SPARE THE CHILD AND HIT THE POCKET:
Towards a jurisprudence on domestic abuse as a quantum factor in financial outcomes on relationship break down

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Introduction

"Dad, can you teach me to change my attitude towards women?" (US)

"I now know its not OK to be physically threatened or scared into things which make me uncomfortable or unhappy or that I don't want to do, just because I am in a relationship." Caroline's Story (Australia)

These are some examples of campaigns being run across the world to discourage domestic violence and abuse, whether to children or to those in a domestic relationship. Some are educational via television or the print media. Some countries have mandatory courses for those who have committed domestic abuse. Some countries have specific laws and procedures to cover domestic abuse in the context of child contact arrangements. Laws, and law/police enforcement, on protection from domestic abuse are getting better and more effective. Statistics published in many counties demonstrate that domestic abuse occurs across all societies; across all ages, wealth and ethnic backgrounds.

The message is now getting out that domestic abuse is unacceptable. It is condemned by family courts. But is it enough to educate and inform, to take into account in contact arrangements and to give protection? The effects of domestic abuse on the victims are often long term and deep, affecting many other aspects of their lives; as parents, as children, in their new relationships and in the work place and college. For those who engage in abuse but for whom any protection orders have little practical impact and for whom child contact arrangements are of little affect, the law's and society's condemnation of domestic abuse is meaningless. Too often, past behaviours of abuse are repeated in new relationships. Abusers escape unscathed, untouched and without cost by their behaviour.

But what if society showed its condemnation of domestic abuse by making it one aspect for consideration in the financial arrangements on the end of the relationship? It would then hit the pocket of the abuser. Would this have a more stark impact than any number of educational programmes? Is it right, appropriate and consistent to do so?

In the past few years an increasing number of jurisdictions have been looking at this issue. Various methods are being used to introduce the issue into the family finance courts. Should domestic abuse during a relationship ever be a factor in the financial outcome on the relationship breakdown? If so, how should it be taken into account? Only as a pure factor of economic loss? As part of either negative contribution by one or the greater positive contribution by the other? Only if it is exceptional violence? Or much wider and as part of society's condemnation of domestic abuse? In any event, how does it fit into a non fault philosophy?

Many problems immediately raise themselves. For example, what difference should there be between abuse which has a direct financial impact e.g. on future earning or needs, and abuse which has no obvious outward financial impact? Should financial implications of abuse be left solely to the civil

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courts and/or to administrative compensation as part of a separate application, and if so, what are the implications on the family law resolution? If there were to be any compensatory element in the family courts adjudication process, how does this fit in with other quantum factors used by the family courts?

Procedurally, how should such allegations be dealt with in the proceedings? How much weight should the family finance court, as distinct perhaps from the family domestic protection court, give to “mitigating” circumstances (a controversial issue in the domestic abuse field) and what impact will it have on costs, delays and the level of contentiousness?

In this paper I look at what is happening in a number of countries, to share lessons learned, to consider some of the problems of introducing domestic abuse as a quantum factor and start to consider a jurisprudence on when it is, and is not, appropriate to take as a factor. In this way I hope the World Congress can encourage a wider debate, to help those many countries who are watching this debate closely and perhaps even gather some global consensus.

A few preliminary notes.

I have used the phase domestic abuse throughout as this is wider than domestic violence, is increasingly the “industry standard” term but with it comes the issue of what sorts of abuse warrant consideration by the family finance courts.

I do not presume the abusee is the woman and the abuser is the man, but this is statistically often the case unless, as too often the case, the abusees are children. Accordingly I have used this gender stereotype.

Although domestic abuse occurs in all forms of relationship, and some statistics show it is more prevalent in casual non marital relationships, I have concentrated on remedies of the divorce courts. Jurisprudence is more developed in the divorce courts than the cohabitation courts and divorce trends tend to lead other relationships.

Finally this paper is written by a family finance lawyer and mediator, with some case work experience of domestic abuse work, rather than by a lawyer specialising wholly in domestic abuse work. I believe this is in fact an advantage. There is, rightly or wrongly, a perception amongst some in family law that there are gender biases and outcome biases in those regularly acting for abused parties. I have not started with any expectations of outcomes for this paper and from the outset have been very aware of the very big issues facing any law which introduces domestic abuse as a factor. But convinced that we need to do more to curtail domestic abuse, I am certain this debate is needed.

The law in various countries.

The simple reality is that very many countries do not have any factor of domestic abuse in financial outcomes. In part, their laws do not allow any opportunity to do so.

Many countries endorse (as if a final court order) any agreements reached between the parties on or before, or sometimes during, marriage. Unless it can be shown that these agreements were reached by force, duress or unreasonable pressure, then the agreements will be upheld and followed. Courts need to be vigilant, alert and aware of violence and abuse leading to the agreement being signed.

However here immediately is a major problem. The contract lawyer would comment that a party did not have to enter into the pre-marriage agreement (even if it were a pre condition to marriage), as in most cultures and circumstances the marriage commitment is essentially voluntary. So why enter into marriage if there was already violence that should have put a spouse on notice that it was likely to continue? The strict contract lawyer would even go further and say that having entered into marriage

knowing there was domestic violence, is that spouse now estopped from arguing a better remedy and financial outcome because the abuse has continued?

This is a real problem for countries with pre marriage agreements. Much research shows that "acceptance" of domestic violence continues from one relationship to another. It does not mean that it is acceptable. It also ill behoves the abuser to claim that there should be no impact of the abuse purely because there was abuse pre marriage and yet the abusee went on with the marriage.

Courts in jurisdictions which endorse private agreements reached between parties should be keenly aware of any suggestion that the agreement was entered into in circumstances of abuse, i.e. by reason by duress. Equally such courts should be aware that for a party seeking to evade the terms of an agreement, it is relatively easy to allege abuse and it will be a matter of strict proof by the one making the allegations. It will only be abuse before the agreement was signed which will go to the basis of duress but post wedding abuse will be evidential.

Those jurisdictions which endorse agreements sometimes have very exceptional circumstances in which the courts can make a contrary outcome. Domestic abuse could be one such circumstance, especially as it goes to the state of mind of the abusee for the future.

Some jurisdictions follow a strict community of property, in which marital assets are divided equally. Some countries have variations and hybrid laws, allowing some account to be taken of other factors, often in the form of an equitable distribution. Invariably this redistribution is quite limited, but there seems no reason why domestic abuse cannot be one such factor.

Some countries have a discretionary basis, some times related to criteria of what is "fair and just" or similar. Although factors, guidelines and presumptions exist, these are either not binding or are part of the overall fairness discretionary exercise. These are the countries where domestic abuse can be most easily accommodated as a factor and indeed these are the countries where attempts are now being made to introduce it. But to what ends? If it is just to overcome the direct physical damage and/or cost to a person as a consequence e.g. they cannot work as before or have medical bills, this does not require a separate jurisprudence in family law. It can be covered in other ways e.g. on a needs basis. If it is compensation, how does this fit with other reasonable claims for compensation arising from the breakdown of a relationship, with fault overtones being then introduced! If it is categorised as contribution, is this negative contribution by one i.e. the abuser, or positive contribution by the other e.g. the need for the abusee to play a greater role in the relationship? Can domestic abuse really be classed as a contribution? Is this not shoehorning a genuine desire to introduce domestic abuse as a factor into existing criteria with the consequence that ultimately it will be found wanting in jurisprudence?

Some countries have remedies in the civil courts and/or administrative tribunals for damages arising out of domestic abuse. Invariably with criminal burdens of proof, they are also often wholly independent of the outcomes of the family courts. So a family court may find itself making an order to resolve financial matters between the spouses only for one thereafter to obtain an order from the civil court/tribunal for a money order for matters arising during the marriage. Are these civil courts appropriate places and do they use appropriate criteria? Should any part of their role be taken over by the family courts? If so, how does that fit with the very different criteria adopted by the family courts?

