



Articles

The *Kennon* ‘factor’: Issues of indeterminacy and floodgates

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*The Family Law Act 1975 (Cth) provides no guidance on the way the courts should treat family violence when determining property disputes. Did the introduction of the **Kennon** ‘factor’ fill this void? This article reports on the application and interpretation of **Kennon** along with the outcomes in 57 first instance judgments of the Federal Magistrates Court, the Family Court of Australia and the Family Court of Western Australia between 2006 and 2012. We found that only 42% of applications for a **Kennon** adjustment were successful with a mean adjustment of 7.3% in those cases where the court identified the relevant percentage adjustment. There was an apparent jurisdictional variation in success rate with judicial officers in the ACT making relatively fewer **Kennon** adjustments. In examining the judicial application of **Kennon** we highlight the diversity in interpretation of specific phrases which form the cornerstone of the **Kennon** principle. We also identify examples of lawyers not raising the **Kennon** principle when it may have been appropriate, not identifying the impact of violence on contributions, and not seeking a percentage adjustment as high as the judicial officer might have considered. Our conclusion is that the **Kennon** factor is being under-utilised and inconsistently applied, and that there is considerable confusion as to its proper application. We argue the preferred solution is legislative reform which addresses directly, and in detail, the issue of the relevance of family violence to the alteration of property interests. In the meantime we suggest that, at the very least, further education concerning both the impacts of family violence and the application of the **Kennon** principle is required within the relevant professional communities.*

Introduction

This article considers the application of the 1997 decision in *Kennon v Kennon*,¹ which addressed how violence perpetrated by a spouse or de facto partner is relevant to the assessment of the victim spouse/partner’s contributions in Family Law Act 1975 (Cth) (FLA) property settlement proceedings. The Full Court held in *Kennon* that violence can be relevant to this assessment where a person is subjected to a course of violent conduct by their partner, which impacts upon that person’s ability to contribute to the relationship or which makes their contributions significantly more arduous than they ought to have been. Not surprisingly, the application of the *Kennon*

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¹ (1997) 22 Fam LR 1; (1997) 139 FLR 118; (1997) FLC 92-757 (*Kennon*).

principle has not been without its difficulties and over the intervening 17 years there has been ongoing discussion about its application and indeed whether this is the best solution to the problem of how to account for what is known as ‘family violence’ in property proceedings.

It is a particularly important time to be considering this question. The research underpinning the 2012 reforms to the FLA, which were introduced² to improve the way family courts deal with allegations of violence in parenting matters,³ highlighted a lack of appreciation in many professional circles of the nuances of family violence and its impact on families. If these issues arise in parenting matters — where dealing with family violence is now considered to be ‘core business’ of the court⁴ — it seems likely that there would be problems of a similar nature arising in property disputes; indeed the impact of violence on contributions may be far more difficult to appreciate. For these reasons, and because to date there has been no legislative intervention, the judicial approach taken to such matters in property proceedings is of significant interest. The only published study to date considering outcomes of cases applying the *Kennon* principle was in 2001 and that identified only 27 cases.⁵ We are not aware of any research that quantifies how common violence allegations are generally in property proceedings, however, the number of *Kennon* claims seems small (including in this study) given that we know violence is commonly reported in the general separated population, including by those who have property settlement court cases.⁶ Certainly, the judicial approach to the application of *Kennon* is likely to impact on whether *Kennon* claims are raised, even where the presence of violence is uncontested. Moreover, the gendered dimension of the impact of family violence cannot be overlooked and it will most often be women (and children in their care) who are adversely affected where the impacts of family violence are not recognised.⁷

This study seeks to provide further and more recent information on how *Kennon* is operating in practice, by analysing cases from 2006–12 (inclusive)

2 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

3 For a summary of the themes arising from that research, see K Wilcox, ‘Intersection of Family Law and Family and Domestic Violence’ (2012) *Thematic Review 2 — Re-issue*, Australian Domestic & Family Violence Clearinghouse, at <http://www.adfvc.unsw.edu.au/PDF%20files/Thematic%20Review_2_Reissue.pdf> (accessed 19 August 2013).

4 See the findings of the Australian Institute of Family Studies in its review of the 2006 shared parenting reforms, at <<http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf>>. For a summary of that report, see R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the Family Law Evaluation Team, ‘The AIFS evaluation of the 2006 family law reforms: A summary’, (2011) 86 *Family Matters* 8.

5 S Middleton, ‘Domestic Violence, Contributions, and s 75(2) Considerations: An Analysis of Unreported Property Judgments’ (2001) 15 *AJFL* 230.

6 See the findings in J De Maio, R Kaspiew, D Smart, J Dunstan and S Moore, Australian Institute of Family Studies, *Survey of Recently Separated Parents A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011*, 2013 at <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/SRSP_Report.pdf> (accessed 15 April 2014). In particular note Table 4.18 which shows a third of parents with a property case reporting physical hurt or unwanted sexual activity before or during separation.

7 There was only one case in those identified in this study where a male partner made a *Kennon* claim: *Stellard & Dresdon-Stellard* [2011] FamCA 718; BC201150691.

where it was identified that a *Kennon* adjustment was sought. Before turning in detail to the study, it is instructive to address briefly the reasons why family violence has the potential to impact on contributions to family life.

Those who believe domestic violence should be considered in property settlements have argued that the impacts of violence 'often make a victim's role, whether as child-carer, homemaker or in maintaining a position in the paid workplace, more onerous'.⁸ These impacts have been described in the socio-medical literature:

Even apart from physical injuries sustained as a result of the abuse, battered women are more likely to suffer from conditions such as depression, anxiety, eating disorders, psychosomatic symptoms and post-traumatic stress disorder.⁹

Many victims of family violence suffer trauma.¹⁰ Long-term stress resulting from the trauma 'can lead to a range of related effects including flashbacks, difficulty sleeping and/or nightmares, avoidance, detachment and irritability, all of which can cause significant, and ongoing distress in all areas of functioning'.¹¹ Thus, family violence can severely hamper a victim's ability to make what might be considered normal contributions to a marriage. 'The unpredictable nature of the abusive outbursts' is particularly distressing in itself.¹² Emotional abuse exacerbates feelings of low self-esteem and self-blame.¹³ This may result in withdrawing from family members, having the desire to be alone or even struggling to communicate with others, amongst other things.¹⁴

Indeed, victims of a violent relationship may also have problems in seeking employment which impact upon their ability to make financial contributions to the marriage:

A number of studies have documented not only the negative influence of abusers on their partner's employment attempts, but also the indirect barrier to job searching that exists due to subsequent health problems and psychiatric disorders caused by domestic violence.¹⁵

Further barriers to paid work include that, due to the controlling

8 New South Wales Law Reform Commission, *Relationships*, Report No 113, New South Wales Law Reform Commission, 2006, p 221.

9 I Evans, *Battle-scars: Long Term Effects of Prior Domestic Violence*, Monash University: Centre for Women's Studies and Gender Research, 2007, p 18. See also D Dobie, D Kivlahan, C Maynard and K Bush, 'Post Traumatic Stress Disorder in Female Veterans' (2004) 164(4) *Archives of Internal Medicine* 94 and N Fagan and K Freme, 'Confronting Posttraumatic Stress Disorder' (2004) 34(2) *Nursing* 52.

10 While family violence can take many forms, given the nature of the *Kennon* factor discussed further below, severe and persistent violence (that might be characterised as 'coercive controlling' violence) is generally being considered. For a discussion of different typologies of intimate partner violence, see J Wangmann, 'Different types of intimate partner violence? A comment on the Australian Institute of Family Studies report examining allegations of family violence in child proceedings under the Family Law Act' (2008) 22 *AJFL* 123.

11 Evans, above n 9, p 14.

12 D Bagshaw and D Chung, *Women, Men and Domestic Violence*, April 2000, Partnerships Against Domestic Violence, at <http://spd.adventistconnect.org/site_data/90/assets/0001/3499/SA_university.pdf> (accessed 19 August 2013) p 9.

13 *Ibid.*

14 Evans, above n 9, p 18.

15 *Ibid.*, p 25.

relationship, victims may have few or out-dated qualifications coupled with limited work experience.¹⁶ Their ability to communicate effectively in an interview for a job may also be hindered by their low self-esteem.¹⁷

Research has identified additionally that women who have experienced violence tend to receive a lower percentage of the property pool whether with a court determination or private ordering:¹⁸ ‘women who reported experiencing severe abuse were around three times as likely as women who reported no physical abuse to indicate receipt of less than a 40% share of the property.’¹⁹ A range of factors may explain this, including the impacts of continuing dominance, control and fear of the negotiation process. Women may want to settle quickly in order to secure safety for themselves and their children. Pursuing legal avenues may involve prolonged contact with their former violent spouse and compromise their attempts to rebuild strength, economically and psychologically.²⁰

Thus, it is evident that there are sound arguments in favour of recognising the impact of family violence in considering spousal contributions under s 79. However, the court has not always recognised this to be the case, and as this article discusses, the ‘solution’ presently provided by *Kennon* is not without its shortcomings. This article therefore sets out briefly the background to *Kennon*, the decision itself and the research to date on how it has been applied. The methodology for the present study is then outlined and the findings discussed. Finally, and given the shortcomings in using the *Kennon* approach identified by this study, proposals for reform are considered.

The development of the judicial solution

In the 1970s and 1980s, after the introduction of the FLA, allegations of violence raised in property disputes were largely dismissed by the court.²¹ This was consistent with the new ‘no-fault’ philosophy, which also led judges determining parenting disputes to ignore, as irrelevant, the exposure of children to violence perpetrated against their mothers.²² By the mid-1990s the effects of violence were starting to be better appreciated by judges, both in relation to parenting matters and property disputes. However, whereas violence was introduced as a relevant factor into Pt VII of the FLA (dealing with children) in 1991,²³ there was no such amendment to Pt VIII (dealing with financial matters). Notwithstanding the absence of legislative direction,

16 Ibid.

17 Ibid.

18 G Sheehan and J Hughes, ‘Division of Matrimonial Property in Australia’, Research Paper 25, Australian Institute of Family Studies, 2001; G Sheehan and B Smyth, ‘Spousal Violence and Post-Separation Financial Outcomes’ (2000) 14 *AJFL* 102 at 111.

