The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity

Claire Green
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Abstract

Exploring economic disparity on divorce: A New Zealand perspective on a vexing problem.

The thesis illustrates and attempts to understand the shadow cast by section 15 of the Property (Relationships) Act 1976.

There is no greater inequality than to treat those who are unequal equally. Practical equality between couples is not always achieved with a straight sharing of relationship property. Economic disparity is far too vexed a problem for this approach alone to be an effective solution.

Section 15 was introduced in New Zealand in 2001 to remedy future economic disparity on the breakdown of a marital type relationship. It is now over eleven years since section 15 was introduced into New Zealand law. During this period it appears that more problems have been created than solved by the introduction of section 15 for lawyers, the judiciary, academics and the New Zealand public.

This thesis is an exploration of these problems involving an empirical study completed with the aim of addressing the void in our knowledge regarding the day-to-day impact of section 15. Consideration is given to what takes place outside of the courtroom when relationship property matters are resolved. The study explores the perceptions and experiences of those interpreting and applying section 15.

The thesis:

• considers the impact of section 15 on the vexed problem of economic disparity;
• attempts to understand how section 15 impacts on the practical day-to-day application of the law; and
• considers whether section 15 has resulted in fairer economic outcomes between people on the breakdown of their relationships.
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Section 15 (economic disparity claims) has created a situation where there are now inconsistencies and an unpredictability regarding the application of the law. The enhanced earnings aspects of economic disparity claims are generally overlooked. There are systemic problems within the wider context of the New Zealand family law framework.

Examining the key findings:

The problems associated with the particular drafting of s15 and the legislation.

The inconsistencies in the legal profession’s interpretation and application of the legislation.

The inconsistencies in the quantum of compensation.

Strong biases come into play resulting in inconsistencies.

The legal profession’s conceptual approaches to relationship property matters are at odds with the law.

If an economically disadvantaged party does not have a career then no compensation is due.

The inconsistencies found in the legal professions conceptual approach to, and application of the causation test: the “but for” dilemma.

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income and living standards is to them in practice (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

**Figure 5.46** Graph online survey results showing the participants’ responses to the question: How much of a problem is determining if the cause of the disparity of income and living standards was a result of the division of functions in the relationship (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

**Figure 5.47** Graph online survey results showing the participants’ responses to the question: How much of a problem is determining the appropriate amount of compensation (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

**Figure 5.48** Graph online survey results showing the participants’ responses to the question: How much of a problem is the vagueness of the section (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

**Figure 5.49** Graph online survey results showing the participants’ responses to the question: How much of a problem do you find it when the economically disadvantaged person has not had a career? (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))
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<td>FCR</td>
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<td>IAML</td>
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<td>CA</td>
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<td>FC</td>
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(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of 1 spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together:

(2) In determining whether or not to make an order under this section, the Court may have regard to-

(a) The likely earning capacity of each spouse or partner:

(b) The responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) Any other relevant circumstances.

(3) If this section applies, the Court, if it considers it just, may, for the purposes of compensating party A,-

(a) Order party B to pay party A sum of money out of party B’s relationship property:

(b) Order party B to transfer to party A any other property out of party B’s relationship property.
The Purpose of the Property (Relationships) Act 1976 section 1M

The purpose of this Act is:

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:
(b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:
(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship

The Principles of the Property (Relationships) Act 1976 section 1N

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice
Chapter One

Introduction to the thesis

Section 15 of the Property (Relationships) Act 1976 (“Act”) was part of a significant law reform package that came into force in 2002 and which changed New Zealand’s law regarding the division of property on the breakdown of relationships. The aim of the provision was to provide a remedy to the economic disparity many couples faced on the breakdown of their relationships. During the 11 year period, which has now passed, considerable literature regarding section 15 and the impact it has had on the development of case law has been published. Yet the impact that section 15 has had on New Zealanders who settle their relationship property matters outside of the courtroom remains essentially unknown.

The dissolution of a relationship is probably the most common occasion for ordinary citizens to interact with the legal system and it is in the shadow of the law that these parties arrange their affairs even when a couple settle their relationship property outside of the courtroom.¹ Most settlements regarding relationship property issues do not go to court. It has been estimated that in New Zealand 90 percent of couples settle matters without entering a court.² Chief Justice Elias, extra-judicially, in an address to a Family Court conference, said to attendees that it is “important to keep in mind that the cases that require resolution through the courts are the exception”.³ Generally, the law of New Zealand with its presumption of equal sharing of relationship property is a concept that is “relatively clear to understand … [and is] usually easily applied in the vast majority of cases”.⁴ Conversely, economic disparity claims are not rule based claims. They are discretionary compensatory claims, and they are

¹ For a examination of how the law casts a shadow in the context of out of court settlements and divorce see Robert H. Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce”, (1978-1979) 88 Yale L.J 950 at 990. Putting these concepts in context within New Zealand - The Department of Statistics records show in the year ending December 2011: 8,551 divorces were granted in New Zealand. There were 9.8 divorces for every 1,000 estimated existing marriages and just over 1/3 (35%) of couples who married in 1986 had divorced before their silver wedding anniversary (25 years). <www.stats.govt.nz> (Because the breakdown of de-facto relationships is not included within these statistics we can assume that the breakdown of relationships in the nature of marriage (including de-facto) is greater than these figures indicate.)
⁴ Ibid.
not “clear to understand” nor are there rules governing the measures of the compensatory awards that can be “easily applied”.

**The aim of the thesis**

This thesis therefore aims to contribute to the existing literature by providing empirical evidence about the day-to-day reality of section 15 and economic disparity cases, based on the experiences of practitioners who work in this field.

**Research questions**

In the 11 years that have passed since the introduction of section 15 into New Zealand law it seems that the provision may have created more problems than it has solved for lawyers, the judiciary and perhaps the general public. The difficulties are such that applications to the courts under the provision seem to be rarely made. A certain amount can be understood by considering the case law and by reviewing the relevant background literature – yet there is more to the issue than what this information alone indicates. There are out of court settlements (in relation to the sharing of relationship property) in the event of divorce or separation, which we never see. In light of this the key research questions are:

- What has the impact of section 15 been?
- What role, if any, is section 15 playing in the out of court settlements (of relationship property) of spouses or partners when they separate?
- How is section 15 being read and applied by those who advise, represent and apply the law in relation to relationship property disputes on a day-to-day basis?
- What are the problems that those interpreting and applying the law perceive?

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5 A literature review gives unequivocal support to this statement. See for example from an academic perspective, Bill Atkin “The Disparity in Economic Disparity, The need for a full-scale overhaul of ss15 and 15A and maintenance” (NZFL Conference October 2005). For examples of practitioners’ sentiments see Anita Chan, Barrister, New Zealand “Economic Disparity – The New Zealand Approach” IAML, Shanghai September 2006 and Deborah Hollings QC who said “Section 15 is a complex provision and its drafting causes some major statutory interpretation questions”, in “Of gold diggers and possums – an examination of the limits of the Property (Relationships) Act” www.lawyers.org/conferences at [6]. The judiciary has also expressed concerns. For example in *M v B* it was noted that section 15 awards have “not exactly been a model of clarity in some of the lower Court judgments” *M v B* [2006] 3 NZFLR 660 at [271].
• Should New Zealand be doing something different to solve economic disparity? If so what suggestions can be made?

The form of the research

With the research aim and questions in mind the research strategy emerges. The sources of data used can be categorised as follows:

- Published work (literature review) – including academic research from a variety of disciplinary perspectives, Government reports, media articles and results from internet searches;
- The statute and court judgments; and
- Empirical research.

Published work and the case law are unable to examine the day-to-day application of section 15. Reliance on this material alone has consequences. As previously stated, most relationship property settlements occur in private and out of the courtroom. Matters that go to court are perceived as unusual or there are other unique or complicating factors. For example couples may be well-resourced financially and, because of this, the stakes are seen as high (an example of this is found in the Court of Appeal judgments of M v B and X v X6 which are perceived as “big money” cases). Alternatively, they may be regarding a novel area of law (for example the Court of Appeal decision Z v Z (No. 2) 7 which raised the question whether a husband’s future earnings and enhanced earning capacity could be considered matrimonial property), or they may have complex features (in the context of relationship property matters this may be because of the existence of trusts, or company structures, or if relationship meets the statutory criteria of a “de facto relationship”8). This means it is difficult to assess the extent to which such cases reflect what is happening in everyday experiences of relationship property settlements.

7 Z v Z (No 2) [1997] NZFLR 241.
8 Property (Relationships) Act 1976, s 2D.
As before mentioned, it is intended that the empirical research will provide an insight into the impact section 15 has had on New Zealanders when they settle their relationship property following the breakdown of a relationship (be it a marriage, de facto partnership or civil union) and also provide an appreciation of practitioners’ experiences of section 15 and economic disparity claims. This aim therefore shapes the format and plan of the thesis.

**The thesis plan and format**

Chapter 1 provides an overview of the topic explaining the contextual background of economic disparity and section 15. The thesis then develops in a further five chapters. Chapter 2 sets out the genesis of the law reform, placing it within its social and political context. In Chapter 3, the Court of Appeal decisions regarding section 15 (M v B and X v X) and the Court’s treatment of section 15 are examined. Chapter 4 is the empirical research, reporting on the interviews with practitioners by asking them to analyse two different relationship property disputes. Chapter 5 continues the empirical research and examines New Zealand practitioners’ perspectives on the impact of section 15 in respect of relationship property law and includes the perspectives of a contextual study group made up of accounting professionals, a psychologist and section 15 claimants. The thesis concludes, in Chapter 6, by suggesting options that, if explored and implemented, may improve how economic disparity disputes are approached within New Zealand.

**Setting the Scene**

**What is meant by economic disparity?**

Economic disparity relates to the economic unfairness suffered by one party on the division of relationship property in the event of breakdowns of marriages, civil unions and de facto relationships. Practical equality between couples is not always achieved with a straight equal sharing of relationship property. As Baroness Hale of the House of Lords, in the leading United Kingdom’s judgment regarding economic disparity, said:

> Too strict an adherence to equal sharing and the clean break [principle] can lead to a rapid decrease in the primary carer’s standard of living and a rapid increase in the

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9 Pursuant to the Property (Relationships) Act 1976 civil unions, marriages and de facto relationships (of more than 3 years duration) come within the ambit of the law.

10 McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618, at [142].
breadwinner’s. The breadwinner’s unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution.

The argument is that there can be no actual equality when the breadwinner is left with the ability to earn an income, often unimpeded by the ongoing daily care of dependent children, while the economically disadvantaged partner has little or no ability to earn an income and is further impeded by the ongoing care of dependent children.  

An issue at the heart of economic disparity is that: “It is hard to be an independent equal when one is not equally able to become independent”.

**Economic disparity in New Zealand: Fresh impetus for law reform from the Court of Appeal in Z v Z**

In 1997 the New Zealand Court of Appeal considered this issue within the case of Z v Z (No. 2). This case involved a marriage of 28 years. At the outset of the marriage the wife’s income was greater than her husband’s. The husband worked in a government department and studied part-time, later gaining a professional qualification. The wife stopped working a year before having their first child. They had three children all of whom were financially independent at the time of separation. At the end of the marriage the wife’s expected income was $7,000 per annum on a benefit, and the husband was earning over $300,000 per annum as an accountant. The wife had health problems and had no future prospect of paid work. The wife’s argument was that she should be awarded more than the ordinary equal share of relationship property because of the considerable difference in income between herself and her husband. Judge Robinson in the Family Court awarded the wife a share of the husband’s future earnings, but the Court of Appeal later rejected this, concluding that it could not award something that did not exist. The Court heard Mrs Z’s

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11The issues are summarised in the Canadian Supreme Court judgment of Moge v Moge [1992] 3 SCR 813 (S.C). Citing , Brockie v Brockie (1987), 5 R.F.L (3d) 440 (Man. Q.B) where the Court held that: “It must be recognized that there are numerous financial consequences accruing to a custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves the adoption of a lifestyle which, in ensuring the welfare and development of the child, places many limitations and burdens upon that parent.”


arguments regarding the enhanced earning capacity of her husband through her indirect
ccontributions made throughout the course of their marriage.

The Court noted the strength of the wife’s argument, that to treat enhanced earning capacity
as matrimonial property is consistent with the policy and spirit of the legislation, but the
Court was unable to treat human capital as an item of property under the definition of
“property” in the Matrimonial Property Act. The Court concluded future earnings have no
present existence and “earning capacity is not property [and] an enhancement of that capacity
is not matrimonial property”. It was felt that it was not within the proper interpretative role
of the Court to give a radically different meaning to the words “property in the way
proposed”. The Court observed that “resolving economic issues on dissolution in terms of
property rather than support ... emphasises the need for a concept of property which is
capable of reflecting the contributions of the non-career wife to the income-earning capacity
of her husband”.

Within the decision there was judicial recognition that the division of matrimonial property
under the Matrimonial Property Act 1976 operated harshly on women who had forgone their
own participation in the workforce to focus on the care of children and/or domestic duties and
that there can be an “inequality in the equal division of matrimonial property”. At the time
this case was heard a political and social environment existed within New Zealand that was
pushing for law reform. Z v Z added to the prevailing climate from which the impetus for law
reform continued to evolve. Compelling factors for the reform also included reports and
social research data (both internationally and from within New Zealand) indicating the
economic disparity faced by many couples on the breakdown of their relationships. New
Zealand Parliament confronted the issue. Margaret Wilson (the then Associate Minister for
Justice and Attorney General), explained in 2000 that the Matrimonial Property Act 1976,
with its presumption of equal sharing of the matrimonial property upon divorce, was not
“equipped to address economic disparities that arise on the breakdown of a relationship” and
between couples and she said:

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14 Z v Z (No 2) [1997] NZFLR 241 at [262]. At the time this legislation was the Matrimonial Property Act 1976.
15 Ibid at [243].
16 Ibid at [246].
17 Ibid at [264].
18 Ibid at [257].
20 Ibid.
Research demonstrates that undeniable poverty results for many women, and, sadly their children, when these relationships end. That is because of the lack of a career option.

I have received details of many case studies illustrating the serious injustices that can occur under the current law. Many of them also demonstrate a recurrent pattern. Women are left, after long term relationships, some of which have lasted as long as 35 years or 40 years, with very few assets and few employable skills. Typically those women have often contributed to the build-up of a farm or business, as well as devoting their lives and their time to the care and upbringing of their children and their partner ... often in thankless domestic tasks. They are left with few assets, as often the business or the farm is in the husband’s name or is diverted into family trusts, and is therefore inaccessible when the relationship ends. To add to the misery of these women they are left with limited employable skills, after having been out of the paid workforce for several decades … Perhaps the greatest injustices occur when one partner ends up with the custody of the children, few assets or capital, and limited employable skills, and is forced to survive on the domestic purposes benefit, while the other partner enjoys a high standard of living.

The 2001 Law Reform

The result of this push for reform saw the Property (Relationships) Amendment Act 2001 passed into law on 3 April 2001. It amended the Matrimonial Property Act 1976 and renamed it the Property (Relationships) Act 1976. The Act was intended to remedy the problems and loopholes identified within the existing matrimonial property law regime. It included section 15 which provides a remedy to address the mischief of the economic disparity on the breakdown of a relationship.

Section 15 is significant in that it introduces a power that permits the departure from equal sharing of relationship property which is the “bedrock” upon which the Act is founded. Bill Atkin noted that this “discretionary power cuts across the concept of a rule-based regime of
property division". It introduces a wide discretion to order compensation from the economically advantaged party’s share of relationship property. This discretion sits “very awkwardly with the philosophy of the Property (Relationships) Act 1976”. As a result New Zealand has a rule-based relationship property regime codified within the Act and a discretionary compensatory provision (contained in section 15) grafted onto the Act. The conceptual foundations of the two appear incongruous.

Despite Z v Z section 15 (and the Act) does not treat future earning capacity as property. Instead, the court is given a wide discretion to order compensation from the higher earner’s share of the relationship property, resulting in a discretionary readjustment of the division of relationship property alone.

The law reform was an attempt to modernise the concept of partnership. Despite this, all of the leading cases involving economic disparity claims have to date been in relation to traditional marriages of long duration.

Importantly, the Property (Relationships) Act extended coverage to more New Zealanders including couples in same-sex and heterosexual de facto relationships of more than three years’ duration and civil unions. This was seen as reflecting “a change in society’s perception of marriage” and a modernising of the concept of partnership. Until the Act came into force de facto couples in New Zealand were not legally viewed as partnerships of equals and had no statutory protection in terms of dealing with the allocation of property after the relationship ended.

The genesis of section 15 came, at least in part, from Z v Z which was a long term traditional marriage and the leading economic disparity cases (argued on the basis of section 15) have, to date, been New Zealand Court of Appeal decisions and they have all been in relation to

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24 For an examination of this issue and wider matters as they affect de facto couples, see W R Atkin Living Together Without Marriage Wellington, Butterworths, 1991.
traditional first marriages of long duration (although unlike Z v Z they have also involved dependent children where the mother was the primary caregiver).  

The 2001 law reform was designed to widen the spectrum of relationships to which the Act applied, but quite how section 15 works within the dynamic of these other types of relationships remains to be seen. 

There may be problems when section 15 is applied to de facto relationships or civil unions because there is less developed case law in relation to these types of relationships and section 15. The provision itself gives little guidance to those interpreting and applying it. This feature of the provision makes the case law particularly significant because those interpreting and applying the law look to the case law for guidance. An additional dimension to this problem could be that the conceptual foundation of section 15 is premised on the traditional model of a husband and wife, where the wife is engaged in primary care-giving and the husband works for an income, and this makes it difficult to consider economic disparity claims in regard to relationships that fall outside of this type of structure. A Family Court Judge made the observation that the Matrimonial Property Act 1976 was developed based on the blueprint of a traditional family unit. This model may have been carried over to the Government’s deliberation on economic disparity because this, as a Queens Counsel opined, is how the Government of the time saw a relationship where economic disparity could be an issue. 

The model has been reinforced in the Court of Appeal decisions involving economic disparity, because they have each involved traditional marriages (of long duration), with a husband engaged in paid professional employment and a wife having forgone a career (with

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25 In Z v Z the children were financially independent at the separation of the couple. 

26 Much has been written about this. For example see Bill Atkin “The Disparity in Economic Disparity, The need for a full-scale overhaul of ss15 and 15A and maintenance” (NZFL Conference October 2005), or Joanna Miles “Financial Division and Property Division on Relationship Breakdown- A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZULR 268. 

27 Family Court Judge Inglis QC said that the Matrimonial Property Act 1976 “was developed to meet the stereotype of the one-income family in a relatively long marriage, the husband having the income and accumulating the family capital, the wife bringing up the children and looking after the home”. See His Honour Judge B D Inglis QC “The Family, Family Law, Family Lawyers and the Family Court of the Future” [1995] Otago Law Review, Vol 8, No 3, at page 305. 

28 The Queens Counsel interviewed in the research made the observation that this was the model that “Wellington” and the “Government” were working on in respect of s15 and the QC thought that this was seen as the model of the “good wife” (being there, at home, supporting her husband while he went out to work). See the results of the empirical research in Chapter 5.
an established career path) to focus on domestic activities (including caring for the children of the marriage). In all probability this type of relationship has become a form of blueprint for approaching section 15 problems. In practice section 15 is rarely applied outside of the scope of “traditional” marriages.

It is difficult for practitioners to apply section 15 outside of such a model because this traditional type of relationship is the conceptual model that the section seems to operate most effectively within. It is acknowledged that there are circumstances where de facto relationships are of long duration and partners, within these relationships, will have assumed similar “division of functions” just as in a “paradigm marriage”. Such cases are similar to traditional marriages with the framework of section 15 sitting with relative ease within the scope of such relationships.

This traditional model of a relationship undoubtedly influences how section 15 and relationship property cases are approached by practitioners and the judiciary. While the Act is about a spectrum of relationships, because of the constraints of the section and the precedent set by the cases, difficulties may arise when section 15 is applied outside of this traditional blueprint of a relationship. It is likely that a practitioner would have some difficulty advising a client whose relationship does not fit the established model. For example it is difficult to determine the appropriate quantum of compensation because there is nothing within the drafting of section 15 to guide a practitioner regarding compensation and the leading decisions have addressed compensation through an analysis of the cost to the wife of the loss of her potential earnings. It is therefore foreseeable that a practitioner would find it difficult to advise a client who presents with a set of facts that does not fit this model. In circumstances where the client has not had a career (or recognisable career path), but nevertheless satisfies the jurisdictional tests of an economic disparity claim, the practitioner would have to consider other models for calculating the quantum of the compensation. But quite what other models to use is uncertain and the section itself offers no solutions.

29 See the results of the empirical research in chapters 4 and 5. Practitioners explained how section 15 and the related case law relies on an outdated model of stereotypical roles of men and women husband/wife and how problematic it is for them when they attempt to apply section 15 outside of this traditional blueprint.

30 M v B [2006] NZFLR 641 and X v X [2009] NZCA 399. This issue is considered in the chapter 3 where the methodology is considered and then later within the context of the empirical research (chapters 4 and 5).
There may also be strong empirical reasons for section 15 applying in traditional marriages of long duration rather than de facto relationships. For example the research of sociologist Linda Waite documents the benefits to spouses found within the working partnership of a marriage and concludes that these benefits, within de facto relationships, while present are “more muted” than the benefits derived from marriage.31 There has been limited social research on the economic benefits to partners within de facto relationships and because of the more informal nature of de facto relationships (with there being no official record keeping of the partnership) it is difficult to source information. For marriages (and civil unions) there are official record keeping sources for example the official register of birth, deaths, civil unions and marriages32 and the New Zealand Department of Statistics keeps records of the number of divorces per year.33 In the context of civil unions there is limited research on these relationships because civil unions remain relatively new, only being legal in New Zealand since 16 April 2005.34 To date there have been no reported cases of an economic disparity claim brought in respect of a civil union.

The focus of the thesis is the impact of section 15 on the vexed issue of economic disparity within New Zealand. Because the leading decisions involving section 15 have all involved marriages of long duration this influences the research. However, later in the thesis, in the context of the empirical research one of the two case studies given to the legal professional study group to analyse and apply section 15 to, is based on a de facto relationship. This case study was included because there was an expectation that such a factual narrative could illustrate how practitioners perceive section 15 and its application to relationships that fall outside of the model of the partnership/marriage that the Court of Appeal decisions have so far established. The other case study, given to practitioners, was based on the familiar facts of a traditional marriage of a long duration with a considerable pool of relationship property where the woman had given up her professional career to care for her family. There are marked differences in the legal professionals’ approaches to the two case studies.35

32 See Birth, deaths and marriages – www.dia.govt.nz
33 See The New Zealand Department of Statistics – www.stats.govt.nz
34 The Civil Union Act 2004 was passed by Parliament on 9 December 2004 and came into effect on 26 April 2005.
35 This research is explored in chapter 4.
It is important to consider section 15 outside of the scope of traditional marriages alone as the Canadian Supreme Court held “it is important to note that families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages”.\(^{36}\)

Putting these themes aside, until later in this thesis when they will be considered in the context of the empirical research, it is important to now consider section 15.

**Section 15 leaves “rather a lot of work to be done”**

The premise of section 15 is simple enough. It is to redress\(^{37}\) economic disparities between couples on a relationship breakdown. However, it is not as simple as it seems, as Joanna Miles observed:\(^{38}\)

> The particular basis, on which it is to be implemented by a court, or by lawyers or parties settling cases, is not readily ascertainable from the text of the Act. The legislator has left rather a lot of work to be done by the judges and commentators, particularly in determining how to quantify awards under the section.

Because the basis of its implementation and the method of calculating the quantum of awards are not “readily ascertainable from the text” the judiciary and wider legal profession must make sense of it and give meaning to words. The intent of section 15 was laudable but perhaps the mischief it was hoped to resolve remains. Mrs Z, if her case was argued pursuant to section 15, would only have been able to be compensated out of the pool of relationship

\(^{36}\) *Moge v Moge* [1992] 3 SCR 813 (S.C). The Court opined:

> ...[that] even in childless marriages couples may decide that one spouse will stay at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable. Conversely ... both spouses may work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer ... or otherwise curtails employment opportunities and thereby incurs economic loss ... A spouse may contribute to the operation of a business ... through the provision of secretarial, entertainment ... or may take on increased domestic ... responsibilities that enable the other to pursue licenses, degrees or other training or education.

\(^{37}\) The Oxford Dictionary defines redress as: to remedy, level out, equalise, balance out, set right, restore. [www.oxforddictionaries.com](http://www.oxforddictionaries.com). As the title to the section suggests the remedy is in part restorative – mirroring the comments of Hammond J in *M v B* when he observed that the legislative package is in part restitutory. *M v B* [2006] NZFLR 641, Hammond J at [223].

property. The value of the relationship property was calculated at $900,000 and then following the Court of Appeal decision the husband’s share in his accounting practice was also included as matrimonial property. The section does not permit ongoing future payments out of a higher earner’s income. The remedy must come from relationship property alone. When there is little in the relationship property pool, from which to compensate the economically disadvantaged party, there is limited scope to provide a remedy. Further, sometimes a lump sum payment in the form of an unequal division of relationship property can be seen as being unfair because it is inflexible and cannot take into account the future circumstances of either party should they change. For many couples the greatest income producing asset is the income derived from the higher earner’s endeavours and targeting income remains outside of the scope of section 15. This issue highlights an important conceptual dilemma within economic disparity claims. For some individuals their conceptual approach to relationship property means that they see an ability to earn a higher income as a product of the relationship which should therefore be shared between the couple when the relationship breaks down. For others it is human capital and as such should not come within the ambit of the relationship property. It is from individuals’ idiosyncratic conceptual approaches to relationship property law that many of the vexing problems inherent within economic disparity claims unfold.

As previously noted in this chapter, the conceptual foundations of the Act (being a rule based property focused statute) and section 15 (a discretionary compensatory provision), appear incongruous. Bill Atkin has said “it is very hard to see how s15 ... square[s] with [the] essential basis of the Property (Relationships) Act 1976”. By including section 15 within the Act the conceptual foundations of the Act have become blurred and this has created problems. There is a sense that section 15 is out of place. For example if the intent of the provision is to remedy a future economic disparity then surely there should be a means to target the future income of the economically advantaged partner in circumstances where they have benefited from the division of functions assumed in the relationship. Yet the remedy available under section 15 is limited to a one-off payment of a share of relationship property. At times this means that an economic disparity goes un-remedied.

Section 15 does not seem to sit logically with a keystone principle of the Act (and Family law) that parties should be entitled to a clean break from each other to be able to “put the past behind them to begin a new life which is not overshadowed by the previous relationship”. Those applying section 15 are required to look back to what has happened in the past (so that it can be established if there is the necessary causal connection between the relationship and the economic disparity) and then also consider the “likely” future differences in income and living standards between the couple. This future inquiry requires a “speculative investigation into what might happen”. Such an inquiry rests uneasily with the clean break principle because it requires the consideration of the future while the clean break principle means no such inquiry should be made. The clean break principle does not have regard to the parties’ economic futures, and is premised on the right of the individual to get on with the rest of their life following divorce without being “overshadowed by the previous relationship”. Finding the correct balance between the two concepts is difficult, the appropriate scope of an economic disparity inquiry when considered against the clean break principle is uncertain.

A rigid application of the clean break principle ... has the advantage of certainty. But it runs the risk of becoming outdated as social conditions change and the reasoning behind it no longer fits in with the modern concept of fairness ... [the] principle translated into rules can operate harshly in some cases, particularly where the resources consist largely of income rather than capital.

Lord Nicholls’ view highlights further anomalies within the Act and section 15. The Act is concerned with property, yet section 15 seems to be concerned with the parties’ ongoing financial needs (the inquiry is on the couples’ “likely income and living standards”). Arguably, such an inquiry is better suited to the “domain of maintenance”. The nature of an economic disparity claim is ambiguous. It could be seen as a debt or, it could be understood as something similar to a continuing moral duty that is traditionally more akin to

43 *McFarlane v McFarlane* [2006 UKHL 24; (2006) 2 AC 618, at [115].
44 Property (Relationships) Act 1976 s 15(1).
45 Bill Atkin provides a summary of interrelationship of maintenance and s15 and questions how the two concepts sit together in *The Disparity in Economic Disparity –the need for a full-scale overhaul of ss15 and 15A and maintenance* (NZFL Conference, 10 October 2005).
maintenance. But the calculation of an award of maintenance is founded on the reasonable needs of the disadvantaged party. It is intended to be a short-term remedy of financial assistance until such time as the disadvantaged party can “get back on their feet” and be self supporting. The scope of an economic disparity claim could be perceived as moving beyond an inquiry regarding the short term reasonable needs of the claimant because it is compensation and it may have restitutionary principles or redistributive elements to it.

Yet compensation, pursuant to section 15, can only come from the capital/relationship property. This means if there is no relationship property (or a limited amount) then the economic disparity between the couple cannot be remedied. Whichever way one looks at section 15 and economic disparity claims, inconsistencies and conceptual problems are evident. Bill Atkin, when he considered the concepts underpinning economic disparity compensation and section 15, said: “There are problems whichever way we leap on this.” The particular drafting of section 15 and the placement of it within the Act causes problems and then, in a wider context, the existence of the provision within New Zealand Family law causes further confusion, for it seems it does not fit comfortably within the existing legal framework.

46 Hammond J notes that the legislative package is in part restitutionary. *M v B* [2006] NZFLR 641, Hammond J at [223].
47 *M v B* [2006] NZFLR 641, William Young P at [199].
48 Ibid at [211].
Chapter Two

Section 15: The legislative history from which the economic disparity provision emerged

Chapter two explores the background to the law reform with a particular focus on the genesis of section 15. The development of the economic disparity provisions marked a shift from the pre-existing policy of equal sharing of matrimonial property. This shift in policy was inevitably shaped by the political and social environment from which section 15 emerged. It is therefore important to consider the legislative history of relationship/matrimonial property in New Zealand so that we can begin to understand the way it contributed to the enactment of section 15.

New Zealand’s relationship/matrimonial property legislative history is complex and reflects the changes that have taken place in our society. For example, New Zealand society has come a long way from the Divorce and Matrimonial Causes Act 1867, which required an act of Parliament to secure a divorce. For a husband to gain a divorce he only had to prove adultery, but for a wife the grounds were very different. The wife had to prove adultery aggravated by bigamy, sodomy, incest, rape, cruelty, or desertion for five years or more (by her husband). Proof of fault was required in matters of divorce. Generally “divorce was for the well-to-do” and “desertion was for the working class”.\footnote{www.teara.govt.nz/en/divorce-and-separation [accessed 16 April 2013]} Divorce was uncommon. In 1868 there was one application for divorce and in 1900 this figure had grown to 111.\footnote{Ibid.} Divorce is not the uncommon social occurrence that it once was. In 2011 in New Zealand there were 8,551 divorces.\footnote{www.stats.govt.nz [accessed 17 April 2013]. Note, the results for 2012 were not available at the time.}

With time the grounds of fault for divorce were extended\footnote{Divorce Act 1898 extended the grounds for divorce. For example adultery became enough for either men or women to get divorced. New grounds included: five years’ desertion, refusal to cohabit when ordered to by the court, drunkenness and failure to support the family (husband) or drunkenness and neglect of domestic duties (wife), seven or more years’ imprisonment for the attempted murder of one’s spouse.} and divorce became easier to obtain but the economic and social ramifications of divorce remained for many New
Zealanders.\textsuperscript{53} The first non-fault-based grounds for divorce were introduced by the Divorce and Matrimonial Causes Amendment Act 1920 and “fault was largely discarded as a legal concept in 1980”.\textsuperscript{54} Bill Atkin and Wendy Parker explained that “the history of property division after divorce reflects the changing notions of fairness and the roles of men and women”\textsuperscript{55} and that:\textsuperscript{56}

[U]nderlying the history of property division are arguments about ‘who did what’ during the relationship, and how this should determine ‘who gets what’ and ‘how much is fair’ once the relationship is over. The basic issue has remained unchanged, but legal responses to it have altered over time, reflecting changes in social expectations.

On divorce, property used to be divided on the basis of who had contributed to it. Only direct financial contributions to property were counted. The Matrimonial Property Act 1963 was the first statute in New Zealand that recognised non-financial contributions to property should be reflected in the division of property.\textsuperscript{57} Yet the 1963 legal regime gave little direction to the courts or to lawyers regarding how the contributions should be considered. It did however indicate what could count as a contribution to the property by the non-owner to the owner’s property. This was “money, services, prudent management, or otherwise howsoever”.\textsuperscript{58} The broad discretion, when handed to the judiciary, created problems even after the law was amended to allow the consideration of indirect non-financial contributions made to property.\textsuperscript{59} An insight into the legal and social significance of the problems was given by Elias CJ when extra-judicially she said:\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{53} At the time in New Zealand social and religious stigma was attached to divorce and the economic consequences of divorce for women were negative. See www.teara.govt.nz/en/divorce-and-separation
\item \textsuperscript{54} This was as a result of the enactment of The Family Proceedings Act 1980. See Bill Atkin and Wendy Parker Relationship Property in New Zealand Second Edition, LexisNexis, Wellington 2009 at page 2.
\item \textsuperscript{55} Bill Atkin and Wendy Parker Relationship Property in New Zealand Second Edition, LexisNexis, Wellington 2009 at page 2.
\item \textsuperscript{56} Ibid.
\item \textsuperscript{57} Matrimonial Property Act 1963, s6.
\item \textsuperscript{58} Matrimonial Property Act 1963, s6(1).
\item \textsuperscript{60} The Right Honourable Dame Sian Elias, Chief Justice of New Zealand, Address to the Family Court Conference, “Separate Property – Rose v Rose” Wellington, 2011 at page 4.
\end{itemize}
The year I started legal practice, the Court of Appeal decided *E v E*. Other generations of young lawyers have had other causes. For young women practitioners, the injustice of matrimonial property division was the burning issue. It seems incomprehensible today that North P, asked to invoke the wide discretion under the 1963 Act wrote in his judgment of the “wife who may be able to go into the arms of her lover well equipped with worldly possessions”.

North P in *E v E* also said:

> The mere fact that a wife has been a good wife and looked after her husband well domestically, cannot possibly, in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share.

The Court of Appeal judges, “apart from Woodhouse J and Wild CJ, gave little weight to non-financial contributions under the 1963 Act”. The impact of these Judges in New Zealand’s legal history has been significant. Elias CJ said they are “heroes … who considered that all forms of contribution to the marriage were of equal importance”.

In 1976, the Matrimonial Property Act introduced a different approach to solving matrimonial property issues within New Zealand by replacing the broad judicial discretion with a strong presumption of equal sharing. This represented a radical change from that of the Matrimonial Property Act 1963, moving from a discretionary regime to a generally rule based property regime. Elias CJ spoke of the significance of this reform and said:

> The reform was necessitated by the entrenched views of many of the judges, which clearly lagged behind community attitudes. And, as a result, it was an important policy of the 1976 Act that it set up a rule-based system rather than a system that

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61 *E v E* [1971] NZLR 859 (CA).
62 Ibid at [885].
65 Ibid.
relied on wide discretion for judges to come to a just division of property in the circumstances of the case.

The Matrimonial Property Act 1976 and its legacy

The Matrimonial Property Act 1976 (the “1976 Act”) was enacted at a time that New Zealand society was undergoing great change. The 1976 Act was seen as a reflection of liberal feminist views of the time and as a groundbreaking piece of legislation. Its objectives of equality and justice, especially for women, pushed it firmly into social policy territory.66

The 1976 Act dealt with the problem of judicial discretion, inherent in the 1963 matrimonial property law regime, by creating the presumption of equal division of the matrimonial property upon divorce.67 Thus a key feature of the 1976 Act “was its legislative direction and the consequent impact that it had in reigning in judicial discretion”.68

The Matrimonial Property Act 1976 applied to all married couples and contained the ability for couples to contract out of its provisions.69 There were three types of property – ‘separate property’70, ‘core matrimonial property’71 and ‘balance matrimonial property’.72 Separate property generally remained the property of the owner, although this was subject to exceptions.73 There was generally an equal sharing of the matrimonial property which “seemed the fairest solution and the tidiest way to increase the share of property allocated to women”.74 The presumption of equal sharing was stronger for the house and chattels than for the balance matrimonial property, but it meant that contributions only needed to be considered when a spouse sought to displace the presumption.75

Balance matrimonial

67 Matrimonial Property Act 1976, s11.
69 Matrimonial Property Act 1976, s9.
70 Separate property is defined in the Matrimonial Property Act 1976, s9.
71 Matrimonial property is defined in the Matrimonial Property Act 1976, s8.
72 Balance is defined in the Matrimonial Property Act 1976, s15.
73 These exceptions related to contributions of the other spouse to the separate property or “mixing” of the separate property. These exceptions are specified in Matrimonial Property Act 1976, s9.
75 The presumption could be displaced in certain circumstances - when it was a marriage of short duration (less than 3 years (Matrimonial Property Act 1976, s13)) or when there were extraordinary circumstances which
property usually consisted of farms and businesses, and was divided according to the contributions of the parties to the marriage.\textsuperscript{76} For these assets there was a presumption of equal sharing, but it had a lower test for its displacement, being in cases where the contribution of one spouse was greater than the other. Section 18 of the Matrimonial Property Act 1976 specified the types of contributions that could be considered. These included care of dependents, the performance of household duties, the acquisition or creation of matrimonial property, and supporting or assisting the other spouse.\textsuperscript{77} The 1976 Act contained a specific direction that there is no presumption that financial contributions are of greater value than non-financial contributions.\textsuperscript{78}

The 1976 legislation was significant, heralding a change in direction from a purely separate property regime to a community property system. At the time the 1976 Act was introduced the then regime was considered akin to a ‘community of surplus’ system where there is no community while the marriage is on foot, but on dissolution the gains made during the marriage were equally shared. The change to some form of community property regime followed from the almost revolutionary reconceptualising of marriage as a partnership between two equal persons. The notion of marriage being a partnership features strongly in the 1976 Act. No longer was it two individuals with the husband at the head of the unit but rather a partnership with the partners each having equal status in the eyes of the law. The focus had shifted from the spouses’ property to their relationship; spouses were now presumed to contribute equally to the marriage relationship, albeit in different ways.

The spirit and intent of the 1976 Act is captured in its long title:

\begin{quote}
An Act to reform the law of matrimonial property; to recognise the equal contribution of the husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce.
\end{quote}

\textsuperscript{76} Matrimonial Property Act 1976, s15. For an analysis of how this discretion has been exercised see Mark Henaghan and Nicola Peart, “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” in Bigwood, R (ed) \textit{The Permanent New Zealand Court of Appeal, Essays on the First 50 Years} (Hart Publishing, Oxford, 2009).
\textsuperscript{77} Matrimonial Property Act 1976, s18(1).
\textsuperscript{78} Matrimonial Property Act 1976, s18(2). Note this remains in the Property (Relationships) Act 1976, s18.
The intent of the 1976 matrimonial property law regime represented a radical change from the 1963 regime and attracted comment at the time of its introduction, much of which was critical.\(^79\)

**The perception of problems within The Matrimonial Property Act 1976**

It was soon felt that the 1976 Act was not working. It was evident that formal equality does not, of itself, bring with it a fair outcome. A sentiment reflected in research and commentary of the time was that upon divorce one party frequently was left with half of the matrimonial property but had little earning capacity and this coupled with the ongoing demands of the day-to-day care of children meant that practical equality was not achieved despite the equal sharing of the matrimonial property. It was felt that the other party to the relationship frequently had a different economic outlook because while they may have the same half share of the matrimonial assets they retained the ability to earn a higher income and had freedom from the day-to-day responsibility of childcare and as such their ability to earn was unencumbered. In such circumstances it was felt that equal sharing did not always bring with it a fairness of result or an equality of substance. Research demonstrated that men and women were clearly in unequal positions at divorce, despite their equal shares in matrimonial property. The main asset of the relationship was often the husband’s earning power and it was felt that many women had sacrificed their ability to have a career either to care for children or to support their husband’s career. Further, as women were frequently the custodians of children, their earning capacity continued to be limited by the need to either reduce earning time and effort to provide childcare, or increase expenditure to purchase childcare. The expenditure and needs of women, with the care of dependent children, were considered great because they had to provide housing and other requirements for their children.\(^80\)

In the 1980s the Government’s Working Group on Matrimonial Property and Family Protection\(^81\) and the Royal Commission examined the problems of the 1976 regime. It was from this context that the 2002 law reform emerged.


The Working Group established in 1988 as part of the Labour Government’s social policy reform programme, reported to the Cabinet of Social Equity Committee and recommended changes to the 1976 Act. The recommendations included a change to the rule about the equal division of matrimonial property and a change to the law regarding the division of property of de facto marriage partners.

The Working Group received submissions regarding the perception that the equal sharing regime of the 1976 Act was failing to secure an equitable division of what the Group called the “product of the marriage”. It was felt that when the goal is true equality of economic outcome between the couple, an equal division of the relationship property is not enough. The Matrimonial Property Act 1976 was, in reality, less than successful in ensuring equity between the spouses when the relationship ended. The Group said: “Equity in theory is not matched by equality of result. Women normally leave the marriage much worse off financially than their husbands.”

The Working Group observed that the heart of the debate about equality and equity is the economic consequences of current sex roles in our society. The Group concluded that if men took a greater share in child rearing and women had better career opportunities the detrimental effects of marriage breakdown would diminish.

The type of reform the Working Group foresaw was built on the existing Matrimonial Property Act because to move away from this premise would have, in the Group’s opinion, been unwise and the existing Act’s principles should not be distorted. The Group recommended the role of maintenance in solving economic disparity be considered. However, the Group backed away from valuing and dividing the future income of a spouse, perceiving a more direct approach would be to encourage the courts to make greater use of


83 These traditional sex roles being that the woman looks after the domestic chores – the homemaking and day-to-day raising of the children and the man specialises in generating an income and making money.
the power to award lump-sum maintenance out of the share of matrimonial property held by
the partner with better financial prospects.

The 1988 Royal Commission’s Report

The Commission also considered the problems of the existing regime and noted the existence
of a lack of equality of outcome as a result of problems within the 1976 Act. The
Commission acknowledged that principles and the functioning of the Act were centred on the
need to achieve a form of equality between men and women with the intent that women
would receive full recognition for their non-paid work within a marriage. The Commission
perceived a lack of equality of outcome and a consequent sense of injustice to women and
children of a marriage relationship.84

The Commission thought that the aim of the 1976 Act’s long title (to recognise the equal
collection of the husband and wife to the marriage partnership and to provide for a just
division of matrimonial property, while taking account the interests of any children) was not
matched by the reality of the economic consequences of divorce. The Act’s provision for an
equal re-allocation of existing assets at the time of separation failed to produce true equality
between the sexes. The view of the Commission was that women and consequently children
are economically handicapped by marriage breakdown.85

The Commission felt that the equal division of matrimonial property created an inequality of
result. The actual result for many wives, and particularly those with children, was of
deprivation. An equal division of the family assets was seen as unable to give both the
husband and wife an equal springboard from which to begin their new and separate lives.
Receipt of half of the equity in the home fails to place women in an equal position to their ex-
husbands. It was felt that a career and its related benefits and prospects are the assets which
have the most impact for an individual’s future economic wellbeing. The Commission felt

IV (April 1988) at page 217.
IV (April 1988) at page 218.
that in New Zealand society a career and its associated prospects was more likely to belong to
the husband than to the wife.86

The Commission considered the typical life-pattern of a married woman and found that it
involved employment, full-time domesticity, then employment again, possibly on a part-time
basis. An interrupted working life for a married woman results in a failure to achieve her
career potential and consequently her full or even viable economic potential.87 It was felt that
the wife is often disadvantaged by the occupational demands of marriage and family welfare.
Submissions made to the Commission pointed to the economic dependency created for
women when they fulfil the demands arising from marriage. The loss of, or failure to gain, a
career and its related prospects is not compensable by an equal division of assets at
separation. The most vital asset of a marriage, the job itself, is not part of the divisible
property. Instead it remains, generally, intact and probably enhanced in the hands of the
husband alone. After separation the assets may be few but the husband’s earning potential
great. It was felt that the 1976 Act was neither able to compensate the wife for her actual loss
or her loss of future expectations, nor was it able to attack the future earnings of the
husband.88

The Commission also noted that the clean break principle was problematic.89 The principle
sprang from the view that spouses should settle their financial and property problems in order
to “put the past behind them to begin a new life which is not overshadowed by the
relationship that has broken down”.90 The Commission noted it has no fair and just
application91 when an equal standard of living is sought for each spouse. It is a principle
particularly suited to a statute primarily involving property. To give effect to the principle of

87 This observation was also made by Lord Hope in McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618, at [101] he recognised that women compete on equal terms with men in business and the professions for high earnings. But many women are also mothers. The career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable.
equality of result the Act needed to move away from its prime concern with determining and satisfying property rights.\textsuperscript{92}

The United Kingdom’s Law Commission, established in the early 1980s to consider the financial consequences of divorce, also noted there was a danger in the clean break principle being used indiscriminately to express different ideas. The Commission also recognised that the occasions on which it is possible for the parties to arrive at a final, once-and-for-all settlement on divorce will be comparatively few – these will be situations where it may have been a relationship of short duration or a childless couple. In 1992 the Canadian Supreme Court in its judgment of \textit{Moge v Moge}, (which involved an unsuccessful appeal from the Court of Appeal to set aside an order for the wife’s ongoing spousal support) reflected this opinion and said that it is “in rare cases [that] the spouses are able to make a clean break”.\textsuperscript{93} The Court opined that to enable a clean break between partners before the conditions of self-sufficiency for the financially weaker partner are met would cause an increase in the poverty of women and children of failed unions.

The Commission concluded that in order to achieve an equality of result, consideration should be had to the future and an attempt made to ensure both spouses have an equal ability to attain a reasonable standard of living.\textsuperscript{94} To achieve an equality of result by means of a property adjustment will generally involve an element of compensation for the spouse who has sacrificed economic advancement in the interest of the marriage and children.\textsuperscript{95} Thus an unequal division of assets will generally be necessary to ensure both spouses have equal ability to attain a reasonable standard of living in the future.

\textsuperscript{92} The House of Lord’s considers the clean break principle – Lord Nicholls explains:
A rigid application of the clean break principle ... has the advantage of certainty. But it runs the risk of becoming outdated as social conditions change and the reasoning behind it no longer fits in with the modern concept of fairness ... statutory statements of principle translated into rules can operate harshly in some cases, particularly where the resources consistent largely of income rather than capital ...

\textit{McFarlane v McFarlane} [2006] UKHL 24; (2006) 2 AC 618, at [12].

\textsuperscript{93} \textit{Moge v Moge} [1992] 3 S.C.R 813.


\textsuperscript{95} Such sentiment is reflected in Lord Nicholls’ observations regarding fairness – how this requires recognition that if there was an arrangement where the affairs of the couple were structured in such a way as to greatly benefit the husband in terms of his earning capacity and leave the wife severely handicapped in terms of her husband’s enhanced earning capacity, then the wife suffers a double loss: her own earning capacity is diminished and then there is the loss of her share of her husband’s earning capacity. Lord Nicholls found that when this is so it is a requirement of fairness that this be taken into account by the Court when exercising its powers. See \textit{McFarlane v McFarlane} [2006] UKHL 24; (2006) 2 AC 618, at [12].
The Commission thought there was merit in the Australian Law Reform Commission’s approach that the courts should adhere to an equal sharing of assets scheme as a starting point, but depart from the equality if the circumstances demanded it. It recommended further adjustment be made after equal sharing if one spouse’s ability to attain a future standard of living comparable to the other spouse had been impeded by marriage-related factors such as childcare. A greater share of the assets could then be awarded to the other spouse. Acknowledging such a scheme would rely heavily on judicial discretion.

A method of attaining equality by property adjustment without resort to broad judicial discretion was desirable because, the Commission felt, if there was a broad judicial discretion this would create uncertainty. The Commission noted that a return to a reliance on a judicial sense of justice could once again create variance and uncertainty.

Interestingly the United Kingdom’s Law Commission also considered this issue and concluded that there is a need to reconcile the desire for certainty with the need for flexibility within the law. The Commission found that the formulation of a policy in respect of this area of law involves the resolution of two objectives – which are intrinsically desirable but perhaps mutually inconsistent. First, that the law should be certain and predictable (this means it is easier for lawyers to give advice) as well as being consistent with the popular concept of justice. Secondly, that the law, to achieve justice between the parties, needs flexibility of approach by reason of widely varying facts of each case. The United Kingdom’s Law Commission did not think that it was possible to completely reconcile these two objectives (of flexibility and certainty).

A further option for reform, suggested by the Commission, focused on establishing future living standards and the classification of income-earning capacity as matrimonial property. Enabling a wife, for example, to share in her ex-husband’s future income is a further method

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97 Ibid.
of achieving an equality of result, and compensation for her own past economic losses.99 This option for reform was not carried over into the 2002 law reform.

**Wider social issues created an impetus for further law reform**

The social context of which the Matrimonial Property Act 1976 and the reports of the Royal Commission and the Working Group were part is significant because it is from this social context that further impetus for law reform emerged.

New Zealand, in the 1970s, 1980s and early 1990s, was undergoing rapid social change. These changes included an increase in the divorce rate.100 There was a sharp rise in the number of divorces in the early 1980s and this is seen as a reflection of the legislative changes introduced in 1981. The Family Proceedings Act 1980, passed in 1981, meant that an application for marriage dissolution could be made by either the husband or the wife on the grounds that the marriage had broken down irreconcilably, provided that a two-year separation was satisfied. Many couples who could satisfy the two-year separation requirement for the single ground of irreconcilable marriage breakdown sought the simpler Family Court dissolution. Consequently, divorces recorded a temporary high of 12,395 in 1982.101

A flow-on effect of this saw the increase in single parent families. In 1976, single parent families were 5.2 percent of all households and by 1991 the figure had increased to 9.3 percent.102 The increase coincided with the introduction of the Domestic Purposes Benefit in 1972 giving separated women access to independent funds for the first time.

During this period the marriage rate declined, while the number of New Zealanders living together outside of marriage began to rise rapidly. By 1996, it was estimated that one in four men and women who were in partnerships were not legally married, and de facto relationships outnumbered marriages for those under 25.103 This period of time in New Zealand, in the 1970s, 1980s and early 1990s, was undergoing rapid social change. These changes included an increase in the divorce rate.100 There was a sharp rise in the number of divorces in the early 1980s and this is seen as a reflection of the legislative changes introduced in 1981. The Family Proceedings Act 1980, passed in 1981, meant that an application for marriage dissolution could be made by either the husband or the wife on the grounds that the marriage had broken down irreconcilably, provided that a two-year separation was satisfied. Many couples who could satisfy the two-year separation requirement for the single ground of irreconcilable marriage breakdown sought the simpler Family Court dissolution. Consequently, divorces recorded a temporary high of 12,395 in 1982.101

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100 www.stats.govt.nz marriage and divorce in New Zealand key statistics March 2001
101 Ibid.
103 Ibid.
Zealand’s history also saw a maturing of feminist ideas and an increase in women’s participation in the paid workforce. An example of the strength of the feminist movement was the enactment of the Equal Pay Act 1972. This Act aimed to ensure pay and employment equity in the New Zealand workplace for men and women. There was also a move to be more accepting of people’s differences with the enactment of the Homosexual Law Reform Act 1986. These factors combined to create a social environment generally more accepting and free thinking than generations past.

The importance of Parliamentary material

It is also important to consider the Parliamentary context from which the economic disparity provisions emerged. Aside from the insight into the social landscape that these materials provide, modern statutory interpretation recognises that legislative guidance can be taken from contextual materials. Under the principles of the Interpretation Act 1999 section 5, legislation is to be considered not only in terms of its text, but in light of the statutory purposes. Section 5 of the Interpretation Act 1999 provides that:

Ascertaining the meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics,

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104 The New Zealand Homosexual Law Reform Act 1986 legalised consensual sex between men aged 16 and older. It removed the provisions of the Crimes Act 1961 which had criminalised this behaviour.

105 JF Burrows and RI Carter in *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at page 182 said:

The actual meaning of the text, the purpose of the legislation, the context, both internal and external, and the practical desirability of a particular interpretation, all play their part.

106 It is interesting to note Hammond J said that “there can be no doubt then about the purposes that the new legislative package sought to achieve” *M v B NZFLR* 681 at [221].
examples and explanatory material, and the organisation and format of the enactment.

As Tipping J observed in Commerce Commission v Fonterra Co-operative Group Limited:\textsuperscript{107}

It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be crossed against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the intermediate and general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

In the context of section 15 this is of particular importance because of the problematic drafting of the provision and the incongruous nature of its placement into the New Zealand family law regime. Simply put, the words of the section cannot stand alone; it is therefore logical that the Legislature’s intended purpose for the provision is considered and Parliamentary material provides an insight into this purpose.

**The road to reform: An examination of Parliamentary material**

The reform of New Zealand’s matrimonial property law took time.\textsuperscript{108} The Matrimonial Property Act 1976 was not subject to any significant amendments for over 24 years. Bill Atkin and Wendy Parker noted that the reform of the law has a chequered policy history and that it was no quick-fire law change.\textsuperscript{109}

\textsuperscript{107} Commerce Commission v Fonterra Co-operative Group Limited [2007] 3 NZLR 767 (SC) at [22].


In 1988, the Royal Commission and the Working Group established to review the Act recommended measures be taken to ensure the fairer division of matrimonial property.\textsuperscript{110} It was not until 1998 that the National Government attempted to address some of the outstanding issues. The proposals spent over 24 months in Parliament under three Governments\textsuperscript{111} and were examined by two select committees. Wendy Parker, in 2000 summarised the Parliamentary landscape forming the background to the law reform when she said:\textsuperscript{112}

The law reform process under the previous centre-right National Government was marked by concerns to uphold the sanctity of marriage. Same-sex rights were rejected outright on moral grounds, and heterosexual de facto couples, especially those with children, were not to be encouraged when marriage was the preferred arrangement. Subsequently, a one-Act-fits-all approach was not adopted. The path of the proposals, both before and after the 1999 election, is notable in itself. The proposals have been with the New Zealand cabinet since 1995. It is interesting to reflect on the arguments that consumed state sector officials and their ministers during the late 1990s. A clear split is evident. The 1996–1999 [National] Government favoured advice from the Ministry of Justice, while an alternative view put forward by the Ministry of Women’s Affairs is reflected in changes since the 1999 election [when a Labour Government was in power].

There are significant political dimensions to the law reform. The political beliefs of the party in power shaped the scope and nature of the reform. For example, the reform, under a National led Government, started out as two inter-linked bills – one to amend the Matrimonial Property Act, and one to provide a property regime in the case of heterosexual de facto couples and as Wendy Parker explained at the time:\textsuperscript{113}

In keeping with the National Party line, this deliberately not only had the perception of keeping the status of marriage intact, but allowed for different tests for property

\textsuperscript{110} Previously examined in this chapter.
\textsuperscript{111} From 1975 until 1984 a National Government was in power, in 1984 until 1999 another National Government was in power then in 1999 a Labour Government was in power.
\textsuperscript{113} Wendy Parker examines the law reform in \textit{New Zealand property rights – a changing landscape}, Family matters No. 57 Spring/Summer 2000 page 63\url{www.aifs.gov.au/institute.pub}
division for de facto couples. These different tests had a weaker presumption of equal sharing than under the Matrimonial Property Act. Whether this was due to a desire to protect the higher status of marriage, or a means of accommodating what was perceived to be a greater diversity of relationships is unclear.

In 1999 there was a general election and National lost power to a Labour led Government. The result saw a radical shift in political ideology, which had a flow-on effect for the shape and scope of the 2001 law reform. The Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill were amalgamated by the Labour Government into the Property (Relationships) Amendment Bill and the provisions relating to economic disparity were added.

Margaret Wilson, the Associate Minister for Justice and Attorney-General, stated the Government was not prepared to leave issues in the too-hard basket,114 saying it was clear the then current law was not equipped to address economic disparities arising upon the breakdown on a relationship, particularly when there was a non-career partner in that relationship. She referred to case studies illustrating “serious injustices” under the then existing law, stating there was demonstration of a “recurrent pattern”. Margaret Wilson spoke of the Property (Relationship) Amendment Bill being: “fundamentally about fairness and it was only fair to recognise all forms of contributions financial or otherwise are valuable to a relationship.”115

One of the stated intents of the reform was that men and women would be free to take time out of paid employment to undertake the care and upbringing of children and domestic duties, without fear that they would suffer economic disadvantage.116 It was also considered important to provide a guide for the courts in the interpretation of the provisions. For this reason there are principles within the Property (Relationships) Act 1976 to guide the courts’ decision making.

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116 Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 (109-3, as reported from the Justice and Electoral Committee).
Highlighting that the Bill was designed to ensure each partner has a fair division of resources and that each is placed on a fair footing to deal with life after separation, Margaret Wilson said:\textsuperscript{117}

This legislation represents long awaited reform for many people who have been subjected to gross unfairness and have suffered serious injustices under the current law. Those injustices have been most acutely experienced by women who have devoted many years of their lives to unpaid domestic duties and childcare, while their partners have contributed to the enrichment of their separate property and business interests ... Under the new law, the wife could apply ... for a lump sum payment and/or spousal maintenance to redress the economic disparity she has suffered as a result of lost career opportunities during the time she spent out of the paid workforce. She could also apply for a proportion of the increase in the value of the husband’s separate property to redress any economic disadvantage she has suffered. These provisions are designed to assist any economically disadvantaged partner, whether male or female, to achieve a fair deal.

The Minister of Women’s Affairs, Laila Harre, spoke of the intent to:\textsuperscript{118}

... preserve some equality between the spouses after the end of a marriage ... including some sort of process that will allow the non-earning spouse to have recognised in his or her settlement the earning capacity of the earning spouse as the non-earning spouse has contributed to the development of the earnings capacity.

Margaret Wilson summarised Parliament’s intent with the words:\textsuperscript{119}

We should provide clearly a legal regime that enables [couples] to achieve justice. The justice that they are seeking relates primarily to the division of property and

\textsuperscript{117} NZPD vol 591, at page 8625.
relates not only to the form of a fifty-fifty division, but also to the substance of a fifty-fifty division on the breakdown of a marriage.

The Government of the time was concerned about the financial consequences of the breakdown of relationships and felt that there were consequences that had important social and economic impact on the day-to-day lives of New Zealanders, particularly women and children. Policy decisions regarding the breakdown of relationships and property were recognised as shaping the future of children and women. There was awareness that the traditional arms-length notions of property law were not enough to address the serious economic injustices faced on the breakdown of relationships. The premise of the reform was to recognise the social significance of the reform and to deliver a workable solution creating equality in substance.

In opposition to the reform National’s Tony Ryall and Anne Tolley said: ¹²⁰

That the economic disparity that can occur when a relationship breaks down must be addressed but giving lawyers an open invitation to ‘have a go’ in court is not the way to go ... The majority of submissions are really concerned about throwing division of property open to the courts to decide on a case by case basis.

There were cries of this being a “Gold Diggers” law.¹²¹ As Richard Worth, a then senior National Opposition Member observed, of all the changes to the Act, section 15 was “probably the most far-reaching one”¹²²

¹²¹ The National Party slammed the reform as a gold diggers’ charter, obliging lawyers to take most matrimonial disputes to Court, lining their pockets and ballooning the legal aid bill “Wife’s Property – Split Plea Could Aid Many”, The New Zealand Herald, 25 May 2000).
The result

The push for reform resulted in the enactment of the Property (Relationships) Amendment Act 2001 on 3 April 2001. It amended the Matrimonial Property Act 1976 and renamed it the Property (Relationships) Act 1976. The reform introduced a range of new powers designed to produce fairness. For example sections 44A-44F enable the court to make orders where property has been diverted to trusts or companies. More relationships are now also subject to the Act including de facto relationships and civil unions. Section 15 of the Property (Relationships) Act 1976 was part of the law reform and is aimed at resolving the economic disparity between couples after the breakdown of a relationship.

In 2000 Wendy Parker examined the then proposed reform and concluded her research with the following remarks:

Overall, the terrain ahead, while generally smoother, looks as if it contains a few rocks. This is probably inevitable in any interface between the law and family relations. Having said that, if the current bill [the Property (Relationships) Bill] is in fact implemented into law, the changes will bring improvement and the social objectives of the law are more likely to be achieved. It is difficult to predict whether the new mix of rules and discretion, the enhanced measures to alleviate post relationship economic disparity, and the extension of statutory coverage to de facto and same-sex couples and the widowed, all built on the bedrock of the 1976 Act, will be a stable and successful blend. For now, at least, they provide a more enlightened and modern reflection of notions of justice. Time will tell if indeed the New Zealand way might be worthy of imitation.

This thesis aims to provide an insight into the “terrain” created by the mix of rules and discretion, and consider whether, in the context of economic disparity claims, the law reform has brought with it “improvement” by delivering on “the social objectives of the reform”.

