), decision-makers, tribunals and courts seem to still be in the dark ages — or perhaps just emerging from there.

There are three areas in which domestic violence evidence can be argued in the context of social security fraud: duress; what constitutes a marriage-like relationship; and as a special reason why a battered woman may be deemed not to be considered as a member of a couple for the purposes of the SSA. The focus of this article is on the latter two.

We need to first look at the victim’s experiences of domestic violence to understand how evidence about the victim’s reality can assist defending against charges of social security fraud.

The victim’s ‘reality’ of domestic violence3

Any one incident is just a small part of a complex pattern of control and cannot be accurately understood nor its gravity measured in isolation from that background. As well as physical battery, abuse can involve an emotional or psychological onslaught of belittlement and humiliation. He tells her that it’s her fault. If she were a better person/partner/mother he would have to treat her in this way. Accordingly, victims are apt to feel shame; responsibility for the abuse and/or not worthy of better treatment.

Social control is also common. Initially flattering — ‘I want you all to myself’ — it may evolve into extreme possessiveness and control over whom the woman speaks to and socialises with.

Some abusive men adopt the creed that ‘money is power’. They often hold socially conservative ideas about the male partner being entitled to control finances.

Control may also be exerted through sexual assault with victims feeling that they have no choice in sexual relations. The issue of consent, and whether the victim was actually consenting to the sexual activity, is of course notoriously difficult to establish — for example, in a criminal prosecution for rape. This complexity is magnified if there is a history of domestic violence as a victim may consent because they have been coerced. The literature suggests that survivors may experience a combination of social coercion, interpersonal coercion, threat of physical force and actual physical coercion. The nature of the coercion may change over the course of the relationship in the context of changing abuse patterns.5

The dynamics of these manifestations of abuse are commonly slow, insidious and isolating; often punctuated by periods of remorse and promises that it won’t happen again. Since the violence is usually erratic with no logical cause, many women live in a state of terror not knowing what may trigger the next violent outburst from the partner. Also the bizarre becomes normal; many women do not identify behaviours as controlling until they are out of the relationship.

Indeed, to the outside world the relationship may appear to be normal. Abused women often speak of their partners as having ‘Jekyll and Hyde’ personalities.6 The ‘don’t talk’ rule means that the violence is often a secret.7 These households are like Potemkin villages: facades for the eyes of the passers-by.

Some battered women do try to leave but leaving may place their lives in more danger if their partner pursues them.8 This fear is demonstrably real. One fourth of intimate partner homicides in Australia from 1989 to 2002 involved estranged couples. In 84 per cent of cases, males were the perpetrators.9

For all of these reasons — terror, secrecy, low self-esteem, denial — women may feel trapped by the violence. Seeking assistance from a counsellor, or disclosing the violence to anyone, is problematic for the same reasons.

Interpreting the legislation

Sub-section 4(3): Marriage-like

Sub-section 4(3) of the SSA states that in deciding whether a couple is in a marriage-like relationship, the Secretary is to have regard to a detailed range of criteria including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship (including whether the people hold themselves out as married to each other), any sexual relationship between the people, and the nature of the people’s commitment to each other.

There is obviously room for some discretion in how these criteria are interpreted. Some commentators...
have observed that the cohabitation rule is capable of arbitrary and capricious application, with Departmental emphasis historically tending to favour the finding of a marriage-like relationship. Certainly it can be a very open-ended and subjective test. In Pelka v Secretary, Department of Family and Community Services ("Pelka") the Federal Court found that the Administrative Appeals Tribunal (AAT) had erred in how it determined a marriage-like relationship. This case has been described as 'a positive development, both in its clarification of s 4(3)(a)(ii), and in French J's gestures towards a more structured approach to decision-making' that may well lead to assessment of each criteria with 'concrete findings about whether or not specific evidence for a criterion discloses a marriage-like relationship.'

Underlying and tacit assumptions made by decision-makers in evaluating whether a relationship is marriage-like may be unconsciously gendered and not inclusive of many women’s experiences. This includes: if a man is living in the same household as a woman she must be dependent upon him; the heterosexual family is the economic unit; and a couple can live more cheaply than two single people. Underlying assumptions may disregard domestic violence and its potential impact upon decision-making.

