

**BREAKING PRECEDENT:
THE RELEVANCE OF PREVIOUSLY DECIDED CASES IN DETERMINING THE
ENTITLEMENTS OF PARTIES IN PROPERTY PROCEEDINGS¹**

The Hon Justice Paul Brereton AM RFD²

It is of course well-established that (CTH) *Family Law Act 1975*, s 79, confers on a court exercising jurisdiction under it an extraordinarily wide discretion,³ which has even been said by high authority to be largely unfettered.⁴ The challenges this presents, and the dilemma it creates for the Full Court, were well-described by Mason and Deane JJ in *Norbis v Norbis*:⁵

The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines. The tension between the two considerations, each of fundamental importance in family law, has inevitably led to a near dilemma for the Full Court of the Family Court. To avoid the risk of inconsistency and arbitrariness, which is inherent in a system of relief involving a complex of discretionary assessments and judgments, the Full Court, as a specialist appellate court with unique experience in the field of family law in this country, should give guidance as to the manner in which these assessments and judgments are to be made. Yet guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be.

In a similar vein, in the same case Brennan J referred to the need for consistency and the undesirability of idiosyncrasy in decision-making, particularly in the family law context, and the desirability of developing guidelines for that purpose:⁶

The authority of an appellate court to give guidance is not to be doubted. It is inevitable that the wisdom gained in continually supervising the exercise of a statutory discretion will find expression in judicial guidelines. That is not to invest an appellate court with legislative power but rather to acknowledge that, in the way of the common law, a principle which can be seen to be common to a particular class of case will ultimately find judicial expression. The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious. These considerations are of especial importance in the administration of the law relating to custody of children, maintenance and property arrangements on the dissolution of marriage. The anguish and emotion generated by litigation of this kind are exacerbated by orders which are made without the sanction of known principles and which are seen to be framed according to the idiosyncratic notions of an individual judge. An unfettered discretion

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² A judge of the Supreme Court of New South Wales.

³ *De Winter and De Winter* (1979) FLC ¶90-605, 78,092 (Gibbs J).

⁴ *Mallet v Mallet (supra)*, at 609 (Gibbs CJ).

⁵ (1986) 161 CLR 513, 519; (1986) FLC ¶91-712.

⁶ 161 CLR, 536.

is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process. As the Scottish Law Commission commented in 1981 with reference to the financial provisions of the Divorce (Scotland) Act 1976 (U.K.) (Family Law: Report on Aliment and Financial Provision, Scot. Law Comm. no.67, par. 3.37):

"The result of a system based on unfettered discretion is that lawyers cannot easily give reliable advice to their clients. Clients in turn feel dissatisfied with the law and lawyers. The system encourages a process of haggling in which one side makes an inflated claim and the other tries to beat it down. A battle of nerves ensues, sometimes right up to the morning of the proof. By that time it is known which judge will be dealing with the case, and this may become a factor affecting last-minute and hurried negotiations. Such a system does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness."

To avoid that situation it is desirable, if it be possible, to give expression to principles which have yielded just and equitable results in the generality of cases to which those principles have been applied. The function of giving expression to principles thus derived falls naturally to the Full Court of the Family Court.

His Honour explained that a guideline should accommodate the generality of cases, but must permit departure from it if its application would produce an unjust or inequitable result.⁷

There may well be situations in which an appellate court will be justified in setting aside a discretionary order if the primary judge, without sufficient grounds, has failed to apply a guideline in a particular case. Where there is nothing to mark the instant case as different from the generality of cases, the failure will suggest that the discretion has not been soundly exercised. The distinction between such a guideline and a binding rule of law, though essential, may be thin in practice. But the distinction must be maintained and a failure to apply the guideline cannot be treated as an error of law: a failure to apply the guideline is no more than a factor which warrants a close scrutiny of the particular exercise of the discretion. What cannot be shut out is the discretion of a primary judge not to apply the guideline when the circumstances of the particular case show that its application would produce an unjust or inequitable result or that another approach would produce a more just and equitable result.

The only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so - guidelines which are not rules of universal application, but which are generally productive of just and equitable orders. If it is possible to develop such guidelines, it is possible to ensure order and consistency in the exercise of the discretionary jurisdiction under the Family Law Act.

One way in which idiosyncrasy can be minimised, and consistency and predictability increased, is by examining how the court has exercised its discretion in comparable cases. Two schools of thought appear to have emerged: what appears to be the dominant school generally eschews reference to and analysis of comparable cases, focussing on the facts of the instant case, and while perhaps accepting that reference to comparable cases is not impermissible, finds little assistance in it.

⁷ 161 CLR, 537.

Nonetheless, I venture that in every case, tacitly if not explicitly, judges and practitioners refer to and rely on their experience in similar cases to decide where the instant case fits and what the outcome should be. What appears to be the minority school, on the other hand - of which I am one - finds it unsatisfying to make discretionary judgments of this kind without being able to explain how they are reached, and finds analysis of comparable cases of assistance in doing so. Moreover, we are all familiar with the concept of a “range” or an “available range”, outside which a discretionary judgment will be liable to be set aside as “manifestly unreasonable”, even though no specific error in it can be identified. The minority school holds to the view that reference to comparable cases is of assistance in identifying that “range”. I call it the minority because it appears to have received a less than enthusiastic reception at appellate level – in my court as well as in yours, as we shall see.

