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Divorce Law Reform

**DIVORCE LAW REFORM IN AUSTRALIA:
THE EMERGENCE OF FAULT
IN THE *FAMILY LAW ACT* 1975?**

by
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1. Introductory

The history and objectives of the *Family Law Act* 1975 in Australia have been frequently and closely documented. Thus, the then Attorney-General of the Commonwealth of Australia, writing at the time of the Act's passage, had stated ¹ that, "... the Act will prove to be possibly the most humane and enlightened social reform to be enacted in Australia since the Second World War." He concluded the article by saying ² that he entertained the, "... very real hope that the changes will be overwhelmingly to the benefit of all concerned, bringing more and speedy relief to those burdened by unhappy marriages ..." Since those remarks were made, the Act has been amended, sometimes very radically, some 53 times at the time of writing. ³

It is equally true that the Attorney-General's sanguine remarks have not been universally shared: thus, one admittedly journalistic, commentator, has said ⁴ that courts exercising jurisdiction under the *Family Law Act*, " ... have frequently become legalistic arenas where conflicting parents have access to air and hammer out their personal vendettas with each other. This marks a long, wayward step from the path of idealistic good intentions the Family Law legislators believed they were paving. It elevates the common domestic brawl to the stature of legal disputation, with all the panoply of the court system. At immense cost and demands on manpower, into the family row are paraded court staffs, lawyers, welfare counsellors and an array of evidence-tendering witnesses as the courts are asked to settle what

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are usually no more than domestic disagreements." More soberly, Star, in a genuinely insightful history of the Family Court, has written ⁵ that, "... it should be acknowledged that there are some areas of human experience that cannot be dealt with adequately by the law. This is so whether or not the court is given adequate finances and whether the crucial tension between rules and discretion swings to one side of the pendulum or the other. In the real world, no amount of early intervention, counselling or court-ordered solutions can hope to amicably settle every situation."

She concluded by stating that, "The best that the Family Court can realistically hope for is that its constant emphasis on the improvement of justice in general and the improvement of client services to each individual are successful, and that those services are carried out with the dignity, low cost and speed that its originators envisaged. This is the closest model of perfection that the court is likely to achieve." If, indeed, the Court is able to achieve that, it will, by all objective standards, have achieved something which is a truly remarkable legal achievement!

As regards the massive amendments to the Act, earlier noted, ⁶ they all appear to have moved in the same general directions: first, towards more directed and structured judicial discretion and, second, a more formalised curial system. As regards the first, for instance, when the Act first came into effect in 1976, the sole provision in relation to custody, guardianship or access, in addition to courts being required to regard the welfare of the child as the paramount consideration, was that courts ought not to make any order contrary to the wishes of any child over the age of fourteen unless, by reason of special circumstances, it was necessary to do so. ⁷ Otherwise, the powers of the courts were apparently unlimited. ⁸

Today, especially in view of the reforms introduced in 1995, ⁹ the level of discretion

is

altogether more restricted: s 68F of the *Family Law Act* 1975, as it now stands, sets out thirteen factors which courts exercising jurisdiction under the Act are required to take into account when deciding what course of action is in the child's best interests.¹⁰ As will later be seen¹¹ certain of these criteria are concerned, directly or indirectly, with family violence and import an element of fault into cases involving children under the *Family Law Act*. Indeed, fundamentally, s 43 of the Act was amended in 1995 to include a new s 43 (ca). Section 43 seeks to set out the principles to which courts exercising jurisdiction under the Act must have regard.¹² Section 43(b) requires courts to have regard to, "... the need to give the widest possible protection to the family as the natural and fundamental group unit of society ..." The new s 43 (ca) requires courts to have regard to, "... the need to ensure safety from family violence ..." The close connection between these paragraphs is, to this writer at least, rather paradoxical and disturbing. Whether this means that the Commonwealth legislature is, somehow, acknowledging that the fundamental group unit of society is inherently violent or whether that paradoxical juxtaposition has escaped both legislators and draftspersons will probably never be known!

The purpose of this paper, hence, is to examine the various approaches to fault which have been, or are becoming, apparent in relation to the operation of the relevant provisions of the Australian *Family Law Act* 1975. Inevitably, both before and after the 1995 reforms, contradictions and peculiarities will emerge, although it seems safe to say that the emphasis on family violence to be found in the 1995 amendments to the Act has had significant effect. At the same time, it will be observed¹³ that the reforms which deal with family violence are very much in the mainstream of Australian curial thought as it existed prior to them.

2. The Ground for Dissolution

As regards the ground for dissolution of marriage itself, a detailed analysis is unnecessary as I have, earlier and elsewhere, sought to do that.¹⁴ In the words of the then Commonwealth Attorney-General:¹⁵ "Section 48(1) of the Act provides for irretrievable breakdown to be the sole ground of dissolution of marriage. The document initiating proceedings will be termed an application, not a petition. Section 48(2) provides that the ground shall be held to have been established, and a decree of dissolution shall be made, if and only if the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months up to the date of the filing of the divorce application. By virtue of s 50, periods of separation before and after a resumption of cohabitation for up to three months may be aggregated for the purpose of establishing the ground of divorce. Section 48(3) prevents the court from making a decree if it is satisfied that there is a reasonable likelihood of cohabitation being resumed. Section 49 provides that the parties may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties and even though they continued to reside in the same residence or that either party rendered some household services to the other."

In my earlier commentary, I concluded¹⁶ that the ground for dissolution, as interpreted by the courts, is structured so as to provide a straightforward escape from an unsatisfactory union, but not so slack as to provide for dissolution on demand. It is highly unlikely that the ground will be changed, even though, inevitably, Tennison¹⁷ has suggested that the relevant statutory provisions mean, "... that legally no offence has been committed when, in fact, very often quite a serious offence has been committed. When this occurs, however, the offender is not treated as an offender and the party who is the victim of the

offence is treated equally with the offender... It is essential and no more than just that the party who is made a victim by the other party should receive some compensatory consideration by the court in the divorce and past divorce proceedings." It must be said the Tennison's views have not wholly been dissipated: Maley, writing in 1992, has urged ¹⁸ that marriage be treated as a species of contract and that a breach of any of its terms and obligations should give rise to an action in damages. Not, perhaps, surprisingly, that view has not been given significant credence by any major Australian political party.

At the same time, it must be noted that there are particular decisions which are slightly disturbing in that they might provide some sustenance for commentators such as Tennison. It is provided in s 44 (1A) of the *Family Law Act 1975* that, "Proceedings under this Act for a decree of dissolution of marriage or nullity of marriage may be instituted by either party to the marriage or jointly by both parties to the marriage." Joint applications are rare indeed. The conduct of the party making the application is not relevant; thus, in *In the Marriage of Tye*¹⁹, the husband had left Australia, telling his wife that, after he had settled abroad, he would send for her to join him. Approximately two months later, she received a letter from him informing her that he would not be resuming cohabitation. Until the wife received the letter, she firmly believed that there was no breach, or impending breach, of the matrimonial relationship and that the *consortium vitae* was still intact. The application was filed over twelve months after the physical separation, but less than twelve months after the wife became aware that the marriage was at an end. At the hearing, the husband gave evidence that he had determined to end the matrimonial relationship within a week or so of leaving Australia. Emery J. held the ground to have been made out and stated ²⁰ that, "... there can be no doubt that the unilateral intention of one spouse not communicated to the other spouse

can bring the *consortium vitae* to an end". On the facts of *Tye*, the judge also commented that, "The conduct of the husband towards his wife in my opinion reflects a complete lack of any sense of moral obligation to his wife and a degree of cruelty which makes it very difficult to believe that he ever had any regard for her at all."