With these introductory comments, I cover a number of countries including those countries of which I am aware domestic abuse is a factor. It is inevitably a summary. I have relied on the assistance of local lawyers as referred to in the appendix.

<u>England and Wales</u>

England has a wholly discretionary based system. It has a mixed fault and separation basis for divorce

but the fault basis is never automatically used in financial issues. There is a case law imperative to produce a just outcome and a number of statutory factors which should be considered by a court. Originally a "needs" based jurisdiction, it has since the White decision by the House of Lords in 2000 moved towards one of equality in cases of long relationships where resources can meet basic needs.

The only relevant statutory criteria is "conduct", specifically "the conduct of each of the parties if that conduct is such that it would be in the opinion of the court inequitable to disregard it.". This replaced in 1984 the stiffer test of "obvious and gross".

The practical reality is that "conduct" cases are rare. Pressure is placed by courts and lawyers not to raise it. Doing so increases significantly the length and costs of a case. Many conduct claims do not succeed. A few of the reported decisions, over many years, highlight that it is a limited option.

In Jones (1975) the wife's tendons of a hand were severed, causing major disability, by an attack of the husband and so she was unable to continue employment as a nurse. The husband was sent to prison. The court found that she would receive Criminal Injuries Compensation (below) as compensation but all of the family home was transferred to her

In J (HD) v J (AM) (1980), post divorce the wife conducted a campaign of harassment against the husband and his new wife, including breaching many injunctions and attacking the new wife for which she was convicted for assault. She was receiving alimony which was in arrears. The husband sought a reduction to a nominal level based on her violence. She sought to increase alimony. The court held her conduct could not be ignored but it then dismissed both applications, leaving her with a small maintenance order!

In Kyte (1987) the wife's active encouragement to the husband to commit suicide for which she would benefit as well as having another relationship whilst the husband was in hospital was held to be conduct and her lump sum was reduced on appeal.

In Evans (1989) the wife was convicted of inciting others to murder her husband. Her maintenance order was discharged.

In K (1990) the husband's drink problem, personality change and not working for 10 years, all found to be self inflicted, resulted in no order for maintenance from the income earning wife yet he got 60% proceeds of family home as he had a housing need.

In S-T (formerly J) v J (1998) a transsexual's false declaration of gender at the time of the marriage, deceiving the other party, resulted in a nullity of marriage, but he (or she?) then went on to claim financial provision against the deceived "spouse". The court held that this was against public policy due to conduct.

In H (1994) the husband was imprisoned for assault and rape on the wife, then lost his employment as a result of being in prison. Both were on state benefits. In view of his conduct, the family home was transferred to the wife as a clean break with no continuing maintenance.

There are some other reported cases but not many. It will be seen they cover twenty five years, a period of rapid change in public thinking on domestic abuse. It is very difficult to gain any consistent jurisprudence. Certainly if there is any direct prejudice by the abuse on the ability to work, the court will take into account, but could do so anyway as "needs". It will try to create a clean break from the abusive party e.g. in transfers of the family home. To succeed, the abuse is often very bad and almost always actual violence. There are some references in recent court judgements to the impact of public policy and public thinking, giving reasonable cause to believe that if public thinking moved on more in condemnation of domestic abuse, the family courts may become more receptive to taking more into

account. But whilst conduct is so rarely raised and indeed often discouraged, the number of cases where domestic abuse is a factor will be rare. But it is at least available.

There are no reported cases where domestic abuse has been treated as a contribution, either negative or positive, even though financial and non-financial contribution is a factor the court can and often does take into account. Indeed one leading judge has said there is no such concept as negative contribution and that it should be treated as conduct, a very different experience to some other discretion based countries.

Where a party obtains a protective injunction e.g. as to sole occupation of the family home, the court can make some financial provision orders at the same time. But these are no more than to cover the ongoing needs. There are remedies to seek damages for harassment, but not much used, and for assaults.

A significant factor is the Criminal Injuries Compensation Scheme. It provides a tariff for payments, made by the state, not the abusive party, following criminal injuries. A court conviction is not in fact needed although claimants must co-operate with the police. It covers injuries to children by parents and in witnessing domestic violence in the home. The tariff takes account of direct losses e.g. in earning capacity. It is though rarely used in the domestic abuse context. The family court is sometimes unaware of the claims (and so do not take into account) as they can be subsequent to the divorce outcome.

New Zealand

The relevant family law legalisation governs both marital and non marital relationships. After three years of a domestic relationship, there is a presumption of equality of financial outcome, which can be rebutted by certain statutory factors. It is a non fault divorce jurisdiction.

The legislation reads as directly opposed to any domestic abuse being taken into account. It provides that misconduct cannot be taken into account at all unless provided by statute. So there is no discretionary element (e.g. in case law) beyond strict statute. Misconduct can be taken into account in looking at contributions provided, first, that it is "gross and palpable", a test based probably on England's former gross and obvious and certainly a high threshold, and secondly that the misconduct "significantly affected the extent or value of the relationship property", referred to more below, and thirdly it occurred pre separation.

It is the casual link, moreover with a test of significant affect, of the misconduct with the family property which ruins any prospect of taking domestic abuse generally into account.

In Greenslade (1978), the husband's excessive expenditure on his mistress depleted resources so it was relevant

In Pickering (1994) the lawyer husband's defrauding of his clients and his bank affected marital resources so it was relevant

But there was increasing comment by senior judiciary that family law was protecting property rights when other laws condemned family misconduct. In 1999, the Chief Family Court Judge, Peter Boshie, said that domestic violence should be an extraordinary circumstance which allowed departure from equality provisions. He quoted the comment in 1995 by a senior judge in Australia, Justice K A Murray, who said that "the disapproval of the legal system of domestic violence will only reach the community at large when such conduct of whatever degree hits the hip pocket of the violent spouse".

A novel twist was used in Gilchrist (1998) in which a three and a half year marriage was treated as a

less than a three year marriage (and therefore financial outcomes were based on actual contributions and not equality presumptions) as the domestic violence of the husband meant it was just to find it a marriage of short duration. The judge said the husband had repudiated and negated the marriage contract.

Although this case has not been directly followed, it has not been over turned or condemned in legal articles.

In Sullivan (1999), the husband grossly abused the child who almost died. The court gave more of the assets to the wife on the basis of her greater contribution in the care of the child and the husband's negative contribution.

In Banda v Hart (1998) the husband drank considerably, was violent and lived off the wife's earnings as a teacher. The judge found an unequal contribution to the marriage partnership, and a negative contribution by the husband. But this is viewed by some as a departure from the strict wording of the statute and a tenuous connection of the misconduct with the extent or value of the matrimonial property.

The continuing debate in NZ has focused on the mixed messages to the community by family law, one condemning in domestic protections and impact on contact, the other positively ignoring misconduct unless directly related to property. Novel devices have used negative contribution to get around the strict limitations of use of misconduct and artificially reducing the length of a relationship. But they are just devices and not a full consistent jurisprudence.

Another creative use of statute has been in the making of financial orders for children, including in respect of real property, based on the interests of the child. In R (1998) where a young girl had been sexually abused, the court made an order against the estate of the now deceased father on the basis that the statue was intended to provide for the care and development of the child and the parent had failed to provide this. NZ commentaries now raise the possibility of this being used to compensate a child who has observed violence in the parental relationship over a sustained time, on the basis that the impact of such observations on a child is well documented.