The issue is given currency by a number of recent judgments. I propose to look at them; then some earlier Full Court judgments; then some judgments of the Supreme Court of New South Wales; and finally at a recent High Court judgment in an analogous field. I do not propose to say that either school is right or wrong; indeed, I think examination of the competing judgments reveals a large degree of common ground, and the difference is really one of emphasis, with the two schools both representing legitimate views on a spectrum. But I will venture to explain why, for my part, I think what I have called the minority view is permissible, consistent with authority, and of assistance.

Smith & Fields

At first instance in *Smith & Fields*,⁸ Murphy J – apparently a fully-paid up member of the minority school – was invited by Kirk SC, senior counsel for the husband, to have regard to a table of cases called “comparable big money cases”, the gravamen of which was to suggest that the decisions summarised in the table indicated that in such cases the “range” awarded to wives whose contributions were predominantly domestic ranged between 27.5 and 40 per cent.

His Honour described the assessment of contributions as an exercise “performed not only within the specific legislative context earlier referred to, but also within the context of what is now nearly 40 years of decided cases” – an observation that echoes the dictum of the Full Court in *McLay & McLay*,⁹ referred to below.

His Honour said:

85. Mr Kirk submits that this Court cannot ignore earlier decisions where the facts can be said to be similar, although his submissions, correctly, recognise that the section requires individual justice, that no two marriages are identical and that, as a result, decisions in earlier cases need to be treated with some circumspection in so far as the results within them might guide the discretion in this, different, case.

86. It is not, then, suggested that any particular decision (including decisions of the Full Court) is binding as to result, but it is contended that there is a consistency in

⁸ [2012] FamCA 510.

⁹ (1996) FLC ¶92-667, 82,901.

the range of results which cannot be ignored. Specifically, Mr Kirk grounds this argument by reference to a comparison of this case with a tabulation of decisions of the Full Court in what his table's heading calls "comparable big money cases" ...

His Honour then set out Kirk SC's table, which was as follows:

| | [Smith] | Lynch | Ferraro | Webster | McLay | Whiteley | Phillips |
|-------------------------------------|---------------|-------------|------------|---------------------------------|----------|-----------------|-----------------------------|
| Assets at start | Minimal | Minimal | Minimal | Wife beneficiary parent's trust | Modest | Nominal | Nominal |
| Period | 29 years | 16/20 years | 28 years | 15 years | 21 years | 27 years | 31 years |
| No. of children | 3 | 4 | 3 | 3 | 1 | 1 | 2 |
| Assistance with children by husband | Some | Significant | Negligible | Some | Minor | Average | Limited |
| Work by wife in business | Some | None | None | Significant | None | Not significant | Significant in early stages |
| Period post separation | 4 years | 8 years | 1½ years | 1½ years | 1 year | 1 year | 3 years |
| Dependent children (post trial) | None | None | 1 | 3 | None | None | None |
| Trust problems | None | Many | None | \$5m children's trust | ? | ? | ? |
| Pool | \$30M - \$40M | \$40M+ | \$12M | \$21.3M | \$8.8M | \$11.3M | \$25M |
| Percentage | ?% | 27½% | 37½% | 27½% | 40% | 30% | 40% |
| Dollars | \$? | \$10M | \$4.5M | \$6.6M | \$3.5M | \$3.4M | \$10.3M |

His Honour then proceeded to hold that it was appropriate to take into account earlier decisions in comparable cases, albeit subject to significant caveats:

88. In my view, it is appropriate, as counsel suggests, to take account of earlier decisions so as to inform generally the parameters of the discretion. However, care must be exercised; orders in any given case are about effecting individual justice by reference to individual circumstances and it is imperative that reference to those decisions should not be used as a fetter on the wide discretion inherent in the section.

89. Reference to counsel's table shows a range of entitlements to the wives in those cases (and it might be observed that in each case it is the wife who receives the lower proportion of the assets) of between 27.5 per cent and 40 per cent. I do not propose to descend into a detailed analysis of each of those decisions; doing so is, in my view, contrary to the principles to which I have earlier referred. I am also conscious of the fact that authorities different to those collated might be produced in an alternative table and be said to be illustrative of a different "range" – a difficulty

inherent in all non-exhaustive comparisons. Nevertheless, results arrived at by an appellate court in other cases where there is a reasonable degree of comparability with the case under consideration cannot, if the jurisprudence is to have a genuine semblance of consistency (despite the wide discretion within it), be simply cast aside as irrelevant.

As I propose to show, there is authority in the Full Court – and indeed in the High Court, albeit in a different sphere – which would support that general approach, subject to a qualification in respect of his Honour's view that a detailed analysis of the comparable cases was not appropriate.

Petruski & Balewa

The arrival of *Fields & Smith* in the Full Court was presaged by its observations in *Petruski & Balewa*, in which the Court said:¹⁰

74 Before leaving these grounds of appeal there is one matter on which we wish to comment. Counsel for the wife, in his written submissions, cited a number of first instance decisions where the court had, in relatively short marriages, assessed the percentage entitlements of the parties at levels similar to that contended for by the wife to indicate that the result reached by his Honour departed so much from the results in these cases that his Honour was plainly wrong. We consider such an exercise to be unhelpful. The task to be undertaken by a trial judge in applying ss 79(2), 79(4) and 75(2) of the Act requires the trial judge to consider the particular circumstances of the case before him or her in determining whether any and if so what order should be made. What another judge may do in another case on the basis of the facts in that case can rarely if ever determine what is done in the case at hand.

