FAMILY COURT PROPERTY PROCEEDINGS: RETHINKING THE APPROACH TO THE 'FINANCIAL CONSEQUENCES' OF DOMESTIC VIOLENCE#

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I INTRODUCTION

In proceedings for matrimonial property settlement, the Family Court must have regard, inter alia, to the matters contained in s 75(2) of the *Family Law Act 1975* (Cth) ('*FLA*'). These matters are broadly concerned with the present and future financial circumstances of the parties, including their health and earning capacities. According to principles developed since 1975, domestic violence may be taken into account to the extent that it has financial consequences relevant to the s 75(2) factors. Yet the fact that domestic violence is the cause of such consequences is itself irrelevant. This article explores the aptly named 'financial consequences' approach to s 75(2), with a view to establishing whether or not the Family Court's refusal to take a perpetrator's responsibility for the consequences of violence into account is justifiable.

Section 79 of the *FLA* empowers the Family Court to make orders altering the interests of parties to a marriage in their property.[1] In the exercise of its discretion to make just and equitable orders,[2] the Family Court must take into account the direct and indirect contributions of the parties to their property and to the welfare of the family.[3] The Court must also take into account a range of other matters,[4] including the matters contained in s 75(2), so far as they are relevant.[5] The factors set down in s 75(2) are of a broadly financial nature.[6] They

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For the purposes of this article the term 'domestic violence' is employed in a broad sense to encompass various forms of abusive behaviour which may take place between spouses including physical, sexual, emotional, social and economic abuse.

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1 *Family Law Act 1975* (Cth) s 79(1).

2 *Family Law Act 1975* (Cth) s 79(2).

3 *Family Law Act 1975* (Cth) s 79(4)(a)–(c).

4 *Family Law Act 1975* (Cth) s 79(4)(d), (f), (g).

5 *Family Law Act 1975* (Cth) s 79(4)(e). The s 75(2) considerations are also taken into account by the Family Court in determining whether to make spousal maintenance orders and, if so, what orders to make. Therefore, while this article pertains to property proceedings, the arguments advanced also have relevance to spousal maintenance proceedings.

comprise, inter alia, the age and health of the parties,[7] their physical and mental capacities for appropriate gainful employment[8] and their responsibility for the care or control of a child of the marriage.[9] The s 75(2) factors contain no express reference to marital conduct as a relevant matter. Section 75(2)(o) acts as a catch-all provision enabling the Court to take into account any other 'fact or circumstance' that the justice of the case requires to be taken into account. Consistent with the no-fault philosophy underlying the provisions of the *FLA*, such 'facts or circumstances' have long been interpreted as encompassing those of a financial nature only and not those pertaining to the marital conduct of the parties per se.[10]

The interpretation of *FLA* s 75(2)(o) has dictated the Court's approach to domestic violence in property proceedings. Thus the fact that one spouse has acted abusively towards the other is not, of itself, a relevant consideration. The consequences, however, of such abusive conduct may be taken into account where they have a bearing upon the present and future financial circumstances of the victim, thus bringing them[11] within the scope of the s 75(2) factors.[12]

This so-called 'financial consequences' approach towards domestic violence, which is not seen to involve any consideration of matrimonial fault, was first enunciated in the cases of *In the Marriage of Barkley* ('*Barkley*')[13] and *In the Marriage of Hack* ('*Hack*'),[14] both decided in the early years of the operation of the *FLA*, and was recently affirmed by the Full Court of the Family Court in *In the Marriage of Kennon* ('*Kennon*'),[15] which remains the leading authority in this area.

Notwithstanding the clear and early support for this approach, in practice an overzealous approach by the Family Court for the first two decades of the *FLA* to the exclusion of evidence of matrimonial conduct generally led to the financial consequences of violence being consistently overlooked, other than in cases where the violence had resulted in severe and permanent impairment of the wife's health with obvious consequences for her future earning capacity.[16] This

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6 The exception to this is *Family Law Act 1975* (Cth) s 75(2)(l) which requires the court to have regard to 'the need to protect a party who wishes to continue that party's role as a parent'.

7 *Family Law Act 1975* (Cth) s 75(2)(a).

8 *Family Law Act 1975* (Cth) s 75(2)(b).

9 *Family Law Act 1975* (Cth) s 75(2)(c).

10 See *In the Marriage of Soblusky* (1976) FLC ¶90-124.

11 That is, the financial consequences but not the abusive behaviour itself.

12 Since 1997 the Family Court has recognised that domestic violence may also be relevant in property proceedings to the extent that it has had a discernible impact upon the contributions of the victim to the welfare of the family. For separate critical analysis of the Family Court's approach to domestic violence in this context see Sarah Middleton, 'Domestic Violence and Contributions to the Welfare of the Family: Why Not Negative?' (2002) 16 *Australian Journal of Family Law* 26.

13 (1977) FLC ¶90-216.

14 (1980) FLC ¶90-886.

15 (1997) FLC ¶92-757.

16 See Juliet Behrens, 'Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse' (1993) 7 *Australian Journal of Family Law* 9; Justice Alastair Nicholson, 'Foreword' (1995) 9 *Australian Journal of Family Law* 1.

eventually gave rise to widespread criticism of the Court's approach, with concerns of this nature being voiced from the early 1990s.[17]

An analysis of recent unreported judgments suggests a shift is currently taking place in the manner in which the Court approaches the 'financial consequences' of violence in the context of property proceedings.[18] In broad terms, these first instance decisions demonstrate that in comparison with the earlier reported case law, the Court is beginning to give recognition to a wider range of 'financial' consequences. Most notably, several cases have taken into account the impact of violence on the victim's psychological health or wellbeing and its effect on earning capacity. These judgments also contain a more detailed discussion of the alleged violence and its consequences within the context of the s 75(2) inquiry.

