

## Spouses' Claims On Damages Awards

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On occasions, there may be a need to address the impact of the *Family Law Act 1975* (Cth) in situations where personal injury damages will or have been awarded after there has been a marriage separation.

Section 79(1) of the Act allows the court to make an order to alter the interests of the parties with regard to property. The courts have interpreted the term property to include that which is both real and personal, corporeal and incorporeal.<sup>1</sup> Despite the wide interpretation given by the courts, case law on whether damages for personal injury are capable of coming within the scope of property applications under the Act is divided.

The division is based on two important issues. The first concerns the jurisdiction of the Family Court to hear matters with respect to damages awarded to one spouse and claimed by the other upon separation. The court's jurisdiction has been challenged on the basis that such an award does not come within the meaning of the term property under the Act.<sup>2</sup> Underlying this position is the view that a claim in tort for damages is a chose in action which is purely personal to the plaintiff. As the right of action is not assignable, it is not property within s.4(1) and therefore cannot be subject to proceedings under s.4(1)(a).<sup>3</sup>

Against this background however, came the decision of *In the Marriage of Holmes*.<sup>4</sup> The case followed *Duff* in that it attributed to the term property its widest possible meaning. Its definition therefore, did not exclude choses in action and the spouse claiming part of the damages in that instance was successful.<sup>5</sup>

The second issue for consideration arises out of s.79(4) permitting the court to consider the contributions made by the claiming spouse to the property in dispute. In this respect contributions made need not be wholly financial but rather may be direct or indirect contributions to the marriage<sup>6</sup> or contributions made by the spouse to the welfare of the family including such contributions as made in his or her capacity as homemaker or parent.<sup>7</sup> The problem has been in the court's assessment of "contribution" made by the party claiming part of their spouses' damages award.

The court's position on the matter has been somewhat inconsistent, reflecting a reluctance to

find in favour of the claimant.<sup>8</sup> Yet, in *O'Brien*<sup>9</sup> the court considered whether, in determining the extent of the spouse's contribution to the "property", the heads of damages awarded to one party were relevant. Although McGovern J assessed contributions in respect of the whole of the property, the appellant's claim to her husband's damages award was restricted to past economic loss - she was not entitled to claim any part of sums allocated for pain and suffering or loss of amenities.

Later, in 1985 the High Court in *Williams v. Williams*<sup>10</sup> held that there was no general presumption that an award of damages consisting of pain and suffering and lost amenities should be excluded in determining what order should be made under a s.79 application.<sup>11</sup> The party seeking part of the settlement of damages in that case was successful in claiming part of that award on the basis that she had substantially contributed to the "welfare of the family" and had made contributions both as homemaker and parent by taking on additional burdens in relation to the husband and household during his injury.<sup>12</sup>

It appears then, that an application under s.79 will not be fettered by a narrow interpretation of the term property under the Act. Moreover, provided the spouse claiming part of a damages settlement to be awarded to their partner can show that they have contributed to such property, they will succeed in their claim to some extent.

### Footnotes

1. *Duff* (1977) FLC 90-217
2. See for example *In the Marriage of Pley* 11 Fam LR 451 (1986) FLC 91-76
3. D Kovacs, *Australian Family Property Law* (1992) Sydney: Butterworths; see also *In the Marriage of Saba* 9 Fam LR 780; *In the Marriage of Palmer* 10 Fam LR 406; *In the Marriage of Pley* 11 Fam LR 451; cf *In the Marriage of Holden* 11 Fam LR 835
4. 12 Fam LR 331
5. See also *In the Marriage of Holden* 11 Fam LR 835
6. s.79(4)(b)
7. s.79(4)(c)
8. See for example *In the Marriage of James* 4 Fam LR 401, (1984) FLC 91-537; *In the Marriage of Palmer* 10 Fam LR 406, (1985) FLC 90-606; *In the Marriage of Pley* 11 Fam LR 451
9. 8 Fam LR 691 (1983) FLC 91-316
10. 10 Fam LR 355, FLC 91-628
11. *Ibid* at 356
12. At 356, see also *In the Marriage of Williams* 9 Fam LR 699