On the other hand, it is equally clear, regardless of fault, that courts will examine factual circumstances to ascertain whether the ground actually has been made out. Thus, in the *Marriage of Fenech*,²¹ described²² by Evatt C.J. as, "... a very sad case", there was evidence of strain in the relationship in that the parties occupied separate bedrooms and there had been no sexual relations between them for a year. The husband was receiving sickness benefit which was insufficient to support two households whilst the wife continued to do the shopping cooking and washing for the husband, who continued to contribute to housekeeping expenses. In dismissing the application, Evatt C.J. commented²³ that, "Marriage comes in many shapes and sizes and many families are living in a strained relationship like this. To the outside observer, matters go on much as usual, and only within the family itself – between the husband and wife – is there any acknowledgement of the breach. To comply with the Act there must be some overt separation, some evidence that there are two households not one ..."

Still more graphically, in *In the Marriage of Caretti*,²⁴ the husband, who had initially moved out of the marital bed, moved back because, in his own words, "of the freezing cold." Murray J. refused to find that the parties were living separate and apart, even though other factors in their relationship, such as the wife's refusing to attend social functions with the husband, strongly suggested breakdown.

It should be said that all of these cases were decided very shortly after the Act came into force and, indeed, the operation of the ground itself was settled very quickly. In addition, the ground, unlike much of the rest of the Act,²⁵ has remained unchanged. Despite

some of the criticisms noted earlier, the ground itself, which clearly operates independently of fault, is unlikely to be altered. It has generally worked well.

3. Cases Involving Children

(a) *The Traditional Approach*

The traditional approach to the issue of fault in cases involving children is represented by the decision of the Full Court of the Family Court of Australia in *In the Marriage of Smythe*²⁶ which involved an appeal against an order granting custody of the relevant children to the husband. During the course of his judgment, the trial judge had asked as to whether the wife was at fault in leaving the matrimonial home. The wife appealed on the grounds that the judge had erred in law in his approach to the question of matrimonial fault and its relevance to the issue of custody. The first point with which the Full Court were concerned was a submission, which had been made by the husband that conduct might be a relevant factor where, or in the instant case, the issues were finely balanced. Also, that it was in accord with public policy to take conduct into account in deciding custody disputes. The basis for that submission was that, generally, the party responsible for the breakdown should not be entitled to seek custody and that principle was applicable in the present case because the wife had been responsible for the breakdown.

Although there had been prior authority, from both Australia and elsewhere,²⁷ Evatt CJ and Asche SJ rejected the submissions made on behalf of the husband and stated²⁸ that there was, "... no justification for saying that if the factors relevant to the children's welfare are evenly balanced some other factors must be decisive of the issue. There may be cases where parties seek to rely on factors which have little or no bearing on the welfare of the particular children whose custody or access is in issue ... Such factors should be treated as of

minor or no significance when set alongside the child's welfare. They cannot be decisive of the issue or be relied on to determine what order will best promote the interests of the child."

In addition, Evatt CJ and Asche SJ emphasised ²⁹ that, in each particular case, there would be a number of factors which had some bearing on the welfare of the children, and those factors which best promoted their welfare would be given the more weight and those less significant would be given less weight. Still more relevant to the present discussion, the judges considered that matrimonial fault or conduct was relevant in relation to custody and access only if it had some bearing on the fitness of the person or parent and, consequently, on the welfare of the child. That principle, they pointed out, did not merely apply to traditional notions of matrimonial fault, such as adultery, cruelty or desertion, but also to other aspects of a parent's behaviour. "In that context," they said, "behaviour can include the attitude of one parent towards the other and the willingness of a parent to make unfounded or intolerable allegations against the other ... to the extent that a child's welfare may be adversely affected by the influence and attitude of such a parent."³⁰ Evatt CJ and Asche SJ laid considerable stress on the point that courts were required to distinguish between matrimonial conduct which had little or no bearing on the welfare of the child and could not, therefore, be seen as a disqualifying factor, and conduct which amounted to neglect of the child or otherwise had a bearing on the welfare of the child.³¹

Although there was a dissent by Gee J in *Smythe* ³² and contrary authority in the shape of the decision of Fogarty J in *In the Marriage of Issom* ³³ *Smythe*, hitherto, represented the generally applicable approach. Of course, there will be situations where the welfare or best interests of the child will clearly be at risk: the most obvious being cases involving allegations of child sexual abuse. The law as it relates to these allegations, particularly as they relate to the broad fact-finding process, I have elsewhere documented,³⁴

so that a brief comment will suffice. In *M v M*³⁵ the High Court of Australia stated that, "... a court will not grant custody or access to a parent if that...would expose the child to an unacceptable risk of sexual abuse." The problems caused by that *dictum*, particularly as it has affected the fact-finding process, have caused something of a change of attitude towards it in Australia³⁶ and elsewhere.³⁷

(b) *The 1995 Reforms and Thereafter*

Before examining the detail of the 1995 amendments³⁸ and their relevance to the emergence of fault in the *Family Law Act* 1975, it is worth pointing out that those amendments were within the existing pattern of curial thought. Of especial importance are the decisions of Chisholm J in *In the Marriage of JG and BG*.³⁹ And the Full Court of the Family Court of Australia in *In the Marriage of Patsalou*.⁴⁰

In the former, the judge was required to deal with competing claims for sole custody of the two young male children of the marriage. There were a number of allegations made against the husband regarding physical and verbal violence. Both parties had put up competing proposals in respect of custody and access, but, in view of the importance of the issue of family violence, the judge considered that it was appropriate to identify and state the legal principles relevant to allegations of violence in the context of proceedings relating to guardianship, custody and access.

First of all, the judge noted that there were relatively few Australian decisions which dealt expressly with family violence itself in that context, but a general principle had been established in cases dealing with other forms of parental behaviour and misbehaviour.⁴¹ He concluded by saying⁴² that, "... the principle that the child's welfare is paramount has an exclusionary aspect, excluding material that has no relevance to the welfare of the children. But it also has an inclusionary aspect, by which I mean that admissible evidence that is

relevant to the children's welfare should be taken into account ... I believe it is clear now that matters truly relevant, to the child's welfare, whether indirectly or directly relevant, should be taken into account."

As regards the specific issue of violence, he noted two earlier decisions ⁴³ where direct reference was made to it.