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Wendy Parker pondered what time will tell. More than eleven years have passed since the reform of which section 15 was part, and New Zealand has now had time to understand and implement the law. In the following chapter the approach of the Court of Appeal to economic disparity claims is examined. From these decisions a view can begin to be formed regarding whether the legal framework adopted by New Zealand for deciding economic disparity matters is in fact “worthy of imitation”.
Chapter Three:

The Court of Appeal decisions

Two Court of Appeal decisions, *X v X* and *M v B*, are the focus of this chapter. At this time, they are the only New Zealand cases regarding section 15 and economic disparity that have gone to the Court of Appeal. To date the Supreme Court has not considered section 15. It is from the Court of Appeal that the precedent regarding economic disparity problems has been established with the lower courts and the legal profession taking direction from these judgments. Because of the problematic nature of the drafting of section 15 the manner in which the Court of Appeal has approached economic disparity is of particular importance. The discretionary elements of the provision, in particular the calculation of the quantum of awards, have proven to be problematic because there is nothing within the section to guide those applying it about the correct manner in which the quantum of the awards should be calculated. *X v X* is one guide that addresses this problem in a terrain largely devoid of alternatives.

A note of caution from the Chief Justice regarding “too much veneration to precedent”

Section 15 is undoubtedly a problematic provision. A literature review confirms that this sentiment is widespread amongst judges, legal practitioners and academics. The difficulties inherent within the provision mean that precedent takes on great significance because the decisions stand as an example of how to make sense of the provision. However there is a danger in following precedent to the extent that it creates a “straightjacket” which distracts those interpreting and applying the provision from the purpose for which legislation was intended. Elias CJ has extra-judicially expressed concern regarding the courts’ reliance on

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125 Joanna Miles, said: “The particular basis on which it is to be implemented by a Court, or by lawyers or parties settling cases, is not readily ascertainable from the text of the Act. The legislator has left rather a lot of work to be done by the judges and commentators, particularly in determining how to quantify awards under the section.” “Financial Division and Property Division on Relationship Breakdown- A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZULR 268 page 4.
126 Ibid
precedent particularly when the courts are considering relationship property matters which are cases that are concerned with social legislation. Elias CJ’s view was that:128

The deference accorded to that very fine Court [the Court of Appeal] may have proved at times disabling … my point here is that in the case of social legislation which has to keep pace with changing conditions and expectations, particularly one that operates as a code,129 I wonder about too much veneration to precedent. A similar point was made by Cooke P in respect of the New Zealand Bill of Rights Act 1990 when he said that with respect to such legislation precedent could not be allowed to be a straightjacket.130

The principles established by Parliament in legislation such as this [relationship/matrimonial property] come to be applied in changing conditions. It would be unwise to be too definite about the ends they dictate. And perhaps we need to query whether courts have approached legislative amendments with a mind-set derived from precedents adopted under earlier legislation which need reassessment. I know there is respectable academic support for the view that the legislation [the Property (Relationships) Act 1976] now in force is confused and inconsistent in part. But … I have been left wondering whether the courts … have tried hard enough to make the Act work as a whole.

The opinion of Elias CJ illustrates the quandary. It is hard to make sense of section 15 because it requires a great deal from those interpreting and applying it and if precedent is not to be adhered to then how to read and apply the provision is uncertain. The Matrimonial Property Act 1976 with its general rule of equal sharing of property on divorce is something that New Zealand had for over twenty-four years without change. It is therefore unsurprising that the courts (and the legal profession more generally) have approached section 15 with a mindset of the past. Further, the economic disparity provisions have been placed rather awkwardly within a pre-existing legislative framework with little guidance regarding how to implement them. The existence of difficulties is therefore unsurprising.

A dilemma concerning the appropriate direction and scope of economic disparity compensation

A further puzzling aspect to economic disparity claims that has been considered by the New Zealand Courts is the appropriate conceptual approach that should be taken in the interpretation and application of section 15. In an early section 15 decision the High Court addressed the point in Nation v Nation: 131

... there is the conceptual problem whether the provisions are properly regarded as being directed to economic equalisation in the larger sense of the term, on the breakdown in the relationship; or whether they are regarded as being directed to the loss of opportunity (by way of earning capacity) that one party has had to embrace by reasons of the divisions of functions in the relationship. [Emphasis added.]

The courts have tended to approach economic disparity claims based on loss of opportunity (by way of earning capacity), although this is not only way to approach section 15. It remains to be seen what other ways a future court may direct an inquiry.

Summary of the Court of Appeal decisions

M v B

The facts

M and B were married in 1982. The husband developed a successful legal career during the course of the marriage. The wife gained an MA and worked in a variety of roles until the birth in 1993 of their first child. The couple moved to England where the husband obtained valuable legal experience. Another child was born in 1996. They returned to New Zealand where the husband was an equity partner in an established and highly regarded law firm earning $600,000 per annum.

The High Court held that a compensatory award under section 15 should be made to the wife and spousal maintenance awarded of around $12,000 per annum for a limited period. The High Court decision was appealed by the wife. One of the questions raised in the appeal was how section 15 of the Act should operate to address the economic disparity between the parties.

The ancillary issue of super profits

The economic disparity claim was one facet of the wife’s claim. Another aspect was Deborah Hollings QC’s argument that the husband’s future earnings included super profit which was classifiable as a relationship asset, to be quantified and divided. Counsel for the husband, Mark Vickerman, disputed this.

Allan J, in the High Court, considered the issue of whether there were super profits and, if they existed how they would be assessed for division as relationship property. Allan J found that super profits were “excess earnings” where the share of the profit derived from the law partnership exceeds the partner’s own earning capacity. Effectively, super profits are profits derived from membership in the firm.\(^{133}\)

\(^{132}\) The argument of super profits is an ancillary issue to the substance of this thesis.

\(^{133}\) B v M [2005] NZFLR 730 at [75].
Allan J concluded that the husband had earnings exceeding those appropriate as remuneration for his experience, skills, responsibilities, and future efforts. It was arguable that his future earnings would include an element of super profit.

Allan J held that if it was likely that future earnings included super profit, it was arguable that the present value of future super profit was relationship property, to be assessed in a way akin to assessments made of superannuation rights. His finding is consistent with \( Z v Z \).\(^{134}\)

The Court of Appeal concluded that super profits existed and they were relationship property and as such the wife was entitled to a share.\(^{135}\)

**The Result in the Court of Appeal regarding the economic disparity claim**

Deborah Hollings QC, for the wife, asked the Court of Appeal to consider section 15 and economic equalisation in the larger sense of the term. The basis of her argument was that the Court’s approach to section 15 should be similar to other jurisdictions with discretionary legislation,\(^ {136}\) consistent with the spirit of the law reform and the purposes and principles of the Act.\(^ {137}\) The Court was urged at the end of the exercise to take an overview of the individual determinations made and decide whether there is a need for further adjustment to achieve the purpose of the legislation in light of the principles of the Act. Mark Vickerman for the husband disputed this and argued that the concepts of justice and equality have to be considered with a narrow focus according to the law.\(^ {138}\) The wife’s argument was rejected by the Court on the basis that New Zealand’s starting point must be the New Zealand Parliament’s enactment of the provision in its current form.\(^ {139}\) The Court did not accept that the purposes and principles of the Act provide the court with a generalised mandate. Rather it

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\(^{134}\) \( Z v Z \) (No. 2) [1997] 2 NZLR 258.

\(^{135}\) See \( B v M \) [2006] NZFLR 641 at [51-100].

\(^{136}\) For example see the House of Lords approach in \( McFarlane v McFarlane \) [2006] UKHL 24; (2006) 2 AC 618, where they have a discretionary piece of legislation regarding the division of relationship property.

\(^{137}\) Deborah Hollings QC was asking the Court to consider the following: the background to the reform of the section as evidenced in the Parliamentary Reports (these have been explored in Chapter 2), the principles and the purpose of the Act – including the need to ensure that both the economic advantages and the disadvantages are considered \( s(1(N)(c)) \), that mens and women’s equal status is maintained and enhanced \( (1(N)(a)) \), that all forms of contribution to a marriage are treated as equal \( (1(N)(b)) \). Including the contextual provision, section 18, that clearly specifies there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature \( (18(2)) \).

\(^{138}\) \( M v B \) [2006] NZFLR 641, Robertson J at [31].

\(^{139}\) Ibid at [32].
concluded that, if a Court enters a topping up or discounting exercise in the name of being just then the parties and their advisers would have no confidence regarding the outcome of the litigation.  

Despite this the Court did see some merit in the wife’s argument. Robertson J’s view was that there was a degree of truth in the position of each Counsel, but thought that a balanced perspective needed to be maintained.  

Hammond J concluded that the legislative package (of which section 15 is part) is in part restitutionary and William Young P accepted that both compensatory and redistributive exercises may be appropriate under section 15.

The amount of the section 15 compensation awarded to the wife by the Court of Appeal was $75,000. The husband left the relationship earning $600,000 per annum. The wife was retraining and had limited earning capacity. The husband would have been able to earn $75,000 (gross) with six weeks of work. The conceptual approach taken by the Court to the interpretation and application of section 15 focused on the loss of income for the wife and was “not directed to an economic equalisation in the larger sense of the term”. The Court considered the economic disparity claim in terms of what the wife had given up in respect of her career and thus was an assessment of the financial cost to the wife of a chance to pursue her career.

Such an approach is at odds with other jurisdictions. The approach of the United Kingdom has been to avoid assessments of what a wife might have earned and be earning because consequences of the choices made by parties in a relationship cannot be “accurately valued in monetary terms”.

The Canadian Supreme Court, in Moge v Moge, considered the evidence required in a spousal support claim, and held that a “detailed, in the sense of a year by year chronology of sacrifices and gains” was not required. The conclusion of the Court was:

140 Ibid at [36].  
141 Ibid at [37].  
143 M v B [2006] NZFLR 641, Young P at [199].  
145 See for example H v H [2007] 2 FLR 548, [80-87], and McFarlane v McFarlane [2009] EWHC 891 (Fam)  
This is not an exercise in accounting, requiring an exact tally of debits and credits for each day of the marriage. It is beyond the means of most parties and our overburdened justice system to devote weeks of lawyers’ and experts’ time to providing a tally. Nor do I think it necessary. It is clear that certain things must be done to maintain a family. Income must be earned. Food must be bought and prepared. Children must be cared for. And so on. In most cases it will suffice if the parties tell the judge in a general way what each did. That will allow the judge very quickly to get an accurate picture of the sacrifices, contributions and advantages relevant to determining compensation ... making detailed quantification and expert evidence unnecessary. Poverty is one of the main problems arising from marital breakdown; it should not be made worse by long and expensive legal proceedings.

X v X

The facts

Mr and Mrs X separated after a lengthy marriage. They had met at university. They were both very competent students and as a result both were highly qualified. They travelled and lived overseas for work and had two children. At the time of their separation their children were aged ten and thirteen. During the marriage Mr X obtained an MBA at Harvard. Mrs X had also been offered positions in MBA programmes which she did not accept (the facts of the case record that Mrs X did not think gaining an MBA was necessary because there was already one in the family and she wanted to focus on “real work”). It was noted that there was a “watershed time for the couple” when they decided, rather than to remain in the Northern Hemisphere to pursue Mr X’s work opportunities which would have rewarded the couple financially, to return home to be closer to friends and family in order to begin their family. By the time they made this decision, Mr X was earning approximately four times the income of Mrs X, and the Family Court Judge (Judge Clarkson) commented that “this show[ed] that he was well on the way to an extraordinary career”.

147 X v X [2006] NZFLR 361 (FC), at [8].
148 Ibid at [12].
Mrs X stopped working when pregnant with the couple’s first child. The Family Court noted that the sort of income that Mr X produced is “not produced without considerable personal and family cost” and further observed that.\textsuperscript{149}

\texttt{[T]here was no dispute in the evidence that Mr X worked very long hours – 60 hour weeks not being unusual – and might be away from home, travelling, for up to three days per week. During this time Mrs X remained out of the work force and in a supportive role as primary caregiver for the children. The parties had some household help but certainly not at the level which might be expected with earnings of the level the family enjoyed. There was an extremely high standard of living, and the children were educated at private schools.}

At the end of their marriage the couple had relationship property worth around $7.5 million (this was not including separate property of the couple). Mrs X had been out of the work force for 14 years while Mr X was gainfully employed, earning $7.7 million in salary over the last five years of the marriage. After separation, Mr X took a step back in his career and was earning around $180,000 a year. Mrs X was working part-time earning $10,000 per annum and it was held that Mrs X could only reasonably expect to earn $65,000 per annum while she re-entered the work force and developed her skills.

Mrs X claimed she was entitled to an award under section 15 because she had been out of the work force for 14 years and had during this time been caring for their children and as such had suffered economic disadvantage. Mrs X sought compensation for the disadvantage she had suffered.\textsuperscript{150}

In the Family Court, Judge Clarkson held that Mrs X had no valid claim for economic disparity and if an award was made then it would place a premium on the role of the caregiver.\textsuperscript{151} Mrs X appealed to the High Court where Hansen J’s view was that:\textsuperscript{152}

\textsuperscript{149} Ibid [21].  
\textsuperscript{150} The wife’s argument was not focused on the economic advantages – or career enhancement aspects to the case – but rather what Mrs X has lost – in the form of a career foregone. Loss of Mrs X’s earnings was the focus of the arguments.  
\textsuperscript{151} X v X [2006] NZFLR 361 (FC), at [160].  
\textsuperscript{152} X v X [2007] NZFLR 502 (HC).
[This] is the classic case of a man being given full rein to develop his career and maximise his earning potential while his wife puts her career on hold. The causal link between economic disparity and the division of roles in the marriage could not be clearer.

The High Court then set the formula for determining the award Mrs X should receive, but left the amount of the award to be determined by the Family Court. Returning to the Family Court Mrs X was awarded section 15 compensation of $240,000. This amount equated to 3.2 percent of the relationship property pool. This payment was in addition to the wife’s fifty percent share of the relationship property being $3.75 million. A total of 53.2 percent of the relationship property was awarded to the wife (being made up of the equal share of the relationship property and the section 15 compensation).

Mr X appealed to the Court of Appeal, saying the award was too high and no order should be made. Mrs X cross-appealed saying the award was too low. Mrs X initially claimed she was entitled to an award under section 15 of over $1.5 million then she pared this back to $400,000. Mrs X contended that she should have been awarded a sum greater than the $240,000 awarded by Judge Clarkson and the appropriate figure was in the vicinity of $400,000.

**The result in the Court of Appeal**

The Court of Appeal agreed with the High Court, dismissing the appeal and awarding $240,000 (3.2 percent of the relationship property pool). However the method of the award calculation was divided with Robertson J taking a different approach to that of France and O’Regan JJ.

The majority considered that a methodology based on formula and extensive input from experts appropriate and held that the Court’s methodology should help settlements to be reached in the future and “enhance the predictability of awards”. The majority did however provide a caution that the methodology is unlikely to provide a complete answer for every

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153 X v X [Economic disparity] [2009] NZFLR 985, at [175].
case, concluding that there is an inherent imprecision in the process and other methodologies are also possible.\textsuperscript{154}

By contrast, Robertson J’s view was that a formula based on expert evidence was problematic. His Honour explained that “by its nature this kind of [expert] evidence is premised on a variety of hypothetical assumptions and is subject to contingencies which diminish the value of the resulting analyses and calculations”.\textsuperscript{155}

Interestingly the Supreme Court of Canada has opined that “for most divorcing couples the costs of obtaining expert evidence and the amount of assets that are involved are practical considerations which would prohibit or at least discourage the use of expert opinion”.\textsuperscript{156}

While patterns regarding the interpretation and application of section 15 have slowly emerged the hope that the Court of Appeal decision in \(X \text{ vs } X\) “may help settle the law down”\textsuperscript{157} appears at this juncture to be unfulfilled because a number of questions remain.

**The future shape of economic disparity claims post the Court of Appeal judgments**

Economic disparity claims are now considered in light of the Court of Appeal’s reasoning. It is uncertain how economic disparity matters should be dealt with outside of the pattern established in these two “big money” Court of Appeal decisions.

This has a flow-on effect, for example, it is uncertain how the facts of other economic disparity claims are measured against those contained in \(X \text{ vs } X\) and \(M \text{ vs } B\). These judgments involved substantial relationship property pools, they were both traditional long term marriages with dependent children, and the wives had given up opportunities to pursue promising career paths while the husbands developed their careers. The facts are atypical of large sectors of New Zealand society. They are not reflective of a cross-section of New Zealand, or people with less assets or professional qualifications. Despite \(X \text{ vs } X\) and \(M \text{ vs } B\)

\textsuperscript{154} X \text{ vs } X [2009] NZCA 399, O’Regan and France JJ at[173] and [175].
\textsuperscript{155} X \text{ vs } X [2009] NZCA 399, Robertson J at [37].
\textsuperscript{156} Moge \text{ vs } Moge [1992] 3 SCR 813 (S.C).
how the Court of Appeal would treat a factual situation where the wife did not give up work but continued to work outside of the home on a part-time basis but still suffered financial loss is not known. It is also unclear how the Court would treat a claimant without an established career path, or without financially dependent children. In such circumstances, how the Court may approach an economic disparity claim remains undecided.

There has not been a significant development of a body of precedent at appellate level regarding section 15, outside of the scope of the “big money cases”, this is conspicuous and it is of significant public importance. The Court of Appeal judgments leaves room for different interpretations and applications of section 15.

This feature of economic disparity claims has wider legal and social relevance. The significance of this is not something that has gone unnoticed. For example, the Auckland Womens Lawyers’ Association sought the leave of the High Court to intervene in the case of \( X \text{ v } X \). The aim of the application was for the Court to address issues regarding the correct legal test to apply to the economic disparity provisions. In its submission noted: \(^{158}\)

- the correct legal tests to apply to the economic disparity provisions remain undetermined at an appellant level;
- the issues are of general public importance;
- there has been unprecedented public interest; and
- the Court has the opportunity to articulate the correct approach to be applied in future economic disparity cases.

The application was declined by Justice Heath. On reflection the broad issues identified in the application remain largely unanswered. Despite this the case law has established some parameters regarding how section 15 matters should now be approached. These parameters will be examined in the remaining part of this chapter.

\(^{158}\) \( X \text{ v } X \) June 2006 High Court, Auckland, CIV 2006-404-00903.
Section 15 and the elements to a claim: Breaking it down

The mechanics of the section: The elements comprising section 15

Section 15 applies only if, on the division of relationship property, the court is satisfied that:

- the income and living standards of one spouse/partner are likely to be significantly higher than the other spouse/partner; and
- this was caused because of the division of functions within the marriage/relationship while the parties were living together.

In determining the above the court may have regard to:

- the likely earning capacity of each spouse/partner;
- the responsibilities of each spouse or partner for the ongoing daily care of any dependent children; and
- any other relevant circumstances.

If, after considering the above, the court considers the section applies then there is yet another test to be applied. The test of whether the court considers it just, for the purpose of compensating the other party, to award a lump sum payment or order the transfer of property to the aggrieved party.
Examining the elements of an economic disparity claim under section 15

The economic disparity hurdle – the claimant must argue that the other party’s income and living standards are likely to be significantly higher than their own

The first hurdle is to establish whether the income and living standards of one party are likely to be significantly higher than the other party because of the division of functions in the relationship while they were living together. The provision gives very little in the way of guidance to those interpreting it.

Likely

The courts have settled some of the uncertainty regarding the issue of what is meant by the concept of likely.\(^{159}\) To satisfy a court of a disparity, “simply means that there must be material before the court from which a judge can determine that the threshold disparity has been met. There is no burden on any party to discharge any particular level of proof.”\(^{160}\) In practice the evidence of experts, human resources consultants and accountants has become the means to gather the requisite evidence required (as was the case in \(X v X\) and \(M v B\)). This approach may have a flow-on effect that creates problems in practice that are associated with additional costs, uncertainty regarding projections, and extensive input from experts.

Significantly

The living standards must be “significantly” higher. The legal profession and the courts must work to give meaning to the term “significantly”. In \(X v X\)\(^ {161}\) Robertson J said the word “significant” denotes a more than trivial disparity: a technical disparity is insufficient for an award under the section. The focus is on the disparity between the parties, which as Bill Atkin and Wendy Parker have said “suggests that there is theoretically no lower-end income differential that will fail the “significant” test, provided that the parties’ incomes are


\(^{160}\) \(X v X\) [2009] NZCA 399, Robertson J at [77].

\(^{161}\) Ibid.
correspondingly low”. In the context of two low earning parties, an objectively small figure may represent a relatively significant disparity, and in the case of two high earning parties, any disparity will need to be higher before it is significant between the parties.

Other questions inherent in any consideration of whether the living standards are likely to be significantly higher are not easily resolved. For instance it is difficult to be certain how far in the future speculative projections should be made. The boundary is imposed with the use of the word “likely”. Thus the court or lawyers involved establish the parameters of this inquiry when they interpret the words “likely” and “significantly higher.”

**Income and living standards**

Another question is the overlap between income and living standards. As Robertson J said: “There is no guidance in the section as to which, if either, of income or living standards is the more important, or whether one is the trumping measure”. In many cases there will be a connection between a party’s level of income and standard of living, such that it would be artificial to consider each element in isolation. The Court of Appeal in *X v X* has now helped clarify this. While both concepts (income and living standards) must be satisfied, separate analyses need not necessarily be carried out. Ordinarily a significant disparity in income will lead to a significant disparity of living standards because income has a flow-on effect to a party’s standard of living, although there will be exceptions to this.

An interesting aspect to the assessment of one’s living standards is whether thought should also be had regarding whether standard of living equates to quality of life. For example in order to achieve a high income an individual may have to make significant personal sacrifices and forego certain things that may have in fact enhanced their quality of life. Examples of this may be the loss of free time because an individual’s time is spent at work in order to generate an income, or the individual may choose to live in a certain area because of work commitments which may not be beneficial to their quality of life (or not something that gives
a high standard of living).\textsuperscript{165} An individual’s health may suffer as a result of work demands or work associated stress or by putting the demands of work ahead of personal health and welfare.

**The causation hurdle establishing a link between the economic disparity and the division of functions in the relationship section 15(1): the conundrum of whether the future economic imbalance has its genesis in the fact of the division of functions in the relationship**

If an economic disparity is established then the next inquiry is regarding causation. Causation inquiries are not easy because they involve speculation. Consideration must be made regarding whether the economic disparity was caused because of the division of functions within the relationship while the parties were living together. If the imbalance is the result of other causes a claimant may fail to meet the jurisdictional test of section 15. The disparity cannot be through lack of education, ill health, a simple lack of ability, or for any other reason but the division of functions during the relationship. There will inevitably be uncertainty when trying to determine how much of the income earner’s success is attributable to his/her own particular individual skills and abilities, and how much is owed to the division of functions and the assistance of the primary caregiver. Priestley J has noted that there will be cases where one party’s significantly higher income or standard of living is solely attributable to his or her talents or inherited wealth, or where any adverse effect of the division of functions in the relationship is a “spent force” and the economic disparity is really a result of external causes.\textsuperscript{166} Priestley J considered that those situations would not meet the jurisdictional requirements of section 15.\textsuperscript{167}

Section 15 may close the door on claims relating to economic disparity caused by matters outside of the divisions of functions in the relationship where there is no causal nexus between the two. There could be a number of reasons for the disparity. For example one party may have come to the relationship with a limited earning capacity and for this reason

\textsuperscript{165} An example could be the number of people that work away from their families due to work commitments. They may work overseas in less than desirable settings (for example the number of New Zealanders that are engaged in work in mines in Western Australia characterised as fly-in-fly-out) but because it is well paid they have a good standard of income but their quality of life is, perhaps, not as high.

\textsuperscript{166} *De Malmanche v De Malmanche* [2002] 2 NZLR 838 at [166]. The external forces that Priestley J gave as examples were ill health, age, individual priorities or ineptitude.

\textsuperscript{167} Ibid.
such a party may find it difficult to successfully prove that any economic disparity was as a result of the divisions of functions in the relationship. Or the reason for the economic disparity could be ill health or other disability. An early section 15 judgment of De Malmanche v De Malmanche, decided in the High Court involved a relationship of 14 years with two children, where it was held that the resulting economic disparity was because of the husband’s age (the husband was 21 years older than his wife) and his redundancy and that these factors had nothing to do with the parties’ division of functions.168 The Court held that the husband’s weaker economic position had been caused by the cumulative effects of his age, his decision to retreat from the advertising industry (a decision made nine years before the couples separation), and his decision not to seek more remunerative employment. The Court opined that the “critical nexus between the division of functions and effects was absent in this case and without that nexus an order [pursuant to section 15] could not be made”.169

In my opinion caution is necessary to ensure that this provision is not interpreted in an unduly restrictive manner.170 Early Family Court decisions set a high threshold for the causation hurdle, holding that the division of functions needed to be the “principal” cause of the disparity.171 In the Family Court decision of G v G Judge Ellis stated that the test for causation was that the division of functions must not only be a real and substantial cause but must be the principal cause of the disparity.172 The Court held that the cause of the husband’s

The Law Commission predicts that the proposed new section 15 will apply only in relatively rare circumstances because it will be difficult to show that the disparity in income and living standards is due to the division of functions during the marriage. We are advised that, although the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of functions in the relationship. A partner who is not in the workforce cannot take advantage of further training at work, and so his or her earning capacity will devalue over time. Even in childless relationships, decisions taken within the relationship could impact on earning capacity. For example, one partner might decline a transfer or leave a job to enable the other to advance his or her career. (Emphasis added).

The courts have overlooked the second step in this and downplayed the fact that the ability to devote time to cultivating those skills needed to develop a career is likely to be affected by the division of functions in the relationship.

168 Ibid at [180].
169 Ibid at [6].
170 The courts should be conscious of this when considering the jurisdictional tests of section 15. When reporting back to the House of Representatives on the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25, the Justice and Electoral Committee commented:

The courts have overlooked the second step in this and downplayed the fact that the ability to devote time to cultivating those skills needed to develop a career is likely to be affected by the division of functions in the relationship.

172 G v G [2003] NZFLR 289 FC at [127].
earning capacity was his skill as a lawyer. William Young P in the Court of Appeal in *M v B* later said that such an approach “… puts the jurisdictional bar too high”. 173

In *Cunningham v Cunningham* the High Court held that the wife had elected to pursue leisure activities over her career and opined that the wife need not have foregone her career in order to ensure a functioning domestic home. However the Court also recognised that the division of roles assisted Mr Cunningham to pursue his professional career free of day-to-day child care responsibilities and this impeded the advancement of Mrs Cunningham’s career as an architect and this was a sufficient causal relationship for the causation nexus to be established. 174 The Full Court of the High Court in *P v P* was not persuaded that the evidence before it established that the husband’s earnings as an orthopaedic surgeon were attributable to the division of functions and one of the major reasons why the wife (a nurse) did not enter the workforce was an absence of pressure to do so. The Court opined that the family income was sufficient without the wife working and the wife had exercised an autonomous choice not to continue with employment.

It is acknowledged that if the court adopted an approach that led to the interpretation of section 15 too liberally the requisite causal nexus (between the economic disparity and the division of functions in the relationship) would be overlooked and this could then lead to a distortion of the purpose of the Act. Under the Act economic disparity compensation can only be awarded for an economic disparity caused by the division of functions in the relationship. It is not awarded for the existence of economic disparity between the couple per se. Too liberal an interpretation of the causation test could mean that economic disparity claims are the norm and not the exception.

Robertson J was undoubtedly correct when he said that “causation is a critical element of s 15”. 176 It is difficult for the courts and practitioners to understand what is intended within the drafting of section 15(1) and the question of whether the disparity was “because of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together”. The Court decisions and also the results of the empirical

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173 *M v B* [2006] 3 NZLR at [201].
174 *Cunningham v Cunningham* (High Court, Auckland CIV 2003-404-002392, 28 November 2003, O’Regan J) BCL 74 AT [58].
175 *P v P* [2005] NZFLR 689.
176 *X v X* [2009] NZCA 399 at [97]
research, considered in chapter 4, indicate a mixed approach to the interpretation of the causation test. These results indicate the inherent difficulty of applying the provision, particularly in achieving the correct balance between being unduly restrictive, rarely finding that the economic disparity was a result of the division of functions, to lowering the jurisdictional bar so that the causation test is effectively meaningless.

Robertson J, in *X v X*[^177] illustrates the danger of a restrictive approach when he liberalises the causation test, finding credit in Hansen J’s approach in the High Court, when Hansen J declined to inquire into the subtleties of the choices presumptively made by both husband and wife. His view was that[^178]

... It is not for the Court to suggest that at some point in the marriage a different choice could or should have been made, even if greater opportunities then existed. That is, as Mrs Hinton, submitted, to substitute a retrospective judgment of when it is reasonable for a person to re-enter the workforce for the joint decision of the parties.

Robertson J found Hansen J was correct to decline to inquire into the merits of presumptively mutual choices: rejecting any suggestion an inquiry ought or needs to be made into the merits of a decision made by the parties as to the division of domestic roles for a causal relationship under section 15 to be established[^179].

This illustrates awareness that an overly stringent approach to the issue of causation can undermine the whole focus and intent of section 15. Where there is a clear causal link between the division of functions in the relationship and the economic disparity, then the test is met[^180]. If such an approach is not taken and a retrospective, individualised focus is adopted then the intent of section 15 (and the Act) may be undermined. The focus is not on the individuals but rather the partnership. The reasons for an economic disparity at the end of a relationship will inevitably be multiple. A person’s income does not come down to any one thing but rather it depends on multiple factors including luck, talent, qualifications, work-ethic, and application.

[^177]: *X v X*[2009] NZCA 399
[^178]: Ibid at [116].
[^179]: Ibid at [103-104].
[^180]: Ibid at [108].
The section comes into play if there is a nexus with the division of functions during the relationship and there is a significant disparity of income and living standards.\textsuperscript{181} It does not have to be the only link because the jurisdictional bar has been lowered by the Court of Appeal. It is no longer necessary to establish that the division of functions was the dominant or even primary cause of the disparity. Other factors such as mental illness\textsuperscript{182} or choice of country to work\textsuperscript{183} may prevent a claim’s success. But it is clear that it is not for a court to re-enter the decisions of the parties made during the relationship and substitute its own view as to what was a reasonable division of functions within.\textsuperscript{184}

The view of Deborah Hollings QC expressed in a paper regarding the Property (Relationships) Act is that:\textsuperscript{185}

... it cannot be the case that the section can be interpreted as only applying where the difference between party A and party B was due entirely to the effects of the division of functions within the marriage. Arguably party A should not have to prove even that the relationship is the principal reason for the disparity. Party A should have to prove though that the division of functions was the cause of at least some of the disparity.

\textit{Comment on the problem of the causation test}

Considering the causation nexus it is apparent that many of the problems associated with economic disparity claims relate to the particular drafting of the provision. Within the Parliamentary material (considered in chapter 2) there was recognition that the lack of a career option and the ability to earn an income is a key determinant in a party’s future economic well being and this was something that the law reform sought to redress. Yet what has come through into the drafting of section 15 is not quite so clear, in fact the wording of

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{181} \textit{M v B} [2006] 3 NZLR, Hammond J at 226.
  \item \textsuperscript{182} In \textit{Southall v Southall} (Family Court, Auckland, FAM 2002-044-1347FP044-363-03, 21 October 2008, Judge Clarkson) it was found that the wife’s mental fragility was the real cause of the disparity and not the division of functions in the marriage.
  \item \textsuperscript{183} In \textit{Lowe v Chu} [2002] 22 FRNZ 204 – no causal link was found where the wife was unable to find employment in New Zealand but would have been able to do so had she remained in Taiwan.
  \item \textsuperscript{184} See Robertson J’s reasoning in \textit{X v X} [2009] NZCA 399 at [103 and 104] and also Vivienne Crawshaw, \textit{Section 15 – A Satellite Overview} NZFLJ June 2009 page159.
  \item \textsuperscript{185} “Section 15 is a complex provision and its drafting causes some major statutory interpretation questions”, in “Of gold diggers and possums – an examination of the limits of the Property (Relationships) Act” www.lawyers.org/conferences page 8.
\end{itemize}
\end{footnotesize}
section 15(1) arguably appears incongruous within the intention of the reform. Too stringent an interpretation of section 15(1) will mean that many cases will not meet the requisite jurisdictional test of whether the economic disparity was caused by the division of functions in the relationship – it will be unduly hard to establish the necessary causal nexus. This high threshold was evident in the early Family Court decisions involving section 15 when the focus was directed to the individual rather than the partnership.\textsuperscript{186} Conversely too liberal an interpretation will mean that the jurisdictional threshold is diluted to the point of being meaningless. Herein exists a substantive problem within section 15 and the issues surrounding the causation test are at the core of the problem. As noted above, the later Court of Appeal judgments liberalise the test but in practice the drafting of the provision means that (understandably) there will be a variance in the subjective interpretations of the requisite test (within the same set of facts one party interpreting the provision may consider that the causation test is satisfied and another will not). The results of the empirical research indicate the spread of a divergence of approaches (see, in respect of vignette one Figures 5.8, 5.9 and the practitioners’ comments on pages 108 – 112 and in respect of vignette two Figures 5.26, 5.27 see page 168). The result of this research indicates a widespread problem which needs further clarification whether it be from the courts at appellant level or from the Legislature in the form of further law reform.

The question of causation is difficult. It is unsurprising that there is divergence in opinions and approaches to the causation test. The philosophy behind the causal connection is that compensation should address the economic disparity which flows from the economic relationship which developed between the couple during the relationship. Spousal compensation should not be expected to redress an economic disparity which did not have its genesis in the relationship. In theory this premise is simple, in practice it is not as simple as it seems. A marriage, de facto relationship or civil union does not per se create a right to economic disparity compensation. The way in which the functions characteristic to the relationship were divided and economic consequences that follow from what each partner did during the relationship are the fundamental criteria for an economic disparity claim. The question is whether the problem is in the way that the test is being applied or is it that a problem exists because of the philosophy that requires a connection between the division of

\textsuperscript{186} For example, \textit{G v G [2003] NZFLR 289 FC}, where the husband’s skill as a lawyer was the particular focus of the Court.
functions in the relationship and the economic disparity. There is interesting research on the causation conundrum and the right to spousal maintenance. For example, in the context of the Canadian legal regime and spousal support, Carol J Rogerson has said:

The adoption by judges of the causal connection test and the results produced by cases in which it has been applied have generated an intense and highly emotional debate within the legal profession. On the one hand, there are those who see the test as a rational approach to spousal support, in keeping with a philosophy of spousal support and of marriage that has been around since the beginning of family law reform in the late 1960s and which has been the implicit foundation of modern support legislation. For others the test is an illegitimate judicial perversion of support law, a test which must be confined to contract cases (where it may not be agreed with, but must be followed as a matter of precedent set by the Supreme Court of Canada) ... On a more emotional level, the charge is levelled that the causal connection test not only distorts existing support legislation but ultimately undermines the meaning and significance of marriage as an institution.

Matters the Court may have regard to (section 15(2))

When considering the jurisdictional tests of section 15 the court may have regard to a number of factors. This gives the court a valuable and wide-ranging mandate.

The court may have regard to:

- the likely earning capacity of each spouse;
- the responsibilities of each spouse for the ongoing care of dependent children; and
- any other relevant circumstance.

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The particular wording of the section means it is not mandatory that the court has regard to them; it just may have regard to them. This provision could be a valuable tool for the courts since the phrase “any other relevant circumstances” gives a broad residual discretion. But as Bill Atkin and Wendy Parker observed “it can be seen from the Court’s reluctance to include re-partnering and other factors, it is not as open-ended as it may at first appear”.  

The responsibility for the care of dependent children that continues after the breakdown of a relationship is a logical consideration when considering economic disparity because financial vulnerability may accompany the ongoing care of children frequently because work commitments must be organised around the needs of children.  

A further question is whether lifestyle in the relationship and personal choices are relevant under section 15(2). In $X v X$ Judge Clarkson in the Family Court thought it relevant (in terms of the overall discretion contained in section 15(3) as well as a relevant circumstance in section 15(2)) and took into account the advantages and benefits that Mrs X had enjoyed in her marriage, concluding that while Mrs X did not pursue her career she did nevertheless enjoy an excellent standard of living. However later, in the context of the overall discretion contained in section 15(3), in the High Court Hansen J did not accept this line of inquiry. His view was that:  

The object of section 15 would be frustrated if an award could be declined because of the perceived non-economic benefits and disadvantages associated with the division of roles in the marriage. The decision would become as broad as it is long. Its exercise would become a subjective assessment of the balance advantage in a marriage.  

Relevant circumstances the court could consider include the structure of the relationship’s financial affairs and the potential economic impact on the party’s respective economic position post divorce. For example, where company or trust structures are used to the

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189 For an interesting consideration of the financial vulnerability of women that are responsible for the ongoing care of dependent children see the Auckland Womens Lawyers’ Association submission to the Human Rights Commission regarding a discussion of Human Rights and Women dated 30 April 2010.  

www.awla.org.nz/submissions

190 $X v X$ [2006] NZFLR 361 (FC), at [155].

191 $X v X$ [2007] NZFLR 502 (HC), at [128].
detriment of the economically disadvantaged party then the court could consider this. It is acknowledged that this proposition is made assuming that there is in fact some relationship property remaining in the pool.

Other relevant circumstances may include:

- the length of the relationship (the shorter a relationship the less likely there is an economic disparity between the couple due to the division of functions in the relationship);
- the age of the parties (someone who is older may not be able to earn as much as a younger person because they may be near retiring);
- the health of the parties;
- how long the likely economic disparity may continue (for example if someone can soon be gainfully employed then this, in all the circumstances of the case, may lessen the length of the disparity); and
- what contributions each party made to the relationship. (Section 18 of the Act could be considered under the discretion afforded to the court under section 15(2) as a relevant circumstance.)

Section 18 of the Property (Relationships) Act 1976: the definition of a contribution

A contribution to the relationship relating to all or any of the following:

(a) the care of

   (i) any child of the relationship
   (ii) any aged or infirm relative or dependant of either spouse/partner

(b) the management of the household and the performance of household duties
(c) the provision of money, including the earning of income, for the purposes of the relationship

(d) the acquisition or creation of relationship property, including the payment of money for those purposes

(e) the payment of money to maintain or increase the value of

   (i) the relationship property or any part of that property; or
   (ii) the separate property of the other spouse or partner or any part of that property:

(f) the performance of work or services in respect of

   (i) the relationship property or any part of that property; or
   (ii) the separate property of the other spouse or partner or any part of that property

(g) the forgoing of a higher standard of living than would otherwise have been available

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that

   (i) enables the other spouse or partner to acquire qualifications; or

   (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.
There is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. Presently, the Courts have not taken direction from section 18 in their analysis of section 15. Yet section 18 could be a useful tool and may be considered as “explanatory material” which assists with the interpretation of section 15 in accordance with section 5 of the Interpretation Act 1999.

**The overall discretion**

The court must consider it ‘just’ to make an award (section 15(3))

After the jurisdictional tests are satisfied the final hurdle is convincing the court it is just to make an award. A claimant may be successful and establish that their claim meets the jurisdictional tests, but within this final limb the court holds a controlling card. It must step back and consider whether, in light of the evidence before it, is it consistent with justice to make a compensatory award.

The concept of justice has the potential to impact on the application of section 15. The concept of just (or justice) is fluid. Social and moral codes and values change with each generation. Legal jurisprudence indicates “justice” is not a static term. The law is fluid and our understanding of what is just changes. In *X v X* the Court of Appeal’s view was that the discretion afforded to the Court under section 15(3) should not be a prescribed one and an element of flexibility must be retained to consider the facts of each particular case:

> The s 15(3) discretionary assessment is not amenable to a prescribed formula, and the justice of an award in any particular case will depend on a comprehensive assessment of the parties’ respective financial positions, their earning prospects going forward, their current obligations in respect of any children of the partnership, and other matters that go to the overall fairness of an award.

The Court of Appeal, in *X v X* felt that, in the context of the causation issue, there is a presumption in favour of mutual choices of the couple in respect of the division of functions

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192 Property (Relationships) Act 1976 s 18(2)
193 See Page 30.
leading to the economic disparity, yet in the operation of the discretion under s 15(3) personal choices and lifestyle may, in certain circumstances, be relevant. The Court gave the example of “a choice by a claimant party to be supported by their spouse rather than return to work” as pointing “against the justice of an award”.195

The question of what is meant by the term “just” is an interesting one. Section 15 is not the only occasion that the concept of “just” or “justice” appears within the Property (Relationships) Act. For example section 13 permits a departure from equal sharing of the relationship property if the Court considers there to be extraordinary circumstances that make equal sharing repugnant to justice. In any such departure it is mandatory to divide the property in question “in accordance with the contribution” of each partner to the relationship. In De Malmanche v De Malmanche196 Priestley J considered section 13, noting that an analysis of the type required to be undertaken by the Court in respect of section 13 “might well be helpful in assessing the relationships to which s 15, as a matter of law, applies”.197 His Honour was of the view that such a test should “not be applied in a formulaic way ... factors of age, un-employability, ill health and economic vicissitudes cannot in themselves, given the diversity of the human condition, constitute extraordinary circumstances ...”. 198

The test, where departure from the equal sharing regime may occur when there are extraordinary circumstances that make equal sharing repugnant to justice, now operates under “fairly settled principles”.199 There are a number of cases that clearly establish Parliament intended the presumption of equal sharing as a stringent one and this makes the presumption difficult to displace.200 For example equal division of the relationship property has been upheld in cases where one party has provided the family home.201 His Honour Justice Priestley concluded that in most cases where there has been an order of the Court for unequal sharing there have been features of “moral deficiency, such as failure to contribute significantly let alone to the best of one’s ability, chronic alcoholism destructive of the

195 Ibid at [115].
196 De Malmanche v De Malmanche [2002] 2NZLR 838 at [112-124].
197 Ibid at [122].
198 Ibid.
relationship, or cynical manipulation". The question of what is “just” is in most cases the subject of the Parliamentary prescription of equality of division. Cases where circumstances have rendered equal sharing repugnant to justice have included the injection of substantial sums of inherited money into the relationship although in contrast, as noted by Bill Atkin and Wendy Parker, another decision was decided differently. Unequal division was ordered where one party contributed substantially more capital to the relationship than the other spouse and also did more of domestic work often because the other party was ill or disinterested. What is that the concept of what is “just” is fact dependent and it is the entire breadth and circumstances of the relationship that the court will consider. However it is undisputable that in the context of section 13 there is a stringent evidentiary threshold to reach before a court will consider it “just” to depart from the equal sharing regime. In the context of section 15 and the use of the directive “the court, if it considers it just”, appears to adopt a less stringent threshold and again highlights the incongruous nature of section 15 and how it fits within the wider conceptual framework of the Property (Relationships) Act. The sense of unease appears again from whichever way one approaches section 15.

Compensation section 15(3)

Section 15(3) states:

If this section applies, the court, if it considers it just, may, for the purpose of compensating party A:

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

202 De Malmanche v De Malmanche [2002] 2NZLR 838 at [44]. Stewart v Stewart [2003] NZFLR 400 was a case where the husband suffered from alcoholism.
Section 15(3) has proven to be problematic. There has been such a divergence in the judicial approaches taken to section 15(3) that a Court of Appeal Judge has observed that the calculation of section 15 awards “has not exactly been a model of clarity in some of the lower Court judgments”.

The section gives no guide regarding what is the appropriate compensation and this question has proven to be the most problematic of the issues that arise in relation to economic disparity claims. An award must be “for the purpose of compensating”. However, what the compensation is premised on is arguably unclear. It is uncertain if the compensation should be founded on the cost of a lost career alone or whether compensation should also be awarded to compensate for economic advantages one party received through indirect contributions made by another party, as a result of the division of functions while the relationship was on foot. The issue is whether there should be compensation paid for any resulting uplift in a career partner’s earning potential (or income) through indirect contributions of the other party made as a result of the division of functions in the relationship. For example through the non career partner staying at home and taking care of children and the household one party may have been able to go out and develop and enhance their career and future earning potential.

Within X v X there was judicial acknowledgment that such an argument is possible, but the scope and nature of such an argument remains uncertain. One important consideration is that the amount of the award is limited by the amount of relationship property there is available. Awards cannot come from future income and consideration must also be had to the clean break principle. This means that the party paying the compensation should not be unduly burdened in the future as a result of the compensation, having the right to put the past behind them and not be overshadowed by the past relationship.

Working out the compensation has proven to be where a significant struggle in economic disparity matters has emerged. The Court of Appeal in X v X has provided some form of template for the methodology. Yet it cannot be said that this method is without problems. It is

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206 M v B [2006] 3 NZFLR 660 at [271].
207 The Property (Relationships) Act 1976 s18 could be considered. For example has one party enabled the other to attend to their work and business interests or gain a degree? If so these may be considered contributions. There is research supporting such an approach. See, for example, J M Krauskopf, “Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital” (1980), 28 Kan. L. Rev 379 or N Bala, “Recognizing Spousal Contributions to the Acquisition of Degrees, Licenses and Other Career Assets: Towards Compensatory Support” (1989), 8 Can. J Fam.
208 Such arguments are consistent with section 18 of the Property (Relationships) Act 1976 which states that a contribution includes the giving of assistance that aids the other party in the carrying on of his or her occupation or business (s18(1)(h)).
209 See X v X [2009] NZCA 399 at [171] and [238].
unlikely that this method will suffice for all economic disparity claims. For example if the claimant has not had a career path then what other methods there are available for calculating an award remains unclear.

**X v X methodology**

Putting aside these issues, in *X v X* the approach of the majority to calculating an award was:

1. **Calculate the “but for” income**
   This amount being the difference between Mrs X’s actual income and the “but for” income figures (being the amount that Mrs X would have earned “but for” her time out of the workforce). Calculating a figure representing the present value of the cumulative difference between the future after-tax income which Mrs X could have been expected to earn but for her role within the relationship and the after tax income which she was projected to earn if she works to the full extent of her future income earning capacity.

   The period of economic disparity (i.e. how long it would take to reach the level she would have been at if she had not ceased paid work) was determined to be 18 years (i.e. until Mrs X was 60 years old). For Mrs X this amount was calculated at $220,000.

2. **Deduct the allowances for the variables relating to a general contingent discount – being allowances made for the non-collection of future income**
   Appropriate allowances are then made to reflect the time value of money and the chances of non-collection of future income, because of reduced time in the workforce for various reasons including ill health, re-partnering, change in personal priorities or early retirement. For Mrs X this was a 50 percent discount.

3. **Deduct a further contingency amount for the uncertainty of the “but for” income**
   For Mrs X this was calculated as a 10 percent discount.
(4) Complete an overall assessment – assessing whether the outcome is just.
Consider: Does it fairly meet the objective of section 15 in all the circumstances of the case?

(5) The final step is to halve the award.
The majority thought that the income shortfall figure should be halved. However the Court also accepted that halving many not necessarily apply when other methodologies are used.

The Court of Appeal was not unanimous in regard to the appropriate methodology to be used. Following the Court of Appeal decisions there remains wide spread uncertainty regarding the appropriate methodology to be used for calculating awards. The Court itself has said that there are other means available to calculate the awards, but quite what these methodologies may be is unclear and the empirical research, examined in chapters 4 and 5, highlights the effect of this sense of uncertainty.

Even if the methodology is accepted, questions remain regarding the appropriate variables to plug into the formula. For example calculating another’s expected income (or income that they may have received) is an artificial and uncertain exercise. Peoples’ lives do not follow set patterns which, it would seem, the methodology is premised on. There are a number of factors that require tenuous projections, including questions relating to what deductions should be made for ill-health, early retirement, life-style choices or redundancy.

The methodology relied heavily on the use of expert opinion. The majority noted this was an unusual case where the stakes were high and as such the Family Court Judge was right to proceed on the basis of the material provided to her.\textsuperscript{210} The effect of this has been that in practice people also rely on the use of expert evidence because this has been the approach adopted in the Court of Appeal. New Zealand presently has no indication from an appellate court of what other approaches can appropriately be taken to the calculation of the awards. Evidence from experts undoubtedly increases the costs associated with calculating the compensation. For many New Zealanders the costs associated with the methodology, particularly the need for expert opinion (even if it is used in out-of-court settlements), would

\textsuperscript{210} X v X [2009] NZCA 399, O’Regan and France JJ at [182].
be prohibitive to their bringing an economic disparity claim. As the results of the empirical research indicate (see chapters 4 and 5) it is evident that this acts as a disincentive to many people thinking about making an economic disparity claim because the costs of a claim can substantially outweigh any compensation that might be awarded.

Robertson J opposed the sentiment of the majority on the subject of expert witnesses, observing that reliance on this type of evidence can potentially create a methodology that is unworkable without the assistance of extensive evidence from experts. A principle of the Property (Relationships) Act 1976 includes solving relationship property problems in a simple, inexpensive and speedy fashion. Opening the door to expert evidence is not consistent with this principle. There are many variables in the type of evidence required and approach taken. Permitting so much in the way of expert evidence diminishes the express intent of “seeing the value in providing some structure for the exercise that judges are required to undertake, which should enhance the predictability of awards”.

There are also questions regarding the halving of the award. The majority thought it was an inescapable feature of section 15 that any award to a claimant will diminish a respondent’s share of relationship property and it is in the interests of justice to ensure awards do not invert the parties’ relative levels of income and standard of living and create a fresh unfairness. It was clear that the majority were not saying that every method of calculating a section 15 award should be halved. There are opposing views on the appropriateness of halving compensation. A different way of seeing the issue is found within the reasoning of Baroness Hale of the House of Lords. Her view was that the retention of a breadwinner’s earning potential is a powerful resource, which provides the breadwinner with an ability to

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211 See X v X [2009] NZCA 399 at [125-129] – where Robertson J explains that the inundation of accounting material and the slotting of figures into formulae to produce end figures is a misconceived approach to s15. The section should not be reduced to an accounting exercise.

212 Principle 1N(d) “... questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice”.

213 For example the potential income of the economically disadvantaged spouse (past and future).

214 Including the exercise of discounting the Court completes – for example a 50 percent discounting for contingences.

215 X v X [2009] NZCA 399, at [175].


217 X v X [2009] NZCA 399, at [236].

218 For example see the paper of Anita Chan for a consideration of the issues around halving the award – Anita Chan, Barrister, “Economic Disparity the New Zealand approach” (IAML, Shanghai, September 2006). Also see the work of Professor Mark Henaghan “Dealing to Disparity” (2008) 6 NZFLJ 51. Both Anita Chan and Professor Mark Henaghan do not agree with the halving of a compensatory award.
generate an income and thereby repair any loss of capital.\(^{219}\) If the issue of compensation is approached as Baroness Hale suggests then there is no need to halve the compensation because the breadwinner will often be able to recover. Conversely, just like the non-earner the breadwinner also faces an uncertain future; ill-health, redundancy, changes in personal circumstances. It is also acknowledged that some of the problem results from the compensation being a one off payment of capital. In the United Kingdom a court can order future periodic payments that can be reviewed should the circumstances of the parties change. For example if the economically disadvantaged party re-partners or marries the payments can be altered or stopped. This feature of the United Kingdom’s regime may give some measure of comfort because the remedy can be modified to reflect parties’ respective needs without speculation on what may occur. Halving of the compensation is a theme examined within the empirical research because it is an issue that there are conflicting opinions on.

Following \(X \nu X\) a door has been opened for an argument to be made regarding enhanced earnings.\(^{220}\) An enhanced earnings argument is a claim based on the ongoing enhanced position of the advantaged partner which is attributable to the division of roles within the relationship. The majority were clear that \(X \nu X\) was not an enhanced position claim, but it seemed that it may have considered such a claim.\(^{221}\) Counsel for the wife did not argue for an enhanced position claim,\(^{222}\) but there is enough judicial comment within \(X \nu X\) to establish the grounds for this line of inquiry in the future. The basis of an enhanced position argument acceptable to the Court is yet to be determined. Enhanced earnings will be examined in the context of the empirical research in chapter 5.

**The compensation must come from the relationship property**

Pursuant to section 15(3) the compensation must come from the relationship property. Because of the definition of relationship property it is inevitable that some economic disparity claims will be successful but taking an action to bring a claim will be in vain because there will not be enough relationship property from which to pay compensation.

\(^{219}\) The breadwinner’s unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution of relationship property. *McFarlane v McFarlane* (2006) UKHL 24, 2006 AC 618, Baroness Hale at [142].

\(^{220}\) See \(X \nu X\) [2009] NZCA 399, at [171 and 238].

\(^{221}\) They recognise a claim may be an income shortfall claim and enhanced position. \(X \nu X\) [2009] NZCA 399 at [238].

\(^{222}\) See \(X \nu X\) [2009] NZCA 399 at [171] of the judgment – were they saying that such a claim should have also been made in conjunction with an income shortfall claim?
Use of trusts limits the pool of relationship property

This feature of the provision has created significant issues. For example if property is held in trust then there may be no “relationship property” from which to order compensation. This is an important issue. In the empirical research it was identified as a problem with the use of trusts resulting in there being no (or little) relationship property from which to order compensation.\(^2^{23}\) The Law Commission has considered this problem and has recommended that the “trust busting” provision (section 44(2)(c) of the Property (Relationships) Act) be amended so that courts “have the power to make an order requiring the trustees to pay a specified sum or transfer property of the trust to compensate the partner whose rights were defeated by the disposition of relationship property to the trust”.\(^2^{24}\)

The definition of “property” was not amended

Despite \(Z \times Z \) (No. 2)\(^2^{25}\) the definition of relationship property\(^2^{26}\) was not amended within the 2001 law reform to “include a concept of property which is capable of reflecting the contributions of the non-career wife to the income-earning capacity of her husband”,\(^2^{27}\) which the Court of Appeal said “resolving economic issues on dissolution in terms of property rather than support” required.\(^2^{28}\)

Once more, there is a quandary within the drafting of the economic disparity provision and what appears to be its purpose. The provision does not permit future payments from the income of the career-partner. Because of this, economic equalisation is frequently going to be unobtainable because without such future support, one party’s economic wellbeing will be less than the other’s (because one party does not have the ability to earn an income equivalent of the other). Further if there is not enough capital, in the form of the relationship property, from which to pay compensation then there is no remedy available for the economic disparity. \(Z \times Z \) (No. 2)\(^2^{29}\) sets a precedent that is clear: earnings referable to future effort are not “property” and they cannot be treated as relationship property. In the Court of Appeal’s

\(^{223}\) See page 210.
\(^{225}\) \(Z \times Z \) (No 2) [1997] NZFLR 241.
\(^{226}\) Within the Matrimonial Property Act 1976, s8.
\(^{227}\) \(Z \times Z \) (No 2) [1997] NZFLR 241 at [264].
\(^{228}\) Ibid.
\(^{229}\) Ibid.
judgment of Z v Z (No. 2)\textsuperscript{230} it referred back to William Blackstone and his \textit{Commentaries on the Laws of England}, where a distinction is made between the Rights of Persons and the Rights of Things, and concluded that “… essentially personal characteristics which are part of an individual’s overall make up, such as the person’s level of intelligence, memory, physical or sporting prowess … are not to be seen as property under the Matrimonial Property Act”.\textsuperscript{231}

Yet Mark Henaghan and Nicola Peart noted that the Court of Appeal, within their decision “tantalisingly left open whether an employment contract (which gives a bundle of rights and is not a transferrable asset, with no exchange value) could be considered matrimonial property”.\textsuperscript{232} This is an argument that remains to be made.

Later the Court of Appeal, in its judgment of \textit{M v B}, noted that “in many ways, [in the High Court] Allan J was constrained by the way in which the parties’ respective cases were presented to him. Everyone – witnesses, counsel and as a result, the Judge – became totally captured by a rigid application of the \textit{Z v Z (No 2)} model”.\textsuperscript{233} Perhaps a future argument could be made to set aside the precedent set by \textit{Z v Z (No 2)} so that in the circumstances of a long relationship where one party has supported the other in their business or professional pursuits through indirect contributions,\textsuperscript{234} the separate property\textsuperscript{235} of the other party (being their interest in their enhanced earning capacity, or their employment contract) has increased in value during the course of the relationship, or where gain occurred through the direct application of relationship property (for example the payment of professional fees for study from relationship property) gains occurred. The definition of property within the Act includes any other right or interest.\textsuperscript{236}

A (tentative) argument could be that enhanced earning or the value in qualifications or an employment contract is “a right or an interest” and therefore property owned by one partner. The general rule is that separate property is not relationship property. But there are two circumstances under the Act where the non-owing partner can claim a share of a gain or increase in value of separate property. The first is under section 9 A(1), where the increase in

\begin{itemize}
\item \textsuperscript{230}Ibid.
\item \textsuperscript{231} \textit{Z v Z (No. 2)} [1997] 2 NZLR 258 at [279].
\item \textsuperscript{233} \textit{M v B} at [58].
\item \textsuperscript{234} See The Property (Relationships) Act 1976, s18(h)(i) – (ii)
\item \textsuperscript{235} Separate property is defined in s9 of the Property (Relationships) Act and includes all “property” of either spouse or partner that is not relationship property.
\item \textsuperscript{236} The Property (Relationships) Act 1976, s2.
\end{itemize}
value of the separate property becomes relationship property (subject to the strong equal sharing presumption under section 11 of the Act) if the increase in value is attributable in whole or in part, to the application of relationship property. This could be in the form of the payment of professional fees, travel, educational fees or other such expenses from the relationship property of the couple. The second circumstance is if the non-owning partner has contributed to the gain, directly or indirectly, by their actions during the relationship, then the increase in value of the separate property is divided between the partners according to their contribution under section 9 A(2).

Any such argument is tentative at best and as noted above precedent would have to be set aside, but as Elias CJ (in an address to the Family Court) has expressed a note of caution regarding “too much veneration to precedent”, perhaps at a later date such an argument may be made.

The Chief Justice draws attention to the Purpose and the Principles of the Act in an extra-judicial address to the Family Court

Elias CJ’s view, as expressed in an address to the Family Court at a conference, was patent: courts should not unduly rely on precedent, particularly when dealing with social legislation, to make sense of the [Property (Relationships)] Act and they should also consider the principles and purpose of the Act to guide their decision making. Elias CJ has deliberated on the topic of how the judiciary can make the Property (Relationships) Act work and has said:

I wonder whether in future cases it may be necessary to work a little harder at trying to make sense of the Act as a whole … In … cases where [the] contribution is less readily quantifiable, it may be necessary to look further to the scheme and overall purpose of the Act if the end of just division is to be met in a particular case.

237 For example the payment of educational fees, travel or other such expenses from the couples’ relationship property.
When completing the exercises involved in reading and interpreting section 15, the Courts (and legal professionals) would be correct to adopt an approach consistent with the wider context of the legislation. The principles, the purpose of the Act and the background to the reform should be considered as a backdrop informing the judiciary and the legal profession of the policy and the appropriate conceptual approach to be taken. Such an approach is reasoned and consistent with a modern approach to statutory interpretation.\textsuperscript{240}

Section 15 does not exist in a vacuum. Margaret Wilson could not have been more clear or direct in her intent when she said: “[T]hat it was thought more guidance should be given to the court in their decision making and for this reason principles that should guide judicial decision-making were incorporated into the Act.”\textsuperscript{241}

\textbf{The Purpose of the Act}

The purposes of the Act contained in section 1M are three:

(a) to reform the law relating to the property of married couples and civil union couples and of couples who live together in a de facto relationship;

(b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership;

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

\textsuperscript{240} Pursuant to the Principles of the Interpretation Act 1999 s5, legislation is to be considered not only in terms of its text, but in light of the statutory purpose. Section 5(1) of the Interpretation Act 1999 states that the meaning of an enactment must be ascertained from its text in light of its purpose, and pursuant to s s5(2) and (3) explanatory material may be considered in this exercise.

\textsuperscript{241} Hansard vol 588 p.6518.
The Principles of the Act

The “principles” provided for in section 1N are “to guide the achievement of the purpose of this Act”:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced;

(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal;

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship;

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

Observations regarding whether the Court of Appeal decisions fit with the purpose and principles of the Act

It is at times difficult to understand how the Court of Appeal’s decisions are consistent with the purpose and principles of the Act. For example a purpose of the Act is to recognise the equal contributions of each party to the relationship. Yet as Professor Mark Henaghan has observed there has been little consideration of the non-financial contributions made by the spouses and the advantages given to the breadwinner through the actions of the partner who takes care of everything on the domestic front. Financial contributions count. They are easily seen and measured. Marilyn Waring considered what is of value and how many

242 For example Mark Henaghan notes that there has been a reluctance to grasp the significance of the non-financial contributions to a marriage or de facto relationship as a partnership of equals who should share the spoils when it ends. See Mark Henaghan and Nicola Peart “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” (2009 Bigwood, R (ed) The Permanent New Zealand Court of Appeal, Essays on the First 50 Years, Hart Publishing, Oxford) at page 101.
people’s perceptions of value come from a “belief that value results when (predominately) men interact with the market place.”

In McFarlane v McFarlane the House of Lords also considered how financial contributions can be valued. Baroness Hale understood the problem, her view was that:

It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money’s worth. The other is counted in domestic comfort and happiness.

The Supreme Court of Canada, in the context of the Canadian matrimonial legislation, opined that:

The doctrine of equal sharing of the economic consequences of marriage ... [that] the Act seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse.

