

Reviewing Kennon [1997] FamCA 27 in Light of the Recent Focus on Domestic and Family Violence

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i. Introduction

The case of *Kennon* gave the Family Court wider discretion in assessing the impact domestic violence has on a victim's contribution to a marriage pursuant to section 79 of the *Family Law Act (FLA)*. In this case, Ms Kennon, the wife appellant, sought a property adjustment under section 79 of the *FLA*, seeking damages for the abuse she endured during the course of her marriage. The trial judge ruled that he 'would not consider generalised allegations of violence',¹ requiring instead that 'each alleged assault needed to be separately identified and proved.'² Although the appellant wife did receive some damages, it was found that the evidence supporting her allegations was too deficient to adjust her property claim under s 79. However, the Full Court found that s 75(2) should be utilised in assessing financial consequences of domestic violence, although no such assessment was made in *Kennon*.³ The Full Court states:

...our view is that where there is a **course of violent conduct** by one party towards the other during the marriage which is demonstrated to have had a **significant adverse impact** upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly **more arduous** than they ought to have been...⁴

The *Kennon* test sets out three limbs that ought to be satisfied for adjustments to property settlements to occur. Firstly, the violence alleged cannot be limited to isolated incidents, and must 'comprise a course of conduct in the marriage'. Secondly, the violence must have made a 'discernible impact' upon the victim. Thirdly, it must be determined that the victim's contributions were 'significantly more arduous' as a result of the violent discourse. All of the before-mentioned limbs must be authenticated with evidentiary support. However, there has been significant criticism of the effectiveness of the *Kennon* test, as adjustments are only made where there are significant financial consequences for not making an adjustment, and only where there is sufficient evidence of violence. The relevant factors under s 75(2) that can be used in determining the financial consequences of domestic violence include the state of the victim's mental and physical health,⁵ the state of the victim's financial circumstances and their capacity to gain meaningful employment,⁶ and any other factor or circumstance the court determines to be relevant.⁷ However, the use of these factors has been largely unsuccessful.

¹ *Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1.

² *Ibid*.

³ *Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1; also cited in Belinda Fehlberg, Juliet Behrens, Rae Kaspiew, Fiona Kelly and Jenni Millbank, *Australian Family Law: The Temporary Context* (Oxford University Press, 2nd ed, 2015) 585 [14.6].

⁴ *Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1 per Fogarty and Lindenmayer JJ.

⁵ *Family Law Act 1975* (Cth) s 75(2)(a).

⁶ *Ibid* (b).

⁷ *Ibid* (o).

Recent years have seen an increase in intimate partner violence, which has led to intense public scrutiny of the issue. The rise in domestic violence has been described as a ‘national emergency’ with ‘domestic violence being the leading cause of death and injury in women under 45’.⁸ In light of this recent focus, it is time to revisit the *Kennon* decision. This essay will argue that the *Kennon* test is an ineffective means of determining property contributions in relation to domestic violence. The *Kennon* test is under-developed, and its limbs are confusing, undefined and extremely vague. It does nothing to consider the complex, and hard to prove, dynamic of domestic violence and its impact upon victims.

For the purpose of this essay, the meaning of ‘domestic violence’ will be drawn from section 4AB of the *FLA* which details what encompasses ‘family violence’, and refers to behaviour that is ‘violent, threatening or other behaviour that coerces or controls’ a partner or causes that partner to be fearful.⁹ Such behaviour includes, but is not limited to physical (sexual or otherwise) or verbal assaults, damage to property and animals, and acts that prevent financial or social autonomy.¹⁰

ii. *The failure of Kennon*

Research indicates that the *Kennon* principle has had little quantitative effect on property division post-separation. In fact, Behrens argues that despite *Kennon*, women are still, if not more, susceptible to economic hardship post-separation as a result of the abuse they have suffered.¹¹ Sheehan and Smyth found that women who experienced ‘severe abuse were three times more likely as women who experienced no abuse’ to receive less than 40 per cent of the property, despite reporting being out of work, as well as being the primary care giver, for children at the time of divorce, which would typically satisfy s 75(2) factors. None of the surveyed participants indicated that the *Kennon* test was applied in their cases. Warden and Young argue that only 42 per cent of unreported cases that pursued ‘*Kennon* adjustments were successful, with a mean adjustment of 7.3 per cent’.¹² The likely reason for this pattern occurring is because of a lack of access to justice for victims of abuse, as running a *Kennon* argument is expensive and requires a myriad of expert witness, which is out of reach for most victims of abuse.¹³

Research indicates that *Kennon* is not achieving what it was intended to do. Since *Kennon*, there have been no reported cases that have used the *Kennon* test, and as a result, the principle

⁸ Ursula Malone and Juanita Phillips, ‘Domestic violence of epidemic proportions a “national emergency”: campaign groups’, ABC News (online), 6 May 2015 <<http://www.abc.net.au/news/2014-05-05/domestic-violence-reaches-epidemic-proportions/5426214>>.

