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How to run and defend financial claims arising from family violence

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* This paper updates my paper originally presented at the 19th National Family Law Conference in Adelaide in August 2022 I thank Leah Reid, barrister from Greenway Chambers, Sydney for the preparation of Appendices 1, 3 and 4, some legal research and comments on the paper.

Contents

Introduction

This paper is firstly about how to run and deal with a "*Kennon*" argument in an application for a property settlement order. The paper also reviews the often overlooked and important civil and criminal remedies and compensation schemes available to victims of family violence. It explores whether what has formerly been called "accrued jurisdiction" and now "the application of state law" in a federal matter can be relied upon to prosecute a claim in tort in the *Federal Circuit and Family Court of Australia* (FCFCOA) when pursuing an application for a property settlement order. Finally, it discusses proposals for legislative reform and the Attorney General's Department's current exposure draft Bill to codify how family violence can be taken into account in property settlement proceedings.

The expressions "*Kennon* claim" and "*Kennon* adjustment"

In *Benson and Drury* (2020) FLC 93-998 the Full Court said at [37]:

> Although the use of the short-hand descriptor of a "Kennon claim" is not of itself erroneous, it is liable to induce error because the issue is not a stand-alone claim, but is rather integral to the entire process (*Paysen & Laukien* (2020) FLC 93-960 at [48]–[50]). Nor is it helpful to refer to the issue as a "*Kennon* adjustment" because that epithet invites treatment of the issue as an isolated claim for an additional share of the available property.

In this paper I shall attempt to remember to use the expression "*Kennon* argument" rather than the two expressions that the Full Court has suggested are best not used when referring to that argument. The use of the word "claim" is still an appropriate description of the whole of an application for a property settlement order.

Some brief history

Before 1976 "marital fault" played a major part in determining the outcomes of proceedings under the *Matrimonial Causes Act* 1959 (Cth). Divorces were granted upon grounds such as cruelty, habitual drunkenness and adultery. The outcomes of both parenting and property proceedings were determined or significantly influenced by the conduct of a party. An adulterer started from behind the eight ball in disputes about children and what property should be settled upon them.

The debates leading to the radical reform rendered by the *Family Law Act 1975* (Cth)(the Act) spoke to the desirability of breaking the nexus between the conduct of a party and their entitlement to a property settlement order. The new legislation provided that an order which altered the parties' interest in property be based upon a consideration of retrospective contributions and prospective considerations. "Fault" and "conduct" were not mentioned and using section 75 (2)(o) as a backdoor way of reintroducing fault was crushed by early decisions. (*Soblusky* (1976) FLC 90-124 *Ferguson* (1978) FLC 90-500; *Fisher* (1990) FLC 92-127. In *Fisher* the Full Court said:

> In the present case the wife's allegations ... do no more than allege misconduct on the part of her husband. They do not contain any allegations that the wife's contribution was thereby increased or that she suffered any diminution in her future earning

> capacity." Even if the alleged misconduct of the husband had that consequence it would not per se have been relevant."

There were exceptions. For example, where a spouse's behaviour had had a direct financial impact on the asset pool *Kowaliw* (1981) FLC 91-092 or upon future earning capacity (*Barclay* [1996] Fam LR 11,554). Otherwise, violent behaviour by one spouse was largely unrecognised in the process of determining financial relief.

By the mid-90s the Court's and society's awareness and attitude towards family violence was changing. In *Waters & Jurek* (1995) FLC 92-635 Fogarty J flagged that the earlier authorities of *Soblusky* and *Ferguson* may need to be revisited and in; *Doherty* (1996) FLC 92-652 Baker J (with whom Fogarty and Hannon JJ agreed) said by way of obiter, that domestic violence may in an appropriate case be relevant to contributions. when considering a property settlement order pursuant to section 79 of the Act (and in this paper, a reference to section 79 should be read also as a reference to section 90SM of the Act as the same law applies to de facto couples).

Then came the watershed judgment of the majority in *Kennon* (Fogarty and Lindenmayer JJ).

Kennon and the important "*Kennon*" cases

Statements have been made by differently constituted Full Courts which have developed the law about a Kennon argument. There have been nine important cases starting with *Kennon*(1997) FLC 92-757. The other eight are: *Spagnardi & Spagnardi* [2003] FamCA 905; *Stevens and Stevens* [2005] FLC 93-246; *Baranski* [2012] FamCAFC; *Britt & Britt* (2017) FLC 93-764; *Keating & Keating* (2019) FLC 93-894; *Benson and Drury* (2020) FLC 93-998; *Loncar & Loncar* [2021] FedCFamC1A 14 and *Martell & Martell* [2023] FedCFamC1A 71. In addition to the basic guideline, seven essential questions emerge and are developed by these cases, namely:

- What is to be proved in a *Kennon* argument?
- What is the role of inferences in establishing an effect of violence on contributions?
- Do the allegations of family violence need to be corroborated?
- Does the *Kennon* argument apply to post separation contributions?
- Is the *Kennon* argument part of a holistic assessment of contributions?
- Should the amount of the increased assessment of the victim's contributions be quarantined?
- What of the "floodgates" argument?

The basic guideline and the word "significantly"

In the well-known purple passages, the majority of the Full Court in *Kennon & Kennon* (1997) FLC 92-757 said:

> Put shortly, 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, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79… To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had **a discernible impact** upon the contributions of the other party (emphasis added).

In 2020 in *Benson and Drury* the Full Court at [18] reaffirmed the basic principle commenting:

> We pause to note that although sometimes, in the context of the *Kennon* argument, words such as "adverse impact"; "more arduous" or "more onerous" are used, the guideline requires the conduct of one party to have had a **significant** adverse effect on the contributions of the other or to have had made that party's contributions **significantly** more arduous than they ought have been. The conduct has to have had a **discernible impact** upon the contributions of the other party (*Kennon* at FLC 906) (bold emphasis in original).

However, without reference to this statement in *Benson and Drury,* in *Martell & Martell* [2023] FedCFamC1A 71 Aldridge J, exercising appellate jurisdiction as a single Judge, revisited and effectively extended the *Kennon* test.

His Honour starts at [19] and [20] by observing that the awareness of family violence has increased since 1997 and that increase in understanding has led to amendments to the Act, such as the insertion in 2011 of a new definition of family violence in section 4AB. He then observes that the statements by the majority in *Kennon* cannot be treated as if they are words of a statute but must be read in light of the current wording of the Act.

Then at paragraph [24] Aldridge J comments that the use of the words "significantly" and "more arduous" in the primary passage from *Kennon*:

> 24…arise from the basis of the principle itself which focuses on contributions. If the nature and extent of a person's contributions are made more difficult or harder so that they should be accorded greater weight, such that they should be taken into account in the determining of the outcome, they have therefore been "significantly impacted" or made "more arduous". The focus is not on the conduct per se, but on its effects on contributions."

and at [25] and [28] he goes on to say:

> 25…The threshold for recognition is therefore met by conduct which has a discernible effect on the contributions of the other party such that it should be recognised in determining the respective contributions of the parties.
>
> 28… In reality, all the majority said in [Kennon] was that a person's contributions are to be assessed in the light of all of the circumstances and where those circumstances have the effect of making the contributions more difficult, onerous or arduous, that should be recognised in the assessment of contributions.

As can be seen the word "significantly" in the original test in Kennon has all but vanished. The new test assumes that something is "significant" as long as it is capable of supporting an argument that a contribution has been made more difficult, onerous or arduous as a result of family violence.

His Honour's statements have since been adopted by a number of trial judges hearing *Kennon* cases (for example Schonell J in *Hambart* [2023] FedCFamC1F 642; Strum J in *Stella* [2023] FedCFamC1F 1092; Eldershaw J in *Scaletta* [2023] FedCFamC2F 1290).

What is to be proved?

In *Spagnardi & Spagnardi* [2003] FamCA 905 the Full Court said at [47]:

> An insufficiency of evidence in the present case leaves the Court with a limited ability to deal with allegations in the context of section 79 proceedings. As *Kennon* has established, it is necessary to provide evidence to establish:
>
> - The incidence of domestic violence;
> - The effect of domestic violence; and
> - Evidence to enable the court to **quantify** the effect of that violence upon the parties [sic] capacity to "contribute" as defined by section 79(4).(bold emphasis added)

For some time this formulation had a significant influence upon what needed to be proved in *Kennon* cases. For example, Strickland J in *Spence & Spence;F Pty Ltd & Spence* 2008 Fam CA 263 concluded:

> 163. There is no doubt that there was some domestic violence during the marriage, but there is no basis to find that "there was a course of violent conduct" by the husband which had "a significant adverse impact" upon the wife's contributions to the marriage. There is simply no evidence provided by the wife to establish the link between any domestic violence by the husband and any impact on her contributions. Certainly the report of the psychologist does not assist in this regard. It does not assist the wife that she may be suffering from post-traumatic stress disorder. That says nothing about whether any conduct by the husband made her contributions "significantly more arduous than they ought to have been". Thus, this is a claim that cannot succeed.

But by 2019 the plurality in *Keating* (Ainslie Wallace and Ryan JJ) by way of obiter and without it being argued, criticised the formulation in *Spagnardi* at [347] and commented at [38] and [39]:

> 38...At first blush the reference in *Spagnardi* to "quantification" seems to elevate the need for an evidentiary nexus or "discernible impact" between the conduct complained of and its effect on the party's ability to make relevant contributions, requiring expert or actuarial evidence of the effect of the violence. That impression is reinforced by their Honour's [sic] reference to and comparison with the husband's failure to adduce evidence to demonstrate the impact on the value of the house by his renovations and improvements…
>
> 39 This uncomfortable analogy does not illuminate what "quantification" of the effect of violence on contributions might look like. It suggests something more than the evidence by the victim spouse. We struggle to understand what that "quantification" evidence might be beyond that given by the victim spouse as to the incidence and effect of the violence as identified in *Spagnardi* in the first two dot points at [47]. Furthermore, we fail to see how this third step accords with the decision in *Kennon* which the Full Court in *Spagnardi* said governed the situation. Perhaps the use of the word "quantification" is infelicitous and has unintentionally added a gloss to the ratio in *Kennon* when, in truth, the Court in *Spagnardi*

> was merely reinforcing the need for there to be an evidentiary nexus between the conduct complained of and the capacity (and or effort expended) to make relevant contributions. And, depending upon the nature of the violence established, in the absence of express evidence about the effect that violence had on the victim spouse's contributions, how difficult it might be for the Court to draw inferences which would establish the evidentiary nexus (see *Spagnardi* at [42]). But we did not have the benefit of argument on the point (nor it seems did the primary judge) and prefer to express no final view about it.

I agree that there is a difficulty with the second dot point in [47] of *Spagnardi* if it is read to mean that the effect of family violence can only be established by evidence and not by inference. It is unlikely that is what the Full Court meant in *Spagnardi* given their statement at [45] about inferences, which is referred to under the next heading.

I also agree that there is a difficulty with the third dot point in [47] of *Spagnardi*. No new or different evidence is needed at the third stage. That stage is about the evaluation of the evidence adduced under the first two dot points and/or inferences drawn from that evidence. Sometimes the severity of the established family violence under the first dot point will, by inference, allow a quantification of the impact or arduous effect upon contributions. Sometimes the victim's direct evidence, under the second dot point, of the effect family violence has had upon her/his capacity to function in making particular contributions will add to the ability to make that assessment, as will any expert evidence opinion relevant to that issue.

Inferences

In cases where there is an absence of evidence as to the effect that a course of established family violence has had upon a party's ability to make contributions, the ability to draw inferences becomes essential, for any positive adjudication to be made in a *Kennon* argument.

In *Spagnardi*, the Full Court at [45] referred to the following statement by the trial judge (Chisholm J) with approval:

> It cannot, however, be the law that the failure to state such matters expressly is necessarily fatal to such evidence; there must be cases where it is obvious or a very likely inference from the facts, that certain kinds of violence must have adversely affected a person's contributions.

The Full Court also agreed [48] that the strength of the evidence about specific acts of violence was insufficient to allow any inference to be drawn in the victim's favour about the effect family violence had had on her ability to make contributions.

In *Britt* at [74] the Full Court said:

> The respondent submitted that the appellant's evidence was not relevant to an issue because even if it was evidence of family violence, the appellant had called no evidence to suggest that the violence had made her contributions more onerous. This submission overlooks the obvious point that the court can infer from appropriate evidence that there was a nexus between the conduct and the relevant contributions.

In *Benson and Drury* the Full Court at [49]-[50] said:

> 49 Even though S *v* S [Spagnardi] might, in the past, have been interpreted as implying the need for something more, it should now be clear that the required nexus between proven family violence and the significant adverse effect upon the contributions of the victim is capable of being inferred from the lay evidence of the parties (*Maine v Maine* (2016) 56 Fam LR 500 at [47]–[52] ; *Britt & Britt* (2017) FLC 93-764 at [74]–[75] ; *Keating* at [27]–[43], [52]–[67])
>
> 50 Here, the primary judge found the appellant perpetrated family violence upon the respondent and drew an inference that such violence did have an effect upon the respondent's contributions, making them "all the more arduous" (at [162]). An inference is an assent to the existence of a fact which is based on the proven existence of some other fact or facts, drawn as part of the fact finding process as an exercise of ordinary powers of deduction and reason in the light of human experience, unaffected by any rule of law (*G v H* (1994) 181 CLR 387 at 390; 124 ALR 353 at 355; 18 Fam LR 180 at 182). Obviously, the strength of the subject inference depends upon the quality of the underlying evidence. It must be reasonable to draw the inference from primary facts. Mere conjecture will not suffice (*Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 275–278 per Spigelman CJ; *Carr v Baker* (1936) 36 SR (NSW) 301 at 306–307 per Jordan CJ). Importantly, the evaluation of the evidence from which the subject inference is sought to be drawn should be thorough and balanced. In the context of a *Kennon* argument, any factual controversies over the alleged misconduct of one spouse and its alleged deleterious consequential effects upon the other spouse should be resolved by familiar forensic techniques. Disputed but untested allegations, are not facts (*Keating* at [55]–[66]).