The second matter raised by Chisholm J arose directly from the first, and that was the determination of when family violence was relevant to children's welfare. After having noted the existence of s 64 (1)(va), of the Family Law Act 1975, which requires that courts have regard to the need to protect children from abuse and ill-treatment, the judge emphasised that "... when the violence is committed in the presence of children, it will obviously have the potential to frighten and distress them". Yet, he said that was not the end of the story: violence occurring between household members away from the children may have the potential to cause them distress and harm, especially if it affects the parenting skills of the custodial parent. Much, though, his Honour suggested, depended on the surrounding circumstances; but the various aspects of violence could be highly relevant in determining the child's welfare. "For children to grow up", he said ⁴⁴ "in a climate of a potentially violent and dominating relationship between their parents seems to me to be an unacceptable model of family relationships, and would be very likely to create a situation of stress and fear that may well be damaging over a period". Chisholm J concluded that, on the one hand, it was wrong to conclude that violence could be relevant only if it was directed at children themselves or took place in their presence; but on the other hand, it would be wrong to assume that violent behaviour would be repeated or that it would necessarily harm children.

The next issue to which Chisholm J turned his mind was the question as to whether the Court should make findings on matters of violence or other alleged parental failings. In the

earlier case of *In the Marriage of Chandler*⁴⁵ Nygh J had said that, "It is a fundamental principle in this Court that if it is clear from the evidence that the relationship between the parents is going to continue, the Court should refrain from making any findings, unless absolutely necessary, which adversely reflect upon the self-esteem or integrity of the parties". Chisholm J in *JG and BG* did not wholly accept that view. First, he said that where allegations were made which had an important effect on the children's welfare it would be necessary for the court to make appropriate findings, particularly where they had been strenuously denied and the Court was, in effect, asked to find that they had been concocted. In addition, it might also be important to make findings regarding family violence in order to determine other issues. It followed that, where the evidence permitted the Court to make findings in cases of contested allegations of family violence, and where such findings were necessary in order to determine what orders would promote the child's welfare, it would so do. In reaching that view, Chisholm J considered,⁴⁶ in respect of Nygh J's *dictum* in *Chandler*, that the only truly fundamental principle was the welfare of the child. However, the Court might refrain from making findings if it did not need to do so in determining what orders would best promote the welfare of the child. If a discretion as to whether or not to make findings did exist, as Chisholm J thought⁴⁷ it probably did, it ought to be exercised on the basis of whether the child's welfare would most likely be promoted by making, or declining to make, such findings. In the case at hand, the judge was emphatically of the view that it was necessary to make appropriate findings.

After a detailed consideration of the evidence, Chisholm J concluded⁴⁸ that the husband had engaged in acts of violence towards the wife, some of which had involved the children and had taken place in their sight and/or hearing. An additional problem, the judge thought, was the attitude taken by the husband, who had simply denied that the violence had

occurred. The effect of that was that the Court had no way of knowing whether he regretted the violence, whether it was likely to recur or whether it had affected his parenting skills. Chisholm J commented that he would, "... be more comfortable if (he) had some indication that the husband accepts responsibility for past violence and has taken measures to prevent it recurring and, perhaps, to minimise any damage already done to the children". The wife was, hence, awarded custody.

Although the decision significantly turned on which of the parties' account of the relationship was more credible, *JG and BG* remains a most important decision, and one which must continually be borne in mind when family violence issues arise, regardless of legislative intervention.

The Full Court of the Family Court of Australia considered the issue in *In the Marriage of Patsalou*. This case concerned an order at first instance granting joint guardianship of the children and custody to the wife, with reasonable access to the husband. The husband appealed on the grounds, inter alia, that the trial judge had inappropriately dealt with the issue of domestic violence. There, Baker J, the presiding Judge (with whom Kay and Tolcon JJ agreed) stated ⁴⁹ that, "The making of derogatory or denigrating remarks by one party to another and the inflicting of physical violence by one party on the other are, in my view, relevant matters to be taken into account in cases concerning the custody of and access to children. Any person who indulges in such behaviour, in my opinion, presents a poor role model indeed for children, and his or her suitability as a custodial parent must be very much in doubt." Thus, although the Court did not address the issue in the detail which Chisholm J had done, it is quite clear that the Family Court is cognisant of the issue and its relevance to the welfare of children.

As regards legislative intervention, s 68F(2) of the *Family Law Act* 1975, as amended in 1995, sets out the matters which courts must consider in determining the best interests of the child.⁵⁰ Section 68F(2)(g) requires courts to have regard to, "... the need to protect the child from physical or psychological harm caused, or that may be caused by: (1) being subjected or exposed to abuse, ill treatment, violence or other behaviour; of (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person. It will be apparent that that paragraph is widely drafted and is aimed at protecting children from the consequences of violence directed by one parent, toward, say, the other. Section 68F(2)(i) requires courts, likewise, to consider, "... any family violence involving the child or a member of the child's family ..." and s 68F(2)(j) refers to, "... any family violence order that applies to the child or a member of the child's family ..."

Section 60D of the *Family Law Act* defines "abuse" as being, in relation to a child, "... (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person ..." In the same section, "family violence" is defined as meaning, "... conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety ..."

The Act goes on to deal more specifically with information regarding family violence

and orders involving it: thus, s 68J(1) states that, "If a party to the proceedings is aware that a family violence order applies to a child, or a member of the child's family, that party must inform the court of the family violence order." Section 68J(2) goes on to provide that a person who is not a party to the proceedings and is aware that a family violence order applies to the child may, subject to the applicable Rules of Court, inform the court of the family violence order. However, by reason of s 68J(3), failure to inform the court of any family violence order will not effect the validity of any order made by the court. Section 68K(1) provides that, in considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order is consistent with any family violence order and does not expose any person to an unacceptable risk of family violence. As regards the latter consideration, s 68K(2) enables the court to include in any order any safeguards which it considers necessary for the safety of those affected by the order.

These provisions are generally unexceptionable, although s 68K is, in this writer's view, rather open-ended. Its provision is altogether too redolent of the test enunciated by the High Court of Australia, in relation to child sexual abuse enunciated in *M v M*, to which reference has already been made.⁵¹ Given the responses to that test, it is surely undesirable to have had it included in an Act of Parliament. Second, the kinds of safeguard referred to in s 68K(2) are not specified: one can but assume that they would be referable to the powers contained in s 114(1) of the *Family Law Act* 1975, which sets out the injunctive powers of the court. Thus, the provision permits the court to make an order or injunction for the personal protection of a party⁵² and "... an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area,

being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are situated ...";⁵³ and also an order or injunction restraining a party to the marriage from entering the place of work of the other party to the marriage.⁵⁴

As regards the case law which has developed around the legislation, first: in *Blanch v Blanch and Crawford*,⁵⁵ the Full Court of the Family court of Australia was required to consider the effect of ss 68F(g), (i) and (j). In that case, the parties, who had begun cohabiting in 1987, were married in early 1990; there were three children of the marriage respectively aged eight, six and three years. In October 1990, the wife was raped by an unknown assailant and claimed that, after that incident, the husband had behaved violently towards her. The parties separated in January 1997, when the husband left the matrimonial home with the children. The wife immediately applied for a residence order, but withdrew the application whilst the parties attempted a reconciliation. Apart from a period of approximately four weeks in early 1997, when the youngest child lived with the wife, the children had lived with the husband at his mother's home since the initial separation. In early 1997, the wife began a relationship with a man who, in addition to assaulting the husband on at least one occasion, had convictions for assaults extending over ten years. In June 1997, the husband consented to an Apprehended Violence Order⁵⁶ which had been sought by the wife and cross-applied in relation to a new application for residence for which she had applied. In November of that year, consent orders were made which provided that the husband had interim residence of the children and that the wife have contact each alternate weekend.

