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ARTICLE

The Intersecting Nature of Family Violence and Relationship Property in New Zealand: The Need for Reform

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Domestic violence is a negation of a relationship contract. It is a destructive pattern of behaviour which perpetrates severe physical, psychological, and sexual harm to its victims. The law must assist victims in leaving their abusive partners and starting a new life. Unfortunately, New Zealand's Property (Relationships) Act 1976 does not allow for the consideration of family violence. This omission is a glaring shortcoming of our law. This article demonstrates the importance of considering family violence in relationship property proceedings and proposes reform to New Zealand's relationship property law based on a comparative examination of other jurisdictions. Zero tolerance towards family violence should mean zero tolerance.

I Introduction

Family violence is a destructive curse upon New Zealand, which has one of the highest rates of intimate partner violence in the world.[1] Victims of abuse suffer physical, sexual and psychological harm, the effects of which leave them with severe trauma and difficulty in obtaining and maintaining employment. Family violence occurs in the privacy of the home and often between partners. Victims struggle to leave these abusive relationships; when they do, they require court orders to divide their relationship property. However, under the Property (Relationships) Act 1976 (PRA), the courts are not to consider a person's misconduct when making a property-division order unless that misconduct

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1 Good Shepherd New Zealand "New Zealand Family Violence and Economic Harm Statistics" <https://goodshepherd.org.nz>.

meets a very high threshold.[2] Family violence falls short of this requirement time and time again because courts do not consider it "extraordinary".[3] Instead, courts accept it as a common occurrence in New Zealand.

This article explores how family violence intersects with relationship property settlements and proposes that New Zealand law should better reflect this intersection.

Part II discusses the historical development of the PRA, which reflects a desire to promote equality between partners. Part III provides a contextual understanding of family violence, particularly the many decades it has taken to understand the harm family violence causes its victims, before exploring the legislative development of family violence law through a human rights lens. Part III describes how the two spheres of family violence and property division intersect and their importance to one another. Part IV employs case law to exemplify how New Zealand legislation falls short in providing recourse for victims of domestic violence. Part V examines comparable jurisdictions, some of which share New Zealand's deferred community property regime and then evaluates whether a discretionary approach is more equitable than the current equal-sharing regime. Finally, Part VI discusses why reform is essential and how Parliament could implement it.

II Overview of New Zealand's Relationship Property System

The PRA has evolved significantly since 1976 to reach its current form. Understanding the progression of matrimonial property law provides fundamental insight as to why equal division is such a central concept in the PRA.

A *Legislative history*

(1) Common law and the Married Women's Property Act 1884

New Zealand inherited the British "unitary concept of marriage and marital property".[4] Under this model, a husband received "ownership of, or control over, most of the wife's assets".[5] Although these rights were subject to certain equitable principles, this system was mainly to the wife's detriment. Changing social attitudes and vigorous campaigning resulted in New Zealand's Parliament passing the Married Women's Property Act 1884,[6] giving married women the "capacity for acquiring, holding and disposing of property".[7] The Act "stood the test of time for many decades and was not put under any real pressure until the post Second World War era", when there was a rise in the number of divorces.[8] The 1884 Act proved "unable to cope with [these] changing lifestyle patterns".[9]

2 Property (Relationships) Act 1976 [PRA], s 18A(3).
3 Section 13.
4 Bill Atkin "Reflections on New Zealand's Property Reforms 'Five Years On'" (2007) (8) Intl Surv Fam L 217 at 218.
5 RL Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [B1.4].
6 Atkin, above n 4, at 218.
7 Married Women's Property Act 1884, s 3(1).
8 Atkin, above n 4, at 218.
9 At 218.

(2) Joint Family Homes Act 1950

Parliament enacted the Joint Family Homes Act 1950 due to concern over the vulnerability of the family home from the husband's creditors.[10] The Act resulted in spouses having joint ownership of their family home, alongside equal rights to "use and possession, an inalienable right of succession by survivorship, protection against unilateral disposition by either spouse and provision for the summary resolution of matrimonial disputes over the home".[11] Despite the Act being a step in the correct direction, it "failed to tackle property other than the home".[12]

(3) Matrimonial Property Act 1963

The Matrimonial Property Act 1963 (MPA 1963) marked a "radical departure from the conventional rules of property law"[13], shifting away from the separate property concept prescribed by the Married Women's Property Act 1884.[14] Specifically, s 5(3) of the MPA 1963 empowered the courts to "extinguish legal or equitable rights",[15] permitting unfettered discretion, subject only to s 6(2). The application of the law was no longer purely procedural.[16] The court, as illustrated in *Haldane v Haldane,* was able to recognise the "value in monetary terms of work done in the home and in the upbringing of children".[17] For "[t]he cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it".[18] Legislative change therefore had the effect of linking and valuing the duties of the homemaker (at the time, ordinarily, the wife), against the family home.

Despite being a significant milestone, the MPA 1963 soon proved unsatisfactory.[19] In practice, the MPA 1963 relied heavily on unfettered judicial discretion, resulting in wide discrepancies in court orders.[20] Although the courts gave some recognition to the non-financial contributions of women when making their orders, they still generally perceived these factors as far less valuable than the financial contributions of men.[21] In short, the system disadvantaged women.

(4) Matrimonial Property Act 1976

Dissatisfaction with the MPA 1963 resulted in the passage of the Matrimonial Property Act 1976 (MPA 1976), which represented a revolution in the underlying philosophy of

10 Fisher, above n 5, at [B1.9].
11 At [B1.9].
12 Atkin, above n 4, at 218.
13 Atkin "Family property law reform" (1995) 25 VUWLR 77 at 77.
14 Atkin, above n 4, at 218.
15 *Hofman v Hofman* [1965] NZLR 795 (SC) at 800.
16 *Haldane v Haldane* [1976] 2 NZLR 715 (PC) at 722.
17 Atkin, above n 13, at 77; and *Haldane*, above n 16.
18 Lord Simon of Glaisdale, former President of the Probate, Divorce and Admiralty Division of the English High Court "With All My Worldly Goods" (address to the Holdsworth Club, University of Birmingham Faculty of Law, Birmingham, 20 March 1964) at 14–15 as cited in Fisher, above n 5, at [B1.10].
19 Atkin, above n 4, at 218.
20 The Matrimonial Property Act 1963, s 5(2): "On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute"; and Atkin, above n 4, at 77.
21 Nicola Peart (ed) *Relationship Property and Adult Maintenance: Acts and Analysis* (Brookers, Wellington, 2013) at 4

matrimonial property rights. The MPA 1976 heralded a deferred community regime whereby a spouse acquires joint ownership rights in their partner's property upon death or divorce.[22] The MPA 1976 established equal sharing as a core presumption and placed New Zealand "at the forefront of social reform in the common law world".[23]

In place of broad judicial discretion, the MPA 1976 provided a code for the classifying and dividing of matrimonial property: "'[s]plitting property down the middle' looked like the fairest solution and the tidiest way to increase the share of property allocated to women."[24] The MPA 1976 strived to recognise the "equal contribution of husband and wife to the marriage partnership" and to "provide for a just division of the matrimonial property between spouses when their marriage ends".[25] These developments reflected the "liberal feminist views of the time".[26]