Overall the climate in NZ is one of condemning domestic abuse yet too often family law has either focused on the abuser and not the abusee or on the need for a relationship between the abuse and the financial resources. The pervading belief is that it is time to rethink the limitations of the conventional restriction of factors.

Australia

Financial provision law is discretionary with an objective of just and equitable. However more than many other discretionary jurisdictions, it is wedded firmly to a percentage outcome of the overall assets rather than a quantum provision figure.

There is a four stage approach in practice, based on the legislation.

The first stage identifies and values all of the assets and liabilities in the property pool. The second is a consideration of the past contributions by the parties, being both financial and non financial e.g. contributions to the welfare of the family. As a result of this exercise, a percentage division is calculated, in very precise figures e.g. 58% to husband and 42% to the wife. There is no equality expectations, such as the White series of cases.

The third stage looks at the present economic and other circumstances, broadly categorised as needs, to determine whether there should be some adjustment to the previous percentages reached. At this

stage, the parent with a housing need for the primary resident children and the party with lower earning capacity usually has their percentage element increased.

The fourth stage is a somewhat strange creature in itself as the Court then, as a separate exercise, looks at whether the division in accordance with the percentages reached would be fair. Not infrequently, husbands have higher than 50% on the contribution stage but less than 50% after needs is taken into account or it ends up near to 50% division. But the outcome is a percentage, at which point the actual assets are divided up to reflect the percentage.

Like New Zealand, it is a no fault divorce jurisdiction and this caused the judges over many years in the 1970s and 1980s to disallow any element of misconduct to enter the financial resolution process, including asserting that misconduct was only the cause of the "needs" or "contribution", so it was not appropriate to investigate. But the 1990s saw much debate on the inconsistencies of the Family Court paying no attention to violence in financial aspects yet giving it much weight in other respects. Juliet Behrens, a leading academic, argued for violence to be seen as negative contribution and that the court should look at all contributions to family life, assess them and make an order accordingly. Senior judges e.g. Chisholm J drew attention to the wide ranging implications of domestic abuse on the parties and their future lives.

In Doherty (1996) Baker J said that a consequence of the husband's violence was the wife's contribution as a homemaker had had to increase and that the husband's had diminished as a consequence, so weighting the contributions in favour of the wife.

In Marando (1997), the wife's homemaking and parenting were made especially harder by the husband's abuse, denigration of her and his attitude to her work and his drinking, all of which necessitated her working much harder than would be normal. She was described as the prime navigator of the welfare of the family over the years. This produced a 55% contribution factor for her. Some may consider this a low outcome in the described circumstances but it must be seen against the back drop of being a quite new legal proposition.

This was followed by the leading case of Kennon (1997). It was a five year relationship and the husband was very wealthy. She complained of several incidents of actual violence and of his frequent rages, throwing items in the house, physical threats and drunkenness. The court found that it was a factor but she only received about A$ 750,000 in total from an asset base of A$ 8M. The court said she had enjoyed a good lifestyle during the marriage and so her contribution to the marriage had already been received in part. But the significance with this, as indeed most of the ground breaking cases reported in this paper, is not so much the actual outcome but the direction the case leads for other cases to follow.

The court in Kennon rejected any concept of negative contribution. Instead they said that "where there is a course of violent conduct by one spouse to the other during a marriage which is demonstrated to have had a significant adverse impact upon that party's contribution to the marriage or, put another way, to have made his or her contribution significantly more arduous than they ought to have been, that is a fact that the Trial Judge is entitled to take into account in assessing the party's respective contributions"

They went on to say that they had referred to domestic violence but the principle they had set out was not so limited. This allows wider elements of domestic abuse.

The court then specifically referred to much earlier cases which had refused any consideration of abuse, saying that in recent years there had been marked changes in perceptions, both legal and social, about domestic violence and its impact and it appeared appropriate now to give effect to those perceptions.

They were anxious about the flood gates argument, referred to again below, and said that these principles were only to apply in exceptional cases and were not to become common usage as tactical weapons or for personal attacks thus leading the courts back to fault and increasing costs and delay. They would leave it to common sense of the lawyers and a firm hand by the court at an early stage when such issues were raised.

To be relevant, the abuse (conduct) had to be during the marriage and not at the time of the break up, not consist just of marital infidelities and had to have a discernable impact on contributions.

In a later, unreported case of Davies, the wife obtained a 60% share taking account of the husband's violence, the case being said to be in the exceptional category.

In P (2003), the court held that if it had not been for the husband's alcoholism, the court would have found either equality or more than 50% for the husband. But the consequence of his drinking was that the wife's ability to keep the house, work efficiently and to improve the parties' economic circumstances and to provide a happy and secure and supportive environment was reduced by the husband's selfish and thoughtless behaviour. The amount he spent on alcohol had an adverse impact on the family's finances. So the court found the wife's contributions were significantly more arduous than they ought to have been if the husband had behaved in a fair and responsible manner. She got 75% of the assets.

In Spagnardi (2003) the same appellate level court as Kennon made it clear that Kennon should not be regarded as saying that "exceptional" meant rare and that it was not only exceptional violence or only a narrow band of domestic violence which fell into those categories of cases where it could be used as a factor. The key words were "discernable and/or significant adverse impact". This can be read as a message by the higher judiciary that they believe more cases of domestic abuse should be brought before the courts for consideration of the impact on the financial outcomes. If not a green light, it was certainly an amber light of encouragement and a clear view that (some of) the judiciary are committed to domestic abuse as a factor.

In H v H (2005) , once again an appeal case, the Court supported the view expressed in Kennon, preferring that approach to the 'negative contribution' one. The Court stated that while it recognised the flood-gates argument, there have been marked changes in perceptions, both legal and social, about domestic violence, and accordingly it would not be appropriate to exclude 'exceptional cases' as a matter of policy simply because of the flood-gate risk. The Court therefore concluded that any division of property in these 'exceptional cases' should encompass and address the domestic violence issue. The Court went further and stated that to be relevant, it would be necessary to show that the conduct complained of occurred during the course of the marriage and importantly, had a discernible impact upon the contributions of the other party.

While this sets a high burden of proof for the party in question, its definite benefits are twofold. It has first driven a further nail into the coffin of the worries of the flood-gate argument, and secondly, it provides support for domestic violence being factored into property division in certain circumstances, while also providing some definitive guidelines as to what factors a party would need to address for a Court to take the issue into account.

Despite the opportunities permitted by Kennon and the definite forward steps taken by H v H, this exercise of discretion to look afresh at contributions is still not being often used and the flood gates regrettably remain quite firmly shut. Possible reasons are examined below. There are still concerns with the conflict with a no fault jurisdiction, an aspect of which Australia is very proud in having been one of the first countries to introduce. But the reality is that the Australian government and many agencies are spending significant time and resources to discourage domestic abuse with higher judges fully behind such campaigns by giving judicial encouragements, yet at first instance courts are rarely letting it affect their assessment of the contributions to family life and/or lawyers are not seeking to bring it before the

courts.

One can only hope that, with the developments in H v H, the Australian courts and lawyers will be more inclined to factor domestic violence into property division.

As a postscript, domestic abuse protection is available but via local (criminal) courts, not the family courts. Lawyers attending court are often from criminal law backgrounds, rather than family law. There is minimal overlap of information between the two sets of proceedings. Yet commencing them is used as a tactic in the family law proceedings, even though the magistrates dealing with the protection proceedings are invariably unaware of the full state of play in the family proceedings.

Hong Kong

Hong Kong is a community with seven million people living in a very small area, many in high rise densely populated dwellings, so it may be thought an area where domestic abuse is rife. In fact figures show no great difference to other jurisdictions.

The financial provision law is very similar to England. But although England has taken some account in its conduct cases, Hong Kong has not followed these cases.