As will be seen, not all Full Courts have found such an exercise unhelpful. Moreover, it may be doubted that even the most ardent advocate of the minority school would suggest that decisions in a comparable case will be determinative; only that – especially where a pattern can be seen in a number of comparative cases – they should be influential.

Fields & Smith

*Fields & Smith*¹¹ was the wife's appeal to the Full Court from Murphy J's judgment. For the appellant wife, Richardson SC contended that notwithstanding the caveats he had expressed, Murphy J had relied on the table and thereby impermissibly fettered the discretion.

Bryant CJ and Ainslie-Wallace J said (emphasis added):

114. *We cannot be certain that notwithstanding the caveats his Honour referred to at [85], his Honour was not led into error by relying on the table.* First and foremost, the table is set out in his judgment in its entirety. Secondly, his Honour points out that self-evidently the table indicates that in each of the cases the proportions to be received by the wives was between 27.5 per cent and 40 per cent. In this case, it is clear from his Honour's earlier comments that the wife's contribution in this marriage was a significant one and that when apparently assessing her against the table it

¹⁰ [2013] FamCAFC 15 (20 February 2013) (Bryant CJ, Strickland & Moncrieff JJ).

¹¹ [2015] FamCAFC 57 (17 April 2015) (Bryant CJ, May and Ainslie-Wallace JJ).

would seem reasonable that she should receive the upper limit of the awards if the table were to be followed. In fact the wife did receive 40 per cent, or the upper limit of the table.

115. *The fetter on the discretion lies, in our view, in the apparent reliance on the table which then has the appearance of acting as a ceiling which prevents the wife from effectively being considered as entitled to any more than 40 per cent, or suggests a result in a particular range should follow.*

116. *Equally importantly, however, the process of considering “other cases where there is a reasonable degree of comparability with the case under consideration” cannot be effectively achieved by the bald statements in the table produced.* Indeed, his Honour himself at [89] suggests that “authorities different to those collated might be produced in an alternative table and be said to be illustrative of a different ‘range’”. We agree with his Honour and therefore find the inclusion of the table in his reasons for judgment all the more concerning. If, as we perceive, his Honour did place reliance on the table, in saying at [89] that he was unable to “simply cast aside as irrelevant” cases which “have a genuine semblance of consistency”, his Honour was apparently referring to the table produced. Otherwise, there would be no point in producing it at all.

117. *The problem with the table is that it gives no indication of the relevant facts in the particular cases.* Headings such as “Assistance with children by husband”, “Work by wife in business”, “Dependent children (post trial)”, and “Trust problems” give no indication of how, as his Honour suggests, those cases have a “genuine semblance of consistency” with the present case, other than in the most broad sense possible. One of the cases, *Webster*, indeed did not involve the wife at all and it was in fact a husband who received the amount set out in the table. The *Whitely* case involved an entirely different case and was about the contributions of a wife/muse to a very successful artist. *With all due respect to his Honour, the table can only inform the glibbest of comparisons, and although it may be a seductive tool, it cannot illuminate the valuing and weighing of contributions in this particular case and carries with it the danger, if relied upon, of detracting from the individual requirement to make orders that are just and equitable in an individual case. And further, as his Honour points out, there are cases which would support a higher percentage which were not part of the table at all.*

118. Given what we have said about the necessity for clarity of reasoning when creating a differential of 20 per cent in relation to the assessment of contribution, apparent reliance on a table with the limitations discussed, which sets limits on the range of possible outcomes, and is designed to do so, leads to uncertainty as to whether his Honour was led into error by reliance upon the table.

...

120. As we have indicated, his Honour’s inclusion of the table of comparable cases, the information contained in that table and the ultimate outcome have led us to conclude that his Honour acted on a wrong principle and reached a conclusion which is plainly wrong.

121. Accordingly we find merit in these complaints and would allow the appeal.

It is important to appreciate just what the Full Court did and did not say. The Full Court did not say that reference to comparable judgments was not permissible, or

even not helpful. What the Full Court said was that the correspondence of the result (40%) with the upper end of the range of cases in the table suggested that the table had been adopted as defining the limits of the range, which impermissibly fettered the discretion. The bald statements in the table did not disclose such a comparative and analytical exercise as was required if use were to be made of comparative judgments. Implicitly, what was missing was an explanation of how the contributions in the instant case compared with those in the cases referred to in the table. What may well have made the difference would have been an explanation of why the husband's contributions proportionately were not less, and the wife's not greater, than those in *McLay* and *Phillips* (other cases in which the wife had been awarded 40%).

Earlier Full Court authorities

Against that background, let me mention some earlier Full Court authorities. The first two are well-known and often referred to in the context of "big-money" cases, and are amongst those referred to in the "table".

McLay & McLay

The influence of previous judgments was mentioned by the Full Court in *McLay & McLay*,¹² in terms similar to those used by Murphy J in *Smith & Fields* (emphasis added):

A judge commencing a s 79 hearing does not start with the terms of that section and a blank sheet of paper. In exercising that discretion in the individual case the judge brings to bear his or her own experience and judgment *and also the experience and guidance provided over the years by judgments at first instance and on appeal*: see, for example, the discussion of Mason CJ, Deane and Brennan JJ in *Norbis*, supra.