Furthermore, the MPA 1976 shifted the law's conception of what constitutes a valuable contribution. Section 18(2) explicitly directed courts to have "no presumption that a contribution of a monetary nature … is of greater value than a contribution of a non-monetary nature".[27] Such contributions included the care of children, household management, the acquisition of matrimonial property, the performance of work or services and the forgoing of a higher standard of living.[28]

The clean-break principle emerged from the considerable flurry of litigation following MPA 1976's enactment.[29] The idea behind this principle is that courts should implement the division of relationship property in a "way which is immediate, complete and final", allowing the former spouses to put the past to bed.[30] Courts would not engage in an in-depth examination of what caused the separation nor who was to blame, reducing the amount of litigation required to finalise the post-separation division of property. Atkin and their colleagues have criticised the clean-break principle as it often operates to the detriment of women and children, as they tend to be worse off financially than men.[31]

While representing a significant improvement over earlier legislation, the MPA 1976 still had several shortcomings that prevented it from achieving its aim of equality. Significantly, the Act only applied to married and separated couples, omitting those who had been in a de facto relationship and those marriages which ended in death.[32] The MPA 1976 also failed to consider spouses' earning capacities post-separation.[33] This omission significantly impacted women who remained home to care for children and support their husbands' careers, leaving them with outdated skills and a bleak professional and financial future.[34] Additionally, the Act did not apply to assets transferred into trusts or companies.[35] Hence, the MPA 1976 had serious gaps that Parliament needed to address with additional reform.

22 Nicola Peart, above n 21, at 4.
23 At 4; and see also Atkin, above n 4, at 218.
24 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis Wellington, 2018) at 3.
25 Matrimonial Property Act 1976 [MPA 1976], long title.
26 Atkin, above n 24, at 3.
27 MPA 1976, s 18(2).
28 Section 18(1).
29 Atkin, above n 4, at 219.
30 Fisher, above n 5, at [D18.47].
31 At [D18.47].
32 Peart, above n 21, at 5.
33 At 4.
34 At 4.
35 At 5.

(5) Property (Relationships) Act 1976

Following a long gestation period, in 2002, Parliament significantly amended the MPA 1976, including changing the MPA 1976's name, which became the PRA.[36] The name change reflected the Act's shift to recognising a broader range of qualifying relationships instead of just spousal relationships.

The PRA is:[37]

> … mainly about how the property of married couples and civil union couples and couples who have lived in a de facto relationship is to be divided up when they separate or one of them dies.

The PRA aims to "recognise the equal contribution of both … partners" and "provide for a just division of the relationship property".[38] Section 1M thus indicates that the PRA maintains the equal-division presumption,[39] and the broader purpose of "ensuring the equal status of women in society" of the MPA 1976.[40] To this end, the PRA provides a detailed scheme of deferred property sharing. It provides an explicit formula which requires very little interpretation, thus avoiding uncertainty and varying results in analogous cases.[41] Under s 11, partners have the right to share equally in the family home, the family chattels and any other relationship property upon the dissolution of a marriage, civil union or de facto relationship, subject to other provisions of the PRA. Property acquired before the marriage or partnership remains separate, subject to other provisions of the PRA,[42] and is "not required to be shared with the non-owning spouse".[43]

Another principle linked to the philosophy of equal sharing emerged from the PRA. The no-fault principle recognises that relationship breakdowns are emotionally charged and that no one should be allocated blame for them.[44] Instead, the law should assist parties in adapting to their changed circumstances.[45] The no-fault and clean-break principles form the two pillars of the PRA.

B *Conclusion*

The legislative history reveals that prior statutory relationship property regimes withheld equal access to relationship property rights from women. The PRA attempts to amend this injustice through the imposition of a regime which advances equality above all else, for "[n]owhere is the progressive emancipation of women reflected more strongly than in the field of matrimonial rights of married people".[46]

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36 Property (Relationships) Amendment Act 2001, s 5(2).
37 PRA, s 1C.
38 Section 1M(b) and (c).
39 Bill Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships" (2001) 3 EJLR 349 at 356.
40 *Reid v Reid* [1979] 1 NZLR 575 (CA) at 580–583.
41 At 581.
42 PRA, s 9.
43 *Hartley v Hartley* (1986) FRNZ 84 (CA) at 88.
44 W R Atkin "The Survival of Fault in Contemporary Family Law in New Zealand" (1979) 10 VUWLR 93 at 93.
45 At 93.
46 Fisher, above n 5, at [B1.4].

III Understanding Family Violence

A *International law*

Family violence is an old and pervasive problem worldwide.[47] The United Nations describes domestic violence as:[48]

> … a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person.

Violence is an attack on one's physical and mental safety, and is an affront to their person. Although international law does not explicitly protect against family violence, it does so implicitly. Article 3 of the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to life, liberty and the security of person".[49] While the UDHR is not binding upon member-states, it profoundly influences them and establishes standards of behaviour and practice.[50] The International Covenant on Civil and Political Rights (ICCPR) contains provisions similar to art 3 of the UDHR,[51] as does the International Covenant on Economic, Social and Cultural Rights.[52]

B *Domestic law*

Historically, New Zealand has failed to give sufficient legislative protection to victims of family violence. Husbands were "permitted to chastise their wives, parents to discipline their children and husbands to be immune from prosecution for raping their wives".[53] It is only in more recent years that family violence is no longer "regarded as an acceptable concomitant of marriage vows but is seen as something undesirable justifying remedial measures".[54]

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47 This article will use the term "family violence" rather than "domestic violence" to reflect the language of the Family Violence Act 2018 [FVA], which replaced the Domestic Violence Act 1995. Family violence covers a broader spectrum of victims than domestic violence, which traditionally has been confined to settings such as marriage or cohabitation. However, this article will largely focus on intimate partner violence and its relevance to relationship property. Although the focus of this article is predominantly on intimate partner violence, this article would like to ensure that all forms of family violence are considered.

48 United Nations "What Is Domestic Abuse?" <www.un.org>.

49 Universal Declaration of Human Rights 590 UNTS 71 (entered into force 10 December 1948), art 3.

50 Ministry of Justice "International Human Rights Legislation" (5 March 2020) <www.justice.govt.nz>.

51 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 6(1): "Every human being has the inherent right to life"; and art 9 (1): "Everyone has the right to liberty and security of person".

52 International Covenant on Economic, Social and Cultural Rights 2171 UNTS 121 (opened for signature 16 December 1966, entered into force 3 January 1976), art 3: "Equal right of men and women to the enjoyment of all economic, social and cultural rights"; art 10: "Widest possible protection and assistance should be accorded to the family" and art 12: "recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

53 Bill Atkin "Family Violence" in Mark Henaghan and others *Family Law in New Zealand* (20th ed, LexisNexis, Wellington, 2021) vol 2 at 1359.

54 At 1359.

(1) Is family violence a human rights issue?