At the time of the trial at first instance, the wife had separated from the other man and the future of their relationship was uncertain. The wife was living with her mother, whilst the man, and his son from a previous relationship, were living in the parties' former matrimonial home. At first instance, orders were made that the children reside with the husband except

for two consecutive weekends in every three and one half of all school holidays when they were to live with the wife.

On the issue of violence,⁵⁷ the trial judge, whilst he was not satisfied that the husband was inherently violent, rather regarding the husband's conduct as being a product of the relationship, he did have concern over the wife's later relationship. He concluded that it was in the children's best interests that they remain with the husband, though, in so doing, the trial judge did not regard himself as bound by the recommendations of the children's representative, who support the mother's application, though he was conscious of the fact that he had departed from those recommendations. The wife successfully appealed to the Full Court of the Family Court of Australia, who remitted the matter for rehearing.

The major judgment was delivered by Lindenmayer J. who, first, accepted ⁵⁸ a submission made on behalf of the wife that she had been the victim of consistent and frequent abuse, both physical and verbal, at the hands of the husband and, hence, the trial judge's findings on that issue were far from satisfactory. On the approach taken by the trial judge, Lindenmayer J had this to say: "It is certainly correct to say that it is not always necessary, or even desirable, for a trial judge to make specific findings in relation to every issue presented by the parties, even ones they clearly regard as important. However, it is my view that in cases such as this, where a case of sustained and severe domestic violence by one party is advanced by the other, the Court is obliged to give a clear indication whether it accepts or rejects that case and, in either event, to explain why it has reached that conclusion."

This, it is suggested, is an eminently sensible and appropriate comment and one which, probably, ought to be generally applicable.⁵⁹

Lindenmayer J then went on to be specifically critical ⁶⁰ of the attitude towards

family violence demonstrated by the trial judge: first, he considered that it was not clear which of the conflicting evidence he had accepted or rejected. Second, Lindenmayer J. found himself left with the impression that, "... responsibility for the violence which he found had occurred between the parties during their relationship was fairly evenly shared between them.:

Lindenmayer J. was of the view that such a conclusion was not reasonable open to the trial judge on the evidence.

It further appeared from Lindenmayer J's judgment ⁶¹that the judge had regarded the relevance of the husband's violence towards the wife as representing a risk that, when the children began to challenge his authority, his violence would erupt and he would cause them harm. Lindenmayer J. agreed that that was certainly one risk to the children, a risk of at least greater significance was, in his own words, "... the risk to the children's emotional development arising from growing up in a violent household under the tutelage and influence of a violent parental role model." ⁶² Lindenmayer J. noted that the trial judge had simply not taken account of that risk and went on to state that, in his view, "... a judge of this specialist Court ought at least to turn his or her mind to the risk in a case where the issue of domestic violence has been so clearly and squarely raised by the evidence in this case.:

The judge continued to be critical of the trial judge's finding that the husband's violence was the product of the relationship rather than of the husband's personality: a view which he did not consider was reasonably open to the trial judge on the evidence. Lindenmayer J. considered that that kind of finding indicated an attribution of responsibility to the wife (who, on the trial judge's own findings, was the victim) or, at the very least, to the interaction between the parties. He went on to say that, "As a general proposition such an attribution of

responsibility for violence away from the perpetrator towards the victim is simply not acceptable, at least in the absence of any evidence of an expert nature to the effect that the sort of behaviour attributed to the victim by other evidence in the case was of such a nature as to be likely to provoke a violent response from any reasonable person, and that the actual response of the perpetrator to that provocation was not disproportionate to the provocation offered."

In the event, Lindenmayer J took the view – surprisingly perhaps in view of other case law⁶³ – that, although there were insufficient findings of fact by the trial judge in relation to the issue of violence, the Full Court ought not to substitute its own discretion. Hence, the matter was remitted for rehearing. It follows that *Blanch* is of interest in that it suggests that the new provisions are being taken seriously by the courts, although it is surely disappointing that it took an appeal and a remission to seek to resolve the matter. Although the three judges⁶⁴ on appeal were *ad idem*, the trial judge's approach seems to have been out of accord with the aims of the legislation and with reality as represented by the facts of the case.

The decision of Mullane J in *M v M*⁶⁵ demonstrates the problems which courts face in dealing with habitually violent parties. In *M*, the mother, who was aged 25, and the father, who was aged 33, had cohabited between December 1992 and January 1997. There were two children of the relationship, aged four and three, who, after the separation had remained with the father. Since the separation, the mother who had a seven years old son from a previous relationship, had formed a new relationship. There were various allegations and orders, including an allegation made by the father that the mother's son had sexually abused the elder child of the relationship: the father and the mother's son had a poor relationship which included the father denigrating and belittling him.⁶⁶ The main issue was the personality of the father: various reports described an aggressive, abusive and intimidating mad who was unable

to deal with people without resorting to abuse and was unable to accept responsibility for his own behaviour. He had threatened his former solicitors and an expert involved with the case; during the relationship, he had been physically and verbally abusive of the mother, including in the presence of the children and also admitted to having hurt the older child on several occasions when he was angry with her. On several occasions following the separation, the father had frustrated contact and had made several specious allegations of danger to the children. The father did not concede that he had a problem with abusive behaviour and denied that he had contributed to the emotional and behavioural problems of the children.⁶⁷ The parties had agreed that the children should reside with their mother and she sought to have sole responsibility for decisions relating to their care, welfare and development.

Mullane J noted,⁶⁸ first, that the, "... father's behaviour presents a multi faceted danger for the children. There is a risk of violence to them personally and injury. There is a risk that violence poses when it involves living with fear, insecurity and vigilance. There is the danger of ongoing fear that the father will emotionally or physically damage the mother they love." However, that notwithstanding, the judge went on to say that the greatest danger was that the elder child would learn from his father's behaviour that, "... physical and emotional abuse are acceptable ways of dealing with other persons and thus come to share his father's disability. Such a disability would mar his dealings and relationships with others, including those he loves, bring him into contact with the police, the Courts and the community, resulting in him being penalised or even imprisoned."