Within the New Zealand context the principle that a just division of relationship property must have regard to the economic advantages and disadvantages resulting from the division of functions within the partnership appears to have been overlooked. The economic advantages obtained by the career spouse through the non-monetary contributions of the

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243 Marilyn Waring, Counting for Nothing – what men value and what women are worth Allen and Unwin, Australia 1988 at page 17. In the Employment Court this issue was addressed by a full Court in Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited NZEmpC 157 ARC 63/12 where it was noted that when women interact in the workplace it is traditionally undervalued particularly when the work relates to “care”.

244 McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618, at [150].

245 Moge v Moge [1992] 3 SCR 813. The Court cited Judge Abella, who said:

To recognize that each spouse is an economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means ... caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as valuable as the career that subsidizes this domestic enterprise. It means that the economics of marriage must be viewed qualitatively as well as quantitatively.

homemaker\textsuperscript{246} are not dealt with by the Court of Appeal. Yet the premium married men receive from marriage cannot be ignored.\textsuperscript{247} The work of Jenny Chalmers of the Social Policy Research Centre at the University of New South Wales and the work of Chicago University sociology professor, Linda Waite, indicate that a married man earns on average between 10 and 40 percent more than an unmarried male. This was matched on age and other relevant characteristics such as qualifications and work experience.\textsuperscript{248} Waite concluded that married men with women at home earn more because they are able to specialise in making money.\textsuperscript{249}

The principles of the Act are founded on the premise that marriage (or a relationship such as a de facto partnership or civil union) is a partnership of two equals. This premise is the starting point from which a Court’s approach to interpreting and applying the law must flow.

If someone considers marriage (or a de facto relationship or civil unions) as a partnership of true equals then that person’s understanding of an equitable division of assets will be different from another’s whose starting premise is the partnership is not as important as the rights of the individuals.

For example, other ways to approach marriage (or de facto relationship or civil union) and economic disparity indicating a different perspective (from that of a relationship that is a partnership of equals) may be to:

- view the issue in terms of \textbf{replacement cost alone}, valuing each partner’s respective/separate contributions to the relationship or the monetary value of services rendered in the course of the relationship (analysing the cost of the services of a nanny, cook, cleaner or driver over the course of the relationship); or

\textsuperscript{246} There are other ways of looking at the contributions of the wife – the House of Lords’ approach is evidence of this. Lord Nicholls said, regarding the wife’s contributions in the McFarlane decision, the wife’s contribution enabled the husband to create a working environment which had produced greater rewards, “of which she should have her fair share”, at \textit{McFarlane v McFarlane} \textsuperscript{[2006]} \textit{UKHL 24}; (2006) 2 AC 618, at [85].
\textsuperscript{247} The marriage premium is noted across countries and it is not limited to any particular country. A number of researchers observe the effects of it. While they may call it something else it is clear that the effect of it is there – see for example, Lloyd Cohen “Marriage, Divorce and Quasi Rents: or I Gave Him the Best Years of My Life” \textit{The Journal of Legal Studies}, Vol 16, No.2 (June 1987) University of Chicago Press pages 267-303 also Katharine K Baker “Contracting for Security: Paying Married Women What They’ve Earned” (1988), 55 \textit{University of Chicago Law Review} 1193.
\textsuperscript{249} Ibid.
• employ the **opportunity cost method**, the valuation of the loss of opportunity, for example, what a partner has lost or sacrificed having stayed at home and cared for the family. This is the current approach of the Court of Appeal.

Both of these approaches are riddled with problems because:

• they ignore the law which starts from the premise that marriage (or de facto relationship or civil union) is a partnership of equals and each partner is entitled to share in the fruits of the relationship as a whole (and a relationship is usually founded on sharing). If parties do not wish to share equally then they have the ability to contract out of the provisions of the Act;²⁵⁰

• the replacement cost analysis overlooks the fact we do not hire the services of a wife, husband or partner. A partner in a relationship is different from a nanny, or cleaner. The cost of these services on the open market is not a true measurement of the total value of the contributions made in a relationship;

• there is more to a relationship than opportunity lost or replacement cost alone. The phenomenon of the marriage premium where a husband’s wages increase as a result of the working partnership of the relationship has been studied and documented by academics;²⁵¹

• building on the above, the productivity and value of a partner is not the same as their market replacement cost. Not all things that a partner contributes to a partnership are available on the market.

The Court of Appeal has considered the compensation on the basis of the cost of loss of opportunity alone. It is arguable that such an approach does not fit within the purpose and principles of the Act. There are other ways of considering the nature of a partnership – be it a marriage, de facto relationship or a civil union. An insight into these other ways of

²⁵⁰ Property (Relationships) Act 1976, s21.
²⁵¹ See Footnote 247.
understanding a partnership might be available through comparing a business partnership with a marriage.

The concept of partnership, in business, has traditionally been framed by the law as a classic example of a fiduciary relationship where parties owe to each other duties of loyalty and good faith and where there is a duty to put the interests of the partnership ahead of one’s own personal interests, for example see Chirnside v Fay. Or a marital type relationship could be understood to be similar to an unincorporated joint venture. Blanchard J in Chirnside v Fay opined that:

The essence of a joint venture which is not yet contractual is that it is an arrangement or understanding between two or more parties that they will work together towards achieving a common objective ... A joint venture will come into being once the parties have proceeded to the point where, pursuant to their arrangement or understanding, they are depending on each other to make progress towards the common objective. [Emphasis added]

A marital type relationship is similar to business partnership or joint venture where parties work together to achieve common objectives this may be raising a family or similar goals. When a comparison is made with a business partnership/or joint venture and a marriage anomalies emerge. The law treats business partnerships as deserving of more care and attention than marriage, imposing the highest standard of duty on a business partner, that of a fiduciary. It seems remarkable that the law will impose fiduciary obligations in the context of a business partnership yet in other partnerships (marriages, de facto relationships, or civil unions) it is much more difficult to establish these obligations. A marriage partnership is premised on the principles of a relationship of two equals with each party having the right to share in the other’s worldly goods should the marriage come to an end. Whether the law should step in and uphold the moral, legal and ethical duties and obligations one takes on in a

253 Meaning that there may be no specific contract regulating the relation between the parties. However it could be argued that marriage is a contract governed by vows given and the law. For example the Property (Relationships) Act 1976. A de facto relationship or civil union could be understood in a similar fashion. For a consideration of the nature of partnerships and joint ventures see Maree Chetwin, University of Canterbury, New Zealand, “The Broad Concept Of Joint Venture: Should It Have A Fixed Legal Meaning?” 2007 EABR (Business) & ETLC (Teaching) Conference Proceedings www.ir.canterbury.ac.nz
255 Reid v Reid [1979] 1 NZLR 572 Woodhouse J.
marriage (or de facto relationship or civil union) the way it does in business partnership is a challenging topic. There is a tension between the right of the individual to freedom of choice and the obligations of the individual to their partner and where the law should stand amongst these divergent interests and duties.256 There is also the uneasy tension between the clean break principle that permits someone on divorce257 to disentangle the bonds formed in a relationship so that the past can be put behind them and the couple can lead independent lives. If the law was to treat marriage (or de facto unions and civil unions) as relationships where the partners each owe each other enduring and fiduciary duties then where the clean break principle would sit within the mix is uncertain. The House of Lords has considered this issue in McFarlane v McFarlane and Lord Hope’s view was that:258

[A]chieving a clean break in the event of divorce remains desirable, but if this means that one party must adjust to a lower standard of living then this result is that the clean break is being achieved at the expense of fairness. Why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up as his share of the bargain that they entered into.

As Lord Hope’s observation illustrates whichever way economic disparity claims are approached there is another problem or view that emerges. A tension exists with economic disparity claims and the clean break principle that in New Zealand we are yet to entirely resolve.

Another tension is evident within the approach of the Court of Appeal and the principle (under the Property (Relationships) Act 1976, section 1N(d)) that questions arising about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice. The methodology used by the Court has not been inexpensive, simple or quick. It is complicated, and involves projections that require the input from experts that

256 The House of Lords examined the requirements of fairness and the obligations that spouses owe to one another. Lord Nicholls considered these issues and addressed the issue of what is required in the interests of “fairness”. Lord Nicholls view was that: “this element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support”.


257 Or breakdown of a de facto relationship or civil union.

McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618 Lord Hope at [120].
increase the time and costs associated with resolving relationship property disputes. This undoubtedly has flow-on effects for those couples trying to settle their relationship property matters (should they include an economic disparity claim) outside of a courtroom.

In the following chapters the effect of the uncertainty and difficulties within the drafting of section 15 and the Courts’ treatment of economic disparity claims will be considered from the perspective of practitioners who deal with relationship property matters within their practices.
Chapter Four

Overview of the empirical research

The rationale for the empirical research

Economic disparity is a multifaceted issue, including problems associated with the drafting of the provision, and the manner in which the provision has been interpreted and applied by the Courts. Projections and theories can be made about what may happen yet the theories and projections need to be tested and measured against what happens in practice.

An aim of the empirical research is to understand the impact that section 15 has had outside of the courtroom on the vexing problem of economic disparity and whether the perceived problems associated with section 15 and economic disparity claims259 are in fact problems in practice. The rationale is to understand how section 15 works and to learn from the profession regarding how they read and apply the mixture of rules and discretion, what they see as problems, and what they see as alternatives and solutions to the law as it presently exists.

The problem of section 15 and the “average family”

Professor Bill Atkin and Wendy Parker previously asked the related question of: “To what … extent has section 15 made a major difference for the average family?”260 Upon reflection, this question now seems difficult to address, because it is harder than ever before to identify what is meant by an “average” New Zealand family. There is no longer a standard family-unit of a married couple with a father (engaged in full-time paid employment), a mother (being the primary care-giver) and 2.4 children that live in their own home. This structure may have formed the basis that \( X \, v \, X \) and \( M \, v \, B \) were measured against, and perhaps the unit from which the impetus for section 15 emerged, but now the manner in which New Zealanders organise their personal lives is more fluid than ever before. For example, marriage rates continue to fall261 and it is projected that there will be more couple-without-children families

259 For example the lack of guidance regarding how to calculate compensation, or that the compensation can only come from capital.
and one-person households in 2031 than in 2006. The rate of New Zealanders owning and living in their own homes is declining. The conclusion that can be drawn is that now more so than ever before it is hard to draw any definite conclusions about average New Zealanders and their families, and this makes understanding the impact of section 15 on New Zealanders all the more elusive, because section 15 appears to fit (or only make sense) within the framework of the traditional family unit of generations past which is a diminishing sector of New Zealand society.

The Court decisions are not reflective of a cross-section of New Zealand

Court decisions will not provide a complete answer to the question of what impact section 15 has had on the problem of economic disparity between couples on the breakdown of their relationships in New Zealand. The judgments are not reflective of a cross-section of New Zealand. This contention is premised on:

- Most settlements of relationship property occur outside the courtroom. It is a rare few that go through to court proceedings. The empirical research also reflects this. Legal practitioners explained how relationship property matters are usually settled without the need to issue court proceedings. A solicitor said: “I usually always advise my clients not to go to court. The ones that do are usually very angry people to take it through ... protracted cases are often clients that have mental health issues or alcoholics.” (SOLAK17). Matters that go through to court are often unique (regarding a special point of law), fuelled by anger or well supported financially. Most New Zealanders do not have substantial pools of relationship property and going to court is not a viable option.

264 In 1991 72.4 percent of all private dwellings were owned by their occupants in 70.7 percent in 1996, 67.8 percent in 2001 and 66.9 percent in 2006. Philip S Morrison, On the falling rate of New Zealand Home Ownership Centre for Housing Research, Wellington [2007].
265 See chapter 1.
266 The value of the relationship property pool is substantial and this is therefore perceived as justifying taking the matter through to Court.
• The high financial cost of economic disparity claims means it is seen as a “remedy for the rich” (BAK5). Few people can afford to bring a claim because the costs are prohibitive. The impact of section 15 on a cross-section of New Zealand society has been minimal. When it is used the consequences of raising it are seen as negative on the family and the monetary value of the potential award is perceived as insubstantial. A solicitor explained: “Section 15 has not ... made a big difference. I have never had a full blown section 15 award just a bit of an acknowledgment of it ... when you start your negotiations then a lot of people will raise it ... It is being used as a threat”.

• The Court of Appeal’s treatment of the jurisdictional tests and the discretions contained in section 15 are perceived by some practitioners as narrow and restrictive.267 The door to bringing a claim is closed for many New Zealanders because of the restrictive interpretation which currently prevails, as a solicitor explained, “The problem is more how the section is being interpreted and applied. I think that the level of evidence to get over the line ... [the] jurisdictional tests do not need to be so tough”.

• The focus of section 15 inquiries has been economic loss. Compensation has been limited to the loss of a career. This means economic disparity claims appear to be unavailable for people who do not have a pre-existing career to establish the grounds of what was lost. This further limits those that the provision is applicable to because there has been limited attention and recognition of the economic advantage/or uplift to an income earner’s career and career progression as a result of the support of their spouse.

It would seem that the National party’s fear that economic disparity provisions will give lawyers an “open invitation to have a go in court”268 has not come to fruition.

267 For example the manner the Courts are approaching the causation test (chapter 3).
The theoretical context of the empirical research

Empirical research can be either qualitative or quantitative. Quantitative research is founded on measures and statistical information in the field. Its aim is to measure events, incidents or various views and opinions in a chosen sample.\textsuperscript{269} Qualitative research is exploratory. The objective is to gain an understanding of underlying reasons and motivations for something, providing an insight into the setting of a problem and uncovering prevalent trends in thought and opinion.\textsuperscript{270} Because of the nature of the research questions the empirical research of this study is founded on qualitative research principles – although elements of quantitative research are present as well.\textsuperscript{271}

A qualitative methodology was employed in the interest of gaining awareness and understanding of individuals’ experiences of section 15 and economic disparity. If quantitative research methodologies were used in isolation the depth of material revealed by the research would be limited. There would be little scope for gaining an awareness of individuals’ experiences of section 15.

Qualitative research is a “systematic, rigorous and theoretically sound method for investigating and understanding the social world” and, as a methodological approach, “is grounded in the interpretative tradition in that it is concerned with how the social world is interpreted, understood, experienced and produced”.\textsuperscript{272} The approach has been to focus on qualitative interviewing as the main methodology of the research and the adjunct to this method was the online questionnaire. The interviews were, for the legal professional study group, semi-structured in format (with the central focus on key questions relating to vignettes or key questions relating to economic disparity and section 15), enabling the research to


\textsuperscript{270} Lisa Webley “Qualitative Approaches to Empirical Legal Research”, The Oxford Handbook of Empirical Legal Research (Oxford, OUP, 2010).

\textsuperscript{271} For example there are quantitative aspects to the questions asked in the interviews and the online survey – there are also qualitative aspects within the court judgments. These aspects are the “things” that can be measured and framed in a statistical analysis. An example is the percentage of the total relationship property pool awarded to claimants. The quantitative material is a useful platform on which the quantitative research is founded (particularly the case law) and avenues for further research developed.

cover key issues relating to the subject matter and also permitting flexibility for the interviewees (and the researcher) to open new channels of conversation.\textsuperscript{273}

John Eekelaar and colleagues explained the process of a qualitative research interview when they said:\textsuperscript{274}

> With a qualitative interview, the researcher pre-defines the subject matter in his or her own words, but by adopting a less structured approach the [participants] would be able to describe their experiences and practices in their own words. The flexibility inherent in a qualitative approach would also allow [the researcher] to follow up any new themes and ideas as they emerge.

Because qualitative research permits flexibility, different avenues of research inquiry unfolded. For example the significant role forensic accountants play in the interpretation and application of section 15 was not understood at the outset of the research process. This theme was explored during the research (with two accountants and one actuary being interviewed). Another example is an interview with a claimant. On the prompting of the QC\textsuperscript{275} contact was made with a section 15 claimant and an informal interview was conducted. The claimant’s experiences proved invaluable, enabling the costs and emotional impact of an economic disparity claim to be appreciated. The qualitative research methodology, while unable to reach and measure the responses of a wide population, is able to deal with complex issues and gain an in-depth understanding of how individuals perceive and experience legal and social issues.

\textsuperscript{273} Lisa Webley explains how this flexible approach may be redesigned to meet changing conditions, perceptions and findings. This means the research design may be relatively fluid; the parameters of the study and the approach and methods adopted may have to be amended to accommodate altered understandings and changing dynamics. Lisa Webley “Qualitative Approaches to Empirical Legal Research”, The Oxford Handbook of Empirical Legal Research (Oxford, OUP, 2010).


\textsuperscript{275} The QC contacted the claimant and discussed the general nature of the research and then email contact was made with the claimant – giving them information regarding the research. An informal interview was then arranged where we met in person.
The theory in context

The information gathered from the research process will enable the day-to-day implications of section 15 and the wider issues associated with the problem of economic disparity to be understood. Such an exercise is particularly important in the area of relationship property law because as Woodhouse J stated in *Reid v Reid*: 276

> Although the Act operates upon “property” as a subject matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation ... the theme of the Act is not the technical, legal adjustment of the kind of property rights that protect arms-length interests in strangers.

The world outside of the courtroom is affected by what happens within the courtroom, but this world outside of the courtroom takes on its own form each time a relationship property matter is negotiated. For example, the legal professionals spoke of relationship property disputes, settled outside of the courtroom, leading to settlements no court would have awarded.

The social and personal nature of relationship property as observed by Woodhouse J in 1979 remains the same today. Justice Woodhouse was mindful that the personal circumstances of a couple contribute to the resolution of a relationship property dispute. An additional layer of complexity is brought by the judges and the legal profession, as a barrister explained, “I know that for many judges they would not have been able to separate their personal experiences and views from their decisions but you know in this area it is very hard to separate” (BAK2).

The barrister’s statement is as true for the judiciary as it is for the legal professionals. Relationship property and, in particular, economic disparity, is an area in which it is very hard to separate life experiences from the issues and problems to be addressed. By employing qualitative research techniques the hope is we can begin to understand how section 15 is understood and grounded within the New Zealand context.

276 *Reid v Reid* [1979] 1 NZULR 572, Woodhouse J at [580].
Background to the decisions regarding study groups and sampling

Empirical legal research regarding family law has two relevant study groups:

- Members of our community involved in family law; they are likely to be claimants or family members whose lives have been affected by the law; and

- Members of the legal profession and other professions involved in family law.

The selection of the study groups

When designing the research, questions of who and how many to interview emerged. It was important to gather a “spectrum of viewpoints and experiences”. However samples for qualitative studies are generally much smaller than those used in quantitative studies. There is a point of diminishing return to a qualitative sample because more data does not necessarily lead to more information. A single occurrence of a piece of data is all that is necessary to ensure that it becomes part of the analysis framework. Frequencies are rarely important in qualitative research, as one occurrence of the data is potentially as useful as many in understanding the process behind a topic. This is because qualitative research is concerned with meaning and not with generalised hypothesis statements.

The selection of the legal professional study group

The research draws validity from the selection of legal professionals from all of New Zealand (from Northland to Invercargill) with a range of experience and types of legal experience. There are sole practitioners, solicitors, senior barristers, a Queens Counsel and a Family

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279 Ibid.
280 See Mark Mason, “Sample Size and Saturation in PhD Studies Using Qualitative Social Research” in Forum: Qualitative Social Research (Vol 11, No3, Article 8 – September 2010).
Court Judge. Economic disparity is an area of relationship property law that is specialised and complex. For the research to have validity the legal professionals needed to have a solid level of legal experience. Accordingly, those interviewed ranged from five years to over twenty years legal experience. The insight gained from more junior practitioners may have been limited because legal professionals consider economic disparity claims to be complex relationship property matters and they are more generally handled by experienced barristers, senior lawyers or senior partners within law firms. For example one barrister said:

[BAK1]: I get the panicked calls from the suburban lawyers. Often there are trusts involved or there are economic disparity issues, this can be butt covering … scared of giving the wrong advice. Sooner or later someone is going to get it wrong and get sued – why [did their advice] turn out inadequate.

Or, as the following response from the online survey indicates, economic disparity matters are not perceived as straightforward:

In my experience the types of cases involving economic disparity are generally ones that are (or should) be handled by senior practitioners. Because they usually involve high net worth [couples] there are often other complicating factors involved such as trusts and companies and assessments of earning capacities.

Legal professionals do not specialise in economic disparity claims alone although a small number, usually senior barristers, specialise in relationship property law. Generally the specialisation of these people is family law. Because of the lack of specialisation the potential study group is large, with some practitioners having limited experience of section 15 and economic disparity claims.

The aim of establishing the legal professional study group was to obtain a full range of experience from throughout New Zealand, representing a cross section of socio-economic clients. For this reason, as before mentioned, the group includes staff solicitors, sole practitioners, a mediator, partners of small and medium sized law firms, barristers, a Queens Counsel and a Family Court Judge. There is a mix of gender, age and experience (see Table 5.1).
Recruiting these participants involved: reviewing the case law regarding section 15, noting who had appeared and contacting these people by email; reviewing websites of law firms and ascertaining which firms had specialist knowledge of relationship property/and family law; speaking with academics regarding legal professionals they knew of with experience in relationship property law; contacting the Family Law Section of the New Zealand Law Society and sending an email with details of the proposed research to members, inviting them to participate in the research.

In all cases, participants were initially contacted by email. This initial communication explained the nature of the research and what was being asked of them, and included a copy of the consent form. Many of these emails were followed up with telephone calls if no response had been received within two weeks of the initial contact.

Participants were told that the interviews would be anonymous: they would be indentified through key indicators, such as professional group and location of practice. They were given the choice of completing an interview and/or the online survey. One legal professional declined to do the interview, instead choosing to do the online survey alone. 19 members of the study group did the online survey as well as the interview. The online survey built on what was covered within the interview. Most professionals preferred to complete the interview – it being easier to recruit participants to take part in the interview process than the online survey. This result was unsurprising. The background literature regarding responses to interviews and questionnaires indicated a difference in response rates to personal requests for an interview (leading to a higher affirmative response rate) rather than requests by mail or email to complete questionnaires.

For this reason a decision was made to concentrate on the interviews. The results of the online survey are held in a secure site within the Otago University’s system and will later be destroyed in accordance with protocol.

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281 For examples of this material see Appendices.
282 See the Appendix for the questions.
283 See for example Duncan D. Nulty “The adequacy of response rates to online and paper surveys: what can be done?”, Assessment and Evaluation in Higher Education Vol. 33 No. 3 June 2008, pages 301-314 www.uaf.edu
All of those interviewed signed the informed consent form. These were stored safely and separate from materials related to the research, so anonymity was preserved. All of the interviews were digitally recorded with the knowledge of the interviewees. The audio records were used to write up transcripts and were later destroyed. Each transcript was identified with the participant’s indentifying tag which is used in the thesis. Nine of the interviews were conducted in person and the remainder were conducted over the telephone. It was intended that the interviews would last around 30 minutes however in practice they ranged from 25 to 170 minutes. The interview process took place over a seven month period from March 2012.

**The form of the interview questions**

The interviews were based on a framework of questions (see the Appendices for the questions). The University of Otago Ethics Committee consent is attached as an Appendix. The questions can be divided into three sections:

1. A preliminary section gathering background information (years of experience, nearest town/province in which they most frequently practice, number of cases/matters that they deal with per year, and gender).

2. The Vignettes. This section involved two cases (which were sent to the interviewees prior to the interview). The first vignette was based on the facts of the House of Lords’ decision: *McFarlane v McFarlane*. This was a “big money case” and it was used to ascertain how, in New Zealand, the facts of this case would be interpreted.

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284 Due to a technical fault two of the interviews were only partially recorded. However hand-written notes were taken.


286 This was important – there seemed to be a different judicial mindset carried by the UK judiciary to their interpretation of the legislation and facts, from that found within New Zealand. For example, Baroness Hale commented that the main family asset was the husband’s very substantial earning power – this was generated over a lengthy marriage – in which the couple deliberately decided that the wife should devote herself to home and family and the husband to work and career. The fact that the wife wanted to take this role on was, according to Baroness Hale, “neither here nor there” explaining “most breadwinners want to go on breadwinning”. This reflects the findings of Professor Linda Waite who explains that a marriage partnership has economic benefits because the ability of the partners to specialise and take on roles in the relationship has positive outcomes for the partnership. For the House of Lords the intent of the wife’s award was to not only provide for the wife’s future needs but to compensate her, acknowledging that she should be entitled to a proper share in the fruits of their collective labours. See *McFarlane v McFarlane* [2006] UKHL 24, Baroness Hale at [154]. Because there was insufficient capital to compensate the wife – following the equal division of the relationship property – there was an order made for periodic payments of $250,000 to the wife (this being a joint life order). This could be
The second vignette was a fictional scenario based on a de facto couple with a limited pool of relationship property and earning power. This was included to ascertain how section 15 may work for people outside of the big money cases and traditional family unit within New Zealand. The questions asked were formed on the basis of section 15 itself. The goal was to understand how practitioners read and apply the law for themselves outside of a courtroom.

3. General questions formed the final section of the interviews. These open-ended questions included problems the interviewee had experienced when advising clients of a section 15 claim, and what they would like to see done regarding economic disparity. The section also sought the interviewee’s opinion on the methodology used to calculate the compensatory award in X v X.

As mentioned, members of the study were also invited to take part in the on-line survey which was designed to build on the questions asked in the interviews.

**The contextual study group**

During the interview process it was apparent that there was another group of people with experience of relationship property law and economic disparity who would be able to make a valuable contribution to the research. For this reason the research group was extended to include forensic accountants, an actuary, claimants and a psychologist with experience of the Family Court. All were provided with information about the research and signed informed consent forms. Anonymity was assured for all group members.

The forensic accountants and actuary were approached because of their experience regarding economic disparity claims. During the interviews it transpired that legal professionals often turn to forensic accountants and actuaries for expert advice. The questions asked related to reviewed in the future should circumstances demand it. The question is, with similar facts; how would New Zealand’s legal profession treat such a case?

287 A number of participants commented favourably on the vignettes – for example BAK3 said: “you have selected two very good case examples as section 15 only really works for the rich”. BAK3 thought that this was due to such people usually both having had an established career path (this means that there can be a claim established on the loss of opportunity – being the loss of career) and that you need money to pay for the claim as the costs of bringing a section 15 claim are substantial.
section 15: How do you establish the variables within the methodology used for calculating awards made pursuant to section 15? What do you perceive as the problems with section 15, and what you would like to see done, in a perfect world, regarding economic disparity? The forensic accountants were also asked if they had an opinion regarding the issue of career enhancement. The forensic accountants were interviewed in person and the actuary was interviewed over the telephone.

One claimant was recommended by a very experienced member of the legal professional group, who had acted for the claimant and who contacted the claimant regarding the nature of the research. The interview was informal and open and consisted of the claimant telling her story and experience of bringing a section 15 claim to court.

The interview with the psychologist was conducted in person. The structure of the interview was fluid and exploratory in nature, drawing on the following open-ended questions:

- Many legal professionals speak of uncertainty and delays regarding sorting relationship property issues. What, in your opinion, is the impact of this on families?

- Do you think if you could get the money side of things sorted between couples then it would all flow from this?

The face-to-face interviews with the economist and the policy advisor/feminist economist were very contextual. They were open-ended discussions regarding concepts underpinning relationship property law and some of the contextual conceptual problems these people perceive with the law. The aim of these interviews was to build on the conceptual depth and framework of the thesis.
Table 5.1 List of participants by identifying tag, indicating the geographic area in which they practice, professional group, time in practice and approximate number of relationship property matters they deal with per year.

<table>
<thead>
<tr>
<th>Identifying Tag</th>
<th>Professional Group</th>
<th>Location</th>
<th>Gender</th>
<th>Time in Practice (Years)</th>
<th>Approx. No. of Relationship Property Matters per year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>Family Court Judge</td>
<td>Christchurch</td>
<td>Male</td>
<td>32 (8 as a Judge)</td>
<td>50-80</td>
</tr>
<tr>
<td>QC</td>
<td>Queens Counsel</td>
<td>Auckland and Wellington</td>
<td>Female</td>
<td>30</td>
<td>50</td>
</tr>
<tr>
<td>BAK1</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Male</td>
<td>30+</td>
<td>30+</td>
</tr>
<tr>
<td>BAK2</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Male</td>
<td>30</td>
<td>50</td>
</tr>
<tr>
<td>BAK3</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Male</td>
<td>36</td>
<td>20-30 (100% of his workload)</td>
</tr>
<tr>
<td>BAK4</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Male</td>
<td>30+</td>
<td>40+ (100% of his workload)</td>
</tr>
<tr>
<td>BAK5</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Female</td>
<td>21</td>
<td>20-30</td>
</tr>
<tr>
<td>BAK6</td>
<td>Barrister</td>
<td>Auckland CBD</td>
<td>Female</td>
<td>24</td>
<td>100</td>
</tr>
<tr>
<td>BAK7</td>
<td>Barrister</td>
<td>Auckland (North Shore)</td>
<td>Female</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>BHM8</td>
<td>Barrister</td>
<td>Hamilton</td>
<td>Male</td>
<td>30</td>
<td>100 (100% of his workload)</td>
</tr>
<tr>
<td>BCH9</td>
<td>Barrister</td>
<td>Christchurch</td>
<td>Male</td>
<td>30</td>
<td>20</td>
</tr>
<tr>
<td>BCH10</td>
<td>Barrister</td>
<td>Christchurch</td>
<td>Female</td>
<td>23</td>
<td>50+</td>
</tr>
<tr>
<td>BDUN11</td>
<td>Barrister</td>
<td>Dunedin</td>
<td>Female</td>
<td>27</td>
<td>30+ (80% of her workload)</td>
</tr>
<tr>
<td>SPRACTNEL12</td>
<td>Sole Practitioner</td>
<td>Nelson</td>
<td>Male</td>
<td>22</td>
<td>20</td>
</tr>
<tr>
<td>ID</td>
<td>Title</td>
<td>Location</td>
<td>Gender</td>
<td>Age</td>
<td>Experience</td>
</tr>
<tr>
<td>-------</td>
<td>----------------</td>
<td>-----------------</td>
<td>--------</td>
<td>-----</td>
<td>------------</td>
</tr>
<tr>
<td>SPRACTWEL13</td>
<td>Sole Practitioner</td>
<td>Wellington</td>
<td>Female</td>
<td>30</td>
<td>5-10</td>
</tr>
<tr>
<td>SPRACTWEL14</td>
<td>Sole Practitioner</td>
<td>Wellington</td>
<td>Male</td>
<td>16</td>
<td>30</td>
</tr>
<tr>
<td>SPRACTNEL15</td>
<td>Sole Practitioner</td>
<td>Nelson</td>
<td>Female</td>
<td>29</td>
<td>20</td>
</tr>
<tr>
<td>SOLNOR16</td>
<td>Solicitor</td>
<td>Northland</td>
<td>Male</td>
<td>42</td>
<td>60</td>
</tr>
<tr>
<td>SOLAK17</td>
<td>Solicitor (partner in small law firm)</td>
<td>Auckland (North Shore)</td>
<td>Female</td>
<td>10</td>
<td>20</td>
</tr>
<tr>
<td>SOLAK18</td>
<td>Solicitor (senior solicitor in medium sized law firm)</td>
<td>Auckland CBD</td>
<td>Female</td>
<td>13</td>
<td>30</td>
</tr>
<tr>
<td>SOLAK19</td>
<td>Solicitor (senior solicitor in medium sized law firm)</td>
<td>Auckland</td>
<td>Female</td>
<td>13</td>
<td>40+</td>
</tr>
<tr>
<td>SOLAK20</td>
<td>Solicitor (senior solicitor in medium sized law firm)</td>
<td>Auckland</td>
<td>Female</td>
<td>13</td>
<td>30</td>
</tr>
<tr>
<td>SOLHM21</td>
<td>Solicitor (senior solicitor in medium sized law firm)</td>
<td>Hamilton</td>
<td>Female</td>
<td>13</td>
<td>40</td>
</tr>
<tr>
<td>SOLTAUR22</td>
<td>Solicitor (partner in a medium sized law firm)</td>
<td>Bay of Plenty</td>
<td>Female</td>
<td>23</td>
<td>25</td>
</tr>
<tr>
<td>SOLTAUR23</td>
<td>Solicitor (solicitor in a medium sized firm)</td>
<td>Bay of Plenty</td>
<td>Female</td>
<td>4</td>
<td>20</td>
</tr>
<tr>
<td>SOLTAUR24</td>
<td>Solicitor (senior solicitor in a large law firm)</td>
<td>Bay of Plenty</td>
<td>Male</td>
<td>14</td>
<td>40</td>
</tr>
<tr>
<td>SOLWELL25</td>
<td>Solicitor (partner in a small law firm)</td>
<td>Wellington</td>
<td>Female</td>
<td>22</td>
<td>50</td>
</tr>
<tr>
<td>SOLWELL26</td>
<td>Solicitor (senior solicitor in a small law firm)</td>
<td>Wellington</td>
<td>Female</td>
<td>21</td>
<td>100</td>
</tr>
<tr>
<td>SOLNEL27</td>
<td>Solicitor (senior solicitor in a small law firm)</td>
<td>Nelson</td>
<td>Female</td>
<td>36</td>
<td>10-20</td>
</tr>
<tr>
<td>Code</td>
<td>Name</td>
<td>Position</td>
<td>Location</td>
<td>Gender</td>
<td>Age</td>
</tr>
<tr>
<td>--------</td>
<td>------------</td>
<td>-----------------------------------------------</td>
<td>---------------</td>
<td>--------</td>
<td>-----</td>
</tr>
<tr>
<td>SOLNEL28</td>
<td>Solicitor</td>
<td>Solicitor in a small law firm</td>
<td>Nelson</td>
<td>Female</td>
<td>5</td>
</tr>
<tr>
<td>SOLDUN29</td>
<td>Solicitor</td>
<td>Partner in a Small law firm</td>
<td>Dunedin</td>
<td>Female</td>
<td>23</td>
</tr>
<tr>
<td>SOLINV30</td>
<td>Solicitor</td>
<td>Partner in a Small law firm</td>
<td>Invercargill</td>
<td>Male</td>
<td>28</td>
</tr>
<tr>
<td>MED</td>
<td>Mediator</td>
<td>In practice as a lawyer 28 years Mediator</td>
<td>Auckland/North Island</td>
<td>Male</td>
<td>80-90</td>
</tr>
</tbody>
</table>
Table 5.2 List of the participants within the contextual study group linked by identifying tag, summary of experience, area of practice and gender.

<table>
<thead>
<tr>
<th>Identifier</th>
<th>Summary of experience</th>
<th>Area of practice</th>
<th>Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACC1</td>
<td>Senior forensic accountant – managing partner of a chartered accountancy firm with over 30 years experience in practice. He has assisted with around 18 section 15 claims in the last year.</td>
<td>Auckland</td>
<td>Male</td>
</tr>
<tr>
<td>ACC2</td>
<td>Senior forensic accountant – managing director of accountancy firm with over 23 years experience in practice. He is regularly involved with advising on section 15 claims.</td>
<td>Auckland</td>
<td>Male</td>
</tr>
<tr>
<td>ACT</td>
<td>Senior actuary – over 20 years experience – extensive section 15 experience in the lower North Island and South Island</td>
<td>Wellington</td>
<td>Male</td>
</tr>
<tr>
<td>Economist</td>
<td>Senior position in a large multi-national accounting/business advisory firm</td>
<td>Pacific region</td>
<td>Male</td>
</tr>
<tr>
<td>Policy advisor/ feminist economist/ Academic</td>
<td>Former politician and an academic</td>
<td>Auckland</td>
<td>Female</td>
</tr>
<tr>
<td>Psychologist</td>
<td>Experienced clinical psychologist – who has over 15 years experience with the Family Court</td>
<td>Auckland</td>
<td>Female</td>
</tr>
<tr>
<td>Claimant One</td>
<td>Brought a successful claim in the courts against her ex-husband in respect of section 15</td>
<td>Withheld – to protect the identity of those involved</td>
<td>Female</td>
</tr>
<tr>
<td>Claimant Two</td>
<td>Brought a successful section 15 claim – through a mediated settlement</td>
<td>Withheld – to protect the identity of those involved</td>
<td>Male</td>
</tr>
</tbody>
</table>
Figure 5.1 Graph Breakdown of the legal professional study group, by reference to position held (barrister, family court judge, mediator, partner, Queens Counsel, sole practitioner and solicitor).

Figure 5.2 Graph Breakdown of the firm size (large firm, medium firm, small firm and if they were a partner) of the solicitors from the legal professional study group.
Figure 5.3 Graph of the town or province in which members of the legal professional group practice.\textsuperscript{288}

Figure 5.4 Graph of the gender of the legal professional study group.

\textsuperscript{288} Note the mediator practices all over the North Island.
Figure 5.5 Graph of the approximate number of relationship property cases/matters dealt with by the legal professional study group on a yearly basis
After the preliminary questions were addressed, participants were asked about the two case studies contained in the vignettes. The vignettes had been provided to the participants prior to the interview.

The questions asked were based on the particular wording of section 15. They required participants to apply the jurisdictional tests in a focused and deliberate manner. For example, the interviewee was asked whether, after the equal sharing of the relationship property, they thought that there was going to be a significant disparity in income and living standards. If a significant disparity was identified, the interviewee was asked to rank the level of significance of the disparity on a scale of 1-10. This meant that there was a quantitative aspect to the answers. The collective responses could be collated and measured while permitting flexibility to open a general discussion concerning the question.

The aim of the questions was to examine how section 15 is applied in practice and to identify what legal professionals see as relevant or not relevant in a set of facts. When legal professionals interpret and apply the section there are a number of voids in the provision that they must work to fill. The intention of the research is to gather information from the professionals’ analysis of the vignettes which would provide an insight into how the voids of section 15 are filled by practitioners and to understand what facts practitioners consider relevant and therefore influence their decisions within the context of economic disparity claims.

Early on in the interview process it was clear that some of the gaps in our knowledge regarding the impact of section 15 could be addressed when an experienced Auckland barrister spoke candidly about the practical nature of relationship property settlements:

[BAK1]: The word is that there are some massive settlements out there that do not reflect what the court says at all. This is all anecdotal … you hear of barristers negotiating a settlement that seems to be far more generous than what a court would decide. There are settlements outside of the parameters that have been set by a court.

The mediator agreed and spoke of a “settlement that would not happen in court”. This settlement included a substantial “fairness payment” made to the wife (including the purchase of a new expensive European car). One of the lawyers involved was, apparently, “shocked by what the parties had agreed on”. While, the mediator explained the settlement was a hit to the
man: “He knew that he could make it up. He had had an affair … and was feeling guilty … It would have made new law. But this settlement would not have happened in a court.”

Subjective factors, operating outside of the law, influence clients when they negotiate relationship property settlements. These factors affect the resulting settlement (making an objective understanding of such settlements difficult). As an Auckland barrister explained:

[BAK1]: This is hard … there are so many factors. You … think of the things that go into this and do not underestimate things like guilt. To what extent is guilt a factor? Or, genuine sincere concern for the wife and children … Sometimes it is there. I do not want to live with her anymore but I do not want to expose her to rack and ruin.

BAK1 spoke of the preconceived ideas of his clients about relationship property and the settlement thereof. For example men come to him with an inherent fear of claims regarding their future earnings.

**General comments regarding vignettes one and two**

It is important to note the general impression vignette one had on the participants. Overall the group’s reaction was straightforward, perceiving a remediable economic disparity (with a central focus on loss of opportunity – the financial cost paid by the wife because of her lost career). The facts spoke to the interviewees and there was a pattern to the protagonists’ life events that the interviewees understood and empathised with (albeit in differing ways – there was, at least, an appreciation of the issues). The husband and wife were real people to the group and they could empathise with these people. This was an unexpected outcome of the research. When the facts of vignette one were discussed a light was turned on and avenues for further investigation were plentiful.

Generally the interviewees treated it as a given that the wife deserved some form of economic disparity compensation. It was the “big money case” and people identified strongly with the elements of factual narrative. For example, some of the female legal professionals identified with the wife. Auckland solicitor, SOLAK18, observed that the economic advantages obtained by the husband in vignette one were similar to those of her husband, mentioning her husband’s long working hours and how this means she will only work part-time. Of the wife

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289 The interviewees were often on similar paths or they had clients who had similar stories to the protagonists in vignette one.
in vignette one, SOLAK18 said: “I hope like hell that it is not me.” The solicitor and her husband:

[SOLAK18]: have talked about this, he is the primary breadwinner and I feel guilty every now and then ... I am not bringing ... as much into the household as my husband and he says to me ‘for God’s sake you know all the stuff you are bringing’.

Legal scholars are aware of hidden biases when interpreting and applying the law.290 It was remarkable to compare academic theories with the interviews and the perspectives, concerns and biases of the participants. Some participants were conscious of this. A Wellington solicitor, said: “I know I am a bit biased being a single working mother, you sometimes do get a little bit biased about these things … I know how tough it is” (SOLWEL26).

The effect of vignette two on the group was different. This story did not open conversation in the manner vignette one did. In fact the impression was it closed conversation down. There were comments like those of a solicitor, who said “there is so little relationship property. I do not know if it is worth it [to make a section 15 claim]. I would not take it. He is only earning $65,000” (SOLNEL28).

Another solicitor said that these are the cases she struggles with. “In the higher net worth ones it is easier to make these awards. But I actually think that in those lower net worth ones, this is where it makes a big difference to people” (SOLTAUR22). SOLTAUR22 said that if vignette two were to come across her desk she would look at it in terms of section 15 but she would struggle with it. The mediator said this is a “disaster case and there is no incentive on the guy to do anything”.

Vignette two’s facts were polarizing (evidenced in the spectrum of participants’ responses). Many interviewees thought an economic disparity claim was unwarranted. When this happened the interview proceeded to part three of the questions in an attempt to keep avenues of thought and discussion open with the participant. The overall impression was vignette two proved to be difficult for many to relate to. Vignette one’s facts were situations the interviewees understood. Vignette two did not strike such a chord in that it did not draw out personal life experiences.

290 Evan R Seamore discusses the need to alert judges to their biases by allowing them to understand how they arrive at decisions and then offer them a framework to analyse the processes they employ to achieve legitimate legal conclusions. See Evan R. Seamore, Judicial Mindfulness, University of Cincinnati Law Review Vol. 70 (2001-2002) page 1024.
Some comments in respect of vignette two stand out, in particular the observation of Auckland barrister, BAK5, who said: “This is what it was designed for [section 15]. But this woman will be on legal aid and no lawyer in Auckland would be able to do it. So goodbye forget it.”

**Vignette one: The big money case**

The facts of vignette one were given to the legal professionals to read prior to the interview and then, within the interview, questions were asked regarding the facts. For a complete list of the questions see Appendices.

**Figure 5.6 Vignette one, as given to participants**

<table>
<thead>
<tr>
<th><strong>The pool of relationship property:</strong></th>
<th>Valued at three million dollars.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The marriage:</strong></td>
<td>The marriage lasted 18 years. The couple met while at university (where they were both excellent students). They lived together for three years before their marriage. There are three children of the marriage – aged at 10, 12 and 15. The mother has the ongoing daily care of the children.</td>
</tr>
<tr>
<td><strong>The wife:</strong></td>
<td>Aged 43 years. The wife was an associate in a large commercial law firm. She gave up her career over 12 years ago, after the birth of their second child, to focus solely on bringing up their children and supporting her husband. Prior to giving up her career she earned considerably more money than her husband. Within the last year she has commenced working part-time (school hours around the children’s needs) in a small general practice earning $40,000 gross per annum.</td>
</tr>
<tr>
<td><strong>The husband:</strong></td>
<td>Aged 45 years. The husband is a top earning equity partner in a large accountancy firm – his earnings over the last three years have substantially increased – last year he earned $1.4 million gross.</td>
</tr>
</tbody>
</table>
The participants views on whether, after the equal sharing of the relationship property, there will be a significant disparity of income and living standards

The responses to the question regarding income and living standards indicate the mixed interpretation of members of the legal professional study group. The clear majority of those interviewed anticipated there would be a significant disparity of income and living standards following the equal division of the couple’s relationship property. Twenty-nine of those interviewed ranked the significance of the disparity 7 or above on the scale of significance. Yet there was a mixed reaction to the question. Some interviewees were unequivocal; after the equal division of the relationship property, there was going to be a significant disparity of income and living standards and this was going to be an enduring disparity. For example the QC thought the disparity was extremely significant, explaining that the wife has the ongoing care of the children and does not have any real income. She is “only left with $1.5 million” (this representing her share of the relationship property). For the QC the husband’s ability to generate a significant income was “critical” and the wife has “little ability to generate a significant income”. This means there will be a significant disparity in income and living standards. There was a perception that the difference in earnings was extremely significant.
and resulted in a dichotomy of lifestyles between the couple. BAK6 thought that even with this “significant relationship property pool”, when earnings of $1.4 million per year are compared with $40,000 the disparity of income and living standards was significant.

Others did not see the facts as straightforward. One interviewee thought the disparity was of little significance and accordingly placed it 2 on a scale and two others interpreted the facts as being on the balance, with the disparity being insignificant, and ranked it as a 5 on the scale. These participants thought that this question was difficult to answer on the limited facts provided because while there is a disparity in their income it was thought that no conclusions could be drawn regarding their living standards.

The comments regarding this question (which represents the first jurisdictional hurdle of section 15) were interesting. There was a general perception that, in their practices, the case law had gone some way in assisting them by giving them some understanding of how the question of disparity in income and living standards should be interpreted. Most practitioners thought the issue was relatively settled. Yet, as the range of responses indicates, applying the conceptual to a set of facts can be problematic. The first question of vignette one (around income and living standards) is evidence of the subjectivity of approaches taken to the jurisdictional tests of section 15. A barrister, who ranked the significance as a 10, discussed the problems within this test:

[BAK4]: The way it is crafted, you have a word like “significant” in there. It is a bit like “extraordinary circumstances” for unequal sharing … there are parallels. I do not think I have ever run a successful unequal sharing argument because it is just so bloody difficult. It’s important to understand how these words can really alter perception … it’s similar with section 15 … you have to have a significant disparity of income and living standards. But what the bloody hell is significant? It is so hard to reach these thresholds. What might be significant to a Family Court Judge sitting there may not be significant to somebody else.

The common theme of the participants’ discussions was the size of the relationship property pool and the link between income and living standards. Some of those interviewed saw the relationship property pool as rather modest. For example the QC spoke of the amount that

291 BAK4 is referring to the test contained in s13 of the Property (Relationships) Act 1976 where there is an exception to the presumption of equal sharing of relationship property if the Court considers that there are “extraordinary circumstances” that would make equal sharing repugnant to justice.
the wife received after the equal division of the relationship property pool as “only $1.5 million” while a sole practitioner thought there would probably not be a significant disparity of living standards because after the equal division of the relationship property pool she would be able to buy a “very comfortable house. [She] would not be worrying about the mortgage” (SPRACTWEL14). Another solicitor agreed and said “… it is a significant sum of relationship property” (SOLNOR16).

The subjectivity of these “facts” is evidenced by the varying perspectives of those interviewed:

[BAK1]: Clearly there is going to be a disparity of income. She has had the interrupted career and he has had the non-interrupted career. Now there is the first grey area because the law says that it has to be conjunctive and you would think as a matter of logic and the cases say as much that if there is a significantly different income and it follows like night follows day there will be a significantly higher standard of living. But this is not necessarily so. What if the significantly higher income earner also has a significantly higher amount of liability? If he has had to … borrow money to pay the wife out? Then he may be earning significantly more money but he is whacked with a liability. The logic that he would have a significantly higher standard of living is interrupted because he has the debt. So to me the conjunctive part … living standards is not exactly subjective, but it is not as easily identified.

A solicitor thought there was clearly a significant disparity in their respective income but the question of living standards was problematic:

[SOLAK17]: It is too difficult to say … the living standards is the stumbling block. Even when you look at the case law … it is still hard to get a handle on it … There is a significant disparity in income but I cannot say on the living standards. My gut feeling is that this is one of the cases that you should consider for a section 15 claim and take through to its logical conclusion. But when you get me to break it down I am not sure if you can get it over this hurdle.

Participants read the facts differently, illustrating how practitioners’ subjective interpretation is imposed on a neutral set of facts. A Northland solicitor thought the wife’s share of relationship property was a “significant sum” and this influenced his decision regarding the wife’s ongoing living standards:
[SOLNOR16]...[S]he gets her $1.5 million there is not a huge difference [between the couple]. It is just a disparity of income. If all she had was a relationship property pool of $200,000 then she is going to be able to buy a reliable car and bugger all else. She has $1.5 million to establish herself and the children comfortably ... She should be pretty comfortable with $1.5 million. So the home thing, the nest, is going to be pretty well taken care of.

Generally the participants, who thought the wife’s share of the relationship property ($1.5 million) was comfortable, were not based in Auckland. The participants based in Auckland generally indicated a difference in their perception of the facts. The wife’s share was not seen as significant. On reflection, this is likely to be because of the significant costs associated with housing in Auckland when compared to other areas of New Zealand.\(^{292}\) Therefore the cost of re-housing in Auckland would be significantly more than in other regions within New Zealand. This geographical factor influenced practitioners’ perceptions of what was a significant amount of capital and what was not.

\(^{292}\) See [www.gv.co.nz/onlinereports](http://www.gv.co.nz/onlinereports) [08 March 2013].
If the participants thought there was a significant disparity in their income and living standards how likely did they think that this was a result of the division of functions in the relationship?

**Figure 5.8** Graph of vignette one results of the question: If you thought there was a significant disparity in their income and living standards, how likely do you think that this disparity was a result of the division of functions in the relationship? On a scale of 1 to 10, with 1 being very unlikely and 10 being without a doubt, where would you place the likelihood of this disparity being a result of the division of functions in the relationship?

The question whether the disparity was a result of the division of functions in the relationship did not prove to be as problematic as the first question (see Figure 5.7 regarding the results of the first question). All of those interviewed thought it very likely that the disparity was caused by the division of functions in the relationship. As Figure 5.8 indicates all of those who responded ranked the likelihood as 7 or higher (24 of the interviewees considered it in the upper range being 9 or higher).

Because the wife had an established career with a foreseeable career path many of the participants considered the facts of vignette one as “classic” and for this reason the question of whether the disparity in income and living standards was a result of the division of functions in the relationship was an uncomplicated inquiry. A barrister explained “her career has been interrupted by the fact she has assumed the primary maternal role. So you have a fractured career and … a classic case” (BAK1). SOLWELL25 said “it is highly likely … if the wife had stayed working she would have been earning something more akin to her
husband’. SOLINV30, after concluding that the disparity was undoubtedly caused by the division of functions in the relationship, said: “The facts speak for themselves on this one.”

BAK3 thought it highly likely that the resulting economic disparity between the couple was a result of the division of functions in the relationship:

[BAK3]… [S]he became the Mum and he became the breadwinner. It is the paradigm case. She had the more promising career. So if there was an argument that the income earner [the husband] was always going to be a high income earner then this argument would not work here.

Some participants explained how they would interpret these facts differently depending on whether they were representing the husband or the wife and gave examples to illustrate their contentions. BAK2 explained how, when representing a “male breadwinner”, he argues that the breadwinner would have always had a career. Framing such arguments with statements similar to “it was nothing to do with the relationship; it was all to do with our client’s skill”.

The participants’ views on the existence of other factors that may have caused the disparity

![Graph results of the question: Can you comment on what other factors may have caused the disparity?](image)

This question builds on the immediately preceding question (how likely do you think the disparity was a result of the division of functions in the relationship?). It was designed to have the interviewees think about other factors contributing to the disparity and uncover a deeper understanding of their subjective reasoning. The results, represented above indicate
that while a large number of interviewees (11 in total) thought there were no other factors involved we see there could have been other factors contributing to the disparity.

Undoubtedly this is a tricky question, asking for interviewees to speculate on the answer with a very limited factual narrative. The interviewees’ responses to the question indicate the complexity involved when the law is interpreted and the subjectivity within a professional’s interpretation of a set of neutral facts. It also may explain how and why the party reading and applying the law plays such a significant role in the operation and shape of the law.

For a number of participants this was a closed question. When asked whether they could comment on what other factors may have caused the disparity, 11 interviewees said there were no other factors, the issue was relatively straight forward and “was a choice they made as a couple” (SOLDUN29). Members of the group thought there was nothing within the vignette to indicate it was anything but a mutual choice. For example the QC said:

[QC]: There are no other factors operating. It is in the facts that she has been out of the paid workforce for a very long time and that is due to the division of functions in the relationship. They very obviously explicitly agreed that she is going to be the traditional wife and mother and therefore she is not really earning any money ... she was an excellent student ... obviously well on track ... an associate in a large commercial law firm and ... earning more money than him. So it looks like she would have gone on to be a partner and then earning just as much as a partner in a large accounting firm ... So assuming she was on track for partnership then this is entirely due to the division of functions in the relationship. If she did not have kids then she would have been earning just as much as him.

A senior male partner in an Invercargill law firm agreed:

[SOLINV30]: The facts speak for themselves with this one ... the overwhelming factor is that decision about who’s attending the children at home ... I would love it if a set of facts like this came through the door ... this is the dream case ... The woman was obviously doing extremely well. They made the decision that she was going to look after the kids ... I have four children myself so I do not under estimate what that involves. My wife worked part-time ... she is a teacher and that is the decision we made. At the end of the day her career options have not been quite where they might have been otherwise.
Among the participants there was a view that the law will disregard any other factor and this is the correct approach. “The law will not take into account the other factors. It was the parties’ choice and that is the only relevant factor” (BAK3). Yet (despite the law being clear) there was an expression of unease with the manner in which section 15 is interpreted and applied by legal professionals. Participants found it “demeaning” and worrisome to “see New Zealand going back to what we had before the matrimonial law reform of 1976” (being an inquiry based on contributions made) by “inquiring into decisions that were made within the relationship … you open a can of worms” (BAK3).

For other participants the question led to comments regarding social issues. The possibility of gender discrimination the woman may have faced was something participants discussed. A female partner in a medium sized law firm in the Bay of Plenty (SOLTAUR22) was conscious of the wider gender implications explaining how there are “gender issues generally” affecting the advancement of women to partnership in law firms. The QC agreed and thought “it is possible that she may have faced discrimination and not made partner … but there is no sign of this on the facts”.

The gender implications the question raised were also apparent when participants spoke of the dilemma faced when single women have children and a career to establish and maintain:

[BAK5]: It is not just the division of functions. It is the loss of opportunity and confidence. For women who have been out of the workforce for as long as she has not only do they lack the ability and experience and qualifications but they lack … confidence to put themselves forward for difficult work, for risky work, for opportunities. So it is … lack of confidence.

If she continues on … having the major caring for the children then she is so impeded because even if they were in a shared care arrangement it will be her that is called on if they [the children] are ill, birthday parties, dealing with the emotional issues … The husband … can continue to do things like … socialisation in the workplace which is necessary for [career] progression … one of the things that happens is … networking.

293 BAK3’s comments reflect those of Baroness Hale who said in respect of the parties conduct and contributions: “it is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.” McFarlane v McFarlane [2006] UKHL 24; at [145].
drinks [or] golf or taking clients out. They are out there amongst the movers and shakers. Now even if you can equalise the actual work hours, you do not make up for that … you [women with the care of children] are disadvantaged in that respect.

Participants held contrasting opinions and thought that the economic disparity may be because of individual decisions made. One woman Auckland barrister thought that the wife “may not have been a career person” and “she may not have enjoyed the life of a large commercial law firm … she may have had hobbies and other pursuits” (BAK6). Other participants agreed and thought the economic disparity may result from the wife’s “lack of ability” (SOLAK17), her “own personal choice” (SOLAK17) and she “may not have been career driven” (SOLAK17). SOLNEL27 observed that it was the wife’s choice not to pursue her career considering “she could have easily [pursued her career] with her ability to have had a nanny and worked part-time”. These sentiments were felt by others within the group for example a female solicitor opined that the wife:

[SOLHM21]… chose to give up and she [the wife] chose to give up for that long ... it is accepted that it is good for women to give up work for a certain period of time to stay and look after children. But how long is it deemed to be an acceptable period of time before it is deemed to be that she has contributed to that loss?

Participants thought that a professional woman deciding to take on the role of a caregiver makes an individual choice because a career can be maintained with the use of nannies and the engagement of outside help. As an Auckland barrister explained:

[BAK1]: … deciding to have children and the wife deciding that she will be the caregiver is not necessarily a division of functions in the marriage but a choice because you could go out and carry on your commercial law career at the cost of nannies. Because it is not a division of functions in the marriage it is a choice.

The other theme that emerged within the interviews was that there “must be some stage in the lifetime of the children when you [as a mother] can go back to full-time work” (BAK2).

Other participants approached the question from the husband’s perspective, thinking the disparity may have had “something to do with his business acumen and his business skills” (SOLTAUR24). BAK2 explained how this question is always problematic but he thought the husband’s “own particular skill is obviously a factor”.

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The mediator explained from experience in cases similar to vignette one the decisions made while the relationship is on foot are significant, but what he finds is that these mutual decisions are forgotten when the relationship has ended:

[MED]… the other factor is him saying ‘don’t you worry honey I will bring the money home’ … It is very effective in the first 5 months of pregnancy. That bump in the tummy is when he says ‘do not worry about anything honey just look after our baby and I will bring the money home, you will be okay’. And wives think ‘oh he is a really lovely man and I am grateful. I will work as long as the doctor says it is okay’ and he says ‘no I want you to stop’ … twenty years later … and a PA in the pot … it is all different and it’s all forgotten, because no one has recorded those wonderful loving moments. Well it is what I deal with all the time. I am not joking. I am just realistic.

The participants’ views on the whether it is ‘just’ to make a compensatory payment to the wife

*Figure 5.10 Graph results of the question: In your opinion is it ‘just’ to make a compensatory payment to the wife? Yes and No answers*
Figure 5.11 Graph vignette one, results of the question: On a scale of 1 to 10, with 1 being unimportant and 10 being extremely important, how important do you think it is to make a compensatory payment to the wife?

One barrister, BAK3, did not think a section 15 compensatory payment should be made to the wife while all of the other participants believed an award should be made. BAK3’s response to the question was: “No, it is not just. The issue should be dealt with through spousal maintenance.” BAK3’s concern related to the nature of section 15 payments and inherent problems within these types of payments “lump-sum payments are inflexible; if circumstances change the payments cannot be adjusted”. By way of example, BAK3 said if you have “a section 15 award and then the wife re-partners what then of the husband that has had to make that payment and then he may see his ex-wife waving to him from a yacht? Or if he breaks his legs, you cannot foresee the future”. BAK3 thought the facts met threshold of section 15 but the failings of the section meant it was unjust to make a compensatory payment to the wife.

A Christchurch barrister ranked the importance of making a payment to the wife as a 4, and explained that it was not extremely important to make a compensatory payment to the wife, because there was a “significant pool of relationship property involved” and this is a factor she considers in economic disparity claims. BCH9 said:

[BCH9]… they have both arranged things between themselves efficiently in a way which means that … they have built up quite a substantial pool of relationship
property that they are sharing in. So to a certain extent she is benefiting … they are both benefiting from the decisions that they made.

Other participants thought that the relationship property pool was significant but this was not a relevant factor in their decision whether a section 15 compensatory payment should be made to the wife. A solicitor ranked the importance of making a compensatory payment to the wife at 9 and stated:

[SOLWELL26]: If she gets $1.5 million in relationship property she is not going to starve, so it is not important in terms of how she is going to manage, but I think it is important in terms of rectifying the disparity and putting these people on an even playing field.

Not all of the participants interpreted the facts to mean that the relationship property pool was substantial; others thought that the wife would be “struggling” following the equal division of the relationship property without a section 15 payment (SOLINV30).

The majority of participants thought it was very important that a compensatory payment was made. A Dunedin barrister thought it extremely important and explained her rationale based on the significance of marriage:

[BDUN11]: In England they say marriage is a really important social structure and therefore their law is designed around the idea that you should not separate and if you do then you have to bear the consequences. And so the wife is entitled to expect that there is a lifelong commitment and then … if he runs off with the secretary after she has helped him build up his earning power … she is entitled to be fully compensated … But in New Zealand we have got … any old man and his dog can get in and out of relationships … if you have got that kind of social value on marriage in our society then perhaps it is not so important that she should be compensated. Marriage is a contract.

Some participants expressed concerns that they could not predict how the courts might treat a case with similar facts to vignette one and in particular whether these facts justify an award. For example solicitor SOLAK17 ranked the importance of making a compensatory payment at 7 and explained this was her own personal view but a court would be unlikely to consider
the importance quite so highly. If she were advising a client she would have to factor this into her advice.

The Judge was unambiguous in his response to this question. He ranked the importance of making a compensatory payment to the wife as 10 on the scale. The Judge concluded that it was extremely important to make a payment to the wife adding the comment: “Yes it is just to make a payment to the wife.” The QC also felt that it was extremely important to make a compensatory payment to the wife.