⁹ *Family Law Act 1975* (Cth) s 4AB(1)

¹⁰ *Ibid* (a)-(j)

¹¹ Juliet Behrens, ‘Domestic violence and property adjustment: A critique of “no fault” discourse’ (1993) 7 *Australian Journal of Family Law* 9; cited in Grania Sheehan and Bruce Smyth, ‘Spousal violence and Post-separation Financial Outcomes’ (2000) 14 *Australian Journal of Family Law* 102.

¹² Sarah Middleton, ‘Domestic violence, contributions and s 75(2) considerations: An analysis of unreported property judgments’ (2001) 15 *Australian Journal of Family Law* 230; Cited in Patricia Eastal, Catherine Warden and Lisa Young, ‘The *Kennon* “Factor”: Issues of indeterminacy and floodgates’ (2014) 28 *Australian Journal of Family Law* 1

¹³ Grania Sheehan and Bruce Smyth, ‘Spousal violence and Post-separation Financial Outcomes’ (2000) 14 *Australian Journal of Family Law* 102.

has received little to no development since it was first established.¹⁴ Middleton argues that *Kennon* has had little to no effect on property settlements, or in the way in which trial judges approach domestic violence.¹⁵ Behrens argues that this is due to the courts favouring what she describes as ‘no fault divorce law’. This approach renders violence in the home as almost irrelevant in property division proceedings.¹⁶ Behrens states that the concept of ‘irretrievable breakdown’, which is the basis of divorce under the *FLA*, implies a ‘no fault’ ‘basis for dissolution, as well as being a one-size-fits-all style fault-system, of which neither or both of the parties are at fault.’¹⁷ This is highly inconsistent with the nature of domestic violence and its definition in the *FLA*. Middleton suggests that the *Kennon* principle is simply a continuation of the ‘no fault’ approach and suggests that, within the property contribution context, victims who have contributed less than expected should be able to use violence as a defence.¹⁸ Middleton favours employing a *but-for* test that shifts the burden of proof away from victims—*but-for the violence, what would have been their contribution?*¹⁹ This also shifts the focus back to perpetrators by creating ‘negative contributions’, and ensures that violent partners cannot benefit from the victims inability to contribute where evidence of the violent behaviour is difficult to gather and/or difficult to prove.

iii. *Expanding the definition and scope of ‘family violence’ within the Family Law Act*

One major difficulty with the *Kennon* approach is the uncertainty surrounding the terms that make up its *ratio* and the lack of definitions delivered by the Full Court in the case. The undefined concepts in *Kennon* have left the test highly unstable, and does not take into account society’s evolution of what domestic violence means, the conduct it entails and the way it truly affects victims. Behrens’ states:

The effects of domestic violence on women are insidious and long-term. They can include dire physical injuries, or can be less easily identifiable physical and psychological injuries, including damage to self-esteem and independence. These effects have inevitable economic consequences.²⁰

A review of the definition of family violence under the *FLA* is required, with amendments focused on a more inclusive definition of domestic violence that recognises psychological violence and controlling behaviour, and which is accounted for in the 75(2) factors. Behrens pointed out that damage to self-esteem has its economic consequences, but there is clearly no provision listed in s 75(2) that addresses this subtle form of abuse and its aftermath. Middleton recommends amending s 75(2) to ‘include an express reference to domestic violence’ that also

¹⁴ Sarah Middleton, ‘Domestic violence, contributions and s 75(2) considerations: An analysis of unreported property judgments’ (2001) 15 *Australian Journal of Family Law* 230.

¹⁵ *Ibid.*

¹⁶ Juliet Behrens, ‘Domestic violence and property adjustment: A critique of “no fault” discourse’ (1993) 7 *Australian Journal of Family Law* 9 [11].

¹⁷ *Ibid* [12].

¹⁸ Sarah Middleton, ‘Domestic violence and contributions to the welfare of the family: why not negative?’ (2002) 16 *Australian Journal of Family Law* 26

¹⁹ Sarah Middleton, ‘Matrimonial property reform: Legislating for the “financial consequences” of domestic violence’ (2005) 19 *Australian Journal of Family Law* 19.

