

## Comparable cases – the controversy about their importance

In university law courses, the importance of precedents is emphasised – *ratio decidendi* and *obiter dicta* are prevalent phrases. Bewilderingly, family lawyers advising clients are confronted with the breadth of the court's seemingly unfettered discretion and unpredictability of outcomes. Recently, the Full Court in *Wallis & Manning* (2017) FLC 93-759 gave some hope that a more consistent approach may be adopted.

### The law before *Wallis & Manning*

In cases like *Fields & Smith* (2015) FLC 93-636 the Full Court seemed to confirm that earlier cases could not be relied on as a guide to decision-making. Bryant CJ and Ainslie-Wallace J said, in relation to the use by the trial judge of a table of comparative cases prepared by one of the counsel:

"The problem with the table is that it gives no indication of the relevant facts in the particular cases ... With all due respect to his Honour, the table can only form 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."

Bryant CJ and Ainslie-Wallace J considered that the apparent reliance on the table by the trial judge may have led him into error and acted as a fetter to the exercise of his discretion. The third member of the bench, May J, also allowed the appeal. In her judgment she did not refer to the offending table, but was critical of the trial judge for ignoring the wife's post-separation contributions.

Professor Patrick Parkinson has written some thought-provoking articles about discretion. For example, in "Why are decisions on family property so inconsistent?" (2016) 90 ALJ 498 at 518, Professor Parkinson said, "the idea that the discretion of the trial judge is so open-ended, and that the exposition of principles and guidelines ... would unlawfully fetter the discretion of the judge, is a misunderstanding of the judicial discretion ... In the exercise of judicial discretion, the trial judge needs to draw upon principles and standards which find their origin in law, rather than in the objective values of the individual trial judge".

Professor Parkinson drew upon the High Court in *Norbis v Norbis* (1986) FLC 91-712 and quoted Mason & Deane JJ, who said (at 75,174):

"With all respect to those who think differently, we believe that the sound development of the law, in this area as in others, is served best by following the tradition of the common law. The genius of the common law is to be found in its case-by-case approach. The decision and reasoning of one case contributes its wisdom to the accumulated wisdom of past cases. The authoritative guidance available to aid in the resolution of the next case lies in that accumulated wisdom. It does not lie in the abstract formulation of principles or guidelines designed to constrain judicial discretion within a predetermined framework. There is no reason to think that the traditional approach, when applied in the family law

area, leads to arbitrary and capricious decision-making or that it leads to longer and more complex trials."

The reference to "arbitrary and capricious decision-making" in *Norbis* was echoed by the High Court in *Stanford & Stanford (2012)* FLC 93-518 which referred to the risk of "palm tree justice" and said that the Court has a wide discretion, but that it must be exercised in accordance with legal principles laid down in the *Family Law Act 1975*.

### **Wallis & Manning – the use of comparable cases**

In *Wallis & Manning*, although not conceding that *Fields & Smith* dictated that comparable cases could not be relied upon, Thackray, Ainslie-Wallace and Murphy JJ also relied on *Norbis* and said:

"While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79 ....

The word "comparable" is used advisedly. The search is not for "some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made". Nor is it a search for the "right" or "correct" result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability – for "what has been done in other (more or less) comparable cases" – with consistency as its aim."

The Full Court analysed a number of cases and compared factors such as the length of the relationship, and the nature, form and characteristics of the contributions made by the parties, including the timing of contributions. The Full Court said that the table in *Fields & Smith* did not do this. The table summarised cases by setting out matters such as the length of the relationship, the size of the pool and the number of children post-trial; summarised contributions in single words such as "modest", "some", "minor", "negligible" and "significant"; and gave outcomes in percentage and dollar terms.

It is early days, but hopefully "comparable cases" will help bring more predictability to family law property settlements.

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