In the recent first instance decision *Sweet and Sweet* [2022] FedCFamC2F 676 at [238]-[239], Deputy Chief Judge McClelland of Division 2 of the FCFCOA (who is also the Deputy Chief Justice of Division 1) suggested that the standard required to accept an inference was lower than that approved by the Full Court in *Spagnardi*:

> 228 The Supreme Court of Victoria, Court of Appeal in *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 440 set out the correct approach as to when it is appropriate for a trial judge to draw an inference on the basis of evidence presented in civil proceedings. At 466, [101] the Court, consisting of Santamaria, Ferguson and Kaye JJA, said:
>
> > The principles, relating to the drawing of inferences in civil cases, are well established. First, any inference must be based on facts established by admissible evidence. Secondly, the process of reasoning must constitute a valid inference, as distinct from speculation or guesswork. Thirdly, and importantly, where the inference is drawn in favour of the party which bears the burden of proof in the case**, the conclusion must be 'the more probable inference' from those facts. In other words, the inference drawn by the judge must be reasonably considered to have a greater degree of likelihood than any competing inference**. Fourthly, in determining whether an inference is to be drawn as a matter of probability, the tribunal of fact is not required to consider each primary fact, established by the evidence, in isolation. Rather, the Court considers the totality of those facts together, giving effect to their united and combined force. (Bold emphasis added by Deputy Chief Judge McClelland)
>
> 239 It is to be noted that the task of the Court is to identify the "more probable" inference, not one that is necessarily "an obvious or very likely" inference.

Corroboration

Whilst it is it right to observe that corroboration will strengthen the narrative of family violence given by a victim, corroboration is not necessary to ground a *Kennon* argument.

In *Keating* the plurality observed at [42]

> It is well settled that a party does not require his or her evidence to be corroborated before evidence of family violence can be accepted. A decade ago the Full Court said in *Amador & Amador* (2009) 43 Fam LR 268 at [79]:
>
> > Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. We have not been referred to any authority in support of such a proposition.

In *Keating* Austin J commented at [62]-[63]:

> 62. One of the reasons (among others) given by the primary judge for the rejection of *Kennon* argument was the lack of corroboration of her contested evidence, but not so as to imply the essentiality of corroboration. Any need for evidence to be corroborated was abolished long ago (s 164(1) of the *Evidence Act 1995* (Cth)). Logic alone dictates that a lack of corroboration does not mean uncorroborated evidence is false or inaccurate, so *Amador* takes the debate no farther, but the absence of corroborative evidence when it would ordinarily be expected and there is no reasonable explanation proffered for the failure to adduce it gives rise to a permissible inference that the evidence would not have advanced the party's case. The inference makes it safer to accept the other party's contradictory evidence.
>
> 63 As was said by Barwick CJ in *Katsilis* v *Broken Hill Pty Ltd* (1977) 18 ALR 181 at 197:
>
> > …it can properly be said that the failure of a party to give or produce evidence which, in the circumstances of the case, that party in its own interest would be expected to give or produce, warrants the conclusion that, if given or produced, the evidence would not support that party's case. Indeed, in some circumstances it might be inferred that it would support the opponent's case; but, if so, it must depend very much on the circumstances. But, in any case, the inference would depend upon some element of conscious repression or withholding of the evidence. The warrant for the inference must depend upon the deliberation with which the evidence is withheld and the appreciation or likely appreciation of the party of its significance in the case. In my opinion, these propositions are in accord with the decided cases which I have taken occasion to examine.

Course of Conduct

Kennon in its original formulation spoke of "a course of violent conduct" and that it did not encompass conduct related to the breakdown of the marriage.

By 2005 the Full Court in *Stevens and Stevens* [2005] FLC 93-246 at [65] (Finn, Coleman and Warnick J) had put the following gloss upon the term "course of conduct":

> The term "course of conduct" is a broad one. We do not think that conduct must necessarily be frequent to constitute a course of conduct though a degree of repetition is obviously required. The wife's evidence does establish periodic behaviour and its consequences throughout the period of cohabitation.

In my view "a course of violent conduct" should not should not be an absolute threshold requirement for the exercise of the court's jurisdiction in a *Kennon* argument today. A single dramatic incident of violence could have such a chilling effect on a victim that subsequent contributions are made significantly more arduous.

Post separation contributions

The Full Court in *Kennon* went on to say in another well known passage:

> It is essential to bear in mind the relatively **narrow band** of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred **during the course of the marriage** and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass (as in *Ferguson*) conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions). [bold emphasis added]

Contributions don't cease at the date of separation and are assessed holistically as at the date of trial. One set of data indicates that 40% of domestic and family violence incidents were post-separation (2016 Victorian Police data quoted in Humphreys C, Diemer K, Bornemesza A, Spitteri-Stains A, Kaspiew R, Horsfall B (2018) *More present than absent: Men who use domestic violence in their fathering* Child and Social Work 1 – 9).

There is a gap between the date the parties separate and the date of a determination after a final hearing. During that period of time, it is often the case that a victim has made significant contributions, particularly in the role of homemaker and parent. In many violent relationships the danger of family violence to the victim increases significantly around and after the date of separation. In those circumstances violence may well make post separation contributions significantly more arduous and all the more so if coercive and controlling family violence continues after the separation.

In *Baranski* [2012] FamCAFC 18 at [257] and [259] the Full Court (Bryant CJ, Coleman and Ainslie-Wallace JJ) said that a *Kennon* argument is not limited to a consideration of contributions to the time of separation but extended to post-separation contributions. This dicta has been consistently followed at trial level ever since (eg *Lad and Gittins* [2013] FamCA 877 (Austin J; *Haines & Raider*(No 4) [2022] FedCFamC1F 1008 (Brasch J).

Holistic assessment

In *Benson and Drury* the Full Court at [35] said:

> The central question raised by this appeal is how a judge takes into account the contributions of one party, found to have been made significantly more arduous by the conduct of the other, when assessing contributions under ss 79(4)(a)–(c) or ss 90SM(4)(a)–(c) of the Act. The answer is the primary judge must take a holistic approach. The contributions which have been made significantly more arduous have to be weighed along with all other contributions by each of the parties, whether financial or non-financial, direct or indirect to the acquisition, conservation and improvement of property and in the role of homemaker and parent. All contributions must be weighed collectively and so it is an error to segment or compartmentalise the various contributions and weigh one against the remainder (*Jabour & Jabour* (2019) 59 Fam LR 475; (2019) FLC 93-898 ; [2019] FamCAFC 78 at [73]–[87] ("*Jabour*"); *Horrigan & Horrigan* [2020] FamCAFC 25 at [42]–[48]).

Quarantining

In *Loncar* the Full Court was asked to consider the novel proposition that a successful *Kennon* argument should be ignored at the third and fourth stage (as described in *Hickey and Hickey and Attorney-General (Cth) (Intervener)* (2003) FLC 93-143) of the consideration of an application for a property settlement order. The argument was based upon earlier cases involving claims in tort considered contemporaneously with proceedings for a property settlement order (discussed below) where claims in tort were quarantined when considering what property order should be made {see *Marsh v Marsh* (1994) FLC 92-443; *Re Q (Damages for Sexual Assault)* (1995) FLC 92-565}. The Full Court explained that the principles articulated in *Kennon* do not fall within the same rubric as cases in tort.

The Full Court in *Loncar* said at [61]-[63]

> 61 Whilst the analogy drawn by counsel for the wife relying on *Marsh* and *Re Q* is obvious, in our view the application of the principles articulated in *Kennon* does not fall within the same rubric as the approach applied in the cases relied upon by the wife, which are claims in tort.
>
> 62 In 1975 the Act deliberately set out to exclude conduct from the assessment of financial adjustment between the parties. The Family Court in *Kennon* carved out an exception to that general proposition by acknowledging the effect that family violence in particular and conduct more generally might have upon the making of contributions by a party. Given that the acknowledgement is made in respect of contributions, the consideration of a *Kennon* claim axiomatically happens at the second step although the ongoing effects of family violence maybe a relevant prospective consideration at the third step.
>
> 63 Absent statutory instruction, there is no warrant in s 75(2)(b) to discount the outcome of the analysis under s 79(4)(a)–(c) of the Act based on a *Kennon* argument. Nor in our view does s 75(2)(o) or s 79(2) create scope for the approach suggested by the wife.

Floodgates

The Full Court in *Spagnardi* commented upon the reference in *Kennon* to "exceptional cases" and "the relatively narrow band of cases". The Full Court in *Spagnardi* adopted the trial judge's comments that:

> …the references to 'exceptional cases' and 'narrow band of cases' occurs in the context of the principle of misconduct in general rather than the more narrow formulation about domestic violence. My reading of these passages, therefore, is that it is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles. It seems to me that reading these passages carefully, the key words in a case where there are allegations of domestic violence are 'significant adverse impact' and 'discernable impact'. That reading of the passage is, I think, given some additional force by the actual decision in the Doherty case and the judgments of Baker J in both *Doherty* and *Kennon.*

There is an increasing awareness and recognition that the often pernicious and long-lasting debilitating effects of systemic family violence can be considered if they are likely to have a continuing prospective effect particularly upon earning capacity (s 79(4)(e),75 (2)(b); (o) of the Act), although the argument is available that they are relevant regardless of their aetiology

In the decades since *Kennon* there has been a widening of the "narrow band of cases" to which a *Kennon* argument is applicable. This has been underpinned by a growing recognition of the prevalence of family violence in cases presenting to the family courts.

In 2011 the current definition of family violence was codified. The statutory definition of family violence widened the focus from serious physical assaults to coercive and controlling family violence.

Since the establishment of the Family Relationships Centres in 2005, the proportion of cases filed for determination exercising jurisdiction under the *Family Law Act*, which involve assertions of family violence in parenting cases, has increased. The emphasis in pre action procedures on dispute resolution, is likely to filter out more cases which do not have family violence as a feature

Research in 2015 by the Australian Institute of Family Studies found that family violence or child abuse was present in 70% of matters resolved by judicial determination and 60% of matters which resolved by consent after proceedings were initiated but prior to trial.

In *Sweet* Deputy Chief Judge McClelland expressed the following view at [233] in relation to the "floodgates" argument:

> At the outset of consideration of this issue, I should firmly state my view that, in the year 2022, there is now much greater knowledge in the community as to the pernicious impact of family violence and each case should be considered on its own merits without any predetermined reluctance to do so because of fear of opening the floodgates.

In Martell & Martell [2023] FedCFamC1A 71 Aldridge J, exercising appellate jurisdiction as a single Judge, having referred to how the awareness and disapproval of family violence has developed since 1997, at [22] effectively buried the "floodgates" argument:

> It has to be said, that their Honours terms "exceptional" and "narrow" lose much of their force if cases involving significant violence are to be the subject of the application of the principles. Such cases might have been regarded as exceptional at the time Kennon was decided but they cannot today be so regarded. Unfortunately the prevalence of family violence is wide and artificial barriers to its recognition, such as trying to limit its recognition in property cases to exceptional or narrow cases, has no basis in principle

Other conduct

For the sake of completeness, the majority in *Kennon* make clear that their comments in relation to conduct were not limited to acts of family violence. Reported cases in relation to other types of conduct which have been found to have made contributions significantly more arduous are relatively few and outside the scope of this paper. Unsurprisingly the majority in *Kennon* endorsed the NSW Court of Appeal's rejection of an argument in *Killick v Killick* (1997) 21 Fam LR 331 by a male partner "that incidents of infidelity during the relationship by the female partner should be taken into account as diminishing her contribution as homemaker or parent."

Presenting, proving and resisting a *Kennon* argument based upon family violence

Standard of proof and s140, s55, s56, s66A, s135 *Evidence Act*

Some of the following discussion may be useful to bear in mind when interviewing a victim or an alleged perpetrator of family violence for the purposes of taking a proof of evidence.

It is a serious matter to make allegations of family violence. In determining whether allegations have been proven the court will apply the civil standard of proof on the balance of probabilities and have regard to section 140(2)(c) of the *Evidence Act* 1995(Cth), which is said to be the statutory enactment of the statements by the High Court in *Briginshaw v Briginshaw.* (1938) 60 CL R 336*.* It is accordingly important to adduce evidence in a form which is as weighty as possible. But there is a difference between weight and admissibility, and even evidence which is individually of little weight may add to the weight of the evidence overall.

It is also pertinent to point out that section 66A of the *Evidence Act 1995* (Cth) provides that the hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the persons health, feelings, sensations, intention, knowledge or state of mind. Accordingly relevant contemporaneous statements made by a victim to a treating professional or the police falling within these categories is admissible evidence (subject, of course, to the other rules of evidence).

However, in a long relationship where there has been systemic family violence with repetitive incidents similar in kind it may well be difficult for a victim to remember with precision even some of the particular events. That however does not mean that general statements are inadmissible.

In *Britt & Britt* [2017] Fam CAFC 27 the Full Court, considering a decision which had dismissed a *Kennon* argument, discussed section 55 and 56 of the Evidence Act and upheld an appeal against the trial judge's rejection of evidence, The trial judge had excluded evidence on the basis that it lacked particularity and took the form of conclusions. The trial judge had been critical of adjectives used by the applicant such as "regularly", "routinely", "repeatedly" and "often". Much of the wife's evidence which the trial judge had rejected contained conclusions in a form such as "I had been having a sexual relationship with [the respondent] since I was 11 years old"; "Our first sexual acts were not consensual on my part"; "I had no close family and few close friends"; "I lived my life in fear of him and often intervened when he attempted to hurt the children physically usually with the result that I was assaulted physically myself"; "He regularly criticised the meals I cooked or the standard of my housekeeping". The Full Court said at [54]:

> "One would not expect any person who had been in a long relationship to remember the exact nature and frequency of recurring events throughout that relationship, let alone specific dates".

Section 56 of the Evidence Act provides that evidence that is relevant is admissible. Section 55 of the Evidence Act provides that evidence is **relevant** if it is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. This is a low bar.