**Section 24 of the SSA: Special Reason in the Particular Case**

The Secretary has discretion under section 24 of the SSA to rule that a person should, for a special reason in the particular case, not be treated as a member of a couple. The discretion applied to married couples (sub-section 24(1)) and de facto couples (sub-section 24(2)). In essence, the Secretary may determine, for a special reason in the particular case, that the person is not to be treated as a member of a couple for the purposes of the SSA. The question arises: have the effects of domestic violence — the lack of will or capacity to agree to a marriage-like relationship — been interpreted as a ‘special reason in the particular case’?

The Federal Court decision of Boscolo v Secretary, Department of Social Security (not dealing with domestic violence) that a husband and wife do not have to be seen as a ‘package’ for the purpose of assessing whether there was a ‘special reason’ in a particular case has left it open for a decision-maker to find that in an abusive relationship the abuser may not be entitled to the benefit of section 24 while his victim, living within her own particular reality, can show ‘a special reason in the particular case’ why she should not be considered to be a member of a couple. In the 2007 Commonwealth Ombudsman report on how marriage-like relationships should be assessed in social security law the Ombudsman recommended that policy guidelines be clarified to convey the importance in making decisions under s 24, of considering the individual position of the person seeking discretion, as well as the position of the couple.

Interpreting section 24 narrowly: ‘Dark-ages’ domestic violence case law

The reality of the battered woman has only begun to be argued seriously in Social Security law since 2001. In Perry and Department of Family and Community Services (Perry) it was roundly rejected. The wife had incurred several overpayments of pension, including overpayment due to failure to notify her husband’s true income, and overpayment of sole parents pension during a period when she was a member of a couple. The Applicant, Liana Perry, said that her husband Ted was physically, psychologically and financially abusive towards her. In relation to the degree of control which Ted exercised over her, the Applicant stated that:

He controlled everything. He controlled my Grace Bros card. He controlled my bank accounts. He controlled the mail that came in. He controlled the money in the house. He just - he's a bully, all right!

The Tribunal member stated:

Although the circumstances in this case reflect severe personal, physical and financial abuse by Mr Perry, Mrs Perry was not prevented by some external force from separating from him and thus changing the implications of his employment on her entitlement to wife's pension or some other payment.

Having taken into account the statute, the case law and Tribunal decisions regarding the discretionary power in s24(1) the Tribunal is not reasonably satisfied that a 'special reason' exists in this case for the exercise of its discretion under s24(1) of the Act.

Similar harsh reasoning was echoed in Watson and Secretary, Department of Family and Community Services (Watson). The violence and intimidation exercised in this case against the wife were even more extreme than in Perry. Mrs Watson was repeatedly assaulted and had been hospitalised with cuts and bruises. When she attempted to separate from her husband in 1995 he said: ‘If you leave I will kill you. I will kill all of you.’ Mr Watson only able to lease her husband and then take protection orders for herself and her children. In concluding her case before the AAT Mrs Watson’s representative argued for the use of the discretion in section 24 of the SSA:

Unless section 24 is applied in this case, the Applicant will be required to pay a substantial debt affecting her and her children. Her situation arose through the actions of a violent and controlling man. While we may be uncertain as to her knowledge of her husband’s working and income, it is clear that she would be in danger if she reported him.

The Tribunal expressed some concern at the impact of the case law surrounding section 24, or at least the Tribunal’s understanding of it, but then went on to rule trenchantly that ‘the Tribunal is not reasonably satisfied that a “special reason” exists in this case for the exercise of its discretion under section 24(1) of the Act.

It is appropriate to look at exactly what sort of circumstances might prompt the Secretary to exercise the discretion under section 24. A valid observation would be ‘not many.’ An indication of how hard it
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is to earn the discretion comes from the Australian Government's Guide to Social Security Law. In that guide, an example is given that a person may enjoy the benefit of discretion if one partner is lost at sea and, due to the body not being found, the Coroner will not declare the partner dead for 2 years.