The participants’ views on the significance of the economic advantages obtained by the wife resulting from the husband’s contributions to the marriage and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

![Figure 5.12 Graph Results vignette one, from the question: How much have the economic advantages obtained by the wife resulting from the husband’s contributions to the marriage influenced your decision whether it was ‘just’ to make a compensatory payment to the wife? ( Ranked on scale of 1 to 10)](image)

There were mixed responses to the question of whether the economic advantages obtained by the wife resulting from the husband’s contributions to the relationship influenced the participants’ decision that it was just (or not) to make a compensatory payment to the wife. The responses ranged from 1, being insignificant (and therefore not an influencing factor) to 9 being a significant factor.
For those who did not believe that the wife received any economic advantages (from the contributions of the husband to the relationship) this question was straightforward. The QC and the Judge both considered it to be of very little relevance and importance. Participants who perceived the existence of economic advantages obtained by the wife, and considered them relevant, believed there was a large amount of relationship property and this was solely attributable to the husband’s endeavours. There was a view that the wife will benefit from the “financial security the husband’s efforts have provided” (SOLAK19) and that the accumulation of the relationship assets was directly “attributable to the husband” (BCH10).

BAK2 ranked the significance at 4 and thought the economic advantages of the wife were of “some relevance but because the pool of relationship property being just comfortable” it was not of central importance. BAK2 compared this factual with \( X \) \( v \) \( X \), considering the relationship property unsubstantial “not like the pool in \( X \) \( v \) \( X \)”.

Some participants said that in their practices husbands often argue the significant pool of relationship property is a result of their personal endeavours and the practitioners felt such arguments were negative. As a solicitor explained:

[SOLWELL25]: [It] is one that the husbands always raise … husbands argue … ‘I have been a fantastic earner … the pool of assets available for division is higher than usual and … you are going to benefit from half of that anyway so do not be so greedy’.

But when you have children and in most of these cases there are going to be children … there is an expectation of a family lifestyle, like private education and up until the marriage breakup the family have lived a certain lifestyle … what I see happening – is that the wife and children end up living a reduced lifestyle and that is hard. Like their Dad can take them on holiday to Fiji and Mum cannot even take them on holiday camping to Levin. I think it sets up a very unpleasant lifestyle for children.

The interests of the children are not factors that section 15 explicitly states as relevant, however, in the wider statutory context of the Property (Relationships) Act, section 26 provides that in any proceedings under the Act the court must have regard to the interests of dependent children of the relationship and the court may, if it considers it just, make an order in respect of the relationship property for the benefit of the children.
Answering this question some participants gave examples from their work experiences of women staying at home and not contributing, but felt in circumstances like those of vignette one usually the wife has made significant contributions to the relationship and this is reflected in the size of the pool of relationship property. A Wellington solicitor explained:

[SOLWELL25]: Look we all know the cases where women have stayed at home and done their nails but … that is not generally the case because in these cases, the high flyers, family life has often been very tough and often the wife has carried everything … all aspects of the family and the father has just really concentrated on his career.

**The participants’ views on the significance of the economic advantages obtained by the husband resulting from the wife’s contributions to the marriage and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife**

![Graph Results vignette one, from the question: How much have the economic advantages obtained by the husband resulting from the wife’s contributions to the marriage influenced your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10)](image)

This question elicited contrasting responses (indicated by range of responses recorded in Figure 5.13). Those seeing little significance in the economic advantages obtained by the
husband through the wife’s contributions to the marriage premised their opinion on the basis
the husband alone earns the money. The husband’s ability to earn his income was perceived
as an individual endeavour, not a collective enterprise. Those participants with this mindset
had a view similar to solicitor SOLNEL28, who ranked the significance at 2, and said “he has
the ability to earn that income”.

In contrast the QC thought that due to the division of functions the husband had the ability to
work “as though he does not have children”. The QC further explained:

[QC]: He would have had the ability to pay someone to look after his kids. Nevertheless it is still a big advantage [having his wife look after his children] as presumably he wanted to have children of his own and he wanted them well brought up … so he got that advantage as a result of the arrangement. So that is important, but it’s not as important as the impact on her … she has had to sacrifice – it is money out of her pocket … he has certainly got a lot out of this arrangement. I do see it that it is an economic advantage to him that he is able to go out and work because she is there looking after their children … she needs compensation for the fact he is able to earn $1.4 million a year and he would not have been able to achieve this unless he had someone there looking after his children.

The QC ranked the significance of the husband’s economic advantages at 5 and explained
that she had marked down the significance of the husband’s economic advantages because
the couple had the ability to engage a nanny:

[QC]: But I will tell you the reasons why I mark it down … he could say ‘yeah but it is not worth that much money to me because if push came to shove … then I would have said right, honey, you keep working and we will get nannies … we could … pay for high quality nannies … I do not want you sacrificing your career’ so he could have employed someone to do it and he still could have managed that career.

The QC’s position, regarding engaging the services of others to assist with the management
of the home, was supported by other participants. Because these participants believed the
couple had the ability to do so, the economic advantages obtained by the husband through the
wife’s contributions were seen as important but not an extremely important factor in their
decision to make a compensatory payment to the wife. For example a senior Auckland
barrister, when discussing the issue, said:
[BAK3]: Well that’s a hard question isn’t it? Because clearly but for her he would have had to employ someone to take care of it all. Nannies, a cook then the only result at the end of the relationship would have been that the pool of relationship property would … have been smaller as money would have been spent on these services. But he could have afforded it.

The other end of the spectrum of responses considered the enhancement or uplift to the husband’s career as a result of the wife’s contributions. For example, BHM8 ranked the relevance at 9 and said:

[BHM8]:[T]hey were at university together they were both good students she seems to have got her career together earlier on than his … he got his career going later on which would have been because of the fact that she has enhanced his career, having her there looking after the kids. I had a note here saying this may be an economic disparity claim not only because the wife has suffered a disadvantage but because she has advantaged the husband’s career. The husband’s career has been enhanced because of the sacrifices she has made.

Others also thought that the husband had benefited economically as a result of the wife’s contributions to the marriage. A Wellington sole practitioner explained: “It’s a no brainer all the benefits of a lovely family without any impact financially” (SPRACTWELL13). Another lawyer thought the wife’s contributions are “at the root of it all” and said “this is why he is able to go out and earn the money he does” (SPRACTNEL12). A senior Auckland barrister was unambiguous regarding the significance of the husband’s economic benefits and said:

[BAK1]: This is the old ... enhancing his career ... you do not become an equity partner like that without working long hours and weekends. It means having to phone and say ‘sorry I can’t get home for dinner … sorry I have a partnership retreat.’ You know when you have got young kids that can only be done with the support of a partner. Has she enhanced his career? Most certainly, has she depressed her own? Yes.

A lot of chaps would go ‘enhanced my career? Good God no. You know she would never come to functions’… [but] she has had a week at home with the kids and you want her to be the wife, chat to the clients who are boring and leering at her …
pinching her bum. Well you know I do not think so. The man says ‘well I did all of this … it is all me … my intelligence, the force of my personality’… I suspect on balance here the big thing would be that she has harmed her career but I would certainly be arguing that she has enhanced his.

The wife enhancing her husband’s career was a theme reflected in the comments of SOLAK18. SOLAK18 ranked the relevance (of the husband’s economic advantages) at 8, and thought that the husband “has gone on to earn considerable money and he would have worked really hard and put in serious hours”. SOLAK18 said the husband’s ability to establish and maintain a career was also because of the wife, and explained: “the fact she [the wife] was at home looking after those children at times feeling like a solo mother and supporting him emotionally and physically. It is all the non-financial contributions that are made in the relationship”.

SOLAK18 reflected on her personal circumstances. She has a young family and works part-time so that her husband, as the primary breadwinner in the marriage, can focus on his career. The question opened a conversation in which SOLAK18 drew parallels with her circumstances, SOLAK18 said:

[SOLAK18]: I hope like hell that this is not me [the wife]. You know we have talked about this. He [my husband] is the primary breadwinner and I feel guilty every now and then as I am not bringing as much into the household as my husband. He says to me ‘for God’s sake, you know all the stuff you are bringing in’… he says how he does not have to stress when he is two hours late home and ‘the mother of my child puts our child to bed’ … We have made a lot of choices. We have a nanny because we did not want our child in day-care … but there are still the … trips to the doctor, the calls in the day.

A Christchurch barrister explained that, because of the way section 15 is interpreted, the economic advantages of the economically advantaged spouse are not of great significance. This BCH9 thought was “not a correct interpretation of the law”, and explained how:

[BCH9]: any compensation under section 15 is going to be based on the loss of earnings rather than the husband’s enhanced earnings and … generally we are advising people that they have very little chance of actually getting compensation based on what the husband’s earnings are or how you have increased the husband’s
earnings. So essentially what we are looking at is what you are capable of earning and what you would have been able to earn if you had continued your career. At the moment it is all loss rather than the uplift or compensation for uplift. I thought that section 15 would have been for both: loss, and then the enhancement but this is not the way that the Courts have interpreted it.

The participants’ views on the significance of the economic disadvantages incurred by the husband resulting from the marriage and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

![Graph results vignette one](image)

**Figure 5.14** Graph results vignette one, from the question: How much did the economic disadvantages incurred by the husband resulting from the marriage influence your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10 of significance)

The majority considered the economic disadvantages of the husband straight forward. An Auckland barrister’s retort of a short laugh and then “show me one” (BAK1) represents the majority mindset.

Others thought that if the husband had not married and had children he would have focused on his career and accumulated more assets. SPRACTWEL14 said “I suppose if he stayed single he might have saved more money”.

For other participants the question led to a discussion of the disadvantages suffered by career men generally. An experienced Auckland barrister said there were no economic
disadvantages incurred by the husband but there were clear lifestyle disadvantages and they should be considered:

[BAK3]: Judge Dale Clarkson got it right when [in the context of \(X v X\)] … she said of the husband’s career how it came at a cost to him. He was not involved in the children’s lives … and it isn’t just bloody drudgery. You know I see it often both professionally and socially. It is hard for hard working Alpha Males. They forego a lot while they are earning for their family and then when the children get older their children do not want to spend time with them. They finally feel like they have now secured their financial security for their family and would like to get to know their children … after all, time with children is not all drudgery is it?

Within discussions a general theme emerged relating to a perception that the pool of relationship property was limited because the wife did not work. It was felt by some that this could be an economic disadvantage to the husband. The QC explained the basis of this opinion when she said:

[QC]: I suppose their household as a whole got less income as a result of the decision for her to stay home and that is a factor … this is reflected in the fact that there is only $3 million worth of property and if she had kept working then there would have been 5, or 6 or so million worth of property. So they both got disadvantaged from that decision.
The participants’ views on the significance of the economic disadvantages incurred by the wife resulting from the marriage and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

Figure 5.15 Graph results vignette one, the question: How much did the economic disadvantages incurred by the wife resulting from the marriage influence your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10)

Figure 5.15 represents the interviewee’s responses regarding the question of how much the wife’s economic disadvantages (resulting from the relationship) were a factor in the participants’ decision whether or not a compensatory award should be made to the wife. The range was from 2 (somewhat insignificant) to 10 (extremely significant).

Two participants ranked the significance of the economic disadvantages of the wife as less than 5. The rationale for this was based on the participants’ perception that the wife had been economically advantaged by the size of the relationship property pool. For example SOLAK18, ranked it as 4, and explained: “she still has a lot of capital advantages.” SOLNEL28 ranked the significance at 5 and said: “I would not put this up the high end because of the value of the relationship property.”

The sentiment that the wife has had the benefit of the husband’s income was also expressed by some of the other participants: even those that ranked the significance of the wife’s economic disadvantages highly. A Tauranga solicitor ranked them at 7 and then explained “she has had advantages from his income” (SOLTAUR24). A Nelson solicitor said “up until
now she has had a pleasant comfortable life … [it’s] a hard question to answer. Her career has been hindered but she is only 43 so she can get her career back up there” (SOLNEL27).

Other participants thought it obvious that there were economic disadvantages suffered by the wife. An Auckland barrister thought that the wife was on the “career path … and her husband disappears off with somebody else. She is left with a fractured career and the kids” (BAK1). A senior partner of an Invercargill law firm thought the economic disadvantages incurred by the wife important and ranked them at 9 and stated that it was “important, it is one of the factors that explains the disparity between them” (SOLINV30).

An Auckland barrister thought that being a mother was what had economically disadvantaged the wife and not the marriage itself. He explained:

[BAK3]: … the only impediment to the wife [returning to work] being the lack of recent experience and then there are the ongoing care giving responsibilities to the children. It is the having of children that economically disadvantages people, not the relationship itself.294

294 This view is consistent with the findings of social science. There is evidence of a wage penalty of motherhood. Linda Waite and Maggie Gallagher said:

What puts a woman’s career and earnings at risk is not tying the knot but cutting the umbilical cord: Married women without children earn as much or more than comparable single women. Mothers, married or single, do not work as much or earn as much as childless women … Even when mothers work continuously, the demands of childrearing detract from their earning capacity. Comparing women with similar work histories, Jane Waldfogel found that one child still reduced hourly earnings by almost 4 percent and two or more children reduced hourly earnings by almost 12 percent. Women do not pay a marriage penalty, but they do pay a substantial motherhood penalty.

The participants’ views on the likely future earning capacity of the wife and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

![Graph results vignette one, to the question: How much did the likely future earning capacity of the wife influence your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10)](image)

As the results of Figure 5.16 indicate, most of the participants, when they made the decision whether or not it was just to make a compensatory payment to the wife, took into consideration her likely future earning capacity. Twenty-nine of those interviewed ranked the significance of this factor above 5 with one participant ranking it at 3 (thirty of those interviewed ranked the significance of the likely future income of the wife. The remaining members of the study group felt it was too difficult to rank the significance).

The lowest ranking was 3, given by a Hamilton barrister (BHM8). BHM8 explained he saw “limited options for the wife” and as such her future earning capacity was not a significant factor in his decision that it was just to make a compensatory award to the wife.

The next level of significance was 6 (six participants ranked it at 6). One of these was an Auckland barrister (BAK7) who explained: “She is not going to get much more than $100,000 per year. It is going to improve but not like his.” BAK7’s sentiment was in contrast with the view expressed by a male partner in a Northland law firm (SOLNOR16). Both had a similar view regarding the significance of the wife’s future earning potential (SOLNOR16 said 7 and BAK7 said 6) but their mindsets concerning the wife’s future were different, SOLNOR16 explained: “This is probably a bit uncertain but you cannot be sure that she will not be earning as much as him in a few years.”
An experienced male barrister thought that the wife’s future earning capacity was an important factor to be considered. He also felt it should be recognised that generally, having children entails far more career interruptions and sacrifices for mothers than it does for fathers:

[BAK1]: Of course it is important … you have to be looking at things like when is it realistic for her to be going back to work? What is the reality of her ex-husband pitching in to help when … little Johnny gets the chicken pox? All of that stuff. I suspect that she will never catch up. She will never get back to where she would have been had she had an uninterrupted career.

Others agreed. Auckland barrister (BAK5) ranked the significance of the wife’s future earning capacity at 8 and said:

[BAK5]: She will not advance much. She is working part-time and she has been out of the workforce a long time and she still has the majority of the care. She would have lost confidence and pace in the workplace. She will advance but is unlikely to advance much.

This is something reflected in the judgment of Moge v Moge where it is noted that:

The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits.

For other participants this question opened discussions regarding the problems of the evidence required to support judgments made regarding a person’s likely earning capacity. These participants said “expert evidence would be needed” to support any argument of what the wife’s likely earning capacity would be (SOLTAUR24). Auckland barrister (BAK2), ranked the significance at 7, and explained the problems associated with the issue of future earnings:

[BAK2]: This is really where I struggle in these cases, because you look at where the evidence is heading. But then Justice Robertson said ‘you do not need all of that

technical evidence’ but if you do not have all of that evidence then what do you have? You know in [reference deleted to prevent identification] we got employment experts and specialists but the problem is that these projections are not done on the person they are done on the potential: the theoretical make believe. We had a terribly damming reference from when [reference to the decision has been deleted to prevent identification] was working but that got overlooked and it showed that she was not going to go on to the next stage. But as a student it looked like she may have got there. This is traditional adversarial stuff.

The adversarial nature of this line of inquiry was discussed by others. Another experienced barrister bemoaned the nature of these inquires and said there are:

[BAK3]: … demeaning elements … effectively we are being taken back to what we had before 1976 under the old Matrimonial Property Act. We are reintroducing a type of fault based inquiry but through another name … It is quite arbitrary: what the career was going to be.

The participants’ views on the likely future earning capacity of the husband and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

![Bar chart showing frequency of participants' views on the likely future earning capacity of the husband and whether it influenced their decision regarding whether it was 'just' to make a compensatory payment to the wife.](chart.jpg)

Frequency

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Ranked on a scale 1-10 (1 being insignificant and 10 extremely significant)
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286 X v X [2009] NZCA 399, Robertson J at [32] said that there are inherent problems within a formula based on expert opinion because such a formula is presumed on hypothetical assumptions and is subject to contingencies which diminish the value of the resulting calculations.
Thirty members of the study group ranked the significance of the husband’s likely future earning capacity in their decision (whether it was just to make a compensatory payment to the wife). The range was from 1 (being insignificant) to 10 (being extremely significant). The results can be broken down into three categories:

- 2 participants considered the husband’s future earning capacity was insignificant (considering it as a 1 or 2 on the scale);
- 2 participants considered it slightly significant (and ranked it at 6); and
- 23 participants thought it was at the higher end of significance (and ranked it at 7 and above).

Three participants did not rank the significance of the husband’s future earnings. Auckland barrister (BAK3) was one, explaining that the husband’s likely future earnings were an irrelevant factor in his decision not to award compensation to the wife under section 15.

The majority of participants thought that the husband’s future earning capacity was significant and did not comment further. For other practitioners the husband’s likely future earnings are relevant because he will benefit from the ongoing care that the wife will take of their children. This would mean he can continue to focus on his career while the wife will struggle. A female Auckland solicitor said:

[SOLAK18]: Usually on separation things carry on with one person retaining the primary care giving. The wife is still probably going to go on with the lion’s share of the work. Even with a more shared care arrangement it is still probably not going to be a fifty-fifty, the wife will still end up doing all the school bits, after school activities, the doctor’s visit … she will end up working part-time as a result. The wife still ends up being the one that not only runs around looking after the children the most but the one doing the parties, the soccer boots … these are things … the husbands do not think about or even know about they can just go on earning.

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297 This view is consistent with the results of the TimeUse Survey: 2009/2010 by the Department of Statistics. The majority of men’s work is paid and the majority of women’s work is unpaid – 63% of men’s work is paid and 65% of women’s work is unpaid. [www.stats.govt.nz](http://www.stats.govt.nz)
The Judge ranked the significance at 8. The issue of the husband’s likely future income was raised by the Judge in respect of the quantum of any award,\textsuperscript{298} considering it necessary to “factor in the husband’s likely short term future in an accountancy firm because he is now 45 and at the age of 50 he is likely to be put out to be turned over – or put out to grass”. In his opinion this was relevant because it affects “the length of disparity of earnings” between the husband and wife and then “this would have a consequential effect on the disparity of income and living standards”.

\textbf{The participants’ views on the wife’s ongoing care of the children}\textsuperscript{299} and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

![Graph results vignette one, from the question: How much the wife’s ongoing care of the children influenced your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10)](image)

Thirty-one participants ranked the significance of the wife’s ongoing care of the children (in respect of their decision to make an award). All of those that ranked this factor considered it relevant, with the range being 5 to 10.

The two participants who did not rank the significance did consider the wife’s ongoing care of the children as a relevant. An Auckland barrister explained how:

\textsuperscript{298} The Family Court Judge did not comment on the issue of the husband’s likely future income until he raised it again in connection with the calculation of the quantum of the wife’s s15 award.

\textsuperscript{299} The children were 10, 12 and 14 years.
[BAK3]:... while it is a big factor there are many unknowns within the issue. There are all sorts of things that can elevate the burden for her: what of re-partnering? Wider family can help: grandparents, crèche, boarding school and nannies.

Some participants discussed the stage in a child’s life at which their mother should return to full-time paid work. Some participants attached more significance to the care of younger children. For example, an Auckland barrister explained, while the wife’s ongoing child care was somewhat relevant, he thought judges would hold a different opinion:

[BAK2]: I would not put such a great rating on that because the children are older … there has to be a stage, as the judges say, where it is just a lifestyle choice [to stay at home with children]. There must be a point in the relationship where it is reasonable for people to look at their roles ... I would say that there is a difference with my view on this and the judges ... my view is that there is a difference in looking after a child that is 2 and looking after one at 15.

For these participants there is a stage when it is reasonable for a care-giver to return to full-time paid work, as another Auckland barrister explained “the children are getting older … that is relevant to her … when she can go back into fulltime employment ” (BAK7). After this period lapses, and if the person is not employed, then this is an individual’s decision (being a lifestyle choice). Another barrister spoke of this benchmark and said:

[BCH9]: they [the children] are getting to an age when a court would expect them to be more self sufficient like at around 10 to 12 years of age or intermediate age kids. There is a benchmark in the way that judges are approaching it. My personal view of this is that in some ways it is unfair as it does not reflect the reality, in the way that the couple chose to operate when they were together and that is where it is unfair to the children and the wife.

For these participants the age of the children within vignette one was significant. Because they were “older children” Wellington solicitor (SOLWELL26) thought it appropriate to mark down the relevance of the wife’s ongoing care of them (ranking it at 6).

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300 This topic emerged frequently with practitioners raising the issue by expressing their opinions and experiences – their personal circumstances and also within their practice (i.e. opinions formed on the basis of dealings with clients).
301 BAK2 ranked the wife’s ongoing care of the children at 5 on the scale of significance.
Within the group there were dissenting views regarding this issue. Some participants thought the ages of the children were difficult ages requiring more input and care from parents than people commonly think. Participants spoke of their personal experiences as mothers and fathers. One solicitor felt the wife’s ongoing care of the children should be ranked at 8, and observed that “these are more difficult ages … people do not understand how important these ages are” (SOLNEL27).

The mediator considered the wife’s ongoing care of the children significant (ranking it at 7). The children’s ages were also very important. He said:

[MED]: These are key years in the children’s lives ... the 15 year old will rebel against being the caretaker of the younger children. Then there may be inter-gender mix issues. There are loads of issues with the children’s ages. They may not have seen enough of their Dad because he was always working … if there is a girl at 15; she might be Mary Poppins or out on the street … and in this town God help her. They might not like the new partner … and this is the only reason why the husband would have left by the way.

Invercargill solicitor SOLINV30 ranked the significance at 9 and said: “You know there are three children, the husband’s financial position is going to be the dominant issue but … that does not mean the care of the children will not be important.”

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302 The mediator and SOLINV30 were very experienced professionals (the mediator had been a partner in a law firm for many years before becoming a mediator) and had raised their own families. SOLINV30 was clear regarding the work and value he saw in the efforts his wife made over the years in raising their family, considering these contributions of great benefit to him personally – so that he could focus on his career – and also of benefit to his children. He spoke of his wife leaving her profession (she was a secondary school teacher) to be with their family – and it is now that his children are older that she has returned to her career. SOLINV30 spoke at length of the significance of his wife’s contributions to the family unit and also her loss in the form of the extended career break that she took – perceiving this being of value to the family unit and himself (because he was able to develop and maintain a career). He explained that without his wife he would not have been able to do what he has.
The participants’ responses on how much the length of the relationship influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the wife

Figure 5.19 Graph results vignette one, from the question: How much did the length of the relationship influence your decision whether it was ‘just’ to make a compensatory payment to the wife? (Ranked on scale of 1 to 10 of significance)

As the results of Figure 5.19 indicate, the majority of participants considered the relationship’s duration significant in their determinations regarding the compensatory award. The lowest ranking was 5.\(^{303}\) The next ranking was 6\(^{304}\) (being somewhat relevant but not an overwhelming factor). The majority\(^{305}\) ranked the significance at 7 indicating this was important but not considered extremely relevant. The remaining 16 participants ranked the significance of the length of the relationship at 8 or above. From this we can conclude the length of the relationship was a very relevant factor to these participants.

An Auckland barrister thought the relationship’s duration relevant to the determination of whether to make an award. This barrister’s view was that the “impact of the support was relevant and then the impact of the depression on her career ... if it had been a three to four year marriage that would be different” (BAK1).

Most participants ranked the significance of the length of the relationship and did not comment further on the question.

\(^{303}\) Two participants ranked the significance of this at 5.
\(^{304}\) Two participants ranked the significance of this at 6.
\(^{305}\) Eleven participants.
The participants’ opinions on the compensatory award

Figure 5.20 Graph Results vignette one, from the question: How much a compensatory payment to the wife should be.

Figure 5.20 indicates the mixed reaction of the study group to the question of quantum of an award: the range being from no compensation to $2 million.

An Auckland barrister (BAK3) thought that the wife should not receive compensation; instead maintenance should be paid. The rationale for this was “maintenance is flexible so if there are circumstances that change then the payments can be adjusted” (BAK3).

At the other end of the spectrum was an experienced female Dunedin barrister (BDUN11), who thought the section 15 award should be $2 million. Because this amount of compensation was considerably more than the other participants the question was asked regarding why she thought such a large award justified. She explained her position and said: “I have an advantage of having more of a global perspective because of my work with [the name of this organisation has been removed to prevent the participant from being indentified] so I am not looking at it just from a New Zealand angle.” (BDUN11)

Note, for ease of reference and collation of the results the amount of the quantum payable was ordered into bands (these are noted above). Some participants worked within this framework while others stated the amount of the award as a figure.

The comment was made to her that this was well above the quantum the other participants thought justified. The amount BDUN11 suggested was over $1.3 million more than the second largest amount suggested by a member of the group.
An Award of less than $150,000 (less than 5% of the total relationship property pool):

Three participants thought an award of less than $150,000 should be made. Auckland barrister BAK1 was one of these participants and explained how when calculating an economic disparity award “you have two possibilities ... The first is the $ X v. X$ formula ... as a starting point.” But he is “extremely mindful that you have to step back from it and go – there is no point in coming up with telephone numbers”. BAK1 then said the next possibility was to look at a 55 percent and 45 percent division of the relationship property pool and see what that gives him. Another barrister (BCH9) thought the award should be less than $150,000 and he thought a court would make a similar determination. The other member of this group was a female solicitor from Hamilton (SOLHM21). She thought the wife should receive less than 5 percent of the relationship property based on “the cases that go before the court”. Further, “she would be lucky to get anything ... I would say she would be getting around $50,000 to $100,000, max … this would be at the very top end of the awards … she has earning capacity and the courts would be looking at that”.

An award of $150,000 (5% of the total relationship property pool): Three of the participants thought an award of $150,000 to the wife was justified. An Auckland barrister was one of the members of this group who said:

[BAK2]: I would say 5 percent [of the relationship property pool] ... on the law, I do not see how you could go any higher [there is a] very limited relationship property pool ... [But] she just had to claim it ... I start off on the fact that the court’s payments have not been generous. You know I would hand over $100,000 on this, tomorrow ... just to get it to go away. Because the relationship property pool is not that significant but his earnings are. It is a good fact scenario to test the law out because it is the earnings of the husband that is significant. It shows how hard the law is and frustrating.

Hamilton barrister (BHM8) said he would, on the basis of awards to date, award $150,000 and explained how his approach is to “always rely on accountants to do this calculation”. BHM8’s said that his “gut reaction” was she should get more but he was constrained by the cases to date.

308 BAK3 thought no award under s15 for economic disparity should be made to the wife preferring to use ongoing maintenance as the means to compensate the wife.
An award of greater than $150,000 (being more than 5% of the total relationship property pool): Three participants thought an award of over $150,000 to the wife was justified. A Christchurch barrister, (BCH10) thought an award of over $200,000 justified, and explained that her approach was to try and “give it a mathematical foundation” but this, she cautioned was “always only a starting point … it is a way of trying to get … a starting point for negotiations”. BCH10 provided a spreadsheet, based on the \( X \times X \) methodology and said:

[BCH10] I … sit down and work out the figures … it takes a couple of hours to try and work out what it may be. You have to look at everything and I can tell you that within this case study … with $40,000 to over $1 million and the type of disparity that exists here, using that calculation it would take a huge chunk of the relationship property pool so that is not necessarily going to happen.

An award of $300,000 (10% of the total relationship property pool): The majority (7 participants) thought a payment of $300,000, equating to an award around 10% of the total relationship property pool, warranted. The Judge was one of these. He thought the factual “warrants a 20% differential” being a “20% share of the total relationship property pool”. However this needed to be halved “in order to achieve balance … so as to result in a 10% payment from him to her”.

An award greater than $300,000 (greater than 10% of the total relationship property pool): Five participants thought an award greater than $300,000 should be made. Two experienced women Auckland barristers, BAK6 and BAK5, were in this group. BAK6 thought a court would be likely to have a similar view and said:

[BAK6]: I think an award of greater than $300,000 and I think that a court would award around this amount maybe a little less … it would greater than in \( X \times X \) because she was an associate in a large commercial law firm so she had high potential ‘but for’ income. He also earns $1.5 million and in \( X \times X \) his likely future income was assessed at $340,000 whereas this guy is going to have a higher future income and so there is a higher disparity in income.

Wellington sole practitioner SPRACTWEL13 thought an award of $400,000 was warranted because if the woman “had not taken the time out to raise the children she may have still been earning more than he is”.

The mediator was the other participant that thought an award of $400,000 justified.
An award of $450,000: Four participants thought an award of 15% of the relationship property pool was warranted (this amounts to an award of $450,000). They included a male sole practitioner in Nelson (SPRACTNEL12) and an experienced male solicitor from Northland who reasoned:

[SOLNOR16] … it should be around 15 percent of the relationship property pool … if I was in court I would be battling and battling for this. I would probably get a judge telling me that I am asking for too much, but I would be thinking certainly not less than 10 percent [of the relationship property pool]. We do not get a lot of cases up here like this so if I was in Auckland I would probably look at it differently. It is a different economic zone … I would want to get out there and fight … I do not like the Court of Appeal decisions and I would welcome an opportunity to do battle with them.

An award greater than $450,000: Five participants thought an award greater than $450,000 should be made.

An experienced male Auckland barrister (BAK4) thought it appropriate to award between $500,000 and $550,000. Because the wife is the “primary-carer” she would have to find someone “to live with the children” and after the equal division of relationship property “she will get $1.5 million and so is he … [but] he will get $1.5 million plus the ongoing ability to earn over $1.4 million per year” (BAK4).

The QC thought that $570,000 should be awarded and thought the amount the husband was able to earn was significant. She explained that after the division of the relationship property the husband “is going to recover so quickly because of his income”.

An Auckland solicitor thought an award of $600,000 was justified and said: “It needs to be at the top end.” The solicitor thought this because she “always factors” into her awards what it “would it take to re-house” the economically disadvantaged spouse (SOLAK19).

An award greater than $600,000: Two participants thought an award of over $600,000 justified. A Dunedin barrister thought that the wife should be awarded $2 million. This was the highest suggested award of the group. BDUN11’s rationale for the large award was:

• the high earning potential of the husband;
her own working knowledge of the approach taken to solving the problem of economic disparity in other jurisdictions. BDUN11 explained how in England, the approach taken to solving the problem of economic disparity begins with questions like “what are the wife’s needs? And then what compensation does she [the wife] deserve?” This type of analysis shapes the approach BDUN11 takes to interpreting section 15 and solving economic disparity matters;

- the wife “has helped him build up his earning power” and as such “she is entitled to be fully compensated for that”; and

- that marriage is a contract like no other and the law should enforce this: “marriage is a really important social structure … if you separate … then you have to bear the consequences and … the wife is entitled to expect that there is a lifelong commitment” (BDUN11).

An Invercargill solicitor thought that the award should be “for a lot … something like a third of the relationship property pool” (SOLINV30). This would mean that the amount of the award was around $1 million. He explained he would need an actuary to do the calculations but his gut feeling was “that it is going to be a big lump sum … as big as anything we have seen so far … this is a dream set of facts” (SOLINV30). SOLINV30 discussed his approach to the calculation of the amount would be an “actuarial assessment of what she would have earned … [and] what she is losing out on [each year] … let’s just say she was able to earn $200,000 per year and that is probably conservative”.

Participants’ views on what a court might award the wife

Figure 5.21 Graph results vignette one, from the question: What do you think a court may award the wife?

When the interview questions were initially drafted there was no question relating to what a court may award. A pattern emerged, within the interviews, where a participant would often answer the question regarding what an award should be and then add a proviso: but I do not think the court would award this.

The comments of Hamilton barrister, BHM8 illustrate this pattern. After giving the quantum he thought justified (which was $150,000) he said: “if a court were to decide this, it would be less than 5 percent [of the total relationship property pool] ... most of the awards to date have been around $30,000.”

Auckland solicitor SOLAK19 said the award “should be at the top end so around $600,000 (20% of the relationship property) but the courts would probably award 5-10% of the relationship property”.

Wellington solicitor SOLWELL26 thought an award of $300,000 justified but said this would “not be what I think that a court would order.” Auckland barrister BAK5 thought an award of greater than 10 percent of the relationship property should be awarded to the wife, but said a “court would probably only award $100,000”. BAK5 advised: “Do not forget that you need
to take your costs off that. So with a case like this to get $100,000 you are going to have to spend $30,000 in fees at least.”

The mediator thought $400,000 would be appropriate and then said “at the moment in the court, after $X \lor X$, the court might give her $200,000 … they all know that they screwed up $X \lor X$ so they might want to increase it a bit”.

**Participants’ views on whether the wife’s choice not to pursue her career is (or should) be a relevant factor when considering any section 15 award**

![Graph results vignette one](image)

**Figure 5.22** Graph results vignette one, from the question: Whether the wife’s choice not to pursue her career is (or should) be a relevant factor when considering any section 15 award?

Figure 5.22 indicates that the majority of participants (24) thought the wife’s choice not to pursue her career was irrelevant in a consideration of an economic disparity award. Some of those, five within the group of twenty-four, said generally no, it was a joint decision of the husband and wife, but they thought it would be different if you could show this was not a joint decision. Five participants thought the wife not pursuing her career was generally relevant to any section 15 award.

During interviews practitioners would often share details and observations about their personal life experiences regarding the demands of work, family and childcare. The question (regarding the wife giving up her career and whether this is relevant to economic disparity claims) uncovered the subjective perspectives of the participants. Dunedin solicitor SOLDUN29 said:

[SOLDUN29]: This is a really good question. I have been thinking about this myself, thinking that if I did not have to work I would really like not to work and stay at home. If I was in the position where my husband wanted to stay at home because I
earned a higher income I would feel really resentful of that as I would want it to be me … I can see both sides of it and … I think that it should be a factor in the consideration … because there are benefits that had they stayed together that she enjoyed in terms of raising the children. But it is also very personal in that he might not have liked kids, what I mean is, she might have been better wired for it [taking the primary care-giver role] than he is.

Wellington solicitor SOLWEL26 reflected on her own biases “as a single working parent” and how these “at times shape [her] view” being aware “how tough it is”. She thought the wife’s choice not to pursue her career was not relevant and said:

[SOLWEL26]… did these people want their children to be raised by nannies or did they want them to be raised by a parent? What was their plan going into the future? Were these people able to handle, in their particular relationship, the pressure of having two high powered working parents? I think that people forget about this and say ‘well you did not work’ but I know what it is like to be a single parent and it is bloody hard and I can imagine if it is two high powered careers it is enormous stress.

Auckland barrister BAK5 thought the wife’s decision not to pursue her career relevant. BAK5 thought that, as a result of this choice, the wife enjoyed the benefit of a closer relationship with the children and this should be considered and a value attached to it. BAK5 said that:

[BAK5]: this has to be given an economic rating as she has benefited from their closer relationship … and the advantages of that closer relationship and I do not think that this should be ignored, and it is ignored too often … to a certain degree it was her choice and to be fair that should be factored in. She would have had greater leisure time than him, less stress possibly, there may be health disadvantages for him … You know many times we do see these guys pop off. It is quality of life … life balance … there are a lot of men that are quite isolated in terms of their own relationships with other people and they do not have the same emotional attachment. It is not all about money, you know life is not … all about money.

Christchurch barrister BCH9 thought the wife’s choice was relevant because this was the reason why she now no longer had a career. “Yes it is relevant, it has to be relevant, if she had not given up her career then an award would not be made” (BCH9).
The majority (24 participants) thought the wife’s decision not to pursue her career irrelevant, because it was a joint decision of the couple and the consequences flowing from the decision should be shared between them. The mediator thought it was not relevant “because they [the couple] made the decision to have children”. For these participants an inquiry of this nature (a retrospective analysis of the couple’s joint decisions) would open a line of inquiry that the law should not consider. For participants this question highlighted problems with section 15 and lines of inquiry it can open depending on the conceptual approach taken to its interpretation. For example an Auckland barrister said:

[BAK3]: No as a matter of principle, the wife’s choice not to pursue her career should not be considered because as soon as you start down such a line of inquiry, inquiring into decisions that were made within the relationship, then you open a can of worms.

When I started practice in 1976 you would not believe the affidavits. They were offensive, inflammatory and degrading, drilling right down to the minuscule of the relationship to prove that someone should get more than other. And we have kind of lost that institutional knowledge. As a result and we are heading back towards that.

Another barrister agreed and opined:

[BAK6]: No it is not. It is what has happened. It is a poor defence used by husbands. I do not consider it relevant … it is something that the husbands look back on with dark tinted glasses. They were quite happy when they were together and it suited them. They benefit from that choice.

A female solicitor alluded to biological and gender backdrops associated with economic disparity problems and observed how:

[SOLNEL28]: … one of them had to give up their career … a nanny is an option but a wife and a mother would feel less comfortable than what a husband would with a nanny … handing over her children’s care to someone else … [it is] just a reflection on the way fathers and mothers are … it is, in my observations much harder for the mother.

Another solicitor thought the question should be relevant “in the first level of inquiry” but then said:
...it was their decision and so the wife giving up her career she has made that choice based on their decision. It is their joint approach and because of this ... it was a joint decision. I would argue that it is a joint decision until the cows come home.

Others agreed and thought the presumption (that it was a joint decision of the spouses for the wife to give up her career) could, with suitable evidence, be rebutted. Then the choice was the wife’s unilateral one and relevant in any determination of an economic disparity award. For example the Judge said: “I would infer that it was a joint decision, so both have to take responsibility for it. It might be different if you could show that the husband objected.”

The QC held a similar view:

[QC] I am afraid that I just do not see it as the wife’s sole choice … he is living with her for 15 years while she is at home. If the position is that he really did not agree … if she really resisted getting back into the work force and he had clear evidence of that then that might be a factor because … she is going to have to take responsibility for that decision … if he said ‘well listen honey you really should be getting back into the paid work force because it is … in your best interest to do so … you are getting out of date … It would be good for you and good for us’ ... but she really resisted it … if she said ‘no, no I do not want the stress I cannot be bothered with it’, then I think that I would take that into account.

A Dunedin barrister also shared this opinion and said:

[BDUN11]: it is relevant and irrelevant. I think that a judge should be able to look at it because I am thinking of a case where I acted for the man and he said to me that ‘we got to a stage where our kids would have been able if she went back to work’ but she refused. She just wanted to live the life of Riley and not help financially. So here … this is relevant but I think that in the majority of cases it is a joint decision that she should not have had to go back to work and they want the luxury of having Mum at home, then it should not be relevant.
The mindset that when children reach an age their primary caregiver should return to the paid workforce

The theme, that there is a time in a child’s life when their caregiver should return to the paid workforce, developed within a significant number of the participants’ responses to the question. The facts of a case and the actions of the primary caregiver are measured against the practitioner’s unique benchmark of what is an appropriate age, and then practitioners form an opinion regarding the actions of the primary caregiver founded on this benchmark. There was no consistency within the group regarding the appropriate age: each participant held a unique view.

This theme was also explored within discussions with the contextual study group. One of the forensic accountants wondered whether this was a factor that should be considered when calculating the amount of any section 15 award. He said:

[ACC1]: The other factor … in the context of interpreting section 15 … [is] the discretion, what time is it that a wife … should go back to work full-time? … I have a case on right at the moment … the accountant on the other side is saying ‘Well the woman wants to stay at home until the youngest child is 18 and once she has done that she will only work part-time.’ My response has been to go back and say: ‘Well the youngest child is actually 14 and then the next is 16, she could work … on a part-time basis: say from 9 until 3.’ She is a medical practitioner … So there is the whole question of how much discretion a woman should be permitted by the section … in other words, should the calculation be driven off a principle that she is forced to go back to work full-time when the youngest child is 14 and can stay at home legally under the law?

The other forensic accountant had a different perspective and discussed the situation of Mrs X:

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309 This line of inquiry unfolded during the process of the interviews – it was a topic that the legal professionals often opened up within their responses.

310 If the wife’s choice not to pursue her career is (or should be) relevant when considering any section 15 award.

311 The accountant was referring to section 10B of the Summary Offences Act 1981 pursuant to which it is illegal to leave children under the age of 14 without adequate supervision.
[ACC2][the] only logical reason for the wife to go off and get a job in that case would have been if she thought her husband was going to go off and leave her. Why should the courts look at why someone should have done something? It is unfair. My wife does not work ... the law does not want the courts standing in and making those judgments. It comes down to people. It was their own decision.

The female claimant’s perception of returning to the paid workforce

The female claimant reflected on her experience of the New Zealand court system and discussed how she felt judged by an underlying attitude within the legal profession that she should have returned to fulltime work. The claimant said that divorce meant that her husband and members of the legal profession rewrote her personal history. Her husband had told her several times in the marriage she “did not need to work”, but then she explained:

[Claimant One] ... later in Court he [her husband] … after all the projections were made regarding what I would have earned in the workforce [said] ‘if I had known you were going to earn that much I would have been more insistent’ ... this is what I have such trouble with … this whole rewriting of history and you know a judge saying, or thinking, that you could have gone back to work.

The claimant said it was a joint decision made within her marriage that she would stay at home and focus on raising their children saying “it was only after the breakdown of my relationship that it became an issue” (Claimant One).\(^{312}\)

\(^{312}\) It is interesting to consider this in light of research frequently appearing in mainstream media. Undoubtedly this material forms a backdrop for many couples and influences decisions. For example, see Mathew Backhouse, “Mums harming kids through day-care – report” The New Zealand Herald, 8 February 2012. This article referred to a psychologist’s report that says New Zealand mothers could be harming their children by sending them to daycare, saying in the past it has been all about getting women back to work but there has been little consideration given to some of the research regarding the negative effects of long term childcare in daycare centres.
Participants’ views on whether an award of maintenance should be made

![Bar graph showing the results of the question: Whether an award of maintenance should be paid to the wife.](image)

Figure 5.23 Graph vignette one, results from the question: Whether an award of maintenance should be paid to the wife

The majority thought an award of maintenance should be made. Some participants thought section 15 should be awarded rather than maintenance. As previously explained an Auckland barrister thought maintenance should be used instead of section 15 because maintenance is flexible so that if “their joint circumstances change then … payments can be adjusted with the changing circumstances” (BAK3).

Priestley J in *De Malmanche v De Malmanche* 313 considered the issue of how maintenance might be used as a remedy in respect of economic disparity. His Honour thought that the discretion afforded to the Court under section 15(3) included the need to consider whether the economic disparity is likely to be short-term or long-term and whether the economic disparity might be more appropriately redressed by awards of periodic and/or capital sum maintenance under the provisions of the Family Proceedings Act 1980.314 His Honour declined to advance the matter beyond a general conceptual discussion and was careful to not “express any view as to how a Court should deal with them”.315 It remains to be seen how in future a Court may deal with this issue.

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313 *De Malmanche v De Malmanche* [2002] 2NZLR 838.
314 Ibid at [167 -168].
315 Ibid at [168].
The tension between section 15 and maintenance claims

The aim of the question was to uncover how maintenance and section 15 claims work for practitioners as remedies for them in their day-to-day practice. Legal writers have examined the uneasy tension between economic disparity claims and maintenance. The case law is also evidence of the tension between the rightful place of maintenance and section 15 compensation. One of the reasons that the tension exists is because, on the surface, the two remedies appear to be the same, but with closer examination the differences are apparent.

Maintenance claims involve an inquiry into a claimant’s reasonable needs in the future (albeit a reasonable period of time) and the payment of maintenance is, usually, out of the respondent’s future income. It is aimed at temporary support enabling a party to overcome the effects of no longer living together and to assist with the adjustment to new circumstances. The Family Proceedings Act 1980, under which maintenance is paid, treats maintenance as a mechanism of meeting financial needs for a transitional period only. In the days when marriage was understood to be a life-long commitment it made sense for the obligation to maintain to also be a life-long commitment. This has changed so that the recipient ought to be able to adjust and support themselves in their new domestic situation. Yet the mood of the Court has shifted from the tenor of the Court of Appeal in Slater v Slater which stressed the short term nature of maintenance. However it remains clear that there is no liability to pay maintenance under the Family Proceedings Act if a claimant can meet their own needs, even if there is a substantial income-earning disparity.

Section 15 goes beyond this: it is not concerned with a claimant’s reasonable needs for a finite period. Section 15 moves into novel territory and opens lines of inquiry not traditionally undertaken in New Zealand’s relationship property law regime.

316 The issue of the tension between the rightful role and scope of economic disparity and maintenance has enough substance to warrant a separate thesis – and is really an ancillary issue to the one of this thesis. It is something that emerged from the research and it warrants some consideration.


318 Within M v B – there is an inquiry as to whether maintenance should be considered first and then a s15 award made. See M v B [2006] 3 NZLR 660, William Young P at [188-198].


320 Slater v Slater [1983] NZLR 166. In Z v Z (No 2) [1997] 2 NZLR 258 the Court of Appeal expressed a view that Slater v Slater had been interpreted too narrowly.
When section 15 is considered we ask questions about the future and also take consideration of historical events: is there going to be a significant disparity of income and living standards because of the division of functions in the relationship? Establishing the rightful parameters of an inquiry involving section 15 is proving elusive and problematic for New Zealand’s legal profession (including the judiciary) and it is here that the problems and tensions between maintenance and section 15 arise. Both section 15 awards and maintenance assist with remedying economic disparity between the parties, yet section 15 must be understood to take us a step further. The purpose of maintenance is not to remedy the effects of economic disparity between couples on divorce, but to provide short-term financial relief. There is no such curb on section 15 compensation. Section 15 and maintenance could be understood as performing different functions. Section 15 could be understood as something more akin to a repayment of a debt (or something founded on principles of a restitutionary nature) and maintenance is more like an economically advantaged partner providing limited financial support.

An underlying aim of the research has been to understand how the legal profession puts into practice section 15 and the remedy of maintenance must have a practical impact on the operation of section 15. There is a finite amount of money which couples have access to, as BAK4 explained in his day-to-day practice “clients are better off parking their section 15 claim and going for maintenance” because there is often “not enough in the relationship property pool to make a section 15 claim worthwhile”. BAK4 also said that a friend of his who is a High Court judge has reinforced to him on a number of occasions that he is “better going for maintenance than pursuing economic disparity claims”.

Section 15 awards must come out of property/capital and in some circumstances there is not enough relationship property from which to make the award, yet with maintenance there can be on-going payments which can be made from income. While the conceptual underpinning of the two remedies (maintenance and economic disparity compensation) may be different, for practitioners who deal with the practicality of everyday relationship property problems the boundaries between the remedies are blurred and it appears it is often better to attempt to negotiate maintenance payments from income rather than attempt to bring an economic disparity claim from a limited pool of relationship property.
In practice section 15, as a remedy, has been described as expensive and difficult. The same comment has been made in respect of maintenance. Deborah Hollings QC said that: “The Courts’ record for enforcing any sort of maintenance order is poor. It is frankly expensive, difficult and slow”.321

The participants’ views on whether maintenance should be paid

The participants’ comments regarding whether maintenance should be paid to the wife illustrate the tension between maintenance and section 15. If a claimant claims for both, some participants thought this was seen as “greedy” or “double-dipping” (SOLTAUR24 and SOLAK20 both said this). This makes it hard for practitioners to apply the remedies to “real life” cases (BAK5). The interplay between the two remedies and how they impact on the legal advice that practitioners give to clients was discussed. One participant, said:

[BAK1]… if I was advising the bloke [in vignette one] I would be saying ‘do yourself a favour, be generous here [with your maintenance payment] and then you will not need to pay so much in the capital sum’ [section 15 claim]. Think about what the wife needs … a good house in a good area, not too far from her parents … they are back up support if she needs it … [and think about the local] schools. There are all these sorts of factors that need to be built in that have nothing to do with the mathematics, but everything to do with the personal circumstances.

The views of the participants who thought maintenance should be paid to the wife

For the majority there was no issue regarding whether maintenance should be paid. For these participants the usual response was similar to that of barrister BAK2, who said “maintenance should definitely be paid”. His perception of the facts was that there “is not sufficient capital to compensate her” and he said there is “no fault in spousal maintenance – so she is there” (BAK2). While the majority thought that maintenance should be paid, the group were not consistent in their views regarding the amount and timeframe for the payments (see Table

5.3). The lack of certainty regarding the grounds and terms of maintenance payments is a substantive issue for practitioners as BAK2 said: “The problem … is that the cases are not reported enough … there is not enough structure around it [maintenance]”. This means that in practice there is a feeling of uncertainty regarding the terms of maintenance awards making it difficult for practitioners to know what to advise clients.

Barrister BAK4 argued maintenance needed to be paid because:

[BAK4]… there is a fundamental distinction … between periodic support and capital. For a period of time she should get some maintenance for up-skilling and training that she is going to need and that capital is going to be needed because she has to care for the children.

The participants that felt maintenance should be paid frequently discussed the conceptual underpinnings of the remedy as a barrister said:

[BAK6]: she would need it because she will not be able to meet her own reasonable needs without one … [It is] a no brainer. All the case law says this: one is a compensatory one off payment and the other is an ongoing needs based.

Another participant explained:

[BDUN11]: We are talking about two different concepts. One is about compensation for a career that is sacrificed … [being] the economic disparity and in New Zealand it is limited to the pool of relationship property and the other is to do with her reasonable needs [maintenance] and it is also to do with his income, which remember is $1.4 million gross.

Invercargill solicitor, SOLINV30, was unequivocal in his opinion that maintenance, in conjunction with a very sizable economic disparity award, should be paid to the wife because:

[SOLINV30] … she ticks all the boxes. The bottom line is that she has obviously been living the lifestyle. Without maintenance the situation is going to be pretty dire
for her. She needs an opportunity to scrape herself off the bottom just to meet the costs associated with three kids. She will get child support but you know just to keep the household running you cannot do that on $40,000 per year especially with three kids and with the expectations that this couple would have had.

The mediator shared a similar view, and explained that while the wife may be receiving a sum of money under section 15 and also her fifty percent share of relationship property this amounts to a “capital sum and she should not have to resort to capital [to live]. It is a reasonable sum and she should be able to invest this”. He was also acutely aware of the needs of the children and considered it important for the wife to stay in the house; he said “It may be that she wants to keep the children where they are”. An award of maintenance, in the mediator’s opinion, contributes to overall wellbeing and future security of the wife. The mediator thought the wife should be paid $8,000 per month. This was a considerable award compared with the views of other participants. His view was that this amount would provide an opportunity for the wife to invest her capital and grow it “and then she has got something to really go forward on”. His rationale was that “she is 43 years old … she is coming to an age that she needs as much security as possible as there are not really that many decent men around at that age. I think about this”. He explained that:

[MED]… you need to think, three kids of that age … think of the life that they would have had and they are meant to be able to maintain it … when you think of what he is earning over one million dollars … the amount of maintenance I am suggesting is not going to affect him much. This amount should be paid until the youngest child is 14.

Solicitor SOLWEL26 thought the amount of child support that the husband was willing to pay was relevant, explaining that she had had a recent case, with similar facts, where the husband paid maintenance of $250 per week for six months. She hoped the wife in vignette one would be awarded more than this. In respect of how long the award should be for she said: “realistically they both considered that these children should have been raised by their parents – so I would say until the youngest is 16 [years]” (SOLWEL26).

Some participants said under the law the wife may be entitled to maintenance and an economic disparity award but claiming both is, in practice, problematic. Others explained
their “personal view” was that the wife should receive maintenance but this does not mean the judiciary would agree as an Auckland solicitor said:

[SOLAK20] In my personal view section 15 and maintenance are for different purposes … judges have told me something different when I argue this in front of them. It seems that they see it as ‘double-dipping’. They seem to say well you have already got more than fifty percent [of the relationship property] what more can you want? But you know, I say to them, well it is for ongoing day to day living. The thing is section 15 is compensation and it is not maintenance.

The perception that it is double-dipping to claim economic disparity compensation and maintenance was also discussed by other participants. For example, SOLTAUR24 said “if you were acting for the husband you would be saying no [regarding maintenance] that it is double-dipping if you claim section 15 as well. What the law says is one thing what will be acceptable to the individuals involved is another”. A client may be entitled to both but being entitled to something does not mean it can be achieved. The other side may simply not accept it. As a barrister explained:

[BAK5] … it is unrealistic to ask for both section 15 and maintenance. Legally you might be able to get it … but no one will settle with that. You will get one or the other and I would rather have a decent whack of income. If you were looking at this properly what you would need to look at is what it would cost to employ someone to look after her children every time there is a [work related] social or networking thing on at short notice? Have someone on tap. That is what she needs … if she goes into a large commercial law firm and … has to work on a transaction she will be out of operation for three days not just days but nights – three nights. So who is suddenly going to step in? That is the problem and if she does not do the large transactional work she will not be promoted. So if I had this case and I had the money to put into it so I could pay my fees I would be calculating the cost of a high powered nanny at short notice for 36 hours per week [as the basis of a maintenance award].
The participants’ views who thought perhaps a maintenance award should be made but the amount of an award depends on the amount of any economic disparity compensation that the wife may receive

A number of participants thought a maintenance award should “probably” be made but if the wife receives maintenance then she will not need a section 15 award. BCH10 said maintenance:

[BCH10] … decreases the need for the disparity award … one impacts on the other. Sometimes it is more palatable, funnily enough, to wrap things up in a disparity claim rather than ongoing support as men really reject the idea of ongoing support but they can take the hit of a lump sum. I do not know why it is but it is the reality.

A suggestion regarding why people may prefer lump sum payments could be that open-ended or long term spousal support may create a feeling of economic dependency when people would like to be able to put the past behind them. A lump sum payment also means there is no ongoing risk regarding whether or not future payments will in fact be made.

A sole practitioner thought it possible that the wife should receive maintenance, but this would be for a “short period … [and] it depends on how much economic disparity compensation there is. I think that they are linked. Maintenance needs to be based on reasonable needs so the two [economic disparity and maintenance] work together” (SPRACTWEL14). SPRACTNEL15 wondered if maintenance “as well as the section 15 award” was even possible.

Another solicitor agreed concluding that “it depends on the amount she is going to get” under section 15 and said “that is the trouble. You need to weigh the two of them up” [economic disparity and maintenance] (SOLNEL27).

Participants spoke of the difficulty involved when deciding whether to pursue maintenance or an economic disparity claim. One solicitor said: “This is the endless debate – spousal maintenance and/or economic disparity … it’s too hard” (SOLAK17). Another solicitor said in the short term an award of maintenance should be paid, because it is important to have funds “up front” for the wife. This money would fund legal costs and short
term needs, explaining how “in the short term [the wife should receive maintenance] leading up to settlement so she has funds and if she needs to be looked after following settlement ... but if she gets enough section 15 then she will not need it” (SOLAK19). Another solicitor also thought maintenance should be available to fund the wife’s legal costs, and noted that an award of maintenance “influences the quantum of what we are looking for” in respect of section 15 compensation (SOLNOR16).

The solicitor also explained the significance of maintenance because a claimant needs financial resources to access legal representation. His view was that:

[SOLNOR16] If she is only getting a little by way of section 15 then she should get more maintenance. Section 15 and maintenance need to work together. He has got the ability to pay maintenance and he should be paying maintenance.

If I was successful in section 15 in getting the $450,000 then the award of maintenance for the woman should be a standard award. If not then she needs a generous amount of maintenance. I favour the idea of a whacking great maintenance sum during the years that she needs it and in the years that she does not then it could be tapered off. When he is earning $1.4 million then there is huge capacity to pay maintenance.

The first thing that I would do if she was to come to me is make an application for lump sum maintenance, to fund the whole battle, otherwise she is going to be hugely disadvantaged … I would want … a decent sum for a war chest … it would come under maintenance. She must not be disadvantaged in the battle … get a decent sum up front so that you can fight the battle properly, particularly now that legal aid has turned to crap.

The disadvantages of not having access to decent law and legal representation are just horrendous … the money is critical because of the level of competence and the level of thoroughness that goes into the preparation of the case. It is pivotal to the outcome.
The views of the participants who did not think a maintenance award should be made

Some participants thought if there was “a reasonable section 15 award” then maintenance should not be paid. The Judge was a member of this group. His view was that:

[Judge] because of the compensatory award there is limited scope for a maintenance award … he will be paying child support as well … Because the maintenance award is something designed to reflect the value of the disparity otherwise she is earning sufficient to support herself … child support will be generous. So depending on evidence of lifestyle I do not think that maintenance should be paid.

The QC also thought if section 15 compensation was awarded then there would be little scope for a maintenance award as well. Her view was that:

[QC] If she [the wife] is earning $40,000 … she will have a mortgage free house … if I was awarding that much under section 15 [then] I think that I would probably be reluctant to award maintenance particularly because she is at the age where she could start earning more money. It is in her interests to do so, you know if she does not do it soon then she will really miss the boat.

Hamilton barrister, BHM8, thought maintenance should not be paid if she gets “her economic disparity payout then she would not need this.” A solicitor agreed and said:

[SOLHM21] the fact she is working and earning $40,000 means she can support herself … maintenance is for the children and not the spouse. The children may be used to trips away, private schools … so the husband should pay for this … there are many variables in this.

Another solicitor explained that “after the section 15 payment with the amount of money involved probably not” (SOLTAUR22). SOLNEL28 felt interim maintenance should be awarded “not on-going maintenance because … her reasonable needs would be met by the relationship property”.

322 The QC thought $570,000 should be awarded to the wife.
Summary of the participants’ views on whether maintenance should be paid to the wife

The results are indicative of a divergence of opinions, amongst the legal profession, regarding the purpose of maintenance and amounts that any award should be for.

Table 5.3 results vignette one - participants’ opinions regarding maintenance, indicating the amount of the award and duration of the payments linked to their opinion on economic disparity compensation

<table>
<thead>
<tr>
<th>Identifying Tag</th>
<th>Amount of the maintenance award</th>
<th>Period of time the award should be paid (years)</th>
<th>Comments (if any)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td></td>
<td></td>
<td>Thought that there was limited scope for maintenance and that there should be section 15 compensation instead.</td>
</tr>
<tr>
<td>QC</td>
<td></td>
<td></td>
<td>Thought that there was limited scope for maintenance and that there should be section 15 compensation instead.</td>
</tr>
<tr>
<td>BAK1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BAK2</td>
<td>$700 - $1,000 per week</td>
<td>3-5 years (“I would go for 5 years”)</td>
<td>Considered that there was insufficient capital to compensate her under section 15 so there was a definite need to pay maintenance.</td>
</tr>
<tr>
<td>BAK3</td>
<td>$2,000 per week (at least)</td>
<td>5 years to be reviewed yearly</td>
<td>Thought that section 15 compensation should not be paid because it was felt that maintenance was a better option. This is because maintenance affords people some flexibility in the payments over time.</td>
</tr>
<tr>
<td>BAK4</td>
<td>BAK4 felt that it was hard to give an amount on the facts.</td>
<td>2-3 years</td>
<td>Considered that there is a fundamental distinction between capital and periodic support. The wife needs</td>
</tr>
<tr>
<td>Expert</td>
<td>Comment</td>
<td>Amount</td>
<td>Duration</td>
</tr>
<tr>
<td>---------</td>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
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</tr>
<tr>
<td>BAK5</td>
<td>BAK5 felt that it was hard to give an amount on the facts but thought consideration of the costs of obtaining the services of a “high powered nanny” must be taken into account within any amount paid to the wife.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BAK6</td>
<td>BAK6 felt that it was hard to give an amount on the facts. But around $300 per week. The amount paid depends very much on the wife’s income and her likely actual future income.</td>
<td>$250</td>
<td>4 years</td>
</tr>
<tr>
<td>BAK7</td>
<td>$250 per week</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BHM8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BCH9</td>
<td>$770 per week</td>
<td></td>
<td>7 years</td>
</tr>
<tr>
<td>BCH10</td>
<td>Could not give the amount because BCH10 felt that there were too many unknown variables. BCH10 said that with a case similar to this one the wife received $100,000 (covering an 18</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Source</td>
<td>Response</td>
<td>Additional Comments</td>
<td></td>
</tr>
<tr>
<td>--------</td>
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<td></td>
</tr>
<tr>
<td>BCH10</td>
<td>throught that the husband had the means in vignette one to pay maintenance.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BDUN11</td>
<td>Needed more information.</td>
<td>BDUN11 said that an award should be made if she satisfies the reasonable needs test.</td>
<td></td>
</tr>
<tr>
<td>SPRACTNEL12</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SPRACTWELL13</td>
<td></td>
<td>Considered that if the wife was successful in respect of an economic disparity award then she will not need maintenance as well.</td>
<td></td>
</tr>
<tr>
<td>SPRACTWELL14</td>
<td>$190 per week</td>
<td>Felt that maintenance should be paid but stressed that it should be “just for a short period”. It would depend on how much economic disparity compensation there is – maintenance and economic disparity are linked. Maintenance needs to be based on reasonable needs. The two are linked and as such it was felt that they must work together.</td>
<td></td>
</tr>
<tr>
<td>SPRACTNEL15</td>
<td>Could not give the amount because there are too many variables – depends on the wife’s outgoings.</td>
<td>Felt that this was a hard question: if maintenance should be paid as well as section 15 compensation. It depends on the wife’s financial needs and what the living standards have been.</td>
<td></td>
</tr>
<tr>
<td>SOLNOR16</td>
<td>SOLNOR16 said that it depends on what the quantum of the section 15 award is.</td>
<td>Section 15 and maintenance need to work together if there is a sizable section 15 award then there is not so much need for maintenance.</td>
<td></td>
</tr>
<tr>
<td>SOLAK17</td>
<td>Too hard to answer.</td>
<td>SOLAK17 said how in practice this is the endless debate - section 15 economic disparity compensation and/or</td>
<td></td>
</tr>
</tbody>
</table>
It is also hard in practice to come to any conclusions.