The family is quintessentially a private concept, meaning family violence has often remained "outside of the central or legal issues of concern to state governments",[55] enabling family violence's perpetuation. However, Shazia Choudhry and Jonathan Herring argue that family violence is a human rights issue requiring state intervention.[56] As David Richards and Jillienne Haglund highlight, when a state fails to "uphold [its] responsibilities to citizens by not protecting them from violence, the state has committed a human rights violation".[57]

Applying a human rights lens to family violence is challenging because, generally, only states have legal responsibilities to uphold human rights.[58] Even so, s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA) states that "everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment". The NZBORA aims to affirm New Zealand's commitment to the ICCPR.[59] Ultimately, if the law provides no meaningful recourse for vulnerable victims of family violence, then state law is not neutral but implicitly pro-family violence.[60]

(2) Legislative history and current statutory regime: Family Violence Act 2018

By passing the Domestic Protection Act 1982 (DPA), New Zealand became one of the first countries in the world to enact standalone legislation focused on the "reduction and prevention of violence within families".[61] The purpose of the DPA was to "mitigate the effects of domestic violence and to confer protection from molestation in the domestic sphere".[62] However, contemporary commentators quickly highlighted the inadequacy of the DPA's criminal justice response to family violence harm.[63]

Hence, Parliament replaced the DPA with the Domestic Violence Act 1995 (DVA). The DVA became widely known for its comprehensive definition of domestic violence that expressly included "physical, sexual and psychological violence for the first time in Aotearoa".[64] The DVA recognised that all forms of domestic violence were "unacceptable" and strove to ensure that where "domestic violence occurs, there is effective legal protection for its victims".[65] Although the DVA was a robust statute, domestic violence remained a prevalent scourge in New Zealand society.[66] In 2015, when the Ministry of Justice invited submissions on potential reforms to New Zealand's family violence law, submissions supported broadening the definition of domestic violence to include the

55 David L Richards and Jillienne Haglund *Violence Against Women and the Law* (Paradigm Publishers, Boulder (Nevada), 2015) at 2.
56 Shazia Choudhry and Jonathan Herring "Righting Domestic Violence" (2006) 20 IJLPF 95.
57 Richards and Haglund, above n 55, at 3.
58 At 2.
59 New Zealand Bill of Rights Act 1990 [NZBORA], long title.
60 Richards and Haglund, above n 55, at 3.
61 Domestic Protection Act 1982 [DPA]; and Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) at 127.
62 DPA, at 840.
63 Henaghan and Atkin, above n 61, at 129.
64 At 132.
65 Domestic Violence Act 1995, s 5.
66 Peter Boshier "Dealing with Family Violence in New Zealand" (2007) 5 NZFLJ 241.

concept of coercive control and adding "principles that guide how agencies respond to family violence".[67]

Once more, with repeated demands for legislative reform, Parliament passed a new statute: The Family Violence Act 2018 (FVA). The change from "domestic violence" to "family violence" better recognises the "wider conception of abuse within families and the need to protect an array of vulnerable individuals within family groups".[68] Section 3(a) states the Act's purpose is to "stop and prevent family violence", including by "recognising that family violence, in all its forms, is unacceptable". While s 5 of the DVA similarly stated that all forms of domestic violence are "unacceptable," its purposes were slightly weaker than the FVA's, only aiming to "reduce and prevent" domestic violence. At s 4, the FVA lists principles that support its purpose, similar to those advocated for in the submissions. Significantly, these principles include tikanga Māori and highlight the importance of considering and respecting the views of victims and ensuring their safety.[69] Section 11 widens the definition of psychological abuse and, for the first time in New Zealand's legislative history, the FVA acknowledges dowry-related violence in New Zealand.[70] The creation of three new criminal offences within the Crimes Act 1961 bolstered the changes in the FVA: strangulation, assault of a family member and coercion to marry.[71] These offences reinforce that *all* forms of family violence are unacceptable.[72]

Proceedings under the FVA are brought before the Family Court or any other court with jurisdiction.[73] Remedies include police safety orders, protection orders, property orders, safety programmes/non-violence programmes, and criminal prosecution of the offender.[74]

C *Forms of family violence*

Section 9 of the FVA provides a comprehensive definition of family violence. Family violence means any violence inflicted against a person by "any other person with whom that person is, or has been, in a family relationship".[75] Violence includes physical abuse, sexual abuse and psychological abuse.[76] Patterns of behaviour comprised of several coercive or controlling acts that cause the person cumulative harm also fall within the definition of s 9.[77] Abuse may be a single act or several acts, "even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial".[78]

New Zealand has the highest reported rates of intimate partner violence in the developed world.[79] At least 35 per cent of women in New Zealand experience physical or

67 Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: Summary of Submissions* at 17.
68 Henaghan and Atkin, above n 61, at 101.
69 FVA, ss 4(k), 4(l) and 4(m).
70 Sections 9(4) and 11; and Henaghan and Atkin, above n 61, at 143.
71 Crimes Act 1961, s 207A.
72 Henaghan and Atkin, above n 61, at 101.
73 FVA, s 8.
74 Parts 3, 4, 5 and 7.
75 Section 9(1).
76 Section 9(2).
77 Section 9(3).
78 Section 10.
79 Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: A Public Discussion Document* (MOJ175.1 (25), August 2015).

sexual intimate partner violence in their lifetime,[80] and 55 per cent when violence's definition includes psychological and emotional abuse.[81] In 2017, there were 121,747 family harm call-outs by the police, equating to one call every 4 to 5 minutes.[82] Responding to calls is a time-consuming practice for police. For example, in 2017, in the Counties Manukau district, family violence made up 21 per cent of phone calls but used up 40 per cent of officer time.[83] The New Zealand Family Violence Death Review Committee found that between 2009–2015, there were 194 family violence-related deaths.[84]

Prosecutors charge family violence perpetrators with offences under the FVA and the Crimes Act. In 2021, 4,354 people were charged for assault on a family member. However, only two-thirds (66 per cent) of people were convicted. Similarly, in 2021, 1,205 people were charged for strangulation/suffocation, however, 50 per cent had no outcome.[85] Despite the criminalisation of violence against family members, there is a clear trend in which the number of call-outs has more than doubled, but arrest rates have continued to drop.

(1) Physical

Physical abuse is perhaps the most understood and prosecuted form of family violence. It includes, but is not limited to: "hitting, kicking, slapping, grabbing, punching, choking, burning, beating, pushing/shoving, and throwing dangerous objects".[86] Many victims of domestic physical abuse have shared horrifying accounts of "electrocution, attempted drowning in the bath to the loss of consciousness, burning with cigarettes or irons and being doused with scalding liquids".[87] In its most extreme form, physical abuse can cause the victim's death.