19 Sheehan and Smyth, *ibid.*, at 109.

20 Evans, *above n 9*, p 7.

21 N Alves-Perini, M Harrison, H Rhoades and S Swain, ‘Finding Fault in Marital Property Law: A Little Bit of History Repeating?’ (2006) 34 *Fed L Rev* 377 at 388; See also, H Rhoades, C Frew and S Swain, ‘Recognition of Violence in the Australian Family Law System: A Long Journey’ (2010) 24 *AJFL* 296 at 304.

22 R Alexander, ‘Moving forwards or back to the future? An analysis of case law on family violence under the Family Law Act 1975 (Cth)’ (2010) *UNSWLJ* 907 at 914.

23 Protection of children from abuse and harm was included in the ‘best interests checklist’ and a definition of child abuse was added: Family Law Amendment Act 1991 (Cth).

the court did, however, develop principles about the relevance of family violence to outcomes in property disputes.²⁴ While the first example of the recognition of family violence as a factor relating to the assessment of contributions in property proceedings is seen in *Marriage of Doherty*,²⁵ it is the subsequent 1997 case of *Kennon* which is now routinely cited in this regard.

The wife in *Kennon*, as part of her property application, had made a claim under cross-vesting legislation for \$50,000 in damages for assault and battery. Coleman J ruled in favour of the wife in relation to two specified events of battery awarding the wife \$8000 in damages (including for psychological suffering). In the subsequent appeal both parties challenged this outcome unsuccessfully. However, one of the wife's submissions at first instance was that, if she were unsuccessful in her cross-vested claim, the court could, and should, make an adjustment in her favour under s 75(2)(o) due to the psychological damage sustained by her and caused by the husband's conduct.

While Coleman J was not prepared, on the facts, to make any such adjustment, his Honour concluded that it was open to him to do so, both under that section and under s 79(4) to the extent that the violence impacted upon the wife's contributions as homemaker. In the Full Court, Fogarty and Lindenmayer JJ, after referring to earlier case law, including *Doherty* (where the statements of the Full Court were obiter), and academic commentary in favour of the recognition of the relevance of family violence to s 79 claims, concluded as follows on this point:

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 . . . or to put differently 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 . . .²⁶

Their Honours went on to say this principle was of wider application than domestic violence; however in considering the floodgates argument said the adjustment should be applied only to a 'narrow band of cases', which thus

²⁴ L Young and G Monahan, *Family Law in Australia*, 8th ed, LexisNexis Butterworths, 2013, at [13.38]ff. According to the NSW Law Reform Commission, *Relationships*, Report No 113, 2006, domestic violence impact can be taken into account in two different ways: firstly, during the assessment of the parties' respective contributions to the marriage under s 79(4), the conduct may be taken into account by way of a *Kennon* adjustment if evidence can be presented by the victim that the violence had a significant impact upon their ability to make contributions. Secondly, the violence may be taken into account during the assessment of the s 75(2) factors, which include matters such as health and future earning capacity. In this article we are examining the first and the more common means of considering violence.

²⁵ (1995) 20 Fam LR 137; (1995) 127 FLR 343; (1996) FLC 92-652.

²⁶ *In the Marriage of Kennon* (1997) 22 Fam LR 1; (1997) 139 FLR 118; (1997) FLC 92-757 at [24] (emphasis added). In addition, in considering s 75(2) factors the court can look at any disability resulting from the violence.

requires something ‘exceptional’ about the case.²⁷ In a separate judgment, Baker J endorsed his comments in *Doherty*, reiterating his view that domestic violence can be relevant under s 79 where it has rendered the victim’s contributions ‘more onerous’.²⁸

The wife had not argued an increased contribution under s 79 and so the Full Court did not consider this on the facts. Nor was the s 75(2)(o) argument considered as the Full Court accepted Coleman J’s finding that no causal link could be established between her health and the conduct complained of.²⁹ However, the general statements of principle as set out in the joint judgment have been adopted by subsequent Full Courts,³⁰ confirming their basis as authority for what is now routinely referred to as the *Kennon* ‘principle,’ ‘adjustment’ or ‘factor’ by judicial officers, lawyers and academics. Its introduction marked a significant change in family law property proceedings.

As Middleton has commented, the formulation of this test ‘raises as many issues as it solves’, with there being uncertainty as to the precise ambit of the principle.³¹ Drawing from the majority statement above, the key elements to a *Kennon* claim are:

- A violent course of conduct,
- During the marriage,
- Requiring proof of a significant adverse/discernible impact,
- Upon a party’s contributions to marriage OR having made those contributions significantly more arduous (as Middleton comments³² it is not quite clear whether this was intended to create two alternative limbs or whether the latter is simply an alternative formulation of the former, but like Middleton we consider that the likely interpretation is two alternative limbs).

The Full Court, as mentioned earlier, were clear the above factors would only arise in exceptional circumstances, thus emphasising that only a ‘narrow band of cases’ would meet these requirements.³³ It is also important to note their Honours said the presence of these factors *entitles* a court to take them into account; it appears it does not require the court to do so.

While the ruling was ‘welcomed by many . . . others saw it as a risky decision that harboured the potential to reintroduce the pre-Family Law Act approach to property settlements’.³⁴ Concerns included ‘a reluctance to return to a fault-based approach’ and ‘a fear of “opening the floodgates”’.³⁵ In fact though, the focus by the judges on the impact on the victim’s contributions in *Kennon*, rather than characterising the perpetrator’s conduct as a negative

²⁷ Ibid.

²⁸ Ibid, at [169].

²⁹ Ibid, at [208].

³⁰ See, eg, *Polonius & York* [2010] FamCAFC 228; BC201051123 at [86].

³¹ Middleton, above n 5, at 231.

³² Ibid.

³³ Ibid.

³⁴ Alves-Perini et al, above n 21, at 391; See also, P Nygh, ‘Family Violence and Matrimonial Property Settlement’ (1999) 13 *AJFL* 10.

³⁵ Arguments for and against both positive and negative contributions are critiqued thoroughly by the NSW Law Reform Commission, 2006, Domestic Violence and Property Adjustment, <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r113chp09#H3> (accessed 28 August 2013).

contribution, reflects 'the Family Law Act's departure from fault-based grounds of divorce':³⁶

It is to be hoped that the Family Court will continue to stress the consequences in terms of increased needs or increased contribution rather than the conduct which caused it.³⁷

Moreover, the leading judgment was very clear that it had 'the floodgates' in mind, in making this a principle of narrow application.³⁸ Accordingly, 4 years later in 2001, Middleton reported finding only 27 cases where *Kennon* was applied.³⁹ In 17 of these unreported first instance matters the wife successfully argued for an increased contribution because of violence, however it was difficult to determine the extent to which, if at all, this affected the overall assessment of percentage contribution, with only one case actually identifying the specific percentage increase (5%) on this basis.⁴⁰

In 2005, Middleton concluded that the effect of *Kennon* was limited:

Indeed, over time it has become clear that significant practical and conceptual difficulties lie in proving to the court's satisfaction that domestic violence has had a relevant impact upon a victim's contribution to the welfare of the family. This appears to have contributed to reluctance on the part of lawyers and Family Court judges alike to deal with the violence issue. It is telling that, in the eight years [as at 2005] since *Kennon* was handed down, no subsequent reported cases have taken domestic violence into account as an aspect of the victim's contribution or in relation to the assessment of s 75(2) factors.⁴¹

As noted above, this is the last, and only, published analysis of the operation of *Kennon*.

The current study

Do Middleton's findings still hold? Have there been ongoing problems in the application and interpretation of *Kennon* as identified by Middleton⁴² or has the passage of time clarified the ambit and proper application of the principle?

Fifty-seven relevant first instance judgments were identified in which a *Kennon* claim was raised by one of the parties during the years 2006–12

³⁶ New South Wales Law Reform Commission, *Relationships*, Report No 113, 2006, p 218.

³⁷ Nygh, above n 34, at 13.

³⁸ *In the Marriage of Kennon* (1997) 22 Fam LR 1; (1997) 139 FLR 118; (1997) FLC 92-757 at [24].

³⁹ Middleton, above n 5, at 231. At the time of Middleton's analysis, unreported judgments of the Family Court were not generally available to members of the public. Her sample is the result of an electronic search of an initiative of the Family Court library at that time — a national database of single judge decisions. She notes that the database was still under construction and contained only a 'majority' of all the first instance judgments of the court. Further, it did not include any cases determined by the State Family Court of Western Australia. Her search terms included violence, assault, abuse, rape and *Kennon*.

⁴⁰ Middleton, *ibid*.

⁴¹ S Middleton, 'Matrimonial Property Reform: Legislating for the 'Financial Consequences' of Domestic Violence' (2005) 19 *AJFL* 9 at 9.

⁴² Thus, our sample has no overlap with either of the previous research studies that considered case law post-*Kennon*. See Middleton, above n 5 and Alves-Perini et al, above n 21.