The issue of domestic violence and the impact that it has upon the family in social and financial terms is presently being closely examined in Hong Kong following what is known as the “Tin Shui Wai Tragedy”. The background to this event is that on 11th April 2004 a woman, Madam Jin, and her twin daughters were found murdered in their flat in an area called Tin Shui Wai. They were murdered as a result of domestic violence. The husband, a Mr. Li, was seriously injured and died two weeks later from those injuries. There have been various explanations given for this current tragedy, including the failure of the police properly to respond to the problem and, for some reason still to be explained, there was no involvement by the Court in providing any protection by way of injunctive relief. This recent tragedy involving the death of children, and new immigrants to Hong Kong from the People’s Republic of China, has caused various agencies, including the Law Society of Hong Kong, to examine the issue of domestic violence in its wider context, with a view to suggesting reforms and improvements. In late 2005, the Law Society produced a working paper to examine how to strengthen the law to provide protections from domestic abuse.

The ripple effects of the Tin Shui Wai tragedy may make domestic violence feature more prominently in financial awards.

USA

Introduction
The USA is a federal jurisdiction and so each state has to be looked at separately. However some trends and categories of state’s approaches and laws can be discerned.

Recent years have seen the US openly “declare war” on domestic abuse, with an increasing public recognition of its unacceptability. There are massive media campaigns aimed at changing the American psyche, with a large part aimed at the young. Curiously it is often explicitly aimed at violence against women rather than domestic abuse in itself against either gender.

But the US has also had to struggle with being mostly a non fault jurisdiction, including requirements that fault is not to be considered on financial settlements. The involvement of domestic abuse as a factor in family cases has not laid comfortably with non fault.

In 1994, Congress enacted the Violence Against Women Act (VAWA) with goals of treating violence

as a major law enforcement priority, to attack attitudes which nurtured violence against women and to provide help for survivors. The Supreme Court in US v Morrison (2000) said that individual states can introduce laws based on VAWA to provide civil actions and damages for domestic violence. A number of states followed suit, including NY, California, Illinois, and others to follow soon. But it is in the divorce context that the remedies are often best available. Yet some very conflicting positions are adopted by the states. The cases can be set out in a number of categories.

States where domestic violence as a factor
The first category is states where domestic violence is specifically set out in legislation as a factor in property division. In these states, there is no need for a direct link of abuse to impact on finances nor does the violence need to be especially dramatic or significant. In some of these states, the fault basis of the divorce is automatically adopted into the financial outcomes.

In Crowe (Alaska 1992), the wife got the majority of martial property due to husband's physical abuse.

In Bleuer (Connecticut 2000) the husband abused the wife and children and she got 80% of assets.

In Dodson (Montana 1995) the wife got an unequal division of marital assets (save for the house) in her favour due to numerous adulteries of husband and his physical abuse, but in addition she then also got the whole marital home on the basis of his two threats to kill her by putting a loaded gun in her mouth.

In West (South Carolina 1993) the wife got 40% after a short marriage to which she contributed very little but due to his physical and mental abuse.

In Thompson (Rhode Island 1994) the husband admitted to three acts of physical violence and the wife got 65%.

In Faram (Texas 1995) the husband got only 27% based on his abusive and violent nature.

But in Tinsley (South Carolina 1997) the wife said the husband locked her in her bedroom, beat her regularly and on the day she attempted to leave, he damaged her car. She produced a diary she kept of the beatings and photos of the bruises. But the first instance and appeal court found a lack of significant evidence of fault leading to the end of the marriage, so gave an equal division.

Although some of these cases (there are many others) cannot be isolated from the divorce context, they do represent a number of states where property settlements are often materially influenced by the existence of violence or abuse. In some states, the violence is relevant only if it was the cause of the divorce e.g. Alabama, Texas.

States where economic fault as a factor
The second category is states which do not allow any general marital fault but will consider "economic fault". Often these courts will consider domestic abuse as economic fault e.g. because of inability to work, medical bills etc.

In Coomer (Indiana 1993) the court gave an uneven division on the basis that the husband's physical abuse meant a substantial likelihood of the wife devoting a good share of her future income to future medical expenses.

In Mosely (Washington DC 1992) the husband only got one third as he left home at least twice and frequently spent evenings drinking, leading to alcoholism and violence.

States where domestic violence as a factor if very serious
The third category, going on from the second category, are states where domestic violence is only

relevant if of a very serious nature. This is “egregious” in New York (a US specific term meaning literally “surpassing”, “shocking”, “towering above the rest”, probably the same as significant or obvious and gross but more than material), or “outrageous or shockingly unforeseeable” in Michigan, or “gross and extreme so not to penalise would be inequitable” in Kansas.

In Stevens (New York 1985) the wife struck the husband, bit him and wounded him with a kitchen knife whilst breaking into his briefcase. The court noted it only took place in the waning years of the relationship and so did not divest her of her property interests built up over 15 years of marriage.

In Kellerman (New York 1992) the appeal court had to intervene and direct (contrary to the view of the first instance court) that 27 separate acts of violence during a brief marriage was egregious so to warrant different apportionment of marital property.

But in Orofino (New York 1995) the husband’s extraordinary consumption of alcohol, biweekly abuse and regular assaults, threats to commit arson and threats to kill still allowed him 60% of joint portfolio on the basis he had managed the portfolio and had been the homemaker!

In reality few cases in these states have found conduct to be egregious, or similar, unless it has culminated in attempted murder e.g. Wenzel (New York 1984) when wife left for dead after assault, Stover (Arkansas 1985) conspiracy to murder and D’Arc (New Jersey 1980) husband’s offer to a third party of $50,000 to kill his wife.

New York has just introduced the VAWA locally so it is hoped that this will enable civil remedies in cases beyond the egregious.

States where fault cannot be considered
Fourthly at the furthest category are states where fault may not be considered at all. However these states allow economic fault thereby allowing domestic violence if an economic impact. In Mellon Bank v Holub (Pennsylvania 1990) the court noted that although it could not consider fault itself, it was appropriate to award all the marital assets to the wife after the husband asked a third party to murder her. It viewed such a request as a dissipation of marital assets!

Example from Virginia
An example of development of the law over the years is Virginia. A trial court may consider fault (whether domestic abuse or other fault) if it has a negative impact on the marital relationship, but it cannot be used specifically as a means of punishing one spouse. Fault is simply one of the factors that courts considers in making equitable distribution awards.

In Aster v. Gross (1988), it was said

“A court must consider all circumstances that led to the dissolution of the marriage insofar as those circumstances are relevant to a monetary award. Equitable distribution is predicated upon the philosophy that marriage represents an economic partnership requiring that upon dissolution each partner should receive a fair portion of the property accumulated during the marriage. … Therefore, circumstances that affect the partnership’s economic condition are factors that must be considered for purposes of our equitable distribution scheme. Circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are not relevant to determining a monetary award, need not be considered. A trial court need only consider those circumstances leading to the dissolution of the marriage, that are relevant to determining a monetary award in order to avoid an unreasonable result.”

Then O’Loughlin (1995) seemed to revive “fault” by clarifying what the court meant in Aster

“The appellant’s infidelity had a negative impact on the well-being of the family....[W]hile equitable distribution is not a vehicle to punish behavior, the statutory guidelines authorize consideration of such behavior as having an adverse effect on the marriage and justifying an award that favors one spouse over the other. The rule established in Aster, that circumstances leading to the dissolution of the marriage but having no effect on the marital property or its value are not relevant to determining the monetary award, was meant to require proof of some relationship between the fault and the marital estate, to require objectivity to the trial court’s decision making on equitable distribution, and was focused on a couple’s monetary contributions. .. Our ruling in Aster did not establish that the negative impact of marital fault or other behavior could not be considered in light of the other factors, such as the couple’s non monetary contributions. Just as marital fault could be shown to have an economic impact on a marriage, i.e., waste or dissipation of assets, it can also be shown to have detracted from the marital partnership in other ways.”