²⁰ Juliet Behrens, ‘Domestic violence and property adjustment: A critique of “no fault” discourse’ (1993) 7 *Australian Journal of Family Law* 9 [17]

covers conduct'.²¹ Nygh argues that the current definition of 'family violence' under the *FLA* is too focused on tortious conduct, battery and assault, and although it does address psychological conduct, such as controlling behaviour, this conduct is only relevant in s 60D²² situations, where the best interest of the child is the paramount concern, thus ignoring spouse victims.²³ Although tort claims are a clear and definitive means for courts to compensate victims, tort law and its application to domestic violence cannot 'adequately capture the dynamic of on-going domestic violence'.²⁴ A more inclusive definition of domestic violence needs to be incorporated into s 79(4), in order to ensure that violent conduct in a marriage is adequately taken into consideration where property contributions are concerned.²⁵ The only current means within s 75(2) in which conduct of this nature can be considered is through 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account,' and this is inadequate in relation to domestic violence.²⁶ This section needs amending to include a provision that expressly states that violence will alter property division, and will provide clarity.

iv. ***The disjointed limbs of the Kennon test***

Due to the *Kennon* test being applied almost exclusively to unreported cases, there has been almost no expansion upon the terminology used within the test. Various terms and phrases, which make up the test, were vague to begin with, and have since been left undefined. One example of this definitional uncertainty is the vagueness surrounding what is meant by the first limb of the test, which asks whether the violence has had any 'discernible impact' upon a victim's contribution. The Full Court made no attempt to explain what would be required to prove a 'discernible impact', whether it be a diagnosable condition or otherwise. Middleton argues that the lack of guidance as to what proof is required to fulfil this limb leads to confusion as to what constitutes a 'more arduous' contribution. *Kennon* also offers no direction in what evidence the court would accept to support a connection between the alleged violence and the victim's contribution, nor does it attempt to give guidance on how to measure the contribution or the impact of the violence.²⁷ The second limb of the *Kennon* test presents even more confusion. The second limb of the test, which asks whether the impact of the violence has made contributions 'more arduous', is in fact a turn on the first limb. Middleton argues that the test presents the same question in two different ways and 'indicates two different

²¹ Sarah Middleton, 'Matrimonial property reform: legislating for the "financial consequences" of domestic violence' (2005) 19 *Australian Journal of Family Law* 9.

²² *Family Law Act 1975* (Cth) s 60D

²³ Peter Nygh, 'Family Violence and Matrimonial Property Settlement' (1999) 13 *Australian Journal of Family Law* 10

²⁴ Juliet Behrens, 'Violence in the home and family law: an update' (1995) 9 *Australian Journal of Family Law* 70

²⁵ Attorney-General's Department, *Property and Family Law: Options for Change*, Discussion Paper, Attorney-General's Department, Canberra (1999) 36; cited in Sarah Middleton, 'Matrimonial property reform: legislating for the "financial consequences" of domestic violence' (2005) 19 *Australian Journal of Family Law* 9.

²⁶ Juliet Behrens, 'Domestic violence and property adjustment: A critique of "no fault" discourse' (1993) 7 *Australian Journal of Family Law* 9 [20].

²⁷ Sarah Middleton, 'Domestic violence, contributions and s 75(2) considerations: An analysis of unreported property judgments' (2001) 15 *Australian Journal of Family Law* 230.

scenarios: one, where the violence leads to the victim contributing less than otherwise expected' or 'more than would be expected in the circumstances.'²⁸ Another key phrase that holds considerable uncertainty is the 'course of violent conduct' required for the *Kennon* principle to apply. The Full Court provided no examples of what might constitute 'violent conduct', nor did it attempt to define the requirement when it was introduced. However, the Full Court impressed that 'violence need not be frequent to constitute a course of conduct, although a degree of repetition is required'.²⁹ The words and their lack of common law definition are the main weakness within the *Kennon* principle, and it is for these reasons that the approach needs to be revisited, if only to provide certainty to the above-mentioned terms.

v. **Conclusion**

Kennon needs to be revisited, and not just because of the focus on domestic violence in recent years. The *Kennon* principle, or test, has been largely ineffective in its purpose, with victims of domestic violence receiving less than equal share of property interests in divorce proceedings. Victims have declared they received less than 40 per cent of the property interests, despite the presence of 'severe abuse' and reports of systemic poverty post-separation. *Kennon* has not been applied to any reported cases since its introduction and, as a result, the test and the terms that construct it have been left vague, undefined and severely under-developed, especially in relation to evolving societal views of what actually constitutes domestic violence and its impact upon victims. By revisiting *Kennon* and by amending the *Family Law Act* to expressly include modern concepts that constitute family violence in relevant provisions, justice, safety and financial security can be achieved for survivors.

²⁸ Ibid.

²⁹ *Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1; Cited in Patricia Easteal, Catherine Warden and Lisa Young, 'The *Kennon* "Factor": Issues of indeterminacy and floodgates' (2014) 28 *Australian Journal of Family Law* 1

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