Having said that, Mullane J was of the view that, on the evidence, the children's best interests, in all but the very short term, required that they have no contact with their father. However, he did note that there was a contrary indicator that, "... they have some attachment to him and could be distressed by complete separation at this time." The solution devised by

the judge was that the children should have a sequence of supervised contact of reducing frequency, aimed at facilitating a separation. In turn, that required supervision by a professional person in safe premises and the only available option⁶⁹ was the family Court Counselling Service. That meant, because of the limited staff and resources of the service, that contact would be infrequent. In the event, Mullane J decided⁷⁰ that the contact orders should continue for a year so that if the father recognises his problem, and undertakes successful therapy, he would be able to apply to the Court for the continuance of contact.

The judge also commented⁷¹ that, owing to his abusive behaviour, the father's claim for a residence order had no prospect of success, though he was unwilling to accept legal advice to that effect. Once again, because of that attitude, he had subjected the mother to the stress of a lengthy hearing and she was likely to have exhausted any legal aid finance she might have had. Since the father did not accept responsibility for his problems and actions, it was likely that he would make further applications. In order to protect the mother, the father was prohibited from bringing further proceedings for three years without leave of the Court.⁷²

M, it is suggested, contains some contrary and equivocal responses: although contact between the children and the father was to be phased out,⁷³ the possibility of its continuance had been raised by the judge.⁷⁴ Given the father's quite appalling record and the emphasis of the legislation,⁷⁵ it seems to this commentator that the instant removal of the father from the lives of his children would have been wholly desirable. A further contradictory message has been sent by the judge's prohibition of the father's bringing proceedings in the Family Court for three years. It may be that contradictory messages are inherent in Part VII of the *Family Law Act* as its major purpose is to, in the words of s 60B(1), "... ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and

development of their children." The emphasis which the legislation has on family violence, positively, seems to contradict s 60B(2)(a) which stated that children have the right to know and be cared for by both of their parents and s 60B(2)(b) which provides that children have a right of contact with their parents.

4. Fault and Family Property and Finance

(a) *The Traditional Approach*

Both of the major substantive provisions of the *Family Law Act* 1975 – s 75, which deals with spousal maintenance and s 79, which deals with property redistribution on dissolution of marriage – are silent on the issue of family violence, except to the extent that both provisions state that courts may take any fact or circumstance which the justice of the case requires into account.⁷⁶ At the same time, though, there is significant case law which demonstrates developments which are analogous to those which can be discerned from the cases relating to children.

The major case decided shortly after the *Family Law Act* came into effect was *In the Marriage of Soblusky*.⁷⁷ The issue in question was whether the provisions permitted the consideration of conduct which was "obvious and gross" in assessing maintenance. The husband argued that the wife's conduct in nagging him for the duration of their married life, occasionally assaulting him,⁷⁸ refusing him permission to use the car when it suited her, banking his salary and other income and, at the time of his leaving the home, prevailing on him to transfer his interest in the matrimonial home for \$1000. The husband had a meagre income, no other assets, a wholly dependent *de facto* wife and was in debt. A judge of the Supreme Court of Queensland had ordered him to pay \$9 per week maintenance.

The basis of his appeal was the *dictum* of Lord Denning MR in *Wachtel v Wachtel*⁷⁹

that, "There will be no doubt be a residue of cases where the conduct of the parties ... is both 'obvious and gross', so much so that to order one party to support another whose conduct falls into this category is so repugnant to anyone's sense of justice. In such a case the court remains free to decline financial support or to reduce the support which it would otherwise have ordered."

After a lengthy analysis of case law from England and both pre and post 1975 cases in Australia, the Court concluded⁸⁰ that it was inappropriate and artificial to apply the *Wachtel* test to the Australian legislation. Further, the court considered that the legislation did, "... not include facts or circumstances relating to the marital history as such of the parties but relate only to facts and circumstances of a broadly financial nature." Indeed, the Court went further and stated ⁸¹ that, were the *Wachtel* test applicable in Australia, the facts would not justify its application in the present case. This is a strong statement relating to the relevance of fault in property and financial matters in Australian family law: assuming that the husband's allegations ⁸² were correct, it is hard to see what conduct – short of the wife's attempting obviously to kill the husband, for instance ⁸³ – might suffice!

As regards the facts and circumstance of "a broadly financial nature," a useful and interesting instance is provided by the decision of the Full Court of the Family Court of Australia in *In the Marriage of Fane-Thompson*.⁸⁴ There, the husband had appealed against a trial judge's property settlement which had awarded the husband between one-sixth and one-seventh of the parties' total assets. In making that order, the trial judge had found that the husband had given very little financial support to the household for a very considerable period and, hence, the financial burden of running the household had fallen on the wife. In addition, the husband had dissipated a significant portion of his income and, but for the wife's

financial energy and acumen, there would, in all probability, have been no worthwhile assets left for distribution. Not wholly surprisingly, the Full Court⁸⁵ dismissed the husband's appeals and, in doing so, stated⁸⁶ that the assets, "... were preserved by the wife despite the husband's fecklessness. He may have negated all of it but for his wife's actions. Her contribution rose proportionately as his fell. This is not to say that [the trial judge] was taking conduct other than financial conduct into account. He was assessing contribution."

(b) Post-1995 Case Law

Although, as already noted,⁸⁷ the property and finance provisions of the Act are silent as to the issue of family violence, a perceptible trend has taken place, redolent of that in relation to children.

First, the decision of the Full Court of the Family Court of Australia in *In the Marriage of Doherty*⁸⁸ concerned an appeal by a husband against a first instance decision which had divided the parties' property 65%/35% in favour of the wife. In reaching that decision, the trial judge had referred to the appellant's drinking habits and to violence and aggression which he had exhibited towards the wife and children. Baker J, in the Full Court, noted⁸⁹ that, although the trial judge had done no more than record those matters, it was clear that the wife's contribution as homemaker and parent⁹⁰ had been increased in consequence. Baker J was of the view that, even though the violence only took place during a short period of a fairly long relationship,⁹¹ the trial judge would have been entitled to have so found. Though Baker J did, additionally, comment that the wife's contribution would only slightly have been increased.

In the later case of *Marando v Marando*,⁹² Gee J sought to explicate Baker J's remarks in *Doherty*. Gee J remarked⁹³ that, although those remarks were *obiter* and made in an *ex*

tempore judgment, they were entitled to great respect. In particular, Gee J was of the view that they did not represent new law as, apparently, had been suggested. The relevant facts in *Marando* were that the parties had married in 1946 in Italy and had separated in 1994 in Australia. There were three children of the marriage. There was evidence, which was accepted at the trial that the husband had abused and denigrated the wife and the children throughout the subsistence of the marriage. He gave the wife no assistance with the house or with the children after a long period of time, which, when coupled with a drinking habit, necessitated, in the judge's own words,⁹⁴ "... the wife working especially hard and harder than would be usual in the normal situations as homemaker, parent and as the prime navigator of the welfare of this family through the many seas of problems and difficulties which confronted them over the years." As was the case in *Doherty*,, Gee J was of the view⁹⁵ that, while in a long marriage, in normal circumstances, a conclusion of equal division would be reached, "... the special factors ... in relation to the wife's contribution in relation to the welfare of the family lead to the conclusion that the overall contributions were thereby so increased as to be greater than those of the husband, and, although it is difficult to be precise, to the extent of 55 per cent to the wife and 45 per cent to the husband."