In *Britt* the Full Court referred to statements made by the High Court in *IMM v R* (2016) 257 CLR 300 at [40]:

> "But neither s 55 nor s 56 requires that evidence be probative to a particular degree for it to be admissible. Evidence that is of only some, even slight, probative value will be prima facie admissible, just as it is at common law (footnote omitted)."

The Full Court in *Britt* at [34] pointed out that the probative value of a particular piece of evidence should not be considered in isolation from the rest of the evidence including the proposed evidence because one piece of evidence may affect the probative value of another and a number of pieces of evidence when considered together may have a probative value greater than if each is considered individually. The Full Court went on to say at [40]- [41]:

> "40…There is nothing in the *Evidence Act* that prevents evidence being given as a conclusion (save for expert opinion expressed as conclusions which can only be given by expert witnesses)... If the nature of the conclusion is such that it has no probative value, the evidence should be rejected.
>
> 41… We are, however of the view that none of the evidence which was excluded should have been excluded on the basis that it had no probative value at all, simply because it was expressed as a conclusion."

When acting for an alleged perpetrator do not overlook the general discretion of a judge to exclude evidence under section 135 *Evidence Act* if it can be argued that the probative value of a particular piece of evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the alleged perpetrator or that it would cause or result in an undue waste of time.

Acting for the applicant (the victim)

Early in the relationship with the client in a financial matter, it is important to directly ask questions to ascertain whether they assert they have been the victim of family violence. Sometimes eliciting that information takes patience and is incremental over more than one conference and requires the client to have developed confidence in the lawyer.

For reasons that will become obvious when I discuss limitation periods in respect of claims based in State law, it is important to establish at the earliest possible time whether the client might have a significant claim in tort.

A cost/benefit analysis

Once it is established that a financial claim might be available as a result of the client being the subject of family violence, it is important to pause and undertake a considered costs/benefit analysis.

The safety of the client is of course paramount. There will be those clients who have been in relationships where the risks of future violence are high and they want ties with their former partner severed as cleanly as possible and with as little risk of antagonising that partner as is possible. From their view, no money is worth future risk to their safety.

There will be those clients whose mental and emotional health has been affected by them being subjected to family violence and they have no interest in reliving those experiences through litigation. The money simply is not worth the future potential damage to their emotional wellbeing.

There will be those clients, particularly with younger children, who face the reality of having to have a continuing parenting relationship with the perpetrator. Again, that may deter a client from pursuing any argument for adjustment arising out of the family violence they have experienced.

Some assessment also needs to be made as to the legal costs likely to be incurred and the return that might be achieved through litigation on best and worst case scenarios.

It may a client simply wishes to use that argument as leverage in negotiations without any intention of running that argument in contested litigation.

Client statement / Witnesses statements

The definition of family violence in the Act provides a convenient checklist for exploring with a client, whether there is sufficient evidence to support a contention that coercive and controlling behaviour has been perpetrated upon your client.

Section 4AB(2) of the Act provides examples of behaviour that may constitute family violence which include but are not limited to

- An assault
- A sexual assault or other sexually abusive behaviour
- Stalking
- Repeated derogatory taunts
- Intentionally damaging or destroying property
- Intentionally causing death or injury to an animal
- Unreasonably denying financial autonomy that your client would otherwise have had
- Unreasonably withholding financial support needed to meet the reasonable living expenses of your client or the children at a time when your client is entirely or predominantly dependent upon the perpetrator for financial support
- Preventing your client from making or keeping connexions with their family friends or culture
- Unlawfully depriving your client or any member of their family of his or her liberty

It also should not be overlooked that a party's contributions in the role of homemaker and parent can be made significantly more arduous if family violence is directed against children in the household and your client assists the children in dealing with the impact upon them of the family violence. Again s4AB(4) of the Act provides examples where children might be impacted by family violence:

- Overhearing threats of death or personal injury
- Seeing or hearing an assault
- Comforting or providing assistance to your client when assaulted
- Cleaning up a site after property has been intentionally damaged
- Being present when police or ambulance officers attend an incident involving an assault

A victim might have a very good recollection of particular events that are seared into their memory. A victim's memory might be able to be refreshed by looking at particular documents that have perhaps been obtained from treating professionals or under subpoena from, for example, the police. It's axiomatic that the evidence which will be given most weight is the evidence that a victim can give with clarity and particularity. Given that is so, practitioners

should take the time and make the effort to get as precise a recollection from their client as possible so, that evidence can be presented as specifically as possible.

As has already been pointed out, the Court is well aware that in a long relationship, involving repetitive incidents of a similar kind, a victim's ability to be precise might be compromised. In those circumstances general statements are admissible (see the passage from *Britt* above].

Having elicited all relevant evidence from a client about acts of family violence it's important to explore in as much detail as is possible how that family violence has had an impact upon contributions the client has made in all spheres referred to in section 79(4)(a)-(c) of the Act.

The case law is replete with examples of abandoned or unsuccessful Kennon arguments which have floundered because of insufficient evidence to found a connection between the established family violence and an effect on contribution. For example in *Martell & Martell* [2023] the appeal against the application of the *Kennon* principle succeeded because the reasons of the primary judge were silent on the issue of how the acts of violence of the husband led to the non-financial contributions of the wife being made difficult, distressing and more arduous.

A victim can give first hand evidence about the symptoms, feelings, sensations and state of mind they experienced as a result of family violence and how these have impacted upon their contributions from time to time. Although in the absence of that evidence, the client may rely upon inferences depending on the nature and extent of the family violence.

Corroborative evidence

As has already been discussed, it is well settled that a party does not require his or her evidence to be corroborated before evidence of family violence can be accepted.

But that does not mean that if corroboration is available it should not be gathered. Again as already mentioned, in certain circumstances an adverse presumption can be made against a party who has not called relevant available corroborative evidence.

The sources of that corroborative evidence may include:

1. Adults who have lived together with the parties in a household but serious consideration needs to be given as to whether adult children are called as witnesses
2. Other lay witnesses to particular events
3. Medical reports and records from treating practitioners
4. Photographs of injuries
5. Police records including a party's criminal record and COPS entries for occasions when police were called to a home
6. Local court records from criminal proceedings or ADVO proceedings
7. Relevant documents including texts, emails and social media postings

It is to be noted that no application is required to tender a report or adduce evidence from your client's treating medical practitioner (*Federal Circuit and Family Court (Family Law) Rules 2021* (Cth) [Rule 7.01]. An application may need to be made under Rule 7.04 (or in certain circumstances rule 7.08), if you wish to call expert evidence from a non-treating medical practitioner that might go to your client's current and future physical and mental health including any debilitating effect caused by family violence upon a client's future earning capacity.

Section 102NA

The requirements of section 102NA may come into play if an alleged perpetrator (or the alleged victim) is an unrepresented litigant. The section is triggered if either party intends to cross examine the other and either party has been convicted or charged with an offence involving family violence or there has been a State family violence order or personal protection order under the Act. The Court may otherwise, in its discretion, order that the requirements of section 102NA(2) are to apply. This section provides that cross examination can only be conducted by a legal practitioner acting on behalf of the examining party. From time to time there have been difficulties with the administrative and financial arrangements in engaging that legal representation for the unrepresented party

Acting for the respondent (the alleged perpetrator)

When acting for a client who is alleged to have been the perpetrator of family violence it is important to ensure that the client understands what is being alleged and that the client provides as detailed instructions as is possible, responding to the allegations. The alleged perpetrator might have a very different recollection than what is alleged with respect to particular events. For example in *Keating* the plurality on the one hand and the trial judge and Austin J (in the minority in *Keating* on this topic) on the other hand reached quite different views about the history of family violence which emerged from the evidence. It is your job, if there is an alternative narrative, to develop it.

Impress upon the client that you require them to provide frank disclosure about the allegations, so that you are able to give advice as to whether the right to silence might be exercised in relation to any particular allegation in respect of which there might be a potential prosecution. If a right to silence is not exercised, advise the client to admit those parts of the allegations that are true. It may be appropriate to make an application for a certificate under s128 of the *Evidence Act* in circumstances where your client has a legal obligation to provide evidence which might be incriminating.

The rules of evidence apply. In the past a person making allegations may have provided a very sloppily drafted affidavit. After objections are determined an alleged victim may have found themselves without any substantive evidence upon which to base their *Kennon* argument. However, the Full Court's decision in *Britt* has restricted the ability to attack the statement of conclusions in an affidavit rather than the primary evidence upon which those conclusions are based. Also, the recognition by the courts of the effect family violence has upon precise memory as to the time and circumstance of a particular incident, mitigates against objections that might have been successful at an earlier time.

As already mentioned, a submission might be able to be made relying upon s135 *Evidence Act* that the probative value of exploring a particular topic raised by the alleged victim is substantially outweighed by the danger that that evidence might cause or result in an undue waste of time.

Particular care should be taken when the final hearing involves both parenting and property applications and the evidence about the alleged history of family violence is relevant to both applications. Ordinarily in parenting matters, ss 69ZT(1) of the Act provides that significant parts of the *Evidence Act* do not apply. Those rules of evidence apply in respect of the allegations about family violence in the property proceedings. An application under ss69ZT(3) should be made for the Court to apply the rules of evidence in both proceedings if they are to be heard together.

Many acts of alleged family violence happened behind closed doors, without witnesses. In those circumstances the credibility of both parties may be decisive. Evidence impugning the credibility of the alleged victim can be garnered and adduced, so that the alleged perpetrator's credibility and version of events might be preferred

On the issue of the effect of family violence upon contributions, evidence of the alleged victim's ability to function at normal levels particularly in employment outside the home maybe useful. That line of attack was pursued in *Benson and Drury* but ultimately the extent and the nature of the family violence in that case overwhelmed any argument the alleged perpetrator could make arising from the wife's apparent level of functioning in her profession.

If expert medical evidence is called by the applicant, consider seeking to have the applicant examined by a single expert or for leave to call your own expert evidence. This can misfire. Curiously the husband in *Kennon* did this but unfortunately for him his own expert ended up providing the wife with the best expert evidence that she had!

An additional matter to remember, when negotiating a property settlement for the alleged perpetrator in a case involving allegations of family violence, is that the alleged victim may still take action for tort in a State or Territory court. Accordingly as part of any settlement negotiations the alleged perpetrator should think about seeking an appropriate Deed of Release from any further action by the alleged victim for damages for personal injury.

Claims based on State law

Prior to 1976 the common law had not developed to specifically deal with the right of one spouse to bring an action in tort against the other spouse for systemic family violence during their relationship and afterwards because "the doctrine of unity" applied to a married couple (but not to a de facto couple). The fiction was that the legal personality of each party to the marriage merged into the other's. As a result, the common law precluded any claim in tort by one against the other for acts during the marriage.

In 1975, s 119 of the Act, which has remained unamended since its introduction, changed the common law by specifically providing that a party to a marriage may bring proceedings in contract and tort against the other party.

Claims under state law can obviously be pursued in a state court. I shall later explore in this paper the opportunity that may exist in some cases to bring such a claim within the federal jurisdiction of the FCFCOA.

I wonder whether family lawyers who are taking instructions from a victim of serious family violence regularly turn their mind to remedies that might be available outside the confines of the Act. In my view, you do your client a disservice (and perhaps risk a claim in negligence!) if you are not mindful of the available remedies which might possibly provide your client with substantial financial benefit. Family lawyers are used to navigating a wide range of legal areas of law including trust, tax, bankruptcy and corporations law. When family lawyers are uncomfortable about their level of specialist knowledge about an unfamiliar area of the law they collaborate with other professionals. For example, if there are serious tax implications for a particular property settlement proposal, specialist advice is often obtained. If you are uncomfortable about taking on a state based tort claim for a client, seek out and work collaboratively with a personal injury lawyer, either within your firm or externally. There are plenty of them advertising for work.

Depending upon the size of the pool, State based claims can be worth significantly more in compensation for the victim. For example, and by way of comparison, in *Whitlam and Whitlam* [2008] FamCA 606 the wife was the subject of systemic coercive and controlling family violence during a 16 year marriage. That violence included one rape a couple of years before the separation and one attempted rape. The wife received an increase in the assessment of her contributions based on a *Kennon* argument equal to 10% of the property pool being an amount of $69,133. Even allowing for inflation, this might be compared to the award received by Ms Wilden from the NSW District Court in *Wilden v Jennings* [2021] NSWDC 705.Ms Wilden received an award of $490,091 for a Post-Traumatic Stress Disorder ('PTSD') as a result of four rapes during her marriage to Mr Jennings.

Another recent example that demonstrates the value of considering a state based claim is *Southon v Ray* [2022] NSWDC 32. At the end of a violent domestic relationship the de facto husband pushed the de facto wife in their lounge room and she fell and suffered an injury after her head hit a coffee table. Notwithstanding significant pre-existing physical injuries and mental health issues she received damages of $163,786. This outcome was confirmed on appeal (*Ray v Southon* [2022] NSWCA 267).

What types of claims might be actionable between spouses?

The most common examples of an actionable claim in tort arise from assault and battery. However, the circumstances may give rise to the consideration of other types of tort including false imprisonment, trespass to land, trespass to property or chattels , malicious prosecution and defamation. Damages have also been awarded in the context of so called "revenge porn" cases relying upon the breach of an equitable duty of confidence.

Assault and battery

Almost always assault and battery occur together, moments apart. However, one may happen without the other. For example, a blow from behind might not involve an assault. A punch which is pulled will not be a battery.

Battery

The tort of battery is committed by a spouse intentionally or recklessly bringing about harmful or offensive contact with the body of the other spouse. The contact needs to be offensively outside that occasioned by the normal vicissitudes of life. The victim does not need to prove that the perpetrator intended to inflict bodily harm nor is liability confined to foreseeable consequences.

The contact need not be directly to the body, for example pulling a chair from under a spouse, ripping something away from the other spouse or, in the case of battery of the child, injuring the child by causing the parent holding the child to fall.

The victim does not have to establish a lack of consent. This issue often arises where the allegation is one of non-consensual sexual contact. If consent to the contact is alleged, the onus is on the defendant to establish it.