These recent advances in the Court's approach are sufficient to meet some earlier criticisms of its approach towards domestic violence in property proceedings. For example, it is no longer accurate to say that the Court 'submerges' allegations of domestic violence in 'no-fault discourse'.[19] Nor can the Court be accused of ignoring all consequences other than those arising out of severe and permanent physical injury.[20] Furthermore, although it is difficult to determine whether negative judicial attitudes and gender bias influence the Court's approach, it is relevant to note that, since the early 1990s, judicial education has become a central part of the Court's attempt to increase awareness of domestic violence and its relevance to the *FLA* provisions.

Yet while there may be little ground to disagree with the Court's recent recognition of a *wider variety of financial consequences* than those arising solely out of disabling physical injury,[21] difficulties persist with the Court's approach to domestic violence within the context of s 75(2) due to its insistence that, whilst the financial consequences of domestic violence may be relevant, the manner in which those consequences came about cannot be taken into account. The result is that the Court takes account of the impact of domestic violence on the victim's financial circumstances, but does not reflect the perpetrator's responsibility for those consequences in orders made. It is relevant that the Full Court in *Kennon* expressed strong reservations about this non-recognition of the origin of financial need within the context of s 75(2).[22] While their Honours ultimately preferred to express no final view, thereby leaving the traditional approach undisturbed, their comments do signal the need for further analysis.

In providing such analysis, this article examines the reported case law in order to ascertain whether there is a sufficiently clear rationale for the principle that domestic violence, as the origin of financial need, is irrelevant when determining property entitlements. It goes on to explore several difficulties with the Court's

17 Ibid.

18 See Sarah Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations: An Analysis of Unreported Property Judgments' (2001) 15 *Australian Journal of Family Law* 230.

19 Behrens, 'Domestic Violence and Property Adjustment', above n 16, 9.

20 Ibid 19.

21 It should be noted that there are still very few cases taking domestic violence into account in this manner. This may indicate the need for statutory reform to draw attention more directly to the relevance of domestic violence, but such analysis is beyond the scope of this article.

22 (1997) FLC ¶92-757, 84,293 (Fogarty and Lindenmayer JJ). See below n 41 and accompanying text.

approach in this regard, especially when compared with its approach towards economic misconduct. In doing so it assesses whether there is both the justification and the scope for the Court to take account of a perpetrator's responsibility for the financial consequences of violence, ultimately concluding that there is.

II CAUSE VS CONSEQUENCE: JUDICIAL VIEWS ON S 75(2) AND THE RELEVANCE OF DOMESTIC VIOLENCE

The origin of the view that the Court must have regard to the relevant consequences of domestic violence, but without regard to the cause of those consequences, can be traced to the 1976 decision in *Hack*.[23] This case involved the wife's claims for property alteration and spousal maintenance in circumstances where she claimed the husband's conduct had rendered her a quadriplegic. Bell J, presiding over the proceedings, considered that the wife's quadriplegia could be taken into account insofar as it had totally and permanently incapacitated her for any type of gainful employment pursuant to *FLA* s 75(2)(b). However, his Honour refused to take into account the husband's alleged liability in damages to the wife, holding that '*the manner by which the applicant became a quadriplegic is not relevant*'.[24] This was underscored by his description of the circumstances of the wife's injury as an 'incident'.[25]

Since this judgment, handed down almost 25 years ago, the few reported cases which have had occasion to consider the financial consequences of domestic violence within the context of s 75(2) have followed the principle enunciated by Bell J with virtually no critical re-examination of the underlying rationale.[26]

The lack of judicial scrutiny of this aspect of the financial consequences approach is, nevertheless, somewhat surprising given the absence of clearly articulated reasons underlying the statement of principles in *Hack*, and given the Family Court's willingness in recent times to re-evaluate other aspects of its approach regarding the relevance of domestic violence in property proceedings. While it is clear that Bell J considered that to take domestic violence into account as a cause would be tantamount to reintroducing issues of matrimonial fault, his Honour did little to explain the precise basis for this conclusion other than citing past authorities, and it is not altogether clear that these provided justification for the approach adopted.

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23 (1980) FLC ¶90-886.

24 Ibid 75,595 (emphasis added).

25 Ibid 75,593.

26 See *In the Marriage of Saba* (1984) FLC ¶91-579; *In the Marriage of Rogers* (1980) FLC ¶90-874; *In the Marriage of Fisher* (1990) FLC ¶92-127. Even the 1997 Full Court decision in *Kennon* (1997) FLC ¶92-757, 84,290, although highlighting difficulties with Bell J's approach, did not address the issue in any detail, the commentary of the majority judges being intended as a 'brief' discussion only.

In the first place, Bell J cited the seminal Full Court decision of *In the Marriage of Soblusky*[27] as authority for the proposition that:

> save to a very limited extent in proceedings for maintenance, evidence relating to the marital conduct of the parties is irrelevant and inadmissible. However, evidence of conduct affecting broadly financial matters may in some circumstances be admissible and highly relevant.[28]

On this basis, his Honour concluded that the manner by which the wife became a quadriplegic could not be taken into account. However, given that the violence in this case was conduct affecting broadly financial matters, owing to its impact upon the wife's health, earning capacity and financial commitments as a full-time nursing home patient, the reason for this conclusion was not sufficiently elucidated.

