

W a l l i s & M a n n i n g

Use of comparable cases to inform contributions assessment

In *Wallis & Manning*,¹ the Full Court of the Family Court (comprised of Thackray, Ainslie-Wallace and Murphy JJ) held that whilst

*“no two cases are precisely the same ... comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79 [of the Family Law Act 1975 (“FLA”).”*²

This was an appeal from a judgment of Judge Demack of the Federal Circuit Court delivered on 29 September 2015, three years after her Honour heard the matter. This case note relates only to the Full Court’s reasons as to the third ground of appeal, particularly in relation to the appellant’s contention of discretionary error with respect to the Trial Judge’s assessment of the parties’ contributions. Consequently, the facts of the case have no bearing, and I will not set them out.

Their Honours drew a parallel between the exercise of the discretion in assessing contributions in property matters under the FLA and sentencing discretion in criminal matters, noting that, in both, Counsel commonly refer to the “available range”.

The Full Court considered the High Court’s judgment in *Barbaro*,³ where

*“the plurality ... [pointed] out that specifying a ‘range’ for the exercise of the relevant discretion does not inform as to which ‘facts and factors’ have been taken into account in arriving at the submitted ‘range’.”*⁴

It found that

*“what the plurality said in Barbaro of the sentencing discretion is what can and should be said of assertions as to ‘the range’ ... in the exercise of the relevant discretions under s 79.”*⁵

¹ *Wallis & Manning* (2017) FLC ¶93-759.

² At [67].

³ *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58.

⁴ *Wallis & Manning* at [39].

⁵ *Wallis & Manning* at [40].

The Full Court noted the joint judgment of Mason CJ and Dean J in *Norbis*,⁶ where their Honours said

*“To avoid the risk of inconsistency and arbitrariness ... the Full Court ... should give guidance as to the manner in which these [discretionary] assessments and judgments are to be made ... in a way that preserves ... the capacity of the Family Court to do justice according the needs of the individual case.”*⁷

The Full Court in *Manning & Wallis* considered the earlier Full Court decision in *G v G*,⁸ and High Court decision in *Mallet*,⁹ which, respectively, supported the proposition that the discretion ought to be guided “by a process of careful analysis **and comparison of like cases**”¹⁰ and that “*shared experience and accumulated expertise [sic] should lead to the emergence of generally accepted concepts of what is ... just and appropriate*”.¹¹

It contrasted that position with subsequent Full Court decisions in *Petruski*,¹² *Daymond*,¹³ and *Cloughton*.¹⁴

In *Petruski*, the Full Court, faced with submissions that departure from results in various first-instance decisions with respect to “*short marriages*” resulted in a “*plainly wrong*” decision by the Trial Judge, “[considered] *such an exercise to be unhelpful*.”¹⁵

The Full Court in *Daymond* held that

*“there is no necessary basis for the overall assessment of contributions, for example, in one case, to be decided in the same way as in other cases, simply because there may be a broad similarity between the facts of those cases.”*¹⁶

In *Cloughton*, Strickland J said that “*the Full Court on at least two occasions decried*” the use of comparable cases,¹⁷ referring to *Petruski* and *Fields & Smith*.¹⁸

The Full Court in *Manning & Wallis* agreed with those judgments to the extent that “*in a guided but otherwise unfettered discretion the result in another case ... cannot determine the result in the case under consideration.*”¹⁹ However, their Honours found that Strickland

⁶ *Norbis & Norbis* (1986) 161 CLR 513.

⁷ *Norbis* at 519-520 cited in *Wallis & Manning* at [46].

⁸ *G v G* [2001] FamCA 1453.

⁹ *Mallet v Mallet* (1984) 156 CLR 605.

¹⁰ *G v G* cited in *Wallis & Manning* at [48] (emphasis in original).

¹¹ *Mallet* cited in *Wallis & Manning* at [49] (emphasis in original).

¹² *Petruski & Balewa* (2013) 49 Fam LR 116.

¹³ *Daymond & Daymond* [2014] FamCAFC 212.

¹⁴ *Cloughton & Northey* [2015] FamCAFC 213.

¹⁵ Cited in *Wallis & Manning* at [51].

¹⁶ *Daymond* at [63], cited in *Wallis & Manning* at [54] (emphasis in original).

¹⁷ Cited in *Wallis & Manning* at [55].

¹⁸ *Fields & Smith* (2015) FLC ¶93-638.

¹⁹ At [57] (emphasis in original).

J's view that "any comparison with those cases is 'unhelpful' ... is ... inconsistent with both High Court ... and ... Full Court authority".²⁰

Their Honours reiterated that "the judgment of the plurality in *Barbaro* ... provides ... powerful guidance in respect of the use of comparable cases for the exercise of the s 79 discretion."²¹

As set out at the top of this case note, their Honours ultimately held that

*"comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79"*²²

Their Honours went on to say that

*"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 ... 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."*²³

Their Honours, referring to submissions made regarding allegedly comparable cases, noted that

"while the facts of each of those cases were ... listed in the submissions, there were no submissions which sought to compare the facts there with the case under consideration. ...

...

*No argument was made to her Honour as to any consistency emerging from those authorities, nor is there any attempt to canvass a number of different authorities ... so as to seek to establish any such comparability."*²⁴

This highlights the importance of not merely summarising comparable cases, but clearly setting out how, and why, the facts of earlier cases are similar to the case at hand, and identifying any consistency emerging from those earlier cases.

²⁰ At [58].

²¹ At [64].

²² At [67].

²³ At [68].

²⁴ At [71] – [73].