The significance of *Marando* lies in the equation of abuse and denigration with the kind of financial misconduct as represented by *Soblusky*.⁹⁶ However, in that context, note should be taken of the decision of the Full Court of the Family Court in *In the Marriage of Ferguson*.⁹⁷ There, Watson and Wood JJ had taken the view that conduct was only relevant if it, "... itself has produced consequences which have diminished or destroyed the property of the parties, or the effect of it has been to cause the recipient of the conduct to act in a way which has resulted in the value of the property being diminished or in the property being lost to the parties". However, in *Ferguson*, the judges also noted that there might be a rare or

exceptional case where a party has ignored completely the basic concepts upon which the partnership of marriage has been founded: in such a situation the principles enunciated in s 43 of the Act might come into operation. As had been earlier observed ⁹⁸ s 43 had been amended in 1995 to take account of domestic violence. Hence, the background to the situation at large may well have changed.

At the same time, regardless of statutory amendment, the comments of the judges in *Ferguson* are by no means dissimilar from those of Lord Denning MR in *Wachtel*.⁹⁹ Yet, it may well be that the amendment has had some effect: thus, *Kennon v Kennon* ¹⁰⁰ involved an appeal by the wife, and a cross appeal by the husband, against first instance orders made in relation to property settlement and damages for assault. The parties had begun cohabitation in 1989 and married in 1991. During the marriage, the husband had access to four children of previous marriages, though there were no children of the marriage in issue. The parties separated in 1994 and the wife filed an application seeking a property settlement and also a cross-vested claim as damages in respect to assaults which were alleged to have taken place during the marriage. On the issue with which this part of the paper is concerned, Fogarty and Lindenmayer JJ initially noted ¹⁰¹ that it was 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."

After a consideration of the earlier case law, the judges concluded by saying ¹⁰² that, in their view, where there had been a cause of violent conduct by one party to the other during

the marriage and which was demonstrated to have had a significant adverse effect on that party's contributions to the marriage,¹⁰³ then that was a fact which the trial judge was entitled to take into account in assessing the parties' relative contributions in relation to property distribution.¹⁰⁴ Fogarty and Lindenmayer JJ then continued by suggesting that earlier authorities which had sought to remove fault in totality from the areas were no longer binding because of market changes in both legal and social perceptions of domestic violence and it appeared appropriate to give effect to them.

At the same time, they were of the view that it was important to consider the "floodgates" argument: in that context, they regarded the principles which they had earlier enunciated as only being applicable in exceptional cases. The reason for that view was that they might, "... 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 – a circumstance which proved so debilitating in the past." However, s 79 of the *Family Law Act* ought to encompass exceptional cases of the nature which they had described.

Even so, the judges emphasised, once again, that there would be a relatively narrow band of cases to which these considerations would apply. "To be relevant," Fogarty and Lindenmayer JJ said,¹⁰⁵ "it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact on the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass ... conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions." Thus, the emphasis appeared to relate to a small number of instances which could be directly related to the issue of contributions under s 79 of the *Family Law Act* 1975. One must surely question

whether, given the new emphasis in s 43 (ca) of the Act, ¹⁰⁶ this is sufficient. Section 75(2)(b) of the Act refers to "financial resources" and there should be no logical reason why violence which might have affected the financial resources of the victim ought not to be taken into appropriate account.

This rather unduly narrow approach was likewise adopted by Baker J in *Kennon*,¹⁰⁷ who reiterated what he had said in *Doherty*,¹⁰⁸ the reason being that the contributions of a party who has suffered domestic violence at the hands of the other might be all the more onerous because of that violence and, therefore, should attract additional weight.¹⁰⁹

5. Conclusions

It will have been apparent that the signals which have been given in relation to developments in fault under the Australian *Family Law Act 1975* have been, depending on their context, rather mixed. Thus, the ground for dissolution seems wholly to be dissociated from notions of fault, even though that very fact may have attracted criticism.¹¹⁰ However, both through legislative change and judicial activism, issues of culpability, especially in the area of family violence, may very well be becoming more relevant in the areas of child law and family property and finance.

Of course, the issue is whether both legislature and courts have gone far enough. Hence, one commentator, Behrens, has written ¹¹¹ of the 1995 changes that, "... amendments which add to the complexity and uncertainty of the law will advantage those who have resources to fight legal battles for interpretations in their favour; in general women will suffer most from any complexity. Women who are the targets of violence are particularly vulnerable. One of the features of the violence is often isolation from sources of financial and emotional support. Resort to the legal system is thus often particularly difficult and can be

the focus of renewed or increased violent attacks." In the light of that statement, which cannot be readily disputed, she draws attention ¹¹² to various *lacunae* which are not included in the 1995 amendments and which she considers are not likely to be included in any immediately proposed amendments to other parts of the Act. First, she urges that breach of a personal protection order made under s 114 of the *Family Law Act* become a criminal offence. Second, she notes that violence has not specifically be included in the factors which are to be taken into account in determining past contributions and future needs in relation to property division.¹¹³ Although it will be apparent from the previous discussion,¹¹⁴ that some judges are actively seeking to have it taken into account, legislative *imprimatur* would surely make their task more straightforward and also provide a warning beacon for the violent spouse. Third, she points out ¹¹⁵ that "duress" as it occurs in the *Family Law Act* is not specifically defined so as to include the subjection to violence or threats of violence. This may be of especial relevance in relation to the setting aside of property orders which have been made on the basis of duress.¹¹⁶ Finally, she suggests that the issue of violence is not directly dealt with in the provisions of the Act itself which are concerned with mediation and counselling.

All of these are clearly sensible suggestions and, what is more, are easily capable of legislative amendment, though it should be said that Australian law is not wholly silent on the matters which Behrens has raised: as regards duress, in *In the Marriage of Kokl*,¹¹⁷ Gee J adopted the view ¹¹⁸ that "duress" as involved in the statutory provision meant, "... the compulsion of a person by physical or mental harm." That description is, surely, sufficient to cover issues involving family violence and it has never been judicially further restricted. Second, 025A of the *Family Law Rules* does mention family violence as a factor in relation to whether a particular dispute is subject to mediation. Nevertheless, Behrens's views are well taken.

At the same time, note should be taken of other views: thus Murray J, writing extrajudicially,¹¹⁹ argues, in this commentator's view, rather paradoxically, that family violence should be regarded as a special category of conduct but only in that it can attract both civil and criminal sanctions. It ought not, she considers to be specifically designated for inclusion in legislative amendment, presumably of the kind urged by Behrens,¹²⁰ but rather be dealt with by a civil claim in connection with property proceedings.¹²¹ She suggests that any such amendment would lead to "extra costs and extra anger." This is nothing more than an assumption and has been shown by much of the preceding discussion not to be generally supported. Murray J was critical of an earlier article by Behrens where she had, first and most specifically, suggested¹²² that conduct, including violence, which does affect the party's capacity to carry out particular roles, particularly those of homemaker and parent, has traditionally been undervalued by the courts. The previous discussion now suggests, if not more that, although that once was true, there is an, albeit uncertain, move away from it.