It is often the case that an alleged perpetrator will accept that contact was made with the body of the other spouse causing injury but argue that it was not battery because forcible restraint of that spouse was necessary to prevent violence being perpetrated against him/her.

Assault

Assault occurs when a spouse intentionally creates in the other an apprehension of imminent harmful contact. The essence of the offence is apprehension in the spouse's mind created by the threat of contact made by the perpetrator. Usually, a threat of battery made by a perpetrator is accompanied by bodily movement but in certain circumstances the threatening words might be sufficient to constitute an assault, if the victim apprehends the perpetrator has the ability to carry out the threat.

False imprisonment

False imprisonment is, relevantly, the direct and intentional bodily restraint of a spouse or child. An obvious example is forcibly locking a spouse in a room. But long gone are the days where there is a strict requirement for incarceration. The essence of the offence is the constraint of a spouse's will, even if physical force is not used. Common examples are preventing a spouse from leaving the home by threat of force or driving a car in a matter which prevents the spouse from leaving it.

Trespass to land

It is not uncommon that one spouse will come upon another spouse's property, even in circumstances where there are legal restraints upon them doing so. One spouse's intentional and unauthorised interference with the other spouse's exclusive possession of property is an actionable tort. Given that it is a tort of strict liability damages may be awarded even in circumstances where no actual damage has been suffered by the plaintiff because of the defendant's trespass (*TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82). In *Plenty v Dillon* (1991) 171 CLR 635 Gaudron and McHugh JJ concluded that police officers caused distress when entering land against the wish of the person in possession when they had no right to do so and said at [24]:

> …the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land… If the occupier of property has a right not to be unlawfully invaded then… the "right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric"[citation omitted]..:If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights…The appellant is entitled to have his right of property vindicated by a substantial award of damages.

Compensatory damages are available for this type of deliberate action, particularly if it has a serious effect upon the victim's psychological health. Aggravated damages may be awarded if there has been special humiliation. Exemplary or punitive damages are available if there is a particularly malicious aspect to the intruding spouse's behaviour including contemptuous disregard for orders which are in place restraining the defendant from coming onto the property. One aim is to provide an effective deterrent against repetitive intentional unlawful behaviour (see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

Defences to a claim in trespass include necessity (for example apparent imminent danger to a child) or genuine and voluntary consent given by the other spouse, with the onus on the defendant to establish the defence.

Trespass to property or chattels

Section 4AB(2)(e) of the Act provides intentionally damaging or destroying property as an example of behaviour that may constitute family violence if it coerces, controls or causes fear. The tort of trespass to property or chattels involves the interference with or destruction of property or chattels of the other spouse. The wronged spouse needs to have actual or constructive possession of the property or chattel at the time of the deliberate interference by the other spouse. Whilst damage to property or chattels is usually a common feature it is not actually necessary as the trespass is a tort of strict liability. The usual remedy is compensatory damages although if the action by the defendant is egregious, exemplary damages may be available. Defences include consent, apparent imminent danger or that the defendant or some other party had a better right to possession.

Malicious prosecution

Malicious prosecution consists of maliciously and without reasonable and probable cause, being responsible for the bringing of a groundless prosecution. The essence of the tort is mala fides on behalf of the person making the complaint. It is often the case that an alleged perpetrator will claim that false statements have been made to the police which have led to criminal charges or ADVO proceedings being prosecuted for the ulterior motive of advantaging the complainant in family law proceedings. In circumstances where it is asserted those complaints have been brought maliciously, particularly after a criminal charge or an application for an apprehended domestic violence order has been dismissed, the tort of malicious prosecution is available (see for example *Rock v Henderson* [2021] NSWCA 155).

Defamation

With the rise in the use of social media, it can be often the case that defamatory postings by a spouse against another will reach a relatively wide audience. Our current plaintive friendly defamation laws can provide a remedy.

A defamatory statement includes one that tends to diminish the respect and confidence in a spouse by relatives, friends and others (assuming that circle of people represent a respectable group in the community). The disparaging remark should discredit reputation not simply insult a spouse's pride. Mere abuse might not be actionable as defamation. Remarks made with due deliberation will provide a more solid basis for a defamation claim than words hurled during an angry exchange.

Deceit

In *Magill v Magill* 2006 H CA 51 the High Court held that the tort of deceit is not usually actionable between partners in an intimate relationship. The High Court explain at [88] that this is because representations which are personal, private and intimate, cannot be justly or appropriately assessed by reference to bargaining transactions, with which the tort of deceit is typically associated. There may be some limited grounds for a claim in circumstances where one spouse has induced the other by fraud to enter a contract or dispose of property (see *Magill* at [85]).In *Morris v Karunaratne* [2009] NSWDC 346 a second wife, who otherwise obtained an award for damages for assault, was unsuccessful in an additional claim based upon the tort of deceit in which she alleged that her husband had failed to disclose to her during their courting that he had been the perpetrator of family violence upon his first wife.

The breach of an equitable duty of confidence

With the ubiquity of social media comes the phenomenon colloquially referred to "revenge porn".

In *Giller v Procopets* [2008] VSCA 236, after the end of a violent relationship, the de facto husband had shown or had threatened to show others, a video depicting sexual activity between the de facto wife and himself. The wife sought damages for the breach of an equitable duty of confidence, intentional infliction of mental harm and invasion of privacy, (along with the damages for other assaults and batteries) but was unsuccessful at first instance. The Victorian Court of Appeal held that there was power to award damages for

breach of confidence and the de facto husband had breached his duty of confidence with the deliberate purpose of humiliating, embarrassing and distressing the de facto wife, and that his conduct had that effect. The wife was entitled to damages including aggravated damages of $40,000. Maxwell P would have also upheld the wife's claim for intentional infliction of emotional distress as an additional basis for awarding the same amount of damages.

The husband in *Scala and Scala* [2019] FCCA 3456 had been jailed for nine months for posting naked images of the wife on the Internet. The Federal Circuit Court (as it then was) ordered damages in the sum of $70,000 for the husband's breach of his equitable duty of confidence, with the parties to otherwise receive an equal share of the pool pursuant to section 79 of the Act. The wife's claim for breach of equitable duty of confidence was heard by consent along with the property claim without apparent consideration of whether there was jurisdiction to do so.

Statutes of limitation

Statutes of limitation in the States and Territories present set time limits in which state-based claims in tort can be made. Appendix 1 contains details of the 8 relevant statutes and the period of time that the statutes provide to bring a cause of action. Previously it had been six years but it is generally now a period of **three** years.

However, there are at least three ways in which a victim may not be confined to commencing an action within three years of the occurrence of an incident of violence.

Firstly, the limitation usually runs from the date of 'discoverability' – that is, the date the victim knows, or ought to know, that they have an injury, that the injury was caused by the fault of the defendant, and that it is sufficiently serious to justify a cause of action. If a victim has been the subject of a serious physical battery, they will usually immediately know they have suffered injury and they are likely to know they have a cause of action. Injury to mental health from systemic family violence is far more insidious. Even if the victim's symptoms manifest soon after an incident of family violence, a victim may not have been professionally diagnosed with a mental disorder, such as PTSD, until years later. In those circumstances, in most jurisdictions, the limitation period may run from the date of the diagnosis. In *Wilden v Jennings* (supra) the four rapes that gave rise to the wife receiving a substantial award for PTSD occurred more than three years prior to the filing of her Statement of Claim.

Secondly there may be a suspension of the limitation period as of right, if during the limitation period the victim was under a disability which means they are, incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action, by reason of any disease or any impairment of his or her physical or mental condition (see for example s52 and s11(3)(b) *Limitations Act 1969* (NSW)). Again an impediment such as PTSD may mean that a victim is substantially impeded in being able to bring their cause of action and dealing with those practical matters that need to be attended to for the action to be brought in time. Those practical matters include "seeking advice about whether a civil remedy exists for some perceived wrong, seeking advice about the difficulties, risks, cost and effort involved in pursuing any such remedy and the likely returns, comprehending and evaluating that advice, and, if the decision to commence proceedings is taken, thereafter engaging in the continuing

process of co-operation, interaction and decision-making that exists between lawyer and client in running any civil action." (see *Guthrie v Spence* [2009] NSWCA 369 at [140]).

Impairment arising from a mental condition is best established by expert evidence. Earlier family violence which is not to constitute an individual cause of action might still be relevant to medical opinion relating to the victim's disability for the purposes of the Limitation Act.

Thirdly there is a right in some jurisdictions to seek leave to extend the limitation period.

It is also to be noted that in most jurisdictions there is a 'long-stop' limitation period which is an ultimate bar to commencing proceedings from the time of the act that grounds the claim (for example in NSW it is 12 years). Ultimately, whether a claim may be statute-barred, or the prospects of successfully arguing for an extension, may require specialist advice.

In relation to the second of the "exceptions" to which I have just referred I briefly refer to two contrasting cases. In *Saunders and Anor v Jackson* [2009] NSWCA 192 the NSW Court of Appeal dismissed an appeal against an award in tort in favour of an adult victim of child and adolescent sexual abuse arising from events outside the limitation period. Hoeben JA (with whom Ipp and Macfarlan JJA agreed) said at [48]:

> 48 The fact that the [victim's] mental condition fluctuated between a "major depressive illness" and a "low grade level of depression with little interest in enjoyment of life" over the years is not decisive. The fact that she was able to maintain employment and raise two children (although it is clear that she received considerable help from her mother in that regard) is also not decisive. From the psychiatric evidence it was well open to her Honour to find, as she did, that the [victim] was substantially impeded by her mental condition in the management of her affairs in relation to the cause of action. Such a conclusion was not only open to her Honour but was clearly correct. This is particularly so when to commence and maintain the cause of action required in the circumstances of this case, such a difficult and emotional decision by the [victim]with potentially devastating repercussions for her family."

This decision is to be contrasted with *Cooper v Mulcahy; Mulcahy v Cooper*:[2013] NSWCA 160 which involved a claim for a property settlement order between parties to a de facto relationship under state law [the date of the parties' separation meant Part VIIIAB of the Act was not attracted] together with claims by the de facto wife in tort. The trial judge had awarded the de facto wife substantial damages in relation to three acts of violence all of which had taken place during the relationship but more than three years before her action was commenced. . The trial judge found that the wife was subject to a relevant disability under s52 of the Limitation Act 1969 (NSW) which meant that the limitation period did not commence to run at the date of the assaults and batteries. Hoeben JA (with whom Basten and Meagher JJ agreed) upheld an appeal against the damages awards on the basis that the de facto wife had failed, in the context of conflicting expert evidence, to establish that she was subject to a relevant "disability" and held that the claims arising from the proven assaults and batteries were time barred by the Limitation Act*1969* (NSW). Hoeben JA said at [116-117]:

> 116… The difficulty in making a decision because of "human psychological dynamics" is not the same as being substantially impeded in her ability to commence the cause of action by reason of an impaired mental condition.

> 117 A decision as to whether or not to end a relationship or to take a step which will have the effect of ending a relationship, can be very difficult particularly when emotions are heavily involved. An unwillingness to make such a decision, however, is not indicative of mental impairment as used in s11(3)(b) LTA. People do remain in relationships despite volatility because of mutual attraction.

Historically time limits for state-based claims have been enforced more strictly than the latitude that has been shown in applications for leave under s 44(3) and 44(6) of the Act. It is consequently important, at the earliest possible time, to obtain instructions from a new client as to whether there has been any serious act or acts of family violence within the previous three years which may ground a claim in tort and whether the client wishes to press that claim. Some immediate decision may need to be made as to whether to file a claim in a State court or alternatively rely upon rule 4.01(2)(e) and(3)(b) to file a State based claim along with a claim for a property settlement order in the FCFCOA notwithstanding pre action procedures have not been complied with. It is advisable to put the advice in writing and ensure any instructions you receive from the client not to proceed with a potential claim in writing, as insurance against any future claim by the client for professional negligence.

Litigating in a State court before, concurrently with, or after an application for a property settlement order

There is little doubt that the claimant in tort by one spouse against the other can be brought in a State court before, concurrently with, or after a claim in the FCFCOA under the Act.

In *Rock v Henderson* [2021] NSWCA 155 the Court of Appeal recorded the wife had received the sum of $265,000 from the sale of a property which was the subject of competing s 79 applications. There had been proceedings in the NSW Local Court, brought against the husband by the police, upon representations by the wife, for an apprehended domestic violence order, which were dismissed. Further the husband alleged that the wife had intentionally come onto his property, against his wishes and in breach of an order, causing him distress and causing the parties' children severe distress. The husband brought proceedings in the NSW District Court seeking damages be paid by the wife, for malicious prosecution (in the ADVO proceedings) and trespass to land, in the sum of $265,000 (an amount identical to the amount that she held). A District Court judge had struck out the husband's Statement of Claim as being an abuse of process. The New South Wales Court of Appeal reinstated the husband's claims confirming that it was open to him to bring them in the way he had.

At [42], Brereton J observed:

> In the light of those observations, a party could not be criticised for bringing the damages claim separately in a state court. It follows that it could not conceivably be an abuse of process to do so. Moreover, with the demise of the cross-vesting scheme, the foundation for concurrent proceedings in the Family Court depends on the accrued jurisdiction. While it is one thing to assert that a claim for damages for assault in the nature of domestic violence during the marriage is part of the same "matter" as a claim for property adjustment, it is another to do so in respect of a claim for post-separation malicious prosecution or trespass to

> land, though the proposition may not be unarguable. In that context, it is all the more justifiable for the damages claim to be brought in the District Court. [footnote omitted]

Double counting?

In *Kennon* the majority endorsed the view of the trial judge (Coleman J) that an award in tort was to be disregarded in the s 79 claim because otherwise the victim would be contributing to their own award [22 Fam LR at page 17] and having upheld the wife's appeal, ignored the damages award of $43,000 when re exercising the s 79 discretion [at page 37].