SOLAK18 felt that this was clearly a case for maintenance as well as a section 15 award.

SOLAK19 said that in the short term maintenance should be awarded leading up to settlement so that the wife has access to funds. SOLAK19 felt that if the wife gets enough section 15 compensation then she is not going to need so much maintenance.

SOLAK20 said her personal view was that maintenance and section 15 should be awarded because they are for different purposes. Section 15 is compensation it is not maintenance. But, SOLAK20 felt that judges see it differently – they see it as double-dipping.

SOLHM21 said that because the wife is earning money she can support herself. If maintenance was awarded it would have to be minimal.

SOLTAUR22 said that after the section 15 award is made maintenance is probably not going to be necessary.

Details of these answers were not recorded

SOLTAUR24 felt that an award of maintenance needed to be considered but if you were acting for the husband you would be saying – no – it is

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
<th>Duration</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOLAK18</td>
<td>$770 per week</td>
<td>At least 5 years</td>
<td>SOLAK18 felt that this was clearly a case for maintenance as well as a section 15 award.</td>
</tr>
<tr>
<td>SOLAK19</td>
<td></td>
<td></td>
<td>SOLAK19 said that in the short term maintenance should be awarded leading up to settlement so that the wife has access to funds. SOLAK19 felt that if the wife gets enough section 15 compensation then she is not going to need so much maintenance.</td>
</tr>
<tr>
<td>SOLAK20</td>
<td>The award should be very modest. It depends on her living standards.</td>
<td>Because the husband is wealthy, it should be at the longer end of the scale so 3-5 years.</td>
<td>SOLAK20 said her personal view was that maintenance and section 15 should be awarded because they are for different purposes. Section 15 is compensation it is not maintenance. But, SOLAK20 felt that judges see it differently – they see it as double-dipping.</td>
</tr>
<tr>
<td>SOLHM21</td>
<td></td>
<td></td>
<td>SOLHM21 said that because the wife is earning money she can support herself. If maintenance was awarded it would have to be minimal.</td>
</tr>
<tr>
<td>SOLTAUR22</td>
<td></td>
<td></td>
<td>SOLTAUR22 said that after the section 15 award is made maintenance is probably not going to be necessary.</td>
</tr>
<tr>
<td>SOLTAUR23</td>
<td></td>
<td></td>
<td>Details of these answers were not recorded</td>
</tr>
<tr>
<td>SOLTAUR24</td>
<td></td>
<td></td>
<td>SOLTAUR24 felt that an award of maintenance needed to be considered but if you were acting for the husband you would be saying – no – it is</td>
</tr>
<tr>
<td>Name</td>
<td>Amount</td>
<td>Duration</td>
<td>Comment</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>----------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>SOLWELL25</td>
<td>$750 per week</td>
<td>3 years</td>
<td>SOLWELL25 said that the wife’s reasonable needs are going to be more than the amount of money she can generate and more than the child support she would receive. SOLWELL25 would consider the lifestyle of the wife before the breakdown of the marriage.</td>
</tr>
<tr>
<td>SOLWELL26</td>
<td>SOLWELL26 felt that it is very difficult to say, and it would depend on what her reasonable needs are. She explained how you would need to know what the wife’s budget is and what her standard of living was. At least until the youngest child is 16 years – so 6 years. SOLWELL26 felt that she was a little biased as she is a working single mother as well so this may influence her decisions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SOLNEL27</td>
<td>Felt that it depends on the amount of section 15 compensation that the wife receives. SOLNEL27 explained how you need to weigh up section 15 and maintenance. “The husband should be paying for all the private school fees and holidays – the life style factors. Once these things are out of the way, all the big things, then this leaves a smaller amount for maintenance.” SOLNEL27 explained that if she was acting for the wife she would ask the wife if she wanted a lump sum payment (section 15 compensation) or maintenance.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SOLNEL28</td>
<td>$1,000 - $1,200 per week</td>
<td>6 months</td>
<td>SOLNEL28 indicated that her view of the amount and length of the maintenance payments was premised on a recent case, with similar facts, she was</td>
</tr>
<tr>
<td>Name</td>
<td>Comments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SOLDUN29</strong></td>
<td>Too hard to give a quantum but it should be a reasonably generous award. About 3 years. SOLDUN29 said that an award of maintenance should be paid even if a section 15 award was made.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SOLINV30</strong></td>
<td>$1,250 per week. SOLINV30 thought that the wife needed something that gives her an income of at least $100,000 per year. This would mean maintenance of $60,000 per year (in addition to her earnings of $40,000). Until the youngest child is finished at school so that would be at least 6 years (the youngest child is 10). SOLINV30 explained his approach: “The wife would need some time to muscle back to where she was and this will take quite some time and she will need good maintenance payments during that time.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>MED</strong></td>
<td>$2,000 per week. 4 years. The mediator felt that maintenance and section 15 compensation are both payable.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Vignette two: the fisherman’s case

Figure 5.24 The facts of vignette two, as given to participants

<table>
<thead>
<tr>
<th>The pool of relationship property: Valued at $200,000.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The relationship: The de-facto relationship lasted 6.5 years. Both have been married before. There is one child of the relationship (aged 3 years) with severe health and behavioural issues. The mother has the ongoing care of the child. She also has three children from previous relationships that she has ongoing daily care of.</td>
</tr>
<tr>
<td>The woman: Aged 36 years. The woman has no qualifications – her skill base is limited – the only work she can get is part-time nanny work, earning $15 per hour. She is currently on the domestic purposes benefit.</td>
</tr>
<tr>
<td>The man: Aged 40 years. The man is a fisherman, doing seasonal work which pays, on average $65,000 per annum (gross).</td>
</tr>
</tbody>
</table>

Observations regarding vignette two

Vignette two proved difficult for the participants. There were a number of components contributing to the difficulty: some participants said it was hard for them to see how an economic disparity claim could be made on the facts. Others explained that this was the “sort of case where economic disparity should be argued” (BAK5) but, if this case was to come before them there would be little incentive to pursue a claim. Other participants thought the woman would be better off to rely on state assistance. This contention was also made in respect of whether the woman should receive a maintenance award. It was felt by a number of participants that the woman would be better on the domestic purposes benefit. This view was held despite the existence of section 62 of the Family Proceedings Act 1980 which states that the fact that someone is on the domestic purposes benefit is irrelevant to the liability to maintain the person under the Family Proceedings Act. The provision makes it clear that the liability to maintain a person under the Family Proceedings Act is not “extinguished by the person’s reasonable needs being met by the domestic purposes benefit”.

The results of the empirical research indicate that the practice of law in everyday settings is frequently different to the law and rules codified within statute. It was felt by some participants that if the woman was to pursue a section 15 claim (or pursue a maintenance award) that it would be “setting her up for a whole lot of hurt” (SOLWEL25 and SOLNOR16

323 For example BAK2 and SOLHM21 thought this.
both said this). From a research perspective, vignette two’s facts did not open the flow of communication in the manner that vignette one did. Nor did it open the window on the participants’ personal experiences.

**The participants’ views on whether, after the equal sharing of the relationship property, there will be a significant disparity of income and living standards:**

![Graph results vignette two](image)

Figure 5.25 Graph results vignette two, from the question: After the equal sharing of the relationship property do you think that there is going to be a significant disparity between their respective income and living standards? (Significance ranked on a scale of 1 to 10)

Figure 5.25 summarises the participants’ responses regarding whether they thought there would be a significant disparity of income and living standards between the man and woman following the equal division of the couple’s relationship property. The results are extremely mixed, ranging from 1 (the disparity was seen as insignificant) to 10 (the disparity was extremely significant). Seven participants thought the significance of the disparity was somewhat significant (ranking it 6), representing the largest group of agreement among participants. The next group was six participants and they considered the level of disparity as significant, placing it at 9.  

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324 The responses are a contrast with the responses regarding vignette one – where 11 of the interviewees thought, post the equal division of the relationship property, the disparity of income and living standards between the husband and wife was extremely significant and placed it at 10 on the scale of significance of disparity.
Auckland barrister BAK1,\(^{325}\) thought that the first of the jurisdictional hurdles contained in section 15 would be established on vignette two’s facts and said “she is a beneficiary and he is a fisherman it is not a huge disparity … [T]here is a difference, it is not a shitload, but it is enough”. Another Auckland barrister, BAK5 thought that vignette two was a “classic example of where section 15 should be applied” and considered the economic disparity between the couple “extremely significant”.

Other participants said this question highlighted the practical problems of applying section 15 where there is a small pool of relationship property. An Auckland barrister ranked the significance of the disparity at 7 and said, “there probably is actually [a significant disparity in income and living standards], there is a hell of a difference between $65,000 and … the DPB, one is kind of vaguely comfortable and the other is definitely not” (BAK6).

The comments BAK6 made were mirrored by solicitor, SOLAK17,\(^{326}\) who said “quite possibly” there was a significant disparity in income and living standards. She was “aware of the case law that says even if there is $10,000 difference in income then there is a disparity … as she has the children her living standards would be different to his”.

Another solicitor said:

[SOLHM21] Yes, definitely ... even though the amount is smaller than the first case – it’s 8 on the scale of things between the couple. The fact that the relationship property pool is only $200,000 and they earn less [it is] still a large difference for the couple. Compare the man’s earnings with the woman’s.

Dunedin solicitor SOLDUN29, felt that the man’s income was significant (when compared to what the woman would receive on the Domestic Purposes Benefit) and this impacted on the disparity. For this reason she ranked the significance at 9 and said: “You need to look at it from the perspective of the parties and so for her there is a big difference between what she would be earning and him earning $65,000.” Another solicitor also ranked the significance at 9 and said: “The gap between them is very meaningful” (SOLINV30).

Other participants disagreed and thought there was not a significant disparity in income and living standards. A Hamilton barrister said there was a disparity in income but explained: “I

\(^{325}\) BAK1 did not rank his answers on the scale of significance.

\(^{326}\) SOLAK17 is a partner of a small law firm on Auckland’s North Shore where, SOLAK17 explained, the client base is varied from very wealthy clients (with a large asset base and high earning potential) to people with few assets and limited earning potential. She felt vignette two’s facts were “more true to real life”.
would have struggled to get a difference in living standards. There is such a small pool of relationship property. They will both have barely enough to house themselves.” (BHM8)

Other participants’ comments are evidence of a divergence in opinion regarding how they read and interpret the same set of facts. For example one solicitor did not think there was a disparity of income and living standards and said: “I think that she might end up better off than him. I think that I would be less than enthusiastic about this claim under section 15” (SOLNOR16).

The participants’ ancillary comments (relating to whether there was a significant disparity of income and living standards) indicate difficulties involved in their interpretation and application of section 15 to matters. For example solicitor, SOLAK20327 said:

[SOLAK20]… it struck me that section 15 was the remedy of the rich … this woman should probably get a section 15 payout but she is unlikely to because his income is probably not really enough. Honestly if this woman was my client we would talk about section 15, I would advise her, but practically, when we were to talk about cost of going to court, or the cost of getting the expert evidence, which has become so fashionable to get, it would not be worth taking it anywhere.

**If the participants thought there was a significant disparity in their income and living standards how likely did they think that this was a result of the division of functions in the relationship?**

![Bar Chart]

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327 SOLAK20 works in a small law firm on the outskirts of Auckland.
Figure 5.26 Graph vignette two results of the question: If you thought there was a significant disparity in their income and living standards, how likely do you think that this disparity was a result of the division of functions in the relationship? On a scale of 1 to 10, with 1 being very unlikely and 10 being without a doubt, where would you place the likelihood of this disparity being a result of the division of functions in the relationship?

The question as to whether the disparity of income and living standards was a result of the division of functions in the relationship, was difficult. No common themes emerged from the responses. The range of likelihood was from 1 (being very unlikely) to 10 (being without a doubt). A number of the participants did not proceed past this vignette’s initial question because they did not consider the facts met the first of the jurisdictional tests contained in section 15. 328 For these participants vignette two’s questions were no longer relevant. 329 The responses indicate a divergence of opinion among the participants regarding the second jurisdictional test of section 15. 330

The opinions of participants who thought it very unlikely that the division of functions in the relationship led to the disparity were premised on the woman entering the relationship “unskilled” with existing dependent children. For example, barrister BAK5 ranked the likelihood at 3 and said: “The problem is that she had three other children”. BAK7 ranked it at 2 and said it was “unlikely that she was working before they met”. Hamilton barrister BHM8 shared a similar view and said:

[BHM8] I wonder if it is the division of functions that is brought about by this marriage because she already had the three children … She did not have any skills at the start … and not at the end.

Christchurch barrister BCH10, agreed and ranked the likelihood at 3. She explained: “She already had three children when they got together so she was already vulnerable when they got together. She has no skills. There is nothing lost.”

This question was a difficult one for the participants to answer, as solicitor SOLTAUR24, said:

328 This test being: If, after the equal division of relationship property, there is a significant disparity in income and living standards.
329 However these participants were encouraged to discuss the remaining questions in a more general sense.
330 Whether the disparity of income and living standards was a result of the division of functions in the relationship.
This is the key issue … I would like to know what she was doing at the time she met him, then assuming that she was on the DPB and caring for the other three children before she met him … she will not meet the section 15 thresholds … section 15 will not apply.

Other participants thought the fact that the woman was caring for the child, which was a result of their relationship, a relevant factor. For example, barrister BAK6 ranked the significance at 6 and referred to the woman caring for their three-year-old child and this was as a result of the division of functions in the relationship.

Many participants thought it a struggle to establish the necessary causal nexus between the ongoing future economic disparity between the couple and the division of functions. This is often the hurdle or “stumbling block” they have in practice as an Auckland barrister explained:

[BAK1]… this is where the stumble is on this one … this is really a difficult concept to explain to a client. You sit down with a client … if I had a dollar for every lawyer’s letter that I have got claiming economic disparity I could have retired by now … almost always the failure in the logic is in that second test, the “but for”. They come in and they say ‘your client is a lawyer, accountant or doctor or something and there is economic disparity.’ But you go ‘hang on a minute there is that second hurdle what about that?’

The QC disagreed and ranked the likelihood at 8. The QC felt that wider gender issues also have a part to play in such cases. She said:

[QC] I suspect that some of it is just to do with gender. He is unskilled as well but he is doing work that is reasonably well paid for unskilled workers and it is work that is available to unskilled men.
The participants’ views on the existence of other factors that may have caused the disparity

As the results of Figure 5.27 indicate, the majority thought the woman having no existing skill base and other children to care for were the predominant reasons for the economic disparity between the couple. This sentiment was expressed by solicitor, SOLINV30, when he said:

[SOLINV30] To me … this is a fairly clear set of facts … the main cause of the disparity is she came in with nothing and of course she already had the other children. So it has not helped her to be able to advance any further that she had to attend to the child care but I do not think that this is a huge thing. She had no skills to start with and had the need to care for the children … would have contributed to it but the fact she came in with no skills is the most significant factor.

Another solicitor expressed a similar opinion and said “she has a lack of skill set that is unrelated to the relationship and … three other children from a previous relationship and so this lacks the causal nexus with this relationship” (SOLTAUR22).

According to solicitor SOLHM21, “the fact that she is uneducated … he is probably not educated but he has a skill … and the ongoing issues with the child” are the reasons for the economic disparity. Barrister BAK5 explained: “Her lack of qualifications, his irregular
work, too many children and not enough money and one child having severe health and behavioural issues” are the reasons for the disparity.

Many of the group did not think the jurisdictional hurdles of section 15 could be established. Because of this, vignette two’s remaining questions were omitted from these interviews.

**The participants’ views on the whether it is ‘just’ to make a compensatory payment to the woman**

Figure 5.28 Graph results vignette two, from the question: In your opinion is it ‘just’ to make a compensatory payment to the woman? Yes and No answers

The majority of the participants thought a section 15 compensatory payment to the woman was unjustified because the jurisdictional tests contained in section 15 were not met on the facts.
The participants that thought a compensatory payment to the woman should be made were mixed in their opinions regarding the payment. For example, while the Judge indicated that an award should be made, he ranked the importance of making an award at 3 and said that really it is “probably not justified” on the facts.

The QC considered wider contextual issues including the impact of the award on the man and explained:

[QC] There is not much money there from which to make a payment even if you did not [make a section 15 payment] she would be relying on State assistance. If you give her an extra $50,000 it is not going to make a huge difference to her life. But it would make a huge difference to him, having to pay it.

The impact that the award would have on the man was also considered by another participant. BAK6 considered it somewhat important to make a compensatory payment to the woman, ranking it at 6 and commented: “If the payment is too big then it may not be just.” (BAK6 thought an award of $10,000 appropriate.)

Auckland barrister BAK4, thought it extremely important to make an award (being the only participant to rank the importance at 10). BAK4 thought an award of $30,000 appropriate and
said if the \( X \) \( v \) \( X \) methodology was used then there \textquotedblleft would be no award\textquotedblright. For BAK4 this illustrates one reason why the methodology of \( X \) \( v \) \( X \) is flawed.

**The participants’ opinions regarding the compensatory award**

![Graph showing frequency and range of compensation](image)

**Figure 5.30** Graph results vignette two, from the question: How much a compensatory payment to the woman should be

Figures 5.29 and 5.30 indicate that the participants had mixed approaches to the interpretation of section 15 and there was also a divergence in their interpretation of vignette two’s facts (remembering that 13 of the participants did not answer this question because they did not think the jurisdictional tests of section 15 were met). This highlights a problem for the wider community. If these results are indicative of the wider legal community\(^{331}\) there must be widespread divergence in legal opinions regarding economic disparity claims and, on the basis of the group’s mixed interpretation of vignette two, there would be significant divergence in legal advice given to the public. The range was from no compensation to four members of the group thinking that over $30,000 should be paid to the woman.

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\(^{331}\) There is no reason why this would not be the case. Qualitative research methodology was used to understand how and why decisions regarding section 15 were made by legal professionals. There is little reason to assume that this group is not representative of the wider New Zealand legal community practising in the field of relationship property law.
The participants’ views on the significance of the economic advantages obtained by the woman resulting from the man’s contributions to the relationship and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman

![Graph](image_url)

Figure 5.31 Graph results vignette two, from the question: How much the economic advantages obtained by the woman resulting from the man’s contributions to the relationship influenced your decision whether it was ‘just’ to make a compensatory payment to the woman (on a scale of 1 to 10)

Participants did not provide additional comments in respect of this question.
The participants’ views on the significance of the economic advantages obtained by the man resulting from the woman’s contributions to the relationship and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman

![Graph results vignette two](image)

Figure 5.32 Graph results vignette two, from the question: How much the economic advantages obtained by the man resulting from the woman’s contributions to the relationship influenced your decision whether it was ‘just’ to make a compensatory payment to the woman (on a scale of 1 to 10)

The results of the question were mixed. Some participants thought that the woman’s contributions meant that the man was “freed up to work” (BAK7). For others the existence of the three children that the woman brought into the relationship meant there could never be any economic advantage to the man because it was thought that these children were a drain on the man’s financial resources (for example BAK5 thought this).
The participants’ views on the significance of the economic disadvantages incurred by the man resulting from the relationship and whether they influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman.

Figure 5.33 Graph results vignette two, from the question: How much the economic disadvantages incurred by the man resulting from the relationship influenced your decision whether it was ‘just’ to make a compensatory payment to the woman (Significance ranked on a scale of 1 to 10)

Generally the participants had very little to comment on in respect of this question. Auckland barrister BAK5 ranked the significance of the economic disadvantages at 10 and said “there are too many children”.

The participants’ views on the significance of the economic disadvantages incurred by the woman resulting from the relationship.
Participants did not comment on this question.

**The participants’ views on the significance of the likely future earning capacity of woman and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman**

![Graph](image)

**Figure 5.35 Graph results vignette two, from the question: How much did the woman’s likely future earning capacity influence your decision whether it was ‘just’ to make a compensatory payment to the woman? (on a scale of 1 to 10)**

The majority’s view was that the woman had no future earning potential as such this was not an issue they provided further comment on.
The participants’ views on the significance of the likely future earning capacity of man and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman

![Graph](image.png)

Figure 5.36 Graph results vignette two, results from the question: How much did the man’s likely future earning capacity influence your decision whether it was ‘just’ to make a compensatory payment to the woman? (on a scale of 1 to 10)

Many participants did not comment on this question. As the results indicate, those that answered this question thought that the man’s future earning potential was somewhat significant. No doubt this was due to the fact that the man’s earning potential as a fisherman was greater than the woman’s (being on the domestic purposes benefit with the care of children).
The participants’ views on the significance of the woman’s ongoing care of the child and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman.

Figure 5.37 Graph results vignette two, results from the question: How much did the woman’s ongoing care of the child influence your decision whether it was ‘just’ to make a compensatory payment to the woman? (on a scale of 1 to 10)

The care of the child was seen as a relevant factor because of the ongoing health issues of the child and the nature of the man’s work. As a fisherman he would be away for periods of time, during which the woman would be solely responsible for the child.
The participants’ views on the significance of the length of the relationship and whether this influenced their decision regarding whether it was ‘just’ to make a compensatory payment to the woman

![Graph results vignette two](image)

Figure 5.38 Graph results vignette two, from the question: How much did the length of the relationship influence your decision whether it was ‘just’ to make a compensatory payment to the woman? (on a scale of 1 to 10)

The participants had a mixed response to this question. Generally the group did not comment on the question.

**The participants’ views on whether an award of maintenance should be made**

![Bar graph](image)

The participants' views on whether an award of maintenance should be made.
Figure 5.39 Graph results vignette two, results from the question: Whether a maintenance award should be paid to the woman.

The majority (20 members) thought maintenance should be awarded.

Table 5.4 collates the responses as to whether maintenance should be awarded and indicates the responses given regarding the section 15 award. The results indicate the wide divergence between legal professionals regarding whether maintenance should be paid and whether section 15 compensation should also be paid. For those that thought maintenance should be paid their opinions were varied regarding the amount of the award and the duration.

Table 5.4 Table of results vignette two: Participants’ opinions regarding maintenance, indicating the amount of the award and duration of the payments linked to their opinion on economic disparity compensation

<table>
<thead>
<tr>
<th>Identifying tag</th>
<th>Should maintenance be paid?</th>
<th>How much?</th>
<th>For how long?</th>
<th>Comments (regarding maintenance)</th>
<th>Opinion on section 15 award (economic disparity compensation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>Yes</td>
<td>Did not indicate</td>
<td>Did not indicate</td>
<td>Maintenance should be paid or a section 26A award.</td>
<td>The Judge was of the view that the facts did not justify an award under section 15.</td>
</tr>
<tr>
<td>QC</td>
<td>No – s15 award is better.</td>
<td>Not applicable</td>
<td>Not applicable</td>
<td>Maintenance is not appropriate – the man is not earning enough money.</td>
<td>The QC thought a section 15 award would be appropriate and explained she “would not award spousal maintenance … he</td>
</tr>
</tbody>
</table>

332 A s26A award delays the winding up of the parties’ property. This provision is at odds with the clean break principle. Under s26A, introduced in the 2001 reforms, the Court is given the power to postpone the sharing of all or any part of the property. The power is very restricted – it can only be for the benefit of a parent who is the principal caregiver and the criterion for its use is “undue hardship”. There must also be a time limit put on the order – this is by reference to either a date or a specified event. See Bill Atkin and Wendy Parker Relationship Property in New Zealand (Second Edition, LexisNexis, Wellington, 2009) pages 256-257. Professor Bill Atkin and Wendy Parker note the courts’ reluctance to use this provision and ponder “quite why anyone would try to use s26A” rather than other remedies such as s33 (a power that enables the Court to order the interim sale of an item of relationship property and deal with the proceeds).
… does not earn enough money”. The QC would say to the man “that the price for you … is $20,000”.

<table>
<thead>
<tr>
<th>BAK1</th>
<th>No</th>
<th>Not applicable</th>
<th>Not applicable</th>
<th>Maintenance is not appropriate – the woman is on the domestic purposes benefit and she is better off on it. An award of maintenance may interfere with the woman’s benefit. BAK1 thought that a section 15 award should be made.</th>
</tr>
</thead>
<tbody>
<tr>
<td>BAK2</td>
<td>Perhaps</td>
<td>Did not indicate</td>
<td>Did not indicate</td>
<td>From a practical perspective, BAK2 felt that, for a woman in this situation, she is better staying on the domestic purposes benefit. That way she knows she will get some income. BAK2 thought that a section 15 award was probably inappropriate.</td>
</tr>
<tr>
<td>BAK3</td>
<td>Yes</td>
<td>$300 per week</td>
<td>To be reviewed in 12 months (but should be paid at least until the youngest child commences school). BAK3 said that the man has “an obligation to support the mother of his child”. BAK3 did not think a section 15 award was appropriate.</td>
<td></td>
</tr>
</tbody>
</table>
| BAK4  | Yes  | $250-300 per week | For 2 years | BAK4 thought it was extremely just to make a section 15 award and ranked it at 10 on the scale. An award of $30,000 was
<p>| | | | | |</p>
<table>
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<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>BAK5</td>
<td>No</td>
<td>Not applicable</td>
<td>Not applicable</td>
<td>BAK5 felt that the man has no money anyway – so it is not fair to make him pay maintenance. BAK5 thought a section 15 award was justified (ranking it at 8). An award of $50,000 was appropriate.</td>
</tr>
<tr>
<td>BAK6</td>
<td>It is a possibility</td>
<td>Perhaps $100 per week</td>
<td>No longer than 2 years</td>
<td>BAK6 thought that the woman is unlikely to be able to meet her reasonable needs from her income (on the Domestic Purposes Benefit) and “the State should not have to foot the bill completely”. BAK6 thought a section 15 award was appropriate – but the award “should not be too big because if it was then it would not be just”. $10,000 would be appropriate.</td>
</tr>
<tr>
<td>BAK7</td>
<td>Yes</td>
<td>$100 per week</td>
<td>For 5 years</td>
<td>BAK7 said that “even though the woman has no skill base – her ability to work is inhibited by the child.” BAK7 thought a section 15 award was appropriate – of around $20,000.</td>
</tr>
<tr>
<td>BHM8</td>
<td>Yes</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>BHM8 thought this was a “clear case for a maintenance application – it is better than going for an economic disparity claim”. BHM8 thought an economic disparity claim inappropriate.</td>
</tr>
</tbody>
</table>
| BCH9 | No | Not applicable | Not applicable | BCH9 thought it would be “difficult to award” a section 15 award greater than $30,000 was
<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BCH10</strong></td>
<td>Was not sure if maintenance really applied.</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>BCH10 thought that the relationship between section 15 and maintenance was difficult: “the two do not dove-tail neatly together.”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>BCH10 thought perhaps maintenance should be paid – “because the man is away at sea often and the child has health issues”.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>BDUN11 thought the facts of this case do not “fit within section 15” because the statutory requirements of the provision are not met.</td>
</tr>
<tr>
<td><strong>BDUN11</strong></td>
<td>Yes</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>BDUN11 thought that if the woman could satisfy the reasonable needs threshold then maintenance should be awarded.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>BDUN11 thought a section 15 award important and felt that $40,000-$50,000 was appropriate.</td>
</tr>
<tr>
<td><strong>SPRACTNEL12</strong></td>
<td>Yes</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>Thought maintenance was appropriate.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Considered that maintenance was a better option than a section 15 award.</td>
</tr>
<tr>
<td><strong>SPRACTWEL13</strong></td>
<td>Yes – “but it depends.”</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>Said that the “man is not a big earner” and the Felt that an economic disparity award</td>
</tr>
</tbody>
</table>
woman may also be getting child support and is probably better off on the domestic purposes benefit (the court may not award as much as this benefit). The woman may also be able to get supplementary benefits as well (these may amount more than the court would award).

<table>
<thead>
<tr>
<th>Name</th>
<th>Assessment</th>
<th>Amount</th>
<th>Duration</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPRACTWEL14</td>
<td>It is a possibility</td>
<td>Could not give an indication</td>
<td>Could not give an indication</td>
<td>From a practical perspective she is probably also getting child support from the other fathers of the children: so she may be better on the domestic purposes benefit and receiving child support.</td>
</tr>
<tr>
<td>SPRACTNEL15</td>
<td>Yes</td>
<td>$80 per week</td>
<td>2 years</td>
<td>SPRACTNEL15 thought it important that maintenance did not interfere with the woman’s domestic purposes benefit. SPRACTNEL15 thought a section 15 award of less than $10,000 appropriate.</td>
</tr>
<tr>
<td>SOLNOR16</td>
<td>Yes</td>
<td>Thought a lump sum amount from the man’s capital was appropriate</td>
<td></td>
<td>SOLNOR16 thought the man did not have a “great deal to give”, because SOLNOR16 thought he would aim for a lump sum maintenance payment rather</td>
</tr>
</tbody>
</table>
because of the limited information. He was unable to specify the amount.

the woman was on the domestic purposes benefit “she is probably better off than him”.

There were two elements in SOLNOR16’s rationale:

(i) The 50% of the relationship property received by the woman gives her capital to purchase a small house – (dependent on where in New Zealand), meaning a “nice life – with access to good schooling.”

(ii) Thought it “very corrosive” on the relationship if a weekly amount were taken from the man. He is probably better able to pay from his capital rather than “ongoing payments”. The woman needs his support – all that can be done to preserve the relationship should be. SOLNOR16 was than a section 15 award.
<table>
<thead>
<tr>
<th>SOLAK17</th>
<th>Yes</th>
<th>$100 per week</th>
<th>2 years</th>
<th>SOLAK17 felt that ongoing payments are probably better than a lump sum payment for both parties.</th>
<th>SOLAK17 said that maintenance is a better option than a section 15 award.</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOLAK18</td>
<td>Probably not</td>
<td></td>
<td></td>
<td>SOLAK18 said that: “in an ideal world the woman should get maintenance but because she is on the benefit it is better to stay on it and not claim maintenance.”</td>
<td>SOLAK18 said that the jurisdictional tests of section 15 were not met as such there should be no section 15 award.</td>
</tr>
<tr>
<td>SOLAK19</td>
<td>Yes</td>
<td>$150 per week</td>
<td></td>
<td>SOLAK19 said that a court would award maintenance but not a section 15 award.</td>
<td>SOLAK19 felt that a section 15 award of between 5%-10% of the relationship property was justified ($10,000-$20,000).</td>
</tr>
<tr>
<td>SOLAK20</td>
<td>Yes</td>
<td>$80 per week</td>
<td>Not given</td>
<td>SOLAK20 thought maintenance should be awarded because the woman’s situation “falls”</td>
<td>SOLAK20 said “this woman should probably get a section 15 payment” but it is unlikely she would get one as</td>
</tr>
</tbody>
</table>
fair and square into the grounds for an award of maintenance – her lack of ability to work and her care of the child these all set her in the grounds for an award of maintenance”. SOLAK20 thought maintenance of $80 per week – so the Domestic Purposes Benefit would be unaffected.

<table>
<thead>
<tr>
<th>SOLHM21</th>
<th>No</th>
<th>SOLHM21 felt that the woman will be getting “sufficient government help” and on the man’s wage paying maintenance would be very difficult for him. SOLHM21 said that there should be no section 15 award.</th>
</tr>
</thead>
</table>

<p>| SOLTAUR22 | Yes | $150-$200 per week | SOLTAUR22 felt that the woman should receive a maintenance award. Their child has severe health and behavioural issues and these factors impact on the woman’s ability to work, cautioning care was needed when SOLTAUR22 thought there should be no section 15 award. If she was advising she would consider it in terms of section 15 but would struggle to find the necessary causal nexus. |</p>
<table>
<thead>
<tr>
<th>SOLTAUR23</th>
<th>A slight possibility of maintenance.</th>
<th>Could not give an amount</th>
<th>SOLTAUR23 said that the woman receives child support, this impacts on maintenance.</th>
<th>SOLTAUR23 thought that a section 15 award of less than $10,000 was justified.</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOLWEL25</td>
<td>Probably not</td>
<td></td>
<td>SOLWEL25 would consider “all the dynamics of the relationship”. If a maintenance claim was advanced, this might mean “setting the woman up for a whole lot of hurt”.</td>
<td>SOLWEL25 thought that there should be no section 15 award.</td>
</tr>
<tr>
<td>SOLWEL26</td>
<td>Yes</td>
<td>Could not give details</td>
<td>SOLWEL26 thought the woman would have 100% care of the special needs child. The man is a fisherman (due to the nature of work he is away for days, weeks or months on end). These are factors that need to be taken into account when considering maintenance. When the man is</td>
<td>SOLWEL26 felt that there should be no section 15 award.</td>
</tr>
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</table>
at sea most of his living costs would be paid – this is another relevant factor.

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<thead>
<tr>
<th>SOLNEL27</th>
<th>Not worth it</th>
<th>SOLNEL27 said that any award of maintenance would probably be a “piss poor amount”. For this reason the woman was probably better off staying on the Domestic Purposes Benefit.</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOLNEL28</td>
<td>Yes</td>
<td>SOLNEL28 said “this is a hard one – because the woman’s on the Domestic Purposes Benefit”.</td>
</tr>
<tr>
<td>SOLDUN29</td>
<td>Yes but it is “borderline” whether this should be made. Not much Not long</td>
<td>SOLDUN29 thought maintenance should be considered but it is “borderline, the man will pay child support and with a section 15 payment he will be left with little money”.</td>
</tr>
</tbody>
</table>
| SOLINV30 | Yes, there is an argument for it Not much Not long | SOLINV30 said “Maintenance would be a very modest leg up” of short duration. “The man will struggle as well. The system is not geared for people 
The mediator said: There is little disparity between the couple – “she never could have earned any money”. This is a “disaster case and there is no incentive on the guy to do anything for them”.

<table>
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<tr>
<th>MEDIATOR</th>
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Chapter 5

Interviews: General discussion of section 15 and economic disparity issues

The questions contained in part C of the interview are open-ended, permitting participants to express themselves freely by drawing out their experiences and concerns with the aim of understanding what section 15 means to them in practice. See Appendix 4 for the complete questions. From this, patterns and a deeper level of awareness of the impact that the Act and section 15 has had on economic disparity emerge, the intention being that the void in our knowledge regarding the implications of section 15 can begin to be filled.

Initially it was not envisaged that people outside the legal profession would be interviewed, but as the research progressed a void in our knowledge regarding the impact of section 15 was evident and this could only be addressed by expanding the sample group to include accountants. For example the legal professionals referred to accounting experts’ significant role within New Zealand’s interpretation and application of section 15. It is to the accounting experts that the legal professionals look to make sense of section 15.333

For example, Auckland barrister BAK5 explained that pursuing an economic disparity claim requires extensive input from forensic accountants and expressed unease regarding the “prohibitive cost of the financial reports”. BAK5 discussed how she had recently contacted forensic accountants to prepare financial reports for a client. The end result was her client would not pursue an economic disparity claim. After completing a cost-versus-benefit analysis of the potential claim, the conclusion was section 15 was not an economic argument to make. A report of the nature required by the New Zealand Courts334 would cost $16,000 and this amount was “the cost to get them to open the books” (BAK5).

BAK5’s comments regarding the cost-versus-benefit analysis are not unique: many practitioners perform a similar balancing act. Practitioners also discussed the high emotional costs to their clients and the family unit associated with economic disparity claims. These emotional costs include the distress of hearing experts’ opinions on the value of an individual

333 Because the provision does not stipulate how the quantum of an award is calculated there is a void which must be filled – presently it is filled by reference to what the economically disadvantaged party has lost – in respect of a career foregone. The accounting expert establishes the ‘cost’ to the economically disadvantaged spouse – on the basis of what they would have earned but for time spent out of the paid workforce caring for the family.
334 This is BAK5’s opinion and experience of the type of evidence that is required by the courts.
(when the value of the lost career is calculated). An Auckland barrister said the legal profession’s approach to economic disparity claims means:

[BAK3] We are re-introducing a fault based inquiry but through another name ... it is so bloody demeaning isn’t it? You know that whole bloody thing when you say ‘oh no she was bloody useless’ but then she says ‘but I could have been the CEO.’ … we … say ‘well you were not really any good you were made redundant’. It is character assassination.

Senior barrister BAK2 spoke of the predicament practitioners face when attempting to apply section 15 and reconcile the provisions voids:

[BAK2] There is no guide at all for calculating the quantum of awards. Robertson J says why do you need all this evidence? And you think well it is all right for you but how else are you going to work it out?

Practitioners spoke of problems created by accountants. One solicitor said:

[SOLTAUR22]… the accountants have hijacked this as we have bought into the fact that there must be a formula to sort this out and the courts when you … stand back and look at the cases and awards they have really deferred their decisions to the accountants. They talk of this broad brush approach but I do not think that you really see that. You know, when you look at the cases and the awards they have really deferred their decisions and their discretion to the accountants ... you know that there are, we all know, and I have used them myself, whole firms of accountants that have made a living out of this.

For these reasons it was important to extend the study group beyond legal professionals to enable an insight into the accounting experts’ experience of economic disparity claims and also to understand the experience of claimants under section 15. Much of the information gathered from the contextual study group is examined in chapter 5.
Question One: The main problems that practitioners experience when they advise clients about the possibility of a section 15 claim

The first question that participants were asked in this section of the interviews was “what are the main problems with advising a client about the possibility of a section 15 claim?”

Participants’ views on the main problems when advising a client about the possibility of a section 15 claim:
Figure 5.40 Graph of the problems identified by practitioners when they are advising clients regarding section 15 and the possibility of a claim
After the results of the interviews were reviewed the responses were collated into groups relating to the common themes that emerged. These themes were as follows.

**The high cost**

Thirty members of the legal professional group identified problems with high cost associated with economic disparity claims. As Figure 5.40 indicates the problem of the high cost of an economic disparity claim was an issue over 90 percent of the participants referred to.

The costs have become a significant hurdle for potential claimants, meaning in practice the option of bringing an economic disparity claim is “only available to the rich” (BAK5). If there is little relationship property then, from a practical perspective, the justification of an economic disparity claim is purely academic. A claimant may win in principle, but the effect of the win may mean nothing because the claim’s costs outweigh the monetary benefit of an award. Often there is not enough relationship property to “warrant the argument and the additional legal fees … it would be an expense incurred that may not warrant the additional work” (BCH10).

Another solicitor said:

>SOLAK17] The cost of arguing it … I mean is it worth it? Particularly when the pool of relationship property is modest, I mean are you going to spend thousands and thousands on it? Even if you are successful the award will probably be so small you think is it really worth it? You need to weigh this up.

The other aspect was the high emotional cost and stresses on the family unit associated with the financial costs of economic disparity claims. This is something that the profession factors into their advice to clients. An Auckland barrister tells clients:

>BAK1] Go forth and go to court but why give the money to me? Why not give it to your family? Do you want to spend the next five years of your life in some sort of limbo? While you are paying lawyers and accountants and hating your life and everyday thinking that the mail is going to come and with it a letter and you want to take

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335 One interesting aspect to this was the family court judge was one of the few members of the study group who did not identify the high cost of bringing a section 15 claim as being a problem. Perhaps this is because the judiciary is one step removed from the day-to-day practical aspect of how section 15 affects people. The legal and accounting costs would not be something they have firsthand knowledge of.
out a new lady and you are boring her with all your tales. These are all of the kind of intangibles that you build into your advice.

Most practitioners complete a cost versus benefit analysis regarding any potential economic disparity claim, weighing the cost of bringing a claim against the likely award. This was seen as problematic due to a widespread sense of uncertainty regarding what a court may award. The “uncertainty” of section 15 was a “huge problem” and this contributes to the high costs associated with claims (SOLNEL28). An Auckland barrister explained:

[BAK4] The other thing you think of is what the cost will be to run the bloody thing and you think you are looking at a sum of $240,000 as the top award and you think why. It is just not economic to run it.

Another Auckland barrister, BAK5, said the “cost of achieving it and especially the accounting costs” are “prohibitive”. A solicitor said that “the cost of compiling a case is prohibitive” (SOLDUN29). BAK5 said the financial reports are necessary because each time you take action under section 15 you are required to get these reports. She gave an example of a matter she was involved in where the accounting costs associated with an economic disparity claim were “substantial … $75,000”.

Participants discussed the difficult situation economically disadvantaged parties face when deciding whether to bring a claim, because there are substantial costs involved with bringing section 15 claims. These costs become insurmountable hurdles. Claimants are often not earning money and have limited financial resources unlike the economically advantaged party who is often still earning an income. One solicitor said:

[SOLNEL28] The … problem is the practical cost of actually realizing any entitlement … my observation is that if you advise the wife that she has an entitlement … the husband thinks that it is bollocks. So you are either embarking on really lengthy negotiations or court proceedings and if the husband has all the money in the world to throw at it then you have a problem.

**The contextual study group’s views regarding the high financial costs of bringing a section 15 claim**

The claimants were frank regarding the high financial costs associated with section15 claims. Claimant one felt she had the “good fortune” to engage a barrister happy to be paid at the end
of the trial. Her barrister felt passionately about her case and “wanted to help with it because she saw it as a way she could put something back into the community”. The impact of the financial cost on the claimant was severe. While her husband’s maintenance payments to her were “considerable” she explained all of these payments went on paying the costs involved with the trial, she spoke of “the huge money involved, legal fees, accountant fees, and then if you lose and have to pay all those costs. It makes it all so stressful”.

The claimant’s fees (legal and accountancy costs included) were approximately $200,000. She said the “whole financial ramifications struck me” and “when you see the legal fees mounting up it is frightening”.

The costs involved with bringing an economic disparity claim were also problems the forensic accountants and actuary noted. Auckland accountant ACC1 reinforced the concern expressed by the legal professionals: “The average award is relatively low and the cost of litigating is too high.” The other accountant ACC2, said really it is “only the rich that can argue it [economic disparity]”.

In accountant ACC1’s interview the principle that questions regarding relationship property, arising under the Property (Relationships) Act, should be decided as “speedily, simply and inexpensively as is consistent with justice” was discussed. ACC1 said in practice: “Well that does not happen does it?”

In the interview with the court psychologist the high cost of a section 15 claim was discussed. The psychologist commented on the negative impact of high legal fees on those involved with ongoing relationship property disputes. She explained:

[PSY] A lot of it is about the quality of the legal advice … around the relationship property … because some … lawyers are … really litigious and will … keep people fighting … and when they do not settle then you get more and more fees … when this happens you just watch your lawyer’s fees click $60,000 to $70,000 … and it is all just ongoing and they do not resent the lawyer they end up resenting the other person.

336 Interestingly the actuary explained how he prices economic disparity opinions; in general, his opinions cost a client less than $1,000. On the basis of the legal professional’s opinions this is substantially less than the forensic accountants’ charges.
337 IN(c) The Property (Relationships) Act 1976.
They see the other person as responsible for taking that other money away from them because if only they were reasonable and gave them the settlement that they were entitled to then this would not be happening so the longer it goes on the more money goes out … there is a deterioration in the relationship over time and the problem is that the children are stuck in the middle of all of this. Because by the time they have got all of this through then the ability to co-parent is in … absolute shreds and then … you get this micro-managing of each other’s finances ever after, you get … if you can take them to Fiji then why can you not pay such and such? … there is a real resentment … money is going out to pay lawyers’ costs and it is absolutely debilitating … you get this real culture of fighting over the money.

The uncertainty of outcome

The next major problem identified by the group was the sense of uncertainty regarding possible outcomes of economic disparity cases. The legal professionals explained that the uncertainty they perceived in practice existed on a number of levels. These include:

- Understanding if a claim meets the jurisdictional tests of section 15;
- Understanding the methodology employed in $X v X$. For example how far into the future should projections be made regarding future income? (Or, the correct place of “the sliding door evidence”338 involved with section 15 (QC));
- Whether an economic disparity claim can be made by a party without a pre-existing career. If there is no existing career path then there is a problem regarding how the quantum of an award is then calculated. The dilemma being how one establishes the cost to the claimant when there had been no loss of a career opportunity;
- Establishing alternative methods from the $X v X$ methodology that can be used for calculating a section 15 award; and
- If an economic disparity claim is successful what amount will be awarded. Practitioners said there are “no clear guidelines as to the amounts to be awarded.”339

One practitioner, BAK6 stood out from the group of participants because she did not perceive any real problem around the uncertainty of the awards made under section 15. She thought

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338 The sliding door reference made is a reference to the film “Sliding Doors” and the premise of alternate path life could have taken if one event had transpired differently.
339 SOLAK19.
that in respect of the amounts of the awards, “you can dash those out pretty quickly and easily” (BAK6).

**The legal professionals’ views regarding the uncertainty of section 15**

The Judge’s first comment was that “the uncertainty of outcome” was a problem with section 15 claims. The QC agreed and said that there was “uncertainty around the section and what actually should the results be”. The QC indentified problems relating to the nature of the evidence required to bring a claim. She said it is:

[QC]... the whole sliding door scenario, you are crystal ball gazing … you are trying to say if I had not had children I would have been the prime minister or … charge nurse or CEO. It is just very difficult to get a grip on that … this is not always … I have a registered psychologist at the moment and they work on a pay scale in the public sector so there is like X number of years you get X amount.

Or think about people who leave when they are still an employee but had the ability to set up their own firm or buy into the firm. But you are not sure whether they could have made it … but then neither are they … they do not know. So it becomes nasty. It questions the character.

The problems of sliding door scenarios and the consideration of the numerous projections section 15 requires lawyers, barristers and the judiciary to make was a theme spoken about by practitioners. Most thought it problematic. One barrister said: “how does one determine how far into the future the relevant time frame is?” (BAK5). BAK5 discussed the projection made by the majority in *X v X*, and thought it problematic to make forecasts twenty-one years into the future: “How can one make these estimations on something so far into the future? How can you do it?” (BAK5).

Another barrister, BAK1 explained how the uncertainty of section 15 means it is hard to give advice to clients and said “the law is all over the place” and this was why in out-of-court relationship property settlements “you get the one off settlements”. The uncertainty also affects clients and the public. The barrister said: “by and large New Zealand men have their head around the fifty-fifty but explaining this [economic disparity] to them is the big issue ” (BAK1).
The uncertainty regarding what amount an award might be for is a serious problem for practitioners when they are advising clients. An Auckland barrister said:

[BAK2] In respect of the amounts … when you are interviewing a client … it is a real test, they expect it off the top of your head. And part of the problem is your sense of what is not recorded in the judgments the sense of where a court might go or how other lawyers are conceding in mediations.

A Wellington solicitor reflected this sentiment: “I would like to know what to advise my clients. The quantum is the real killer” (SOLWELL25). For participants, the uncertainty of the courts’ decisions was troublesome and this creates problems when they advise clients because of “the uncertainty of what the court may do” (BCH9). A solicitor explained that the uncertainty about what may be awarded meant:

[SOLNOR16] … the less there is [in the relationship property pool] the harder it is … to have confidence that you are going to get anything. The more disparity between what you might spend as opposed to what you might end up with on a bad day … up north we do not have huge pots of gold that we are chasing … my concern is, it is unpredictable. This unpredictability has ramifications when you are trying to help someone work out what they may get and how much they would have to spend on it. … New Zealand law was great for its relative predictability … the reform … was a retrograde step. It is like how long is the Chancellor’s foot? … there is a lot to be said for the predictability.

For another solicitor the uncertainty means there is an:

[SOLAK17] … inability to give … [clients] clarity … on whether or not they will be successful, you cannot even give them a fifty-fifty odds or a seventy-thirty. It is frustrating it is … a fly in the ointment … it is a thing out there that needs to be dealt with, if there is any possibility at all of it, but you cannot give anyone any certainty on it.

The sense of uncertainty regarding section 15 and the impact of the uncertainty on practitioners in their work was a general theme canvassed in most of the interviews. One solicitor said: “There is great uncertainty. It is like how long is a piece of string?” (SOLAK20). Another solicitor said the uncertainty meant: “section 15 claims are a gamble … you end up thinking … is the money better spent on other arguments?” An experienced
Auckland barrister, BAK5 spoke of the “unpredictable outcome” of court decisions, and that this was something she “was not prepared to put her clients through”. BAK5 asked: “how do you predict a section 15 settlement?” explaining how this great uncertainty means it is difficult to advise or give any sense of assurance to clients.

The fact that the court decisions offer little assistance to practitioners when they are advising clients was also discussed. For many of the group the decisions reinforce the sense of uncertainty surrounding section 15. A barrister said: “You know after all my years in practice you can find a Family Court decision saying or supporting any idea that you want and you can find a High Court decision that counters most of them”(BCH9).

The sense of unpredictability was explained by a solicitor:

[SOLWELL25] Everyone does argue them [section 15] but we do tend to settle them … you could have a wife who goes to lawyer A and a husband goes to lawyer B both tell them exactly the same story but each lawyer will have a different view on the facts … for most people it is like, bloody hell I am not going to pay her anything, why should I? She chose to stay at home with the kids … it is always like this big elephant in the room, you cannot tell anyone exactly what it is going to be … it is all … like the court could take this into account or that into account it is … arguable both ways. I wish we just had a formula.

**The contextual groups views regarding the uncertainty of section 15**

The accountants were concerned about the uncertainty surrounding section 15 and one accountant suggested that some judicial intervention was required to clear the ambiguity that exists. He thought:

[ACC2] The judges should be putting out a few hypothetical answers … this gives … some guidelines … as a society we are paying for the courts, this is just a disaster. Justice means that it should be quick and cost effective. The more guidance you get from a court then the more likely the judges are … comfortable with giving an answer. At the moment they are not. But if you have not got any certainty from the courts then you are going to give a waffly answer that says it might be this or it might be this.
Another accountant was aware of an inherent uncertainty within expert opinions explaining how he adapts his practice to mitigate some of these more negative effects. ACC1 said:

[ACC1] When I am reviewing the other side’s case I will look at the reasonableness of the calculations … and then try and modify those rather than put forward a completely different set of facts … this helps the parties negotiate a settlement rather than ending up with two different opposing views … one hundred miles apart.

The Claimants both discussed how it felt for them when their legal representatives tried to determine the amount of potential section 15 awards. Claimant one said it was “all so uncertain” and this uncertainty created additional stresses. The uncertainty meant that expert evidence was used to fill the voids in the legal opinion and support the legal arguments. This required the payment of additional accounting fees and to incur these expenses in pursuit of an uncertain award was a dilemma for the claimant who said that “it was all so hard and stressful … at times I felt like giving up”.

The psychologist, whose practice includes people in the context of ongoing relationship property disputes, discussed the negative effect uncertainty associated with the law has on individuals and the family unit and explained how financial uncertainty means people are stopped from:

[PSYCHOLOGIST] … adjusting because the parent does not know what is happening. It is like … if I can get this amount of money … then I can buy X … do I keep trying to keep the children in private schools because if I get the money then I can do it … everybody is in this really odd transition … many women … struggle to know what kind of work position they should have … you get the flow on effects … children … have a huge sense of loss … and sense of uncertainty.

The legal professionals’ views regarding the negative effect of section 15 claims on individuals and families

Many of the participants had opinions on the detrimental effect of an economic disparity claim on the individual and the family dynamic. Twenty-one of the legal professional study group said this was a problem when advising people.
One barrister was direct regarding this negativity, and explained she calls section 15 her “fuck off provision” (BAK5). Economic disparity claims are “seen as punishment” (BAK4). If BAK5 acts for a wife and mentions section 15 the response to it is frequently “fuck off”, she explained:

[BAK5] Often a husband feels they have worked hard for the economic benefit of the family and the wife and he cannot understand why he should have to pay the wife anything further than the fifty-fifty split that the Act provides for … it is like rubbing salt into the wounds.

A solicitor explained economic disparity claims impact negatively on the couple. This means additional costs and delays:

[SOLAK20]... because in my experience husbands rarely say ‘well there is no need to raise section 15 arguments because I was going to offer that anyway’. It is the one thing that is going to make an otherwise amicable settlement go to court. Husbands just do not like it. As soon as you talk about section 15 you are talking about court and this means costs and delays.

Participants also commented on the negative aspects of a fault-based inquiry that many believe economic disparity claims are founded upon.340

The “human side” of the relationship property settlement and its impact on the future wellbeing of the family was imperative to participants. These concerns are contributing factors in the negotiation of relationship property settlements. Barrister BAK7 explains:

[BAK7] … think when there are children we want both parents to be able to provide an adequate home for them so by increasing the pay out to one are you then jeopardizing the other? You get the problem of a father only able to rent a one bedroom place. You cannot have a father sharing a bed with a ten to twelve year old girl. It is a real balancing act and you need to look at it in a holistic way rather than the others that are just dealing with the property they can be more hardnosed about it, where mostly I am dealing with the whole shebang.

340 BAK3 discussed this when he said “We are re-introducing a fault-based inquiry but through another name...it is so bloody demeaning isn’t it?”

BAK3 also mentioned the demeaning aspects of s15: explaining that it is demeaning and is seen as swinging back to the same sort of inquiry based on each party’s respective contributions to property that existed prior to the 1976 law reform of matrimonial property. The QC also said how it comes down to negative questions of character.
A barrister discussed the complex nature of judicial reasoning. He thought that much went into judicial decisions that the public do not necessarily see but it nevertheless shapes the judicial decision making process. When asked, the barrister explained his statement and gave the example of how judges consider the impact of their decisions on the whole family. He felt that this consideration created uncertainty because these intangible concerns of the judiciary are not written into the judgments and so they remain hidden from public view and scrutiny. He said judges are:

[BAK1] … very aware that if I as a judge was to give … a claimant a big pay out then … how that would affect the kids? You are going to feel really bitter while this does not factor into the written decisions it is still there … part of the bigger picture.

For the barrister this was part of the “bigger picture … the conservatism … if judges go out on a limb there are going to be some unintended consequences” (BAK1).

The contextual study group views regarding the negative effect of section 15 claims on individuals and families

Claimant one said how “demeaning the whole process was”. Recounting the day her husband left the family home the “income stream” generated by her husband left with him. The financial ramifications were immense. Her husband was able to keep his lifestyle but the claimant felt the legal system and lack of financial independence of women who are mothers “just makes us look like losers”. She said: “kids are so aware they go to their father’s home and realise he has a nice home it is much nicer and better than their mother’s … Mum you are the loser. Fathers are the winners … with the income”.

For the claimant the heart of the problem was “men see their income as theirs alone and they hate the wife having any of it”.

Economic disparity claims require inquires into the abilities of the couple and this is seen as demeaning. The claimant said how difficult it was for her to be the subject of projections regarding what she would have been worth in the paid workforce. She explained:

[CLAIMANT ONE] When we started we were both university students. We had absolutely nothing and so we built it all up together. He told me several times that I

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341 Arguably made worse by the retrospective nature of the current conceptual approach to the issue of the quantum of awards – focusing on the loss of the claimant’s career alone (what the opportunity cost was to the claimant).
did not need to work. Later on in court he said, after all the projections were made regarding what I would have earned in the workforce, ‘if I had known you were going to earn that much I would have been more insistent.’ But at the time during our marriage that was the decision that was made … when you divorce your history gets re-written … people say you could have done that you should have done this. But this is what I have so much trouble with is this whole rewriting of history and you get a judge saying or thinking ‘you know that you could have gone back to work’. Well how can that be right? … you cannot exchange situations with things that did not happen.

The problems with the “but for” tests/measures of compensation

Most of the legal professionals said the X v X methodology is a problem for them in their practices. The QC explained that if the economically disadvantaged partner does not have a career then you cannot make a claim, saying “section 15 is not only about them”. She thought that section 15 needs to work for “the average couple earning far less … the … people with a house and a mortgage”. Participants felt that it was not working for “average New Zealanders” and much of this had to do with the legal professions’ approach to the ‘but for’ test. It was felt that the ‘but for’ test means an economic disparity claim cannot be made unless the economically disadvantaged party has a pre-existing career which can be considered. An Auckland barrister explained how the ‘but for’ test works in practice so that claimants without an established career path are unlikely to be able to bring a claim, and said:

[BAK3] People who are not rich means … the claimant is unlikely to have established a career path … [the] ‘but for’ the career path how do you prove what has been lost? What if you were a checkout operator or a receptionist? … where is the career forgone?

Another barrister agreed and explained what he says to clients:

[BAK1] You know what I do with my clients is I talk about the two students at law school … they fall in love, get married and have babies. He goes on and becomes a

342 The reference to the “but for” test refers to the test – what would have been a claimant’s position but for the relationship and the division of functions assumed in the relationship.

343 See page 81 regarding the problems associated with establishing what is meant by the ‘average New Zealand family’.
partner in a big law firm and she has babies and she is then the suburban lawyer … [working] part-time.

But now they get this. So then I say well ‘that seemed too hard so I went and instead of marrying the beautiful law student I went downtown and married the florist assistant. And when I left I am a partner and she is still the florist assistant’. Sounds terrible, but you know, it shows you, think about the “but for” test, but for you, she would still have been a florist’s assistant.

One of the biggest problems within section 15 is the consideration of the causation test. Arguably the problem exists because the drafting of the provision is an incongruous fit with the background policy and genesis of the provision. As previously discussed section 15 does not fit neatly within the existing conceptual framework of the Act and nor does it within the wider social and legal framework upon which it has been grafted. These are issues that the participants frequently discussed. For example barrister BAK1 said how he had “read a lot of the policy papers” and section 15 as drafted “might not have been what Parliament intended”. Concluding that “the section [section 15] does not achieve what it set out to achieve” he said “I think that there was a failure of nerve that was compounded by a failure in drafting and the net result was that they have not got to where they wanted to go”. The causation hurdle within section 15(1) is a clear example of how the provision, as drafted, seems at odds with the policy behind the provision. The Parliamentary material and the reports of the Working Group and the Royal Commission, examined in chapter 2 of this thesis, were unambiguous in their findings that the lack of a career option and the potential to earn an income was recognised as being a significant economic handicap to the economically disadvantaged partner. That partner may have enabled the other partner to develop and maintain a career. Yet section 15(1) says that the economic disparity must be “because of the effects of the division of functions” within the relationship. So, the question is then, how else can the section be interpreted? The “but for” causal nexus must be read into the provision. Adopting too wide an interpretation to the provision means that there is a danger of actually going outside of the wording of the provision. The argument is that, because of the drafting of section 15, economic disparity claims are limited to those claimants that have given up a

\textsuperscript{344} In saying that section 15 does not fit within the conceptual framework of the Act what is meant is that the Property (Relationships) Act 1976 is a property focused Act that has rules and presumptions for the sharing of property (see Part 4 of the Act). Section 15 is a discretionary scheme which is compensatory in nature. These issues have been explored in chapter 3 of this thesis. In respect of the wider social and legal framework this observation is made in respect of section 15 and the awkwardness which it sits alongside existing principles such as the clean break principle.
promising career. Alternatively another argument is that the causal nexus should not be overly stringent because if it was, then as Deborah Hollings QC said,\footnote{Deborah Hollings QC who said “Section 15 is a complex provision and its drafting causes some major statutory interpretation questions”, in “Of gold diggers and possums – an examination of the limits of the Property (Relationships) Act” www.lawyers.org/conferences page 8.} … it is simply commonsense and it cannot be the case that the section can be interpreted as only applying where the difference between Party A and Party B was due entirely to the effects of the division of functions.

The research is evidence of the problem within the drafting of section 15 and the impact that this has on practitioners’ interpretation and treatment of the causation hurdle. There is a spectrum of interpretations and causes of the disparity that will be sufficient to meet the test. At one end there is the very strong causal connection found in the “classic case” of vignette one where a wife forsakes her career to support her husband and children. In a case such as vignette one the success of the husband could be understood to have much to do with the support of his wife. At the other end of the spectrum there is no causal connection because the disparity was caused by external factors such as an individual’s personal talent, health, age or aptitude.\footnote{See \textit{X v X [Economic disparity]} [2009] NZFLR 985 [99-100].} What is evident from the research is the inherent difficulty for practitioners to ascertain where the facts of a case may fit within the spectrum and how the causation test should be approached.