Bell J further relied for support upon the earlier decision of *Barkley*. His Honour quoted directly from the judgment in that case where Carmichael J had held:

> I cannot see that because a result very relevant to the means of a party arose from the conduct of the other party to the marriage that the result of that conduct is to be ignored because it can be said to fall under the label of 'conduct of the parties'.[29]

Yet, when read in its entirety, the decision in *Barkley* does not appear to support the approach adopted by Bell J in *Hack*.[30] Nowhere in Justice Carmichael's judgment is there any indication that, where domestic violence has financial consequences, the origin of the need must be ignored. Indeed, in *Barkley* the domestic violence was in evidence and outlined in the course of the judgment. Moreover, Carmichael J had taken into account the circumstances surrounding the wife's injury (impairment of hearing) in that case in so far as it had given rise to a civil entitlement to damages.[31]

Thus, whereas the decision in *Barkley* had drawn a distinction between evidence of matrimonial conduct per se and evidence of conduct affecting broadly financial matters, Justice Bell's judgment in *Hack* went further by drawing a distinction between evidence of conduct having financial consequences which could not be considered and evidence of the financial consequences themselves which could. Accordingly, this can be seen as a 'purer' application of the *Barkley* principle,

> in that it focuses entirely on the increased needs of the disabled spouse without regard to the conduct which caused it, whether it was a regrettable accident or

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27 (1976) FLC ¶90-124.

28 (1980) FLC ¶90-886, 75,594.

29 (1977) FLC ¶90-216, 76,125.

30 It is notable that in quoting from the judgment in *Barkley*, Bell J added emphasis to certain words to lend support to the approach his Honour adopted. One example of this was the emphasis Bell J placed upon the word 'result' in the passage above n 29 and accompanying text: see (1980) FLC ¶90-886, 75,594.

31 Carmichael J took the wife's entitlement to damages against the husband into account in making property orders. Subsequent cases have, however, rejected the proposition that an inter-spousal entitlement to damages may be taken into account as a relevant financial consequence of domestic violence in property proceedings. See *Hack* (1980) FLC ¶90-886; *In the Marriage of Saba* (1984) FLC ¶91-579.

> reprehensible behaviour or indeed was caused by something for which nobody can be responsible, such as illness.[32]

Despite the apparent difficulties arising out of Justice Bell's judgment, the opinion his Honour expressed in that case has been followed in subsequent cases. As already mentioned, these have proceeded with a similar lack of analysis of whether allocating responsibility for the financial consequences of domestic violence is really tantamount to finding fault. The 1990 Full Court decision of *In the Marriage of Fisher* ('*Fisher*')[33] provides a prime example. In this case, Nygh J, with whom the other members of the Court concurred, simply stated, 'it is the existence of the respective contributions and needs which is the primary investigation and not the causes thereof, even though it may be necessary in some cases to relate them historically'.[34]

There are, nonetheless, two Full Court judgments which lend support to the argument (pursued below in Part III(B)) that taking domestic violence into account as the origin of the victim's financial need, is not synonymous with fault finding.

The first of these judgments, *In the Marriage of Ferguson* ('*Ferguson*'),[35] was handed down approximately one year after the decision in *Hack*. In considering the relevance of marital conduct generally, the Full Court held that conduct will only be relevant in financial proceedings if it is of a financial nature or has economic consequences (other than those normally associated with marital breakdown) bringing it within the scope of the *FLA* s 75(2) matters. Strauss J, elucidating these principles in a separate judgment, gave several examples of conduct which the Court might consider relevant by reason of s 75(2)(o) including 'conduct by the claimant, affecting adversely that claimant's earning capacity' and 'conduct by the other party which has affected the claimant's earning capacity'.[36] His Honour continued:

> The relevance of such conduct is not that it caused the breakdown of the marriage or that it constitutes what used to be a matrimonial offence. Its relevance is that financial or economic consequences other than those necessarily flowing from the breakdown of the marriage were *caused* by the conduct, and that the justice of the matter requires the cause of these consequences to be taken into account.[37]

By suggesting that, without contravening the no-fault philosophy, a person's responsibility for conduct adversely affecting a claimant's earning capacity may be a relevant 'fact or circumstance' for the purposes of s 75(2)(o), Strauss J

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32 Peter Nygh, 'Family Violence and Matrimonial Property Settlement' (1999) 13 *Australian Journal of Family Law* 10, 17.

33 (1990) FLC ¶92-127.

34 Ibid 77,847.

35 (1978) FLC ¶90-500.

36 Ibid 77,613.

37 Ibid 77,613–14 (emphasis added).

expressed an opinion clearly at odds with that of Bell J in *Hack*.[38] Yet, notwithstanding that the decision in *Ferguson* came to be one of the two leading authorities on matrimonial fault and misconduct (prior to the 1997 decision of *Kennon*), the comments of Strauss J have been overlooked in subsequent cases, symptomatic of the general lack of interest in domestic violence in the context of financial proceedings during the 1980s and early 1990s.[39]

The second relevant judgment, that of the Full Court in *Kennon*, was delivered in 1997. This case specifically addressed the issue of the relevance of domestic violence in financial proceedings.[40] In a joint judgment, Fogarty and Lindenmayer JJ expressed reservations about the principle derived from the decision in *Hack*. As their discussion of this matter was concise it is reproduced in full below:

> The argument is that if the circumstance is that the claimant suffers from ill-health, either physical or psychological, or has a reduced earning capacity because of physical or psychological deficits, those matters would in any event be taken into account under the relevant paragraphs of s 75(2) and given full weight. The circumstances that that was brought about wholly or partly as a result of the other party's conduct would therefore be irrelevant and in isolation would be seen as punishing the conduct itself, a role better left to the common law. Chisholm J in *Matrimonial Property Reform*, above, after referring to the decision in *Hack and Hack* (1980) FLC ¶90-886 where the wife's capacity for employment had been adversely affected by an assault by the husband, said that:—
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> > Her position (that is, her incapacity to work) would be exactly the same if she had been knocked over not by her husband but by a bus. In each case it is her lack of employment and her inability to obtain employment that is relevant for the purposes of financial adjustment.