Second, more generally, Behrens had suggested¹²³ that Australian courts had, in her own words, "... retreated behind no fault disclosure to strike out any allegations of...violence." Even where, she continues, violence is taken into account in property and financial matters, it is only the consequences of the violence, rather than the violence itself which is taken into account. This is obviously a fair point, but it ought to be one which can be subsumed into the body of the legislation itself. In s 75(2) of the *Family Law Act*, courts are required to take into account "... any other fact or circumstance which, in the opinion of the court, the justice of the case required to be taken into account," and s 79(2) states that the court, "... shall not make an order...unless it is satisfied that, in all the circumstances, it is just and equitable to make the order." It may well be that there might be cases, which despite *In the Marriage of Soblusky*,¹²⁴ where issues of justice and equity could well either override or circumnavigate

the no-fault principle, a view which was hinted at in *Ferguson*.¹²⁵

It follows that the situation in Australian law regarding the emergence of fault is far from clear. In the area of child law it may be that opportunity has not been taken of certainly well-meant statutory provisions; whereas, in the area of finance and property, curial innovation has been readily apparent. A policy must, eventually, legislatively be worked out. This is the more so as, as critics have repeatedly pointed out, with a frequency so great as not to need documentation, acrimony has been transferred from the ground for dissolution itself,¹²⁶ to ancillary matters. The issues raised in this paper are essentially policy matters and ought not to be left to the vagaries of judicial discretion (even though that is more structured than once it was).¹²⁷ Behrens, I would suggest, has provided¹²⁸ a template which is more than useful.

NOTES

¹K.E. Enderby, "The Family Law Act 1975" (1975) 49 *ALJ* 477 at 477.

²*Ibid* at 487.

³March 2001.

⁴P. Tennison, *Family Court: The Legal Jungle* (1983) at 83.

⁵L. Star, *Counsel of Perfection: The Family Court of Australia* (1996) at 213.

⁶Above text at n 3.

⁷Family Law Act 1975 s 64(1)(b).

⁸*Ibid* s 64(1)(c).

⁹For comment, see P.E. Nygh, "The New Part VII – An Overview" (1996) 10 *Aust J. Fam L* 4; R.J. Bailey-Harris, "The Family Law Reform Act 1995 (Cth): A New Approach to the Parent/Child Relationship" (1996) 18 *Adelaide LR* 83.

¹⁰Section 65E of the *Family Law Act* 1975, as amended in 1995, provides that the best interests of the child are the paramount consideration in making a parenting order.

¹¹Below text at n 38, 87 *ff.*

¹²For comment, see F. Bates, "Principle and the Family Law Act: The Uses and Abuses of s 43" (1981) 55 *ALJ* 181.

¹³Below text at n 39 *ff.*

¹⁴See F. Bates, "The Grounds for Dissolution of Marriage and the Philosophy of the Family: The Australian Experience" (1989) 19 *Anglo-Am LR* 7.

¹⁵Above n 1 at 482.

¹⁶Above n 14 at 25.

¹⁷Above n 3 at 104.

¹⁸B. Maley, *Marriage, Divorce and Family Justice* (1992) at 22. It must be pointed out, for necessary context, that this monograph was produced under the imprint of the *Centre for Independent Studies* which is a notoriously right-wing oriented organisation.

¹⁹(1976) FLC 90-028.

²⁰*Ibid* at 75, 122. See also *In the Marriage of Xuereb* (1976) FLC 90-029. For comment see above n 14 at 21, 22.

²¹(1976) FLC 90-035.

²²*Ibid* at 75,133.

²³*Ibid* at 75,134.

²⁴(1977) FLC 90-270.

²⁵Above text at n 3.

²⁶(1983) FLC 91-337. For contextual comment, see F. Bates, "Welfare and Reality in Custody Disputes: Some New Developments in Australian Law" (1984) 33 *ICLQ* 701.

²⁷Notably some passages in the landmark House of Lords decision in *J v C* [1970] AC 668.

²⁸(1983) FLC 91-337 at 78,286.

²⁹*Ibid* at 78,287.

³⁰For a more recent example of such conduct, see *Re David* (1997) FLC 92-776.

³¹In the event, Evatt CJ and Asche SJ, (1983) FLC 91-337 at 78,289, considered the trial judge to have been in error, his decision was not thereby initiated to the extent that it entitled the Full Court to substitute its own discretion. Accordingly, a rehearing was ordered.

³²In so disagreeing, Gee J., *ibid* at 78,292, placed very considerable emphasis on the pre-1975

decision of the High Court of Australia in *Storie v Storie* (1949) 80 CLR 597. This writer has been strongly critical of reliance on this case, 50 years after it was decided and in the face of radical legislative change. See above n 26 at 704.

³³(1977) FLC 90-238. That case has not generally been followed; for comment on the issue of sexual behaviour and its relationship to the *Family Law Act*, see F. Bates, "The Law, Sexual Behaviour and a No Fault Divorce System" (1985) 17 *CILSA* 358.

³⁴See F. Bates, "Evidence, Child Sexual Abuse and the High Court of Australia" (1990) 30 *ICLQ* 413; "Child Sexual Abuse and the Courts – Why We Must Be More Careful" [1990] (1) *Aust Current Law Bull.* 9; "Protecting Children – When and From What" (1991) 6 *QUTLJ* 53; "Child Abuse and the Fact-Finding Process: Problems With Recent Commonwealth Decisions" (1992) 41 *ICLQ* 449; "Finding the Truth in Child Sexual Abuse Cases: Some Peculiar and Comparative Developments" (1993) 5 *J.Child L* 178; "Child Sexual Abuse and the Fact-Finding Process – Some Thoughts on Recent Developments" (1995) 1 *Canberra LR* 181; "Access Where Allegations of Child Sexual Abuse Are Made: Who Are We Protecting and From What" (1995) 13 *U.Tas LR* 237; "New Developments in Child Sexual Abuse and the Fact-Finding Process" (1998) 5 *Canberra LR* 111.

³⁵(1988) 166 CLR 69 at 78.

³⁶See *In the Marriage of D and Y* (1995) FLC 92-581; *G v M* (1995) FLC 92-641; *N and S and the Separate Representative* (1996) FLC 92-655.

³⁷See the decision of the House of Lords in *Re H and Ors (Minors) (Sexual abuse: standard of proof)* [1996] AC 563.

³⁸Above text at n 9.

³⁹(1994) FLC 92-515.

⁴⁰(1995) FLC 92-580. For contextual comment on these cases, see F. Bates, "Domestic Violence and Children – Some New Developments" (1995) 10 (4) *Aust.Family Lawyer* 24.

⁴¹See *Barnett v Barnett* (1973) 2 ALR 19; for comment, see F. Bates, "Custody of Children: Towards a New Approach" (1975) 49 *ALJ* 129; *In the Marriage of Kress* (1976) FLC 90-126; *In the Marriage of Smythe*, above text n 26 ff.