**The problems with the high jurisdictional burdens**

Generally the high jurisdictional burdens associated with any section 15 claim are problems for practitioners. These tests mean it is difficult to bring a section 15 claim, as a sole practitioner said: “section 15 cases are just so rare because of the jurisdictional hurdles that you have to go through” (SOLTAUR24). The high jurisdictional burden means that it is difficult for practitioners to understand how to apply the tests to “run of the mill” cases. A barrister highlighted the problem when he explained:

[BHM8] It is very hard to get over the jurisdictional requirements in a run of the mill case. You often have a disparity in income … but even if there is a disparity in income you often find that the living standards are much of a muchness so you cannot actually get home.
Participants expressed concerns with the particular wording of section 15. In practice the jurisdictional tests are hard to reach, and when interpreting the provision practitioners have found that the words and concepts underpinning these words mean different things to different people. A barrister explained:

[BAK4] You have a word like “significant” in here; it is a bit like “extraordinary circumstances” for unequal sharing of relationship property. There are parallels … I have never run a successful unequal sharing argument because it is just so bloody difficult. It is important to understand how words really alter perception. It’s similar to section 15 … you have a significant disparity of income and living standards but what the bloody hell is significant? It is so hard to reach these thresholds. What might be significant to Family Court judge sitting there may not be significant to somebody else.

Participants were confused about the correct conceptual approach that should be taken when they read and apply section 15’s jurisdictional tests. As a solicitor explained: “The causation is another big issue. The jurisdictional tests make it really hard in the way we are reading and applying the law” (SOLDUN29).

The problems with the high evidential burden including the need for forensic accountants and expert evidence

Many of the problems identified by participants were interlinked, for example an economic disparity claim is expensive and these high costs are associated with the need for expert opinion and evidence to establish a claim. The evidentiary level needed to establish a claim is perceived as significant. In turn this increases costs and stress on the claimant.

A solicitor explained that the “evidentiary level you need” is a problem, and put this problem in context by speaking about a case where they needed to get evidence from the client’s previous employers and from market consultants regarding what would have happened if her client had kept on the same career path then:

[SOLTAUR22] … we had to get an accountant to do the numbers … all of that becomes very expensive not only in terms of the cost in money paid but in respect of the emotional costs … It does take quite a toll on clients, they feel quite pulled apart by that kind of inquiry. You really are under the microscope in terms of ability and …
it is not that easy to find someone that can testify that someone was of that particular standard.

A number of the participants discussed their predicament. They have found that it is hard to apply section 15 to “real matters” because it is difficult to reconcile the voids within the provision without the use of expert evidence and opinion. One senior barrister illustrated the quandary that a number of participants spoke of when he said: “There is no guide at all for calculating the quantum of awards. Robertson J says why do you need all this evidence and you think well it is all right for you but how else are you going to work it out?” (BAK2).

The Judge also gave his perspective, and explained:

There is dicta indicating that the forensic inquiry should not be overcooked, but if you are wanting to launch a claim without some evidence, then it is risking a speculative approach or just a very impressionist analysis; yet on the other hand when one is getting into the regime of forensic inquiry it is an expensive exercise and it requires a lot of litigation ammunition but it probably depends on what is at stake. For example in case one of your case studies you would [obtain forensic evidence] there is more at stake, but case two you would probably not. You would have a more impressionist approach.

The problem of delays

The delays associated with bringing an economic disparity claim were another problem. One of the reasons for the delays, identified by the group, related to the practical problem of obtaining the information necessary to understand the financial circumstances of cases. An Auckland barrister illustrated the problem when he explained:

[BAK3] There are also huge problems with time delays in getting details of the assets. There is no discovery process ... the Act is becoming more and more difficult and getting information is difficult. Some people have delaying tactics and there is no presumption of disclosure and no judicial conference or discovery process. There are often complicated structures involved: tax structures and company/trust issues. No sets of accounts. A real economic disparity occurs on separation when there is no discovery. There is an attitude of some of ‘the longer I can withhold that information the more difficult I can make it for the other to meet their living costs’.
There are also delays in getting a matter to court. This problem is associated with wider problems within the Family Court system, as a barrister said “the huge problem is there is no justice as our Family Court system has broken down. It takes too long to get to court there are delays in getting a hearing ... there is no sure and fast enough system to get into court and when you do get to court then you get an unpredictable outcome” (BAK5), this being something that the barrister “was not prepared to put [her] clients through” (BAK5).

The delays clients experience impact on the day-to-day lives of those involved as the barrister went on to explain:

[BAK5] … in family matters … the time you have for getting a settlement is limited, you have got a window of two years (maximum) because otherwise people re-partner … you have an emotional window in terms of achieving a settlement where people are motivated by guilt, or duty or children or by fairness and that dissipates rapidly when there is a new relationship and so then the issue of timing of getting to court, or getting a settlement is actually really quite important.

The issue of delays in settling relationship property disputes was discussed by the psychologist, who explained:

[PSYCHOLOGIST] … different practitioners say different things. Some of them say sort the money out and then some of them say sort the children out first. But actually if the [relationship property] settlements have been done then it is miles easier to sort out what is going on with the children. That is my experience because when the money is in play it causes all sorts of issues.

Another solicitor said the “protracted cases” she dealt with were “often clients with mental health issues or alcoholics” and also mentioned the that “role of the lawyer” sometimes created additional delays in resolving relationship property matters and explained if a lawyer has said to someone “this is a case for economic disparity … then the person wants to fight it to the end, it gets them all worked up. Then it could go on and on” (SOLAK17).
Delays in settling matters have meant external economic circumstances have impacted negatively on the value of relationship property pools. Participants gave examples of relationship property pools worth “millions” at the beginning of negotiations being reduced to $400,000 (SOLAK17) and barrister BAK5 spoke of declining house values negatively affecting the value of clients’ relationship property.

**Problems associated with limited amounts of relationship property**

Participants frequently discussed problems associated with limited relationship property pools. Economic disparity claims were identified as an option available to the rich, because without a sizable pool of property there simply would not be enough money to fund a claim. It should be noted that the frequency which practitioners deal with matters where there is a limited amount of relationship property is not the fault of the provision itself. It is a reality of practice and life that for most couples there is not, as SOLNOR16 alluded to, pots of gold at the end of rainbows. The reality is most couples have not accumulated a great deal of property during the course of their relationships and this means that there are limited options available to the couple to remedy any of the economic hardship that they may face following the breakdown in their relationship.

The vignettes were used as an example of how “section 15 only works for the rich” and that the vignettes were “two very good case studies” illustrating this point (BAK3). It was felt that vignette one illustrated that an economic disparity claim could work for the wife but, because of the limited resources of the couple in vignette two, even if the jurisdictional tests of section 15 were met there would be very little incentive to bring an economic disparity claim because the costs of bringing a claim would be outweighed by the compensation that may be available to the woman in vignette two.

The use of trust structures was another issue associated with the limited pool of relationship property. A barrister explained:

[BHM8] There is the whole problem with trusts … [it is] becoming more and more prevalent … [in] 70 percent of my cases and I tend to do the more complex cases here in Hamilton, the trust owns the property so you cannot get to the property even if you can mount a relationship property claim.
The barrister illustrated this contention with an example of a case involving medical professionals who met when at university. They were both embarking on further studies enabling them to specialize in their chosen professions. The woman then became pregnant. The couple agreed the woman would cease her studies and focus on the care of the child. After a long marriage (and other children) the husband was a well-paid specialist and the wife worked part-time as a general practitioner around the demands of family life. Trusts were a complicating factor because most of the property was owned by separate trusts. He explained how they were:

[BHM8] … struggling to get the relationship property up to $600,000 or $700,000 but the calculation of the wife’s disparity was close to a million bucks. So even if we were successful … the pool that is there is not sufficient to compensate her.

Practitioners gave examples of clients’ limited pool of relationship property and the effect of this on their decisions to bring a section 15 claim. One barrister, BAK4 discussed a matter where there was no relationship property. The facts highlighted a problem and warrant examination. The couple involved met while at university and commenced a relationship. They did well at university and then embarked on their careers. A few years out of university they married and had two children. It was agreed that the woman would focus on the children and the husband on his career. At no time in the marriage were any high value assets purchased or invested in. The end of the marriage saw the husband earning a substantial income (over $1 million per annum) and the wife earning $80,000. While, in BAK4’s opinion, all of the jurisdictional tests of section 15 were established, there was no benefit in bringing a claim because there was no relationship property from which compensation could be paid. In BAK4’s opinion, the husband’s ability to earn money was an asset personal to him, but to which the wife had made indirect contributions (without her help he could not have established a career). BAK4 thought the definition of relationship property was not encompassing enough and in this case, the wife could not be compensated for the economic disparity. This suggests that future income/earning potential should also be considered as falling within the definition of relationship property. Or the earner could be subject to an order to pay maintenance under the Family Proceedings Act 1980.

For practitioners practising outside of the central business districts or with client bases that did not consist of “high net worth” people, often clients’ limited pools of relationship property was identified as a substantive problem. For example, the Invercargill partner of a
small law firm said, “Often there is not enough relationship property for it [section 15] to be worthwhile”. He explained:

[SOLINV30] … one of the features that we encounter when people break up … one of the reasons why … is that the financial situation gets on top of them. A classic one … is the share-milking type situation … they do not own the land they have been trying to make a go of … it has just not worked. The husband will be able to carry on and get a decent job on another dairy farm, but the wife will not … there is basically no property … and of course section 15 is all about the property, it gets paid out of the relationship property, it is not the alimony type situation … the wife has to care for the children so she will not be able to avail herself to those opportunities … she will not be able to take them … because childcare arrangements just will not fit … with 4 o’clock starts in the morning.

The Northland solicitor, a partner of a law firm, simply said “up here in the north we do not have huge pots of gold that we are chasing all that often” (SOLNOR16).

Problems with the limited number of people to whom section 15 is applicable

The group identified the problem of the limited number of people to whom section 15 is applicable. For example, practitioners observed that “section 15 is a remedy for the rich”, or for an economically disadvantaged person who can establish they had a career and this opportunity was lost due to the division of functions in the relationship. One solicitor said “likely candidates are another problem”, and went on to explain:

[SOLAK19] … someone is likely to be successful if you can say that they have had a career before and it needs to be a recognisable career that has a career path. Like nurses, teachers then there are recognisable bands … the ones that can show the clear … career paths are more easy to advise on than the more general.

Another solicitor felt that section 15 in practice does not accord with the reason it was enacted because of the limited number of people it is applicable to:

[SOLTAUR22]… if we go back to why we have section 15, the reason for it, I can see it … what … has happened is [section 15] got … complex and costly to pursue so it is really preserved for the upper classes but it is [on] the lower classes that it would have the most impact.
Problems relating to the biases at play in interpreting and applying the section

Participants commented on hidden biases that come into effect in the act of interpreting and applying section 15. Because section 15 has discretionary elements demands are placed on those interpreting and applying the law to make judgments, essentially filling voids within the provision. BAK5 asked, what is “significant?” and explained what he sees as significant a “Family Court Judge sitting there may not”. The responses of the group to the vignettes indicated a wide spread of opinions with radically different interpretations of facts and approaches to the application of section 15. These differences are shaped in part by hidden biases and it is difficult to examine legal professionals’ particular idiosyncratic biases.

The Judge explained:

[Judge] There are a wide variety of biases and I think that with a judicial discretion at play as widely as it is here, a compensatory award presents in different colours to different people, different levels to different people. What one person thinks is generous another thinks is mean … this is inherent with the concept of compensation.

For a solicitor there is a “problem that judges in the Family Court … make up their mind before they have heard the case” (SOLAK17). This attitudinal model of New Zealand’s judicial decision making was commented on by a number of participants, for example an Auckland barrister said:

[BAK2] It is hard, it is the same as … relocation law … it is difficult because you do not know what a judge is going to think about life and the roles of people … for many judges they would not have been able to separate their personal experiences and views from their decisions … in this area it is hard to separate … there is not just one path it is all so different … They see their family experiences as the same as everyone else’s and you can’t.

Another barrister discussed the complexity of section 15 claims, including undercurrents operating in the form of moral judgments made by the judiciary and legal professionals when interpreting and applying section 15. The barrister said:

347 For instance a judgment call must be made if it is just to make an award s15(3). What is meant by ‘just’ and in what circumstances it is not just remains an unknown – it is not specified within s15.
348 A notable example is s15 contains no guide for calculation of the quantum of compensation. The section is unworkable without those applying it making a judgment call regarding how the void should be filled – that is what is being compensated and how the amount will be calculated.
In the cases where there is a bigger pool of relationship property and bigger disparity in incomes there is a general feeling that the courts are reluctant to make very significant awards so the gains from … litigation are still modest in relation to the costs and risks … in part that is because … judges are not … entirely sympathetic to the idea of section 15 compensation being necessary when … one party has a very high income both parties benefit from … a … large relationship property pool … maybe a number of judges … see themselves in the position of the high earning partner … and it is not … fair for a mother to get section 15 compensation when she has had the benefit of being able to stay home and look after the children rather than pursue a career … there are a huge number of women that would see this as a huge privilege … so why should they be … compensated for the fact that this has happened if they are getting half the gains?

The other thing is … a perception that if a mother wants to pursue her career rather than be at home with the children then that is an option … available to her especially if she could be earning a high income. If she really wanted to pursue her career then she could. Both parties could arrange for childcare and there is plenty of scope … they could use nannies and that sort of thing.

Problems associated with a perception that the stereotypical roles of men and women that section 15 is founded on no longer exist

Section 15 was seen by some participants as founded on stereotypical roles of men and women and relationship dynamics that no longer exist (these roles are not reflective of reality for a significant number of New Zealand families). The stereotypical roles and boundaries of men as breadwinners and women as caregivers in the home are no longer clear.349

As such, participants felt section 15 is not “reflective of society” (BAK5). For these participants, most New Zealand couples having one partner stay at home and raise their children is not an “economically viable” option (BAK5). The traditional stereotypes act to reinforce the perception section 15 and economic disparity claims are for the rich alone. Barrister BAK5 discussed how the Auckland Women’s Lawyers Association petitioned the

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349 As previously mentioned the TimeUse survey is indicative of the fact the lion’s share of unpaid work within the home is still completed by women. The majority of men’s work is paid and the majority of women’s work is unpaid – 63% of men’s work is paid and 65% of women’s work is unpaid. [www.stats.govt.nz](http://www.stats.govt.nz)
High Court in respect of $X v X^{350}$ and how offensive she considered this action to be. Her concern was that there are more disadvantaged women who need the help and “someone like Mrs X who, by community standards, is economically advantaged” does not (BAK5).

BAK5’s question was, “If it is the economic disparity between the couple that we are most concerned with, why not help someone where there is a $10,000 difference in earning and this is of huge significance to the couple?”^{351}

The QC discussed the issue of the stereotypical roles of women and men at a policy level:

[QC]... part of the reason we have this legislation is because the Government may have been trying to encourage women to be the traditional wife … traditionally this was the model in Wellington, this was seen as the good model … but now section 15 is really not having this effect. The advice I give women is: ‘do not stay out of the workforce for too long’… I tell women ‘you just cannot do that’. Look at the high rates of divorce – 1 in 3 – and start working from that.

Participants thought that the judiciary’s conceptual approach to section 15 was flawed because many of them have limited awareness of what life is like for many New Zealand families. The Bench is not reflective of New Zealand community at large as an Auckland barrister said:

[BAK2]… the older judges are showing … [name deleted] … he never would have thought of his wife working, where as [name deleted] could because she has had to do it … There is a problem from $X v X$ we now have an unrealistic role division and now

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^{350} The Auckland Womens Lawyers’ Association (AWLA) sought leave to intervene on appeal from the Family Court’s decision in $X v X$ (see $X v X$ And Anor HC AK CIV 2006-404-00903 [4 July 2006]). The two issues were:

1) Was the Court correct to inquire into the reasons for the economic disparity?
2) If the Family Court was correct to do so – what factors are relevant to the inquiry?

AWLA’s rationale for the application was that part of AWLA’s constitutional mandate is to work for the reform of the law and the administration of the law as it affects women and children. This was the particular concern of BAK5 – she felt there are more pressing and significant social issues facing women and children in New Zealand – AWLA’s time would have been better spent assisting others who need help.

^{351} It is interesting to consider BAK5’s question together with the results of the two vignettes. As the results from the vignettes indicate, many of the practitioners could relate to the facts of vignette one (or the big money case). They could relate to this narrative because it was reflective of many of their own personal narratives – for all but one of the legal professionals a compensatory payment under s15 was seen as just. The results of vignette two indicate a wide division within the practitioners’ interpretation and application of the law to the facts. Perhaps, in part, the answer to the question; why was there such a divergence of opinion? exists within the participants’ judgements. They could relate to the story of vignette one. The story of vignette two was vexing and it may not be a reflection of the experience of many legal practitioners.
it is hard to know how you apply it in cases other than the rich couple … with the nanny and the gardener and things. X v X takes away the ability to examine the roles.

The problem of a discretion sitting in a much more certain Act

The discretionary nature of section 15, coupled with it sitting in a regime that has a prescriptive approach to resolving relationship property matters, was seen as problematic, creating an unusual hybrid of conceptual approaches (one a formulaic regime and the other founded on discretion requiring moral judgments to support it). As a barrister said:

[BAK4]… the model is wrong because it has been an add-on … [it] has completely bugged it … we … had this presumption of equal sharing and then we put this economic disparity provision in it and you think yes this makes sense there should be some recognition but what has happened?

Participants spoke of difficulties advising clients regarding their rights and obligations in respect of economic disparity claims because it is a discretion buried within a more certain Act. As a solicitor said:

[SOLAK17]… the concept behind … the law is perhaps okay but putting it into practice is very very hard. Trying to work out exactly what someone is entitled to is extremely difficult. If there was a way of working it out that was much easier … to calculate, like the rest of the Act is, it would have helped.

A problem of the legal profession’s approach to the interpretation and application of the section

Some participants hold strong opinions regarding the legal profession’s interpretation and application of section 15. They think it misguided. Their general sentiment being that the conceptual approach taken to the interpretation of section 15 is “conservative” and not what they expected. A barrister said:

[BAK1] What has come out was not was intended … [between the] policy and [the] result there has been a political disconnect … a disconnect between the policy and the

352 The QC discussed the problems of the conservative approach taken by the judiciary in respect of the interpretation and application of section 15.
implementation … I would have thought that even with the way that the law is drafted that we have seen a much bolder approach and more money.

A classic example is in Z v Z … she was trying to argue a case of economic disparity before the law was there for it. What came out … is Slater v Slater353 when the Court said you have been applying this test too rigidly and too narrowly … wake up guys … there is now an area of law that you are not doing right.

There is a situation where the law was not at fault, it was not at fault, it is us guys.

BAK1 was referring to the obiter comments of the Court of Appeal in Z v Z that “[i]t would appear from counsel’s submissions that the principles enunciated by this Court in Slater v Slater have been either misconstrued or applied with undue rigidity in practice”. While section 64 of the Family Proceedings Act 1980 was “undoubtedly intended to give effect to the clean break principle and encourage the former spouses to become independent and self-sufficient after the dissolution of the marriage … nothing in the wording of the relevant sections or the scheme of the Act required this objective to be carried through to the point where the provisions operate unfairly or harshly on one or other of the spouses…”

The barrister thought that there was a high likelihood that a court will send the same message to the New Zealand legal profession regarding its conceptual approach to section 15.

Another theme also discussed by participants was the “timid” approach of the Bench to economic disparity claims, as a barrister said, “You have also got a fairly timid Family Court Bench … we do not have really brave people on the Bench. They do not like being kicked around on appeal there is an inherent timidity on the Bench”(BAK1).

The QC commented on the issue:

[QC] The advice that I am giving people … is that section 15 has turned out not to have any real teeth in it … [in] X v X she was a highly qualified accountant who became a traditional housewife with a pool of around $13 million and she still only got about $230,000 so if she gets that then everyone else gets 50 cents … But somewhere along the line there be a big fat case and it will go to the Supreme Court and I reckon they will look at it much more hardly but I do not think that the Court of Appeal will do it.

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Other participants thought the problem is that many lawyers practising relationship property do not understand the law. Participants spoke of relationship property as being a complex and difficult area of law to practice in (BAK1, BAK5, BCH9 and BHM8). The lawyers who do not understand relationship property law: “rush off to see an accountant rather than try and understand the law itself. There are a number of family lawyers that struggle with relationship property cases” (BCH9). This barrister also thought there was a:

[BCH9] … potential weakness in the system with the way judges try and be a jack of all trades … child related issues can be easier for judges to decide as they do not involve the same intellectual rigor and so there are a number of judges that are more comfortable dealing with the child issues than relationship property issues.

**Dampening down clients’ expectations**

Another theme identified by participants was the need for advocates to “dampen down” expectations of clients. An Auckland barrister said a problem for him was “dampening down women’s expectations of what they are entitled to” (BAK1). The role of a lawyer as someone to establish realistic expectations of clients was also discussed by an Auckland solicitor who explained:

[SOLAK17] … if you say to them … this could be an economic disparity case or claim we could argue it but it is difficult to argue in the court and who knows what you are going to end up with in the end, it might not happen. So you in effect dampen down their expectations … if you get more … then it is a bit of a bonus.

Another barrister discussed this issue and said:

[BCH9] A lot of clients have an expectation … they are aware of the section … they concentrate on the disparity but they are not aware of the other sorts of things that go into it. They have a misconception about the section and sometimes they do not meet the statutory criteria, but they think clearly there is a disparity and I must be in for a compensatory payment.

**Problems of obtaining information and disclosure-type issues**

Participants discussed problems relating to obtaining information and delays associated with gathering information. These problems relate to the lack of disclosure requirements and also
Practitioners spoke of problems when one party has access to financial resources and the other does not. The party with financial power can delay the settlement of the relationship property dispute by engaging in delaying tactics (like withholding financial information). This means there is financial pressure exerted on the already economically disadvantaged party (because they often do not have resources to fund an economic disparity claim). This party is then more likely to accept any settlement offered so that they have some finance which they can then use to get on with their life. A barrister said, from his “experience in practice, the biggest dispute on a practical level is getting information” (BAK3).

**Question two: participants’ opinions regarding the methodology as adopted in X v X for calculating the quantum of section 15 awards**

Participants were asked, “What is your opinion of the methodology as adopted by the majority in X v X for calculating the quantum of section 15 awards?”

**The participants’ opinions of the methodology adopted by the majority in X v X for calculating the quantum of section 15 awards**

![Graph of the participants’ opinions regarding the methodology used by the majority in X v X for calculating the quantum of section 15 awards.](image-url)

Figure 5.41 Graph of the participants’ opinions regarding the methodology used by the majority in X v X for calculating the quantum of section 15 awards.
The majority disagreed with the Court of Appeal’s methodology for calculating the quantum of the awards. Many of the more general problems with economic disparity claims identified by the participants were associated with the methodology, for example:

- The high costs of economic disparity claims;
- The uncertainty of the awards or decisions regarding what the variables in the methodology should be;
- The overuse of expert evidence and opinion;
- The methodology is founded upon loss of opportunity in the form of a career foregone – no reference is made to the positive economic advantages received – nor does it look at career enhancement; and
- The projections contained in the methodology are problematic (for example there were problems identified that related to calculating a party’s future income, or the cost of a lost career, and determining the appropriate length of time for these projections to be made).

Not all of the participants disagreed with the methodology. Two participants agreed with it. One was an Auckland barrister, who said, “I think that the majority’s decision would probably be about right … it is misunderstood by the majority of practitioners … I think that it is fine” (BAK6). The barrister noted one downside to the methodology, being the high costs associated with it, but explained, “Ideally it would be less expensive to calculate it [but] I cannot see a real way around it” (BAK6).

The other participant to agree was another barrister, BHM8 who did not see a problem and said, "I do not see anything wrong with the method of calculation … I agree with what the Court was trying to do. To provide for some certainty” (BHM8).

However, the majority did not share the sentiments of these barristers and thought the methodology over-complicated and problematic. A barrister explained in her practice the methodology has been “no help to me” (BAK9).

The QC, explained:

[QC] Even now … I hesitate to do the bloody calculation myself … You know it is easier for me. I go to the accountancy firms and get them to do it. That is the other

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354 BHM8 did however have a mixed view regarding the approach of the majority on the halving of the award.
thing it is bloody hard to get HR people to stand up and give evidence now. They
know what it is all about and that they will get cross examined. And they too are
giving sliding doors evidence.

The first step of the methodology, the ‘but for’ income, was generally seen as problematic. The QC saw it as “crystal ball gazing” and “sliding doors evidence”. The participants thought that the evidence that goes into the methodology was problematic. This type of evidence is “difficult” and is not perceived as being founded on life’s realities. A barrister explained that the difficult thing, “is that the methodology ignores life’s realities … like the employment situation we have now if you have a young woman aged 20 to 25 years she may not get a job at all employment has changed” (BAK5).

The group generally saw the methodology as “but one way” to calculate an award. The Judge explained that his “gut feeling” was the methodology was “one way”. He referred to William Young P’s comments in X v X that made it clear, “The result is more important than the pathway providing that it is transparent how you get your answer.” The Judge identified “potential problems with the variability of outcomes” associated with the methodology but thought “it is very hard to find a single suitable approach without risking injustice along the way somewhere”.

Barrister BAK1 shared the Judge’s sentiment that the methodology is one way to approach the issue of the calculation of the quantum: “It is all right as a guide. But rigid application of the formula will never produce the result it is expected to produce. This is just one way. You also need to step back” (BAK1). The opinion that the methodology is “but one way” was also expressed by barrister BAK3, who felt that the idea of section 15 was a good one and having a model upon which to calculate the compensation was positive but “it is deeply flawed … one size does not fit all”.

Other participants were passionate in their comments regarding the negative effects of the methodology and the fact that the method is not contained within the Act. An Auckland barrister said:

[BAK4] … none of that is in section 15 … it is just bollocks. It is just bullshit. I think X v X is total bullshit … you have the Court of Appeal coming in … and putting these arbitrary frames into it. The agenda is being set by the forensic accountants … it has been hi-jacked … the minute you start getting down to this mathematical formula you
end up losing sight of it ... it is a real disappointment for me section 15 … there is something to be said for a judge actually judging … looking at a set of facts and doing what judges do best and coming up with a result … because the Court of Appeal have set this formula it becomes set in concrete. We need an economics argument not just an accounting argument because marriage is about human behaviour it is not just accounting … this business of 15 percent for this and 50 percent for that … it is just nonsense. It is not logical.

A sole practitioner agreed and said “if the Legislature wanted something like this sort of test or formula they would have put it into the Act” (SPRACTNEL15).

Participants said that the methodology fails to recognise the uplift or career enhancement elements of an economic disparity claim, drawing parallels with the notion of the bundle of rights issue. Participants spoke of problems regarding the methodology’s approach in that it fails to look at “the package” and the “intrinsic value in being able to go to work … and this could be linked to the contributions of the wife” (BAK4). Participants thought the conceptual approach behind the methodology was deeply flawed. As one barrister said:

[BAK4] We are stuck in a void … I do not believe that … income is totally due to … hardwiring … there would have been dinner parties … that all made up the opportunity. After 18 years of marriage you cannot tell me that the wife has not helped him. It is all part of it along the way … each of us grow and are influenced by others … and by what we do … there needs to be a way of assessing it [and] valuing it.

The barrister’s final comment was that the methodology is indicative of New Zealand’s general lack of evolution in our conceptual approach to relationship property law. “We have stopped in our tracks, thinking about it, we have not evolved” (BAK4).

Another barrister also thought the methodology’s complete omission of any career enhancement argument was a problem and thought there was:

355 The bundle of rights issue that BAK4 was referring to relates to the doctrine that the rights one may have in relation to a trust as a settler, trustee and/or beneficiary (and/or the power to appoint and/or remove trustees, and beneficiaries of a trust) could be viewed as a property interest – a power which is of value – and as such could be seen as relationship property. (This is an issue of current legal interest – see for example, Anthony Grant, “The Bundle of Rights – Is it Good Law?” NZLawyer, Issue 125, 13 November 2009 and Anthony Grant, “Justice Heath predicts the death of the Bundle of Rights” NZLawyer, Issue 182, 20 April 2012.)
… an unfairness in the way that there is no taking into account the enhancement of the husband’s earnings. If you are looking at the overall justice of the situation then … there should be some taking into account of the enhancement of earnings.

A barrister (BCH9) queried the lack of recognition of career enhancement and thought that the methodology seems to close the door on a partner if he/she has not had a career and commented on the considerable accounting costs associated with the methodology. The barrister went on to explain:

[BCH9]… lawyers look to others for advice on these things but they should not really; the arithmetic is not too complicated and lawyers should be presenting or be in a position to assemble the facts and then present the submissions and enable a judge to make a decision.

A number of the group considered it a failure of the legal profession to be handing over economic disparity claims to accountants,356 as one barrister explained:

[BCH9] We should not and the judges should not be looking for accounting advice as to what the calculation should be because accountants are exercising judgments … there are problems with a lot of relationship property work … in practice the sorts of lawyers that are doing this work are often terrible at reading company accounts they do not understand business and do not try to. They are too touchy feely and could be better lawyers. A lot of relationship property law is very complex it is often demanding and high value. There are a number of family lawyers that struggle with the relationship property cases.

**Question three: participants’ opinions regarding the halving of awards**

A controversial feature of the $X \lor X$ methodology is the halving of the compensation, for this reason the third question asked within this part of the interview was, “Do you have an opinion on the theory of “halving” the award – as adopted, by the majority, in $X \lor X$? If so please explain

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356 Which the methodology requires due to the evidence and opinions the methodology is founded on.
The participants’ views on the theory of halving the awards

As the results indicate, the majority did not agree with the theory of halving the award. The general sentiment was the whole procedure and methodology for calculating the award is flawed and the halving of the award is indicative of the problems in approach. For example participants said:

- the practice of halving the award was “part of the fundamental reason why the formula is just so stupid” (QC);
- it is “bollocks ... [there] is nothing in the Act about halving” (BAK4);
- halving the award was “illogical, because the amount is compensation and because it is compensation you have already taken into account the disparity ” (BCH9);
- it is hard to “understand the logic of this, it is compensation, the logic defies me, since when do you halve compensation?” (SOLAK20); and
- It is a “struggle” to understand:

[SOLWELL26] I have never understood the logic behind. It … basically is 99 percent of the time the woman that is getting the award so we are penalising her twice

Figure 5.42 Graph showing participants’ views regarding the theory of halving the award (in X v X methodology). Participants could select more than one option indicating whether, in respect of the practice of halving, they: agree, disagree, are confused by it, have no opinion, their opinion changes, or did not answer.
… first of all she is not earning anywhere near as much as he is and then despite what we award her she is still going to be well behind and then we are going to give him half of what we were going to give her. I do not get it.

Four members of the legal professional study group agreed with the halving of the award. The general rationale was the award needed to be halved otherwise there would be an element of double-dipping for example:

- The Judge considered it logical to halve the award because if it is not halved then you are “transferring from one party the disparity to another”;
- A barrister thought if it was not halved then “the scales are uneven, you take from one and if it is not halved then the one that you have taken from is left disadvantaged” (BAK3); and
- BAK6 said, “if you did not then it would result in a situation where there was a disparity the other way”. BAK6 also said the Court of Appeal did not say compensation always needed to be halved. (BAK6 thought this is something practitioners misunderstand.

Other participants were confused with the rationale of halving an award. For example these practitioners said:

- “I am confused. I get confused every time by it” (BAK1); and
- “I’m not sure why they needed to halve it – I do not understand the rationale behind it” (SOLHM21).

Other participants explained how their opinion regarding the appropriateness of halving the award was variable and it “often depended on which side” they were acting for (BAK2). Another barrister explained sometimes he thinks it is right and then other times he thinks it wrong (BHM8). When he thinks it right his thoughts are that the party is being compensated out of relationship property and if you do not halve it then you are effectively double-dipping. When he thinks it an incorrect approach his rationale is that someone is getting compensated for an economic disparity, you are compensating the person for a loss they have suffered and

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357 SOLWELL26’s view regarding income and earning capacity was shared with the QC who said “the whole issue is earning capacity” and the methodology does not reflect this.

358 The majority in X v X said: “We stress that we are not saying that every method of calculating s15 awards needs to include the step of halving.” X v X [2009] NZCA 399, at [236].
for this reason there is no need to halve the award, he said “It is compensation and compensation should not be halved” (BHM8).

Some practitioners did not have an opinion on the halving of the award. For example BCH10 said she had an opinion once but she had forgotten what it was and said it had been a long time since she had looked at it and it had “taken a while to get my head around the issue of halving an award and [she had] now forgotten it”. Although the barrister does not have an opinion on the correctness of the step she said she always halves awards.

**Table 5.5 a summary of the legal professionals’ opinions regarding the methodology and halving of the award as adopted in the majority’s decision in X v X.**

<table>
<thead>
<tr>
<th>Identifying Tag</th>
<th>Comments regarding the methodology</th>
<th>Comments regarding halving the award</th>
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<tr>
<td>Judge</td>
<td>His “gut feeling was the methodology was one way to calculate the quantum of awards”. He referred to William Young P’s comments in X v X that made it clear “the result is more important than the pathway – providing that it is transparent how you get your answer”. He identified “potential problems with the variability of outcomes” associated with the methodology but thought “it is very hard to find a single suitable approach without risking injustice along the way somewhere”.</td>
<td>The Judge’s opinion was it is logical to halve the award for if you did not then you are “transferring from one party the disparity to another”. The Judge gave an example to illustrate his opinion: “If you had two people and placed them next to each other and there was one tall person and one short person. The disparity between them is the disparity in height. If we want to make them equal you do not cut off the difference in height and then put it in the other: you only take half of the difference.”</td>
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<tr>
<td>QC</td>
<td>The QC said: I hesitate to do the bloody calculation myself ... You know it is easier for me I go to the accountancy firms and get them to do it. That is the other thing - it is bloody hard to get HR people to stand up and give evidence now. They know what it is all about and that they will get</td>
<td>The QC thought that halving the award is “just part of the fundamental reason why the formula is just so stupid”.</td>
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cross examined. And they too are giving sliding doors evidence.

The QC said there was, at times, a positive with the methodology: “It is okay sometimes, in some cases, you can sometimes work it out.”

A negative aspect to the methodology identified was:

It comes out too rigid and it does not take into account these other factors and you have still got the problem of trying to work out what their earning capacity would have been.

The QC thought that a percentage band, for working out the adjustment of relationship property division upon the finding of economic disparity, would be preferable than the current approach ($X \times X$ methodology). This would be cheaper, faster and there would be bands and likely scenarios. There are similarities in divorces and in factual circumstances so people would know where they stand and like cases could be treated alike.

The QC also said that:

- the “whole issue is earning capacity” and the methodology does not reflect this;
- there have been no awards yet that take into account the uplift in one’s career in having a wife stay at home (she felt that there is recognition that this can be done but as yet it has not happened).

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<tr>
<th>BAK1</th>
<th>BAK1 thought it all right as a guide but made the comment “rigid application of formulae will never produce the result it is expected to produce. This just one way – you still need to</th>
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<td>BAK1 did not agree with halving the award. He said: “I am confused – I get confused every time by it.”</td>
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step back and consider the overall net effect”.

| BAK2 | BAK2 thought that the methodology does not work, and said:

The Court of Appeal has not really given us something that can be used with great certainty … you can drive the bus through it. You look at the role, the period. \( X \lor X \) is a worry, they could have dealt with the facts and then given principles but they did not … they were as lazy as hell with it. They did not make good law with this case. The lady had the ability to work but they said that she did not have to work and I feel that this is so unrealistic in this modern world. It is working couples and how many of us have to work – all of our children’s childhood – with both parents working. And this is like these people get this special world? And so economic disparity is for the rich and then the rest of us have to give up and go away because of the cost. There is no certainty to give us any other guide. |

| BAK3 | BAK3 considered some of the concepts behind the methodology good but felt: “What we have now is deeply flawed.” |

| BAK4 | BAK4 does not agree and said there is nothing like this methodology in the provision itself. He said:

You see none of that is in section 15 and to me it is just bollocks, it is just bullshit. I think \( X \lor X \) is total bullshit … you have the Court of Appeal coming in … and putting these arbitrary frames into it. The agenda is being set by the forensic accountants … in my view it has been hi-jacked … the minute you start getting down to this |

| BAK2 | BAK2 said it “depends on which side” he is on but thought “it should be halved because it is relationship property … otherwise you are effectively treating it as separate property”.

| BAK3 | BAK3 thought that compensation should be halved. If it is not halved: “The scales are uneven you take from one and if it is not halved then the one that you have taken from is left disadvantaged.” |

| BAK4 | BAK4 thought that halving an award was “bollocks”. There “is nothing in the Act about halving; it has become an accounting exercise”. This is the wrong conceptual approach to be taken to economic disparity and section 15. |
mathematical formula you end up losing sight of it. You start to load up things ... it is a real disappointment for me section 15.

The methodology reflects the lack of evolution in New Zealand’s conceptual approach to relationship property matters and to the indirect contributions an economically disadvantaged partner makes to their partners in respect of career enhancement.

BAK5 thought, with the right evidence, the methodology is not difficult. But the methodology ignores life’s realities for example younger generations experience difficulty finding work. The nature of employment in New Zealand has changed and the stereotypes and career paths that the methodology is founded on no longer exist in New Zealand.

BAK6 thought the majority’s decision regarding methodology correct and that the problem is most legal professionals misunderstand the decision saying many practitioners have not read the decision properly.

BAK7 thought that the methodology is not any real help to her, and said: “I look at the problems and then think how we can solve them. X v X does not help me in this.”

BAK5 thought that halving the award was reflective of a “complicated” approach.

BAK6 thought that halving the award was correct (“If you did not then it would result in a situation where there was a disparity the other way”).

BAK6 thought that this is something that practitioners misunderstand.

BAK7 thinks it “totally wrong”.

BHM8 agreed with what the Court was trying to do, to provide some certainty, the issue BHM8 does have regarding the methodology, is the halving of the awards.

BHM8 explained that his opinion changes, and sometimes he thinks it right and other times he thinks it is wrong.

When BHM8 thinks it is right his thoughts are the party is being compensated out of relationship
property and if you do not halve it then you are double-dipping.

When BHM8 thinks it is incorrect his rationale is someone is being compensated for an economic disparity – compensating the person for the loss they have suffered, why does this need to be halved?

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<tr>
<th>BCH9</th>
<th>BCH9 thought there are problems:</th>
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<td></td>
<td>• There is a potential unfairness “in the way that there is no taking into account the enhancement of the husband’s earnings, if you are looking at the overall justice of the situation ... there should be some taking into account of the enhancement of earnings”.</td>
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<td>• “You cannot use a precise mathematical formula as there are so many factors that might come into play.”</td>
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<td></td>
<td>• The methodology closes the door to section 15 claims on people that have not had a career.</td>
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<td>• There are substantial accounting costs associated with this methodology.</td>
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<tr>
<th>BCH9</th>
<th>BCH9 thought halving the award was not logical “because the amount is compensation and because it is compensation you have already taken into account the disparity”. BCH9 wonders “why halve the amount if that is what is needed?”</th>
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<td>BCH9 thought it necessary to stand back and “use the residual discretion that the courts have to consider the justice of the ultimate award”.</td>
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<tr>
<th>BCH10</th>
<th>BCH10 thought it a “fair enough way of doing it but there are problems. The maths is not hard. It is the things like adjustments for the uncertainty of income and time value of money – you can plug figures into that formula until the cows come home and you can end up being hundreds or thousands of dollars apart”.</th>
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<td></td>
<td>BCH10 had forgotten her opinion. It had been a long time since she had looked at it and it had “taken a while to get her head around the issue of halving an award”.</td>
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<td>BCH10 in practice halves the awards.</td>
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<tr>
<th>BDUN11</th>
<th>BDUN11 thought there are problems with the methodology and said:</th>
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<td></td>
<td>• “It is too conservative”;</td>
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<td></td>
<td>• “It is too arithmetical and too arbitrary”</td>
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| BDUN11 | BDUN11 thought the whole process “stupid”.

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You lose sight of the human issues if you just apply strict mathematical calculations”;

- “There are problems with the but for test (you can’t just go “but for”- how do we know – we are not God”);
- It misses the point of the “enhancement issue/argument” the cases have not looked at the “uplift in the careered persons career and we should be”;
- “This formula is stupid, it completely misses the point in compensating for economic disparity.”

| SPRACTNEL12 | SPRACTNEL12 said “There must be a better way of working it out”.
| SPRACTWELL13 | SPRACTWELL13 thought the problem with the methodology is what: “Gets plugged into the equation – that is difficult and it is hard to get people who know what should go into it. The maths is not hard it is what goes into it that is hard.”
| SPRACTWELL14 | SPRACTWELL14 had not really examined the case and gets “an actuary to work things out” regarding compensation.
| SPRACTNEL15 | SPRACTNEL15 explained:

| SOLNOR16 | SOLNOR16 thought there is merit in giving some “predictability of the awards” and it is good to have some form of methodology for calculating the quantum but the issue is that judges are “guided by a gut feeling and at the

| | SPRACTNEL12 cannot understand why it needed to be halved. It is compensation – it is unusual for compensation to be halved.
| | SPRACTWELL13 said it “seems a bit strange to halve compensation”.
| | SPRACTWELL14 said “without really being able to think about it” he could “not offer an opinion”.
| | SPRACTNEL15 explained that she has a “hard time getting [her] head around” halving the award; conceptually she “really struggle[s] with it”.
| | SOLNOR16 did not agree with halving the award and said, “It is a distortion that is a consequence of a process that is flawed. It is indicative that they [the Judges] have lost their
end of the day that gut feeling comes back and they submit the methodology to match their gut feeling”.

SOLNOR16 said he “applauds trying to get some certainty but not the current approach”.

<table>
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<tr>
<th>SOLAK17</th>
<th>SOLAK17 thought it “very artificial it is like plucking something out of the air it is not based on much reality” and said “I do not think that there is one size fits all for this. Even the judges do not agree with it there is so much dispute about it. Doing the projections of the but for test is so artificial.”</th>
<th>SOLAK17 could not understand why you would halve the award.</th>
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<tr>
<td>SOLAK18</td>
<td>SOLAK18 thought it is “so arbitrary and those figures could be anything it is so value based”.</td>
<td>SOLAK18 said halving the award “was again an arbitrary thing” explaining “it almost feels like a balancing exercise and it is almost a discretionary thing like they got to that point and then thought does this seem right? They then decided to halve the award.”</td>
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<tr>
<td>SOLAK19</td>
<td>SOLAK19 thought it “provides something at least” enabling practitioners to go through the methodology to “at least get somewhere”. SOLAK19’s takes a different approach to the calculation of quantum and is more global “as to what is realistic for the client.” Asking questions like: “what will it take them to re-house? Whether they can still work and if they can will it be full-time or part-time? What level of borrowing they will require? How long will it take them to get a salary increase?”</td>
<td>SOLAK19 was “not certain” of her opinion, but felt “there should be no double-dipping”.</td>
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<tr>
<td>SOLAK20</td>
<td>SOLAK20 thought it “a way of rationalizing a gut reaction. The judges had a figure in mind and then they justified it”. The awards are arbitrary. The methodology has taken “a life of its own you have to hire experts for these things”.</td>
<td>SOLAK20 did not “understand the logic of this, it is compensation, the logic defies me – since when do you halve compensation?”</td>
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SOLHM21 thought the method is “so subjective and will always be”.

Elements of the methodology are “very difficult to quantify”. SOLHM21 said:

“I thought that lawyers were expensive but the bloody cost of getting an accountant to give you the sort of information you need, someone who specialises in this area giving this sort of valuation, you are paying $10,000 to $15,000 … in Hamilton we used to have a good guy but he has just retired. But now we have another guy and I do not really know who they think they are, they give legal advice … you have to be a high net worth individual to make any section 15 claim worthwhile.”

SOLTAUR22 thought having a formula is an advantage so “we have some better certainty around the approach … it enables … practitioners … to do a first run with your clients”.

SOLTAUR22 thought that there was a problem with the “but for income [because] you need to go into the industry or HR, this is where there is the guess work … it is difficult, it is all crystal ball gazing and it can create unfairness later down the track”.

SOLTAUR22 also said there is “an overuse of accountants in relation to the problem of economic disparity” which comes back to the methodology. Explaining her rationale she said:

“The accountants have hijacked this and we have brought into the fact that there must be a formula to sort this out and the courts when you … stand back and look at the cases and the awards [have] … deferred their decisions and their discretion to the accountants.”

SOLHM21 said:

“I am not sure why they needed to halve it. I do not understand the rationale behind it”.

SOLTAUR22 thought, “It depends who you are acting for so if you are acting for the husband it is great if you are acting for the wife it is not”.
SOLTAUR22 thought more attention must be given to enhancement arguments: “Contributions need to be better looked at, like in the old days, like with section 18”.

The methodology is based on opportunity cost alone and ignores the enhancement side of the argument. For example what of the woman that has kept her profession but also assisted her husband.

This is problematic, SOLTAUR21 said:

“one of the other areas where section 15 has not had the use that … we thought it would is that a lot of people in professions now, as opposed to … twenty years ago … are keeping their hand in. This is problematic in practice … people who have gone back … they are still there so it waters down what sort of compensation they should be awarded. It just does not sit very neatly into how section 15 is approached. And this is the predominant approach.”

SOLTAUR23 said if this methodology is used “you should be an accountant and not a lawyer”.

SOLTAUR24 thought that the method was “workable, but is formulistic, it is useful for certainty.” But it is flawed because the method ignores any enhancement of a career argument. SOLTAUR24 has experience of the “Australian system where it is much easier to advise and talk to clients about [and] the costs associated with the Australian system are also kept down”.

He felt that this is not the case in New Zealand and the methodology contributes to this.

SOLWELL25 explained that it “felt arbitrary” SOLWELL25 said:
and said “I still feel like they are throwing a dart. I have not really found it helpful to apply in other situations”.

“It is crazy, I do not understand it, it makes no sense, why would you then divide it in half? Conceptually I do not understand it.”

SOLWELL26 thought there are a number of problems with the methodology and section 15 in general and said, “I actually hate section 15. I wish that it had never been enacted”.

SOLWELL26 said:

“part of the problem is that we do not know what the compensation is for: compensation for what? For a loss to them? Or is it actually designed to really achieve some sort of parity? ... linking it so much to what the wife did, or may have done, or not done is … not achieving the parity [or] achieving what the section was designed for. That is where I have always really struggled with this … a real example of people that I know.

[There was a] husband and wife met when they were 18 years old. [They] married and he did a qualification … he became a very successful valuer, earning $500,000 per year, she was a nurse, they had four children, she ran the home and raised the kids, he worked long hours, she hosted dinner parties ... did it all fabulously, wonderfully but at the end of their marriage, well she was a nurse … link it to her income. I find this so hard. I mean how much benefit did he derive in his career from her? The fact that he did not have to worry about who was going to pick the kids up from school or get [them] to swimming, it was just all done. You know I would love a wife at home, it would be fantastic.

Basically what they have done, the way economic disparity works is that it only
compensates those women that were professionals, who are well educated, the ones that have really have had more choice this is … not who the section was originally brought in for. For some women it is their job to get married. There is so much emphasis at the moment on the career, the education, rather than the focus being on the actual partnership and achieving parity.”

| SOLNEL27 | SOLNEL27 thought there are problems with the methodology because it was difficult to work out and it is only applicable to a limited number of people “you have to be a Mrs X or someone in case study one to get compensation”.

The solicitor also discussed an emotional cost involved in the methodology. She explained:

“So many women give up in ordinary situations to finish things … it’s too hard in times of stress and you are not going to get this on legal aid … What happened to the Act? Sort things out as speedily and cost efficient as possible?”|

| SOLNEL27 | SOLNEL27 said it is “ludicrous”.

| SOLNEL28 | SOLNEL28 considered having “some sort of methodology makes sense to a certain extent”. But perceived problems with projecting incomes and explained that “it is fine for people with income bands, like teachers and nurses, or even lawyers depending on their level of experience. But the problem is when earnings are hard to predict”. There are problems when there are no income bands or when people have their own business.

| SOLNEL28 | SOLNEL28 had no opinion.

| SOLDUN29 | SOLDUN29 said:

“It is all bloody random. How the hell do you predict someone’s future income? I am sure if you are looking at life insurance … then the...

| SOLDUN29 | SOLDUN29 had a “mixed” view on it. She said: “At the end of the day you have got to stand back and look at the overall impact on both parties [she has] some sympathy with wanting to...
contingencies have been nearly perfected over time, there would be data, calculating the risk but in \( X \times X \) we do not have that … it is dangerous to say that this is the foundation from which we should work.”

SOLDUN29 questioned if the methodology “is even the right approach we should be taking”.

SOLINV30 thought that the methodology was good for some facts and vignette one illustrates this. But the methodology is not a one size fits all. He said that “flexibility needs to be retained as to how you look at the issue of compensation”.

The major problem with the methodology is the halving of the award: “By halving it you may be discounting the compensation to the disadvantaged [party] and that really puzzles and bothers me.”

The mediator did not agree with the methodology, it is part of a general problem in family law of the “whole over science approach”. He said it is “completely wrong. It is artificial”. Judges “give people $40,000 to $100,000 in section 15 awards” and this “does not cut it … they expect women to be grateful”.

He referred to the principles of the Act and said: “It has to be cheaper, fairer and quicker … you know there you have the guiding principles of the Act and everyone ignores them.”

The mediator thought “it is crazy”.

<table>
<thead>
<tr>
<th><strong>SOLINV30</strong></th>
<th><strong>The experts’ views on the calculation of the awards and the methodology</strong></th>
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<tbody>
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<td>The accounting experts agreed that the mathematical basis of the methodology used in ( X \times X ) was relatively straightforward. The consensus was that the correct approach needed to be a simple one. Accountant (ACC2), explained how the Act’s principle, that relationship property matters should be resolved simply, is significant and should guide judicial decision making.</td>
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The experts’ views on the calculation of the awards and the methodology

The accounting experts agreed that the mathematical basis of the methodology used in \( X \times X \) was relatively straightforward. The consensus was that the correct approach needed to be a simple one. Accountant (ACC2), explained how the Act’s principle, that relationship property matters should be resolved simply, is significant and should guide judicial decision making.
ACC2 thought “It would be good for the court to look at a mathematical way of looking at it. A more scientific way of looking at it is what is needed”. 359

The forensic accountants and the actuary discussed how they approach the calculation of section 15 compensation. The model they each use is based on the X v X methodology. ACC1 has a computer model with a spreadsheet to work out the compensation. The actuary explained his approach for calculating awards was twofold. First he considers what was lost. 360 The next step is to halve this amount. The actuary said “you must halve the compensation”.

ACC1 explained his approach and highlighted some of the problems he perceived and said:

[ACC1] The interesting thing with the ‘but for’ calculation … is first you need to say ‘what was the career path of the woman before she was married?’ Then consider her age now and whether she has any opportunity of resuming that career path going forward. Then in behind that if she does have the opportunity of resuming that career path how long will it take her to get to where she would have been if she had not given up the career?

We try to source the best data … pay scales are sourced … at the end of the day it is all extremely judgmental … we have also gone to a recruitment company but this is very hard and particularly hard when a woman wants to rejoin the workforce and seeks to retrain and it may be that the retraining is in a profession that is higher paying than her original career.

While the experts were comfortable with the mathematics involved they were less comfortable with the subjective nature of aspects of the task. ACC1 observed that the model “just does the arithmetic and you still have to exercise a value judgment”. The actuary was concerned about the nature of the method and the evidence that goes into the calculation:

359 See the contrasting opinion of the mediator regarding what he sees as “the over science approach”. Table 5.5. One drawback to a more “mathematical way” of solving the problem of how to calculate the compensation would be further additional costs because it is likely that it would mean more expert fees are incurred to calculate the compensation.
360 This is an inquiry into the financial cost to the economically disadvantaged party of the loss of a career.
[ACT] It takes so much energy to start them they are such a subjective exercise. I feel uncomfortable doing what I have to do ... I know that I am not the last word on it ... It is all subjective.

When asked about methodology ACC1 explained how difficult aspects of it are in practice and how he has ethical and professional concerns regarding what is sometimes asked of him:

[ACC1] It is very hard … the calculation methodology in terms of the arithmetic seems now to be reasonably accepted as a consequence of $X \lor X$, whether you agree with it or not, there is some certainty. $X \lor X$ has cemented the halving of the award. There are a few variables now but not a lot like: what discount rate do you apply? There is uncertainty nevertheless. There are still huge differences in terms of the views of so called experts on either side when it comes to the quantification itself in terms of setting a dollar value and consequentially what happens and you see it from time to time is that barristers will say just crank out the highest valuation that you think will stand up and they say this will never go to court it will be settled, and we will just use this as a negotiating position. Well I will not do that on this basis. I say well if it does go to court I have to put my reputation on the line and say what I believe in.

The actuary and the forensic accountants were asked their opinions regarding the “but for” tests and how they gather the evidence required when calculating section 15 compensation.

When calculating the ‘but for’ income, ACC2, said, “It is logically … the most likely or reasonable outcome mathematically you could put something in … the more ridiculous a number you put in the greater the discount that you need”.

The actuary and one of the forensic accountants (ACC1) said that there are problems with the “but for” test. They thought that the test requires judgment calls to be made and they were, at times, uncomfortable making such judgments. By way of an example ACC1 said what if a woman is retraining? Do you base the “but for” income on a projected expectation of what the woman may be able to earn in the future? Or is the test based on an established career
path which was lost? To illustrate this ACC1 gave an example of a matter he had dealt with where:

[ACC1] The wife had not worked in a high paying job when they were married. She had spend 20 to 30 years not working during the relationship supporting the husband and the children ... doing all those fantastic things ... After the marriage had broken down she went to university studying to obtain a degree in psychology and was intending to practice in that field. So there is a problem in terms of considering the “but for” income. Do you base it on what her income was before she was married or do you base it on the expectation of the career?

ACC2 said when calculating the “but for” test he considers the following:

[ACC2] ... how much is this person actually going to earn? When you get the situation where this person, usually a lady, was fantastic she would have been able to have the most stunning career and now she is 42 she can only be a cleaner well you know I am sorry … you cannot say that she was that stunning and her career would have been that incredible and now she can only be a cleaner because if she was good enough to do that then she can be better than a cleaner.

So the first thing you need to do is stand back and say are we putting a bit of like for like in here? It would be good if you could reduce the main arguments down to what the “but for” income could reasonably be and then the actual likely income. And remove a lot of the other argument about numbers.

**Question four: participants’ opinions of what should happen in a perfect world regarding economic disparity**

The final question asked was “in a perfect world what would you like to see done about economic disparity between couples on the breakdown of a relationship?
The participants’ views on what they would like to see done in a perfect world about economic disparity between couples on the breakdown of a relationship

Figure 4.43 Graph showing the distribution of participants’ comments regarding what they would like to see done in a perfect world about economic disparity between couples on the breakdown of a relationship
### Table 5.6 Table A summary of participants’ comments regarding what they would like to see done about economic disparity in a perfect world (arranged by indentifying tag and a summary of their respective responses)

<table>
<thead>
<tr>
<th>Identifying Tag</th>
<th>Summary of their response to the question: what, in a perfect world, would you like to see done about economic disparity between couples on the breakdown of a relationship?</th>
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</thead>
<tbody>
<tr>
<td>Judge</td>
<td>The Judge said he would like to see:</td>
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<tr>
<td></td>
<td>• Section 15 awards “more honestly” and “more generously awarded”;</td>
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<tr>
<td></td>
<td>• A new approach adopted that is “less sympathetic to the business person”;</td>
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<td></td>
<td>• An examination of the “other biases that get in the way” when judges make their decisions for example “the way male chivalry gets in the way” (male judges find it hard to understand how and why an ex-partner of a successful woman would want to punish them and then to a degree there are “woman judges with biases against stay at home mothers”).</td>
</tr>
<tr>
<td>QC</td>
<td>The QC said “if I had a magic wand” there would be:</td>
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<tr>
<td></td>
<td>• An end to the idea of the clean break principle she said “one of the things that could be made to work a lot better and would be fair to men and women would be no clean break … women … are really disadvantaged when we have those dependent children but … we can take off and we are okay in our 40s and 50s”;</td>
</tr>
<tr>
<td></td>
<td>• A greater awareness that “earning is … important to be able to maintain capital”. She explained how a woman may have $2 million at the end of a marriage “but if she is only earning $40,000 and she is also supporting the kids … the capital gets eroded”. The QC said that she “sees it all the time”.</td>
</tr>
</tbody>
</table>

The QC’s suggestion for solving the issue of economic disparity was to rethink the concept behind the clean break principle that is enshrined in New Zealand’s conceptual approach to solving relationship property issues. Giving the example of vignette one the QC said that her suggestion would be that the husband leaves $1 million with the wife for the next ten years. That way the wife and the children could stay in the family home, he would be able to own a share in the family home and enjoy any increase in value in the property over the ten year period. Explaining how it would mean that “he supports her in that time and it makes a big difference in the children’s lives” and she would be in a position to start

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361 Interestingly this is similar to Baroness Hale’s statement “… the reality that, although the couple may seek to go their separate ways, they are still jointly responsible for the welfare of their children. The invariable practice in English law is to try and maintain a stable home for the children after their parents’ divorce … Giving priority to the children’s welfare should also involve ensuring that their primary carer is properly provided for, because it is well known that the security and stability of the children depends in large part upon the security and
squirreling away some money”. The QC explained that to make a difference to the problem of economic disparity “you are going to have to really start transferring some real amounts of capital [to the economically disadvantaged spouse] otherwise it is not going to make a difference”. The QC explained that in her opinion, using vignette one as an example: “In today’s market $300,000 to $400,000 is not really going to make a real difference … the husband does not desperately need the capital as he is earning so much money he can borrow more money … and off he goes and he knows that he has the rest of his capital just sitting there.”

The QC thought there was “room for this sort of thing”. Re-thinking the clean break principle would make a real difference to the problem of economic disparity because “it might also mean that judges are more comfortable making big awards”. It would mean there was a solution that had time to allow it to work as the QC said: “Matters could be left for ten years as the effects of the division of functions are going to last about ten years.”

BAK1  BAK1 said “get rid of the provision entirely. I think that it is a mess, if you really wanted to solve economic disparity you would look at what Australia has done”.

BAK2  BAK2 expressed his discontent with having a discretion sitting on a much more certain Act. This, in BAK2’s opinion, needed to be addressed.

BAK3  BAK3 suggested:

- Something radical and move from the presumption of equal sharing. He said: “You might think that equal sharing is some form of protection but it is not working.” Illustrating his contention he said, “See the flip side of it, we have the presumption of equal sharing and then take it away, without the presumption we would then have to think.” Using the example of vignette one BAK3 thought people would think “man this woman has got to get more than him” in respect of the wife’s share of relationship property.
- A radical change in New Zealand’s jurisprudence. He explained that: “The quality of jurisprudence around is poor.” He “would actually like to see judges judging”. For this change we need either “a brave judge or a brave Parliament”;
- Changes to the funding for relationship property cases. Funding for cases is an issue faced in practice. He explained that very few people take cases through to court and even less would appeal a decision. He explained that he thought Mrs. X was brave but she had financial means to see the case through and not many other claimants have this ability.
- Dual jurisdictions meaning people could file proceedings in the Family Court and

the High Court. He said there is a “mindset in current jurisprudence that issues around the child or violence get the attention” and for this reason there has been limited jurisprudence on relationship property issues. Further, some Family Court Judges do not understand the complexities of relationship property. “High Court Judges are more aware of complex property issues and are better equipped to deal with relationship property issues”.

- More recognition of the “very important provision in the Act regarding contributions”. BAK3 is concerned that people forget, “Monetary contributions do not count for more than non-financial”. In his practice this is a problem. He explained how women in the 50 to 60 year age group are very often in traditional marriages, where the wife has not needed skills to have a career, the wife’s role was to support her husband. Explaining sometimes these women do not think they are entitled to a greater share of the relationship property, their thinking is (and their ex-husband’s) that “somehow the income earner has made a far greater contribution to the relationship than the one that has not worked in the paid work force”. BAK3 wants us to rethink this mindset and said, “You still have to look at the contribution issue and you have to take into account that all of us in a professional setting … do not do it alone”.

- The law and our conceptual approach to relationship property matters need to evolve. He said “some men do not see their wives as entitled to” a greater share of relationship property. He thought judges “have this same view and this is a problem”.

- “Repair the whole matrimonial property tool kit” including rethinking of maintenance. Also think about the whole Family Court system. BAK3 thought “the hurdles” involved with going to court need to be removed explaining the Family Court has done itself a huge disservice “as it takes too bloody long to get to court and women are worn out by the process. No one wants to go to the Family Court because of the time it takes, the money that is needed and you are not treated fairly”.