On that logic, a State court might deal with the claims in tort first but any resulting award would be disregarded when dealing with the s 79 applications. It also follows from that logic that it doesn't matter whether the claim in tort is dealt with before or after the s 79 claim as the outcome in the tort claim will have no effect upon the outcome of the claim under s 79.

This approach might warrant further granulated thought.

There is a grey area that may give rise to a danger of double counting, if the victim in the tort is awarded general damages which include an element for non-pecuniary losses and importantly, compensation for past pain and suffering and the loss of amenities and enjoyment of life. Is it double counting to then give the victim an increased assessment on contributions because the incidences of family violence have made her contributions significantly more arduous?

There is also the potential for double counting if a party receives a component of a damages award for the loss of future earning capacity and ongoing physical and psychological impairment and that loss and impairment is again taken into account pursuant to s 75(2)(b).

Issue estoppel and *Anshun* estoppel

In *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507 the plurality explained at [22]:

> 'issue estoppel'… operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies"…
> "*Anshun* estoppel" …operates to preclude …the raising of an issue of fact or law, if that …issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for …the issue not to have been raised in that proceeding (citations omitted).

If an action in tort in a State court is determined prior to the hearing of the s 79 applications, issue estoppel or *Anshun* estoppel may arise from the State determination. The majority in *Kennon* make passing referencing to this possibility (22 Fam LR at page 9). It is highly likely

that if one spouse has sued the other on a tort involving family violence and findings have been made in respect of those issues, the parties shall be bound by them in the subsequent litigation in the FCFCOA and shall be estopped from reagitating those issues. Further if a spouse in those first proceeding **should** have pursued an issue and failed to do so, *Anshun* estoppel arises.

Usually a State claim. in tort for assault and battery will result in findings of fact about particular alleged incidents of family violence. Also as mentioned above, findings made by a State Court as to damages which included components for loss or diminution of future earning capacity or ongoing physical or psychological injury may subsequently bind the parties in the FCFCOA's consideration of s 75(2)(b).

Questions of issue estoppel have arisen in cases where parenting and property proceedings are bifurcated and findings about family violence have been made in the parenting case (see for example *Benson and Drury)*. In *Damiani and Damiani* [2010] FamCA 217 the Court considered whether factual findings about family violence in earlier parenting proceedings might be admitted in the property proceedings when considering a *Kennon* argument and said at [11]-[15]:

> 11. The law regarding admitting a finding of fact in another case is contained in the s 91 Evidence Act 1995 (Cth) ("EA") which states:
>
> > (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> 12. Section 91(1) EA is, however, limited by s 93(c) EA:
>
> > This Part does not affect the operation of:
> > (c) the law relating to res judicata or issue estoppel.
>
> 13. Issue estoppel creates a restriction against the reintroduction of an issue upon which a finding of fact has previously been made. The same parties are not permitted to reintroduce the same issue which has already been decided: Parkin v James (1905) 2 CLR 315; Outram v Morewood (1803) 102 ER 630.
>
> 14. In Blair v Curran (1939) 62 CLR 464 Dixon J explained at 531 that "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties".
>
> 15. To attract issue estoppel, the factual findings must be fundamental to the ultimate decision which the Court had determined: "In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action" (Blair v Curran (1939) 62 CLR 464).

Pleading the action in tort

In *Kennon* Baker J described [at 22 FamLR page 40] how the parties and the judge at first instance had approached the common law claims in tort. Justice Baker endorsed the view of

the trial judge that the case should be dealt with in a manner that approximates as closely as possible the manner in which a common law court would proceed to hear the matter.

The action is commenced by a Statement of Claim. A Statement of Claim has to set out a statement of the material facts, and it is usual but not necessary to provide particulars. If particulars are not provided they may be ordered later or alternatively the Court may order that the plaintiff file an affidavit, which sets out the evidence upon which the plaintiff relies, which fulfills the purpose intended to be achieved by particulars. Each particular incident constitutes a separate cause of action. So, although not essential the Statement of Claim would ordinarily set out particulars of each alleged assault and battery in a series of paragraphs.

Pleading an action in tort is not rocket science but if you are uncomfortable in doing so it might be advisable to seek the advice of a personal injury lawyer (or brief Counsel who has experience in personal injury cases). Whilst its form might be slightly different, the pleading of the tort(s) is no more complicated than completing questions 17 and 35 of the Notice of Child Abuse, Family Violence or Risk (rule 2.04(1)) and less work than preparing an affidavit stating the evidence on which each allegation set out in the Notice is based (rule 2.04(2)).

Appendix 2 provides an example of a pleading for assault and battery. Each alleged assault represents a separate cause of action which, if proved, gives rise to a remedy in damages. The elements of the claim are:

1. A direct act
2. That it was intentional
3. Harmful or offensive contact or apprehension of harmful or offensive contact
4. Damages

Damages

Whilst the award is expressed as a lump sum, damages are usually itemised in a pleading and in a judgment. An award for personal injury does not attract income tax.

To recover damages for pecuniary and non-pecuniary losses, there must be findings that the injuries were sustained as a result of the commission of a tort, that is, the compensable loss must be caused by and be not too remote a consequence of the proven tort.

Special damages

Special or specific damages are all items of damage capable, more or less, of precise quantification. These are primary medical expenses and the loss of past earnings. Publicly funded medical expenses cannot be claimed because the victim incurs no expense for them.

General damages

General damages are a claim for non-pecuniary losses, past and future, as well as lost future earnings or earning capacity. The basis of that calculation is the victim's pre-injury earning capacity. The key is the reduction in the duration and extent of the victim's working life, and requires determinations about such things as how long the victim is unable to work, whether the victim will be able to engage in full-time or part-time employment and what is the nature of the job that the victim now can do. The amount of general damages will also involve a consideration of future vicissitudes on the one hand (such things as lost promotion opportunities) and on the other hand, a consideration of the victim's pre-injury health. When calculating the present value of a future income stream which the victim has lost, because it is to be paid in the present, a discount is applied using an interest rate set by State legislation. There are of course difficulties in putting a value upon future earning capacity for those victims of family violence who have fulfilled the primary role as homemaker and parent for a significant time during a relationship. The difficulties in quantifying the loss of earnings for a homemaker is outside the scope of this paper.

General damages also include an element for non-pecuniary losses and importantly, compensation for pain and suffering and the loss of amenities and enjoyment of life. Typically, non-pecuniary losses can comprise more than half of the overall award.

Aggravated damages

Assault and battery within the context of a relationship and perhaps behind closed doors, in what is meant to be a situation of trust, is particularly insidious. Aggravated damages are a form of general damages given by way of compensation for injury to the victim for the indignity sustained as a result of the circumstance and manner of the attack (*NSW v Ibbett* (2006) 229 CLR 638). One consideration when assessing aggravated damages is whether the perpetrator has expressed any regret or contrition in relation to the violent incident.

Exemplary damages

Exemplary or punitive damages focus on the conduct of the perpetrator rather than on the injury to the victim. Exemplary damages are awarded in cases where there is need to punish the perpetrator or to deter the perpetrator and others from acting in a similar way. They are a mark of public censor against egregious misconduct. Exemplary damages are not usually available if the perpetrator has been dealt with by the State (for example, if he has served time in prison for the offence).

Interest

Interest of course runs on the award from the date of judgment. But pre-judgment interest is also claimable in most jurisdictions on paid expenses and lost earnings.

I note in passing that intentional torts which include intention to injure are largely unaffected by the civil liability legislation introduced in the States and territories in 2002 and 2003 largely to limit awards of damages for personal injury resulting from negligent conduct. Although, on

their face, some of these statutes seem to apply broadly, the liability provisions generally only apply (excepting for the Northern Territory) where there is an alleged duty to exercise reasonable care and not to intentional torts. [see s 3B(1)(a) *Civil Liability Act* 2002 (NSW); s 28C(2)(a) of the *Wrongs Act* 1958 (Vic); s 4 and s 52 *Civil Liability Act* 2003 (Qld); s 3A *Civil Liabilities Act* 2002 (WA); s 4 *Civil Liabilities Act* 1936 (SA); s 3B *Civil Liability Act* 2002 (Tas); s 41 *Civil Law (Wrongs) Act* 2002 (ACT); s 4, s 32E and s 32F *Personal Injuries (Liabilities and Damages) Act* 2003 (NT).

Acting for the defendant

The tips offered for acting for a respondent to a *Kennon* argument are equally apt when acting for a defendant in a claim for damages.

Take detailed instructions and assess the strength of the plaintiff's case. In cases where the plaintiff and the defendant are the only witnesses to the event, evidence going to the credibility of each of the parties is important. The onus is on the plaintiff to prove her/his case to the relevant standard (in NSW, that is set by s 140(2)(c) of the *Evidence Act 1995* (NSW).

If it is probable that the defendant is vulnerable to a substantial award, it may be prudent to attempt to settle the claim on the best terms possible. If a decision is taken not to challenge the assertion that an assault and battery has taken place, an early expression of regret or contrition in relation to the actions may help ameliorate a claim for aggravated damages.

Seek to have struck out any parts of the Statement of Claim that failed to adequately disclose a cause of action, including claims barred by a statute of limitation. It is vital that you plead in the Defence, if you are asserting a claim is statute barred lest your client be deemed to have waived the issue.

As mentioned above, if the plaintiff is relying upon a treating medical practitioner, particularly in relation to mental injury, weigh up the pros and cons of making an application under the Rules for the appointment of a single expert or the defendant's own expert to examine the plaintiff (noting as already mentioned this has some dangers as demonstrated in *Kennon* itself where the evidence of the husband's examining psychiatrist was the strongest evidence in the wife's case about her mental health).

Bringing a claim under State law in the FCFCOA

Between1987 and 1999, claims in tort arising from assault were occasionally pursued in the Family Court using the national cross vesting scheme, almost always in conjunction with a property settlement claim. After the High Court's decision in *Re Wakim, ex parte McNally* (1999) 198 CLR 511 held the State cross-vesting Acts which purported to confer jurisdiction in state matters on the Federal Court and the Family Court were invalid, the possibility of bringing an action in tort for personal damage as part of a single controversy has remained undeveloped.

Such a claim has been previously and is sometimes still colloquially referred to as an exercise of "accrued jurisdiction". However, the High Court in *Rizeq v Western Australia* (2017) 262

CLR 1 has suggested that term not be used as it is likely to lead to confusion. The High Court said at [55]:

> 55. Thus, it is commonplace that resolution of a matter within federal jurisdiction may involve application both of Commonwealth law and of State law. Indeed it can happen that a matter in federal jurisdiction is resolved entirely through the application of State law. Application of State law in federal jurisdiction came for a period to be described, "[f]or want of a better term" as "accrued jurisdiction". There is "no harm in the continued use of the term 'accrued jurisdiction' provided it be borne in mind ... there [is] but one 'matter'". However, the imprecision the term introduces into the word "jurisdiction" means that the term is best avoided. There is but one matter and that matter is entirely within federal jurisdiction, as distinct from State jurisdiction. (Footnotes omitted)

In this paper I use the expression "the application of State law" rather than the expression "accrued jurisdiction".

When will the FCFCOA have the ability to adjudicate a claim in tort?

A single controversy

The FCFCOA is actually not a new court but an umbrella name for Division 1 [formerly the Family Court of Australia] and Division 2 [formerly the Federal Circuit Court of Australia] of the FCFCOA.

Sections 71 and 76 (ii) of the Constitution provides the FCFCOA judicial power in any matter arising under any laws made by the parliament. As a drafting device to achieve "a single point of entry", generally speaking the Parliament has conferred original jurisdiction under the *Family Law Act* on Division 2, (s 132 *Federal Circuit and Family Court of Australia Act 2021* (Cth)(**FCFCOA Act**) and Division 1 only obtains jurisdiction when the Division 2 transfers a matter to it (s 25 FCFCOA Act).

The scope of a "matter" in s 76 of the Constitution is the ambit of a single justiciable controversy between the parties arising out of a substratum of facts and claims. It is important to understand the claim based on State law is not "clamped on". The whole controversy is federal.

In *Re Wakim; Ex parte McNally* [1999] 198 CLR 511 at [140] Gummow and Hayne JJ (with whom Gleeson CJ and Gordon J agreed) observed:

> "What is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships"" [footnotes omitted]

Their Honours then proceeded at [140]-[141] to describe three indicia (which for convenience I have numbered 1, 2 and 4) where there is a single controversy and one where there is not (which I have numbered 3) namely:.

1. “There is but a single matter if different claims arise out of "common transactions and facts" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide”.

2. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination.

3. Conversely, claims which are "completely disparate" , "completely separate and distinct" or "distinct and unrelated" are not part of the same matter

4. Often, the conclusion that, if the proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter”.

As part of establishing the tort of battery or assault (and other torts discussed above), the facts and circumstances which constitute the tort, if not conceded, need to be proved. In defended proceedings this will involve a forensic inquiry as to whether the victim’s allegations are made out to the requisite standard of proof. Axiomatically the tort of assault and battery will require an examination of part of the same evidence that would need to be established to found a *Kennon* argument. That this is so is demonstrated by issue estoppel and/or *Anshun* estoppel arising if the tort claim is actually heard first in a state court.

Whilst, because of the statute of limitations, the incidents of violence relevant to tort claims, may not usually include **all** of the incidents of violence relevant to the *Kennon* argument, as discussed above, in many cases the history of those earlier incidents may be relevant to an argument about the victim’s impairment in which the limitation period is ticking.

Also, a s 79 hearing requires findings about the future income and the physical and mental capacity of the victim for appropriate gainful employment (s 75(2)(b)). The same evidence is relevant when considering damages in tort which included components for loss or diminution of future earning capacity or ongoing physical or psychological injury. It is not to the point that there is an extra element of connectivity required in the tort claim that does not exist under s 75(2)(b).

In these circumstances, there is a “common substratum of facts” notwithstanding the facts upon which the claims depend “do not wholly coincide” (indicia 1 from *Re Wakim*) and if the proceedings were tried in different courts there could be conflicting findings made on one or more of the issues common to the two proceedings (indicia 4). The claims could not be described as “completely separate and distinct” (indicia 3).