“Fault is not a ‘wild card’ that may be employed to justify what otherwise would be an arbitrary or punitive award. When fault is relevant in arriving at an award, the trial judge is required to consider it objectively, and how, if at all, it quantitatively affected the marital estate or well being of the family.”

Theismann (1996) reconciles Aster v. Gross with O’Loughlin

“In Aster, we held that fault could not be used to punish the offending spouse but instead should be considered in terms of its economic impact on the marital estate....In O’Loughlin...we held that the negative impact of fault on non-economic aspects of the marriage could also be considered in determining a monetary award. We reaffirmed our holding in Aster that fault could not be used as a ‘wild card’ to justify an otherwise arbitrary award.”

Then in Watts (2003)

“[J]ust as marital fault could be shown to have an economic impact on a marriage, i.e., waste or dissipation of assets, it can also be shown to have detracted from the marital partnership in other ways. Consideration of non monetary contributions to the well being of the family requires no showing of an adverse economic impact. In that context, the ‘well-being’ of the family relates to the effect on the family’s emotional welfare and condition.”

Note: In Watts, the Husband’s adultery “prejudiced the well-being of the family and dashed any hope that the parties’...reconciliation would succeed...His late-night activities foreclosed contact with his school-age son and required wife to assume most family responsibilities and duties.”

In Budnick (2004), an abuse and criminal activity case, the wife received 90% of marital estate, affirmed on appeal, but this is an unusual distribution of a 90/10 split. More often, when there is an unequal distribution, it is more along the lines of 55/44 or a 60/40 split. Moreover the focus was on husband’s criminal activities, and less his abuse of his wife. The husband was verbally and physically abusive towards the wife, and the husband also engaged in various criminal activities (primarily bank fraud). The Commissioner found that criminal and abusive behaviour directly impacted “the well-being of the marriage.” In determining equitable distribution, “a trial court is not required to weigh monetary contributions more heavily than non monetary contributions.”

“This court has held that consideration of non monetary contributions to the well being of the family requires no showing of an adverse economic impact. In that context, the ‘well-being’ of the family relates to the effect on the family’s emotional welfare and condition. .. [The legislation] does not require that the trial court find that the negative non monetary contribution resulted in a pecuniary impact on marital property when it considers how the spouse’s conduct affected the well-being of the family for equitable distribution purposes.”

“Equitable distribution does not mean equal distribution. [The legislation] authorizes the trial court to consider a spouse’s negative behavior in determining equitable distribution, and justifies an award that favors one spouse over the other, when that behavior adversely affects the marriage.”

Conclusion on US

In the US there is a vast diversity of outcomes, based primarily on the different outlooks and jurisprudence across the country. But generally the move is to reflect some element of domestic abuse in outcomes. Congress found at the time of passing VAWA that domestic abuse deterred the taking of employment and/or the performance in employment and/or the creation of business, diminished productivity and increased medical and other costs. The country seems now to be accept domestic abuse has a wider impact than just on the family and individuals concerned and more than just the direct physical consequence of the violence. Whilst the no fault doctrines and legislation will still have an impact, and greatly so in some states, the trend appears to be to appreciate the adverse effect of the lack of action through the outcomes in the family finance courts. There seems to be a feeling that the country had been silent on the issue for some time but now is making a loud noise of condemnation, through all avenues.

France

There are different outcomes of division of assets held by the spouses due to the different pre-nuptial agreements that spouses may sign e.g. community of all assets, community of assets acquired during marriage, separation of assets etc. But no direct rule or law exists which allows a family Judge to use the sharing of matrimonial properties as a mean to “punish” by hitting the purse of a spouse found guilty of abuse. Nevertheless a combination of criminal and civil rules of law may allow a party to pursue and obtain the same result. Moreover the same judge, sitting in their capacity as a civil judge, can deprive a party of assets following a financial order after criminal proceedings

A victim of domestic abuse has the right to initiate a criminal procedure by a claim either after or before a divorce procedure. This claim may be filed in different ways on the basis of the French criminal code. French criminal law does not specifically categorize domestic abuse but merely considers domestic abuse, on spouses or children, as an aggravating circumstances and thus an aggravated sentence :

- When abuse is committed on a spouse, or a cohabitee
- When committed on a child by a parent
- When committed on minors less than 15 years of age

Claims may be filed at the police station or to the Public prosecutor who decides if the claim should be pursued. If the assault is very serious, the police may prosecute without asking the victim to file a claim. If the victim or the parent of the victim is willing to ensure that the claim is pursued, there is also the possibility to file in the hands of the Dean of the examining judges. A fee is required which is reimbursed to the victim if the accused is sent to court. After inquiry, and after advice of the prosecution, if enough evidence is found, the accused is sent to Court to face trial.

During this criminal trial, the victim may appear and ask for damages. The criminal court is more generous for the victim than civil judges, but French damages are far from the amounts granted to victims in, for example, the USA.

Assault and battery on women is very seriously prosecuted when the accused is either the husband or companion. The first sentence is invariably suspended but heavy damages (for France) would be granted to the victim. The prosecutor may request a jail sentence against the woman’s wishes if the assault was serious enough.

If the spouses are married in separation of assets but, as with many spouses, had acquired joint property, e.g. real estate, the spouse victim may execute the criminal sentence (the financial order) on damages

on her/his spouse's share.

If the spouses are married in community of assets, either limited to the assets acquired during marriage or all assets, the sharing would normally be 50/50, but the victim spouse may reduce her/his spouse's share by enforcing the order made in the criminal court on the other party.

France has a system of equitable distribution to overcome any important discrepancies and unfairnesses of the divorce. It is done in two parts :

- the judge will proceed first to the granting of the equity (compensatory alimony, usually a capital lump sum), then after divorce, the assets are wound up pursuant to the rules of either the prenuptial agreement or the legal regime .
- another procedure is then needed to wind up the matrimonial assets.

However this equitable distribution takes no account of issues of domestic abuse.

South Africa

Marriages governed by the laws of South Africa are either in community of property (where all assets and liabilities are the joint assets and liabilities of both parties), or out of community of property (where the parties have signed an antenuptial contract).

Further division is based on the question of when the parties were married, on account of a sea change in the law introduced by the Matrimonial Property Act 1984. A major change brought in by the Act was "the accrual system". Parties entering into an antenuptial contract could choose to incorporate the accrual system into their marriage or to exclude it.

Marriages by antenuptial contract therefore fall into 3 categories:

1. Antenuptial contracts entered into prior to the 1st November 1984
2. Antenuptial contracts entered into after 1st November 1984, incorporating the accrual system
3. Antenuptial contracts entered into after 1st November 1984, excluding the accrual system.

Historically the purpose of an antenuptial contract was to separate the estates of the parties for all purposes. However it became clear that this was inequitable in the majority of cases, namely where one spouse had been the breadwinner and had been able to build up a substantial asset base during the marriage whilst the other spouse had perhaps given up a career to run the household and bring up the children and had therefore had no opportunity to build up any estate. A division on the basis of "what's yours is yours, what's mine is mine" brought about severely unjust results.

For this reason, section 7 of the Divorce Act was introduced to allow the Court at its discretion to transfer assets from one spouse to another in order to bring about a more equitable financial outcome. Section 7 specified factors which the Court may take into account in making such a decision, some being the normal in discretionary jurisdictions but including the conduct of the parties and the reasons for the breakdown of the marriage. These last two factors provide substantial scope for penalties against abusive spouses and compensation for abused spouses as is clearly set out in the case of Beaumont (1987), an Appellate Division case which has been consistently followed by lower Courts.