(inclusive)⁴³ using the Australasian Legal Information Institute (AUSTLII)⁴⁴ online database with the search terms ‘property AND violence AND Kennon’.⁴⁵ Another 11 cases were identified in which *Kennon* was mentioned by the judicial officer, but not raised by the lawyers or parties; these are discussed separately. Twenty-five of the 57 hearings took place in the Family Court of Australia, 30 in the Federal Magistrates Court of Australia (Family) (now the Federal Circuit Court of Australia) and two were heard in the Family Court of Western Australia. The following information was recorded for each case: name; hearing date; registry; judicial officer; whether parties were represented or not; nature of allegation (type of violence); period of violence; alleged impact on contributions; evidence required to establish violence and impact; whether or not an adjustment was made on the basis of *Kennon*; if an adjustment was made, what the percentage was; whether any s 75(2) factor adjustment was made on the basis of the impact of domestic violence; and what impact ‘test’ was referred to in the reasoning for an application or rejection of the *Kennon* principle (that is, which of the two limbs was referred to).

NVivo 10,⁴⁶ a computer assisted qualitative data analysis (CAQDA) software program, was used to assist with qualitative data analysis. While this software does not directly analyse data itself, the main purpose for using this software was to hold and organise data for analysis. All judgments in our sample were uploaded and coded according to the factors mentioned above into ‘nodes’. Particular focus was given to judicial comments made about the type of violence required for a *Kennon* claim; the duration of violence required to be considered ‘a course of violent conduct’; the alleged impact of the violence upon contributions to the marriage; the evidence that was required to demonstrate impact upon contributions; what was required to categorise a case as ‘exceptional’; and how a percentage adjustment was reasoned.

A limitation of our methodology is that not all cases appear on AUSTLII. Also, we deliberately did not include matters heard following the 2012 family violence amendments.⁴⁷ However, our dataset provides a useful benchmark study and uses the most comprehensive source of Australian family law judgments available together with a reliable search facility. While it is speculation, one would imagine that the rarity of *Kennon* claims, as discussed below, in fact favours the likelihood that cases considering this principle will be referred for citation in AUSTLII.

43 This reflects the period after Middleton published her papers. A list of the cases is available from the authors.

44 Australasian Legal Information Institute, *AUSTLII* (February 2013) Australasian Legal Information Institute website <<http://www.AUSTLII.edu.au>> (accessed 4 February 2013).

45 Limiting our timeframe ensured that there were no unintentional biases due to effects of legislative change mid-2012 in how the term ‘domestic violence’ (referred to as ‘family violence’) is defined in the Family Law Act 1975 (Cth) (FLA). The search terms were chosen on the basis that we are seeking to analyse those matters in which the judicial officer mentions both *Kennon* and allegations of violence.

46 QSR International, *NVivo 10* (February 2013) QRS International <http://www.qsrinternational.com/products_nvivo.aspx> (accessed 4 February 2013).

47 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

Floodgates appear to have remained closed

For the 6 year period (2006–12) there were only 57 matters identified in which *Kennon* was raised. Why so few, particularly when violence is so commonly raised in family law parenting proceedings and is commonly reported in the separated population?⁴⁸ It is possible that a lack of understanding of *Kennon* on the part of some lawyers and self-represented parties plays a role here. As stated earlier, 11 cases were excluded from the sample since the parties to the proceedings failed to raise a *Kennon* argument in circumstances where the judicial officer later referred to the principle.⁴⁹ In nine of these 11 cases, the judicial officer specifically identified this omission and concluded therefore the violence would not be considered. For example:⁵⁰

At the commencement of the trial I asked the wife's counsel if he sought there to be a *Kennon* type argument where it is alleged that the violent conduct of one party towards another during a marriage was demonstrated to have a significant adverse impact on the parties contribution to their marriage, or, put it the other way, to have made his or her contributions significantly more arduous than they ought to have been. *I was informed by counsel for the wife that no such argument was being put.*⁵¹

It was further submitted that the mental health issues from which the wife is currently suffering can be attributed to the marriage, the psychological abuse to which she was subjected to by the husband during that period, to its breakdown and then the subsequent assault on Mr J by the husband. *However, the wife's counsel fell short of positing an argument of the type set out in Kennon v Kennon . . .*⁵²

48 It is very difficult to get figures on actual numbers of property applications and trials in a year for any court. However, by way of example, in the Family Court of Australia in the 2006/07 year 4034 applications were filed involving financial issues. In that year, 8% of matters resolved had done so via a trial (note that in the 2004/05 period only 4.5% reached trial). In the 2010/11 year there were 2209 applications for final orders involving financial issues with over 10% of matters in that year proceeding to trial. These figures are taken from the Court's Annual Reports published on their website: <www.familycourt.gov.au>. Note too that recent research consistently confirms how common allegations of violence are in family law matters.

49 These were identified in the search as the Judge or Magistrate had made reference to *Kennon*. Of course, there may have been insufficient evidence to establish such a claim in some of the cases. In one case, *IABH & HRBH* [2010] FamCA 110; BC201050072 at [317] per Watts J, it was a second rehearing of a matter, and the retrial did not permit reconsideration of pre-separation contributions. However, in the context of a reconsideration of the s 75(2) evidence, Watts J indicated no *Kennon* argument had been run in relation to violence, which suggests this was true throughout the life of this case, both in relation to contributions and the impact of violence on future needs.

50 Emphasis added. This is perhaps unsurprising where the alleged violence is not claimed to have impacted upon future needs factors (s 75(2)), as consideration of the impact of violence is not expressly required under s 79 of the FLA. Technically though there is no reason why the 'any other matter' catch-all in FLA s 75(2)(o), which is relevant to property proceedings by virtue of s 79(4)(e)(e), would not permit the court to consider such matters in relation to contribution even if not raised by the parties.

51 *Wheat & Wheat* [2008] FamCA 266; BC200851128 at [48] per Benjamin J.

52 *Wilmot & Schneider* [2009] FMCAfam 932; BC200909918 at [181] per Bender FM.

There is detail of evidence in the wife's case about violent and destructive conduct by the husband during the periods spanning the relationship of the husband and wife. *This was not raised as an issue in the list provided to me by the advocates . . . I will not further address that issue.*⁵³

In the wife's affidavit there was extensive reference to matters of violence alleged to have been perpetrated by the husband upon the wife. The husband denies the alleged violence. *No Kennon v Kennon (1997) FLC 92-757 case was referred to in submissions.* As a result I have ignored those parts of the wife's affidavits, which allege violence by the husband upon the wife.⁵⁴

The judgments shed no light on why *Kennon* arguments were not put however one would not expect judicial officers to mention a principle in circumstances where it clearly could not apply. Rather, it might be assumed the potential application of *Kennon* was the reason for the judicial officer making clear that the argument was not run, and so not considered. Certainly it is possible that strategic, evidentiary, costs and personal issues may have led to a conscious decision not to run a *Kennon* argument in individual cases, which might include an assessment that such an argument would fail in the particular case. It is also possible however, particularly in light of our findings below about the lack of clarity as to the application of the *Kennon* principle, that potentially successful claims were overlooked or under explored.

Success rate of *Kennon* claims

As demonstrated in Table 1, in 42% of the 57 judgments where a *Kennon* adjustment was sought, this factor was held to warrant an adjustment. This is less than the 62% success rate found in Middleton's study of earlier case law.⁵⁵

Table 1: Registry by Outcome

| Registry | Number | |
|----------------------|-----------|-----------|
| | Yes | No |
| Adelaide (n=4) | 2 | 2 |
| Brisbane (n=6) | 3 | 3 |
| Canberra (n=5) | 1 | 4 |
| Darwin (n=3) | 0 | 3 |
| Hobart (n=1) | 0 | 1 |
| Melbourne (n=13) | 7 | 6 |
| Newcastle (n=1) | 0 | 1 |
| Parramatta (n=5) | 3 | 2 |
| Perth (n=2) | 1 | 1 |
| Sydney (n=17) | 7 | 10 |
| TOTAL: (n=57) | 24 | 33 |

⁵³ *Liakos & Zervos* [2011] FamCA 547; BC201150531 at [244] per Loughnan JR.

⁵⁴ *Tian & Larson* [2009] FamCA 1307; BC200951244 at [265] per Le Poer Trench J (this was an appeal from the decision of Bender FM).

⁵⁵ Middleton, above n 5. Although Middleton's sample is comparatively small, comparison of the samples and presentation of results in percentages are valid as the numbers are large enough a statistical significance test to be run.

Of the 57 cases, the violence claimed was accepted by the judicial officer as having occurred in 72% of matters (n=41). Thus, of these 41 matters, 59% of applicants were successful in receiving a *Kennon* adjustment (n=24). There were therefore 17 matters where, although the judicial officer accepted that violence had taken place, no adjustment was made. Possible reasons for this are explored further below.

While the numbers are very small, it is interesting to note that all registries which heard two or more *Kennon* claims had a comparatively equal division of successful and unsuccessful claims, except for Canberra where one of the five succeeded. This may be attributed at least in part to the views of Brewster FM (as he then was) who is based in that registry and heard two Canberra cases. His Honour has refused to apply the *Kennon* principle:⁵⁶

... I am not bound by the dicta of the Court in *Kennon* and for the reasons I have given I decline to follow it. I believe that contributions are to be measured in absolute terms and not weighted by considerations of arduousness, whether caused by domestic violence or otherwise.⁵⁷

Size of *Kennon* adjustment

No guidelines are provided within *Kennon* as to how any increase in percentage for contribution should be calculated. This is of course consistent with the general approach to the application of s 79, namely, that it is a matter of discretion for the judicial officer. Altobelli FM noted in *Kucera & Kucera* however that:

its assessment needs to be approached *conservatively* for the policy reasons that are clearly articulated in the Full Court's decision.⁵⁸

In 11 of the 24 cases with successful *Kennon* claims, the increased percentage attributed to the *Kennon* claim was not specifically articulated.⁵⁹ An example of this is as follows: '... I assess the wife's entitlement at 55% and that of the husband at 45%. I do so by weighing up all the factors I have addressed ...'.⁶⁰

In *Kucera*, where Altobelli FM awarded a *Kennon* adjustment of 15% (the

56 Brewster FM outlined his reasons in detail in *Palmer & Palmer* (2010) 244 FLR 121; [2010] FMCAfam 999; BC201007281 at [75]–[100] and as an addendum in *Brandow & Brandow* [2010] FMCAfam 1026; BC201007395 at [27]. In *Palmer & Palmer* (2010) 244 FLR 121; [2010] FMCAfam 999; BC201007281 at [93]–[94] his Honour suggested that, if violence is to be relevant to contributions, perhaps a more appropriate consideration would be to reduce the contributions of the perpetrator to the welfare of the family, rather than to increase the weight of the victim's contributions. It is beyond the scope of this article to consider in detail the arguments put by Brewster FM as to whether or not this principle is legally justifiable, though his Honour raises some important points of principle in his discussion which are touched on later in this paper.