The line hard developed in Perry and Watson continued in McKenna and Watson in McKenna and Department of Family and Community Services (McKenna). An overpayment of parenting allowance and parenting payment benefits arose as a result of non-disclosure by Mrs McKenna of her husband's earnings. She claimed that the fault was not hers as she had handed over all the family's financial affairs to her husband and was ignorant of what he did with the finances. Although there was some ambiguity in her evidence, the Tribunal accepted that Mr McKenna had been the controlling party. A social worker concluded in a report commissioned by Centrelink that Mrs McKenna 'was in fact the victim of abuse and did not know what was going on with the finances.' Nevertheless, the Tribunal member found:

Having regard to the circumstances of this case, I am not satisfied there is a special reason justifying the exercise of the discretion in favour of Mrs McKenna. Her former husband may have been controlling and abusive, but I have already concluded that she knew he was receiving benefits that he was not entitled to receive, and that she must have been aware that her entitlements were affected. She had the ability to approach Centrelink and clarify her position if she wished to do so. She knew what was occurring, and she could and should have done something about it. Her failure makes it difficult to justify the exercise of the discretion under section 24(1).24

The decisions in Perry, Watson and McKenna were unanimous that violence and controlling behaviour is not of itself a 'special reason in the particular case' for the purposes of section 24 of the SSA. The reasoning in each case demonstrated a lack of understanding about the impact of violence on the women involved.

In the following case an expert was used to try to increase that level of understanding.

The beginning of the renaissance: Arguing Section 24 and Section 4(3)25

In a 2008 AAT matter one of the authors (Emerson-Elliott) acted as the advocate for the Applicant, while the other (Eastal) provided material for the Tribunal on the effects of domestic violence on the victims. 'Anne-Marie' had a history of involvement in abusive relationships. Her mental health counsellor commented in a report prepared for Centrelink that:

The deterioration of her overall mental health following the breakdown of her first and then subsequent abusive de facto relationship has caused Anne-Marie a great deal of physical pain, emotional distress and concerns for her safety....

Anne-Marie began to suffer from severe anxiety disorder, panic attacks and disabling agoraphobia. Her agoraphobia became so bad that by 1998 she was unable to leave the country town in which she lived, for even a brief time.

Several years before a man, 'AB', entered Anne-Marie's life. He moved in with her and fathered a child (her second child). Then, for almost four years, he proceeded to exploit her domestically, sexually and financially. Although AB received a reasonably good salary he insisted Anne-Marie continue to claim and accept parenting payment at the single rate so that he could use the extra money to support his drug habit, gambling and addiction to alcohol. Centrelink accepted as a fact that Anne-Marie 'did what AB told her to do [in relation to her continuing to claim and accept parenting payment at the single rate] because of AB's violence and threats of violence towards her; because of her need for a relationship because of her fragile mental health; and because she needed money for her children.' Finally AB was arrested and convicted for a violent assault on Anne-Marie and was sentenced to a term of imprisonment.

Despite accepting that Anne-Marie acted under what in criminal law would clearly be regarded as duress, Centrelink found that she was responsible for approximately a $30,000 overpayment of parenting payment and proceeded against her for that amount. Anne-Marie appealed to the Social Security Appeals Tribunal (SSAT) which — influenced by the line of AAT decisions culminating in Watson and McKenna — affirmed Centrelink's decision.

Anne-Marie’s appeal to the AAT was argued on two grounds. The first was that she was not in a marriage-like relationship with AB despite some of the external appearances of such a relationship. The second ground was that AB’s violence and the degree of control he exercised over Anne-Marie robbed her of the will or capacity to agree to a marriage-like relationship and that, in the circumstances, the Secretary should have exercised his discretion under section 24(2) of the SSA to determine that she should not have been treated as a member of a couple.

22. Ibid [2.2.5.50].
24. Ibid [22].
25. AAT Matter No 2008/2484. The facts in the case are disturbing and we have used pseudonyms to protect the Applicant's identity.
Our approach was to bring very specific evidence that while Anne-Marie may have known what was going on, she certainly could not "do something about it." Evidence from Anne-Marie's GP focused on the serious medical conditions which she had suffered from during the relevant period. A counsellor and a clinical psychologist provided evidence as to the degree of control that AB exercised over Anne-Marie because of her vulnerability due to her conditions. The counsellor who treated Anne-Marie during the relevant period told the tribunal that Anne-Marie 'suffers a severe anxiety disorder and the effect of that condition is prepared to stay in an abusive relationship with (AB) rather than to be alone.' In answer to a specific question she said that in her professional opinion Anne-Marie 'was so fearful that she was unable to make any decision contrary to the wishes of (AB).'. In other words Anne-Marie 'could not have done something about it.'