<table>
<thead>
<tr>
<th>BAK5</th>
<th>BAK5 thought:</th>
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<tbody>
<tr>
<td></td>
<td>• Enhancement arguments need to be considered but the methodology used at the moment to calculate the awards does not permit it.</td>
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<td></td>
<td>• Resolve the problems of getting into the High Court. Relationship property matters should be heard in the High Court but “we cannot get into the High Court”. High Court Judges “were more skilled in the area of property” as generally speaking the</td>
</tr>
</tbody>
</table>
High Court Bench comes from commercial backgrounds more so than the members of the Family Court Bench.\footnote{The Family Court Bench has specialist judges. A Family Court Judge cannot be appointed unless they are by reason of their training, experience and personality, a suitable person to deal with matters of family law (Section 5(2) of the Family Courts Act 1980).}

| BAK6 | BAK6’s opinion stood out from the group. She thought that the law “is pretty much as near to perfect as you can get … section 15 is working reasonably well, ideally it would be less expensive to calculate it [but she could] not see a real way around this”. |
| BAK7 | BAK7 thought maintenance should be used to remedy economic disparity on the breakdown of a relationship. |
| BHM8 | BHM8 suggested:  
- Slightly redraft section 15. The redrafting would be focused on lowering the jurisdictional tests.  
- Recognise the uplift of the career of the career holder through the indirect contributions of the economically disadvantaged partner. |
| BCH9 | BCH9 said:  
- “I would like to see the courts taking a more robust approach” to their interpretation and application of section 15;  
- This robust approach should also be taken in cases where there is a modest pool of relationship property “this is where the disparity can sometimes have the greatest effect and be the most significant to the parties”;  
- This robust approach would remove some of the ambiguity surrounding the interpretation and application of section 15 creating more “certainty with it”. |
| BCH10 | BCH10 said:  
- “In a funny way things are improving.” When BCH10 first commenced practising, the word “maintenance was a dirty word”. In those days it was almost never used and if a party could not support themselves then the State provided assistance in the form of the domestic purposes benefit. At least with section 15 we are seeing a step in the right direction;  
- Section 15 should be interpreted differently. She thought “that the courts are interpreting the section very narrowly. Parliament opened it up and the courts have closed it down”;  
- We should consider the number of people excluded from the benefit of section 15 |
because it is not applicable to them. BCH10 explained “the criteria is very narrow ... this prevents a lot of people from being assisted by it, it ... is only for cases where there is a lot of property and there is a huge disparity and then it is really blindly obvious that there should be an award”. The cases with smaller property pools would help people more. BCH10 thought, “It would be great if [section 15] ... had a wider application than what it presently has”.

- Section 15 should be applicable “to people that may have not had a career, [but] where someone with their efforts during the relationship ... has promoted the career of the other”. BCH10 said it is “really hard to make a case like that at the moment and it should not be”.

BDUN11

BDUN11 thought:

- New Zealand should consider England’s system for resolving relationship property matters. England’s approach has evolved and New Zealand’s has not: “we have taken this concept [of economic disparity] and drafted it really badly and then given it to judges who cannot cope with it at all because they are so set in the fifty-fifty mindset”;
- New Zealand should move more towards the English system by “repealing the really structured economic disparity provision ... [replacing it with] a much broader discretion” and the judges need to look at Principles that are there in the Act;
- New Zealand fails to really understand and promote the fact that “marriage is a partnership and as such it carries with it obligations” that should be upheld. The legal profession needs to recognise this.

SPRACTNEL12

This part of the interview was not recorded.

SPRACTWEL13

SPRACTWEL13 thought the solution would be to have a maintenance type provision, because in her experience many people need income when they separate. Although access to income is not without problems, these problems would relate to people trying to get around paying it by “saying that they do not have enough income – a lot of people would try and manipulate their income”.363

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363 The solution put forward by SPRACTWEL13 is something claimant one would agree with. Claimant one expressed her shock regarding how when her ex-husband left the family home so too did the income stream attached to him and this made her feel very economically vulnerable.

The other aspect to the solution put forward by SPRACTWEL13 was discussed when I met with the economist. He expressed concerns around solving economic disparity with any solution relating to the future earnings of one spouse and said, “the additional earning power is in human capital ... [and] there is a philosophical dimension that runs through it akin to slavery”. His view was that if a judge were to make someone pay a share of their income to their ex-partner they may say: bugging it. It is not worth my time earning it and working. I will
| SPRACTWEL14 | SPRACTWEL14 thought:
|---|---|
| • Section 15 works reasonably well and said “I do not think that it needs to change – I am happy with the law at the moment. It is not a perfect world you will not achieve perfection”;  
• Mediation should be used to determine relationship property settlements because it is a “benefit” to those involved saying that “people do not want to be a guinea pig” and going to court can make you one. People should not have to go to court for the public good. By using mediation “people can get on with their lives”.

| SPRACTWEL15 | SPRACTWEL15 suggested:
|---|---|
| • Section 15 should have more shape with “more guidelines and there should be more prescription in the law”. For example what is a relevant circumstance? Whether someone without an established pre-existing career can receive section 15 compensation should be clarified. “What if one person had no career at the start of the relationship? Should we be taking into account the length of the relationship and how many children they have had?”;
• We should look at the Australian model as an example, considering the guidelines they have for determining the division of relationship property.

| SOLNOR16 | SOLNOR16 thought it was “probably just about as good as you can get”. The problem is to do with our approach to its interpretation and application. There are “so many differences”. The Court of Appeal’s interpretation of section 15 “is not working”. If this were to change then section 15 could work.

| SOLAK17 | SOLAK17 thought:
|---|---|
| • There should be more certainty. “Trying to work out exactly what someone is entitled to is extremely difficult. If there was a way of working it out that was much easier to calculate ... it would help.”  
• Dealing with family law and relationship property in practice is difficult. While we may have theories and concepts behind the law that conceptually work, putting it into practice is something quite different. SOLAK17 said: “You can look at the law and you can look at it quite clinically but you know there are a whole lot of other factors that really come into it and these really change what you are doing ... particularly with family law there is so much more.” Any solution to the problem of economic disparity on divorce needs to reflect this.

| SOLAK18 | SOLAK18 thought if section 15 to “survive” there needs to be:
|---|---|

not work ... When it comes to human capital the reality is ... [it] also requires a fronting up by the person to unleash the cash flow.”
Better consideration of the enhancement issue.\textsuperscript{364} This would mean there was a “better consideration of the value of the wife and the enhanced earnings [of the husband] … these factors need to be considered as much as the interrupted career stuff”\textsuperscript{365}

A formula for calculating awards based on a percentage band because “people think better with some sort of percentage band” when calculating economic disparity awards.

SOLAK19 was unsure of what should be done to address the issue of economic disparity and said “I am not certain. I wish I had time to sit and think about it but that is your job”. SOLAK19 thought:

- Economic disparity is something that needs to be addressed but SOLAK19 said she does not “think ... there is true recognition of the issue - it is just like it is something that is thrown in to be negotiated by lawyers.”
- Lawyers in general need to accept economic disparity is an issue … while it is part of the legislation it is still not taken seriously.
- “The judiciary ... need to take it more seriously” and perhaps the judiciary have not had the right cases put in front of them. She said “if the judiciary had their time again to decide $X \text{ v } X$ they would do it differently”.

SOLAK20 thought economic disparity is an issue that urgently needs attention, and explained:

- In her practice she sees people that should receive an award, but section 15 is prohibitive, because of the high costs associated with it;
- In the “ideal world it would be more accessible it would not just be a remedy of the rich … it has just been priced out of the market as a remedy”;
- Some “form of scale of awards would be helpful [providing] certainty” for example the solicitor thought there could have been an award in vignette two. This would help in practice because it would mean a lawyer could inform clients of what an award might be and costs associated with bringing a claim could then be weighed against the likely award.

SOLHM21 thought:

- Economic disparity is difficult because it is “such a subjective thing” and “different for everyone”;

\textsuperscript{364} The economic benefits the careered spouse receives, from the indirect contributions of the non-careered (or care-giving) spouse.

\textsuperscript{365} Essentially saying the focus of the law should not be on the loss of opportunity alone – as $X \text{ v } X$’s focus was - the loss of a career alone.
• There should be a formula for calculating awards. This would resolve the problem of high costs associated with section 15;
• There should be a specialised judiciary handling relationship property matters. Relationship property is a specialized area of law and there are not “many in the Family Court that can really handle these decisions. A lot of them do not understand the complex relationship property claims. Once you get to the High Court or the Court of Appeal a lot of the judges have never dealt with relationship property matters: they have never practiced in this area”;
• There are problems with clients paying. She wondered what legal professional is going to take a claim through to the end when clients are unable pay. And asked “who is going to take a relationship property case all the way to the higher courts?”

SOLTAUR22 thought:
• There “must be an easier way to do this;”
• When the quantum of an award is decided the final step in the decision making process should be to stand back and consider the overall discretion; adjusting the award as a percentage of the relationship property pool. There could be a specified range of awards, leading to greater certainty and reducing costs;
• It is important to settle relationship property matters out of court. While this is negative for the law’s development it is important for the family involved. People can get on with their lives and they are often parents. She said how she tells clients success is not just about winning and to “think about can the two of you go to the weddings the graduations and the 21sts together for the sake of your children?” This is the “human response” in her, the lawyer does not want it, but the human response needs to be considered especially in family law.

SOLTAUR23 thought: Not recorded

SOLTAUR24 thought:
• There should be greater public awareness of economic disparity the public needs to be made aware it is not just a fifty percent division of relationship property;
• The causative aspect of section 15 needs to be clarified;

366 SOLHM21 gave an example of a barrister taking relationship property cases and not seeking payment for their services until an award has been made, so that the clients can afford to engage the services of the Barrister.
362 Referring to section 15(3) – if the Court considers it just it may compensate the economically disadvantaged party.
368 Section 15(1) – if there is a significant disparity of income and living standards then there needs to be an inquiry relating to whether this was caused by the division of functions in the relationship.
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<tr>
<th>SOLWELL25</th>
<th>SOLWELL25 thought:</th>
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<tr>
<td></td>
<td>• There should be more certainty regarding the quantum of section 15 awards this would help advising clients and keep the costs down;</td>
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<td></td>
<td>• The legal profession needs to consider the purpose of section 15. The policy and purpose of section 15 has not carried through to the courts’ decisions and these factors should have been;</td>
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<tr>
<td></td>
<td>• The legal profession needs to better consider all forms of contributions made to the partnership/relationship, and said: “it is not just who brought in the dollars that counts.”</td>
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<tr>
<th>SOLWELL26</th>
<th>SOLWELL26 thought:</th>
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<tr>
<td></td>
<td>• The whole system needs to be rethought;</td>
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<td></td>
<td>• Something with more certainty needs to be adopted like a formula for calculating awards. This would mean there is certainty enabling people to organize their affairs and it would help when advising clients;</td>
</tr>
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<td></td>
<td>• What section 15 is compensating people for needs to be clarified. SOLWELL26 thought it should be for career enhancement and not just the loss of opportunity.</td>
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<tr>
<th>SOLNEL27</th>
<th>SOLNEL27 said:</th>
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<tr>
<td></td>
<td>• There should be a percentage scale adopted for economic disparity awards;</td>
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<td></td>
<td>• The scale should specify relevant factors to be considered when determining the quantum of an award;</td>
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<td></td>
<td>• There is a lot to be said for certainty; it would mean “everyone would know where they stand. If there was a clear formula then what would be the point in going to court?” If there was a clear formula then some of difficulties involved with section 15 would be removed and the costs associated with it would also be reduced.</td>
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<th>SOLNEL28</th>
<th>SOLNEL28 said:</th>
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<td></td>
<td>• Section 15 should be more applicable to people who do not currently sit neatly into the subsections of the community it currently applies to, for example if you</td>
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369 Section 21 of the Property (Relationships) Act provides a mechanism for couples to contract out of the provisions of the Act – it is important to note that parties are not given complete freedom to reach any agreement they wish. For an overview see Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (Second Edition, Wellington, LexisNexis 2009) Chapter 8 (Contracting out of the Act) Pages 185-201.
are not married to a doctor or a lawyer it should still apply;
• More certainty and guidelines need to be given.

<table>
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<tr>
<th>SOLDUN29</th>
<th>SOLDUN29 said:</th>
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<tbody>
<tr>
<td>• Section 15 as it is presently being interpreted and applied is too “unwieldy and the jurisdictional thresholds are too high … the causation tests are too hard”;</td>
<td></td>
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<tr>
<td>• We need a simple formula for calculating awards and more criteria so the courts were consistent when applying the law. This would also help in practice;</td>
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<td>• Enhancement issues must be considered.</td>
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<tr>
<th>SOLINV30</th>
<th>SOLINV30 thought that there should be something more like maintenance and /or alimony his view was that:</th>
</tr>
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<tr>
<td>Section 15 does not really address a lot that can happen afterward as it is confined to the property relationship pool … what I would like … is something that looks more at the capacities of the individuals and does something to try and compensate on that front … maybe … this just cannot be done with relationship property and … it falls into the role of spousal maintenance or something akin to that because … I know what it costs to … bring up a family … even as a team you are sometimes drawn short.</td>
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| Mediator | All relationship property matters should be referred to mediation. |
Results of the online survey

Nineteen members of the legal professional study group took part in an online survey. The online survey built on the questions asked in the interviews. The survey was intended to be an additional vehicle for gathering information regarding legal professionals’ experiences of and opinions regarding section 15.

Participants’ responses to the question: Within a yearly period approximately how often are legal proceedings in relation to relationship property matters commenced?

The results were:

- 2 had not commenced legal proceedings in relation to relationship property matters;
- 9 had commenced legal proceedings in relation to 1-5 relationship property cases;
- 4 had commenced legal proceedings in relation to 6-10 relationship property cases;
- 3 had commenced legal proceedings in relation to 11-15 relationship property cases; and
- 1 had commenced legal proceedings in relation to 16-20 cases.

The general sentiment in respect of relationship property matters was that it is often better to sort matters out between the couples without commencing legal proceedings. Mediation was often seen as a better course of action than legal proceedings. One participant explained: “I try to guide my clients towards mediation before considering proceedings as a result I do not have many files that require proceedings to be issued.”

Commencing legal proceedings is often problematic because of the high costs and the uncertainty of outcome particularly for economic disparity claims. In relationship property matters where there is no economic disparity claim there is little reason to proceed to court. One participant said: “Most straightforward cases settle because the law is so clear with regard to the fifty-fifty split.”

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370 One of the responses was from the mediator – as a mediator he would not commence legal proceedings.
Participants’ responses to the question: In the context of a relationship property matter, how often do you advise clients about the economic disparity provisions contained in section 15 of the Property (Relationships) Act?

The results were:

- 9 respondents always advise clients of the economic disparity provisions;
- 6 frequently advise clients (approximately 75% of the time) of section 15 and economic disparity claims;
- 2 often advise clients (approximately 50% of the time) of section 15 and economic disparity claims;
- 1 seldom advises clients (less than 25% of the time) of section 15 and economic disparity claims; and
- 1 has never considered section 15 to be relevant.\(^{371}\)

The responses indicate the advice the public receives regarding section 15 and economic disparity claims is mixed.

One respondent said they always consider a potential claim:

> During the initial meeting with clients I always gather information from the client about their work and work history along with the same information about their partner/ex partner. At the time I explain why I am asking those questions and we consider whether the client has a section 15 claim and/or spousal maintenance claim or they may have one against them.

Another said, “It is important to canvas it and consider it in ALL cases”.

Another participant explained how if they think there is a “possibility” of a claim they will mention it and then said if “I don’t think they have a high prospect of success” this is discussed and “it is for the client to decide if they wish to pursue it or not”.

\(^{371}\) As noted, one of the respondents is a mediator and does not give legal advice. For this reason it is to be expected that the mediator has not advised a client about s15 and economic disparity.
Another participant explained:

Most often it would not be worthwhile to run an economic disparity claim as the woman (I have never had a male) has always gone back to work soon after the children are born and the likelihood of any successful award is not worth the lawyer’s time trying to advance such a claim.\(^\text{372}\)

**Participants’ responses to the question: Based on your experience indicate the types of people that the economic disparity provisions are commonly of relevance and importance to**

This question tries to uncover how section 15 has impacted on people within New Zealand. Do the professionals advising on the provision think it is for the high net worth sectors of New Zealand’s community or is it a remedy for all?

The results were as follows:\(^\text{373}\)

- 11 indicated high net worth people;
- 12 indicated high earning professionals;
- 7 indicated middle income earners;
- 2 indicated low income earners; and
- 7 indicated all of the categories.

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\(^\text{372}\) This is an interesting observation. The respondents’ comments indicate their focus is on the opportunity lost alone. Because most of the respondents’ clients have returned to work soon after having children, the respondent believed there is little scope for a section 15 claim because the focus is on the loss of opportunity in respect of the career foregone. Yet if economic disparity claims considered career enhancement arguments, there may be grounds on which to establish a section 15 claim. This sentiment is reflected in Baroness Hale’s judgment. Her view was that “there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home”. *McFarlane v McFarlane* [2006] UKHL 24; Baroness Hale at [153].

\(^\text{373}\) The respondents could choose multiple categories.
Participants’ responses to the question: Based on your experience indicate the people that section 15 is more commonly used by

The results were:

• 14 indicated married people;
• 7 indicated people in de-facto partnerships;
• 0 indicated civil unions;
• 0 indicated same sex couples; and
• 6 indicated the provision is used by all the people in these categories.

Participants’ responses to the question: Based on your experience what has been the impact of section 15 in cases you have settled out of court?

The results were:

• 5 thought it had made no substantive change;
• 2 thought 1-3% more of the relationship property had been awarded;
• 5 thought 4-5% more of the relationship property had been awarded;
• 1 thought 6-7% more of the relationship property had been awarded;
• 3 thought 8-9% more of the relationship property had been awarded;
• 2 thought that above 10% of the relationship property had been awarded.

The respondents could comment on their answers. One respondent explained that the results of the share of relationship property were “so variable” and said there has been “a range of economic disparity awards and not an average” and as such their response to the question was not necessarily correct.

Putting this response aside, the results to this question indicated the uncertainty surrounding section 15 awards and the real basis on which they are made outside of the courtroom. There

374 The respondents could choose multiple categories. This sample is reflective of the case law with the majority of cases involving section 15 regarding married couples. There have been fewer de-facto relationships and no civil union matters.
is a feeling that in practice economic disparity claims are often conceded to resolve matters. For example, a respondent said:

One of the problems I frequently encounter is acting for a client whose ex-partner is arguing that they have a section 15 case without producing any real evidence or figures to support their position. There is just a general statement made that “X is seeking an adjustment for economic disparity”. Often there is not a strong claim at all but usually what happens in mediation or during settlement negotiations is the non-claiming partner often ends up settling for slightly less than half of the relationship property to resolve matters. In their mind they have simply accepted less than half to settle matters. In the other party’s mind they have achieved an economic disparity award. There is then the difficult task of how to write the unequal division in the relationship property agreement. Often it ends up being recorded as a payment for “economic disparity/spousal maintenance” simply because the other side insists on the same and to not agree would compromise or derail the agreements reached.

Another respondent had a similar view. They said:

In settlements there is often a premium paid over a strict fifty-fifty division. Whether this is a premium for closure, recognition that the non-earning partner will struggle, a compassionate payment, lump sum spousal maintenance, strictly a section 15 payment or something else (guilt money?) is, by the end of negotiations inchoate.

Some responses indicated that section 15 has had little impact on the division of relationship property. For example, one participant said section 15 has had “very little” impact “unless the couple has a lot of assets”. Another explained that they have “never included a section 15 claim in an out of court settlement”.

These views are different to those of the mediator who indicated, within the context of mediated relationship property settlements, economic disparity awards are substantial. He said “section 15 top ups in mediation vary between 5-12 percent” of the relationship property pool, in “some cases there is significantly more awarded”.

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Participants’ responses to the question: Based on your experience what has been the impact of section 15 in cases that have gone to court?

The results were:

- 11 thought no substantive change had been made to the awards;
- 1 thought 1-3% more of the relationship property had been awarded;
- 2 thought 4-5% more of the relationship property had been awarded;
- 1 thought 6-7% more of the relationship property had been awarded; and
- 2 thought above 10% of the relationship property had been awarded.

Participants’ responses to the question: In out-of-court settlements involving section 15 how do you determine the amount that should be awarded?

The respondents indicated:

- 5 used a formula for calculating the award similar to that specified in X v. X;
- 5 determined the amount based on what they considered to be a fair amount founded on a percentage of the relationship property;
- 4 referred it to expert valuers;
- 3 indicated they used other methods to determine the awards.

The participants’ comments indicated that there are varied approaches to the determination of awards (this finding is consistent with the results of the interviews) and there is disagreement among the legal profession regarding elements of awards. For example:

- One response was there “is no set formula, it’s very random”;
- Three participants implied that the case law is a starting point in determinations – but this is just one aspect in the equation. One respondent said: “I usually consider the case law but obviously need to consider the facts of the case I am dealing with”;
• A respondent used a combination of things to work out an award and explained how they “use really all” of the methods;³⁷⁵
• One respondent explained the difficulty of the X v X approach to calculating awards. Their view was that:

The X v X methodology is reasonably well settled so … accounting experts usually agree. What they cannot agree on, because it is a factual issue, is the inputs, particularly the “but for” income, the length of the disparity period and the discount for contingencies. The formula is a base starting point in negotiations it is used as a guideline … lawyers will talk X v X and the parties negotiate from that point.

Participants’ responses to the question: Do you perceive any problems within the economic disparity provisions?

The clear majority perceived problems with the economic disparity provisions. Eighteen of the participants said they perceived problems and one did not.

The following questions were asked in the online survey to try and understand the problems associated with the economic disparity provisions.

Are the problems associated with:

• meeting the jurisdictional tests of section 15?
• determining whether there is a significant disparity of income and living standards?
• determining if the cause of the disparity of income and living standards was a result of the division of functions in the relationship?
• determining the appropriate amount of compensation?
• the vagueness of the section?
• when the economically disadvantaged person has not had a career?

³⁷⁵ Meaning the X v X type formula, a fair amount based on a percentage of the relationship property and advice from expert valuers.
The participants were asked to indicate on a scale of 1-10, the level of difficulty they perceive around each of the problems (with 1 being of slight difficulty and 10 being extremely difficult).

The graphs below record the participants’ responses. The significance of the problem is labelled on the horizontal axis.

![Graph showing the participants’ responses to the question: How much of a problem meeting the jurisdictional tests of section 15 are to them in practice (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))](image)

Figure 5.44 Graph online survey results showing the participants’ responses to the question: How much of a problem meeting the jurisdictional tests of section 15 are to them in practice (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

![Graph showing the participants’ responses to the question: How much of a problem determining whether there is a significant disparity of income and living standards is to them in practice (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))](image)

Figure 5.45 Graph online survey results showing the participants’ responses to the question: How much of a problem determining whether there is a significant disparity of income and living standards is to them in practice (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))
Figure 5.46 Graph online survey results showing the participants’ responses to the question: How much of a problem is determining if the cause of the disparity of income and living standards was a result of the division of functions in the relationship ( Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

Figure 5.47 Graph online survey results showing the participants’ responses to the question: How much of a problem is determining the appropriate amount of compensation ( Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))
Figure 5.48 Graph online survey results showing the participants’ responses to the question: How much of a problem is the vagueness of the section (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))

Figure 5.49 Graph online survey results showing the participants’ responses to the question: How much of a problem do you find it when the economically disadvantaged person has not had a career? (Ranked on a scale of significance from 1 (insignificant) to 10 (extremely significant))
Participants’ comments regarding other problems they have found with section 15

The participants were also able to comment on other problems they have found with section 15. The following are extracts of the comments:

“The questions of causation and future disparity are at times problematic, but the variation among judicial attitudes is hard to reason. I think the judges are reluctant participants and in fact women judges are hardest to persuade ... maybe as self made high earning professionals they have little sympathy with stay at home mums.”

“It is not what I lobbied for all those years ... to be part of the Legislation.”

“The failure in section 15 to recognise the other benefits derived in the course of the relationship by the economically disadvantaged spouse leading to outcomes which appear to unjustly enrich that person/appear unfair to the litigants. Also, the failure of section 15 to take into account possible future changes in the relative economic situation of the parties.”

“The case law has developed in a way that seems not to accord with the section nor justice and fairness provisions, and the costs are too high.”

“The major problem comes with middle class workers.”

“The fact that there are no clear guidelines. [E]veryone seems to have a different version of how it should work”.

“The legal costs of advancing such a claim make any award you would get a waste of time.”

“Often Counsel will raise a section 15 argument whether there is justification or not in an attempt to get a bigger share of the relationship property for their client. More often than not it is a distraction from the real issues and a waste of time for all parties.”
Participants’ views on the question: Do you perceive any differences between male and female views regarding the economic disparity provisions?

Fifteen of the participants perceived a difference between male and female views regarding economic disparity. It was felt, by one participant, that “there is an inbuilt blindness to male applicant’s needs”. Another thought “men don’t believe it [section 15] should be given any weight. Women are very hurt their child rearing is so little valued”.

Other participants also explained it is hard for some of their male clients to understand section 15 and the reason New Zealand has it. Typically males “are more likely not to accept the principles or philosophy behind the section”. A participant said “men, by and large, tend to be un-accepting of the notion”. Another explained “men ( earners) don’t believe it should be paid, and women expect it” and men “believe that the woman has been well taken care of during the relationship and this is sufficient”. Further:

The income earning partner is not infrequently accepting of a consequential disability and desire to ensure that the children are well provided for although rejects any notion that but for the relationship the non-earning partner would be doing as well as he/she.

Another participant said:

Some men struggle to recognise that they have been advantaged and in fact some think that the woman has been advantaged from his earning capacity while they have been together without recognising … the woman’s contribution.

There was also a sentiment expressed that “women are more likely to claim a section 15 adjustment”. One comment was “I have not had any section 15 claims in relation to the male claiming section 15”, or “males generally cannot see the need, or fairness … awards are usually against males”. One respondent, said:

Women often feel a sense of entitlement to an award for economic disparity when they have looked after the children … whether or not they meet the requirements of section 15. They feel cheated and often angry when you advise that they don't appear to have a claim (usually because they have not had a “career”) … men tend to understand the legal
requirements of the section … (they don’t … look at it with the same emotion). However, when faced with advice that their ex-partner has a claim … most men want to scale the claim back to the smallest amount possible. I … encounter comments like “she chose to work part-time”, or “she chose to take that long off with the kids” suggesting that little value … is being placed on the value the wife/partner contributed to the relationship by caring for the children and keeping the home running.

The observations of the participants are evidence that there are gender differences regarding section 15 and economic disparity claims. Men are said to “feel more vulnerable” and “harbour a general sense of injustice”. This is “partly fuelled by a misapprehension of the real ambit of the provisions”. The participants thought that “typically … the female partner feels that her career as a homemaker has been unjustly terminated and she should be entitled to some form of compensation”.

**Participants’ responses to the question: Have you any additional comments or experiences you would like to make or share in respect of relationship property and the issue of economic disparity?**

The observations made by the group mirror those in the interviews, expressing concerns about:

- The methods used for calculating the quantum of awards.
- Whether the awards should be halved.
- The substantial costs associated with economic disparity claims.
- The delays and the inherent uncertainty with bringing a claim.

The comments of the participants included the following:

- There is an on-going debate as to whether the “compensation” should be “halved” or not. That is one aspect of variability in an area of broad discretion … maybe that’s what is inherent in a compensatory exercise?

- It [section 15 and economic disparity claims] needs to be cheaper, fairer and easier for women to get, the legislative changes have not worked and only the richest … can afford to even fight it.
• It [section 15 and economic disparity claims] continues to be a source of conflict and prevents speedy resolution of cases. It is very often the factor most impacting on the ability to settle cases, and causing one or other party to issue proceedings. The uncertainty of outcome makes it relatively difficult to provide solid advice. It is very often perceived to be unfair by the party being required to pay compensation because there is no recognition of their sacrifices.

• This is a very difficult area. The cases I find most difficult are middle income families where there is not enough money for the client to pay for expert assistance to calculate the claim and you are left trying to formulate the claim and decide on the variables to use in calculating the quantum of your claim. I also find the cases where the other side makes a sweeping statement that their client is wanting x for economic disparity without any evidence, justification or figures very hard to resolve.

• In my experience the types of cases involving economic disparity are generally ones that [should] be handled by senior practitioners. Because they usually involve high net worth there are often other complicating factors ... such as trusts and companies and assessments of earning capacities.

• I think that in mediation as opposed to court, people will consider and accept a section 15 payment because they have a say in what it should be and, most importantly, how it will be paid.

• Some clear guidelines would be useful.

• The section (and others) introduces undesirable uncertainties in an area where resolution should be predictable, inexpensive and speedy. Thus it encourages litigation and the continuation by that means of dysfunctional relationships.

• The test is impractical and the argument is difficult to run.
A summary of the findings of the empirical research: What conclusions can be drawn from this research?

The key findings are summarised and then following the summary each issue is examined in further detail.

Section 15 (economic disparity claims) has created a situation where there are now inconsistencies and an unpredictability regarding the application of the law: There are widespread inconsistencies in the interpretation and application of section 15 that have created an unpredictability regarding the way an economic disparity claim may be handled by those involved (be it a lawyer, barrister, forensic accountant or judge).

The legal participants’ range of suggested compensation in the vignettes highlights the significance of the divergence in results. The range in vignette one was no compensation to over $2 million. In vignette two, only twelve participants thought section 15 compensation should be paid. For those that thought compensation should be paid the range of compensation was from less than $10,000 to $40,000-$50,000.

These inconsistencies lie at the heart of problems associated with economic disparity. It is undoubtedly difficult for the New Zealand public to obtain reasonable and consistent legal advice because the profession itself does not agree. Professionals find the provision complex and ambiguous to interpret and apply, and these problems flow into the legal advice given to the public. As a participant explained “Putting it [section 15] into practice is very hard” and then “trying to work out what someone is entitled to is extremely difficult” (SOLAK17). The view of a number of practitioners was that section 15 means different things to different people with practitioners and judges unable to agree amongst themselves.

These features logically impact on the legal advice that the public receive. As the research indicates, it is hard for a lawyer or barrister to advise someone if an economic disparity claim may be successful. Even if a claim is likely to be successful, the amount of compensation that may be awarded is unquestionably uncertain. The unpredictability associated with economic

376 Also see Figures 5.7 to 5.49 that illustrate a pattern of an inconsistent application and interpretation of s15 by legal professionals.
377 The two practitioners who gave these responses were both respected and experienced senior barristers.
disparity claims exists to such an extent that it may challenge the integrity of the rule of law. People cannot be certain of their rights and obligations under section 15 because there is so much variability in approaches to the interpretation and application of the provision leading to unpredictable results.\(^{378}\) One feature of the rule of law is that people should be able to know what the law is. Within the context of section 15 people cannot know what their rights or obligations may be because the section does not provide a guide and the Courts have yet to make sense of aspects of the provision (for example alternative methods of calculating the compensation).

**The enhanced earnings aspects of economic disparity claims are generally overlooked:**

The enhanced earnings side to economic disparity has not yet been factored into the awards. Enhanced earnings means the uplift or enhancement of the careereed partner’s earning potential and career attributable to the indirect contributions of the other spouse. These indirect contributions may include the giving of assistance or support, whether or not of a material kind:\(^{379}\)

- that enables the other spouse to acquire qualifications; or

- that aids the other spouse in the carrying out of his or her occupation.

For some practitioners this was seen as a result of the judiciary failing to properly consider the issue of enhanced earning. For example a solicitor explained: “The court does not seem to understand the effect of having someone stay at home and the effect that that has on enabling someone else to build up their career” (SOLAK18). Forensic accountant (ACC1) said the courts “are just missing the point with all of this”. ACC1 thought that there was an economic advantage given to the career-holding party of having a wife/partner stay at home and thought the key to addressing economic disparity is to consider the future income of the careered partner. The actuary agreed yet felt that this issue is largely overlooked by the profession because of the current conceptual approach it takes to section 15 which has been formed, in part, on the basis of the precedents set by Court decisions.

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\(^{378}\) Note if the methodology of \(X v X\) is adopted because of the inherent unpredictability of the variables that need to be imputed into the formula (for example the amount of the loss of income, how many years the projections should be made and what discounts should be made) the uncertainty around the amount of any award remains.

\(^{379}\) See section 18 Property (Relationships) Act.
Enhanced earnings is an important consideration in any examination of economic disparity claims. In the New Zealand context it is particularly important because there has not yet been a successful case argued on the basis of enhancement of a career. It is also yet to be ascertained whether “earning potential” might be seen as “property”. These issues will be considered later within this chapter.

Systemic problems within the wider context of the New Zealand family law framework: While there are problems associated with section 15 (with the drafting of the provision and the conceptual approach taken to its interpretation and application) there are also problems within the wider context of New Zealand Family Law and the court system. There are institutional problems associated with the high costs of a section 15 claim and inherent delays in getting a matter before the court.

Practitioners discussed problems in having matters heard in the Family Court; many thought the High Court would be better equipped to deal with the complexity of relationship property matters (often involving trust and company structures). There are also problems due to the conflict between economic disparity claims and wider principles of family law, for example the clean break principle. It is hard to understand how section 15 works within a property...

380 See chapter 3 page 69.
381 BAK5 said “that there is no sure and fast system to get into court. It takes on average over a year to get to court and then when you do you get an unpredictable outcome”. This was something that BAK5 said she was “not prepared to put her clients through”.
382 The participants in the study gave examples of the level of the monetary costs involved in bringing an economic disparity claim. For example Auckland barrister BAK5 explained that there were “prohibitive costs associated with taking any action under s15. It requires extensive input and work from accountants.” BAK5 said to just get them [an accountant] to open the books was $16,000. The accounting reports “are required because of the current approach taken by the Court of Appeal for calculating the quantum of an award”. BAK5 gave another example of a matter she was working on where accounting costs were $75,000 and the total relationship property pool was $2 million. The claimant said that the costs associated with her s15 claim (which went to the Court of Appeal) were $200,000. The claimant explained that she “was very lucky” in that her lawyer waited until the end of the matter to be paid but the on-going “costs of the forensic accountants were huge”.
383 BAK5 said that the “calibre of some of the Family Court Judges was debatable” and she wondered “if they had the ability to hear and decide relationship property matters which can be extremely complex.” She explained that s15 is a complex piece of legislation and then as it is relationship property there are often trusts and company structures involved.” In her experience some of the Family Court Judges “did not have a basic understanding of accounting and banking concepts”. The problem for BAK5 is to do with the limited pool of people in New Zealand from which the judiciary can be selected. BAK5 spoke of the problems in getting a matter to the High Court and her perception that High Court Judges are more skilled in the area of property as they often come from more commercial backgrounds than Family Court Judges.
384 This observation is also true with respect to the clean break principle and maintenance obligations. Although in respect of maintenance the duty to pay is not an enduring one. The maintenance obligations are to be short term remedies; arguably economic disparity obligations may go further than this.
based Act (such as the Property (Relationships) Act) which is founded on the principle of parties being able to put their past relationship behind them without ongoing future obligations owed to a former spouse/party overshadowing their future. Understanding quite how section 15 fits within this, because it requires the future economic conditions of the parties to be considered, is difficult. So too is the relationship between economic disparity claims and maintenance awards.

Examining the key findings:

The inconsistencies

The majority thought that there are serious problems associated with section 15 and/or the way it is being interpreted and applied. The problems are not isolated at a judicial level. There is a perception of the existence of problems that are widespread across the legal profession, to the extent that “everyone seems to have a different version of how it [section 15] should work”\(^{385}\). The approach forensic accountants take to section 15 is also seen as flawed. The manner that the profession reads and applies the law means there are conflicting views taken of the same set of facts and the provision has became difficult to apply. A number of participants thought that the solution to the problem (of the inconsistencies) would be to “step away from … the current thinking and the way that the case law has evolved” (SOLDUN29).

There is a lack of consistency in the manner the jurisdictional tests of section 15 are read and what factors influence practitioners when they consider section 15.\(^{386}\) Because some practitioners interpret the jurisdictional tests in a restrictive manner there is a high jurisdictional and evidential threshold created. This means “there are a lot of people that it does not apply to” (SOLDUN29) and it was felt that these people should be able to enjoy the benefit of section 15. As an Auckland barrister, said “wake up guys … this is now an area of law that you are not doing right. There is a situation where the law is not at fault … it is us guys” (BAK1).

The problems associated with the particular drafting of section 15 and the legislation:

Section 15 sits uneasily within a statute that gives the appearance of being founded on the

\(^{385}\) A response received from the online survey.
\(^{386}\) See Figures 5.11 – 5.39.
basic premise of “splitting relationship property down the middle”. It means contributions only need to be examined when a party seeks to displace the presumption. 387 Unlike other comparable jurisdictions, New Zealand’s relationship property regime has the appearance that this fifty-fifty sharing of the relationship property is the “norm” and it is “on this bedrock of equal sharing” 388 section 15 is grafted. A barrister explained the dilemma of section 15 and its placement within the scheme of the Act: “well you see at the moment it is a discretion sitting in on a much more certain Act” (BAK2). This may explain why, as the practitioners said, men see the provision as “punishment” or if a woman seeks recompense under section 15 she is told to “fuck off” by her husband/partner (BAK5). Because it is seen as being something outside of the scope of a “standard” relationship property settlement this in turn means practitioners often do not want to raise economic disparity arguments because they think it is important for the welfare of the individuals and the wider family unit to settle matters amicably so that the least amount of external stress is exerted on an already stressed family unit. To pursue a remedy which is expensive, unpredictable and ineffective seems defy logic for practitioners (being a sentiment expressed by BAK5).

Similarly, it could explain the meagre awards made by courts under section 15. It is likely that the judiciary feel constrained by the Property (Relationships) Act which is predominantly a rule/formula based Act and section 15 could be seen as out of place within such a statutory scheme. This sense of constraint may be further compounded because the presumption based statutory scheme of equal sharing of property has been a feature of New Zealand law for over 36 years. 389 Given the duration that the statutory scheme has been in place it is unsurprising that there is disinclination on the part of the judiciary and legal practitioners to make generous economic disparity awards because to do so would be to venture into an untested domain that may have unforeseen political or social consequences. 390 Because of the problems within the drafting of section 15 and the placement of it within the framework of an

388 Ibid.
389 Ibid.
390 Section 15 has been part of the statutory scheme for eleven years.
391 As explained in chapter two there was public and political debate about the 2002 law reform and change in this particular area of law has seen flow-on political and social effects- large section 15 awards may in turn cause social debate.
established statutory scheme (which the public are very aware of\(^{391}\) it in unsurprising that confusion abounds regarding quite what to do about economic disparity claims.

The empirical research indicates the significant role that legal practitioners play as gatekeepers\(^{392}\) when deciding whether to pursue an economic disparity claim. Because the drafting of the provision is vague the profession can exert a considerable influence over a claim. The practitioner’s idiosyncratic ideology shapes their respective decisions. For example section 15(3) requires a judgmental exercise of whether it is “just” to make a compensatory payment. Practitioner’s read their own sense of ‘justice’ into this exercise. This is shaped by a range of largely hidden factors. For example a solicitor said that “there are some cases when it [a section 15 claim] could be justified like in the X v X case but really these are few and far between”(SOLAK17). The solicitor gave a hypothetical example of a couple with a “big pool of relationship property … $3 million … they get $1.5 million each”. The solicitor’s view was that it is best to leave matters with the fifty-fifty division of relationship property. She said “think about it do you really have to start meddling again?” The flow-on effect of this type of attitude may mean that for the public section 15 claims are stopped in the offices of lawyers because of the particular feelings of the counsel advising about the justification of bringing a claim.

The most significant of the discretionary elements of section 15 are centred on the quantum of the awards. Within the practitioners’ exercise of the discretion there is a continuation of the historical trend that a stronger emphasis and appreciation is placed on the contributions that can be measured in financial terms.\(^{393}\) Generally there is a failure to recognise and acknowledge within an award the non-financial contributions made to the relationship or marriage. This is despite an explicit direction that financial contributions are not to be presumed of greater value than non-financial contributions.\(^{394}\)

\(^{391}\)The New Zealand public have, over time, come to understand, or at least are aware of, the presumption of equal sharing such that frequently comments were made by participants within the study that the public are aware of the presumption and realise it is a feature of New Zealand’s legal framework.

\(^{392}\)Where a practitioner makes subjective decisions on the parameters of a claim and whether a potential claimant should bring a claim. The practitioner makes the decision as to whether a claim should be brought.

\(^{393}\)For example Professor Mark Henaghan notes that there has been a reluctance to grasp the significance of the non-financial contributions to a marriage or de facto relationship as a partnership of equals who should share the spoils when it ends. See Mark Henaghan and Nicola Peart “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” in Bigwood, R (ed) The Permanent New Zealand Court of Appeal, Essays on the First 50 Years (Hart Publishing Oxford, 2009) page 101.

\(^{394}\)Section 18 (2) Property (Relationships) Act 1976.
Many of New Zealand’s legal professionals have never, in the context of a relationship property matter, been required to exercise a wide discretion or make judgment calls of the nature section 15 requires of them (or they perceive the section requires of them). Arguably this is a skill many are unfamiliar with, particularly in relation to the determination of relationship property matters. Participants explained that the “hybrid nature” of section 15 “is wrong because it has been an add-on to the model” and it “has completely buggered it” (BAK4).

The reference to the “add on” is a reference to section 15 and its grafting onto a legal regime which generally gave legal professionals some certainty regarding the rules to be applied on the division of relationship property. Generally the law is a straight equal division of relationship property (unless there are extraordinary circumstances that would make equal sharing repugnant to justice). Section 15 deviates from this directive and provides no framework for those interpreting and implementing the law on how the relationship property should be divided other than for the purposes of compensating for the economic disparity. For many of the practitioners this is a problem they battle with in practice. The words of the provision do not speak for themselves, there is no directive regarding the division of the relationship property if the economic disparity is established. Instead section 15 leaves a lot of work and analysis to be done by those considering it.395

For some participants the effects of this problem are worsened because New Zealand’s legal profession has lost some of the “institutional knowledge” required when exercising the type of discretion contained in section 15 and “as a result we are heading backwards” (BAK3).396 BAK3 was referring to the negative nature of relationship property law he encountered in practice when affidavits were given in support of the exercise of the discretions (in the existing law under the Matrimonial Property Act 1963 (see chapter 3)) that were “offensive, inflammatory and degrading ... drilling right down to the minuscules of the relationship to

395 For example what is a meant by the concept of “significant”? The first jurisdictional hurdle of s15 asks the practitioner to consider if there is going to be a “significant disparity of income and living standards?” (s15(1)). Or what should a practitioner have regard to when determining whether or not to make an economic disparity award? s15(2) gives examples of what a Court “may” have to regard to – but it is not an extensive list. It includes the catch-all statement of “any other relevant circumstances” (s15(2)(c)). A further example of this void is how does one calculate another’s “likely earning capacity?” These issues, and the gaps that the section contains, have been examined in chapter 3.

396 BAK3 alluded to his understanding and experiences of relationship property laws existing prior to the matrimonial law reform of 1976 where the focus was on what contributions had been made to property by the spouses – there was no presumption in law of equal sharing between the spouses. But a claimant had to establish a link to the property through their contributions to the property.
prove that someone should get more than the other”. This is an issue the United Kingdom’s judiciary has also considered and where they express a similar view to BAK3.397

The inconsistencies in the legal profession’s interpretation and application of the legislation: The first step when interpreting and applying the provision is to consider: are the jurisdictional tests of the provision met? The varying responses of the participants to the vignettes indicate the complexity of this question for practitioners. The manner in which the legal profession considers and applies the jurisdictional tests to the cases before them is not universal.

The divergence in opinion regarding the same facts and the correct interpretation and application of section 15 onto these facts is evidenced in the participants’ treatment of vignette one. See Figures 5.7 – 5.20 for the range of responses. Another illustration of this was in the group’s treatment of the question whether in vignette one there was a significant disparity in income and living standards between the husband and wife. The QC thought the disparity of income and living standards was significant and Dunedin solicitor said “this is a no brainer … there is a significant disparity of income and living standards” (SOLDUN29). However, some practitioners disagreed. They were less conclusive. Auckland solicitor SOLAK17 did not think this was a “dream set of facts” (which SOLINV30 did) and felt that “this is one of the ones you should consider for a claim … but when you break it down I am not sure you can get over the hurdle” and conclude there is a significant disparity of income and living standards. Another participant Auckland barrister (BAK1) thought there were “grey” areas in respect of the issue of income and living standards, and said:

[BAK1] … this is the first grey area because the law says that it has to be conjunctive and you would think as a matter of logic … that if there is a significantly higher standard of income and it follows as night follows day there will be a significantly higher standard of living. But this is not necessarily so. What if the significantly

397 Baroness Hale references the words of Coleridge J in G v G, who discussed what a contribution is, explaining how the focus of the law is on a “detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward, not back ... But then, the facts having been established, they each call for a value judgment of the worth of each side’s behaviour and translation of that worth into actual money... It is much the same as comparing apples with pears and the debate is about as sterile or useful” Baroness Hale says: “Each should be seen as doing their best in their own sphere” McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Baroness Hale at [146].
higher income earner also has a significantly higher amount of liability? … So for me the conjunctive part, the living standards, is not exactly subjective but it is not easily indentified. In this case they are probably going to get over the first hurdle.

Another example of the inconsistencies in the legal profession’s interpretation of section 15 was illustrated in the next question participants were asked to answer in respect of vignette one. After establishing that there was going to be a significant disparity of income, the next question asked was how likely the disparity was a result of the division of functions in the relationship.

A solicitor ranked the likelihood as 10 (meaning he considered that without a doubt the disparity was a result of the division of functions in the relationship) and said:

[SOLINV30] The facts speak for themselves on this one … the overwhelming factor is that decision about who’s attending the children at home. I can’t see anything else. I would love it if a set of facts like this came through my door. This is the dream case … I mean you cannot see it any other way.

Compare SOLINV30’s response with that of another solicitor who thought the likelihood of the disparity being caused by the division of functions of the relationship should be ranked as 6 on the scale and felt:

[SOLHM21] … after a certain period of time after the kids got to a certain age she would have been more than capable of going back to work … she is well qualified and … earned good money before having children. Once you have given up work for over 5 to 7 years you need to show that you had good evidence of reasons why you have given up work for that long … this is how society will look at this.

Participants think it is the judiciary that is misinterpreting the legislation and this has led to some of the problems they encounter. There are “so many different interpretations taken” (SOLNOR16) that it makes the provision hard to apply. Participants question the Court of
Appeal’s approach and have said that it “is failing” and “not working” (SOLNOR16). It is to the judiciary that practitioners look for guidance regarding how the law should be approached and the judiciary’s treatment of section 15 has, in some participants’ opinions, fallen short. SOLNOR16 said it is “the Court of Appeal’s approach in its interpretation that is not working”.

**The inconsistencies in the quantum of compensation:** A key indicator of the inconsistency of results is illustrated in the compensation that the group thought should be paid in the vignettes. The fact there is an inconsistency of result is not totally unexpected although the range is exceptional. The inconsistencies found in decisions regarding the amount of section 15 compensation are evident in the variable decisions contained in the case law and also within the out-of-court settlements the empirical research is indicative of.\(^{399}\)

One of the key difficulties faced by courts and by practitioners in the application of section 15 has been how to calculate the quantum of an award. In *P v P*, the High Court commented:\(^{400}\) “The absence of any meaningful guidance in section 15 about how the quantum of an award is to be calculated is remarkable.” There is a general understanding that *X v X* provides a framework for the calculation, but it is not always going to be an easy fit with the facts encountered in practice. The question for practitioners is then: what are the alternative means for calculating a section 15 award?

The empirical research indicates that practitioners struggle with the calculation of the quantum and applying the jurisdictional tests to real matters. This is unsurprising because section 15 does not inform those reading and applying it how to calculate the awards. The problems faced by the legal profession regarding section 15\(^{401}\) have flow-on-effects. For example, the empirical research illustrates the high costs involved with bringing an economic disparity claim in New Zealand.\(^{402}\) Much of the high cost results from the need for extensive expert evidence regarding the calculation of quantum of. As Priestley J said in 2000 regarding the then intended reforms, “Heaven help the accountants who might be unleashed

\(^{399}\) The spread of the legal professionals’ decisions regarding of the compensation due under the vignettes is evidence of this.

\(^{400}\) *P v P* [2005] NZFLR 689, at [68].

\(^{401}\) In particular the absence of a method of calculation of the quantum of award.

\(^{402}\) BAK5 said it was $16,000 to get a financial report from accountants of the nature required by the Court – and that was really to just “get them to open to the books.”
on us as a result”.

Three years later Priestley J commented, “The concept of compensation of course brings into play nice considerations of actuarial and arithmetical calculations, hence the gathering swarms of accountants!” The research results confirm Priestley J’s observation.

Participants discussed difficulties experienced when they have explained to clients what is involved in establishing the grounds for an economic disparity claim and the potential amount of an award. They also expressed a sentiment that when they advise their clients they are aware that whatever opinion they have would not be the “last word on the matter” (SOLAK17). Participants felt that they are in the dark regarding what a claim may cost because there is a reliance on expert evidence (the high costs of this evidence were also noted as being hard to rationalise). An Auckland solicitor explained the situation many other practitioners also spoke of when she said there was a problem with the “inability [she has] to give [her] clients any clarity at all on whether or not they would be successful” (SOLAK17). It means when she has advised people she cannot give them “any certainty” or “a fifty-fifty odds or a seventy-thirty” likelihood of success (SOLAK17).

The research of Mnookin and Kornhauser suggested vague legal standards have effects on parties’ relative bargaining power and on negotiations. Uncertainty about the outcome in court increases transaction costs. Imprecise legal standards require an expert to estimate the probable outcome of a case. This is evident in the context of section 15 where, in the context of this research, legal professionals observed the existence of widespread reliance on the advice of forensic accountants. As summarised by a solicitor who had the view that “the accountants have hijacked this” and the legal profession “have bought into the fact that there must be a formula to sort this out” and they have “deferred their decisions to the accountants” (SOLTAUR22).

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403 His Honour Justice JM Priestley, High Court Judge, In the discretion of the Court Property Relationships Masterclass 2000 LexisNexis.
A lawyer may be necessary simply for a person to learn what their bargaining chips are. Even then in the context of section 15 this is problematic because practitioners struggle to provide their clients with clear opinions regarding how a case may be determined. An experienced barrister said that, when advising clients, it can be a situation of saying to clients “on the one hand it is this ... and on the other it is that” (BAK1) and how clients “just want a bloody answer” and they think “who is this bloody lawyer and why can he not tell me the answer?” (BAK1).

Legal practitioners must come to some conclusion. They must give their clients some opinion regarding the application of section 15 to their case. Thinking this problem through, how must it be for clients when practitioners interpret and apply the law to their particular set of facts? It is unlikely that two lawyers (or other legal advisers) will agree on matters. It is foreseeable that there will be a lack of consensus regarding any suggested framework for calculating the quantum of an award, particularly when each practitioner will be advocating for their respective client and depending on the method of calculation of the award one client may be favoured above the other. For example, the method of calculation of awards, as followed in X v X, may frequently favour the careered partner. If an economically disadvantaged spouse did not have a career prior to the relationship then X v X can be argued to close the door on such a person bringing a claim. Even if the claimant had a pre-existing career the methodology overlooks the career enhancement elements of economic disparity. There is no recognition of the uplift in the economically advantaged partner’s career attributable through the contributions of the other spouse. This favours the careered spouse because it means no additional funds need be transferred, in recognition of career enhancement, to a claimant.

Some practitioners explained that they followed the framework specified in X v X in respect of calculating the award and they were relatively comfortable with this. For example, a barrister said she “did not have a problem with the uncertainty of the awards” (BAK6).

Yet the majority of participants expressed contrary opinions regarding the X v X methodology. The QC said “I hesitate to do the bloody calculation myself” and the method of

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calculation together with the halving of the award is “just part of the fundamental reason why that formula is just so stupid”.

Even if the methodology of $X \times X$ is accepted, the correct determination of the variables that should be inputted into the equation is a quandary. As the QC said it is “sliding doors evidence”. Each practitioner will have a different perspective regarding what the opportunity cost equates to and how long the projected loss should be calculated for.

The accounting experts also perceived difficulties with the methodology and the conceptual approach that the methodology is founded on. For example the actuary thought there are problems relating to “the subjective nature of the material” on which the methodology is founded. The $X \times X$ methodology is the starting point for the actuary, it is a template and what goes into that the template is subjective. The actuary said “it takes energy to start” the section 15 calculations and he “feel[s] uncomfortable doing them”. One of the reasons he feels uncomfortable doing them is he knows he is “not the last word on it”. The actuary struggles in “writing a report that favours the person paying for the report”. A forensic accountant, ACC1 agreed and also expressed his unease with the process and said they try “to source the best data that they can ... but at the end of the day it is all extremely judgmental”.

These factors combine to create the uncertainty and inconsistencies associated with section 15. They increase the time needed to work through the permeations of the law and also increase the costs of a section 15 claim (the need for extensive expert evidence inherent in the $X \times X$ methodology is well documented). Substantial costs, uncertainty and delays are features consistently highlighted about the nature of negotiating section 15 claims or taking a section 15 claim to court.

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407 Robert H. Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce”, (88 Yale L.J 950 1978-1979) at [979]. Mnookin and Kornhauser argue that the uncertainty of the law increases the costs and delays associated with bringing a claim, with costs and delays being a problem associated with s15 that the clear majority of legal practitioners and the claimants observed.

408 A feature of s15 cases to date is the lengthy projections made regarding the likely future income of the wife and the somewhat arbitrary discounts made for various contingencies. This has created a need for expert opinions and it also means that there are high costs for those involved. The effect of this is that people may be put off from even considering making a s15 claim. These factors create uncertainty, delays and very high costs. These features, found in connection with the Court decisions, are also reflected in the empirical research findings.
Strong biases come into play resulting in inconsistencies: A consistent theme within this thesis has been the voids within section 15. These voids create an opening for the hidden biases of those interpreting and applying the law to creep into their analysis of the facts. Participants were very aware of this, as a forensic accountant said “it is all extremely judgmental” (ACC1). According to a solicitor, “it is a problem that judges in the Family Court have made up their minds before they have even heard the case” (SOLAK17). The solicitor’s opinion is reflected in the Court of Appeal decision when William Young P said:409

When I was listening to the arguments advanced by Mrs. Hollings, I formed the view that in large measure the wife was seeking to be compensated for the breakdown in the marriage and this, in my view, lies outside of the scope of a section 15 assessment.[Emphasis added]

The judgmental elements involved in the process are layered (judgments are made by clients as well as the professionals involved in relationship property law). As a barrister explained:

[BAK4] [he] … sees women in the 50 to 55 year age group when there has been a traditional marriage, very much that was her role and this is his role, she was looking after the family, supporting his career … and they have this view that they are not entitled … or … the income earner, the person who has managed to get all of those things, … they have made a far greater contribution to the relationship … some men do not see their wives as entitled to it … why the law has not evolved the way that it should have is that you have judges with that same point of view … this is the problem.410

409 M v B [2006] 3 NZLR 660, William Young P at [203]
410 This is not unique to New Zealand’s Family law jurisprudence – for example the issue was discussed in the insightful Australian decision Ferraro and Ferraro (1993) FLC 92-335. The Full Court said: “The task of evaluating the parties’ respective contributions where one party has exclusively been the breadwinner and the other exclusively the homemaker, is a most difficult one to perform because the evaluation and comparison cannot be conducted on a ‘level playing field’. Firstly, it involves making a crucial comparison between contributions to property and contributions to the welfare of the family. Secondly, whilst a breadwinner’s contribution can be objectively assessed by reference to such things as that party’s employment record, income and assets acquired, an assessment of the quality of a homemaker’s contributions to the family is vulnerable to subjective value judgments as to what constitutes a competent homemaker and parent and cannot be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role.” [Emphasis added]
Bias can be apparent when a practitioner makes a judgment call regarding when a woman should have returned to the paid workforce and whether or not that person is able to work full-time. There is nothing in the Property (Relationships) Act that says this is a relevant factor and considering it as a relevant factor may run contrary to section 18 of the Act. Arguably such an approach inherently favours the breadwinner because it devalues the contributions the primary care-giver (frequently a woman), makes to the family unit when they take care of the family or support their husband/income earning partner (matters that section 18(2) of the Act specifically states are contributions). Evan R Seamore explains how the judiciary may be unaware of their own hidden biases when they are interpreting a “neutral set of facts”.

The legal profession is also part of this process. The results of the empirical research indicate the subjective nature of the analysis of facts. This influences the conceptual approach taken to a problem and the application of the law onto the facts. For example, for many of the legal professionals’ opinions there would be a contrary opinion expressed by another practitioner. The opinions form another layer in the interpretation and application of the law. Solicitor, SOLINV30 thought his personal circumstances mirror the facts in vignette one. He has four children and knows of all the work involved with bringing up children, so he “do[es] not underestimate what that involves”. He discussed the cost of children. “I know what I earn and having brought up four children and the youngest is 16. I know what it costs.”

A contrary view was expressed by practitioners who discussed the need for women to return to the workforce after a certain period of time; or that a woman could have returned to work with the assistance of outside help such as nannies, daycare, cleaners and gardeners. The QC spoke of employing people to assist her to carry out tasks. “People will have to be paid to do it … like me … I have had to pay people to do the taxi work.”

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411 For the purposes of the Act, a contribution to the relationship means the care of any child of the relationship s18(1)(a). (Note that this is not dependent on the age of the child yet for practitioners the age was often relevant.)

412 Evan R Seamore discusses the need to alert judges to their biases by allowing them to understand how they arrive at decisions and then offer them a framework to analyse the processes they employ to achieve legitimate legal conclusions see Evan R. Seamore, “Judicial Mindfulness” (University of Cincinnati Law Review Vol. 70 (2001-2002)) page 1024.

413 See the results of vignette one and vignette two.
Female solicitor SOLH21 said that after children are a certain age a woman can return to work. This assertion is reflected by a male barrister, who said (regarding a wife’s ongoing care of children) there must be a stage: “where it is just a lifestyle choice. There must be a point in a relationship where it is reasonable for people to look at their roles … there is a difference in my view on this than judges” (BAK2).

Evan R Seamore thought that judges needed to be alerted to their own hidden biases. The results of the empirical research indicate the existence of similar problems for the legal profession (and, in the context of economic disparity claims, the accounting profession because of their substantial role in the determination of claims). An examination of legal theory indicates the general acceptance of the phenomenon where idiosyncratic biases shape decisions. Researchers have said court decisions are shaped by the ideology of the decision-makers as much as precedent.414 Former American Chief Justice Hughes, regarding the phenomenon, explained that “at the constitutional level where we work, ninety percent of any decision is emotional the rational part of us supplies the reasons for supporting our predilections”.415 Lawyers would be no different from the judiciary and it may be that the decisions of lawyers can be based on emotional responses because there are fewer institutional checks on them than the judiciary. For example there is no appeal process and their decisions are not made in the public domain where, for example, the media can act as a check on their decision-making.416

The fluid nature of the hidden biases and the complexity of how such biases form part of practitioners’ conceptual approaches to interpreting and applying the law is illustrated by a Dunedin practitioner who is the mother to a young child, a wife and a senior partner in a law firm, when she said:

[SOLDUN29]… [A]s a working woman with a child … if I had to pay my husband and I was not earning $500,000 per year I would probably be really resentful but I …

416 The public can go to the media with their concerns and there is also a procedure where the public can make a complaint to the Lawyers Complaints Service which is a branch of the New Zealand Law Society. The rules that govern the legal profession are Rules of Conduct and Client Care for Lawyers (they are based to a large extent on the four fundamental obligations of lawyers set out in section 4 of the Lawyers and Conveyancers Act 2006). The rules include protecting and promoting a client’s interests and acting for them free from compromising influences or loyalties, treating a client fairly, respectfully and without discrimination.
cannot help seeing it as a practitioner as well…[On a] personal note I had children later in life. I remember the girls can do everything ads on television. But it is not like that. After discussions with friends I realise that you cannot have two career orientated people in a relationship and children. Even two career orientated people without children. I do not think that this works. Having children … you can understand how those traditional roles evolved, they make sense, I was a staunch feminist … one of my friends that I talk to a lot about this lectures in women’s studies and she has told … her students not to leave having children until too late. No one ever told me that. I had my first child … in my forties. Timing of children is an issue. When I was about to have our son I was talking to a counsellor and she asked me ‘what are you going to do about child care?’ I said well ‘this and this’… and she said to me with a knowing look and a smirk …‘you seem fairly clear cut … I just wonder if you will feel like that when you are in the situation’ … I still have days that I miss him and wish I had time with him. I feel constantly torn … there is a connection … because you are a woman … when you have a child and you are a woman.

The legal profession’s conceptual approaches to relationship property matters are at odds with the law: Individual opinion and attitudinal models influence the conceptual approach a legal professional takes to their interpretation and application of section 15. This is illustrated by considering a professional’s approach to a founding premise of relationship property law, that marriage (or civil union or de facto relationship) is a partnership of equals. It is from this premise decisions regarding relationship property law flow, taking their own particular shape.