Prior to its amendment, s 59 of the Crimes Act permitted every parent or person in place of a parent to use "force by way of correction towards any child" so long as the force used is "reasonable in the circumstances". Parliament intended that the amended section would "make better provision for children to live in a safe and secure environment free from violence".[88]

(2) Sexual

Sexual abuse typically involves the use of force and usually "constitutes some form of violation or indecency upon the person who is alleging that sexual abuse has occurred or upon a member of the family".[89] Sexual offences involving force include incest, indecent assault, indecent acts, sexual violation, and sexual intercourse with a young person under 16.[90] However, some sexual offences, such as exposure, voyeurism, and the showing of

80 Juliet Gerrard *Every 4 Minutes: A discussion Paper on Preventing Family Violence in New Zealand* (Office of the Prime Minister's Chief Science Advisor, November 2018) at 5.
81 At 5.
82 At 13.
83 At 13.
84 Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality & Safety Commission, June 2017) at 18.
85 Justice Statistics Data Tables <www.justice.govt.nz>.
86 Richards and Haglund, above n 55, at 12.
87 Deborah Lockton and Richard Ward *Domestic Violence* (Cavendish Publishing, 1997) at 9.
88 *YMS v GWS* FC Napier, FAM-2006-042-550, 2 November 2006 at [6].
89 At [6].
90 Crimes Act, ss 128–132 and 134–138.

explicit videos, do not require the application of force to be considered abuse. This is particularly true where the welfare of a child is concerned.[91]

(3) Psychological

The DVA was the first statute to include psychological abuse within the definition of domestic violence and under the FVA, psychological abuse was given its own section, s 11.[92] With the knowledge that domestic violence is a manner of achieving domination and control, it follows that perpetrators will use other methods to ensure the subjugation of their victims.[93] "Threats of physical abuse, of sexual abuse or abuse of any kind" are included in the statutory definition of psychological abuse, although this list is non-exhaustive.[94] For victims of family violence, the threat of alone of physical or sexual violence can inject just as much terror as the act itself, leaving victims in a constant state of fear.[95] Notably, there need not be a physical or sexual element to the abuse, psychological abuse can occur without any other form of violence being present.

Further examples of psychological abuse can include reoccurring criticism, verbal aggression, jealous behaviour, accusations of infidelity, threats to end the relationship and the hostile withdrawal of affection.[96] It is important to note that several seemingly minor incidents can amount to a pattern of abuse.[97]

Section 11(2) holds that a child has suffered psychological abuse if they have heard the "physical, sexual or psychological abuse of a person with whom the child has a family relationship" or if an adult places the child or allows another adult to place the child somewhere they are at "real risk of seeing or hearing that abuse occurring".[98]

(4) Financial

This form of abuse is a relatively new concept and was included in FVA, s 11 via amendment in 2013.

Two examples of this abuse are: "unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education".[99] Due to the broad scope of this abuse, courts have considered the confiscation of electronic devices, and text messages seeking money as forms of economic and financial abuse, respectively.[100] Due to its novelty, financial abuse is still "poorly understood and ill-defined in the wider community".[101]

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91 Mark Henaghan and others *Family Law in New Zealand* (online loose-leaf ed, LexisNexis), at [6.451].

92 Randye J Semple *Psychological Abuse in Intimate Relationships: A New Zealand Perspective* (Columbia University, New York) at 65.

93 Lockton and Ward, above n 87, at 16.

94 FVA, s 11(1).

95 Lockton and Ward, above n 87, at 15.

96 Emma Howarth and Gene Feder "Prevalence and physical health impact of domestic violence" in Louise M Howard, Gene Feder and Roxane Agnew-Davies (eds) *Domestic Violence and Mental Health* (Royal College of Psychiatrists, London, 2013) 1 at 2.

97 Atkin, above n 53, at 1386.

98 FVA, ss 11(2)(a)–11(2)(b).

99 Section 11(2)(e).

100 *Higgins v Higgins [Protection Order]* [2019] NZFC 1716, [2020] NZFLR 995, at [40]; and *Guram v Guram* [2021] NZHC 3153, [2021] NZFLR 528, at [117].

101 Ayesha Scott "Surviving Post-Separation Financial Violence Despite the Family Court: Complex Money Matters as Entrapment" (2020) 10 NZFLJ 27 at 27.

(5) Intimate partner violence

Historically, intimate partner violence was termed "battered woman syndrome" to reflect the gendered nature of family violence. [102] Although women are often more likely to experience severe and persistent physical, sexual, and psychological harm,[103] the term has advanced to intimate partner violence, to better account that family violence does occur within other intimate relationships.[104]

The Law Commission defines intimate partner violence as "any behaviour within an intimate relationship (including current and/or past live-in relationships or dating relationships) that causes physical, psychological or sexual harm to those in the relationship".[105] Gender must be a consideration within this sub-category of family violence, as "gender asymmetry in domestic violence remains in full effect".[106]

D *Consequences of family violence for the individual*

(1) Physical

Following physical abuse, victims can experience serious health effects, such as difficulty walking, difficulty completing daily activities, pain, memory loss and dizziness.[107] Acute injuries are the most obvious manifestation of family violence, along with chronic health issues.[108] Many victims demonstrate physical illness from the tension and stress they experience as symptoms of anxiety, insomnia and depression.[109] Women who experience violence are also likely to experience issues with their sexual and reproductive health, manifesting in gynaecological disorders, infertility, pelvic inflammatory disease, unwanted pregnancies/miscarriages, sexually transmitted diseases and unsafe abortion.[110]

(2) Mental

Broken bones, teeth, bruises, bite marks and burns are straightforward ways in which the horrors of family violence manifest physically. However, the psychological effects of being a victim of repeated, long-term family violence run deeper than physical injuries. Research suggests that victims of family violence are at an increased risk of experiencing mental disorders.[111] The severity and duration of family violence are "associated with the frequency and severity of depression, and rates of depression decrease as time since the cessation of violence increases".[112] The mental health issues that can arise from family

102 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at [2.6].
103 At [2.6].
104 At [2.6]–[2.7].
105 At [1.13].
106 Michael S Kimmel "'Gender Symmetry' in Domestic Violence: A Substantive and Methodological Research Review" (2002) 8 Violence Against Women 1332 at 1358.
107 Howarth and Feder, above n 96, at 10.
108 At 10.
109 Lockton and Ward, above n 87, at 19.
110 Janet Fanslow and Patrick Kelly *Family Violence Assessment and Intervention Guideline: Child Abuse and Intimate Partner Violence* (Ministry of Health, June 2016).
111 Kylee Trevillion, Siân Oram and Louise M Howard "Domestic violence and mental health" in Louise M Howard, Gene Feder and Roxane Agnew-Davies (eds) *Domestic Violence and Mental Health* (Royal College of Psychiatrists, London, 2013) 18 at 21.
112 At 21.

violence are "depression, anxiety disorders (including post-traumatic stress disorder), eating disorders, bipolar disorders, psychotic disorders, antenatal and postnatal mental disorders, and alcohol and substance misuse".[113] Low self-esteem is frequently cited by victims of family violence, along with feelings of "confusion, guilt, shame and insecurity".[114] Sexual assault is "associated with much higher levels of psychological disturbance than any other forms of violence".[115]

Children who have witnessed or suffered family violence show "internalising symptoms" such as anxiety and depression, externalising behaviours including aggression, and trauma symptoms such as flashbacks.[116] A child's social development and academic attainment are also affected, as is their likelihood to engage in risky behaviours. These include smoking, substance misuse and early initiation of sexual activity.[117] Moreover, children who experience family violence represent a high-risk factor for perpetrating violence.[118]

(3) Economic

The human and social consequences of family violence are well-understood. However, there is also a tremendous economic cost experienced throughout society. The government incurs a direct cost through its expenditure on healthcare, welfare payments and law enforcement.[119] Civil society also bears costs, particularly via providing public services such as women's shelters, support groups and social welfare services for victims.[120] Perhaps more challenging to calculate is the indirect cost that stems from the loss of productivity in both the formal and informal employment sectors. Victims may take time off work for their safety, to tend to injuries, see a medical practitioner, meet with a lawyer, or attend court. Employers will sustain loss stemming from the victim's reduced work performance, administrative time processing sick leave, and costs for the search and training of a replacement employee should a victim leave their job.[121]