While that statement refers, expressly, to guidance provided by judgments at first instance and on appeal, in referring to the judge's own experience it also necessarily includes the judge's experience in more or less comparable cases.

JEL & DDF

In *JEL & DDF*,¹³ Kay J said:

Some guidance as to the limits of a proper exercise of discretion in such very large money cases can be drawn by reference to earlier decisions.

His Honour then proceeded to review *Phillips* and *Ferraro*, compare their facts with those of the instant case, and conclude that the differences were not adequately reflected in the result as first instance.

In the same case, Holden and Guest JJ said¹⁴ (emphasis added):

¹² (1996) FLC ¶92-667, 82,901 (Nicholson CJ, Fogarty and Dessau JJ).

¹³ (2001) FLC ¶93-075, 88,309 [3].

¹⁴ (2001) FLC ¶93-075, 88,335 [152].

Whilst *decisions in previous cases where special factors were found to exist may provide some guidance to judges at first instance*, they are not prescriptive, except to the extent that they purport to lay down general principles.

SPG & BAG

The third case to which I refer remains unreported, although it contains an erudite conceptual analysis of the s 79 jurisdiction in the context of a big money case. It is a judgment of Lindenmayer, Finn and Guest JJ on 20 December 2001, called *SPG v BAG*.¹⁵

The trial judge had awarded the wife 42.5% of a pool of close to \$8 million, largely the product of property development, in which the husband had played the overwhelming role, while the wife, almost to the exclusion of the husband, had been homemaker and parent to two children. The husband appealed, contending that the award to the wife was excessive. I must disclose that I was counsel for the appellant husband, while Mr Murray Tobias QC (as he then was) was counsel for the respondent wife. Two of the grounds of appeal were:

27. Her Honour was in error in failing to have any or sufficient regard to the range of outcomes established by comparable decided cases.

28. Her Honour was in error in concluding that the contributions were to be apportioned 42.5% to the wife and 57.5% to the husband and failing to apportion them 33% to the wife and 67% to the husband.

The first of those grounds failed, not because the Full Court did not think it proper to have regard to comparable cases, but because it did not accept that her Honour had not failed to do so. The second ground succeeded, because the comparable decided cases when analysed and compared with the facts of the instant case showed that the judgment was not reconcilable with them. The Court said (emphasis added):

224. In very lengthy and detailed submissions in support of these grounds, senior counsel for the husband referred to, closely analysed, and compared in detail with the facts of this case, the facts and results of several reported and unreported cases, involving pools of property in the so-called “high range”, which have been decided in this jurisdiction over the past 12 to 13 years, either by the Full Court or at first instance. These cases included those referred to by the trial Judge, which we have identified in paragraph 68 hereof, and the subsequently reported case of *JEL and DDF* (2001) FLC 93-075. That analysis was predicated upon the following premise:-

“While property adjustment under s.79 is, as is well known, a discretionary exercise – so that even a judgment in an identical case, were there such a thing, would not have the force of a binding precedent as to the percentage division – decided cases are nonetheless useful and important for illustrating the ambit of the legitimate range of judicial discretion.”

225. As authority for that statement, reliance was placed upon dicta of the Full Court (Nicholson CJ, Fogarty and Dessau JJ) in *McLay and McLay* (*supra*) at 82,901, and of Kay J (as a member of the Full Court) in *JEL and DDF* (*supra*) at 88,309 (paragraph 3).

¹⁵ [2001] FamCA 1453.

226. *We accept the validity of the premise*, provided that, in comparing one case with others, it is kept very clearly in mind that **no two cases are ever precisely alike**, and that the discretion reposed in the trial Judge by s.79 was described by Gibbs J (as he then was) in *De Winter and De Winter* (1979) FLC 90-605 at 78,092 as “extraordinarily wide”, and by the same learned Judge, as Chief Justice, in *Mallet v Mallet* (*supra*), at 609, as “largely unfettered”.

Having accepted that premise, with that caveat, the Court considered the comparative analysis; notably, many of the cases referred to were also referred to in the table in *Smith & Fields*:

235. As previously noted, these submissions then undertook a detailed analysis of the second group of cases referred to above (*Ferraro, McLay, Stay* and *JEL and DDF*, all *supra*) and a close comparison of the facts of those cases with those of this case, as found by the trial Judge. We think that it would serve little purpose for us to repeat, or even attempt to summarise, that detailed analysis and comparison in this judgment. It will suffice, at this point, to say that we found that detailed analysis and comparison to be meticulous, illuminating and, at least on the surface, persuasive, in so far as it satisfied us that, certainly in each of *McLay* and *Stay*, and arguably in *Ferraro*, in comparative terms, the contribution of the husband was proportionately smaller, and that of the wife proportionately greater, than the respective contributions of the husband and the wife in this case, which were closer to those of Mr L. and Mrs F., respectively in *JEL and DDF* (*supra*).