57 *Palmer & Palmer* (2010) 244 FLR 121; [2010] FMCAfam 999; BC201007281 at [95] per Brewster FM.

58 *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [103] (emphasis added).

59 Middleton reported the same in 'several' of the 17 successful *Kennon* claims in her study: Middleton, above n 5, at 237.

60 *Parsons & Prendergast* [2008] FamCA 259; BC200851121 at [95] per Guest J.

highest figure a judicial officer overtly attributed to *Kennon*), his Honour describes the indeterminacy of the assessment of any aspect of a parent's contributions:

What I am doing, however, is trying to assess (as a percentage of the value of the assets in question) the extent to which the wife's contribution was rendered 'significantly more arduous than they might have been'. *This process is as subjective and discretionary as any other discretionary exercise of power.* I take into account the length of the period of family violence in this case — the entire marriage. I take into account its frequency and nature — it was coercive controlling violence that was [sic] pattern of abuse. I take into account the strength of the evidence of family violence and its impacts on the wife and the contribution she made to the marriage. All of these matters justify an assessment of 15% in the wife's favour.⁶¹

Lawyers can play an important role in shaping this exercise of judicial discretion in any family court property case by effectively setting the parameters of a decision by arguing for a particular percentage adjustment of assets. This was also true in terms of how the *Kennon* factor was assessed. In two cases⁶² the judicial officer considered whether they should award a higher percentage than was sought; in both instances the judicial officer declined to move beyond the maximum adjustment sought by the party (or more likely their lawyer). In *Czeb & Czeb*,⁶³ Barry J was somewhat unclear as to whether he would have ordered a higher adjustment if asked, saying '[i]t has crossed my mind to award to the Applicant a percentage distribution greater than that which she seeks, but in the whole of the circumstances, I have decided not to adopt this course.'⁶⁴ Altobelli FM on the other hand clearly considered himself more constrained by the parameters set by the parties:

Counsel for the wife submitted it should be 10 percent. I accept this figure as being appropriate under the circumstances of this case, but, quite frankly, if I had been asked to assess contribution at a higher figure, I would have.⁶⁵

In the 13 cases where the judicial officer did specify the percentage value of the *Kennon* award, the mean adjustment awarded was 7.3%. The most common percentage figure awarded overall was 10%, closely followed by 5%. The lowest percentage figure awarded was 4% (in 2 of the 13 cases). More than half the cases identified the *Kennon* percentage, in contrast to the single case out of 17 to do so in Middleton's study. The increased rate of identification obviously aids analysis of the exercise of judicial discretion, and promotes transparency in decision making, though as always it is difficult to draw something concrete from the 'leap from words to figures'.⁶⁶

61 *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [110] per Altobelli FM (emphasis added).

62 *Czeb & Czeb* [2011] FamCA 87; BC201150108 at [87] per Barry J and *Kozovska & Kozovski* [2009] FMCAfam 1014; BC200908956 at [77] per Altobelli FM.

63 [2011] FamCA 87; BC201150108 at [87] per Barry J.

64 *Ibid.*

65 *Kozovska & Kozovski* [2009] FMCAfam 1014; BC200908956 at [77]. Note that the terms of s 79(1) make it clear the court can make 'such order as it considers appropriate'.

66 See Coleman J in *Steinbrenner & Steinbrenner* [2008] FamCAFC 193; BC200851355 at [234] on this point in the context of reflecting quantitatively the qualitative assessment of contributions under s 79.

Elements of *Kennon*

The 'discretionary exercise of power'⁶⁷ referred to earlier by Altobelli FM is not limited to the calculation of any percentage adjustment. The formulation of the *Kennon* principle outlined at the outset of this paper makes it clear that it has a discretionary aspect, most notably by stating that the presence of the relevant factors merely 'entitles' the court to apply the principle. However, a review of the decisions suggests that in addition there is considerable variation in how a number of elements of this principle are being interpreted by judicial officers. We will now consider how the cases in the sample dealt with the various elements of the *Kennon* principle.

'Narrow Band' of cases — what constitutes the 'exceptional cases'?

It is clear that there must be something 'exceptional' about the case — arising from the nature of the violence *and* its impact — for the principle to apply. In the unreported decision of *Spagnardi*, the Full Court said the term 'exceptional' was not to be understood to mean 'rare'. Rather, they preferred the approach of the trial judge in that case:

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 . . . [I]t is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles . . . reading these passages carefully, the key words in a case where there are allegations of domestic violence are 'significant adverse impact' and 'discernable impact'.⁶⁸

Notwithstanding this, in one case, *Stellard v Dresden Stellard*,⁶⁹ O'Reilly J spoke as if the 'narrow band of cases' requirement was a separate and necessary consideration (turning on the nature of the violence), in addition to the requirement to show the impact of the violence.⁷⁰

The forty-two percent of cases that were successful may seem to be indicative of a high success rate given that the principle only applies to 'exceptional' cases, however, it must be considered in light of the very low number of cases where this argument is raised by a party. Without any yardstick to measure what is exceptional and what is not, such an assessment may naturally seem subjective and arbitrary, relying on judicial interpretation as to what constitutes exceptional circumstances in terms of the severity of the behaviour and the way the violence impacts on a relationship. However, a context-based assessment is surely what the Full Court intended.

While it is not a separate criterion as such, clearly some judicial officers consider it important to highlight the need for the case to be 'exceptional'. Moore J, for example, implied that the duration and seriousness of the violence and its ongoing impact on contributions may contribute to such a determination:

⁶⁷ *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [110] per Altobelli FM.

⁶⁸ *Spagnardi & Spagnardi* (unreported, Appeal No EA26 of 2003) at [46].

⁶⁹ [2011] FamCA 718; BC201150691.

⁷⁰ *Ibid.*, at [286] and [298].

... His conduct, she said, had a deleterious impact on her capacity to further her career *over the many years* of their relationship. That is the link *Kenyon* makes necessary and *the persistence of this serious problem over many years* takes it out of the 'floodgates' reservation and puts it into the 'exceptional cases' spoken of in *Kenyon* ...⁷¹

Ongoing serious violence alone will not suffice, of course. In *Dodge & Meldrum*, Brown FM accepted the victim's evidence of 'the husband's violent treatment' which was 'frequent' and 'serious', having commenced on the eve of their three year marriage. However, his Honour noted he had to 'adopt a cautious approach to such issues' (presumably reflecting the floodgates consideration) and ultimately did not find the overall circumstances 'to be exceptional in the terms referred to by the Full Court'.⁷² This was because the wife did not establish the violence had 'a sufficiently delineated impact upon her homemaking contributions'.⁷³

The explanation as to why the case was not exceptional was less clear, however, in other cases. In *Wei & Wei*⁷⁴ Barry J accepted the evidence of one particularly serious assault about 2 months after separation and the '[w]ife's claims of domestic violence and controlling behaviour by the Husband'⁷⁵ (though it is not clear from the judgment precisely what those claims were). This case involved a marriage of about 5½ years throughout which the wife worked as well as being primary carer to the parents' child. A psychiatric assessment of the father described him as exhibiting 'significant obsessional traits with a need for control'.⁷⁶ With little explanation, Barry J concluded that 'the case as presented did not amount to one that would persuade me it comes within the relatively narrow band of cases provided for in the decision of *Kenyon*'.⁷⁷

Given that the factors that will establish a *Kenyon* claim are themselves susceptible to interpretation, as the cases indicate, the need for the case to be 'exceptional' takes on greater significance. In a sense, it is the lens through which the other factors are considered; however, the judicial guidance to date is less than clear on precisely what tips the scales.

A course of violent conduct

A 'course of violent conduct' must be demonstrated as it forms part of the overall test for a *Kenyon* adjustment. The Full Court in *Kenyon* did not describe, nor provide examples, of what behaviours might constitute such a course. However, in 2005 in *S v S*⁷⁸ the Full Court provided some further insights. In dismissing the appeal by a husband against a Federal Magistrate's *Kenyon* adjustment of 5%, the Full Court held the term 'course of conduct' is a broad one; that violence need not be frequent to constitute a course of

71 *May Laguna & Laguna* [2007] FamCA 320 at [77] per Moore J (emphasis added).

72 [2010] FMCAfam 119; BC201002000 at [131] at [132] and [138].

73 *Ibid*, at [137].

74 [2007] FamCA 527; BC200750576 per Barry J.

75 *Ibid*, at [150].

76 *Ibid*, at [54].

77 *Ibid*, at [150].

78 (2005) FLC 93-246; [2005] FamCA 1304.

conduct, although a degree of repetition is required.⁷⁹ In this case, the husband was found to be sporadically physically violent and regularly verbally abusive towards the wife over the course of a 16 year marriage. This affected the wife's self-esteem and her ability to perform her role as a primary caregiver and homemaker for much of the marriage.