Although it is possible that the jurisprudence may develop in the opposite direction, as the case law currently stands (as discussed above), the second indicia of a “single controversy” is not enlivened because neither the determination of the s 79 proceedings nor the claim in tort are dependent upon the other (*Kennon* at page 17).

There may however be a circumstance where that dependence under the second indicia exists. If for a tactical reason (for example a worry about how the court might treat "addbacks"), a spouse chooses to prosecute a tort for the deliberate destruction of property rather than a claim in property proceedings reliant upon the principles annunciated in *Kowaliw* (1981) FLC 94-092, and assuming that it can be argued successfully that the damages awarded cannot be quarantined, the determination of the tort claim needs to be determined before a final property settlement order is made.

Is the exercise of jurisdiction by the FCFCOA in a claim based on state law discretionary?

Some decisions of the Full Court of the Family Court of Australia have suggested that there is a discretion as to whether to exercise jurisdiction in a claim based on State law that is part of a federal matter. Examples are the second question posed in the case stated in *Warby* (2001) 28 FamLR 443; *Finlayson* (2002) 29 FamLR 460 at [120], [122] and [124]; *Bishop* (2003) 30 FamLR 108, *Whitehouse* (2009) 42 FamLR 319 at 333.

It is not necessary to discuss the historical debate around this question. It is now settled and accepted that once a court has determined that there is a common substratum of facts, there is but a single federal matter "and that jurisdiction conferred with respect to that matter is not "discretionary" and ordinarily is to be exercised by the court concerned" (*ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; *Houghton v Arms* [2006] 225 CLR 553 at 564 [27] *Bergman* [2009] FLC 93-395 at [27]; *Noll* (2013) 48 FamLR 635 at 642-643).

Some first instance decisions

Somewhat surprisingly there have been few reported cases after *Re Wakim* that that have considered a claim under state law arising from tort in the context of proceedings for a property settlement order.

Saba and Saba

Prior to the crossvesting laws and their invalidation by *Re Wakim,* in *Saba and Saba* (1984) FLC 91-579;9 FamLR 780 Gee J dealt with a case where, at the conclusion of a fight between the parties towards the end of the marriage, the wife had thrown hot oil over the husband causing first degree burns to his face and other parts of his body. She had pleaded guilty to a charge of assault occasioning actual bodily harm, brought in a private prosecution by the husband. As well as being placed on probation, the wife was ordered to pay the husband $9000 by way of compensation. This was $1000 less than then statutory maximum under s437(1) of the Crimes Act 1900 (NSW) and was by way of "compensation for injury" that is to say "bodily harm" and "loss" sustained by reason of the assault. The Magistrate applied the same principles as applied in an action for damages for personal injuries save that punitive and exemplary damages were not covered by the legislation. Both parties sought that the Family Court hear the husband's application for those additional damages at the same time as the competing applications for a property settlement order.

Although Gee J observed that the fact of the assault by the wife upon the husband was relevant to considering the husband's state of health and his physical and mental capacity for

appropriate gainful employment under s 75(2)(a) and(b), his Honour found that the claims were not based on "common transactions and facts" and found the husbands claim for damages for assault was "a completely disparate claim constituting a different preceding," and, "a distinct and separate justiciable controversy from the one that attracts federal jurisdiction". His Honour, also said as a matter of discretion he could refuse to exercise jurisdiction and gave reasons why he intended to do so.

It is to be observed that this decision was at a point in the development of the jurisprudence before *Kennon*, when any evidence of fault in a property claim was usually excluded. Also as discussed above, once a finding has been made that there are different claims arising out of a common substratum of facts constituting a single matter, there is no discretion not to exercise the whole jurisdiction.

Yen and Yen

In *Yen and Yen* [2010] FamCA 1, Cronin J had listed for final hearing competing applications for a property settlement order. The wife had filed a Statement of Claim in a local Magistrates Court seeking $100,000 in damages against her husband arising from a series of alleged indecent assaults towards the end of the marriage, each after the husband had administered a sedative to her. The husband had been charged and pleaded guilty in respect of one of the alleged incidents but nonetheless had filed a Defence in which he did not admit any of what the wife alleged. The husband sought to have wife's claims in tort heard under "accrued jurisdiction "along with the applications for property settlement orders. as part of a single controversy. He also sought an anti-suit injunction against the wife continuing the proceedings in the local court. The wife resisted these applications.

Importantly, in this case, Cronin J recorded at [27] that:

> … the wife has indicated that she is not intending to argue in this Court that the consequences of the husband's conduct had had an impact on her contribution as a homemaker. In addition, it is asserted by the wife... that the issue of the impact of the husband's conduct upon her is not a major issue for the purposes of section 75 (2)...

Cronin J observed the evidence required to establish the elements of the claim in tort was only of peripheral relevance in the property proceedings. and noted the wife's application for exemplary damages, "which might normally be awarded to reflect public disapprobation" are matters unrelated to the determination of any entitlement based upon contribution.

But, again importantly, Cronin J said at [52]:

> "…It is stretching the language to say that an assault in a marriage that may or may not give rise to damages is a significant factor in a property case where there is no claim that contribution has been made more difficult because of conduct or because the conduct adversely affects future health or earning capacity".

His Honour concluded that "the nature and basis of the claims in the two proceedings are quite different having arisen from completely different sets of facts "and he could not find that there was a single justiciable controversy and dismissed the husband's applications.

Given Cronin J's observation at [52], it is tolerably clear that had the wife for example made a *Kennon* argument and/or asserted that the sexual assaults had had a long-term effect on her earning capacity, the outcome could have been different.

Interestingly in *Saba* Gee J adjourned the property proceedings until the result of the tort claim was known. In *Yen* Cronin J implied that consideration of the property proceeding should await the outcome of the determination of the tort claim. However, neither of these approaches are consistent with what the Full Court said in *Kennon* (as discussed above).

Crampton and Robison

In *Crampton and Robinson* [2013] FamCA 65 Cleary J, in property proceedings between husband and wife, declined to entertain the husband's claim for damages in tort as a result of the wife pushing him through the open window of a hotel. Her Honour concluded in one sentence at [53] that the two controversies did not arise out of the same substratum of facts. Cleary J went on to say that even if she was wrong about that she would exercise the "discretion" against taking up "accrued jurisdiction" in any event and gave reasons for why she would not exercise discretion to hear the claim. As discussed at page 36, it is a misconception that a court has a discretion not to exercise jurisdiction which has been properly invoked by a party who has demonstrated that the principles, enabling the application of state based law, apply.

Tullo and Tullo

In *Tullo and Tullo* [2016] FamCA 716 the wife had commenced proceedings in the District Court in tort. The husband had made an application to restrain the wife from continuing those civil proceedings and to join them with the property proceedings. The wife made an application that the property proceedings be stayed pending the outcome of the District Court proceedings. Loughnan J dismissed both applications. In the property proceedings the wife was arguing that she had made all but a tiny fraction of the contributions that were made and accordingly Loughnan J observed there was little or no room for a *Kennon* argument and it consequently could not be argued that there was a common substratum of facts.

Pichard and Pichard

In *Pichard and Pichard* [2022] FedCFamC1F 549 Riethmuller J refused an application to join a tort claim to proceedings for a property settlement order. The wife had pleaded serious and extensive family violence between 1982 and 2016. His Honour preceded on the basis that *prima facie* most of the very serious claims were statute barred (although there was no detailed discussion of the provisions of the *Limitations Act* that might allow them to be entertained). There was only one example within the normal three year period, which was an alleged assault but not a battery. Riethmuller J discussed the policy reasons against hearing the two claims together. In doing so he referred to *Saba*, *Yen, Crampton and Robinson*, and *Tullo* and said that he was not persuaded that the approach adopted in those cases was clearly and plainly wrong [27] concluding "If this line of authority is to be challenged, it's appropriately a matter for the Full Court". His Honour said "This leads to the conclusion that the respondent's tort claims are beyond the appropriate ambit of the

exercise of accrued jurisdiction by this court when exercising its jurisdiction to determine property settlement claims in this matter".

With respect to His Honour, all these cases turn on their own facts and do not constitute a line of authority which means the application of state law is beyond the appropriate ambit of the exercise of jurisdiction. In *Yen* and *Tullo* there was no *Kennon* argument. In *Saba* and *Crampton and Robinson* there was a conclusion that there was no common substratum of facts but also an erroneous conclusion that even if jurisdiction existed it was possible not to exercise it as a matter of discretion.

There was an appeal against the trial judge's decision in *Pichard*. My understanding is that arguments similar to those presented in this paper were made by the appellant in the appeal. The appellate court reserved its reasons but shortly before the delivery of judgment the parties settled the matter and so we don't have the benefit of the view of the appellate court about whether the application of state based law in property proceedings is beyond the appropriate ambit of the exercise of jurisdiction.

Giunta v Giunta

In *Giunta v Giunta (No 3)* [2021] FamCA 272 Mrs and Mr Giunta had extensively litigated their family property settlement, which had included a *Kennon* argument based upon a detailed history of significant family violence. McClelland DCJ. produced a 167 page/617 paragraph judgment which led to Mrs Giunta receiving an uplift based upon *Kennon* principles.

Mrs Giunta commenced personal injury proceedings in the District Court claiming common law compensatory damages for family violence including the intentional torts of assault, battery, and unlawful conduct intending to cause emotional distress. The husband made an application to strike out a statement of claim arguing *res judicata*, issue estoppel, *Anshun* estoppel, oppression and abuse of process.

In in dealing with that application in *Giunta v Giunta (Pseudonyms)* [2023] NSWDC 201 Judge Levy SC relied upon *Pichard* to conclude that although the Family Court had jurisdiction to entertain a claim based on state law, properly understood a Kennon argument is not one for damages for intentional tort and that such claims involve much more expansive evidence as to loss than the evidence required in a *Kennon* argument. Although it is not explicitly stated it seems that His Honour concluded that there was no common substratum of facts.

Even if it could be argued that there was a common substratum of facts Mrs Giunta had not asked the Family Court to exercise state-based law.

The District Court concluded that the husband failed to sustain his argument that issue estoppel or *Anshun* estoppel had arisen. Further relying upon *Rock v Henderson* the court also found that Mrs Giunta tort claim was not an abuse of process and she was entitled pursue her claims for damages notwithstanding the success of her Kennon argument.

The District Court proceedings both the alleged victim and perpetrator would potentially be put to the financial and emotional costs of relitigating evidence about family violence that occupied 167 paragraphs of a Family Court's judgment.

Could a claim in tort be dealt with as part of a single controversy in a parenting case?

The majority in *Kennon* (at 22 Fam LR page 9), when speaking about the necessity for there to be proceedings within the original jurisdiction of the Family Court, for a claim in tort to be attached under the former cross vesting scheme, said (by way of obiter)

> Where the action for damages is litigated in a state court that outcome would ordinarily have only limited relevance to a subsequent s.79 proceeding in this Court between those parties. …. before it can be heard in this court it is necessary for there to be a proceeding within the original jurisdiction of this Court to which it is attached. Whilst in theory any claim under the Family Law Act may be sufficient, it seems to us likely that it could only be attached to a s 79 claim. It may be difficult to envisage a case where there would be a sufficiently relevant connection (aside from the identity of parties) between a common law action for damages and applications under the Family Law Act such as … [for] **parenting orders…**
> [bold emphasis added]

Whether you agree with that obiter, I think depends upon your imagination. Speaking for myself, I can envisage a case where almost the whole forensic enquiry centres around contested allegations of serious family violence. Whilst the parenting case is not seeking any financial relief, there is a common substratum of facts, notwithstanding that the facts upon which the claims depend do not wholly coincide.

Arguably a claim in tort by a parent on behalf of a child who has allegedly been sexually abused by the other parent would raise the same substratum of facts as is raised in a parenting case where unacceptable risk of sexual abuse is a matter of forensic enquiry by the court.

How would the FCFCOA assess damages?

In the event that the FCFCOA accept that there are a band of cases in which there is a common substratum of facts relevant to both the *Kennon* argument and the tort claim. so that there is a single controversy, at least initially, until the court builds up its own case law, it may be appropriate to adduce expert evidence from an accredited specialist personal injury lawyer as to the range of damages that would be awarded in like cases in the State court, supported by recent relevant examples.

Costs in State based claims heard in the FCFCOA

In State based claims, normally costs follow the event depending on which party is successful and there are particular rules around the effect of offers made. If a claim under State law becomes part of one matter and that matter is entirely within Federal jurisdiction, the question arises as to whether s 117 of the Act covers the field in relation to all applications for costs of the parties. The answer to that question may turn on the opening words of s 117(1) which applies the operation of the section to “each party to proceedings under this Act”. If s 117 applies to the State based claim, the starting point is each party bear his or her own costs (s 117(1)). Relevantly, the court can make a just costs order if it is of the opinion that

there are circumstances that justify it in doing so (s 117(2)) and in that consideration the court can take into account "matters as the court considers relevant" (s 117(2A)(g)) One such matter would be how a State court might approach the costs of the State based claim. Because the parties are litigating a "common sub stratum of facts", unpicking what costs relate to the State claim might be tricky but the awarding of costs is a discretionary exercise not lightly overturned on appeal

Cross vesting back to a State court

Even though there is but a single federal matter, there is a discretionary option available to the FCFCOA under s5(4) *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (a part of the cross vesting legislation that has survived *Re Wakim*) to transfer the whole matter back to the State court. However, usually the s 79 (s 90 SM) proceedings is the dog and the claims in tort is the tail, so usually properly invoked federal jurisdiction should remain to be determined in the FCFCOA if that is where it was commenced.

Crimes

Compensation ordered it criminal trials

It should not be overlooked that an intentional tort perpetrated against a spouse is also usually a crime.

If the other spouse has actually been convicted of a crime under a State or Federal criminal law, the criminal court may be able to order a convicted person to compensate the victim without the need for a separate civil trial.