In Beaumont, the wife had not worked outside of the home other than to assist in her husband's business. The Court took into account the help that she had provided to the husband in his work, the fact that she had taken care of the household and also the maltreatment that she had suffered due to the husband's parsimony during the marriage and the emotional trauma of the husband's affair. The Court found that the emotional abuse and economic suffering of the wife had been gross and prolonged and necessitated a generous award to the wife. The Appellate Division upheld the decision and also ordered the husband to pay the wife's costs of the appeal.

The principle in Beaumont - that a wife who suffers abuse at the hands of her husband would be entitled to some form of compensation – is most easily capable of implementation in the case of pre-1984 antenuptial contracts because of the provisions of section 7. The scope for this is provided in a much more limited way in marriages in community of property and marriages where the antenuptial contract incorporates the accrual system, by way of the principle of "forfeiture of benefits". This principle applies to both such matrimonial regimes and specifically envisages a penalty to be imposed upon a spouse whose conduct is grossly unreasonable. The forfeiture principle has in most cases been confined to gross financial misconduct, but there seems to be no reason why the courts would not be willing to invoke this principle in the event of domestic violence. However, it should be noted that forfeiture would be limited to a claim by the spouse who had been guilty of misconduct and this is obviously not the same as penalising a spouse by depriving him of his own assets.

With regard to antenuptial contracts which exclude the accrual system, there is no scope for an award to the other spouse at all. Accordingly there would be no scope for a domestic violence compensation or penalty order.

Zimbabwe

Zimbabwean marriages are all out of community of property and the proprietary consequences of divorce are governed by the Matrimonial Causes Act 1985. Section 7 has very similar provisions to section 7 of the South African Divorce Act 1979.

The South African case of Beaumont was cited and followed in the Zimbabwean High Court in the matter of Marimba (1999), a case where the wife had been subjected to physical violence. The Zimbabwean court interpreted the South African Beaumont case as authority for the principle that abuse on the part of a husband would result in a greater award to the wife.

In addition, in both the Beaumont and the Marimba cases, the husband was ordered to pay the wife's costs.

Greece

Greece has a two fold system of property distribution on divorce. The first is separation of assets in which the marriage does not alter the financial independence of either spouse. This has been modified to allow one spouse who has contributed to any increase in the property of the other to claim the increase arising from the contribution. This is rebuttably presumed to be one third of the increase unless the contrary is shown. The second system is community of property (in conventional form) but this requires an agreement between the parties. Although introduced over 21 years ago, few Greek couples chose to enter into such agreements, instead relying on the law of separation of assets modified by contribution.

In any event, neither contribution or any other factor in ascertaining outcome gives consideration specifically to domestic abuse. There has not been the contribution cases based on domestic abuse as described in this Paper for some other countries.

Instead, by Greek Civil Law, there are two provisions which can be used and can be considered by the family court to get compensation for domestic abuse whether or not a divorce also occurs.

By the first, (article 914, Greek Civil Code) "A person who has caused illegally and through his fault prejudice to another shall be liable for compensation". This is a very general provision for pecuniary

compensation. More specific for moral prejudice is the second (article 932) "Independently of the compensation for pecuniary prejudice the Court may upon the occurrence of an unlawful act allot a reasonable amount of money to be determined in the Court's appreciation as reparation for moral prejudice. This provision shall apply especially in regard to a person who suffered harm in his health, honour or purity or who was deprived of his/her liberty. In case of death of a person such monetary reparation may be allotted to the victim's family on account of moral suffering".

The criteria used to determine the reasonable compensation are, inter alia, the sort of the offence, the extent of the prejudice, the circumstances of commission of the unlawful act, the gravity of the fault, the financial and social position of the parties and especially the sufferer, the concurrent fault of the person who suffered the loss, the penalty that may have been imposed on the person who committed the unlawful act, the personal situation of the parties generally (age, sex, sensibility), the behaviour of the person who committed the unlawful act after wards etc.

The Court allots such amount as depends on the criteria. The amount will cover any proved pecuniary prejudice and will be reasonable, proportional to the gravity of moral prejudice. It has nothing to do with marital assets, so no percentage of overall assets can be given for it. Usually the amounts are not high.

Occasionally a civil claim for moral prejudice is joined to the divorce action. More often a civil complaint is filed, for the spouse or partner to be condemned by the civil courts for their domestic abuse.

Domestic abuse can establish a claim for full maintenance during separation and before the divorce, as it is a justified ground for interrupting the marital living together. However after divorce it would not provide a claim for maintenance unless the applicant cannot properly support herself due to state of health, care of a child, in training to become self sufficient and judicial discretion and diligence. The first factor may allow some direct impact of abuse.

Islamic countries

Naturally, the position varies greatly across the Islamic world. Some countries apply the Qur'an literally and in a very fundamentalist fashion. Some apply it more liberally. Some apply it in a balance with the demands of the civil, secular laws and take account of other religious faiths within the country. Generalisations are therefore difficult.

However very few, if any, of the Islamic States have codified their laws to allow for compensation during divorce proceedings because of domestic violence. There is even some debate on the passage in the Qur'an about whether a husband is allowed to 'beat' his wife. Very many operating in the area of family law and family relationships oppose this interpretation! However, if a wife is seeking a judicial dissolution of the marriage on the ground of harm (darar), she does not need to return the mahr to her husband. This position is accepted by the majority of Islamic Scholars. However, there may be difficulties in the wife proving harm, due to the weight of a woman's evidence compared to that of a man and the need for witnesses etc.

Amongst the countries which are perceived to be stronger in their condemnation of domestic abuse in the Islamic world are Jordan, Egypt and Tunisia. These countries have codified their laws significantly and, according to some, at times against the literal teachings of the Qur'an. Moreover women can state stipulations in their marriage contracts, and therefore carefully drafted contracts can cover this issue.

There are many millions of the Islamic faith living in non Islamic countries and whose relationship breakdown is dealt with by the totally secular laws of that state. Most have close families living in Islamic states Family law practitioners in non Islamic states must understand the cultural marriage laws and

arrangements of those from the Islamic community but in turn a very strong message of condemnation of domestic abuse, with financial implications, from one part of the global family law community will have an impact elsewhere.

European Union

Reference must be made to the very large Daphne project with substantial funding (50 Mill euros!) and intentions. According to its web site, the Daphne II programme runs from 2004 until 2008 with a budget of EUR 50 million. It aims at supporting organisations that develop measures and actions to prevent or to combat all types of violence against children, young people and women (men aren't mentioned!) and to protect the victims and groups at risk. It is complementary to programmes that exist in the Member States of the European Union, especially in the way it focuses on the exchange of good practices about violence across the Union. Daphne represents the starting point of NGOs and voluntary organisations cooperation at EU-level in the fight against violence towards children, young people and women. It encourages NGOs to set up or reinforce European networks and helps them implement innovative projects, the results of which can be disseminated to other Member States and regions.

More details can be found at its web site at http://www.europa.eu.int/comm/justice_home/funding/daphne/funding_daphne_en.htm

Date of abuse

Domestic abuse at the time of the break up of the relationship is not to be excused but many studies testify to the stress on all couples at such a time and the real upset felt by some who do not want the relationship to end. The circumstances of its ending can be very different to the circumstances of the relationship itself.

On balance and in the normal course of events, domestic abuse at the time of the break up should probably not become a factor in the financial outcome. An exception would be any violence which was so bad as to have a direct economic outcome e.g. on earning capacity, when it would be appropriate to consider.

This approach is supported by judgements in several countries. It is also consistent with the message of condemnation of domestic relationship during an on-going relationships.