In our sample, there was no simple correlation between the length of the course of violent conduct and the likelihood of a successful *Kennon* claim. The violence alleged was often inflicted on the claimant during the whole or most of the marriage, and, as noted above, Moore J seemed to equate length with an 'exceptional' case.⁸⁰ Nevertheless, we found one example in which violence was alleged to have taken place over a long period of time; rather than helping establish this factor, in fact it seemed to weigh against the claimant:

There is an inherent unfairness in raising, many years after the event, conduct that could and perhaps should, have been addressed at the time. Recollections fade, witnesses become unavailable and records are lost. Indeed that may be an explanation for the wife's evidence about the husband's conduct during the preponderance of the marriage, being vague and general.⁸¹

This is a somewhat odd comment, given these matters were naturally only being raised as a result of the separation and consequent property proceedings. However, it highlights the difficulties of trying to establish factors relevant to contribution that are of a non-financial nature, particularly over the course of a long marriage.

'During the marriage'

Should judges consider the effects of violence, or indeed violence itself, following the end of the marriage? The question is what, if anything, did Fogarty and Lindenmayer JJ mean by referring to a course of violent conduct 'during the marriage'. Was this phrase intended somehow to limit the principle? Given that post-separation contributions are relevant to the application of s 79, on the face of it one might assume that the relevant enquiry is whether the pre-separation violence (or indeed any post-separation violence) has inhibited contributions made by the victim pre-trial.

There has been some confusion in the decisions on this point.⁸² In *Kucera & Kucera*, Altobelli FM first says: 'The Full Court's decision focuses on conduct during the marriage, but not afterwards, which suggests the concept was not intended to apply to post-separation contribution.'⁸³ His Honour does not consider two points, however. First, for the purposes of property settlement it is the period of cohabitation, rather than marriage, which is

⁷⁹ Ibid, at [65]. The violence alleged against the husband apparently comprised 'arguments or incidents' occurring about twice yearly.

⁸⁰ *May Laguna & Laguna* [2007] FamCA 320 at [77] per Moore J.

⁸¹ *Cornwell & Cornwell* [2009] FamCA 1072; BC200950999 at [108] per Loughnan JR; see also *Meiloakitau & Taumoepeau* [2008] FamCA 476; BC200850801 at [149] per Loughnan JR.

⁸² See the comment in *Stellard & Stellard Dresdon* [2011] FamCA 718; BC201150691 at [298] recognising that uncertainty.

⁸³ [2009] FMCAfam 1032; BC200909073 at [16].

significant to contributions under s 79, including contributions to the welfare of the family.⁸⁴ It is possible the Full Court, cognisant of this fact, was not attaching particular significance to the words ‘during marriage’. Second, the Full Court was making explicit that the *Kennon* principle was *not* relevant to the assessment of future needs under s 75(2) and in that context distinguishing between what happened pre-trial and post-trial.

Altobelli FM does later refer to this latter aspect of *Kennon* saying:

... *Kennon* principles operate retrospectively, and not prospectively ... The issue is to what extent was contribution during the marriage rendered more arduous, not to what extent family violence during the marriage creates future needs ... Thus the fact that the wife appears to have prospered after the end of a violent relationship does not affect the assessment of contribution during the relationship.⁸⁵

The point being made here is that because the enquiry is about the impact of contributions during marriage, rather than on future needs under s 75(2), it is irrelevant if the wife recovers after separation; this is entirely consistent with the Full Court’s formulation. However, if the violence *did* continue to affect a party’s ability to contribute during that post-separation, pre-trial period, presumably it could be considered. This approach is reflected in the decision of Watts J where an uplift (on certain assets) of 5% was awarded for the contributions the wife made ‘since separation’ from ‘what they would have been had they not been made significantly more arduous by the husband’s conduct’.⁸⁶

In *Baranski & Baranski*,⁸⁷ Brown FM recites Altobelli FM’s original comment focussing on the duration of the marriage and interprets it to mean that isolated incidents of violence arising around the time of separation should not attract the *Kennon* principle. What follows is a discussion which, in reality, goes to why violence arising around the time of separation might not generally fit the *Kennon* profile. However, Brown FM once again tries to draw some connection to the question of violence ‘during the marriage’:

The powerful emotions precipitated, on separation, may cause a spouse to behave inappropriately or even violently in the heat of the moment. Such behaviour is likely to be isolated and often completely out of character, being reflective of a person reacting to an episode of emotional crisis. In such circumstances, it would be fundamentally unfair that such isolated episodes should have ramifications for the assessment of contributions made over the entire and often lengthy period of a

⁸⁴ *In the marriage of G* (1984) 9 Fam LR 969; (1984) FLC 91-582.

⁸⁵ *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [107]. The husband had argued that the adjustment allowed on the basis of *Kennon* should be reduced on the basis the wife was able to make post-separation contributions with ease.

⁸⁶ *Damiani & Damiani* [2012] FamCA 535; BC201250749 at [179]. See also O’Reilly J’s comment in *Stellard & Dresden-Stellard* [2011] FamCA 718; BC201150691 at [298] where her Honour notes the question of whether post-separation impacts might be taken into account in respect of post-separation contributions.

⁸⁷ [2010] FMCAfam 918; BC201010421 at [390].

marriage. *This also seems to be the rationale as to why usually Kennon-type issues should be confined to the assessment of contributions within the parameters of the marriage concerned.*⁸⁸

As it happens, *Baranski* went on appeal before Bryant CJ, Coleman and Ainslie-Wallace JJ, and the husband challenged Brown FM's decision on the precise point of whether post-separation acts of violence were relevant to a *Kennon* claim.⁸⁹ In a joint judgment, their Honours emphatically rejected the argument that post-separation violence could not be a relevant consideration in the assessment of contributions under s 79. Exclusion of such considerations, said their Honours, may be 'conducive' to outcomes that are not just and equitable, as required under s 79(2).⁹⁰ So, despite some initial confusion arising from the way the *Kennon* criteria were originally framed, it is now clear that post-separation (and logically also pre-marriage) violence can be considered in determining whether a *Kennon* adjustment should be made.

'Significant adverse,' 'significantly more arduous' and 'discernible impact'

The impact requirement of the *Kennon* principle requires that a party makes the specific claim that violence impacted upon their ability to make contributions and articulate how. Impact was raised directly in 21 of the 24 cases which were successful in receiving a *Kennon* adjustment. These claimants each tended to describe two or more different ways in which the violence had affected their contributions. For instance, one claimant was able to establish that 'she was a traumatised and fearful parent' who was 'isolated and intimidated' which made homemaker tasks more difficult and affected her 'self-esteem and sense of identity', as well as placing a restriction on her relationships.⁹¹ Another woman established many years of physical and emotional abuse by her husband resulting in a major depressive order; she led evidence in support that this caused a significant reduction in her ability to function on a day to day basis. She had to make repeated attempts to escape the husband and made a suicide attempt.⁹²

In the three cases where *Kennon* claims were successful despite not describing the effect on contribution, one alternative approach taken by some judicial officers was to 'infer' the violence had made the victim's ability to contribute during the marriage 'more arduous' or that it had had a 'significant adverse impact'.⁹³

Notwithstanding the need to show impact, across the total sample of 57 cases there were 25 matters where the claimants or their counsel failed to make a direct reference to the impact the violence had on the party's ability

⁸⁸ *Baranski & Baranski* [2010] FMCAfam 918; BC201010421 at [396]–[397] (emphasis added). See also *Kozovska & Kozovski* [2009] FMCAfam 1014; BC200908956 per Altobelli FM.

⁸⁹ *Baranski & Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070.

⁹⁰ *Ibid.*, at [257].

⁹¹ *Baranski & Baranski* [2010] FMCAfam 918; BC201010421 at [403].

⁹² *Tolbiac & Tolbiac* [2008] FamCA 265; BC200851125 per Brown J.

⁹³ This is discussed in the next section.

to contribute to the marriage. This would of course have affected the likely success of the claim. Why would counsel overlook this matter?⁹⁴ It may be that lawyers are relying on a judicial inference being drawn, as described further below; or it might reflect a misunderstanding of this element of *Kennon*. It would hardly be surprising if lawyers were confused as to how to argue this principle given that it seems to cause judicial officers some considerable confusion. It may also be that, within the contributions assessment framework of s 79, the impacts of violence on contributions are subtle and difficult to articulate.

The term ‘significant adverse impact’ upon contributions could be read to suggest that the victim made a lesser contribution than they could have made and hence the court should increase their contribution to what it would have been, but for the violence. However, the majority in *Kennon* follow this formulation with the words ‘put another way’ and then go on to talk of a contribution being made more arduous. A plain reading would suggest the second formulation of impact (relating to a contribution becoming more arduous) is simply to elaborate upon the words ‘significant adverse impact’. However, the particular phrase used to express the second formulation — ‘to have made his or her contributions significantly more arduous than they ought to have been’ — would seem to indicate that the contributions *had* been made but that they were made more difficult by the violence thus requiring the court to give more weight to them.⁹⁵ Thus, there are two possible interpretations. The narrower is that it must be shown the significant impact *is* making contributions more arduous; the broader is that this is one way of showing impact.

It appeared to be accepted by the majority of judicial officers during their discussion of the *Kennon* principle that ‘more arduous’ and ‘significant adverse impact’ are two different tests or limbs — ‘more arduous’ indicating that the tasks were made harder, and ‘significant adverse impact’ meaning that less of a contribution was made. For example, Loughnan JR explains:

As to the two limbs of the *Kennon* argument — here there is no suggestion that the wife was *prevented* from making contributions because of the alleged conduct . . . As to the second limb, the wife does not give evidence about the husband’s conduct making her contributions *more arduous* than they ought to have been . . .⁹⁶

Strickland J differentiates too between an ability to make contributions and whether they were in fact more arduous:

there was virtually no evidence that satisfies me that that behaviour or conduct had a ‘*significant adverse impact upon (the wife’s) contributions to the marriage*’ or ‘*made (the wife’s) contributions significantly more arduous than they ought to have been*’ . . . The wife still went about her daily tasks in caring for the children and running the household and performed them well, and she will receive credit for what

⁹⁴ Of the 25 cases where impact was not raised, only one claimant was self-represented.