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38 Although Strauss J made no specific reference to the relevance of violence in this discussion of principles, it is implicit that the general reference to 'conduct' included domestic violence by virtue of his Honour's reference to conduct which may have formerly constituted a matrimonial offence. It is further relevant to note that the Full Court approved the earlier decision of Carmichael J in *Barkley* (1977) FLC ¶90-216. In the subsequent Full Court decision of *Fisher* (1990) FLC ¶92-127, Nygh J commented that the examples given by Strauss J in *Ferguson* sought to explain the decisions at first instance in *In the Marriage of Issom* (1977) FLC ¶90-238 and *Barkley*. His Honour went on to say, 'those decisions were given very early in the operation of the Act and before the Full Court clarified the position in *Soblusky* and *Ferguson*. They may need to be reconsidered ... we do not consider it appropriate to do so now': at 77,846. Ironically, Nygh J seemed to be suggesting that the discussion in *Ferguson* should be reconsidered in light of the principles in *Ferguson*.

39 See Behrens, 'Domestic Violence and Property Adjustment', above n 16.

40 For commentary on *Kennon* see Justice Linda Dessau, 'Family Violence and Other Conduct in Property Cases: Life After *Kennon*' (Paper presented at the Law Council of Australia Family Law Section, Ninth National Family Law Conference, Sydney, 5 July 2000); Juliet Behrens, 'Kennon: A Big Step Forward?' in Law Council of Australia, *Eighth National Family Law Conference Handbook* (1998) 63; Rebecca Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Re-opening the Debate' (1998) 12 *Australian Journal of Family Law* 3; Greg Howe, 'The Relevance of Conduct in Property Settlement Proceedings in the Family Court of Australia' [1998] *International Family Law* 87; Neil Buckley, 'Gender and Power: Balancing Rhetoric and Reality in the Family Court' (2001) 1 *Queensland University of Technology Law and Justice Journal* 176; Nygh, above n 32; Middleton, 'Domestic Violence and Contributions to the Welfare of the Family: Why Not Negative?', above n 12; Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations', above n 18. See also Letter from Family Law Council to Daryl Williams, Commonwealth Attorney-General, 'Letter of Advice: Violence and Property Proceedings', 14 August 2001, <http://sgeag001web.ag.gov.au/www/flcHome.nsf/Web+Pages/94BE71AA87C7C881CA256BAC 0007E386?OpenDocument> at 25 November 2002.

> This view has attractions to it. But it seems to us to carry with it the assumption that any deficit such as ill-health, unemployment, etcetera, will be given full effect within s 75(2) even if it arose from factors which were unconnected to the marriage, and may have occurred long after the marriage ceased. This gives rise to the 'social engineering' objection. We have some reservations about this approach and prefer to express no final view about it.[41]

It can be seen from this passage that their Honours had some difficulty with the idea that a party's financial needs should always be taken into account pursuant to s 75(2) without any regard to the origin of that need, pointing to situations where the financial need may have arisen out of ill health or loss of earning capacity unconnected with the circumstances of the marriage. Similar concerns have been raised by commentators during the past decade and a half.[42]

Although the primary reservation of the majority judges was in relation to financial consequences *unassociated* with marriage being taken into account pursuant to *FLA* s 75(2), the implication which can be drawn from their discussion is that the financial consequences of domestic violence should be taken into account *because* they were caused by violence and thus were connected with the circumstances of the marriage. Accordingly, as mentioned at the outset, the majority judgment in *Kennon* casts doubt on the long held view that, while the Court can take account of the financial consequences of domestic violence, the cause of those consequences must necessarily be irrelevant.

It is regrettable that ultimately their Honours preferred 'to express no final view'[43] on the matter, thereby leaving the traditional approach undisturbed, despite the apparent absence of clearly articulated reasons supporting such an approach. While subsequent judgments have raised no further query over this issue,[44] the majority discussion in *Kennon*, in association with the comments of Strauss J in *Ferguson*, do indicate that the issue is awaiting an authoritative determination from the Court.

III RESPONSIBILITY FOR THE CONSEQUENCES OF DOMESTIC VIOLENCE: A NEED FOR REFORM

In view of the heightened interest in domestic violence in property proceedings since the mid-1990s,[45] it seems likely that the Full Court will be asked to re-examine the 'financial consequences' approach in the foreseeable future. If and when such an opportunity presents itself, there is a need for the Full Court to undertake a detailed analysis of the issue, with a view to providing well-reasoned and conclusive guidance for the future.

Such analysis reveals several difficulties, in principle, with the proposition that the Court must not consider the manner in which the financial consequences

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41 (1997) FLC ¶92-757, 84,293.

42 See, eg, Henry Alan Finlay and Rebecca Bailey-Harris, *Family Law in Australia* (4th ed, 1989) 305.

43 (1997) FLC ¶92-757, 84,293.

44 See Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations', above n 18.

45 Ibid.

of violence were brought about. It further reveals compelling arguments in favour of a reassessment of the Court's approach in this regard.