In 2014, the Public Service Association released a report that detailed the economic losses suffered in New Zealand workplaces due to domestic violence. It was estimated to cost employers at least $368 million over twelve months, with projections indicating that the total costs will be at least $3.7 billion combined over the next ten years.[122]

E *Conclusion*

Family violence is slowly shifting from the private to the public sphere. Although the law now recognises that family violence in all its forms is unacceptable, significant work remains to reduce its prevalence in New Zealand. With a constantly evolving understanding of the manifestations of family violence and its consequences, the law must

113 At 21.
114 Lockton and Ward, above n 87, at 19.
115 At 15.
116 Howarth and Feder, above n 96, at 12.
117 At 12.
118 Richards and Haglund, above n 55, at 14.
119 Suzanne Snively *The New Zealand Economic Cost of Family Violence* (Family Violence Unit, December 1994) at [5.29].
120 Richards and Haglund, above n 55, at 14.
121 At 14.
122 Sherilee Kahui, Bryan Ku and Suzanne Snively *Productivity Gains from Workplace Protection of Victims of Domestic Violence* (Public Service Association, 21 March 2014) at ii.

evolve to reflect these developments better. The question, therefore, arises as to why the PRA does not consider family violence when dividing property.

IV Family Violence and Property Division

This Part will examine provisions under the PRA that create exceptions to the equal-sharing presumption. The article will then discuss case law to demonstrate the PRA's constraining effect in making family violence count in relationship property disputes.

A *PRA*

(1) Exception to equal sharing: s 13

Where the court considers that there are:[123]

> ... extraordinary circumstances that make equal sharing of property or money ... *repugnant to justice*, the share of each spouse or partner in that property or money is to be determined in accordance with the *contribution* of each spouse.

The primacy of the equal sharing presumption is "not to be eroded in the ordinary circumstances of marriage", as conveyed in the words "extraordinary" and "repugnant".[124] The test imposed is stringent, and a long line of case law establishes this.[125] Applications under this provision require certain technical elements for the judiciary to intervene, as well as an "injustice so plain and serious that it ought not to be tolerated".[126]

Situations courts have judged as satisfying the test include a gross disparity in contributions, as in *I v I* or *Wilton v Crimmins*,[127] and when there has been a substantial injection of capital via an inheritance or a gift.[128] Finally, situations with a non-contributing partner or unequal division of debt have also fallen within the ambit of this exception.

(a) Relevance of s 18 to 'Contributions' under s 13

If a court is satisfied that circumstances satisfy s 13's requirements, then the "shares in the asset or assets in question are determined in accordance with *contributions* to the marriage or de facto relationship".[129] The determination is per the court's discretion and can apply to all or only some of the relationship property.[130]

Contributions are provided for under PRA, s 18. It is incorrect to consider contributions solely by accounting for specific items of property. Instead, the assessment must account for the whole of the parties' lives together.[131] Importantly, all forms of contribution are

123 PRA, s 13(1) (emphasis added).
124 *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111.
125 Atkin, above n 24, at 77.
126 *Martin*, above n 124, at 107.
127 *I v I* (1994) 12 FRNZ 490 (DC); and *Wilton v Crimmins* (2003) 23 FRNZ 357 (DC).
128 *Allen v Choi* (1997) 16 FRNZ 29 (HC).
129 Fisher, above n 5, at [D12.36] (emphasis added).
130 At [D12.36].
131 *Maw v Maw* [1981] 1 NZLR 25 (CA) at 31.

inherently equal, and a contribution of a monetary nature is not of greater value than a contribution of a non-monetary nature.[132]

There are eight classes of contribution listed exhaustively under s 18(1) of the PRA:

(a) the care of a child or relative;
(b) household services;
(c) provision of money;
(d) creation or provision of relationship property;
(e) gifts between spouses or de facto partners;
(f) payments to maintain or increase property;
(g) work in services in respect of property;
(h) forgoing a higher standard of living; and
(i) assisting or supporting the other spouse or de facto partner.

Clearly, not all these contributions are monetary, reinforcing the sense of contribution equality that the PRA aims to promote. Courts must measure the contributions of each party against each other, giving weight to the quality of the contributions, not just the quantity.[133] This is not a precise exercise, as assigning an exact percentage to non-financial contributions is not always easy.[134]

(b) Section 18A: does misconduct play a role?

The court is not to take any "misconduct of a spouse or partner into account in proceedings under this Act, whether to diminish or detract from the positive contribution of that spouse or partner or otherwise".[135] Misconduct is relevant only when "determining the relevant *contributions* of the parties when assessing whether any of the exceptions to equal division applies".[136] The misconduct must be "gross and palpable and must have significantly affected the extent or value of the relationship property".[137] Thus, a partner's misconduct during a relationship is usually irrelevant to the property division, reflecting the implicit no-fault principle.

(2) Economic disparity: s 15

Should the income and living standards of one spouse or partner be higher than the other due to the "effects of the division of functions within the marriage, civil union, or de facto relationship", then the courts have the jurisdiction to award lump sum payments or the transfer of property.[138] When making this determination, the court may have regard to the likely earning capacity of each spouse or partner, their responsibilities for the ongoing care of any dependent children and any other relevant circumstances.[139] This section thus aims to provide a means to deal with inequality, a consideration property division does not address.[140]

132 *Williams v Williams* [1980] 1 NZLR 532 (CA) at 534; and PRA, s 18(2).
133 Atkin, above n 24, at 89.
134 At 89.
135 PRA, s 18A(1).
136 *Hewson v Deans* [2020] NZHC 1465, [2020] NZFLR 262 at [1] (emphasis added).
137 PRA, s 18A(3).
138 Section 15(1).
139 Section 15(2).
140 Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR15.01].

(3) Short duration relationships: ss 14, 14AA and 14A

The court can deviate from the equal-sharing regime under these provisions should specific requirements be met. The definition of a short-duration relationship is under the PRA, s 2E. Should the court find that a relationship is of short duration, the property is apportioned according to each spouse's contribution to the relationship.[141]

B *Case law*

The PRA requires misconduct to meet a high threshold before judges can consider it during divisions of relationship property, as moral judgments have little relevance under the Act. This article explores five cases to determine whether victims of family violence can find recourse through relationship property proceedings.

(1) *S v S*

During an 11-year marriage, Mr S physically assaulted his wife, causing her severe injuries that forced her to reside in a women's refuge for nine months.[142] Unfortunately, Ms S was unsuccessful in gaining a greater than 50 per cent share of the property, as it was an "unfortunate indictment on our society that the occasional assault during a marriage is not so uncommon as to be extraordinary".[143]

Treating family violence as an everyday occurrence means that a particular case must demonstrate violence outside the general parameters of routine family violence to meet the s 13 test. It sets an unconscionably high threshold. In this case, the court also noted that, apart from the violent behaviour Mr S demonstrated, he was a good provider and father overall. A danger comes with weighing an abuser's positive contributions against their negative ones. It diminishes the victim's experience and promotes the idea that under the PRA, for as long as a person provides for their family economically, any misconduct behind closed doors will go unpunished.