In the unusual circumstance where one spouse has brought a private criminal prosecution against the other, a claim for compensation can be advanced on sentencing (see the discussion of *Saba* above). Otherwise, the prosecuting authority may need to be approached and provided with the necessary evidence to substantiate the claim. Sometimes if the groundwork is done ahead of time by the victim, the offender will come to court with a bank cheque for the victim, so that the Crown Prosecutor will make a submission that the victim is not out of pocket.

Appendix 3 details relevant legislation in each state and territory which allows a criminal court to order compensation. Only in Western Australia is no compensation available for injury or loss. Each of the other States and territories (and for crimes under the Commonwealth Crimes Act) allow uncapped claims, except New South Wales, which has a cap of $50,000 for personal injury.

Victim compensation schemes

It may be that a victim of family violence simply does not want to engage the perpetrator in any litigation about that violence. Each State and Territory has a scheme which allows for an amount of compensation to be paid to victims of crime. That amount is capped and is

dependent upon the severity of the crime. There is the ability for proceedings to be taken by the state against the perpetrator to recover compensation paid to a victim under the schemes.

Appendix 4 details the relevant legislation and caps in each State and Territory.

Future reform?

The ALRC's recommendation for a statutory tort of family violence ?

In March 2019 the Australian Law Reform Commission published its final report "Family Law for the Future. An Inquiry into the Family Law System". It was billed to be the greatest inquiry into the operation of the family law system in Australia in over 40 years.

In its initial discussion paper the ALRC had proposed a codification of *Kennon* in the Act. However in the final report the ALRC proposed something which was diametrically different which it acknowledged would have the effect of a statutory reversal of *Kennon.*

Recommendation 19 was

> "The Family Law Act 1975 (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies".

If a party was able to establish the elements of this new statutory tort of family violence the party would have the ability to claim compensation for both physical and psychiatric injury and any consequent economic loss.

The ALRC expressed the opinion that addressing family violence through the lens of contributions inevitably produced "a calculation of damages" based upon a percentage of the parties combined wealth which led to vastly different outcomes depending on the size of the property pool. The ALRC argued that a new federal tort of family violence would allow the Court to consider the economic consequences of family violence by reference to the particular circumstance of the victim of the violence and not by reference to the property held by the parties.

The proposed remedy allowed the tort to be established with reference to a pattern of violent behaviour of combined physical and emotional abuse over the whole of the period of a relationship, but also in respect of a single incident.

A person who committed an act of family violence upon another would, the ALRC suggested, be liable to that person for damages, including, but not limited to, general damages, special damages, aggravated damages, and punitive damages. The ALRC did not recommend that there be any cap placed on damages commenting that courts will likely look at damages awarded in comparable cases for other torts and that damages must be commensurate to the harm and should avoid trivialising the individual's injury.

It was proposed any award of damages would be omitted from the calculation of the family's net worth in orders relating to the division of property of the marriage or of the de facto relationship.

The proposal overcame the current difficulties with statutes of limitation by proposing that the time for commencement of an action be the later of:

a. three years from the date of the last act of family violence by the defendant against the plaintiff;

b. three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of family violence by the defendant against the plaintiff.

Policy arguments for and against the ALRCs recommendation

For

- There is only the one proceeding in one court instead of two proceedings in different courts which is likely to be less expensive and quicker overall. It is possible to have one hearing but isolate the two claims, hear the assault and damages evidence first and then the s.79 evidence, and have one composite adjudication.

- The Court is able to deal with the matter without needing to adjudicate on questions of issue estoppel.

- Any issue in relation to the quarantining of the outcome of the tort claim is resolved.

Against

Some of the arguments against were discussed by the majority in *Kennon* in the context of hearing a tort claim under the old cross vesting legislation

- It involves the simultaneous or virtually simultaneous hearing of two claims with different dynamics and which serve different purposes.

- The s.79 claim should remain the major focus in the FCFCOA because it is the area in which that Court has direct jurisdiction and particular expertise.

- The parties themselves may not be able to draw the distinction between the two legal claims and the s.79 claim could be submerged by what appears to the parties to be fault based issues which may overrun the quite distinct issues relevant under s.79.

- If the respondent to the tort claim is the applicant in the property claim, that person may suffer procedural unfairness if he or she is required to proceed first and is

cross-examined about the assault claims before a prima facie case on that issue has been established. The procedures could be adjusted to meet this problem.

- It will normally lead to extended trials of a particularly bitter kind, and will take a heavy toll on the parties in both financial and emotional terms.

- There is not any legitimate basis for concluding that the FCFCOA is uniquely suited to the adjudication of domestic violence damages claims. Its daily work brings it into contact in a variety of ways with domestic violence but the same may be said of the Magistrates' Courts and District Courts of the States which have the additional advantage of being more familiar with claims for damages. The State courts are the "natural" tribunals for the adjudication of common law claims

- The possibility of a party commencing a claim in tort in a State court after receiving property settlement order is not avoided as the ALRC envisaged that in addition to the statutory tort, people experiencing family violence would continue to be able to bring a common law tort action in a State court in the alternative. That problem could be eliminated by excluding that alternative.

- The ALRC did not discuss the constitutional basis for its proposed reform. The marriage power may be relied upon for married couples. However the de facto property powers in the Act rely upon State statutes referring power. Those statutes do not refer power to deal with State based torts and it's unlikely that ALRC's recommendation 19 could be implemented for de facto couples without a further referral of power

The ALRC was mindful that its recommendation might have adverse consequences for dispute resolution and litigation, both in terms of increased conflict in negotiations and in increased complexity of proceedings. Nonetheless the ALRC argued that those risks need to be weighed against the benefit of giving a victim of family violence the ability to bargain in the shadow of a clear legal framework in relation to the relevance of family violence in financial proceedings. Overtime this may have the effect of encouraging settlement and better outcomes for people affected by family violence; a conclusion which the ALRC said was strengthened by the evidence that people experiencing family violence currently face a number of barriers to achieving an appropriate outcome in financial proceedings.

The Morrison Government's response

In March 2021 the Morrison government noted the ALRC's recommendation 19 and responded in the following way:

> The Government will further consider how the impacts of family violence would be addressed by a statutory tort of family violence. This will include whether the establishment of a statutory tort, being a civil remedy required to be sought and proved by a party, is the most appropriate reform option.
>
> The Government believes that a tort of family violence may increase conflict and acrimony between parties, with a subsequent impact on children, and have limited applicability due to

> the need to prove loss or damage. Additionally, the tort may be costly and result in lengthy hearings, potentially causing delays in the resolution of family law property matters. Consultation with key stakeholders has indicated a lack of support for this recommendation.

It is fair to say that the Morrison government poured cold water upon recommendation 19

The Family Law Amendment Bill [No. 2] 2003 – Exposure Draft

The current draft

In September 2023 the Albanese government introduced the *Family Law Amendment Bill [No 2] 2003 - Exposure Draft,* containing changes to Part VIII of the Act, which included dealing with the future of *Kennon.* Consistent with the Morrison government's position the current government has rejected the ALRC's recommendation for the abolition of the approach in *Kennon* and for the introduction of a statutory tort of family violence instead.

Relevantly, as part of the amendments to the property regime, this draft bill proposes that section 79(4) and 90SM(4) be amended to add, to the current contribution considerations in (a), (b) and (c), new contribution considerations which include:

> 79(4)(ca) the effect of any family violence, to which one party to the marriage has subjected the other party, on paragraphs (a), (b) and (c); and
>
> 79(4)(cb) the effect of any economic or financial abuse to which a party to the marriage has been subjected by the other party
>
> [whilst the drafting of 79(4)(cb) could be better, the new proposed 79(2)(b) makes it tolerably clear that this consideration is also about effect on contributions in paragraphs (a), (b) and (c)];

There is no change to the well known words of s 79(4)(a), (b) and (c) which relate to financial contributions made directly or indirectly to the acquisition, conservation and improvement of property; contributions (other than financial contributions) made directly or indirectly to the acquisition conservation or improvement of property and contributions made by a party to the welfare of the family including any contribution made in the capacity of homemaker or parent].

The focus of these new subsections is on the *effect* family violence and economic or financial abuse has on contributions.

Given the proposed s 79(4)(ca) the proposed s 79(4)(cb) has limited scope. There is no separate definition of "economic or financial abuse". The definition of "family violence" in s 4AB already includes examples of behaviour (other than threatening or violent behaviour) that coerces or controls a spouse including at s 4AB(3)(g) unreasonably denying financial autonomy and at s4AB(3)(h) withholding necessary financial support to make reasonable living expenses in circumstances where that family member is entirely or predominantly dependent on the person. This other behaviour which coerces or controls without violence or threat constitutes a non-physical means of domination of another (*Olivia and Olivia* [2020] FamCA 639 (Gill J) at [48]. It is a form of family violence and consequently captured by the proposed s 79(4)(ca).

The Attorney-General's Department's September 2023 consultation paper acknowledges the overlap of the proposed s 79(4)(cb) with s79(4)(ca) but says that "Using the term 'economic and financial abuse' is intended to capture a broad range of conduct. This would include controlling or denying access to money, finances or information about money and finances, and also undermining a party's earning potential, for example by limiting access to employment, education or training". It seems s 79(4)(cb) is intended to make clear that economical and financial abuse extends to situations where the victim is not entirely or predominantly dependent upon the other person. For example, the perpetrator may require the victim to use the whole of their income to support the family whilst they maintain total control over their own earnings or where the perpetrator totally controls family finances expending them for their own purposes. However, the first example would ordinarily be dealt with under s 79(4)(a) and the second has traditionally been dealt with as an "add back" at "Stage 1" and would be covered by the new proposed s 79(4)(cc) which proposes to deal with the issue of "waste" as a negative contribution.

The new proposed s 79(5) and 90SM(5) set out considerations relating to current and future circumstances and lists as the first of those considerations:

> 79(5) (a) the effect of any family violence, to which one party to the marriage has subjected the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;

Again the focus he is upon the *effect* on prospective considerations. It has been the case since the Act began that violence which has an affect on earning capacity can be taking into account (see *Barkley v Barkley* (1977) FLC 90-216).

Comparison with existing case law

Serendipitously, as at June 2024, the current state of the development of the case law in *Kennon* aligns with the amendments in the new proposed s 79(4)(ca) and (cb) and s 90SM(4)(ca) and (cb).

What the proposed sections do is:

- Put the emphasis on the **effect** on contributions.
- Eliminate the word "significantly"
- Eliminate any "floodgates" argument and the notion that it needs to be an exceptional case.
- Eliminate any need for there to be a "course of conduct". A single incident of violence might be sufficient depending on the effect it has.
- Adopt a holistic approach to the assessment of contributions

What the new sections do not do is:

- Amend section119 of the Act. Whilst the government has rejected the ALRC's recommendation to enact a federal statutory tort of family violence, it has left unaltered the provision that has been in the Act since its commencement allowing either party to a marriage to bring proceedings in tort against the other party (using state-based laws).
- Have any effect on the consideration of other conduct which may have an effect on contributions.

Caveat

Legislative reform about the relevance of family violence in property settlement has been fraught over a long time. Some submissions have been made to the Attorney General's Department opposing the amendments in their current form. We will have to wait to see whether the proposed amendments are enacted.

Proposed s102NK

The Exposure Draft of the Amendment Bill also proposes to introduce a new Division 4 of Part XI, including a section 102NK, which will replicate section 69ZT for all non-child related proceedings. This would mean that ordinarily the more common rules of evidence will not apply to property proceedings. The Queensland Law Society (along with the LIV) does not oppose this proposal. The Law Council and all other constituent bodies oppose this change. Excluding core rules of evidence is somewhat problematic when dealing with *Kennon* arguments involving serious allegations of family violence. If this part of the amendments come into effect then it will be important to consider, under the new section 102NK(3), whether to make an application for the rules of evidence to apply. In any event it, will almost always be the case that attempting to comply with core evidentiary rules will produce the most cogent case.

Appendix 1

Statute of Limitations for Torts involving personal injury

NSW	*Limitations Act 1969* (NSW)	Where the cause of action accrued before 1 September 1990	6 years (s 14(1)(b))
		Where the cause of action accrued on or after 1 September 1990 but before 6 December 2002, but not including Category 3 cases	3 years (s 18A) (see definition of "breach of duty" in section 11 which includes trespass to the person)
		Where the injury or death occurred on or after 6 December 2002, but not including cases covered by the *Motor Accidents Compensation Act* 1999.	3 years **from date of discoverability** or 12 years from act or omission, whichever expires first (s 50C)
Victoria	*Limitation of Actions Act 1958* (Vic)	Prior to 5 November 2002	6 years (s 5(1)(a))
		Between 5 November 2002 and 20 May 2003	3 years from the date on which the cause of action accrued (s 5(1AA) but note this is subject to s 5(1A)).
		Tortious acts or omissions occurring on or after 21 May 2003, or/and to actions for alleged tortious acts or omissions which occurred before that date but for which proceedings were commenced on or after 1 October 2003	3 years from when the plaintiff discovers they have a cause of action; or 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned; whichever comes first. (The majority in High Court in *Stingel v Clark* (2006) 226 CLR 442 held that "breach of duty" was capable of covering intentional torts including trespass to the person). For persons under a disability, the time limit from the date of discoverability is 6 years (s 27D)

Qld	*Limitations of Actions Act 1974* (Qld)	3 years (section 11) **But note** that under section 9 of the *Personal Injuries Proceedings Act 2002* (Qld) a person considering personal injury action must first give written notice of the claim, in the approved form, to the proposed defendant within the earlier of: (a) the day 9 months after the day the incident giving rise to the personal injury happened or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury; or (b) the day 1 month after the day the claimant first instructs a law practice to act on the person's behalf in seeking damages for the personal injury and the person against whom the proceeding is proposed to be started is identified	
South Australia	*Limitation of Actions Act 1936* (SA)	**3 years** (section 36(1)), but if the personal injury remains latent for some time, the 3 years begins to run "when the injury first comes to the person's knowledge".	
Western Australia	*Limitation Act 1935* (WA)	For actions prior to 15 November 2005	4 years for trespass to the person, menace, assault, battery, wounding or imprisonment (s 38(1)(b))
	Limitation Act 2005 (WA)	For actions on or after 15 November 2005	3 years - Section 14(1) Action accrues on date Plaintiff becomes aware that he or she has sustained a significant personal injury, or of first symptom, clinical sign or other manifestation of such injury if earlier: s 55 Section 36 provides that where the defendant is in a close relationship with a person with a mental disability the limitation period is three years after the relationship ceased.
Tasmania	*Limitation Act 1974* (Tas)	If the personal injury incurred before 1 January 2005	3 years (s 5(1) – now repealed) but the limitation period can be extended up to a period of 6 years from the date on which the cause of action accrued