A Inconsistent Treatment of Domestic Violence vis-à-vis 'Financial' Misconduct

On the Court's current approach, domestic violence is treated differently from misconduct of a more obviously financial nature such as gambling, alcoholism, property damage or economic waste. In cases involving domestic violence the Court will take the consequences of the violence into account when evaluating the s 75(2) matters but not the cause of those consequences. Conversely, in cases involving 'financial' misconduct, the Court takes into account not only the financial consequences of the conduct *but also the cause* of those consequences. Thus, a party's responsibility for economic loss may be reflected in the financial outcome by leading to some adjustment in favour of the other spouse such that the loss is not borne equally by the parties.[46]

To illustrate this distinction, consider a case where an alcoholic spouse has squandered a substantial amount of money to support a drinking habit. If the Court were to ignore his or her responsibility for the financial consequences of that conduct, and only take account of the consequences of the conduct (as it does with domestic violence), it would simply divide any property still remaining at the date of trial, taking into account the impact of that conduct on the parties' respective present and future financial positions (and this could quite possibly involve an adjustment *in favour of* the alcoholic spouse on needs-based criteria under *FLA* s 75(2)). Instead, it is possible for the Court to take a person's responsibility for the financial losses associated with such behaviour into account and for that to be reflected in the assessment of s 75(2) matters or in the valuation of property in s 79 proceedings.[47]

A good example is provided by the decision in *In the Marriage of Benson* ('*Benson*').[48] In this case, the wife applied for an order pursuant to *FLA* s 79 transferring the husband's interest in the matrimonial home (the only asset of value) to her. The evidence established that the wife had made virtually all of the financial contributions to the property and had performed the role of homemaker and parent with almost no assistance from the husband, who was an alcoholic. The only legal basis upon which the husband could have avoided the order sought by the wife, which would leave him with virtually no capital and only in receipt of an invalid pension, was that of financial need. Nevertheless, Smithers J acceded to the wife's claim noting that 'the husband has squandered a very large amount of money which was available to him in the past, and which if saved, would help him to meet the needs which he has at the present time'.[49] His Honour further considered:

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46 See, eg, *In the Marriage of Antmann* (1980) FLC ¶90-908. See generally Richard Chisholm and Owen Jessep, 'Fault and Financial Adjustment under the Family Law Act' (1981) 4(2) *University of New South Wales Law Journal* 43.

47 Ibid.

48 (1984) FLC ¶91-584.

49 Ibid 79,710.

> An order by which the husband lost the whole of his interest in this property would be a very far reaching order indeed. However, it is clear that in an appropriate case the Court should not shrink from making such an order. In my view this is such a case.[50]

In cases like *Benson*, involving misconduct of a clearly financial nature, the Court considers it appropriate to reflect a party's responsibility for the consequences of that behaviour in the orders made, owing to the *unreasonableness* of the conduct. Hence, the Court has held that financial losses should not be shared where one of the parties has embarked upon 'a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets', or where one of the parties has acted 'recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value'.[51] Taking into account a person's responsibility for the financial consequences of conduct is, therefore, not generally perceived as raising any issue of matrimonial fault. Instead, it is seen as necessary to secure financial justice between the parties, embodying the concept of financial accountability rather than concepts of compensation or punishment.[52]

B No Justification for the Inconsistent Treatment of Domestic Violence on Grounds of Fault

The current state of the law raises the question of whether it is justifiable for the Family Court to take into account responsibility for the financial consequences of economic misconduct but not responsibility for the financial consequences of domestic violence.

The reasons for the Court treating domestic violence differently from conduct of a more obviously financial nature have never been clearly articulated but appear to centre around the concern not to reintroduce concepts of matrimonial fault and misconduct into financial proceedings. Domestic violence, unlike gambling, alcoholism and economic waste, does not involve the direct disposal or dissipation of money or assets. Rather, it involves conduct perpetrated by one spouse against the other. Accordingly, the impact of the conduct on the parties' respective property entitlements is less direct. This, coupled with the fact that domestic violence was once capable of constituting the matrimonial offence of cruelty,[53] and may form the subject of criminal or civil proceedings, has led to a tendency to dismiss this conduct as being probative only of matrimonial fault and misconduct and therefore irrelevant in financial proceedings.

However, it is far from clear that making a spouse accountable for the financial consequences of violence would be tantamount to reintroducing fault.

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50 Ibid.

51 *In the Marriage of Kowaliw* (19891) FLC ¶91-092, 76,645. See also *In the Marriage of Browne and Green* (1999) FLC ¶92-873.

52 Consistent with a no-fault philosophy, the Family Court has held that property orders should not be used to compensate or punish parties. See *In the Marriage of Beck (No 2)* (1983) FLC ¶91-318, 78,167. See Anthony Dickey, *Family Law* (3rd ed, 1987) 510.

53 See generally Sarah Middleton, 'Cruelty against "Concubines": Maintenance for De Facto Wives in Tasmania' (1999) 13 *Australian Journal of Family Law* 140.