(2) *Wright v Graham*

Analogous to the previous case, equal sharing was ordered despite "gross and repeated violence by Mr Graham against Ms Wright over an extended period".[144] The violence in question was of both a physical and sexual nature, with the wife's account supported by three witnesses. Ultimately, however, the evidence failed to establish the required causative link between the misconduct and the property's value.

The imposition of a direct link between the misconduct and the property's value is far too challenging to prove in the context of family violence. While an offender can destroy chattels and damage property, the violence of concern is against the person—violence against *a victim's* physical and mental well-being. While this may not causally link to property, considering all they have faced, it makes the victim's contributions much more valuable.

Judge Moss distinguished between the terms "gross" and "palpable". To be gross, the misconduct must be "flagrant or extreme". However, palpable was "readily perceived or

141 At [PR14.01].
142 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 151.
143 *S v S* DC Whangarei, FP 888/218/82, April 1991 at 10.
144 *Wright v Graham* DC Wellington FP558/92, 16 August 1995 at 6.

evident".[145] The latter requirement presents an obvious hurdle for victims of family violence, as nearly all family violence occurs in the privacy of one's home. Perpetrators of abuse are skilled at ensuring their violence remains a close-kept secret from anyone outside the immediate family. Victims maintain silence as they fear repercussions for themselves and their children from their abuser or are concerned that others will not believe them.[146]

(3) *Gilchrist v Gilchrist*

The marriage between the two parties was for a three-and-a-half-year period.[147] Judge Inglis considered the husband's behaviour to be unacceptably violent, rendering it just in all circumstances to treat the marriage as one of a short duration. The reasoning was that the husband had been abusive and physically violent for the greater part of the marriage, resulting in the wife's "psychiatric disability" and later escape to the woman's refuge.[148]

Gilchrist v Gilchrist was significant at the time as it reflected the changes in social and legislative outlooks on family violence. It recognised:[149]

> … domestic violence and other forms of seriously abusive behaviour as social evils that have had to be confronted effectively, demonstrating a degree of departure from the generally non-judgemental approach of the 1976 Act.

The court recognised the impact of the violence on the quality of the relationship, as well as Ms Gilchrist's battered woman's syndrome, which deprived her of the ability to "take any effective steps to put an end to the situation".[150] There had been a "repudiation and negation by the violent party of a fundamental feature of the marriage commitment".[151] Judge Inglis's recognition of these various elements marked a significant step towards understanding the non-trivial nature of family violence and its lasting impact on its victims.

A short-duration relationship must be for less than three years unless the court, having regard to all the circumstances of the relationship, considers it just to treat the relationship as one of short duration.[152] Under this circumstance, the court treated Ms Gilchrist's marriage as one of short duration as the relationship had passed the required time by only six or so months. This circumstance is very particular; therefore, abuse victims cannot rely on this provision.

Finally, although the violence impaired the quality of the marriage, it did not do so to the extent that it legally affected the contributions to the marriage partnership, thus not qualifying as misconduct.[153]

145 Parker, above n 142, at 152.
146 Victoria Price "Why do Victims of Abuse Remain Silent?" (23 January 2020) Price Slater Gawne Solicitors <www.psg-law.co.uk>.
147 *Gilchrist v Gilchrist* [1998] NZFLR 807 (FC) at 808.
148 At 815.
149 At 813.
150 At 815.
151 At 814.
152 PRA, s 2E.
153 Parker, above n 142, at 152.

(4) *Banda v Hart*

This case was heard before Judge Inglis and involved an unsuccessful application by the husband for the equal division of property. The wife provided the matrimonial home and generated most of the financial contributions. Mr Banda was described as having "no respect for women except to the extent that he is able to dominate and control women and to use women for his own gain".[154] Mr Banda was physically violent and controlling towards his wife, and his tangible and intangible contributions were negative.[155] It was an amalgamation of Mr Banda's negative contributions that led towards unequal division. As noted in *S v S,* it is likely that had Mr Banda found a meaningful way to contribute positively to the relationship, the abuse may have been counterbalanced, which would have been an unfortunate and unjust result.

(5) *Ubels v Barrett*

More recently, *Ubels v Barrett* was a "rare and exceptional case where not only should there be unequal sharing, but a vesting of the assets entirely in the name of the plaintiff only".[156] Mr Barrett was a patched member of the Mongrel Mob, finding himself in and out of trouble with the law, largely unemployed and absent for much of home life. However, when Mr Barrett was home, Ms Ubels "suffered regular and severe physical, sexual and psychological abuse" at his hands.[157] Following one particular abusive outburst, Mr Barrett was imprisoned for 12 months as a result of the severe injury he caused Ms Ubels. Hammond J found that the negative contributions "so clearly outweigh everything else as to not be worth anything at all on a matrimonial property claim".[158] Importantly, Hammond J recognised that family violence negatively contributes to a relationship.[159] However, a case this extreme is remarkably rare.

C *Conclusion*

Within the PRA, there is a conflict between the "justice of recognising contributions and the advantages of equal sharing".[160] The imposition of arbitrary equality promotes "certainty, simplicity and control of judicial attitudes"[161] and the no-fault premise of the PRA. As demonstrated through case law, there are rare circumstances where individual justice can prevail, where the "disparity between relative contributions is particularly wide".[162] However, in the context of family violence, this rarely happens. Violence perpetrated by abusers cannot meet the high threshold requirement of extraordinary circumstances unless it has a direct economic effect on the property.[163] As has been discussed, family violence has severe and lasting physical and psychological effects and is a scourge on our society. Sadly, New Zealand's legislative framework does not "effectively

154 *Banda v Hart* [1998] NZFLR 930 (FC) at 934.
155 At 940.
156 *Ubels v Barret* [2000] NZFLR 666 (HC) at [1].
157 At [11].
158 At [26].
159 At [26].
160 Fisher, above n 5, at [D12.27].
161 At [D12.27].
162 At [D12.28].
163 *Haldane*, above n 16, at [10].

and adequately consider violence as a negative contribution" and employs an "inappropriate and ineffective way to counter this type of criminal behaviour".[164]

V Jurisdictions Outside of New Zealand

This article has established that New Zealand's current relationship property statutory regime does not adequately account for the effects of family violence. Part IV will discuss comparable jurisdictions, some of which operate discretionary regimes that allow courts to adjust property entitlements in the interest of justice.

A *Canada and Scotland*

Analogous to New Zealand, Canada also employs the no-fault principle. It is challenging to depart from the equal division presumption, and the test is onerous, requiring evidence that equal sharing is unconscionable, inequitable or grossly unfair.[165] Misconduct has minimal relevance in proceedings unless it amounts to dissipation or has some other direct financial impact on the partners or their property.[166] Examples include s 14(3) of The Family Property Act Manitoba 2017 c F25 and s 25 of The Family Property Act Saskatchewan 1997 c F-6.3.

The Family Law (Scotland) Act 1985 (UK) also operates on the presumption of equal sharing, allowing an exception in special circumstances.[167] The Act's exceptional circumstances threshold is much lower than New Zealand's or Canada's.[168] Scotland's Act also contains guiding principles for the court's discretion in deciding financial provision orders.[169] When applying the principles set out in the Act:[170]

> ... the court shall not take account of the conduct of either party ... unless the conduct has *adversely affected the financial resources* which are relevant to the decision of the court ... or it would be *manifestly inequitable* to leave the conduct out of account.