⁹⁵ See on this Middleton, above n 5; See also Family Law Council (Des Sempé), Letter of Advice to Attorney-General, *Violence and Property Proceedings*, 14 August 2001, p 3.

⁹⁶ *Cornwell & Cornwell* [2009] FamCA 1072; BC200950999 at [104]; See also, *Meiloakitau & Taumoepau* [2008] FamCA 476; BC200850801 at [148] per Loughnan JR.

she actually did, but to repeat, there is no evidence that indicates those tasks were more onerous because of the husband's behaviour or conduct.⁹⁷

In our sample, the terms 'more arduous' and 'more difficult' were referred to in just over two thirds of cases. This may be explained by the fact that claimants predominantly argued that their contributions were made more arduous than they should have been, rather than that they would have made greater contributions but for the violence.

Highlighting the uncertainty concerning whether or not there are two limbs as described above, there were some cases where the judicial officer did not clearly identify the test as being two-limbed, referring only to a victim's contribution being made more arduous.⁹⁸

Further confusion has arisen by the additional inclusion of the term 'discernible impact'; Altobelli FM's reference to this phrase indicates it is perhaps a phrase intended to capture both limbs of the test.⁹⁹ Carmody J posits likewise:

What the majority in *Kennon* meant by 'discernible impact' is not clear but they obviously envisaged contribution being measured according to the capacity of the party to make it and the degree of difficulty he or she may have in doing so.¹⁰⁰

'Which is demonstrated'

Leaving aside the question of judicial officers drawing inferences as to impact, discussed below, it is clear from statements within the sample judgments that the court will require proof of both the course of violence *and* its impact on contribution.¹⁰¹ Accordingly, it was found that an important factor influencing outcomes which appeared within the sample was whether or not the allegations of violence were corroborated by evidence in addition to that of the alleged victim and perpetrator such as police, medical and/or family consultant reports, criminal charges or a family violence order. Of the total sample, the violence (and possibly its effect on contribution)¹⁰² was corroborated by additional evidence in 70% of cases (n=40);¹⁰³ it was corroborated by additional evidence in 92% of cases where a *Kennon* adjustment was awarded. While adducing such corroborative evidence did not necessarily guarantee a *Kennon* adjustment, as would be expected there was a higher likelihood of an adjustment being awarded where it was presented.

97 *Dowdell & Public Trustee of the Northern Territory* [2007] FamCA 1276; BC200750312 at [161]–[162].

98 See, eg, *Baranski & Baranski* [2010] FMCAfam 918; BC201010421 at [387] and *Dodge & Meldrum* [2010] FMCAfam 119; BC201002000 at [136], though these were both decisions of Brown FM.

99 See, eg, *Bingham & Bingham* [2009] FMCAfam 99; BC200900560 at [25].

100 *Murphy & Murphy* [2007] FamCA 795; BC200750675 at [725].

101 *Bodar-Twersky & Twersky* [2009] FMCAfam 163; BC200901530 at [99] per Neville FM; *Bingham & Bingham* [2009] FMCAfam 99; BC200900560 at [48] per Altobelli FM.

102 It is difficult to distinguish what evidence went to proving which element, as in most judgments this level of detail was not included.

103 One would have thought this was rather a low figure, where a *Kennon* claim is being made. However, it must be noted that even in parenting matters claims of violence are often poorly presented to court: L Moloney, 'Violence allegations in parenting disputes: Reflections on court-based decision making before and after the 2006 Australian family law reforms' (2008) 14 *Jnl of Family Studies* 254 at 257.

Evidentiary problems might occur then if the complainant is solely a homemaker and does not seek medical or other external help following any of the family abuse experienced. In such cases, there would be little evidence except the victim's own that their contributions were affected. Therefore, from the sample cases it appears to be easier to show that violence had made an impact on contributions where, for example, the claimant was required to seek refuge somewhere else:

I find that the wife's contributions during the marriage were made far more difficult because of the husband's behaviour. At least as importantly, had the husband not behaved in the way he did, the wife's contributions would not have been wasted on renting homes for herself, when she had her own home in which she could have been living.¹⁰⁴

Of course, providing evidence sufficient to establish that violence has made contributions to a marriage 'more arduous' or that it had a 'discernible impact' or 'significant adverse impact' upon the claimant's contributions, will inevitably be problematic since the value of any evidence depends upon how the judicial officer applies the term(s)/test(s). Reithmuller FM was so satisfied in *W & W & L*:

An adjustment on this basis is not to be undertaken lightly. It is important to find a specific evidentiary foundation. In this case there appears to have been a long history of violence in the relationship, as set out above. In the Family Report the mother describes the life in the household like 'walking on eggshells'. She exhibits an ongoing fear of Mr W. Her relationship with D was effectively severed during this time. The children A and B were subject to family violence. I am satisfied that there is sufficient evidence of specific violence, and that it shows that her task of homemaker and provider of a nurturing environment was made far more difficult.¹⁰⁵

There is a strategic aspect that arises out of the requirement to prove the impact on the victim's contributions. Parties who wish to claim a *Kennon* contribution may find it perilous to rely only on an argument that their contributions were reduced as a consequence of the conduct. If the *Kennon* claim is unsuccessful (and abuse is often difficult to prove many years later) then they risk a devaluation of their share based on the actual contributions they claim. Thus, there may be an incentive to argue all the contributions one can, just in case; but doing so may diminish the chance of establishing the second limb. In the case of *Lynton v Lynton*¹⁰⁶ the wife established the claimed abuse and that this significantly contributed to her suffering from Post Traumatic Stress Disorder. However, she worked during the marriage and gave evidence that, despite the husband's treatment of her, she 'continued to provide for the family, she maintained the house, cared for the children, attended to the book-work and provided the special care' required for two of their children.¹⁰⁷ Dawe J made no *Kennon* adjustment and did not consider the 'more arduous' aspect of the principle:

104 *A & A* [2011] FCWA 98 at [110] per Thackray CJ.

105 [2007] FMCAfam 438 at [197].

106 [2010] FamCA 690; BC201050775.

107 *Ibid.*, at [129].

The court is satisfied that the wife has established the violent conduct, however the evidence has not established on the necessary standard of proof (balance of probabilities) that this violent abusive conduct by the husband had a '*significant adverse impact*' upon the wife's contribution to the marriage. In fact, the evidence supports the conclusion that notwithstanding the violent and abusive conduct by the husband, the wife continued to make substantial contributions to the household and in particular the welfare of the family.¹⁰⁸

Naturally, having to prove impact invites questions of causation, which may prove difficult where the claimant suffers from a medical condition worsened by the violence, as explained by Altobelli FM:

... However, the Full Court goes on to say that such a course of violent conduct is 'demonstrated' to have had a certain impact. The use of the word 'demonstrated' clearly illustrates the need for the claimant to establish that a certain impact is causally linked to the violent conduct. The wife's evidence does not so satisfy me. Even if she were to convince me to the requisite standard of the impact on her contributions, I could not be satisfied that this was attributable to family violence because her medical condition was much more complex than to allow that simple causative conclusion.¹⁰⁹

Are there, however, circumstances in which the court draws an inference as to the impact on contributions of an established violent course of conduct during a marriage? The *Kennon* principle's predecessor, *Doherty*,¹¹⁰ has been used to support the use of inferences. Baker J, with whom Fogarty and Hannon JJ agreed, found that, while the trial Judge did not precisely spell out the link between the recorded violence and the impact, 'it is clear from his findings that the wife's contribution as homemaker and parent may have been increased as a result thereof'.¹¹¹

Subsequent to *Kennon*, the unreported Full Court case of *Spagnardi & Spagnardi*¹¹² considered whether a court may draw such an inference. Their Honours concluded that *Kennon*:

... has established it is necessary to provide evidence to establish:¹¹³

- The incidence of domestic violence;
- The effect of domestic violence; and

108 *Lynton & Lynton* [2010] FamCA 690; BC201050775 at [130] per Dawe J. Notably, nor did the wife receive any extra weighting on the basis this amounted to a 'special' contribution (see [142]–[143], despite the suggestion in some cases that such a scenario may so qualify: see *JEL v DDF* (2001) FLC 93-075 at 88,331; (2000) 28 Fam LR 1; [2000] FamCA 1353. See also *Dowdell & Public Trustee of the Northern Territory* [2007] FamCA 1276; BC200750312 at [162] per Strickland J.

109 *Bingham & Bingham* [2009] FMCAfam 99; BC200900560 at [47] per Altobelli FM; See also *Jarrett & Jarrett* [2009] FMCAfam 55; BC200900557 at [92]–[93] per McGuire FM; *Bacasa & Bacasa* [2011] FMCAfam 198; BC201102743 at [73] per Dunkley FM and *Dakin & Dakin* [2011] FMCAfam 177; BC201101738 at [21] per Sexton FM.

110 (1995) 20 Fam LR 137; (1995) 127 FLR 343; (1996) FLC 92-652.

111 *Ibid*, at [141].

112 (Unreported, Appeal No EA26 of 2003) as cited in *Stellard v Dresden Stellard* [2011] FamCA 718; BC201150691.