The concept of matrimonial fault involves making a financial adjustment in favour of a party to reflect the fact that that party has been wronged by the conduct of the other (which has caused the marital breakdown) and is ultimately based on concepts of compensation and punishment for the repudiation of marital obligations.[54] Taking into account a person's responsibility for the financial cost of violent conduct, and reflecting that matter in orders for financial relief, would not involve considerations of matrimonial fault any more than in cases involving misconduct of a more financial flavour. Instead, it would involve making a person accountable for financial consequences unreasonably incurred.[55] It is noteworthy, in this regard, that the fact that habitual intoxication was once a matrimonial offence has not prevented the Court holding an alcoholic spouse accountable for the financial consequences of such conduct.[56]

Moreover, by adopting a different approach to domestic violence, owing to the fault-based nature of the conduct, the Court draws a distinction that is based on outdated and obsolete concepts. In a statutory regime lacking notions of matrimonial fault or misconduct, logic dictates that the same approach should apply to all conduct shown to have financial consequences. The Court's refusal to take into account responsibility for the financial consequences of violence cannot, therefore, be justified by arguments relating to fault.

C Associated Failure to Take Account of the Past Financial Losses Arising Out of Violence

The impact of domestic violence upon a victim's *present and future financial circumstances* can be taken into account pursuant to *FLA* s 75(2) without attributing responsibility for those consequences. However, to take into account, in any meaningful way, the *past financial losses* caused by the conduct, it would be necessary to have regard to the conduct giving rise to the loss alleged in order to assess whether the spouse responsible for it should be held accountable for its consequences. The Court's failure to accept that it can take into account a party's responsibility for the financial consequences of domestic violence pursuant to s 75(2)(o) may help to explain why the past financial losses associated with domestic violence have been consistently ignored in the case law, with the consequence that such losses have been borne equally by the parties. Conceivably, these may have included costs associated with medical, hospital or dental treatment, lost earnings and the costs of relocation.

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54 See generally Paul Toose, Ray Watson and David Benjafield, *Australian Divorce Law and Practice* (1968). The reciprocal marital obligations, which were once enforceable by law and around which the fault-based system developed, no longer exist. See Henry Finlay, Rebecca Bailey-Harris and Margaret F A Otlowski, *Family Law in Australia* (5th ed, 1997) 9–10.

55 As argued below Part III(D), domestic violence can be categorised as 'unreasonable' in this context.

56 If a spouse can be held accountable for the financial consequences arising out of excessive drinking which is not illegal and which may be the product of alcoholism and therefore referable to addiction, there seems little justification for adopting a different approach with regard to domestic violence which is legally sanctioned and is not referable to addiction. There has been no analysis of this matter in the case law.

While no reported judgment has ever specifically drawn a distinction between the relevance of the *past* financial consequences of domestic violence and the *present and future* consequences, such a distinction is implicit in the reported case law. Early decisions of the Court, including the decisions of *Barkley*, *Hack* and *In the Marriage of Saba*, identified domestic violence as being relevant to the victim's health and earning capacity but did not take account of any past financial consequences of the violence. This exclusive focus on the relevance of domestic violence to the present and future financial needs of the victim is also evident in the more recent case law. In the 1990 decision of the Full Court in *Fisher*, Nygh J (with whom the other members of the Court concurred) refused to take account of the wife's allegations of violence against the husband under *FLA* s 75(2), finding that she had failed to show 'any diminution in her future earning capacity'.[57] Similarly, the majority judges in *Kennon*, in discussing the relevance of domestic violence to s 75(2), confined their comments to the potential relevance of the impact of domestic violence on matters related to a victim's health and/or earning capacity.[58] Consistent with these reported authorities, recent unreported judgments have also focussed exclusively on the alleged present and future financial consequences of violence.[59]

There is, in fact, only one reported decision that provides any support for the proposition that the past financial consequences of domestic violence may be relevant pursuant to s 75(2). This is the decision of *In the Marriage of Rogers* ('*Rogers*'),[60] where the Full Court held that evidence of assaults by the husband against the wife were irrelevant to the issue of property settlement since 'it was not suggested that the alleged assaults had any lasting ill-effects or that they had impaired the wife's earning capacity or that they had involved her in any *expenditure*'.[61] Moreover, there has been no subsequent reference to this aspect of *Rogers* in subsequent cases, and there remains no reported case taking account of past consequences of domestic violence. It is accurate to say, therefore, that over the past 20 years, the 'financial consequences of violence' have come to be regarded as encompassing only the consequences of such conduct on the present and future financial circumstances of the victim.

The Court's reluctance to take account of past financial losses arising out of domestic violence leads to a further inconsistency in the treatment of domestic violence and the treatment of financial conduct, for it is beyond doubt that *FLA* s 75(2)(o) permits a consideration of the *past financial* consequences of conduct in proceedings for property settlement.[62] Indeed, most cases involving economic misconduct have seen the Court take account of a spouse's responsibility for

57 (1990) FLC ¶92-127, 77,847.
58 (1997) FLC ¶92-757, 84,293.
59 See Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations', above n 18.
60 (1980) FLC ¶90-874.
61 Ibid 75,540 (emphasis added).
62 *In the Marriage of Garrett* (1984) FLC ¶91-539, 79,372.

losses *already* sustained.[63] Again, it is necessary to address whether there is a legitimate basis for adopting a different approach in relation to domestic violence.