236. There is, of course, a natural reluctance on the part of this Court to seek to define too closely the parameters of the range of a reasonable assessment of the parties' contributions in any given case, or in a given class of cases, lest it be seen to fall into the error of substituting its own exercise of discretion for that of the trial Judge. At the same time, however, it is the duty and function of this Court to scrutinise the exercise by trial Judges of the discretion vested in them by the legislation, *and by a process of careful analysis and comparison of like cases*, and the promulgation of guidelines for the exercise of the discretion, to attempt to ensure a reasonable measure of consistency of outcomes (and therefore of predictability of result) in similar cases, for the ultimate benefit of the litigating public: *Norbis v Norbis* (1986) 161 CLR 513; (1986) FLC 91-712, per Mason, Deane and Brennan JJ.

Those passages demonstrate the utility of comparable cases, and how they can be applied to show that a first instance judgment is outside the available range. This was explained:

238. If a trial judge in a given case, properly performing his or her duty, within those guidelines makes a finding about or an assessment of the parties' total contributions in the terms to which we have referred, that offers this Court, in the exercise of its supervisory role, *the opportunity to scrutinise that part of the reasoning process by which the trial judge reached his or her ultimate conclusion and compare it with the same step taken in earlier similar cases and, if satisfied that the assessment arrived at in the case under review is significantly out of step with the assessment made in the earlier cases, to conclude that the trial judge somehow erred in his or her assessment in the case at hand.*

In rejecting ground 27 (failing to have any or sufficient regard to the range of outcomes established by comparable decided cases), the Court did not suggest that it would not have been erroneous to fail to have regard to comparable cases. The Court said:

246. It is true that, in paragraph 123 of her judgment, after referring to a submission by senior counsel who then appeared for the wife to the effect that the analysis undertaken by senior counsel for the husband “has limited scope and does no more than demonstrate that each matter stands to be determined according to its own particular facts”, her Honour said this:-

“For myself, I think there is something to be said against trying to be too precise about these matters. Often short summaries do not capture the substance of contributions in a particular case.”

247. Nevertheless, we do not take that statement by her Honour to signify a rejection of the use of the outcomes in other apparently comparable cases as a guide to how the discretion might reasonably be exercised in a given case, but only as a caution against a too ready assumption of comparability based on what are often only broad summaries in the judgments (especially on appeal) of the relevant facts. It is a caution with which we would agree.

248. Accordingly, we think that this is not a case in which it could validly be submitted that her Honour failed to have any or any sufficient regard to the apportionments arrived at in comparable cases before coming to her assessment of the appropriate apportionment in this case. Thus, although ground 27 was not formally abandoned, the thrust of the case of the husband on these grounds was, and could really only be, that her Honour’s apportionment fell outside “the generous ambit of reasonable disagreement” referred to by Brennan J in *Norbis, supra*, which is essentially what is asserted by ground 28.

The Court then summarised the wife’s submissions (emphasis added):

256. It was then submitted that if the contribution of each party in this case in his or her principal role were assessed in its own sphere, the wife’s “marks on the home front would necessarily on [the trial Judge’s findings] be very high indeed”, and that the contribution of the husband “in his main sphere” would also be “[a] high one of course, taking care to leave some leeway for the likes of Messrs Gates, Hawking and Picasso should such persons one day find themselves litigating in the court”. He therefore submitted that in the circumstances of this case (including those referred to above as having taken “considerable gloss off” the husband’s contributions) the mark for the husband for his contribution in his sphere was “surely not much higher than [that for] the Wife for her performance in her main sphere”. That submission loses some force as a result of our decision that ground 11, relating to the SWC issue, should be upheld.

257. It was then submitted that if the contribution of each party in his or her subsidiary sphere (husband as homemaker/parent and wife as financial activist) were compared, on the trial Judge’s findings, the husband should receive a lower marking for his contribution than the wife for hers. Accordingly, it was submitted that “conservatively, the range applicable to the wife which reasonably reflects her contribution is between 40-50%”, so that her Honour’s finding “that the Wife was responsible for 42.5% of the compendious contributions of both parties”, whilst open to her, was “at the bottom or lower end of the range” of a reasonable exercise of discretion.

258. Finally, and in summation on this point, senior counsel for the wife submitted:-

“(z) *The authorities quoted in the judgment and relied on in argument demonstrate no more than the proposition expounded in **Mallet** (supra) and*

elsewhere that each case turns on its own facts. ... Comparisons of individual background matrices of facts and margins allowed is not very useful in any other case, including this one.

...

(bb) At the end of the day, her Honour's assessment of 42.5% for the Wife and 57.5% for the Husband cannot be said to be 'manifestly outside the legitimate range of reasonable disagreement' the test accepted (properly) in the Husband's Submissions at #10."

The Court, however, concluded:

259. Having carefully considered the submissions of the parties on this issue, we have concluded that the trial Judge's determination that the parties' property should be divided between them, on the basis of their contributions, in a way which gives the husband \$1,174,154 more than the wife, out of a total pool of \$7,827,693, gives manifestly insufficient recognition to the significant disparity, favourable to the husband, in those contributions. Accordingly, in our judgment, that determination falls outside the range of a reasonable exercise of discretion, and is, in the relevant sense, "plainly wrong". Ground 28 (but not ground 27) of the appeal is therefore upheld.

SPG & BAG amounts to a strong endorsement by a unanimous Full Court of the utility of comparable cases, and a demonstration of how they should be used – not merely to describe the limits of a range, but through an analysis of the similarities and differences to illuminate where the contributions in the instant case fall within – or outside – that range.