The AAT accepted this evidence. While it found that there had been a 'marriage-like relationship' it also found that there was a special reason in the particular case for the exercise of the discretion in section 24(2) of the SSA.

The path to enlightenment: 'Marriage-like' relationship

The success of Anne-Marie's case is a small win and a step in the right direction. However, there is a bigger battle to win and a longer step to take. Courts and tribunals need to accept that the effects of domestic violence can actually disqualify a relationship from being 'marriage-like' because there is no true consent by the battered partner. In Anne-Marie's case the AAT sidestepped this issue by using the discretion in section 24 and avoided having to decide if battered woman's reality can actually disqualify a relationship from being 'marriage-like' because there is no true consent by the battered partner.

Justice French's approach in Pelka requires that in determining whether a marriage-like relationship exists the section 4(3) factors above (and more) must be examined. However, what French J does not say is that the examination must be done with an understanding of the effects of violence. This can be done by providing evidence about the dynamics and effects of domestic violence. Psychological tests may be tendered that show low self-esteem but high scores in the dependency and passivity personality dimensions. Alternatively, or in addition, a non-'pathologising' expert26 can assist the tribunal members and judges in understanding what is reasonable behaviour in a domestic violence situation. Indeed, broader social framework evidence is necessary to fill the gaps of community knowledge about the dynamics of domestic violence.

AAT members could then understand why a woman might not have made any disclosures to any agency or sought counselling. They could also integrate this knowledge into the interpretation of the section 4(3) elements of the marriage-like relationship test. For example:

(a) significant pooling of financial resources: need to understand how economic abuse can obviate consent.
(b) the living arrangements: need to understand how the patterns of violence mean that she had no choice but to remain in the same dwelling.

(c) social aspects of the relationship: need to understand how secrecy is a key component in domestic violence and that it is not uncommon for friends and family to be unaware that she is being battered.

(d) any sexual relationship between the people: need to understand that the violence in the relationship may negate consent.

(e) the nature of commitment including (i) the length of the relationship: need to understand that there may be a correlation between the length of relationship and the degree of violence since the worse the violence the harder it may be for the victim to leave the relationship.

The New Zealand Court of Appeal27 quashed Isabella Ruka's conviction for benefit fraud. They held for the first time we can find in the Antipodes that domestic violence could vitiate a presumption drawn from legislative check lists of what is or is not a marriage-like relationship.28 The actual language of the Court of Appeal's decision was drawn from the check list, with the Court finding that the case for a relationship in the nature of a marriage could not be made out because neither emotional commitment and companionship nor financial interdependence could be shown.

We will probably have to wait some time before section 4(3) of the SSA is interpreted like this in Australia. In Bruce v SSAT29 for instance, in relation to the social aspects criterion, the Applicant agreed that although she and her ex-partner had presented themselves as a couple this was not what she wanted and she had no choice. She also agreed that throughout the relationship they slept together and had an ongoing sexual relationship. She explained that sexual relations took place mostly against her will or because she would 'give in just to get a bit of peace and quiet'. The applicant told the Tribunal that throughout their 15 years together she received no emotional support from her violent 'partner'. She preferred to describe their living together as a 'situation' rather than as a 'relationship' adding that in retrospect she could not regard their situation as ever being 'marriage-like'. Although the Tribunal did find in her favour the decision was based upon the applicant's financial circumstances and the prospects of recovery of the debt. It was not based upon the merits of her argument that the financial aspects, sexual relationship and social aspects must be considered in the context of the abuse and unhappiness.

Decision-makers in Social Security law need to grasp the nettle and to rule that if a woman does not have the capacity to consent to her circumstances she cannot be said to be a member of a couple. The New Zealand Court of Appeal decision in Ruka provides the template demonstrating that it is possible to translate a battered woman's reality into the rather technical legal language which surrounds the concept of a marriage-like relationship.

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