Coupled with concerns relating to the reintroduction of matrimonial fault, the continuing reluctance of the Court to examine the past financial consequences of domestic violence seems to relate to the fact that these consequences may be compensable in separate civil (or possibly criminal) proceedings.[64] Indeed, there appears to have been a concern on the part of the Court not to take into account past financial losses arising out of domestic violence which would otherwise amount to 'special damages' in tort proceedings. There has been a parallel reluctance to take into account the costs incurred by the wife in bringing earlier proceedings, arising out of domestic violence, in a different court.[65]

However, whether the fact that financial consequences of domestic violence can be compensated in another jurisdiction precludes them from consideration in financial proceedings is open to debate. This is particularly so given that the objective of taking the financial consequences of violence into account is not to compensate or punish. Rather, its objective is to achieve financial justice between the parties. It is, for example, beyond dispute that the future financial consequences of violence (such as its impact upon earning capacity) can be taken into account to increase a victim's property entitlement pursuant to *FLA* s 75(2), notwithstanding that such matters could also form the basis of a general damages award.[66] Furthermore, taking the past financial consequences of domestic violence into account as a 'relevant fact or circumstance' would not necessarily involve the Family Court in any exercise of civil jurisdiction. It may simply require the Court to take account of matters relevant to the statutory provisions but which have formerly been ignored. The Court could take these losses into account by making an adjustment pursuant to s 75(2), or in a specific manner,

63 Generally speaking, *Family Law Act 1975* (Cth) s 79(4)(e) is used to bring into account matters relating to the current and prospective economic position of the parties and thus to their present and future financial needs. However, as Dickey, above n 52, 702, observes, 'considerations imported by para (e), and especially that contained in s 75(2)(o), can ... be used to take into account events which have occurred in the past'. In proceedings for property settlement, past losses can also be factored into the valuation of property, as 'notional property'. See, eg, *In the Marriage of Townsend* (1995) FLC ¶92-569.

64 The weight of authority supports the view that the Family Court must disregard an inter-spousal entitlement to damages when making property orders: see above n 31. See Nygh, above n 32. On criminal and civil compensation for domestic violence, see generally Family Law Council, *Violence and the Family Law Act: Financial Remedies Discussion Paper* (1998), <http://sgeag001web.ag.gov.au/flc/Violence%20and%20the%20Family%20Law%20Act.htm> at 25 November 2002.

65 See, eg, *Barkley* (1977) FLC ¶90-216; *Hack* (1980) FLC ¶90-886. See also *In the Marriage of Garrod* (Unreported, Family Court of Australia, Renaud J, 14 October 1997).

66 See, eg, *Barkley* (1977) FLC ¶90-216; *In the Marriage of Saba* (1984) FLC ¶91-579.

when ascertaining and valuing the property available for redistribution, as it has done with conduct of a more obviously financial nature.[67]

D Domestic Violence as a Form of Financially Blameworthy Conduct

There appears to be nothing preventing the Court from approaching domestic violence in precisely the same manner as other financially blameworthy conduct. Moreover, there are good reasons for it to do so. Two main arguments can be put forward in support of this claim.

In the first place, it is well accepted that domestic violence is conduct that may involve consequences relevant to the s 75(2) considerations.[68] The most obvious financial consequences stem from physical injury. There may, for example, be actual financial costs associated with the injury such as medical treatment, dental restoration, hospitalisation or physiotherapy. Such injuries may also result in an actual loss of earnings and may have an impact upon the victim's long-term health and capacity for appropriate gainful employment, especially where the victim is left with permanent disabilities. Similar financial consequences may flow from the detrimental impact of domestic violence upon a victim's confidence, self-esteem and general psychological health. Other financial costs arising out of domestic violence could include the costs of relocation after separation, the expense involved with obtaining protection from domestic violence or pursuing criminal or civil compensation and, more indirectly, the loss of a support network for victims who have become socially isolated.

To date, evidence for a common connection between domestic violence and financial adversity has to a large extent been anecdotal. However, the results of a recent national random population survey, examining the post-separation financial circumstances of men and women who report having experienced spousal violence, expose the grave post-separation financial circumstances of women who report severe violence.[69] Compared with those reporting no physical abuse, these women were less likely to be in paid work and were more likely to be 'poor' and reliant upon social security as their main source of income. Almost half were out of work at the time of separation (having spent at least one third of

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67 In this regard it is relevant to note the decision of *Re Q* (1995) FLC ¶92-565. In proceedings for property settlement, Harper J held that considerations of justice, equity and public policy made it inappropriate for the Court to take into account the husband's liability to pay his daughter, 'Q', A$100 000 in damages for sexual assault in any way which would diminish the amount to be received by the wife (Q's mother). Furthermore, the sum of money expended by the husband in funding his criminal proceedings in relation to charges arising out of the sexual abuse (and in relation to which he pleaded guilty and served a term in prison) was added as a notional sum in the asset pool available for redistribution. This notional sum was included in the husband's overall share, in effect making the husband solely liable for it.

68 See generally National Committee on Violence Against Women, *Submission to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* (1991) 23; Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994) vol 1, 191; Behrens, 'Domestic Violence and Property Adjustment', above n 16, 17–19.

69 Grania Sheehan and Bruce Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* 102. The authors define severe violence to include a combination of actual or threatened physical and/or sexual violence, emotional abuse and harassment, and fear.

the time they were married out of the work force to care for children), and almost all had primary responsibility for the care of dependent children after separation and divorce.[70]

This research demonstrates a strong correlation between domestic violence and post-separation poverty.[71] Some may argue that this lends weight to the hypothesis that women's economic vulnerability upon marriage breakdown is exacerbated for those who have experienced violence during the marriage or after separation.[72] It should be pointed out, however, that the research is limited in its ability to conclude that severe violence during marriage had caused the impoverished circumstances of the women following divorce.[73]

In the second place, there are sufficient grounds on which to argue that domestic violence should be viewed as an *unreasonable* form of conduct, the financial costs of which should (if possible) be borne by the party responsible for its commission. First, domestic violence has been denounced at the highest levels by federal, State and Territory governments, as well as by law reform bodies, organisations and individuals. The attention given to this matter in the legal context generally over the past two decades reflects its status as a matter of 'special public concern'.[74] Secondly, the *FLA* already contains several provisions relating to 'family violence', which, by definition, encompass domestic violence.[75] These give legislative emphasis to the seriousness with which such behaviour should be viewed. Section 43 of the *FLA*, for example, directs the Family Court to have regard in the exercise of its jurisdiction to 'the need to ensure safety from family violence'. Family violence is also a matter that must be taken into account when considering the 'best interests of the child' in proceedings for residence and contact.[76] Furthermore, the seriousness with which the Court now views domestic violence is evident in several recent judgments. In *Kennon*, for example, the majority judges referred to the 'pervasiveness and destructiveness' of domestic violence.[77] In subsequent unreported decisions,

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70 Ibid 113–16.