Canada and Scotland operate on property systems akin to that of New Zealand. Both jurisdictions constrain misconduct as relevant only where there has been a negative *economic* impact. The courts thus have minimal discretion to divide relationship property unequally in favour of the victim. Hence, victims of abuse will find little relief in these jurisdictions.

B *England and Wales*

Neither England nor Wales have a deferred community property regime. Instead, the courts have broad discretion to grant ancillary relief upon separation. Anne Barlow

164 Parker, above n 142, at 154.
165 Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at [3.34].
166 Family Property Act Manitoba 2017, s 1: "the jeopardizing of the financial security of a household by the gross and irresponsible squandering of an asset"; and Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, June 2019) at 208.
167 Family Law (Scotland) Act 1985 (UK), s 10(1).
168 Law Commission, above n 165, at [3.35].
169 Family Law (Scotland) Act (UK), s 9.
170 Section 11(7) (emphasis added).

describes the traditional functions of family law, at its interface with property law, as a form of protecting the more dependent, weaker economic spouse.[171] Adopting a deferred community system in England and Wales would abandon this function, as the premise of equal sharing often prevents courts from awarding the weaker economic spouse more than half of the relationship property.[172] The current system in England and Wales is needs-based rather than entitlement-based,[173] with the courts having broad discretion to "redistribute both income and capital assets to achieve a 'fair' outcome between the parties".[174]

Despite this broad discretion, when making property adjustment orders, the court can only consider the conduct of a party if that "conduct is such that it would in the opinion of the court be *inequitable* to disregard it".[175] The Matrimonial Causes Act 1973 (UK) thus sets a very high standard for awarding unequal divisions of relationship property in favour of victims.[176] Courts have thus only considered violence and financial misconduct when that conduct amounted to the "grossest breach of trust".[177]

C *Australia*

Australian law and society have increasingly recognised the pervasiveness and destructiveness of family violence. Family violence significantly contributes to poverty and homelessness and is a barrier to recovering financial assets.[178] It is thus germane to relationship property proceedings.[179]

The Family Law Act 1975 (Cth) (FLA) does not explicitly reference family violence in its provisions. However, when making a determination, the courts shall take into account any financial contributions, contributions towards property, and contributions to the family's welfare.[180] In *Kennon*, the court demonstrated a willingness to consider family violence in relationship property proceedings. The court's decision seemed to reflect the view that family violence had a "significant adverse impact upon that party's *contribution* to the marriage".[181]

(1) *Kennon*

Kennon marked a watershed moment for victims of family violence in Australia. The husband and wife, in this case, had been married for five years, with the husband bringing

171 Anne Barlow "Property and Couple Relationships: What does Community of Property Have to Offer English Law?" in Anne Bottomley and Simone Wong (ed) *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Hart Publishing, London, 2009) 27 at 27.

172 At 46.

173 Henaghan and Atkin, above n 61, at 194.

174 Barlow, above n 171, at 28.

175 Matrimonial Causes Act 1973 (UK), s 25(2)(g) (emphasis added).

176 Law Commission, above n 166, at 208.

177 Debbie Heald "Bad Behaviour: What Amounts to 'Conduct it would be Inequitable to Disregard'?" Stowe Family Law <www.stowefamilylaw.co.uk>.

178 Australian House of Representatives Standing Committee on Social Policy and Legal Affairs *A better family law system to support and protect those affected by family violence* (Parliament of the Commonwealth of Australia, December 2017) at [5.1].

179 Patricia Easteal, Lisa Young and Anna Carline "Domestic Violence, Property and Family Law in Australia" (2018) 32 IJLPF 204 at 204.

180 Family Law Act 1975, s 79(4).

181 *In the Marriage of C K and I W Kennon* (1997) 22 Fam LR 1 (FamCA) [*Kennon*] at 3 (emphasis added).

a substantial amount of wealth into the relationship. During cohabitation, there were "many incidents when the wife was placed in fear of her safety by the husband's actions, such incidents becoming progressively more frequent as the marriage went on".[182] Several doctors swore detailed affidavits, describing the wife's psychological state, resulting from prolonged abuse, as anxious, unhappy and stressed, along with symptoms of "lethargy, anorexia, light headedness and fainting episodes".[183]

The wife sought a property adjustment in her favour under the FLA. The court held that the FLA could be used to assess the consequences of family violence under ss 75 and 79 of the FLA if there is a:[184]

> ... *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.

Their Honours clarified that no generalised allegations would succeed, as victims would be required to provide particulars for each instance of alleged violence. This clarification ensures these considerations only apply to a relatively narrow band of cases.[185] The victim would also be required to prove that these incidents of violence were not isolated; a "degree of repetition is required".[186] Further, a causal link is required between the violence and the victim's difficulty contributing to the relationship.[187] There was concern that the principles developed in this case would become "common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this court to fault and misconduct in property matters".[188] However, in their Honour's view, it would be inappropriate for s 79 of the FLA to not encompass these exceptional cases because of a fear of risk.[189]

(2) Australia post-*Kennon*

There have been mixed reactions to *Kennon.* The courts have grappled with the artificiality of a *Kennon*-type adjustment:[190]

> ... it is clear that neither 10 percent or any other figure could possibly be characterised as compensatory because no amount could compensate her for what she experienced at the hands of her husband.

The Court in *Kennon* failed to provide any guidance on this matter, and since then, some courts have ascribed a percentage value to the abuse with no explanation as to how they

182 At 12.
183 At 13.
184 At 24 (emphasis added).
185 At 24.
186 Easteal, Young and Carline, above n 179, at 216.
187 Fernanda Dahlstrom "Can Violent Conduct Affect a Property Settlement?" Go To Court <www.gotocourt.com.au>.
188 *Kennon*, above n 181, at 24.
189 At 24.
190 *Kozovska v Kozovski* [2009] FMCAfam 1014 at [77].

reached that figure.[191] Such decisions are inappropriate because "[j]udicial decision making can be discretionary, however, it cannot be arbitrary".[192]

There have been many calls for reform in Australia. However, the form this change should take is still undecided. Some argue that Australia should implement an adjustment based purely on financial need, while others suggest that family violence should be considered a negative contribution to relationship property.[193] There have also been proposals for the introduction of a separate statutory compensation regime, which would enable the court to award compensation for "pain and suffering and economic loss as a result of a history of family violence during the relationship".[194]

The Australian Law Reform Commission made an innovative recommendation in March 2019 to amend legislation to acknowledge the relevance of family violence through the express inclusion of a tort of family violence.[195] Consequently, this would give rise to the ability to claim compensation for both physical and psychiatric injury, weighing the violence against the harm caused rather than against property.[196]

D *Conclusion*

England and Wales reflect a system of equality whereby discretionary powers by the courts better meet the needs of the disadvantaged. This approach "provides an individualised form of justice, tailored to the specific circumstances of each case".[197] It allows the courts to consider what they otherwise cannot, such as the partners' future needs and post-separation childcare arrangements. Hence, it appears that the English and Welsh courts can provide a more equitable division of property. However, the Matrimonial Causes Act omits reference to family violence. Ultimately, "Australia is at the forefront in family law in recognising the relevance of family violence to property matters".[198] Despite having practical difficulties, the *Kennon* decision has opened discussions on better incorporating family violence into relationship property legislation. New Zealand unquestionably can learn from this.