New South Wales authorities

The Supreme Court of New South Wales exercised a closely similar jurisdiction under (NSW) *Property (Relationships) Act*, s 20. A similar divergence of approach to the use of comparable decisions emerged there.

Sharpless v McKibbin

In *Sharpless v McKibbin*,¹⁶ a same-sex de facto property case under that Act, I referred to comparable cases and identified the differences to confirm the result reached:

[94] In my judgment, once the matters to which I have referred are taken into account, the contributions should be evaluated in proportions 96:4 in favour of Mr McKibbin. In a case of this type, mathematical justification of such a result is even more impossible than in an ordinary case under the Act. But the appropriateness of the assessment may be gauged from the range produced by a number of "sole contribution" cases, under the (CTH) Family Law Act 1975 and under the Property (Relationships) Act. In *Figgins & Figgins* (2002) 173 FLR 273; (2002) 29 Fam LR 544; (2002) FLC 93-122; [2002] FamCA 688 (Nicholson CJ, Ellis and Buckley JJ), with a pool of some \$21,000,000 of which \$14,000,000 was inherited by the husband early in a relatively short marriage, and the remainder accumulated by the joint

¹⁶ [2007] NSWSC 1498.

efforts of the parties, but for which the inheritance was the seed money, the wife was found to be entitled to about 8% on the contributions; this equates to about 24% of the \$7 million increment in value during the relationship. (She received an additional 3% by reference to the s 75(2) factors, which are not relevant for the purposes of the Property (Relationships) Act). In *Kennon & Kennon* (1997) FLC 92–757, of a pool of about \$8,700,000 — all of which was held by the husband (who earned \$1,000,000 per annum) before the marriage, the wife (in a marriage of about five years with no children) was held entitled to about 4.6% on the contributions (and an additional 3.4% for the s 75(2) factors). And in *Dwyer v Kaljo* (1992) 27 NSWLR 728, (1992) DFC 95–127, Mr Kaljo had assets of at least \$11 million to which Ms Dwyer had not contributed; she had enjoyed many benefits during the relationship, but had made contributions as a homemaker during their six year relationship; the Court of Appeal increased the trial judge’s award of \$50,000 to \$400,000 (3.6%). I have taken into account that the pool in the present case is significantly smaller than in those cases, and thus the domestic contributions attract greater weight; I regard Mr Sharpless’ net contributions, once regard is had to the benefits, financial and otherwise, conferred on him by or taken by him from Mr McKibbin, as significantly less, in absolute terms, than those of Ms Dwyer and Mrs Kennon, let alone those of Mrs Figgins.

Burgess v Moss

*Burgess v Moss*¹⁷ was an appeal from the District Court to the Court of Appeal, in a de facto property case. On the question whether the trial judge’s assessment of Ms Moss’ contributions at 21% was manifestly excessive, or “outside the legitimate range of the generous discretion given by s 20 of the Property (Relationships) Act”, I said:

[18] Although counsel for the respondent argued to the contrary, I do not know of any better way to describe the legitimate range of that generous discretion than by reference to judicial decisions in cases bearing some similarity (see, for example the exercise undertaken in *Sharpless*, at [94]), but it remains fundamental that each case involves its own exercise of judicial discretion, attending to the particular features and circumstances of that case.

[19] There are significant differences of materiality between the present case and the cases to which reference was made in *Sharpless* at [94]. First, the relationship was significantly longer than the relationships in *Figgins v Figgins* (2002) 173 FLR 273, in *Kennon v Kennon* (1997) FLC 92-757 and in *Dwyer v Kaljo* (1992) 27 NSWLR 728. That, of itself, indicates that the homemaker contribution is entitled to greater weight here than it was in those cases. Secondly, the asset pool in the current case was a very much smaller asset pool than in any of those three cases. The smaller the asset pool, typically the more significant will be the homemaker contribution and the less significant will be the financial contributions. That is plainly so in the present case. Thirdly, there is the circumstance that by moving from Western Australia to New South Wales and foregoing secure full time employment in Western Australia and the opportunity to accumulate her own asset position the domestic contributions of Ms Moss are accentuated.

[20] A second way of looking at it is in absolute terms. In *Figgins*, Mrs Figgins received about \$1.7 million on account of her domestic contributions alone. In *Kennon*, Mrs Kennon received about \$400,000 on account of domestic contributions alone and in *Dwyer*, Ms Kaljo received about \$400,000 also for domestic

¹⁷ [2010] NSWCA 139.

contributions alone. It can be seen that in absolute terms, for contributions which were not (at least significantly) less than those in each of those three cases, and in some respects more, Ms Moss will receive a lesser amount, principally because her contributions were to a smaller pool. That, I think, demonstrates that it cannot be said that the amount to which she was held to be entitled was manifestly excessive.

[21] Yet another way of looking at it is to look only at the increase in value of assets from cohabitation (when they were about \$340,000) to separation (when they were about \$1.11 million), an increase of some \$770,000 over the period of the relationship. The award to Ms Moss represents a shade over 30% of the increment in the value of the property of the parties over that period. To my mind, it cannot be said that such apportionment attributes manifestly excessive significance to a sixteen year long homemaker contribution, and her modest income contributions, against Mr Burgess' significant initial contributions, his ongoing income contributions and his contributions to development of the property. Conversely, in my judgment it cannot be said that it demonstrates that insufficient weight was given to his unquestionably important initial and ongoing contributions.