71 See generally Family Law Council, *Submission on the Discussion Paper Property and Family Law: Options for Change* (1999) 102, <http://sgeag001web.ag.gov.au/www/rwpattach.nsf/viewasattachment Personal/6C0EE846868A3A9FCA256C0E0012C3D9/$file/PropertySub.pdf> at 25 November 2002.

72 See, eg, Juliet Behrens, 'Violence in the Home and Family Law: An Update' (1995) 9 *Australian Journal of Family Law* 70; Reg Graycar, 'The Relevance of Violence in Family Law Decision Making' (1995) 9 *Australian Journal of Family Law* 58; Belinda Fehlberg, 'Violence and Sexually Transmitted Debt' (1997) 3 *Current Family Law* 76.

73 Sheehan and Smyth, above n 69. The findings addressed the broad research question, is there an association between spousal violence and post-divorce economic circumstances, by comparing the post-divorce financial living standards and workforce participation of women and men who reported different levels of spousal violence. Sheehan and Smyth state that their findings do not 'inform whether or not spousal violence *leads to* certain post-divorce economic circumstances or vice versa': at 114. In this regard they refer to the complex interplay of factors surrounding spousal violence and post-divorce economic circumstances and observe, 'the stress and strain of economic hardship may contribute to violence as well as violence having contributed this stress and strain': at 117. In this regard, there is clearly a need for further empirical research.

74 Nygh, above n 32, 24.

75 See *Family Law Act* (Cth) s 60D(1).

76 *Family Law Act* (Cth) s 68F(2)(g).

77 (1997) FLC ¶92-757, 84,290.

there have been references to domestic violence as being 'despicable', 'abhorrent' and 'unacceptable'.[78] Finally, in addition to its deleterious impact upon the welfare of the victim and other family members, domestic violence may also carry legal sanctions. Acts of violence may amount to a crime or a tort or may, at the very least, provide grounds for a protection order. Domestic violence may also involve the denial of basic human rights,[79] further lending support to its categorisation as unreasonable conduct.[80]

IV CONCLUSION

The preceding discussion has critically analysed the principles concerning the relevance of domestic violence within the context of s 75(2) of the *FLA*.

There is no difficulty with the first aspect of this 'financial consequences' approach, namely, that where domestic violence has had an impact upon any of the matters for consideration in s 75(2) this must be taken into account in the exercise of the Court's discretion in making orders for property alteration. Moreover, recent unreported judgments have given recognition to a wider range of consequences than exemplified by the reported case law suggesting a trend away from the formerly restrictive application of this principle which had attracted substantial criticism.[81]

The second aspect of the 'financial consequences' approach, that the Court must have regard to the financial consequences of domestic violence *without* taking any account of their cause, is more problematical. As I have argued, there has been insufficient justification put forward for this principle in the reported case law, and in this regard the reservations expressed by the Full Court in *Kennon* are notable. Not only does this approach lead to an inconsistency in the Court's treatment of domestic violence and conduct of a more obviously financial nature, it also contributes to *past* (as opposed to the present and future) financial consequences of violence being ignored. Although the basis of the approach appears to be the concern not to introduce concepts of matrimonial fault and misconduct, there is clearly scope for responsibility for the financial consequences of domestic violence to be taken into account, consistent with the

78 See, eg, *In the Marriage of Trajceski* (Unreported, Family Court of Australia, Loughnan JR, 1 May 1998); *In the Marriage of McCarthy and Lockart* (Unreported, Family Court of Australia, Ellis J, 16 April 1998); *In the Marriage of Kostyrka and Connor* (Unreported, Family Court of Australia, Loughnan JR, 14 September 1999).

79 See National Committee on Violence Against Women, *National Strategy on Violence against Women* (1992) 1.

80 It should be pointed out that the considerations mentioned above do not apply to non-financial misconduct generally. Adultery, for example, is arguably less likely to involve adverse financial consequences than domestic violence (although *pregnancy* may lead to adverse financial consequences). There may be financial consequences associated with desertion, but desertion could not be categorised as an unreasonable form of conduct under the *Family Law Act 1975* (Cth) (except perhaps to the extent that financial support was denied by the deserting party). It would similarly be difficult to categorise adultery as unreasonable on any basis other than a moral one, unless, perhaps, it was on health-related grounds.

81 See Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations', above n 18.

approach adopted in respect of financial misconduct, without introducing such concepts. As this article has shown, domestic violence has financial consequences and is a category of conduct that should to be regarded as unreasonable for the purposes of financial proceedings.

Accordingly, the current principle, which holds that the manner in which the financial consequences of domestic violence came about is irrelevant, should be rejected and replaced with a principle which states that where the violence of one spouse has caused adverse financial consequences for the other, this may be a relevant 'fact or circumstance' for the purposes of *FLA* s 75(2)(o).