			(Note the majority in High Court in *Stingel v Clark* (2006) 226 CLR 442 held that "breach of duty" was capable of covering intentional torts including trespass to the person – this has been followed in Tasmania, see for example *W v Eaton* [2011] TASSC 4).
		For personal injuries incurred after 1 January 2005 but before 30 June 2018	The earlier of 3 years from the date of discoverability (s 5A(3) – now repealed) and 12 years commencing on the date of the act or omission which it is alleged resulted in the personal injury or death that is the subject of the action.
		For personal injuries incurred after 1 July 2018	3 years from the date of discoverability (s 5A(3))but it may be extended to 6 years
ACT	*Limitation Act 1985* (ACT)	Prior to 9 September 2003	6 years (s 11)
		On or after 9 September 2003	3 years from date of injury, or if the injury includes a disease or disorder, 3 years after the person first knows they have an injury that is or includes a disease or disorder and the injury is related to someone else's act or omission : s 16B(2)
Northern Territory	*Limitation Act 1981* (NT)	3 years: s 12(1)(b) (general tort limitation period). Note that under the *Personal injuries (Civil Claims) Act 2003* (NT), a claimant must give written notice of his or her claim to the respondent within 12 months after the date when the incident in relation to the personal injury occurred or within 12 months after the day on which the symptoms first appear An action to claim damages for a personal injury to which section 12(1b) of the *Limitation Act 1981* applies is maintainable after the expiry of the limitation period, despite no proceeding having been commenced, if a notice of claim has been given within the period or as extended in accordance with the Rules	

Appendix 2
Sample Statement of Claim

BACKGROUND

1. Lyn and Roger have been married for 16 years.

2. There are two children of the marriage.

3. The parties separated on 16 August 2021.

4. There have been a number of instances of family violence during the marriage:

> Lyn was shocked on her honeymoon when, during an argument, Roger slapped her across the face. He showed remorse and apologised profusely afterwards. Lyn's bruising and discomfort had subsided by the time they had returned home. From that time onwards, Lyn was fearful of further violence. During the marriage there were repeated occasions where Roger threatened Lyn with physical injury (including death). Lyn was intimidated by this. Her self-esteem suffered badly and she submitted to Roger's wishes (including his demands for intercourse without her consent) out of fear and a wish to minimise damage to the children. Roger had also refused Lyn access to family and friends and on a number of occasions, had taken Lyn's telephone from her. In the latter years, Roger had given Lyn minimal household allowance. Lyn was the subject of coercive and controlling violence by Roger throughout the marriage.

DIRECT INTENTIONAL CONTACT

5. Roger by direct intentional acts, brought about harmful and offensive contact with Lyn and intentionally created in her an apprehension of imminent harmful or offensive contact.

Particulars of contact

A. On 16 August 2018 Roger pushed Lyn against a wall and then pulled her to the ground by the hair. While she was on the floor, he kicked her, breaking one of her ribs. She was taken to Westmead Hospital casualty and x-rayed but not admitted. The course of systemic family violence during the marriage had a debilitating effect on Lyn and the date of the cause of action, from the incident on 16 August 2018, is to be construed to be 16 August 2021, when the wife was physically away from the impairment of the husband's coercive and controlling family violence.

B. On 16 August 2020 Roger beat Lyn about the head with his fists and fractured her jaw and damaged a number of her teeth. She underwent extensive orthodontal work and now wears a plate in her mouth.

C. On 16 August 2021 Roger repeatedly kicked Lyn after she had fallen to the ground during a physical attack by him. Lyn sustained significant long-term injuries to her back and was admitted to hospital for a period of six weeks and off work for three months.

INJURY

6. Roger's assaults and batteries have caused Lyn personal injury.

Particulars of injury

A. On 16 August 2018 Lyn sustained:

i. A fractured rib

ii. Bruising, discomfort and distress

B. On 16 August 2020 Lyn sustained:

i. Fracturing of her jaw and damage to a number of her teeth

ii. Bruising, discomfort and distress

C. On 16 August 2021 Lyn sustained:

i. Severe spinal injury

ii. Bruising, discomfort and distress

DISABILITIES

7 As a consequence of the assaults and batteries, Lyn suffers and continues to suffer, disabilities..

Particulars of disabilities

a) Recrudescence of symptoms of post-traumatic stress disorder

b) Hyperarousal, hypervigilance and exaggerated startle reflex

c) Nightmares and flashbacks

d) Phobic anxiety and avoidant behaviour

e) Panic attacks

f) Insomnia

g) Diminished motivation

h) Anxiety

i) Need for antidepressants

j) Continuing discomfort from the area of her lower right rib

k) Back pain, restriction of movement and reduction in physical strength

l) Limitation on ability to perform activities of daily living.

DAMAGES

8 The wife claims damages as follows:

Special damages		
i.	**Insert detail of hospital, doctor, orthodontist, pharmacist, physiotherapist and psychiatrist expenses relating to Claims A, B and C**	$10,000
ii.	Loss of three months wages	$13,000
General damages		
iii.	Future treatment	$50,000

iv.	Loss of future earning capacity; loss of future wages; loss of amenities and enjoyment of life; claim for assistance with housework; pain and suffering.	$200,000
Aggravated damages		
v.	The assaults were intentional and unprovoked. Roger has expressed no regret or contrition in relation to his actions. Lyn is entitled to compensation in addition to general damages.	$50,000
Exemplary damages		
vi.	The assaults and batteries were intentional and without any mitigating circumstance. Roger inflicted deliberate pain, humiliation and degradation on Lyn. Roger should be deterred from similar behaviours in the future.	$75,000
Interest		
vii.	Interest on general damages	$10,000
viii.	Interest on aggravated damages	$2,500
Total		**$410,500**

Costs

Lyn claims costs

Appendix 3

Relevant legislation and maximum compensation in a criminal case

	Legislation	Max compensation that can be ordered
NSW	*Victims Rights and Support Act 2013* (NSW) – Part 6	$50,000 by way of compensation for any injury sustained through, or by reason of, the offence For compensation for loss, the Court is limited to an amount in excess of the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for the recovery of a debt
Victoria	*Sentencing Act 1991* (Vic) s 85B	No maximum – Court is to award such amount as it thinks fit Compensation order may be made up of amounts for: - Pain and suffering - Medical expenses - Expenses for counselling services - Other expenses not including any expense arising from loss of or damage to property
Qld	*Penalties and Sentences Act 1992* (Qld) – section 35	No maximum Can be for compensation for: - Any loss or destruction of property - Personal injury
South Australia	*Sentencing Act 2017* (SA) s 124	No maximum - Compensation will be of such amount as the court considers appropriate having regard to any evidence before the court Can be for compensation for injury, loss or damage. Can't award compensation arising out of use of a motor vehicle (except damage to property)
Western Australia	*Sentencing Act 1995* (WA) s 117	No maximum Can be made for loss or damage to victim's property, and any expense reasonably incurred by the victim The Court cannot make an order for compensation for injury or loss
Tasmania	*Sentencing Act 1997* (Tas) s 68	No maximum – the Court can order compensation for injury, loss, destruction or damage
ACT	*Crimes (Sentencing) Act 2005* (ACT):	No maximum The Court has power to make a reparation order for loss or expense. But loss is defined as "loss means a loss in property, whether temporary or permanent, and includes not getting what one might get

	Legislation	Max compensation that can be ordered
Northern Territory	*Sentencing Act 1995* (NT) s 88.	No maximum – the Court can order compensation for: - injury suffered by a person in the course of, or in connection with the commission of the offence, - loss or destruction or damage to property
Common wealth	*Crimes Act 1914* (Cth) s 21B	No maximum The Court can order reparation in respect of any loss suffered or any expense incurred.

Appendix 4
Victim Compensation Schemes

	Legislation	Ineligibility traps	Max claimable as recognition payment	Max claimable for financial support	Limitation period for applying
NSW	*Victims Rights and Support Act 2013*	A person is not eligible for support if they have been paid, or are entitled to be paid, compensation awarded by a court under Part 6 of the Act (s 25(1)).	$5,000 for primary victims of a sexual assault (one incident), attempted sexual assault with serious bodily injury, assault with grievous bodily harm, or physical assault of a child that involves a series of incidents. $1,500 for primary victims of an attempted sexual assault without serious bodily injury, sexual touching, a robbery involving violence, or an assault without grievous bodily harm.	Financial assistance for immediate needs up to $5,000 to help pay for things needed urgently to be safe and healthy because of the violent crime. The Immediate Needs Support Package is for victims of domestic violence only up to $5,000. Financial assistance for economic loss up to $30,000 to help pay for loss of earnings and other costs (e.g. medical bills, out of pocket expenses) that assist with the victim's recovery.	Within 2 years from the violent crime. For victims of domestic violence, sexual assault, within 10 years.
Victoria	*Victims of Crime Assistance Act 1996 (Vic)*	Amounts reduced if damages are recovered at common law, or for compensation, assistance or payments, of any other kind (s 16)	N/A	Primary victims - up to $60,000 in financial assistance (s 8) plus any special financial assistance. The Tribunal may make an award of special financial assistance of up to $10,000 to a primary victim who has suffered a significant adverse effect as a result of a crime being committed against them (s 8A).	Within two years after the violent crime (s 29).

	Legislation	Ineligibility traps	Max claimable as recognition payment	Max claimable for financial support	Limitation period for applying
Qld	*Victims of Crime Assistance Act 2009* (Qld)	General requirement that victims must report acts of violence to police (or in certain circumstances to counsellor, psychologist, doctor or domestic violence service) and the assessor cannot grant assistance if reasonably satisfied there was no reasonable excuse for not reporting (s 81)	A 'special assistance' payment for a primary victim can be up to $10,000 (see ss 38, 39, and Sch 2) – but note this sub-limit falls within the overall $75,000 limit	Primary victims - up to $75,000, and up to $500 in legal costs incurred in applying for assistance under the Act (s 38). (Note there is a sub-limit of $20,000 for loss of earnings suffered or reasonably likely to be suffered (s 39(e))	Within 3 years after the act of violence happens (s 54).
South Australia	*Victims of Crime Act 2001* (SA)	The victim cannot be compensated for losses that have already been compensated, or could be compensated, from another source – e.g. Medicare, private health insurance (s 17)	N/A	The amount awarded is capped at $100,000 (indexed) (s 20(b)(iii)) Sublimit of $20,000 for compensation for grief (s 20(1)(c))	Within 3 years after the commission of the offence (s 18(2))
Western Australia	*Criminal Injuries Compensation*	An assessor must not make a compensation award in favour of a victim if the assessor	N/A	Up to $75,000 (s 31)	Within 3 years from:

	Legislation	Ineligibility traps	Max claimable as recognition payment	Max claimable for financial support	Limitation period for applying
	Act 2003 (WA)	is of the opinion that the victim or close relative did not do any act or thing which he or she ought reasonably to have done to assist in the identification, apprehension or prosecution of the person who committed the offence (s 38) [NB – no express / apparent exception for domestic violence / family violence]			• the date of the offence, or • the date of the last offence, if there have been a number of offences against the victim over time by the same offender.
Tasmania	*Victims of Crime Assistance Act 1976* (Tas)	Compensation not awardable for loss of, or damage to, property (s 6)	N/A	The maximum amount that can be awarded to a primary victim for a single offence is $30,000 and $50,000 for more than one offence.	An application for an award is to be made within 3 years after the date of the relevant offence (s 7) The Commissioner may extend the 3-year period referred to in subsection (1A) or (1B) if satisfied that

	Legislation	Ineligibility traps	Max claimable as recognition payment	Max claimable for financial support	Limitation period for applying
					there are special circumstances which justify the extension (s 7)
ACT	*Victims of Crime (Financial Assistance) Act 2016 (ACT)*	Act of violence must have occurred in the ACT after 1 July 1983. It is a 'disqualifying event' if the victim unreasonably failed to give assistance to the police in relation to the act of violence that is the subject of the application (s 45(1)(e)) [NB – no express / apparent exception for domestic violence / family violence]	$30,456 (see ss 28, 29, 30 and *Victims of Crime (Financial Assistance) Regulation 2016* cl 8,9,10)	The maximum amount of financial assistance that may be paid to a primary victim is $58 013 (indexed) (s 24 and *Victims of Crime (Financial Assistance) Regulation 2016* cl 5)	Within 3 years of the last occurring of the following: - the day of the act of violence that is the subject of the application; - if there are 2 or more relevant acts of violence—the day of the most recent act of violence (s 32(1)) But can be extended (s 32(2))
Northern Territory	*Victims of Crime Assistance Act 2006* (NT)	The violent act is not reported to a police officer within a reasonable time after its occurrence, unless the assessor is satisfied	N/A	Primary victims - up to $40,000 for a violent act (s 38). Sub-limit for financial loss is $10,000. Note - an assessor can only award financial assistance for a compensable	Must be made within 2 years after the occurrence of the injury described in the application (s 31)

	Legislation	Ineligibility traps	Max claimable as recognition payment	Max claimable for financial support	Limitation period for applying
		circumstances prevented the report being made (s 43) The applicant failed, without reasonable excuse, to assist police officers in a material way in the investigation or prosecution of the violent act, including by failing to make a formal complaint or statement (s 43) [NB – no express / apparent exception for domestic violence / family violence]		injury if the total of the injuries is at least $7,500.	Director may accept late applications, and must have regard to whether the offender was in a position of power / influence / trust, and whether the injury occurred as a result of sexual assault or domestic violence (s 31)