[22] The result cannot be said to be outside the legitimate range of the generous discretion given by s 20 to a trial judge.

However, the reference to comparable cases did not receive endorsement from the other members of the Court. Beazley JA agreed with the conclusion, but added a caution about the use of comparable cases. Her Honour said (emphasis added):

[25] Although the challenge was to her Honour's reasons, the underlying complaint was that the order made by her Honour was simply too much and, as Brereton J has indicated, the adjustment ordered by her Honour was not outside the range of orders made in such cases. Care must be taken in deciding cases under this legislation in referring to "ranges" or "tariffs" for two reasons. First, the assessment required under the legislation is an evaluative one. Secondly, and this feeds back into the first, the evaluative judgment is made in a diverse range of circumstances including the relationships that fall within the Act, the pool of assets that are available for adjustment and the nature and quality of the contributions that are made by the parties.

[26] It would be wrong given those wide range of circumstances that fall to be determined to have a "tariff" reflecting the contribution of particular types of claimants, such as homemaker claimants. In other words, the legislation does not authorise the adoption of a tariff in the evaluation of what is just and equitable in a particular case.

[27] The adoption of a "tariff" not only has the tendency to ossify the just and equitable compensation payable to claimants under the Act (which of itself may adversely affect the interest of one or other of the parties in a way that is not authorised by the legislation), it also has the tendency to distract attention from the evaluative judgment that is required by the legislation. *That is not to say that guidance cannot be obtained from the approaches of other judges in other cases. However, such cases may only be used as a guide and not as a replacement for the court's own discretionary judgment in a particular case.*

Notwithstanding the reservations expressed by her Honour, the last two sentences of [27] are entirely consistent with the approach I advocate.

The other member of the bench was Tobias JA, who said (emphasis added):

[28] I agree with the orders proposed by Brereton J and, subject to one matter, with his reasons. However, like Beazley JA and for the reasons she has stated with which I respectfully agree, I do not find much assistance in the use of other cases of the nature of those referred to at [94] of Brereton J's judgment in *Sharpless v McKibbin* as providing any reliable "tariff" in what is an inexact and non-scientific evaluative process or task dependent on its own facts and circumstances. This is particularly so in a case such as the present where one is assessing a wholly non-financial homemaker contribution of the respondent.

[29] The relevant principles in relation to the evaluative task required under s 20 of the Act are summarised by McColl JA, with whom in this respect Beazley JA agreed, at [106] and [108] of *Hayes v Marquis* (2008) NSWCA 10, as well as in the judgment of Einstein J in the same case at [195]–[197]. As Einstein J noted at [197] in *Howlett v Neilsen*, Hodgson JA observed that the task of identifying and evaluating the respective contributions of the parties for the purpose of s 20 was not a narrow or purely mathematical process. It is, indeed, an exercise of a discretionary power of a very general kind and referred to in the authorities as a "holistic value judgment". *Those factors in my view support the proposition advanced by Beazley JA in this case that it is misleading and unhelpful for reference to be made to the decisions in other cases on entirely different fact situations as providing some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made under s 20 founded, as they are required to be, on no more precise a test that what is "fair and equitable".*

[30] I appreciate that Brereton J in the reasons that he has just given is generally of a similar view but I do not think that a citation of the authorities in the manner which his Honour adopted at [94] of his judgment in *Sharpless* is going to be of any assistance to the evaluative task in which the court is engaged by s 20 of the Act.

Barbaro v R

Finally, it is instructive to consider a decision of the High Court in a different but analogous field – the discretionary exercise of sentencing in the criminal law. In *Barbaro v R*,¹⁸ the High Court was concerned with a practice which had emerged in Victoria of sentencing judges asking the prosecution to make a submission as to what was the "available range". The offenders had pleaded guilty in the context of a "plea bargain" in which the prosecution had indicated that it would submit to the sentencing judge a particular available range. The sentencing judge, King J, declined to permit such a submission to be made, saying that it would be of no assistance, and imposed sentences which exceeded what the prosecution would have submitted was "the range". The offenders appealed, complaining that her Honour refusal to entertain a prosecution submission as to the available range amounted to a denial of procedural fairness.

The High Court dismissed the appeal. French CJ, Hayne, Kiefel and Bell JJ disapproved the practice, in cases of criminal sentencing, of prosecutors making a bare submission as to the bounds of the permissible range of sentences, or for that matter the specific sentence, that should be imposed. But even in that context, the

¹⁸ [2014] HCA 2; (2014) 253 CLR 58; (2014) 305 ALR 323.

High Court made very clear that it was appropriate and necessary to have regard to "more or less" comparable decisions.

The Court first (at [24]-[28]) explained the concept of the "available range" - noting that a judge fixing the sentence to be imposed on an offender exercises a discretionary judgment - as being derived from the residuary category of error in discretionary judgment referred to in *House v The King*, where the result embodied in the court's order "is unreasonable or plainly unjust" and the appellate court infers "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".

26. ... In the field of sentencing appeals, this kind of error is usually referred to as "manifest excess" or "manifest inadequacy". But this kind of error can also be (and often is) described as the sentence imposed falling outside the *range* of sentences which could have been imposed if proper principles had been applied. It is, then, common to speak of a sentence as falling outside the *available* range of sentences.