VI The Need for Reform

This Part will discuss whether it is time for New Zealand to reconsider the legislation surrounding matrimonial property rights and family violence.

A *Why consider reform?*

As Part II of this article discussed, New Zealand's matrimonial property rights developed over time with the purpose of creating legal equality between partners. The central

191 Sarah Middleton "The Verdict on *Kennon*: Failings of a contribution-based approach to domestic violence in Family Court property proceedings" (2005) 30 Alt LJ 237 at 239.
192 At 239.
193 Law Commission, above n 166, at [8.74].
194 At [8.74].
195 The Australian Law Reform Commission *Family Law for the Future—An Inquiry into the Family Law System: Final Report* (ALRC Report 135, March 2019) at [7.115]
196 Law Commission, above n 166, at [8.75].
197 Law Commission, above n 165, at [3.14].
198 Easteal, Young and Carline, above n 179, at 206.

principle of no-fault emerged from these developments, creating a strong underlying presumption of equal sharing.

With equality as an overriding aim, why does the PRA fail to consider family violence? Especially when "violence within a family has a direct and unbalancing effect on equality".[199] Violence within a family is one of the "clearest indicators of inequality, and if the objective of financial provision law is the redressing of inequality, then logic demands that violence be taken into account in property division".[200]

The no-fault principle does not focus on equality. More judicial discretion is required to achieve judicial equality in dividing relationship property between the perpetrators and victims of family violence. At the heart of fairness are social and moral values.[201] "If all types of contributions are considered to be equal, then outcomes should also be equal."[202] Despite the PRA stating that all contributions, monetary or otherwise, are considered equal when making determinations,[203] it does not consider the negative contribution of family violence. The contributions to a relationship made by a victim in the face of abuse *must* be of more value. In the face of abhorrent behaviour designed to break a person down physically and psychologically, most victims continue to provide and contribute to relationships in extraordinary ways. To not place any value on these contributions in court is inequitable.

Many victims have called for an end to no-fault divorce settlements.[204] One victim, Lisa, recounted how her abuser raped, beat, financially and emotionally abused her.[205] Lisa suffered permanent loss of hearing caused by blunt force trauma, had three teeth extracted after a beating and had sought protection orders in the past. She described the legal process as an "abomination", as her partner had previously refused to contribute but then initiated property proceedings in order to gain 50 per cent of assets:[206]

> They have set the ceiling so high and because domestic violence is so common in New Zealand, my circumstances, even though I'm badly injured - that doesn't constitute "extraordinary circumstances repugnant to justice".

Lisa's experience makes it very difficult to justify the current statutory framework, especially considering that this type of treatment is a breach of human rights,[207] and has a clear and concerning economic effect.

From a policy perspective, it is objectionable that the PRA protects people from the consequences of conduct prohibited in other areas of law, such as the Crimes Act and FVA.[208] As the definition and understanding of family violence changes and grows, so too must legislation. There is also some concern regarding the consistency of s 18A with other

199 Parker, above n 142, at 153.
200 At 153.
201 Mark Henaghan "Exceptions to 50/50 Sharing of Relationship Property" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 1.
202 At 1.
203 PRA, s 1M(b).
204 Gill Bonnett "Domestic Abuse Victims Call for End to 'No-Fault" Divorce Settlements" (11 February 2020) Radio New Zealand <www.rnz.co.nz>.
205 Bonnett, above n 204. Note that a false name is used.
206 Bonnett, above n 204.
207 NZBORA, s 9.
208 Parker, above n 142, at 153.

provisions of the PRA. While s 18A purports to exclude misconduct from consideration, other ss such as 17A, 18C, 20E, 43 and 44 appear to include it.[209]

B *Past recommendations*

In October 2017, the Law Commission completed an Issues Paper, part of which considered whether a new relationship property regime should consider family violence.[210] Overall, the Law Commission's preferred approach was to retain equal sharing despite it not consistently achieving fair outcomes in individual cases.[211] There was some discussion as to the role of misconduct in proceedings, particularly concerning family violence. The Commission noted that by "not penalising violence in property division, the law "effectively transmits the message that the behaviour has no impact on the contributions to marriage partnership by either spouse".[212] Ultimately, however, the Law Commission concluded that New Zealand should address family violence in areas of law other than relationship property.[213]

C *Argument against including family violence in the PRA*

The New Zealand Law Society opposed the reintroduction of fault as a factor in property division beyond the current ambit of s 18A. They reasoned that a more expansive exception would have the unintended consequence of "encouraging fractious affidavits and incentivising meritless applications about family violence".[214] An obvious example of this is infidelity. For many, this will cause a relationship to break down and potentially leave a partner with psychological trauma. The question then arises as to why infidelity cannot be raised in the Family Court if Parliament widens the scope of s 18A.

The Law Society also raised concerns about the potential for double jeopardy, as an abuser could be tried and convicted of a crime and then financially punished in the Family Court.

The inclusion of family violence as a consideration under the PRA would undermine the no-fault principle upon which the PRA is based. "[M]oral turpitude is irrelevant unless it qualifies under s 18A(3) no matter how despicable society may view that behaviour".[215]

D *Final recommendations*

New Zealand cannot undergo a complete removal of the equal sharing presumption to give way for broad judicial discretion in relationship property division, as in England and Wales, as the presumption is too ingrained in our legal system. Instead, exceptions that include family violence, similar to that in Australia, should be enacted to ensure "financial

209 Luke John Day "Reconsidering the Role of Misconduct in Relationship Property Proceedings" (2019) 9 NZFLJ 159 at 161.
210 Henaghan and others, above n 91, at [7.601.02].
211 Law Commission, above n 165, at [3.16].
212 Law Commission, above n 166, at [8.69].
213 Law Commission, above n 165, at [3.68].
214 At [3.58].
215 Geraldine Callister "Domestic Violence and the Division of Relationship Property Under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 31.

consequences for marital misbehaviour where it leads to the breakdown of the relationship and causes harm".[216]

This article recommends two avenues for amendment. First, lowering the misconduct standard to include family violence. The language used sets a very high threshold, which effectively ensures that abusive partners who still contribute in some way to the relationship escape the parameters of s 13. Therefore, Parliament should change s 13's wording, particularly the word "extraordinary", to allow family violence to qualify even if the abuser has contributed to the relationship in other areas. Secondly, given that there are concerns regarding setting a lower threshold, the legislature could include an amendment specifying that family violence is not to be excluded from consideration on the grounds that it is not extraordinary. While neither the Australian nor the English and Welsh approach is perfect, the law must require courts to consider family violence in relationship property proceedings. Reforming the law to ensure that courts consider family violence in relationship property proceedings will allow courts to develop case law, which they can refine over time.

VII Conclusion

New Zealand's relationship property law insufficiently considers family violence. There is an evident push and pull between the no-fault principle and the growing change in social and legal attitudes towards family violence. Violence has a deleterious effect on the quality of a person's life and their relationship. As a society, we must make a "concerted effort to curtail family violence and [all] aspects of the law must operate coherently and consistently to achieve the same end".[217] It is time for New Zealand to stop negating victims' experiences and for relationship property law to recognise the consequences of family violence.

216 Law Commission, above n 165, at [8.69].
217 Parker, above n 142, at 154.