Balance of proof

When domestic abuse appears before the criminal courts, the burden of proof is the criminal one (obviously!) of beyond reasonable doubt. When the abuser is alleged to have breached domestic protection injunctions and is before the civil or family courts for possible committal or a penal order, then it is again appropriate that the criminal burden should apply given the seriousness of the outcome e.g. possible loss of liberty.

But what should be the burden of proof when a factor in financial cases before the family courts? It is difficult to see why it should be any different from the other factors before the family courts i.e. the civil burden of balance of probabilities. Any finding should not bind the criminal courts on any subsequent criminal proceedings because of the different standard of proof which applies. There is no difference with the husband who is cross examined about alleged disposal of assets or off shore hidden assets or the wife being cross examined on her high income claims. The civil burden of proof should apply.

What rules of evidence

Although Australia uses the same very strict laws of evidence as apply in civil proceedings, most countries recognise that some softening of the civil rules of evidence is needed in the domestic context, not least as often it is only the two parties who are witnesses to the primary events. This is classically the case in situations of domestic abuse, literally going on behind closed doors with no other witnesses.

Courts have nevertheless to be very wary of the evidence presented. It has to be tested carefully. It cannot be taken at face value of accusations made. Some corroboration usually exists, even in peripheral form, to confirm or cast doubt on evidence. Hard as it may be for the parties concerned, stiff cross examination is quite appropriate given the nature of the allegations that are often made and the impact of any findings on the finances and also on the reputations of the parties.

Courts cannot ignore the making of false allegations or exaggerated allegations to obtain a much better financial settlement. Most judges have experience of this occurring. There can be no presumptions of abuse.

Although this may seem harsh, applicants for such provision based on domestic abuse must know there are firm public policy reasons for the stiff requirements of evidence. The reality is that there are some cases in which there has been bad abuse yet the evidence is simply not there. It is better for a judicial system if some leave the court frustrated that they were unable to prove their case on the evidence than some are wrongly found to have abused the other party or child.

The burden on judges

Judges cannot ignore the gender issues inherent in this area of work. Male judges in family law work are often sympathetic to women who have been abused, and most are aware of how they can too easily respond to such cases by feelings of need to protect and come to their aid. (Some female parties may not agree with this fact but perhaps because this is because good judges are aware of themselves and their responses so it does not impact on the case.) There is a perception that some female judges are against men per se. Again, this is often not the case but judges need to be aware of such perceptions.

When should the evidence be considered?

Should the evidence of domestic abuse be considered at the final financial hearing or separately in advance? If the domestic abuse is not proven, then the final hearing will often be much shorter as a consequence. Moreover removing the issue of allegations of domestic abuse (by proof or non proof) should make the remainder of the case easier to settle. Finally the allegations are inevitably painful and distressing for both parties and there is much benefit in removing this from the final financial hearing.

In England, the House of Lords in Re L; Re V; Re M: Re H (Contact: Domestic Violence) in 2000 directed that where there were allegations of domestic abuse such as to have an impact on parenting arrangements, there should be a preliminary hearing to adjudicate on the evidence of such allegations, with such allegations being set out in sworn statements separate to the other issues in the case. A perception amongst English family court judges is that this works well and should probably be the model if domestic abuse is raised in finance proceedings.

Many researchers of domestic abuse comment that women often report the fact of a series of abuses, a course of behaviour by the man over many months or years, rather than specific details of specific events. Events merge into each other. Actual dates and facts are lost in the overall miasma of the continued abuse. Yet the nature of the adjudication process is that courts have to find actual events of abuse. They need dates and who did what to whom and how and what happened next and who

responded how etc. They need these to test whether an abuse occurred and ensure the evidence is reliable. A perception is that this can place a benefit on the man, as the abuser is presumably more in control and aware of what is happening. It can work against women. Given that the system of adjudication by the testing of evidence is proven over centuries, it is unlikely to change. Perhaps as with rape trials, in time some accommodation may be found.

In the meantime, it places a huge (but not unreasonable) burden on lawyers presenting such cases to ensure the sworn statements of the evidence are very full, as specific as possible, with as many supporting details as possible, with as many actual events set out (rather than general assertions) and bringing in as much corroboration as possible. A claimant's case may depend on the skill of the lawyer in presenting the evidence.

Alimony and domestic abuse

A trend in family law internationally over the past couple of decades has been the decline of alimony (spousal maintenance); as to the frequency of such orders being made, the quantum and the term (length) of such orders. A number of reasons can be found; the concentration of available income onto child support, the making of capitalisation orders, the philosophies of self support and clean break, the greater incidence of term orders etc.

Moreover whilst some countries e.g. England have similar factors governing distribution of capital and income resources, some have very different criteria. Australia has a discretionary basis of capital provision, based on just and equitable. But income provision is "only if (the applicant) is unable to support herself". This allows any direct cost or consequence of domestic abuse e.g. unable to work as a result of injuries sustained in domestic abuse. But it does not allow any account of the domestic abuse during the relationship itself. Although some countries are not so explicit, it is likely there would be less willingness to reflect domestic abuse during a relationship in quantum or term of alimony.

However in pursuit of finality, especially important in the context of an abusive relationship, England makes clean break orders i.e. no continuing alimony, to ensure the parties minimise future contact. This is possible where the courts can balance capital and income provision on the same criteria, and are entitled to look at the wider factors concerning a family in deciding if a case requires the mechanism of a clean break. This is an excellent response in the family finance courts to the issue of domestic abuse.

But generally, the consequence of the reduced number of maintenance orders and the sometimes varying criteria is that alimony is an inadequate aspect on which to concentrate new jurisprudence of domestic abuse as a quantum factor.

The role of lawyers in bringing such claims; why no flooded gates?

Several countries have been anxious that allowing abuse as a quantum factor may open the floodgates of claims. This has most explicitly not happened and indeed Australia had recently had to remind lawyers of the available remedy. So why are lawyers not bringing these claims forward?

In some countries, family lawyers are very specialised; children, finance, domestic abuse etc. The finance lawyer may not feel comfortable raising issues of domestic abuse of which he himself may be uncomfortable and unfamiliar. He may not raise the subject in initial interviews with clients nor give active encouragement to the issue being raised. Raising domestic abuse inevitably increases the stakes in a case and makes settlement much less likely and increases costs. Some clients may not want to follow that path especially if the outcome of raising it is uncertain or not worth the extra aggravation. There is still a stigma attached to admitting the fact of domestic abuse. Many clients do not tell their lawyers.

But these facts should encourage countries to bring forward domestic abuse as a quantum factor,

secure in the knowledge that, on past experience, it should not lead initially to a flood of cases.

Mitigation

For the domestic protection court, it is future safety which matters. Causes or mitigation is of much lesser importance. For the children issues court, concerned with residence or contact with a domestic abusive parent, it is the child's best interests which matters. Causes or mitigation is of much lesser importance.

But for the family finance court, there arises some very sensitive issues. The party who is subject to the alleged abuse allegations may wish to excuse or justify or at least explain his behaviour. Certain factors are often cited. Constant nagging, excess expenditure, failure to budget, refusal of sex, verbal provocation, involvement of family members in spousal disputes. And here the family finance court finds itself in the middle of a major disagreement amongst family law professionals, between those who believe that domestic abuse can never be excused or tolerated and those who, whilst not condoning, want to hear both sides of the story and may then decide the abuse was less culpable in the circumstances. It is the area of the pre fault debates, the judgement on the family's actions and conduct. For some this is a good enough reason not to allow the factor at all! The easy way out is not to face such issues.