27. The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some "substantial wrong has in fact occurred" in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.

28. Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an "available range" of sentences, stating the bounds of an "available range" of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall.

Those observations are capable of application to s 79.

Next, the Court identified reasons why a bare statement of the prosecution's view of the available range was of no utility. *First*, the prosecution's view may be affected by extraneous considerations tending to leniency - such as cooperation with authorities or avoiding a lengthy trial - which no-one would contradict. That is unlikely to be a problem in the s 79 context. *Secondly*, a bare statement of the range did not encompass the variables so far as the facts that might be found were concerned. Their Honours said:

37. This serves to demonstrate that bare statement of a range tells a sentencing judge nothing of the conclusions or assumptions upon which the range depends.

That rather reflects what the Full Court said in *Fields* as to the inadequacy of the very brief descriptors in the table to explain the similarities and differences. *Thirdly*, a bare statement of the range was a mere assertion of the prosecution's opinion which was irrelevant.

However, it is clear that what the High Court was concerned about was a bare statement of available range. Their Honours proceeded to endorse the "proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases" (emphasis added):

39. ... Even in a case where the judge does give some preliminary indication of the proposed sentence, the role and duty of the prosecution remains the duty which has been indicated earlier in these reasons: to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied *and what has been done in other (more or less) comparable cases*. It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall.

40. *The setting of bounds to the available range of sentences in a particular case must, however, be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases.* Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence.

41. As the plurality pointed out in *Hili v The Queen*, in seeking consistency *sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect.*

Gageler J agreed in the outcome, but disagreed on the permissibility of a submission as to the available range. His Honour said that, whether made on behalf of the prosecution or on behalf of the offender, a submission that a sentence within a given range would or would not be available in the circumstances of a particular case was a submission of law, because it amounted to a submission that a sentence within that range would or would not fall within the limits of a proper exercise of the sentencing discretion. Similarly, the character of a submission that a sentence within a given range would or would not be available to be imposed by a sentencing court in the circumstances of a particular case as one of law similarly cannot depend on whether the submission is made to a sentencing court or to a court of criminal appeal. His Honour said:

62. The majority of the Court of Appeal of the Supreme Court of Victoria in *R v MacNeil-Brown* (Maxwell P, Vincent and Redlich JJA) was in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance. If a sentencing court can be told after the event on an appeal by the prosecution that the sentence it has imposed is outside the available range for reasons articulated after the event by an appellate court which may or may not "admit of lengthy exposition", the same sentencing court should in principle be able to expect to be assisted before the event by a prosecution submission as to the available range

supported by such exposition of the reasons for that range as might at that time seem both possible and appropriate. Such a prosecution submission, where made, has no greater or lesser status than any other submission of law. The sentencing court is not bound to accept the submission and may or may not in the event be assisted by it. The sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but remains entitled to expect to be assisted in so doing by appropriate submissions of law.

With respect, I find Gageler J's reasoning on this highly persuasive. It may well be that the majority view is influenced by the *sui generis* nature of sentencing proceedings, in which the prosecution has traditionally had a very constrained role. I do not think it would be suggested that in a s 79 case, it was impermissible to make a submission as to the available range, or the precise result, that should be reached.

But what is very clear, even from the judgment of the plurality, is that reference to "more or less" comparable cases is not only permissible, but essential to the attainment of consistency.

Conclusion

I suggest that the following conclusions can be drawn.

- Property adjustment under s.79 is a discretionary exercise. It remains fundamental that each case involves its own exercise of judicial discretion, attending to the particular features and circumstances of that case. Even a judgment in an identical case, were there such a thing, does not have the force of a binding precedent as to the percentage division.
- However, a proper exercise of the evaluative discretion in s 79 requires reference to what is done in similar cases. While that does not mean that in every case it is necessary expressly to refer to more or less comparable cases, doing so will often be helpful. Decided cases are useful and important for illustrating the generous ambit of the legitimate range of judicial discretion.
- When considering more or less comparable cases, it is not enough to derive a range described by the results in the comparable cases and produce a result within that range. A particular case may fall outside the range so described. It is essential to undertake an exercise of analysis and comparison of their salient features with the subject case, so as to demonstrate why the contributions of a party in the subject case do or do not exceed, proportionately or absolutely, those of the corresponding party in the comparable case. That, I suggest, is what was seen to be missing in *Fields*.
- The essential difference of opinion is not whether reference to comparable cases is permissible – there is practical unanimity that it is at least permissible, although *Barbaro* supports the view that it is necessary. Nor is there difference as to whether comparable cases are determinative – again, there is unanimity that each case requires its own exercise of judicial discretion, attending to the particular features and circumstances of that case. The difference is really about the extent to which reference to comparable

cases is helpful or useful, and different judges find it more or less helpful. Minds will legitimately differ on that.

- For my part, however, I find the exercise useful because it provides transparency of reasoning – it spells out what I suspect we all do tacitly; it promotes and demonstrates consistency in decision-making; it reduces the impact of idiosyncrasy; and in all those ways it assists the profession to give accurate advice, provides potential litigants with more predictable outcomes, and mitigates the disadvantages of discretionary decision-making referred to in the Scottish Law Commission report and *Norbis*, without detracting from the capacity of the Court to do justice in the individual case.

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