113 The requisite standard of proof in property settlement proceedings is the civil 'balance of probabilities'. Under s 140(2) of the Evidence Act 1995 (Cth), in determining whether a party has proven his or her case on the balance of probabilities, the court can consider the nature of the cause of action, the nature of the subject-matter and the gravity of the matters alleged. Note that with a *Kennon* claim, the victim not only has the onus of proving that the

- Evidence to enable the court to quantify the effect of that violence upon the party's capacity to 'contribute' as defined by section 79(4).¹¹⁴

Their Honours found in *Spagnardi* that, in that case, the complete absence of evidence of how the conduct affected the claimant's ability to contribute was fatal to the claimant's particular *Kennon* claim. However, as noted by O'Reilly J in *Stellard v Dresden Stellard*,¹¹⁵ the Full Court in *Spagnardi* also referred with approval to a statement by the trial Judge to the effect that there would be some cases where the proved facts *would* allow an inference of impact to be drawn: 'there must be cases where it is obvious or a very likely inference from the fact'.¹¹⁶ O'Reilly J takes the same approach in *Stellard*.¹¹⁷ This supports the approach taken in *Doherty* and so it may be said that there are cases where the impact on the claimant is self-evident from the established facts. For example, one might imagine an extreme case where the violence results in a disability in the victim or an extended period of hospitalisation.

Within the sample of judgments, there were varying judicial opinions about whether or not inferences should be drawn. In *Whelan & Whelan* for instance, Harman FM did so:¹¹⁸

Whether or not that is possible in order to establish a 'Kennon' claim, the court needs to make some finding about the effect of the conduct of one party upon the contributions made by the other.

It may not be automatically assumed in a particular case that an effect on a party's condition automatically means there is an effect upon the party's contributions . . .

I am in the context of this case prepared to infer that the history of the husband's violence, in fact, meant that the contributions for which the husband concedes the wife made, were made in circumstances, where they were significantly more arduous as a result of the husband's conduct than they would have otherwise been if he had not behaved in the way that he did.¹¹⁹

Altobelli FM also demonstrated in *Kozovska & Kozovski* his willingness to draw an inference between the impact of violence and the ability to make contribution in one matter:

I am left in no doubt that the evidence provided by both the wife and the daughter satisfies me, without having to draw any inference, that her contribution was rendered more arduous. In any event I would be prepared to infer that the contribution was rendered more arduous based on comments made by the Full Court in *Doherty* (1996) FLC 92-652 at 82,683 per Baker J.¹²⁰

Conversely, in two other 2009 decisions handed down before and after *Kozovska, Bingham & Bingham* and *Kucera & Kucera*, Altobelli FM said that,

violence occurred, but also that the violence had a discernible impact on them. See also S Middleton, 'Domestic violence and contributions to the welfare of the family: Why not negative?' (2002) 16 *AJFL* 26.

114 *Spagnardi & Spagnardi* (unreported, Appeal No EA26 of 2003) as cited at [47]–[48] of *Stellard v Dresden Stellard* [2011] FamCA 718; BC201150691.

115 [2011] FamCA 718; BC201150691.

116 *Ibid* at [45].

117 *Ibid* at [292].

118 [2010] FamCA 530.

119 *Whelan & Whelan* [2010] FamCA 530 at [177] (Watts J); See also *Denton & Denton* [2011] FMCAfam 1282 at [141] (Harman FM).

120 [2009] FMCAfam 1014; BC200908956 at [76] per Altobelli FM (delivered in September).

as he read *Kennon* (and without referring to *Doherty*), 'little or no room is left for inference'.¹²¹ Further, in a case preceding all these decisions his Honour said:

Moreover, none of her evidence actually explains how her contributions were rendered more arduous. At most, I am left to draw an inference that this was plainly a case where, in view of the nature of the allegations, and the findings I have made, it is reasonable to infer that her contributions were more arduous. I don't believe that the Full Court's decision in *Kennon* allows me scope to make these findings based on an inference in a situation where the evidence could easily have been led.¹²²

Again, we see a picture of confusion as to the use of inferences in this regard. Practically, this is significant: precisely how does one prove that homemaker tasks are made more difficult, especially if a judicial officer is not prepared to draw an inference to that effect? In the sample cases this proved difficult to establish. Five claimants simply claimed the impact of the violence was that their homemaker tasks were more difficult than they ought to have been but for the violence and received an adjustment. Eight others made the same claim but were unsuccessful.¹²³

The way forward

Clearly a flood of claimants has not eventuated; over a 6 year period only 57 first instance matters appear in AUSTLII that have included a consideration of *Kennon* and there have been an average of only four cases a year cited in AUSTLII where an award is made on that basis. However, as noted earlier, we know that violence is a commonly raised factor amongst the family court population and the separated population in general. The cases reviewed suggest that *Kennon* is not always raised by legal practitioners, even when the circumstances might lend themselves to such a claim. Further, self-represented parties would be unlikely to know about the *Kennon* principle.¹²⁴ As one judicial officer noted of a litigant in person:

It appeared to me that the wife's allegations, although not clearly, if at all, articulated as such, might fall within the decision of the Full Court in *Kennon* . . .¹²⁵

A lack of awareness of *Kennon* and what is required to establish a successful claim may have contributed to the cases that failed to address specifically impact on contribution, or to provide any evidence of impact and/or to seek lower percentage adjustments based on *Kennon* than the judicial officer would have awarded.

121 *Bingham & Bingham* [2009] FMCAfam 99; BC200900560 at [25], delivered in February (see also the comments at [48] in that decision). This paragraph is repeated by his Honour verbatim in *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [16], delivered in October.

122 *Shaw & Shaw* [2008] FMCAfam 1024; BC200808336 at [154].

123 Compounding the obvious difficulties of proving impact, there are the normal factors that affect the likelihood of success of any claim, for example, the relative quality of legal representation, unexpressed judicial values and the way witnesses present in court.

124 Three of the 57 claimants in our sample were self-represented.

125 *Hutton & Hutton* [2007] FamCA 1701 at [202]. The self-represented wife in this case made claims of serious assaults which were denied completely by the husband. While she did not argue *Kennon*, Carter J noted its relevance however the wife did not lead evidence which supported her claims of violence and so they were not accepted.

The *Kennon* factor, which has attracted little superior reconsideration,¹²⁶ is a complex combination of vague phrases and it is not surprising then that, possibly like some legal practitioners, there are judicial officers who appear to be unclear about the test in general and whether it fits the facts in a particular case. When combined with the Full Court's exhortation that this is a principle of exceptional application, this may well contribute to the fact that there are so few successful claimants. Take for example the comments of Bell J, who declined a *Kennon* award in this case:

I do not believe that the *Kennon* principle totally applies but it comes very close to it in that her contributions, which were of the physical nature, were made more difficult by his overbearing and bullying manner . . .

I take into consideration that during the cohabitation not only did she do the work to which I have referred but I consider she did something over and above that in looking after the physical disabilities of the father, and whilst *I am not quite sure whether that is Kennon or not*, putting up with the abrasive and bullying behaviour of the father when he [sic] demanded that the children and the mother act no better than servants towards him.¹²⁷

In other judgments, statements such as '[i]f I am incorrect in allowing a *Kennon*-type weighting . . . in my view it would be open for me to make some allowance, in this regard, for family violence factors . . .'¹²⁸ are indicative of a lack of clarity. That lack of clarity has contributed to one judicial officer, Brewster FM, choosing not to apply *Kennon*,¹²⁹ citing the comments of Altobelli FM in *Kozovska & Kozovski* as giving him comfort in his position.¹³⁰

While we do not concur with Brewster FM's reasoning in general regarding *Kennon*,¹³¹ it is a fair criticism that, as expressed to date, the *Kennon* principle leaves too many grey areas resulting in judicial indeterminacy with diverse interpretation of its wording. For example, it is evident that 'significant adverse impact', 'significantly more arduous' and 'discernible impact' are approached by different judicial officers in varying ways, and there is some confusion as to whether impact is a one limbed test requiring proof that a contribution has been made more arduous, or whether it is broader than that. In addition, there is a lack of consensus about what evidence is required to establish impact. Some judicial officers consider it appropriate to 'infer' that the evidence of violence was sufficient to demonstrate that the ability to contribute had been impacted upon. In other cases, the entire *Kennon* claim

¹²⁶ As noted earlier, *Baranski & Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070 did clarify one aspect of the application of *Kennon*, namely, the question of post-separation violence.

¹²⁷ *Columbia & Columbia* [2009] FamCA 311 at [19] and [46] (emphasis added).

¹²⁸ *Baranski & Baranski* [2010] FMCAfam 918; BC201010421 at [425] per Brown FM.

¹²⁹ Brewster FM's view expressed in *Palmer & Palmer* (2010) 244 FLR 121; [2010] FMCAfam 999; BC201007281 that *Kennon* is not binding and lacks any jurisprudential basis, was one of eight grounds of appeal in *Palmer & Palmer* (2012) FLC 93-514; [2012] FamCAFC 159; BC201250606. However, this ground was not pursued by applicant's counsel as explained at [62]. Other judicial officers (including in the Full Court) have not endorsed Brewster FM's position.

¹³⁰ [2009] FMCAfam 1014; BC200908956 at [77].

¹³¹ Notably, the two later Full Court judgments referred to above n 119, which upheld *Kennon* adjustments, did not refer to *Palmer & Palmer*.

was rejected on the basis that there was insufficient evidence to establish that the violence had made such an impact. Concern has also been expressed at how one values a *Kennon* claim in terms of percentage adjustment.

In terms of clarifying how best to take account of family violence in property proceedings, the only options are fresh Full Court direction or legislative amendment. However, the very small number of cases where *Kennon* is argued, together with the likely resources (both financial and emotional) of those litigants, dramatically reduce the chance of the former option. Moreover, there has been little superior judicial appetite evidenced for a reconsideration of this principle.