⁴²(1994) FLC 92-515 at 81,316.

⁴³*Smith v Swinfield* (1981) 7 Fam LR 757; *In the Marriage of Jaeger* (1994) FLC 92-492.

⁴⁴(1994) FLC 92-515 at 81,317.

⁴⁵(1981) FLC 91-008 at 76,107.

⁴⁶(1994) FLC 92-515 at 81,318.

⁴⁷*Ibid* at 81,319.

⁴⁸*Ibid* at 81,324.

⁴⁹(1995) FLC 92-580 at 81,752.

⁵⁰Other matters found in the amendments include the replacement of the terms "custody" and "access" with "residence" and "contact"; see *Family Law Act* ss 65M, 65N.

⁵¹Above text at n 35.

⁵²*Family Law Act* 1975 114(1)(a).

⁵³*Ibid* s 114(1)(b).

⁵⁴*Ibid* s 114(1)(c).

⁵⁵(1999) FLC 92-837.

⁵⁶See *Crimes Act* 1900 (NSW) Part 15A.

⁵⁷The other major issue related to the trial judge's treatment of evidence by a counsellor regarding the children's attachment to the wife.

⁵⁸(1999) FLC 92-837 at 85,745.

⁵⁹It is surely undesirable that different approaches be taken to the issue of findings of fact in relation to domestic violence and child sexual abuse.

⁶⁰(1999) FLC 92-837 at 85,745.

⁶¹Ibid at 85,746.

⁶²See, *In the Marriage of JG and BG* and *In the Marriage of Patsalou*, above text at n 39 *ff*.

⁶³See *H v W* (1995) FLC 92-837; *K v Z* (1997) FLC 92-783.

⁶⁴The other judges were Kay and Mullane JJ.

⁶⁵(2000) FLC 93-006.

⁶⁶On one occasion, as noted by Mullane J, *ibid* at 87, 152, the father had assaulted him by stabbing him in the arm with a dinner fork and, on another had punched him in the face. At the time, the child was four years old. He was prosecuted, but failed to attend the hearing to defend the charge, giving an excuse which was not regarded as credible. He did not appeal against the conviction and fine.

⁶⁷Ibid at 87,159.

⁶⁸Ibid.

⁶⁹The judge noted, *ibid*, that the paternal grandmother would be unsuitable to supervise contact as she did not accept that the father had any problem and was intimidated by him.

⁷⁰(2000) FLC 93-006 at 87,160.

⁷¹Ibid at 87,161.

⁷²See *Family Law Act* 1975 s 118(1)(c).

⁷³Two hours per week for the first month; two hours per week for the second month; two hours per week for the remaining ten months.

⁷⁴Above text at n 70.

⁷⁵Above text at n 50.

⁷⁶See *Family Law Act* 1975 ss 75(2)(o), 79(4)(b), the latter refers back to s 75.

⁷⁷(1976) FLC 90-124

⁷⁸In the words of the Court (Demack and Watson SJJ and Fogarty J), *ibid* at 75, 570, "... from time to time she threw things at him, threatened him on one occasion with a knife, 'belted him up' on a number of occasions and on at least one occasion cut up his clothing with a knife."

⁷⁹[1973] 1 All ER 829 at 835

⁸⁰(1976) FLC 90-124 at 75, 586

⁸¹Ibid at 75,588.

⁸²Above n 78.

⁸³For comment on that, and related situations, see F. Bates, "A Plea for the Battered Husband" (1981) 11 *Fam L* 90. Also *D'Arc v D'Arc* 395 A 2d 1270 (1978).

⁸⁴(1981) FLC 91-053.

⁸⁵Asche and Emery SJJ and Bulley J.

⁸⁶(1981) FLC 91-053 at 76,435.

⁸⁷Above text at n 76.

⁸⁸(1996) FLC 92-652.

⁸⁹Ibid at 82,683.

⁹⁰*Family Law Act* 1975 s 79(4)(c).

⁹¹The relationship involved a period of cohabitation of something over twelve years.

⁹²(1997) FLC 92-754.

⁹³Ibid at 84,169.

⁹⁴Ibid at 84,168.

⁹⁵Ibid at 84, 169.

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- ⁹⁶Above n 77.
- ⁹⁷(1978) FLC 90-500 at 77,606.
- ⁹⁸Above text at n 12.
- ⁹⁹Above text at no 79.
- ¹⁰⁰(1997) FLC 92-757.
- ¹⁰¹Ibid at 84,290.
- ¹⁰²Ibid at 84,294.
- ¹⁰³Or, to put the matter another way, to have made the other spouse's contributions significantly more arduous than they ought to have been.
- ¹⁰⁴See *Family Law Act* 1975 s 79.
- ¹⁰⁵(1997) FLC 92-757 at 84,295.
- ¹⁰⁶Above text at n 12.
- ¹⁰⁷(1997) FLC 92-757 at 84,329.
- ¹⁰⁸Above text at n 88.
- ¹⁰⁹Baker J, (1997) FLC 92-757 at 84,329 was also of the view that it was preferable in most cases for domestic violence to be taken into account as an element of contribution rather than for litigants to pursue actions in damages. His reason for this view was that actions did not fit comfortably with family law proceedings at large. For a valuable commentary on the relationship between the matters, see J Behrens and K Bolas, "Violence and the Family Court: Cross-Vested Claims for Compensation" (1977) 11 *Aust. J. Fam. L.* 164. The issue of cross-vesting has, however, been complicated by the High Court of Australia's decision in *Re Wakim* (1999) 163 ALR 270.
- ¹¹⁰See above text at n 17.
- ¹¹¹J Behrens, "Ending the Silence, But ... Family Violence Under the Family Law Reform Act 1995" (1996) 10 *Aust J. Fam L* 35 at 44.
- ¹¹²Ibid at 45.
- ¹¹³See *Family Law Act* 1975 s 79(4).
- ¹¹⁴Above text at no 88 *ff.*
- ¹¹⁵Above n 115 at 46.
- ¹¹⁶See *Family Law Act* 1975 s 79A(1)
- ¹¹⁷(1981) FLC 91-078 at 76,557.
- ¹¹⁸See R. Meagher, W.M. Gummow and J.R. Lehane, *Equity: Doctrines and Remedies* (3rd Ed., 1992) at 386.
- ¹¹⁹Murray J, "Domestic Violence and the Judicial Process: A Review of the Past 18 Years – Should it Change Direction?" (1995) 9 *Aust J Fam L* 26 at 36.
- ¹²⁰Above text at n 113.
- ¹²¹*Cf* Baker J above n 109.
- ¹²²J Behrens, "Domestic Violence and Property Adjustment: A Critique of No-Fault" (1993) 7 *Aust J Fam L* 9 at 10.
- ¹²³Ibid at 13.
- ¹²⁴Above text at n 77.
- ¹²⁵Above text at n 97.
- ¹²⁶Above text at n 14 *ff.*
- ¹²⁷Above text at n 9.
- ¹²⁸Above text at n 112 *ff.*