

The recognition of family violence in property proceedings: Has change brought improvement?

Prof Lisa Young

Murdoch University

Legal basis for altering parties' interests in their property on separation

- Long term approach
- Wide discretion: what is just and equitable as between the parties?
- Mandatory considerations + any other relevant circumstance
- Considerations retrospective (largely contributions assessments including to welfare of family) and prospective (relative situations going forward)

Why the change in relation to family violence?

- No reference to FV in the legislation but growing awareness since 1990s of its relevance to a range of family law issues
- Common law principle developed permitting consideration of FV in assessing parties' contributions - *Kennon*
- Criticisms:
 - ill defined and a difficult jurisprudential basis
 - under used, hard to succeed and small uplifts
 - invisible to litigants in person

***Kennon* principle**

- Did FV have a discernible impact on a party's **contributions** , or 'put the other way', were their contributions made **more arduous** by the FV?
- Applied over time to non-physical abuse
- Decision maker could draw an inference as to the impact the established FV had in making the party's contributions more arduous/onerous, even without direct evidence in appropriate cases

What are the changes?

1. Explicit statutory reference to FV as relevant factor when considering parties' contributions
2. Explicit statutory reference to FV as a relevant consideration when considering parties' 'current and future circumstances'
3. Amended non-exhaustive definition of financial abuse by providing more explicit examples

Government's expressed goals

- Codify *Kennon*?
- ..‘*better recognise* the economic consequences of family violence in property...proceedings’
- Greater certainty and law more visible to all users of system
- Fairer and more timely outcomes for victims with clear recognition of the disproportionate impact FV has on women

Concerns about the changes

- Increased cost for parties; lengthier affidavits, longer trials, delayed judgments
- Increased strategic allegations
- S 79(4)(ca) doesn't use same words as *Kennon*:
‘the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the ability of a party to the marriage to make’ contributions’.
- Narrower as no reference to ‘more arduous’?

Impact of changes?

1. Does s 79(4)(ca) codify *Kennon* ?
2. What is the impact of the changes to the definition of financial abuse?
3. What is the (added?) benefit of explicit reference to FV in relation to current and future circumstances?
4. Are the government's goals being achieved?
5. Are any of the critics' concerns being realised?

Is this a codification of *Kennon*?

- 41 cases published in Austlii to date
- No appeals on interpretation of s 79(4)(ca)
- All JOs assume pre-reform case law applies
- No issue taken with failure to refer to contributions being made more arduous
-> nearly all decisions rely on contributions being made more arduous (rather than contributions being reduced by the FV) and inferences as to impact are being drawn

Has the change to the definition of financial abuse had an impact?

- 18 cases established financial abuse
- In nearly all cases there was *post-separation* family violence established and in some of those cases the *only* abuse was post-separation financial abuse
- Reframing of litigation/separation induced financial misconduct as financial abuse
- Likely growth area in litigated matters

Benefit of explicit reference to FV in relation to current and future circumstances

- Can argue at both stages (as was the case pre-reform)
- 8 cases in post-reform sample (eg physical/psychological effects of FV; perpetrator incarcerated)
- Where financial misbehaviour post-separation involves depletion of assets, query benefit since loss of addbacks as a result of *Shinohara*

Are the government's goals being achieved?

- Four male self-represented litigants; 4 male parties did not appear
- Not clear that overall awards are any higher than under *Kennon*; may reflect implications of the 'holistic assessment' of contributions (increasing house prices?)
- No evidence of 'losing the house' if you 'abuse the spouse' (70% max)
- Increased use of *Kennon* pre-reforms; 44 cases in 18 months prior and 63% success rate (57 in 2006-2012 42% successful)
- Greater recognition of financial abuse, including separation/litigation related?

Are the government's goals being achieved?

- Most matters settle before a trial
- Prior to trial, unclear if/what FV will be established and if impact will be established/inferred
- Thus, unlikely to be explicitly factored in, in many mediated and negotiated settlements
- Better recognition? Greater certainty? Access to justice claims?

Critics' concerns: strategic allegations

- Who is making the strategic allegations?
- There were 8 cases where a male partner, who had been found to have engaged in family violence, also made allegations of family violence by his female partner. In all cases the victim's alleged actions were either not established, found to be defensive or did not (or were not argued to) impact the male partner's contributions.
- FV by male not established in only 4 cases (10%)
- NB (not established ≠ lying)

Critics' concerns/goals – practitioner experience?

- Are parties aware of change pre-advice?
- At what stage do lawyers start gathering evidence?
- Do lawyers feel confident advising on impact of FV?
- Is FV a significant factor in negotiated/mediated settlements?
- Are costs increasing (in preparation and in trial length) due to need to lead and prove relevant FV and impact?
- Are judgments more delayed?
- Are victims achieving better outcomes post reform?

How do the victims feel about it?

- Are some clients resisting relying on FV?
- What other impacts may it have for client/family to raise FV if, when the matter settles, it remains unresolved and is not factored in?
- Will these changes result in better experiences for victims of FV going to trial (cf Wilde, Sheeran and Douglas, The psychological impact on mothers who have experienced domestic violence when navigating the family court system: a scoping review, 31/4 (2023) Psychiatr Psychol Law, 764: systems abuse, revictimisation, short-term and long-term psychological impacts)

(Financial) cost v benefit of changes

Something to think about:

- Is it possible that, with the loss of addbacks; the shifting of waste to s 79(5); additional costs and possible delay by running the argument, that the financial benefit of these reforms is cancelled out? Indeed, if settles with no recognition it is possible there is a negative financial effect (though the spectre of FV being run at trial may impact willingness to settle)
- And how would we know....? The more 'holistic' the assessment, relying on the intuition of the decision maker, the less likely we can evaluate