This is not acceptable. The family courts are often well versed in the present thinking of broad spectrums of society. They are aware of where along the scale of abuse is the mark of inexcusable behaviours and where there could be mitigation and some explanation. The help is found in the now wider definition of domestic abuse. It is not violence alone. It is other forms of behaviour which can be equally abusive especially given the different responses of men and women. The violence complained of may be met by allegations of abuse, perhaps non violent, by the other party. It cannot be denied that this opens up difficult territory for the family courts. However this debate is going on amongst family professionals and can only benefit from being the subject of judgements from the family courts.

So the family finance court should be able to look at all the background surrounding circumstances to the abuse and weigh it up with all the other quantum factors.

Civil or family courts?

Some countries allow domestic abuse to result in a financial award but through civil or criminal courts or tribunals. This keeps the family court "clean" of such conduct issues. It is one way forward. It can enable the criminal burden of proof. It is in courts which can look at the abuse away from the wider family resolution issues.

But it can result in duplications as two courts make orders regarding a family's finances. Sometimes the family finance court will not know what other orders are going to be made, so make their own order in isolation. This can often cause an injustice. There can be duplications of issues being raised and litigated. At the least, two courts are looking into the family's background and deciding issues of evidence. There can be two sets of lawyers where the family lawyer would not deal with civil or criminal law.

A spouse may be prepared to raise domestic abuse in the context of financial outcomes but a number are reluctant to do so if there is a risk that the father of their children may then be sent to prison. Conversely the opportunity is available to threaten criminal proceedings if an offered financial settlement is not accepted. Almost all good practice codes across the world condemn such action. Should it even be available?

Some countries may continue with a dual system and it is better than a total disregard to the presence of domestic abuse. But if the family courts have the power to take abuse into account, is it not better

that all matters affecting a family are dealt with by one court and one set of proceedings and one consistent law?

Towards a jurisprudence; to compensate or punish?

Countries with a discretionary basis have varying objectives. But they follow a pattern or theme: to produce a fair outcome. Punishment is a fair objective for the criminal courts. It is not for the family courts. The family courts do openly condemn certain behaviours such as failure to give full disclosure, an unco-operative approach to litigation or settlements etc. However it is rare for the outcome to have an ingredient of punishment. Mostly it provides an outcome that condemns the behaviour by amply covering any extra costs resulting from the other side's conduct or the case proceeds on generous imputations based on failure to disclose etc. It would be quite new for family courts to take on a punishment regime. Some may consider that the fact of domestic abuse warrants such a change. This is one crucial area for debate.

The family courts do make compensation orders. They are rarely described as such. But the nature of family finance orders recognise contributions of all kinds and provide for needs based on commitments and sacrifices made to a relationship. These result in what in other spheres of law and society would be commonly understood as compensation.

As this paper shows, an increasing number of jurisdictions are openly allowing family finance claims based on the direct impact of abuse e.g. in future medical fees, lost wages (perhaps due to injuries or having been unable to work or make work place progress) in the past and the future. This does not need a new jurisprudence. It is part of needs following the break down of the marriage. It is merely a fair outcome. It does not give rise to issues of unforeseeable or unreasonable compensation. All countries with any discretionary basis and/or giving account to future needs should make sure they give fair weight to claims for direct costs and expenses and losses arising from domestic abuse in the relationship. Any other response allows accusations of giving tacit acceptance of domestic abuse.

Some countries go further and look at the greater and wider impact of the abuse on the individual and the children. This is often more difficult to quantify yet is often the more deep seated and longer lasting result of abuse. Sometimes the result of the abuse can be the much greater work which has had to be done by one spouse in parenting, home making or in earning and budgeting. Some times it is the impact on confidence and well being of one spouse by long term abuse which will cause a much longer term ability to become self sufficient. Although much harder than with direct costs and losses, these wider affects of abuse can also be quantified e.g. in period needed to be able to return to work, the extent that past assets and energies have been able to be committed to a career or building up resources or the extent that the abuse has resulted in lost resources. It may be that some help will be needed in calculating the quantum but this is not new, nor difficult, for resourceful, specialist lawyers.

One feature working against is the trend for fixed and/or short term maintenance orders. This can work against the spouse who may need longer to overcome the abuse in a relationship and return to self sufficiency. If there is a limit on the maintenance, then other routes must be found to produce a fair outcome, perhaps in higher capital.

Some may say that a financial outcome that gives full weight to the (non direct financial) impact of domestic abuse is making compensation for past abuses, hardships and distresses. But it is unlikely that many will be able to point to cases where there has been no ongoing impact of some form by material abuse sustained in a relationship. Research tends to suggest the impact is deeper than many family courts and family professionals have given credit in the resolution of outcomes.

The family court's concern is to produce a fair outcome. And fairness moves across the decades and

with changes in public opinion, sometimes finding certain behaviours and conduct more acceptable or more worthy of open condemnation. And across many countries, domestic abuse is now increasingly and openly considered as unacceptable. For the family finance court to ignore the element of domestic abuse is now to get out of step with present public opinion, to give a contradictory message and to produce unfair outcomes.

Any conclusions?

This paper is to start and encourage debate. But I am conscious that the law can only go so far. I believe this is an area where there will be progressive movement, the law moving onwards with public acceptance. I have not formed any final conclusions about what shape the law should take and in substantial part this will vary between jurisdictions. But I am certain that the family finance courts must give greater awareness of the wider impact of domestic abuse on the future of the abused spouse, in both direct easily quantifiable costs and in the wider, longer term impact which can be less easily quantified.

But perhaps to take the debate forward, can I suggest a few pointers

- Abuse at and after the breakdown of the relationship should not be considered unless material direct loss
- Abuse at the time of entering into any pre marital or separation agreement should be taken into account in the weight given to the agreement
- Abuse allegations should be separately alleged in written documents from the other parts of a case and considered on the evidence at a hearing separately from the main final hearing
- Strict laws of evidence should be applied to consideration of abuse allegations even if the family court does not apply such strict laws on other aspects.
- A civil burden should apply, not a criminal burden, presuming any finding only results in a financial outcome in the family courts
- Threats to raise abuse allegations, whether in family or criminal courts, unless a particular settlement is accepted should be strongly condemned by good practice codes.
- The benefits of raising abuse allegations must be realistically countered with the greater delays and costs and decreased prospects of settlement
- Abuse which has a directly quantifiable result in terms of loss or cost should be given obvious weight in the factors taken into account by the court.
- Abuse which is less easily quantified should have expert advice on impact and attempted quantification, until more case law and practice arises.
- Abuse on a child may be even less easy to quantify but should be clearly shown to be unacceptable by the family court.
- Clean breaks are particularly appropriate in abuse cases, even if it means a disproportionately higher level of capital is given to the abusee.

I proffer this paper to the world wide family law community to take forward the debate on this important subject.

Footnote

This version of the paper is prepared in December for publication in 2006. The sections for Greece, England, USA, Hong Kong, Australia and France were updated for the publication of this paper.

In March 2005 at the World Congress in Cape Town a number of resolutions were passed including

17 That family courts should present a consistent message of its condemnation of domestic abuse (DA); and for DA to be reduced and so the home to become a safer place for children and all family

members; and for society's unacceptability and intolerance of DA to reach those who seek assistance from the family court on financial matters; and for the family court to hand down fair, just and socially acceptable outcomes,

18 This Congress calls on all jurisdictions to make Domestic Abuse a factor and consideration in quantum on financial matters on relationship breakdown, wherever possible, and/or provide methods for the family justice system to compensate for the affect of DA on victims from the abusive family member, and for a report on progress at the next Congress,

19 All States should make adequate financial, social and emotional provision to enable and support victims who wish/need to live away from their family and for community so to do,

Further details are available on the World Congress on website at www.lawrights.asn.au

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