Middleton has argued in detail how legislative reform could direct a more uniform approach to domestic violence and property division.¹³² The Australian Law Reform Commission also supports legislative reform:

Commentators, law reform bodies and others have raised strong arguments that the Family Law Act should be amended to recognise family violence expressly as a relevant factor in property disputes. . . . Legislative recognition may have a number of advantages over continued reliance on the *Kennon* precedent . . . [It] will provide greater confidence for victims of violence and their legal representatives who seek to raise family violence allegations in property disputes, in particular, out-of-court settlements.¹³³

An obvious reform would be the introduction of a mandatory consideration *requiring* judicial officers to take account of the impact of established violence on contributions, thereby removing the possibility of it being ignored due to pleading defects. The Family Law Council proposed that s 79(4) be amended to include a new subsection '79(4A)' which would direct the court to have regard to the effects of any family violence on the contributions of the parties.¹³⁴

Another Family Law Council proposal suggests that the future needs factors in s 75(2) be amended to include¹³⁵ '[t]he extent to which the financial circumstances of either party have been affected by family violence perpetrated by a party to the marriage'.¹³⁶ The cases are very clear that *Kennon* only applies to the assessment of contribution under s 79; this is the retrospective aspect of the enquiry in a property settlement case. However, if that is the only basis for an adjustment, it will not account for any ongoing impacts of violence on the victim. Middleton has suggested that the future needs aspect has been overlooked since the development of the *Kennon* approach.¹³⁷ Indeed, she has argued that given the difficulties associated with applying *Kennon* it should be abandoned, preferring amendment of s 75(2) as the key legislative solution, however allowing a *Kennon* type defence to claims of reduced contributions by victims.

Brewster FM, who eschews *Kennon* as articulated, proposes that the more

¹³² Middleton, above n 41.

¹³³ Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation paper, 2010, pp 426–8.

¹³⁴ Family Law Council (Des Semple), above n 97, p 7.

¹³⁵ Australian Law Reform Commission, above n 135, p 427. See also, Family Law Council (Des Semple), above n 97; Evans, above n 9.

¹³⁶ Family Law Council (Des Semple), above n 97, p 7.

¹³⁷ Middleton, above n 41, at 9.

appropriate approach when considering domestic violence would be to incorporate a ‘negative contribution’ provision within the legislation. This would involve deducting from the contributions made by the perpetrator of the violence to family welfare, rather than adding to the contributions of the victim. Indeed, favouring legislative reform, Brewster FM says that it is the legislature, rather than the courts, that should be charged with what he characterises as ‘an exercise in public policy’.¹³⁸ Of course, this is no more or less a matter of public policy than many other developments of principle by the family court; the court must determine how to apply the relevant provisions of the FLA and, as usual in that legislation, the property provisions are broad leaving ample room for judicial interpretation which necessarily takes account of public policy issues.

The purpose of *Kennon* is not to compensate or punish;¹³⁹ however it appears from judicial comments that it is difficult to separate these concepts from the notion of addressing contributions. The use of emotive language such as ‘arduous’ does not appear to assist in separating these concepts.¹⁴⁰ Moreover, as *Kennon* considerations are limited to ‘exceptional cases’ where there is a ‘course of conduct’ in which the impact of violence was demonstrably significant, the removal of ideas of compensation or punishment proves even more difficult. This is because it is the very serious long term abuse of a party, with clearly detrimental impacts on that person, which will most easily establish a *Kennon* claim. It may be possible to reduce, or eliminate, the conflation of potential goals of making an adjustment through clear, legislative articulation of a principle, which would help to normalise the consideration of violence in property disputes and the basis of such consideration. For all these reasons, we support legislative reform.

While understanding Middleton’s reasons for arguing for the abandonment of a *Kennon*-like approach to contributions (which are strengthened by our findings), we consider there is much to be said for the Family Law Council’s proposal that both ss 79(4) and 75(2) be amended. Given the difficulty family law decision makers have historically, and repeatedly, shown in giving proper weight to the impacts of violence in the family, we believe the broader consideration of violence allowed by referring directly to violence under both heads is preferable. However the Council recommended the inclusion of quite general provisions; this would still leave considerable room for judicial interpretation. The difficulties identified with the application of *Kennon* argue in favour of there being more detail in any provisions to clarify their ambit and perhaps the introduction of a specific objects section to identify the goal of the amendment.

138 *Palmer & Palmer* (2010) 244 FLR 121; [2010] FMCAfam 999; BC201007281 at [100].

139 Despite the question in this regard raised by Dewar (in J Dewar, ‘Family Violence and Property Distribution: Where Now?’, Conference Handbook, 2000, proceedings of the 9th National Family Law Conference, Sydney, Family Law Section, Law Council of Australia and Television Network, pp 293–8, cited in *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [108]), nothing in the case law supports such an interpretation. Note the comment to that effect by Altobelli FM in *Kucera & Kucera* [2009] FMCAfam 1032; BC200909073 at [110].

140 And we would suggest resulted in sending Brewster FM down a fruitless path of comparison of ‘arduous’ forms of employment, ignoring that the basis of a *Kennon* claim is founded on a course of conduct by one party towards the other.

This is not to suggest that such a legislative solution would result in easy decision making. Any potential legislative amendment would not alleviate issues of proof of violence and there would still need to be evidence relevant to the consequences of the violence, whatever legislative route was taken. The question of drawing inferences, however, could be resolved by legislative direction. Sheehan and Smyth suggest that if violence were to be included in ss 79(4) and/or 75(2), the term would also need to be defined within this part of the Act.¹⁴¹ The Family Law Council proposes that 'the definition of family violence in Part VII of the Family Law Act be adopted in Part VIII'.¹⁴² Since that report, we now have a much more detailed definition of family violence which applies to the whole FLA, s 4AB. That section provides examples of what may constitute exposure of a child to violence (s 4AB(4)); likewise a subsection could be included to provide examples of what amounts to impact in relation to contributions. Further, the question of how post-separation violence relates to contributions pre- and post-separation could be clarified. Finally, consideration could be given to whether the 'exceptional'/narrow band of cases' rider should be retained. We would suggest not and argue that this should be dealt with through careful drafting of criteria for application of the principle. If the principle is sound that violence can be factored in to the extent it affects contribution, then a party ought to be able to claim that and have to make their case, without any superimposed vague requirement of exceptionality.¹⁴³ Trivial claims will be treated accordingly, just as are trivial claims of contribution. In these ways, codification could 'clarify . . . a number of loose ends . . . and offer guidance to litigants and their advisors on what conduct is relevant, as well as when and how . . .'.¹⁴⁴ Thus, while a degree of ambiguity could be removed by legislative reform, discretion (and thus subjectivity) would of course remain in determining whether property division should ultimately be affected by family violence and, if so, by how much. This is inevitable within the highly discretionary system we have.

If there were legislative reform, then one might also expect improved appreciation of the relevance of family violence to property disputes by the various professionals working in this field. It is accepted in the parenting area that family violence has not been well understood and there has been criticism about a general failure to take proper account of its relevance to family law proceedings. It would seem that changes in this regard to Pt VII¹⁴⁵ are starting to have some positive effects in terms of judicial appreciation of the nature of family violence and the way cases are prepared by lawyers.¹⁴⁶

With or without legislative reform, an important strategy for providing

141 G Sheehan and B Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14 *AJFL* 102.

142 Family Law Council (Des Semple), above n 96, p 7; See also Evans, above n 9.

143 This resonates with the increasing judicial reluctance to accept that there are 'special' contributions: see, eg, *Smith & Fields* [2012] FamCA 510; BC201250415.

144 Dewar, above n 141, pp 293–8 in *Kucera & Kucera* [2009] FMCafam 1032; BC200909073 at [108] per Altobelli FM.

145 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

146 This is based on the report by the Chief Justice, Diana Bryant, of research being undertaken in the Family Court of Australia by one of the judges: D Bryant, 'Recent Developments in Family Law in Australia', *Parentage, Equality and Gender*, 2nd International Family Law and Practice Conference, London Metropolitan University, 3–5 July 2013, London, England.

more certainty for parties and ensuring that claims are made in appropriate cases is education, both at law school and via ongoing accreditation courses. Legal professionals (and others) working in the area need better knowledge both about family violence and also regarding the appropriate way to make a claim for adjustment on the basis of family violence in property settlement matters. Further, given the number of self-represented litigants, and for those who resolve matters privately, documentation provided by the courts and the various legal aid departments could address this issue, as could training of family dispute resolution practitioners. A more uniform and widespread understanding of the application of this test can only work to increase recognition of potential claims and improve the presentation of evidence. Indeed, the flow on effect of this might be to increase the opportunity for superior judicial comment on *Kennon* which in turn would provide greater clarity and certainty.

Conclusion

Family violence is not just an issue of the protection of children. As Chisholm highlights, ‘the family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding’.¹⁴⁷ Dewar agrees that ‘[t]he problem is . . . everything depends on violence being properly identified, understood and responded to by all actors in the system; . . . this is precisely where the Australian system has failed.’¹⁴⁸ These sentiments apply to all the ways in which family violence might be relevant to the breakdown of an intimate relationship. It is very convenient to characterise the relevance of family violence in a narrow way, as originally occurred in relation to parenting matters. However, there are very broad implications to the impacts of violence on women in the home which are, to a large extent, ignored when we talk about the division of property. Brewster FM believes this is a matter for the legislature, because *Kennon* is the reflection of a ‘public policy’ issue. As indicated above, we agree that a legislative solution would be preferable; however until that eventuates, judicial officers have no choice but to fill the gap that exists.

Kennon represented a welcome advance in this regard, however, it is now becoming clear that the principle as originally formulated is not sufficiently robust. We have not sought in this article to build a comprehensive argument as to precisely how the court, or legislature for that matter, should address domestic violence in property proceedings. Rather, our aim was to explore how the *Kennon* principle is being applied. Our findings make a compelling case as to the need for a fresh consideration of the issue; hopefully they will help reignite this debate. With the present focus on family violence in parenting matters, it is an opportune time for the spotlight to be brought back to how best to ensure violence in the home is appropriately considered in property cases.

¹⁴⁷ R Chisholm, *Family Courts Violence Review*, Commonwealth Attorney-General’s Department, November 2009, p 5.

¹⁴⁸ J Dewar, ‘Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia’ (2010) 24 *AJFL* 139 at 146.