It is questionable whether this is the starting premise417 for legal and accounting professions when they interpret and apply the law to real problems. If it is the universal conceptual starting premise then things would flow neatly from it. The mixed results of research indicate that things do not flow neatly from this starting premise and the notion of the individual is favoured over the martial partnership.418 If a practitioner’s conceptual premise to resolving relationship property disputes is founded on the understanding that marriage (or civil union or de facto relationship) is a partnership of equals it is conceptually logical that the partners

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417 Marriage-type relationship is a partnership of equals with equal sharing.
418 For an interesting examination of the primacy of individualism over the partnership model in judicial reasoning see Alicia Brokars Kelly The Marital Partnership Pretence and Career Assets; The Ascendancy of Self Over the Marital Community 81 B.U.L Rev.59 2001.
have a right to share equally in the fruits of the relationship. There is an enduring obligation owed to the other partner in respect of the fruits of the relationship. The empirical research indicates that this conceptual model of marriage (or civil union or de facto relationship) is not always embraced by the legal profession. There is evidence of strong biases in favour of an individual over the partnership found within legal practitioners’ reasoning. For example, in vignette one some of the practitioners thought that the wife not returning to the paid workforce was a choice of the partnership: a mutual decision. But for others this was perceived as a choice of the individual and/or a lifestyle decision. For these participants it was felt that the wife had enjoyed a great benefit in staying at home. This perspective is at odds with the law. The law gives a directive that non-monetary contributions made to the relationship, including the management of the household and the performance of household duties, are a contribution (section 18(1)(b) of the Property (Relationships) Act) and the giving of assistance or support (whether or not of a material kind) that aids the other spouse in the carrying out of his or her business or occupation are contributions (section 18(1)(h)(i)–(ii) of the Property (Relationships) Act).

The variation found in the participants’ responses to vignette one’s question concerning the significance of the economic advantages obtained by the husband resulting from the wife’s contributions to the relationship illustrates the different opinions held by the group. A solicitor ranked the significance at 2 (which was very low on the scale) and said it is the man “that has the ability to earn that income” (SOLNEL28). This is an example of how much flows from a perception of the correct conceptual approach to marriage: an individual’s earning potential in this case was seen as a result of the husband’s efforts and talents alone. This type of thinking impacts on the manner that the jurisdictional tests of section 15 are approached. It would appear that in practice legal professionals, through their subjective interpretation of the provision, can at times make the causation tests unduly restrictive. For example they may form an opinion that the requisite causal nexus is not established (there being no connection between the economic disparity and the division of functions in the relationship) because the disparity was caused through the personal endeavours of one spouse. This view was expressed by the forensic accountant ACC2 who said: “If a lawyer marries his secretary and he is a genius and he goes on to have a brilliant career in a big law firm the [Property (Relationships)] Act was not designed to compensate her.” Such an

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419 See Figure 5.13.
opinion can be contrasted with those of other participants who said “we do not do it alone” (BAK3) “marriage is a partnership that carries with it obligations” if you divorce “you have to bear the consequences and so the wife is entitled to expect that there is a lifelong commitment … if he runs off with this secretary after she has helped him build up his earning power then she is entitled to be fully compensated for that” (BDUN11).

**If an economically disadvantaged party does not have a career then no compensation is due:** Some participants felt that, if the economically disadvantaged party did not have a career or could not establish a foreseeable career path, they were not entitled to an award. Other participants thought a wife’s choice not to pursue a career was irrelevant, but in practice “the women without a career are not getting it” (SOLNEL27) meaning they are stopped from bringing a claim. This is because the $X v X$ methodology is focused on the loss of career. It is also because the ‘but for’ section 15 test⁴²⁰ is frequently being read in an unduly restrictive manner. This is contrary to the case law. A claimant does not need to have been employed before entering the relationship in order to argue causation successfully.⁴²¹ An Auckland barrister illustrated how in practice this directive is difficult to follow. He explained how he has given clients an example of two law students:

[BAK1] … they fall in love, get married and have babies he goes on and becomes a partner in a big law firm … she has babies and … is then the suburban lawyer … part-time … they get this, so then I say, ‘well that seemed too hard so … instead of marrying the beautiful law student I went downtown and married the florist assistant. And when I left I am partner and she is still the florist assistant’ sounds terrible, but … it shows you.

Think about the “but for” test … but for you … she would still have been a florist assistant.

The rationale of BAK1 is premised on an assumption that section 15 and economic disparity claims are based on loss alone. If a claimant did not have a career then there was no loss. This

⁴²⁰ Being a consideration of the question ‘but for’ the relationship the economically disadvantaged party would have been in a different economic position.

⁴²¹ *Nathan v Nathan* [2004] NZFLR 942, at [100].
means no compensation is due. This is not what section 15 says but it is what some legal professionals read into it.

Inconsistencies found in the legal profession’s conceptual approach to, and application of, the causation test: the ‘but for’ dilemma: Another way in which the ‘loss of career alone is compensable’ sentiment comes into play is the restrictive manner in which the causative test contained in (section 15(1)) is read.

Assuming the initial jurisdictional hurdle is established there is another jurisdictional hurdle to overcome relating to the cause of the disparity. The disparity must have been because of the effects of the division of functions during the relationship: commonly referred to as the ‘but for’ test. What would the economic position of the economically disadvantaged party be at the end of the relationship but for the division of functions while the relationship was on foot?

The causation hurdle is something that has been settled in the courts. The economic disparity must have been because of the effects of division of functions during the relationship, but it is important to be aware that the claimant does not need to have been employed before entering into the relationship in order to argue causation successfully.

Early Family Court decisions set a high threshold for causation. The division of functions needed to be the “principal” cause of the disparity. The Court of Appeal in \( M v B \) rejected this interpretation of section 15, considering that “it put the jurisdictional bar too high”. In \( X v X \) the Court of Appeal uses the phase “[t]here is a clear causal link”. This implies any causal link will suffice and it need not be “a real and substantive cause”. The Court of Appeal has effectively closed down the argument of causation, by making it a presumption that there is the necessary causal nexus.

\[\text{References}\]

422 Is there a significantly higher standard of income and living standards?
423 Nathan v Nathan [2004] NZFLR 942, at [100].
425 \( M v B \) [2006] 3 NZLR 660, William Young P at [201].
426 \( X v X \) [2009] NZCA 399, Robertson J at [108].
428 In practice it is questionable if this has been generally accepted and understood by practitioners.
Robertson J rejected any suggestion that an inquiry ought or needs to be made into the presumptively mutual choices of the parties, explaining that there should not be any inquiry into the merits of a decision made by the parties as to the division of domestic roles for a causal nexus under section 15 to be established. The benchmark for the causational test has been lowered. There should be little room for a retrospective re-examination of the relationship or questions relating to whether it was an individual’s choice to stay at home.

The empirical research indicates members of the group are conceptually uncomfortable with, or do not accept, this presumption that the causal nexus exists. Some of the group interpret the causative hurdle in an unduly restrictive manner. This restricts the application of section 15, closing the door to potential claims, as a barrister explains:

[BAK1]… if I had a dollar for every lawyer’s letter that I have got claiming economic disparity I could have retired by now … almost always the failure in the logic is that second test: the but for … they say ‘your client’s a lawyer, accountant or doctor or something and … there is economic disparity.’ But you go ‘hang on a minute there is that second hurdle. What about that?’

Another barrister thought a section 15 claimant needs a career path because: “But for the career path how do you prove what has been lost?” (BAK3).

For the public this means that when they receive legal advice regarding section 15 they must frequently be told that their claim would fail without a career path. This is at odds with the purpose of the Property (Relationships) Act and section 15 – the remedy is not reserved for a person who has foregone a career. The Act is about economic advantages and disadvantages. It is not premised on economic loss alone. Because of the problems within the drafting of section 15 it is acknowledged that it is rather unsurprising that there are problems and

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429 X v X [2009] NZCA 399, Robertson J at [103 and 104].
430 IN(c) Property (Relationships) Act 1976 provides that a just division of relationship property has regard to the economic advantages and disadvantages to the spouses arising out of the relationship. It is interesting to note how the Supreme Court of Canada in Moge v Moge makes it clear that the economic advantages as well as the disadvantages arising from a marriage breakdown need to be recognised in the division of property and ongoing support. Moge v Moge cites the Canadian Law Reform Commission’s Working Paper 12, Maintenance on Divorce (1975) noting how the Commission paid heed to the work of Judge Abella in “Economic Adjustment On Marriage Breakdown: Support” who observed that a spouse that manages a home or provides child care “should be seen as freeing the other spouse” to do perform other functions.
inconsistencies within the legal advice that the public is given. The causation test contained in section 15(1) is confusing. It is always going to be difficult to establish whether there is a sufficient causal link between a disparity and the division of functions in a relationship. There will be a spectrum of reasons why there is an economic disparity between couples on the breakdown of relationships. However, it is important that the test is not unduly restrictive. If it is, then a court (or other legal professional) may enter into a retrospective examination of historical decisions of the couple and substitute their own view as to what should have happened or what was a reasonable division of functions within the relationship. For example in the Family Court decision of EM v RKM 431 the judge accepted that the division of functions does not have to be the only cause, just a substantial cause. The husband unsuccessfully argued that from the outset of the relationship he had a higher earning capacity and it was his qualifications and talents which caused the disparity, these factors being outside of the division of functions. The judgments have helped clear some of the confusion associated within the problematic drafting of the causation test. The Supreme Court of Canada concluded that what was required was a “common-sense, no-technical view of causation” and that the evidence required to establish the causal nexus need not be detailed. The Court opined: “It is not an exercise in accounting, requiring an exact tally of debits and credits for each day of the marriage.”432

There is also a link between enhancement of earnings of the careered partner and causation. Although the court decisions are clear (a claimant does not need to have had a successful career before entering into the relationship in order to argue causation successfully)433 some members of the legal profession impute such a requirement into the ‘but for’ test. This overlooks the guiding principle of the Property (Relationships) Act found in section IN(c) that a just division of relationship property looks at the economic advantages as well as disadvantages of the spouses in the course of the relationship.

If the legal profession is conceptually at an impasse regarding causation (failing to understand it is not only the loss of a career that economic disparity claims can remedy) there will be no traction forward to the next step of understanding and accepting enhanced earnings

431 EM v RKM (Family Court, Waitakere, FAM 2006-090-000892, 8 May 2008, Judge Clarkson)
433 Nathan v Nathan [2004] NZFLR 942, at [100].
arguments. The legal profession’s conceptual focus, in respect of relationship property claims, has generally been on:

**Loss of opportunity** (economic disadvantage): an inquiry into a career foregone.

**Replacement cost or out of pocket expenses** (again this is a focus on the economic disadvantage): this is reflected in a participant saying that the husband had the ability to employ “nannies and a cook” and “the only result at the end of the relationship would have been that the pool of relationship property would have been smaller as money would have been spent on these services. But he could have afforded it” (BAK3).

Enhanced earnings arguments require those interpreting and applying section 15 to move forward, considering the economic advantages conferred on the careered spouse through the indirect contributions of the other spouse. To do this requires a shift in respect of the conceptual approach taken to section 15. The movement would be to shift the focus from considering loss/economic disadvantages to considering gains/economic advantages as well. Without this conceptual shift there will be no traction forward for the legal profession to consider a cornerstone in any real consideration of economic disparity – that is enhanced earnings.

**Hidden and subjective benchmarks and idiosyncratic opinions are used by practitioners and judges when they interpret and apply section 15:** Hidden benchmarks and opinions insert an influence over how section 15 is read and applied. These subjective benchmarks are formed by the legal professionals’ opinions regarding what individuals do and do not do within relationships.

The personal opinion of the practitioner may be concerning whether it is “right” to make a claim of economic disparity in the first place. In such circumstances it is apparent that the legal professionals’ opinions and benchmarks act as a barrier to the public when accessing a legal remedy. Lawyers are gatekeepers to the public’s access to legal redress and the subjective opinion of the particular legal advisor determines whether the gate to an economic disparity claim will be opened. A practitioner decides if it is *just* to bring an economic disparity claim and on the basis of the practitioner’s decision they act as a gatekeeper.
between the public and access to a claim.\textsuperscript{434} If the practitioner thinks it “just” then a claim may be made. Conversely if it is deemed to be “unjust” then there may be no claim. Because section 15 is a discretionary provision lacking in a substantive framework that denotes what a practitioner or court should consider as relevant (or irrelevant) factors it cannot be ascertained with any certainty what the relevant factors or irrelevant are when it comes to the exercise of the discretion.\textsuperscript{435} Although, it must be noted that the Act does have a clear purpose and there are guiding principles but these factors seem to be largely overlooked in practice.

Frequently claimants are measured against legal professionals’ subjective opinions of when a caregiver (usually a mother) should be able to return to the paid workforce after having children. There is no standardised opinion amongst the legal profession regarding when children are of an age that their primary caregiver should be working.\textsuperscript{436} Further the law creates no such test. This is despite the Court of Appeal concluding that it is not for a court to substitute a retrospective judgment of when it is reasonable for a person to re-enter the workforce.\textsuperscript{437} BAK2 said that “there must be a stage, as judges say, that where it is reasonable for people to look at their roles … Most practitioners, or women in family law, would agree with that comment they would not necessarily agree with the threshold.”\textsuperscript{438}

The QC spoke of the wife in vignette one being able to earn:

[QC] … a very high income … if she did kick start her career … she could get some outside help to help her with those kids, like I do … you just pay people to do it …you do not need to be there all the time … it might be nice to be there but you actually do not need to be there.

The woman in vignette one was 43 years old and her children were aged 10, 12 and 15. For some practitioners this was an appropriate time for her to return to the paid workforce on a

\textsuperscript{434} Property (Relationships) Act 1976, section 15(3) provides that the Court, if it considers it just, may for the proposes of compensating the other party order an award. It seems that the legal professionals are reading this test of “is it just” in a broad manner and impute the test to all the decisions that they make regarding s15, and in so doing use their subjective moral compass as the benchmark for the test.
\textsuperscript{435} See the Appendices regarding the United Kingdom and Australian legislation. Of particular interest are the guiding factors that such legislative schemes include.
\textsuperscript{436} The results of the empirical research indicate that practitioners each hold a unique view and this view is formed largely on personal experience.
\textsuperscript{437} X v X [2009] NZCA 399 at [116].
\textsuperscript{438} BAK2 was referring to the standard or benchmark of when it is appropriate for a woman or primary caregiver of children to return to work.
full-time basis. In practice this is something practitioners measure the justification of an economic disparity claim against. If, in the legal practitioner’s subjective analysis of the facts, the woman did not return to the workforce within this period (unless there are mitigating factors such as the ill health of a child) then it becomes the woman’s individual choice to remain out of the paid workforce. For this reason such women should accept some personal responsibility for their choice. While this factor is not specified within section 15 it is inferred by some practitioners. This issue is linked to the causation issue, but for the division of functions in the relationship what would the economically disadvantaged party’s position be? If the practitioner forms the opinion that the party is somehow individually responsible for the economic disparity because they did not return to work when they should have, then for some practitioners the causation nexus of section 15 is not met or it is somehow unjust to pay compensation.\textsuperscript{439}

It is important to note that not all practitioners thought this. For example barrister, BAK6, said the argument when a mother should return to the paid workforce is often used as a “poor defence by husbands … it is not relevant … it is something that husbands look back on with dark tinted glasses, they were quite happy when they were together and it suited them. They benefit from that choice”.

Similar observations were made by others including the mediator who explained that in his experience husbands forget the choice was made by them as a couple and “then twenty years later on with a PA in the pot and it is all forgotten, because no one has recorded those wonderful loving moments”. The mediator said “it is what I deal with all the time, I am not joking, I am just realistic”.

A solicitor thought, in the context of vignette one that:

\[\text{[SOLNEL28]} \text{ … one of them had to give up their career … a nanny is an option but a wife/mother would feel less comfortable, than what a husband would, with a nanny … the way fathers and mothers are … it is much harder for a mother.}\]

\textsuperscript{439}Property (Relationships) Act 1976, s15(3) provides that the Court, if it considers it just, may for the purposes of compensating the other party order an award.
SOLDUN29 said: “I remember the girls-can-do-anything ads on television but it is not like that … I realise that you cannot have two career orientated people in a relationship and children.”

Auckland barrister BAK3 questioned whether women are really economically disadvantaged following divorce he referred to the research of sociologist Lenore J Weitzman. Weitzman researched the economic consequences of divorce and the negative economic impact of divorce on women and families.\(^{440}\) BAK3 said Weitzman’s work is questionable and wondered “if there is really any ongoing economic disadvantage, particularly when women re-partner”\(^{441}\) Putting this observation in context economist Susan St John said:

There is a dearth of New Zealand based research to support the claim that the economic consequences of divorce are more severe for women and children than men. Nevertheless, there is a large amount of circumstantial and anecdotal evidence which corroborates this conventional view.

Moreover each practitioner has a unique view of what is fair and just. As seen in relation to the jurisdictional tests contained in section 15,\(^{442}\) a practitioner’s personal assumptions about the actions of people colour their analysis of the jurisdictional tests.

In the House of Lords, Lord Nicholls made the following observation:\(^{443}\)

\(^{440}\) Weitzman's “The Divorce Revolution” (New York, The FreePress, 1985), reports a 73 percent decline in women's standard of living after divorce and a 42 percent increase in men's standard of living. These percentages, based on data from a 1977-1978 Los Angeles sample, are substantially larger than those from other studies. Interestingly, further research contained in Richard R. Peterson “A Re-Evaluation of the Economic Consequences of Divorce” American Sociological Review, Vol. 61, No. 3 (June, 1996), page 528. <www.jstor.org> replicates “The Divorce Revolution’s” analysis and demonstrates that the estimates reported in the book are inaccurate. This reanalysis, which uses the same sample and measures of economic wellbeing as The Divorce Revolution, produces estimates of a 27 percent decline in women's standard of living and a 10 percent increase in men's standard of living after divorce. There is a wealth of international social research indicating that economic disparity following divorce is a verifiable phenomenon. The Supreme Court of Canada in \textit{Moge v Moge} [1992] 3 SCR 813 (S. C) was unequivocal in their conclusion that the economic consequences of divorce were serious. Their findings were that family law nevertheless has a role to play alleviating poverty for divorced women.


\(^{442}\) Whether there is a going to be a significant disparity of income and living standards and whether the resulting economic disparity was as a result of the division of functions in the relationship.

\(^{443}\) \textit{McFarlane v McFarlane} [2006] UKHL 24; Lord Nicholls at [1].
Fairness is an elusive concept that is grounded in social and moral values. These values cannot be justified or refuted by any objective process of legal reasoning. These values are fluid changing from one generation to the next … there can be different views on the requirements of fairness in any particular case.

The fact that fairness is an “elusive concept” and that it is “grounded” in an individual’s social and moral norms is illustrated by a barrister who said:

[BAK2] … it is difficult because you do not know what a judge is going to think about life and about the roles of people … for many judges they would not have been able to separate their personal experiences and views from their decisions … in this area it is very hard to separate … They see their own family experiences as the same as everyone else’s and you can’t.

While for some practitioners there is a subjective standard of when the primary caregiver should return to work, by no means are the parameters of the standard settled and a number of practitioners use their own experiences of juggling a career and raising a family as the benchmark. Like all of life’s experiences there is a subjective element to this benchmark. For example BAK5 did not think the issue quite as simple as some other practitioners. BAK5 thinks often teenage children need their parents around, the teenage years being the time she thought children could go astray. The mediator shared a similar opinion and thought that teenage children need considerable supervision from their parents.

The forensic accountant ACC1 perceived the existence of a hidden benchmark regarding when a woman should return to work. His comments indicated how his particular benchmarks shape his approach to section 15. He said:

[ACC1] The other factor … in the context of interpreting section 15 is the decision what time is it that a wife should take the view that she should go back to work full time? … I have a case … at the moment … the accountant on the other side is saying ‘well the woman wants to stay at home until the youngest is 18 and … she will only work part-time. My response has been to say ‘well the youngest child is … 14 and then the next is 16 … she could … work on a part-time basis … from 9am until 3pm’
… there is the whole question of how much discretion a woman should be permitted by the section ... should the calculation be driven off a principle that she is forced to go back to work full-time when the youngest is 14 years old and can stay at home legally under the law? You know the Family Protection Act?444

Another example of where the opinions of participants are used to fill the voids of section 15 is evident in how some practitioners believe that the economically disadvantaged partner may not have the natural ability or desire to establish and maintain a career. Vignette one brought this to the fore, when participants were asked to comment on other factors that may have caused the economic disparity. The results of the participants’ responses are collated in Figure 5.9. The majority (11 participants) said there were no other factors; it was just the division of functions within the relationship. Others disagreed. As barrister BAK6 said: “She may not have been a career person, she may not have enjoyed the life of a large commercial law firm, she may have had hobbies and other pursuits”. SOLAK17 thought it may have come down to her “lack of ability … her own personal choice … she may not have been career driven”. SOLNEL27 though it was the wife’s own choice “not to pursue her career considering she could have easily, with her ability, had a nanny and worked part-time”.

There are gender differences in the legal professionals’ approach to the interpretation and application of section 15: There appear to be differences between males and females in their conceptual awareness and approaches to relationship property issues. A participant in the on-line survey explained how “it is hard for males to understand section 15 and the reasons for it” and “women are very hurt that their child rearing and contributions to the relationship are undervalued”.

One cannot say there is a single view for all female practitioners or is there one for all male practitioners. The issue is too complex for a sweeping statement. Some of the practitioners were aware of their respective gender biases. SOLWEL26 explained: “I know I am a little biased being a single working mother – you sometimes do get a little biased about these things.”

444 Pursuant to section 10B of the Summary Offences Act 1981 it is illegal to leave children under the age of 14 without adequate supervision.
It is interesting to consider this aspect of the research and the view of the then Chief Family Court Judge who spoke of the need to acknowledge:\textsuperscript{445}

\ldots that the issue of gender gives rise to many difficult questions in the family law context \ldots ask what’s gender got to do with it? And engage and learn from each other in the knowledge that answering this question can be difficult and at times uncomfortable \ldots courts deal with raw emotion and make decisions that have a significant impact on the day to day lives of the people involved. Therefore it is important to take a proactive role in understanding gender issues which can often be pivotal to resolving family law issues.

**Discrimination:** There are elements of discrimination when the law is interpreted and applied. There is the on-going theme in New Zealand’s treatment of relationship property law – that the breadwinner is favoured. The breadwinner’s contributions and individual skill/career capabilities are recognised and protected over the non-breadwinner’s contributions to the marriage and relationship (who is effectively discriminated against because contributions of a non-financial nature go relatively unrecognised in the legal profession’s decisions). This finding is not limited to economic disparity claims but is a feature of New Zealand family law more generally.\textsuperscript{446}

This is also a feature of family law internationally. For example the empirical findings by the Australian Institute of Family Studies on property division found that:\textsuperscript{447}

\ldots non-financial contributions made to the non-basic assets of the marriage, particularly the domestic activities performed by the wife that frees the husband to work directly for financial reward, were under-valued or in some cases disregarded when the property was divided.

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The finding of Australian empirical research is unsurprising, as the marginalisation of the non-monetary contributions made to the relationship is a theme frequently commented on within New Zealand family law.\textsuperscript{448} The research findings are conclusive: traditionally the non-monetary contributions of one partner are under-valued or disregarded. Putting this finding in context, section 15 permits a discretion in the way that the law can be interpreted and applied. It is therefore unsurprising that some of the participants approached the discretion in a manner consistent with the predominant trend and frequently disregarded the non-financial contributions made to the relationship. For example, BAK7’s comment, in the context of vignette one and the disparity of income and living standards between the couple, was that it may have been caused through “her decision not to stay at work”.\textsuperscript{449}

It is interesting to consider this comment against that of then Chief Justice of the Family Court of Australia – the Honourable Alastair Nicholson:\textsuperscript{450}

We would … sound a warning shot across the bows about the danger of descending into an analysis of contributions and engaging in a battle between spouses about them … It would be invidious for the courts to undertake such an exercise and it is not hard to see that cases would descend to the old-days of the types of argument\textsuperscript{451} that were heard before the days of no-fault divorce … and it is that open door … that would lead the courts to more readily classify financial contributions as “special” because society as a whole tends to attach greater financial worth to financial contributions, and thereby introduce gender bias via the back door.

The Judge thought there would be more generous economic disparity awards made if a different conceptual approach was adopted by those interpreting and applying the law (one that was less understanding and sympathetic to the business person) specifically one which

\textsuperscript{449} Another solicitor, SOLWEL25 said the husband went into a big accounting firm and within these accounting firms the remuneration is “substantially greater than other forms of business …so even if she stayed in the workforce she may not have earned quite that much…[it would have been] excellent money but not at that extreme.”
\textsuperscript{450} The Honourable Alastair Nicholson, AO RFD Chief Justice, Family Court of Australia co-authored with Rebecca Wood “Resolving Property Disputes – An Anglo-Australian Contrast” (speech for the Family Law Practitioners’ Association of Western Australia at Perth Zoo Conference South Perth 2002).
\textsuperscript{451} Just as BAK3 observed how in New Zealand under the 1963 Matrimonial Property Act there were “offensive, inflammatory and degrading affidavits … given in support of the exercise of the discretions”.

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“showed more understanding to the homemaker”. (Such a view is consistent with actively recognising that marriage (or de facto relationship or civil union) is a partnership and the individual should not be favoured over the partnership.)

The empirical research is indicative of the pattern identified by Professor Mark Henaghan who noted that in $M v B$ the Courts largely ignored the wife’s contribution to the husband’s career, this being the advantage part of the principle of doing justice economically at the end of a marriage, concluding that judges have ignored this part of the principle.\textsuperscript{452}

Lord Nicholls’ observation regarding the role of relationship property laws and the difficult task the judiciary experience when they are exercising a discretion was that:\textsuperscript{453}

\begin{quote}
In seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties’ contributions to the family there should be no bias in favour of the money-earner and against the home-maker and the child-carer. This is a principle of universal application.
\end{quote}

It is interesting to consider how contributions made in the course of a relationship are assessed in the context of vignette one and the divergence of the participant’s views regarding whether there were any perceived economic advantages obtained by the husband through the contributions of the wife (see Figure 5.13). There is a spectrum of opinions\textsuperscript{454} with some participants concluding that the wife’s contributions were of little significance to the husband and others considering them to be extremely important. Barrister BAK3 thought that the husband would have had to engage outside assistance but this would have only resulted in a smaller relationship property pool being available at the end of the relationship. BAK3 said: “But he [the husband] could have afforded it.”

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\item\textsuperscript{452} Mark Henaghan, “Achieving Economic Equality at the End of Marriage and Other Relationships: not all is fair in love and war” (IAML Annual Meeting, Queenstown New Zealand, 1-5 September 2010) <www.iaml.org> where he refers to principle 1N(c) of the Property (Relationships) Act 1976, that states a just division of relationship property has regard to the economic advantages ... to the spouses arising from their marriage.
\item\textsuperscript{453} McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Lord Nicholls of Birkenhead at [1].
\item\textsuperscript{454} With the participants ranking their view (on the significance of the economic advantages obtained by the husband resulting from the wife’s contributions to the marriage and whether they influenced their decision regarding whether it was “just” to make a compensatory payment to the wife) on a scale of 1 – being insignificant to 10 – being extremely significant. The results were a spread from 1 to 10 on the scale. The clear majority of participants ranked the significant at 6 or above.
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Some comments of the legal professionals reflect the concerns they have regarding the hidden biases perceived in their daily practice and the discrimination associated within. One example of this discrimination was the view that there is a failure to give due weight to the non-financial contributions of a spouse. SOLWEL25 said “more consideration of the value of all forms of contributions to the partnership is needed”, there needs to be greater importance attached to the non-monetary contributions made to the partnership: “it is not just who brought in the dollars that counts”.

Auckland barrister, BAK3, thought that there is a problem because the legal profession’s mindset has not evolved in respect to the conceptual understanding and approach to resolving relationship property issues. BAK3 said “some men do not see their wives as entitled to a greater share of relationship property” and “judges too” hold this view. For BAK3 this was a significant problem. BAK3 opinion was not an isolated one. For example BDUN11 thought one of the solutions to economic disparity would be a change in mindset and discussed how judges “cannot cope” with the very concept of economic disparity because “they are so set in the fifty-fifty mindset”.
Enhanced earnings: this issue is often over looked by the New Zealand legal profession

What is meant by enhanced earnings in the context of a relationship? In the context of a relationship, enhanced earnings relates to the uplift in a careered partner’s earnings (and future potential income) that occurs during the course of a marriage/relationship through the sacrifices and contributions made by both partners as part of the working partnership between the couple. The concept of career enhancement and the value of a working partnership found in a marriage is not a new or novel idea. For instance in 1745 Benjamin Franklin said: 455

A single man has not nearly the value he would have in the state of union. He is an incomplete animal. He resembles the odd half of a pair of scissors. If you get a prudent healthy wife your industry in your profession with her good economy will be fortune sufficient.

While Benjamin Franklin’s statement might seem quaint, it strikes at the heart of the issue. And this issue remains relevant today. It is the working partnership between the husband and wife (or partners within a relationship) that creates the value in the relationship. There is extensive social and economic research on the issue of career enhancement. Professor Linda Waite explains: 456

For men the data leaves little room for doubt. Marriage itself makes men more successful. In fact, getting and keeping a wife may be as important as getting an education. The wage premium married men receive is one of the most well documented phenomena in social science. Husbands earn at least 10 percent more than single men and perhaps as high as 40 percent … This pattern strongly suggests that something about the working partnership with a wife … is responsible for a husband’s higher earning capacity.

455 Linda Waite and Maggie Gallagher The Case for Marriage – Why married people are happier, healthier, and better off financially (Doubleday a division of Random House, New York 2000) pages 97 and 100.
The pattern of the wage premium is matched on age and other relevant considerations such as qualifications and work.

This working partnership between the husband and wife (or partners in a relationship) means the careered partner in a relationship, with someone at home to take care of the domestic duties, is able to specialise in the business of making money.\textsuperscript{457} This contention is reflected in the results of extensive social research both internationally and within New Zealand indicating men/husbands on average contribute fewer hours of unpaid work in their homes than their wives/female partners.\textsuperscript{458} While the overall picture is that women’s labour force participation has steadily increased for several decades married/partnered women still have more responsibility for the care of children and other household (non-paid caring) duties than their male counterparts. The New Zealand TimeUse Survey compiled by Statistics New Zealand is evidence of this with women across the population of New Zealand spending more time on household work and childcare activities than men.\textsuperscript{459} And indeed in a broader sense in relation to the lessons found within a retrospective examination of New Zealand’s relationship property law Professor Mark Henaghan noted that there has been very little consideration of the advantages given to the breadwinner through the actions of the partner who takes care of everything on the domestic front.\textsuperscript{460} The results of the empirical research are consistent with these findings. Because the value of the contributions made by the partner without a career to the development and enhancement of the other party’s career are largely overlooked by the legal profession (with most of the practitioners considering section 15

\textsuperscript{457} Ibid.


\textsuperscript{459} While males and females spend similar amounts of time on productive activities – the survey indicates that the ratio of paid to unpaid work varied between the sexes. The majority of men’s productive activities were related to paid work (63 percent), while the majority of women’s were unpaid activities (65 percent).

\textsuperscript{460} For example Mark Henaghan notes that there has been a reluctance to grasp the significance of the non-financial contributions to a marriage or de facto relationship as a partnership of equals who should share the spoils when it ends. See Mark Henaghan and Nicola Peart “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” in Bigwood, R (ed) \textit{The Permanent New Zealand Court of Appeal, Essays on the First 50 Years}, Hart Publishing, Oxford, 2009 or Mark Henaghan, “Achieving Economic Equality at the End of Marriage and Other Relationships: not all is fair in love and war”(IAML Annual Meeting, Queenstown New Zealand, 1-5 September 2010).
compensation based on loss of career alone) we see a continuation of the trend outside of the courtroom.

However it is acknowledged that generalised propositions are problematic. In past generations a wife/female stayed at home and took care of the domestic duties (housework, care of children and supporting a husband) and a husband/male worked outside of the home, yet now the manner that New Zealanders organise their personal and working lives is more fluid than ever before. In New Zealand many partners both work outside of the home (this is a finding also reflected in the results of the empirical research). Barrister BAK2 felt that the stereotypical roles of men in the workforce and women at home were largely a thing of the past and were reflective of a lifestyle that only the privileged few in society can afford. Because of this, arguments regarding career enhancement may at times be problematic. An example could be when a woman has not entirely stepped out from a career to have children because she has continued to work part-time. The division of functions that solicitor SOLAK18 and her husband have agreed upon could be seen as reflective of this trend. SOLAK18 works part-time around the needs of her child. Such blurring of the roles assumed between couples makes generalised statements regarding the issue of career enhancement difficult. Yet it remains true that couples, even in dual career relationships, frequently make choices where one partner’s career is favoured over the other partner’s. SOLAK18 explained it was agreed that her husband would focus on his career and she would combine motherhood and part-time work. Despite societal changes the results of the New Zealand TimeUse survey indicate that the majority of the supportive unpaid care carried out in New Zealand households remains largely the domain of women. The results of the empirical research reflect these findings. For example SOLAK18 works as a lawyer yet she nevertheless contributes to the enhancement of her husband’s career by freeing up his time so that he can focus on work without the pressure of day-to-day child care demands because it was agreed that this was something SOLAK18 would be largely responsible for.

Pursuant to section 18 (b) of the Property (Relationships) Act the management of the household and the performance of household duties constitutes a contribution. Section

461 See chapter 4 for a consideration of this phenomenon. This is also a theme that the courts are aware of. For example his Honour Judge Inglis QC has said: “The stereotype of the nuclear family with a working father and home-bound mother has become noticeably and significantly eroded.” W (formally C) v C (unreported Family Court Tauranga FP 070213/96 Judgment 27 June 2000 Judgment of Judge Inglis QC).

462 See McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Baroness Hale at [138].

463 See the results of the TimeUse survey 2009/2010 www.stats.govt.nz
18(h)(ii) provides that the giving of assistance or support to the other partner that aids that partner in the carrying on of his occupation is a contribution. The difficulty of quantifying contributions continues. The values of financial contributions are relatively easily determined because a monetary value can be determined. This is the opposite of non-financial contributions because it is hard to place a monetary value on them. Yet the recognition of the value of the non-financial contributions is of great importance and the significance of these contributions will continue because there are now more dual-career couples where non-financial contributions are still made but such contributions may be marginalised because the roles between the couple are blurred. When both individuals work outside of the home it could be easy to overlook that an economic disparity claim may still be justified. Economic disparity claims should not just be an investigation into what was lost\textsuperscript{464} but also what has been gained\textsuperscript{465} as a result of the division of functions in the relationship. So even in circumstances where both partners have worked outside of the home there may be elements of career enhancement that should be considered within an economic disparity claim yet these could easily be overlooked because the division of functions in the relationship were blurred. Each case is always going to be very fact specific depending on the circumstances of the relationship. A rigid presupposition or a blinkered approach to the interpretation of the law and the facts of a case should be avoided.

This assertion is arguably reinforced by a comment of forensic accountant ACC2, when asked to consider section 18 of the Property (Relationships) Act 1976 (which clearly states that there is no presumption that monetary contributions are of greater value than a non-monetary contributions\textsuperscript{466}), said “but how do you work it out? ... the problem is: how do you value it? Monetary contributions are easy to point to. It’s screaming for the other party to say you are useless”. ACC2 could understand how contributions are made in “the course of business or family business” but in the context of a household these proved elusive.

Evidence of the specialisation of tasks between the genders/partners was found within the empirical research. SOLAK\textsuperscript{18} discussed the arrangement she had made with her husband where it was agreed that he would focus on his career and she would work part-time and

\begin{footnotes}
\item[464] The reference to what was lost refers to the loss of a chance of pursuing a career.
\item[465] The reference to what was gained refers to the economic advantage in terms of career enhancement.
\item[466] By way of background, section 18(1)(b) Property (Relationships) Act 1976 states that the management of the household and the performance of household duties is a contribution. Section (1)(h) states that the giving of support or assistance – whether or not of a material kind that aids the other spouse in the carrying out of their occupation or business is a contribution.
\end{footnotes}
assume more of the childrearing duties. SOLAK18 explained this was something she struggled with but while her children are school aged she will not work full-time. SOLAK18 was very aware that their decision was “enhancing her husband’s career” and she was “depressing [her] own”, she said she “hope[s] like hell” she will not be in the situation where her relationship ends and she has to live with the economic fall-out of the decisions she and her husband made while their relationship was on foot.

The comments of SOLAK18 regarding the division of functions in her marriage are indicative of the types of compromises couples make so the family unit can function in an efficient way. Such divisions have flow-on effects that can be felt in the future. For example the solicitor, in all probability, will not recover the loss of earnings she has suffered due to time out of the paid workforce by electing to work part-time. Her husband is able to focus on his career, staying late and attending important work functions, putting in work now that is likely to have long term economic benefits to his career.

Baroness Hale spoke of the rationale for redistribution of relationship property upon divorce (this is particularly relevant to SOLAK18 and many other working couples) when she said:467

A further source of need may be the way in which parties chose to run their life together. Even dual career families are difficult to manage with completely equal opportunity to both. Compromises often have to be made by one so that the other can get ahead. All couples throughout their lives together have to make choices about who will do what … sometimes freely made in the interests of them both.

The claimant also explained how during her marriage there was an explicit agreement that she would be responsible for majority of the household tasks and the care of the children while her husband would focus on his career. Dunedin barrister BDUN11 thought that the legal profession fails to understand and promote the view (and principle of the law) “that marriage is a partnership and carries with it obligations that should be upheld”. For the New Zealand legal profession to recognise enhanced earnings elements in an economic disparity claim would indicate an acceptance that marriage or other relationships, such as de facto partnerships and civil unions are partnerships of equals.

467 McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Baroness Hale at [138].
As SOLAK18 observed:

If the section is going to survive then there needs to be better consideration of the economic benefits for the husband, more consideration of the value of having a wife and the enhanced earnings. These factors need to be considered as much as all that interrupted career stuff.

One solution that may assist to achieve fairness between couples could be more effective use of contracting out agreements under section 21 of the Property (Relationships) Act.\textsuperscript{468} In circumstances (such as those of SOLAK18) where it is agreed between the couple that one party’s career will be focused on to the detriment of the other party’s career for the benefit of the family unit (or the careered partner), people could use section 21 of the Act. Section 21 could be used to record agreements regarding the respective obligations and rights of each party should the relationship fail. It is suggested that parties could negotiate and record their agreement while the relationship is on foot. This would limit the retrospective examination of the relationship when it has failed and the relationship property is being divided. The empirical research results indicate that this is not an infrequent occurrence. Often parties have their own version of events and understanding of the implicit agreement they had with their partner.\textsuperscript{469} Perhaps the rights and obligations codified within the Property (Relationships) Act could be understood as the default provisions which the couple would fall back on should there be no other framework in place to work through their relationship property matters.

This suggested framework could be considered as being similar to that found within the New Zealand Companies Act 1993 which provides for the situation when a company does not have a constitution.\textsuperscript{470} The Companies Act acts as the default position for the regulation of the affairs of the company. The effect of a company having a constitution is that the company, the board, the directors and the shareholders have the rights, powers, duties and

\textsuperscript{468} Section 21 of the Property (Relationships) Act permits couples to contract out of the provisions of the Act regarding property.

\textsuperscript{469} For example the Claimant spoke of her ex-husband telling her that she did not need to work and how it felt for her when she felt that the Court was re-writing the history of her marriage or the mediator spoke of men looking back at the relationship with dark tinted glasses. He explained how they frequently forgot that they had told their partner to give up work and that they did not need to work but instead should stay at home and focus on raising the children.

\textsuperscript{470} Under section 26 of the Companies Act 1993 a company is not required to have a constitution. The company constitution essentially sets out the rights, powers and duties of the company, the directors, the board and the shareholders. The effect of a company not having a constitution is that the company, the board, directors and shareholders have the rights, powers, duties and obligations set out in the Act (section 28).
obligations that are set out in the Companies Act except to the extent that they are negated or modified by the constitution of the company.\footnote{The Companies Act 1993, section 27.} \footnote{The Companies Act 1993, section 31.} (It should be noted that the constitution of a company has no effect to the extent that it contravenes, or is inconsistent with, the Companies Act.\footnote{Section 21F of the Property (Relationships) Act 1976 (It is of note that if the agreement was obtained by undue influence or duress the fact that it complies with the statutory criteria does not immunise it from challenge.)}) In the context of the Property (Relationships) Act there are a number of safeguards. These include formal requirements regarding the making of a valid contracting out agreement.\footnote{Section 21J of the Property (Relationships) Act 1976.} An agreement may be set aside even though it complies with the necessary formalities if, having regard to all the circumstances of the case, a court is satisfied that giving effect to the agreement would cause serious injustice.\footnote{Moge v Moge [1992] 3 SCR 813 (S.C.).}

There is no reason why the example of the Companies Act (acting as the default position for companies without constitutions) could not be explored in the context of couples. The use of contracting out agreements may be effective and, for the couple involved, a palatable solution to the problem of economic disparity more so than any court or lawyer negotiated settlement under section 15 of the Property (Relationships) Act. It is thought that an agreement negotiated by the parties in a pro-active manner at a time when they have the ability to negotiate their respective rights and obligations could be effective. The Supreme Court of Canada noted the shifting of power within a relationship and said: \footnote{Moge v Moge [1992] 3 SCR 813 (S.C.).}

> While the union survives, such a division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside of the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

An agreement negotiated while the relationship is on foot could be some measure of protection for the economically disadvantaged partner. At the very least the cost of
negotiating and documenting the agreement would, usually, be less than a court awarded settlement. The downside of this suggestion is the general reluctance of couples to document anything in relation to the terms of their relationship.\textsuperscript{476} It is generally seen as being an emotive and difficult subject to discuss let alone implement. Nevertheless it is something that legal practitioners could consider advising clients about particularly in the context of a professional couple where one party has sacrificed (or may sacrifice) their career for the benefit of the family or their partner and as a result jeopardises their future economic wellbeing should the relationship break down. Conversely the other partner may, as a result of the division of functions in the relationship, have the opportunity to enhance their future career.

The importance of the enhanced earnings in respect of economic disparity claims:

A number of practitioners recognised the significance of enhanced earnings. For example a solicitor said the “future of economic disparity” claims are in “enhancement arguments” (SOLTAUR24). One of the forensic accountants, ACC1 said how in a perfect world when the economic disparity awards are being calculated regard would be had to “the benefit of having a wife stay at home”. The actuary perceived the need to consider enhancement claims in respect of economic disparity claims. In examples of the actuary’s written advice, tabled as an indication of his approach to the calculation of economic disparity awards, the actuary referred to “the uplift” in the economically advantaged partner’s career due to the contributions and assistance of the economically disadvantaged partner. Within his advice he explained to clients he had not allowed “for this uplift” but would “be happy to provide an updated calculation” should the legal practitioner seeking his advice wish for it.\textsuperscript{477}

Fifteen members of the legal study group said in a perfect world they would like enhanced earnings considered in economic disparity claims. But the steps forward, regarding how we apply the concept of enhanced earnings to cases as presented to practitioners, are elusive.

\textsuperscript{476} The negative public perception of contracting out agreements was an observation made by some members of the legal professional study group and was something that the economist spoke about at length.

\textsuperscript{477} At the time of the interview the actuary said that he had had no requests to value the “uplift” in the career.
For other practitioners there was little recognition of the economic advantages obtained by a husband when he has a wife at home taking care of the household duties. The view of Auckland barrister, BAK3, reflects this when he said that the husband in vignette one could have employed “the services of a nanny and a cook” this would have meant that there was “less relationship property” but the husband could have afforded it. Forensic accountant ACC2 could not perceive the merits of an enhancement claim, and questioned “how would you work it out?” and said if a “genius … goes on to have a brilliant career” the Property (Relationships) Act is not “designed to compensate” his wife if she is a secretary.

Considering the research results, and the opposing views of practitioners on the issue of enhanced earnings, it is important to place these views in the wider legal contextual framework. Within the context of judicial reasoning there is some excellent judicial analysis of enhanced earnings. On the basis of this reasoning there is no conceptual reason for the absence of the enhancement side of economic disparity claims. The problem is, however, finding direction forward to enable a move from the conceptual to framing a tangible argument in practice.

As the QC observed there have been no section 15 awards in court calculated on the basis of enhancement or the “up-lift of having a wife at home” but “there is recognition that this can be done but as yet it has not happened”.

**Judicial pro-announcements regarding enhanced earnings:**

Examples of judicial recognition of the enhanced earnings arguments are found within the decisions. For instance there is recognition that because of the specialisation that occurs between spouses in a marriage, when the marriage ends the party that has a career can leave the relationship with the potential to earn money and this ability has value. More often than not it is the wife that is left, after the breakdown of the relationship, doing the lion’s share of the care giving. In the United Kingdom Baroness Hale observed in *McFarlane v McFarlane*:

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478 *McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618, Baroness Hale at [141].
Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer’s standard of living and a rapid increase in the breadwinners. The breadwinner’s unimpaired and unimpeded earning capacity is a powerful resource.

Baroness Hale’s statement indicates the correct conceptual approach to remediing economic disparity requires a consideration of the future (for example an inquiry of the future earning potential of a spouse). It is not enough to only examine the past or the opportunity costs as New Zealand currently does. This forward looking approach is something that in New Zealand we struggle with. Very few legal professionals look at the problem in the manner that Baroness Hale does. Without this aspect featuring as part of the inquiry the issue of enhancement will remain un-remedied.

Baroness Hale’s observation is apt for the situation in which both claimants found themselves following the breakdown in their relationships. Claimant one spoke of working part-time and the inherent difficulty involved with combining paid work and care for her children. Claimant two explained he was surviving on savings and also Family Tax credits. In both of these cases the ex-partners of the claimants were engaged in well-paid full-time work with the responsibility of the day to day care of the children being carried out by the claimants (meaning that the breadwinners could focus on their careers unimpeded).

The New Zealand judiciary has also considered the issue of enhancement in the context of reasoning contained in dicta statements. In 2002 Priestley J described the issue of career enhancement and the role of section 15 to remedy this mischief:

The classic case … is a wife who forsakes advancing her career and instead devotes herself to supporting her husband and caring for the children whilst her husband ascends some economic pinnacle but who leaves the relationship initially unemployable and unable to command a high income and standard of living … Such a scenario illustrates two causal factors working in combination, the adverse effect

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479 Claimant One said how she could not “just jump up and race out of work … as it did not look good … but I had to pick up the kids. I do remember my daughter being there at the end of the street being the last kid left. I was always racing … but I do not want to seem like I feel sorry for myself as millions of mothers do this sort of thing: juggling work, children and all the other things.”

480 De Malmanche v De Malmanche [2002] 2NZLR 838, at [156].
which the wife’s role has had on her income earning potential and the positive enhancing effect which her role has had on the husband’s income earning potential. [Emphasis added]

It matters not whether the disparity is the effect of the claimant’s earning capacity having been depressed or by the defendant’s economic position having been enhanced, or by a combination of both. Both of these situations are compensable.

The issue of career enhancement was also considered in M v B when William Young P said:481

A woman who stays at home and looks after children frees up her partner’s time and energy and in this way may facilitate an enhancement of his earning capacity. Thinking along these lines is reflected in section 15 and in some circumstances, such an enhancement of earning will properly be redistributive under section 15. [Emphasis added]

The enhanced earnings/position argument was acknowledged in the leading Court of Appeal’s decision regarding section 15. O’Regan, France JJ considered the enhancement aspects to an argument regarding economic disparity explaining:482

The object of an enhanced position award is to provide the disadvantaged partner with a share of the enhancement of the advantaged partner’s future income or living standards resulting from the division of roles in the relationship. This could arise … where the disadvantaged partner’s role has … enabled him or her (the advantaged partner) to commit himself [or herself] full-time to work, without the distraction of child caring responsibilities and the resulting enhancement to the advantaged partner’s income or living standards continues after separation.

The legal environment contains fertile ground for an economic disparity argument to be made. But it is implementing the argument and moving from the conceptual to applying it to the facts of a specific case and quantifying the amount of any enhancement that is difficult.

481 M v B [2006] 3 NZLR 660, William Young P at [200].
482 X v X [2009] NZCA, 399 O’Regan and France JJ at [170].
The judiciary has given a nod of affirmation to career enhancement arguments but it is proving difficult for the legal profession to apply these principles in any real and understandable way to cases that they see in their practices.

One aspect also often overlooked is that the enhancement aspect of economic disparity and relationship property more generally is reflected in the Principles of the Act. These Principles are evidence of the Legislature’s intent that economic disparity compensation should not be about economic loss alone. For example:

I N. Principles

(b) The principle that all forms of contribution to the marriage partnership ... are treated as equal.

(c) The principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or de facto partners arising from their marriage or de facto relationship from the ending of their marriage or de facto relationship. [Emphasis added]

The failure of those interpreting and applying section 15 outside of the courtroom to take into account enhanced earnings and economic advantages is important, because this means section 15 has not delivered in the spirit and manner that the Legislature intended. It means individualism is favoured over the partnership ideal (with the justification founded on a theory the careered partner’s ability to earn a high income is derived from their own unique character and hard work). Failing to address the economic advantages of a partner’s career enhanced during the marriage/relationship means the inherent value of the non-financial contributions of the spouse/partner to the partnership are not recognised. The partnership model of a marriage (or relationship in the nature of a marriage) is the model on which New Zealand law is founded yet this partnership model is not conceptually embraced by the New Zealand legal profession within their daily practices. By failing to embrace this model the legal profession is not properly taking into account the law that considers marriage (or civil union or de facto relationship) as a sharing enterprise where each partner contributes to the relationship, albeit in different ways, and non-monetary contributions are not of greater value than non-monetary contributions (see section 18(2) of the Property (Relationships) Act).
Some members of the legal profession and forensic accountants fail to appreciate the significance of section 18. It is unequivocal: all forms of contribution to the partnership are to be treated as equal. Pursuant to section 18(1)(b) the management of the household and the performance of household duties is a contribution and section 18(1)(h) provides that the giving of support or assistance that aids the other spouse/partner in the carrying out of his or her occupation or business is a contribution.

The view that marriage (or civil union or de facto relationship) is a partnership, both emotional and economic, pervades and dominates the law of marriage and relationship property. It is against this backdrop the couple organise their lives. Yet as found by legal theorists and social scientists these principles are not adhered to by legal decision makers, be it inside the courtroom or in the context of a lawyer advising a client in a relationship property matter. This is summarised by the following observation: 483

Despite repeated adherence to the rhetoric of a martial community, it appears that in important ways legal decision makers do not actually believe the tale they so often tell. Instead, another view of marriage – almost always obscured by other rationales, but unmistakably present – often drives outcomes upon divorce. As cases where a career asset is in contention reveal another model has risen to challenge that of partnership. Martial partnership is the pretence, but in many cases, the ascendant value is solitary individualism. On this view, although there may be a specific exchange of resources that needs to be accounted for upon divorce, both spouses enter and depart marriage as separate individuals who have had relatively minimal influence on one another. Sovereign identity is treated as fundamental and untransformed by marriage.

Within New Zealand it is evident from the case law and also the results of the empirical research that very rarely does the principle of partnership truly guide the decisions made by lawyers and the judiciary. One other aspect to this that should be considered in the context of New Zealand and section 15 is the approach that forensic accountants take regarding contributions to the marriage/partnership. They also marginalize the non-financial contributions made in a marriage. Forensic accountant, ACC2, was asked to consider

section 18 of the Act. After reviewing the section he said how hard this sort of thing is to measure: “how do you value it? Monetary contributions are easy to point to” (ACC2). This problem was discussed by a very experienced barrister, BAK4 who said there needs to be more recognition of “the very important provision in the Act regarding contributions”. The barrister was concerned that “people forget that monetary contributions do not count for more than non-financial”. He explained that the individual must not be favoured over the partnership and said “you still have to look at the contribution issue and you have to take into account that all of us in a professional setting … do not do it alone” (BAK4).

As the then Associate Minister of Justice explained (when the amendments to the then matrimonial property laws were considered) often the economically disadvantaged party is the wife:  

Who may have devoted many years of their lives to unpaid domestic duties and childcare, while their partners have contributed to the enrichment of their separate property and business interests. [Emphasis added]

Section 15 was intended by the Legislature to not only compensate for loss of opportunity but also to recognise the long lasting positive effect on the earning capacity of the breadwinner that the contributions of the non-earning partner has made. The former Minister of Women’s Affairs, Laila Harre, explained how the law was intended to:  

Preserve some equality between the spouses after the end of a marriage … including some sort of process that will allow the non-earning spouse to have recognised in his or her settlement the earning capacity of the earning spouse as the non-earning spouse has contributed to the development of the earnings capacity.

The results of the empirical research indicate the enhanced position is an argument that conceptually practitioners accept, but it is the implementation of this conceptual argument to the facts of matters they are dealing with on a day to day basis that is proving to be elusive. Practitioners review files and meet with clients who present with facts where it would be

484 Hansard report of the Third Reading debate by the Associate Minister of Justice, Margaret Wilson, NZPD vol 591, p 8625.
logical to make an enhanced position argument but it is perceived by many as being too hard an argument to make. There is judicial acknowledgment that there could be an economic disparity argument founded on enhanced position yet there is no judicial guidance regarding the steps that need to be taken to make such an argument. The Act itself is silent and the decisions do not provide practical guidance for practitioners regarding how to frame such an argument.

The end result is, as evidenced by the empirical research, a number of practitioners would like to see recognition of the uplift/career enhancement aspects of an economic disparity claim. Fifteen study participants indicated, in a perfect world, they would like to see something done about economic disparity between couples on divorce (see Figure [5.42]). Barrister, BAK5, explained the predicament when she said there should be more consideration of the enhancement argument but the methodology used at the moment to calculate the awards (being that used in $X \times X$) does not permit it. Another barrister, BCH10, explained how difficult it is to run an enhanced position argument and said “section 15 and economic disparity claims should be available for people who have not had a career but where someone with their efforts during the relationship … has promoted the career of the other”. BCH10 said it is “really hard to make a case like that at the moment” and she did not think it should be.

The issue of enhanced earnings is linked to the recognition that future earnings and the ability to earn a high income is an asset that has far reaching economic ramifications. For example the QC thought there needed to be more awareness that “earning is just so important” because it enables one partner to maintain capital. The QC explained an economically disadvantaged partner may have a considerable sum of money after the division of the relationship property but that person may be earning considerably less than the other partner and often has responsibility for the on-going care of dependent children (resulting in the erosion of the economically disadvantaged partner’s capital base while the economically advantaged partner’s ability to earn continues). As Baroness Hale indentified this ability to earn is a “considerable resource” that is enhanced at the end of the relationship because it is “unimpaired and unimpeded”, often with the primary care of children remaining in the hands of the economically disadvantaged partner.

\[486\] McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Baroness Hale at [141].
In 1992 the Supreme Court of Canada reflected a similar sentiment and concluded that after the breakdown of a marriage economic disadvantages resulting from the marriage may be suffered by one spouse “while the other spouse reaps its economic advantages”. The Court held that:487

Women tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside of the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities.

Structural problems and/or themes identified in the empirical research:

The empirical research also identified problems and themes un-associated with the inconsistency of results and the failure of section 15 in practice to address the issue of enhanced earnings. Some of these problems are not as a result of anything the legal professionals are doing, they are independent from them, and could be considered as characteristic of the nature of family law.

Mediation: Early on in the interview process the significance of the use of mediation in the resolution of family law issues was apparent. For some participants there was a distinct push towards resolving relationship property issues through mediation processes rather than issuing court proceedings. Mediation was seen as more cost effective and less emotionally draining on those involved than resolution of disputes through the court system.

An Auckland barrister said how generally in respect to relationship property matters she “will try and get [her] clients into the strongest position possible and then go to mediation” (BAK5). BAK5 explained in her experience “mediation is not justice, as legal principles are rarely relied on in the course of mediation”. But it gives her clients a definite result which means they can “get on with their lives”. The wait for a relationship property matter to go to court can be lengthy and it is not something she likes to put her clients through. In her practice there is a feeling of “pressure on clients to settle their relationship property disputes”. Some of this pressure is attributable to the “the uncertainty that people are feeling within New Zealand”. For example BAK5 discussed some of the influencing factors including the recession which has created job uncertainties. Some people now find they have negative equity in their homes and natural disasters have impacted on people’s psyche (for example the Christchurch earthquakes). BAK5 said in these “uncertain times people are looking for certainty … there is real value in clients getting a deal now as opposed to later”.

Mediation is seen as a vehicle enabling people to reach a deal and resolve the relationship property matters. The court system is not seen by practitioners as offering a quick and efficient solution to relationship property disputes.

The mediator explained his perception of the process:
[MED] I am here to deal with fairness, reasonableness and morality but really what we are dealing with is the underlying issues in the relationship and not just the figures. … I get a far better solution and the lawyers will tell you. This for example maintenance for life, there is no clean break principle, you cannot do that in court … the clean break principle only ever suits the person with the dough, now in mediation it is a very different dynamic.

The opinion, mediation is a better means of resolving relationship property issues than the court process, is based on the perception that mediation provides better flexibility than court awarded settlements of relationship property. It is important to note that this sense of flexibility will depend on a number of variables, for instance: who is the mediator? And who are the lawyers or parties involved? Are all of these protagonists prepared to be flexible and will they be accepting of the results?

The mediator’s comments provide an insight into this issue:

[MED] Lawyers love to be loved … I say to my clients ‘lawyers are like your mistress. They are expensive to keep: they are not always available when you want them, and they cannot always guarantee satisfaction’. If you can control the lawyers in the room then the mediation will always succeed because people are sensible and reasonable. They want it over and done with.

For some legal practitioners, more adversarial in their approach, mediation is unlikely to be an option they put to their clients as means of resolving their relationship property dispute. While practitioners report there have been some good results achieved for clients within the mediation process, if you were to encounter two advocates with extreme views (such as barrister BAK3 in vignette one who did not think any section 15 compensation was due to the wife and barrister BDUN11 who thought the wife should be awarded $2 million) it is apparent that the mediation process cannot be seen as being without its own problems. For this reason the viability and worth of the mediation process must be seen as being extremely fact and/or attitudinally dependent. At times mediation would permit greater flexibility but there will be contrary experiences and sentiments expressed by others that have taken part in the mediation process.
Many of the practitioners spoke of out of court settlements of relationship property that were far in excess of what they thought a court would award. There was a settlement discussed where the careered partner handed over all of the relationship property to the economically disadvantaged partner because it was recognised that the careered partner had the ability to earn a high income and there was a significant level of guilt harboured by one partner for the breakdown of the relationship. Putting this mediated settlement aside, undoubtedly settlements of relationship property achieved through mediation are perceived by many in the legal profession as being better for the long term relationship of the family and the partners and better financially (because the resulting awards are often greater than those achieved through the decisions of the court and the costs both financially and emotionally are substantially less).

One downside to settling matters outside of the courtroom is that the development of the law is hindered. There can be no development of judicial reasoning and jurisprudence. The other aspect to this is that because the provision is silent regarding how to calculate the quantum of the award, the tools or references used within mediations to calculate what is fair between the parties in respect of the division of relationship property are not available for others to consider. What is conceded by other lawyers or their clients in the throes of mediation is not a matter of public record. As a barrister said “part of it is the problem [is] your sense of where the courts might go or how other lawyers are conceding in mediations” (BAK2).

Some of the mediated settlements the legal professionals discussed do not appear to sit within the regimes of the law. The terms of these settlements may be due to other emotions and external factors such as guilt, pain and anger that are such integral part of family law.

Undoubtedly there are problems within the mediation process yet it is interesting to note the confidence a number of the practitioners had with the process. One conclusion that can be drawn from the results of the empirical research is it is very fact and/or attitudinally dependant whether mediation will work, and there is an element of unpredictability regarding the results that may be achieved in the process.

**The interplay with economic disparity claims and maintenance claims and other claims:**
There are conceptual and practical issues for legal practitioners regarding the correct
application of spousal maintenance awards and the scope of an award for economic disparity made under section 15. Participants felt that in practice they need to make a decision whether to pursue section 15 or maintenance. See Tables 5.3 and 5.4.

While the two concepts (maintenance and economic disparity) are fundamentally distinct, when practitioners are faced with a relationship property matter the two remedies can become blurred. An example of this was evident when BAK3 opined that in vignette one the wife should not receive section 15 compensation and maintenance alone should be awarded. BAK3’s opinion was at the opposite end of the spectrum from BDUN11 who said there is a fundamental difference between maintenance and section 15 and explained that they are “two different concepts”, economic disparity is compensation and maintenance is premised on assisting a party to meet their reasonable needs.

At a practical level for practitioners negotiating relationship property settlements, problems would inevitably arise because there is a lack of consistency between practitioners’ thinking regarding the rightful place of both of these remedies. An illustration of this contention would be to consider the dilemma a couple would be faced with if their legal representatives were barristers BAK3 and BDUN11.

A Wellington solicitor explained how in the context of some relationship property settlements other remedies are used as weapons to the detriment of an ex-spouse, when she said:

[SOLWELL25] Sorry to sound like I am man bashing but these men are now applying for shared care, like in this case I am working on … they feel like their wife is on the gravy train. [Applying for shared care] cuts down on the child support. The problem is that it is shared care in name only … the wife is still doing it all … the mothers end up doing all the mental parenting ensuring that the children have all that they need and the other parent is not doing this and it is not really shared care.

The high cost of bringing an economic disparity claim: Economic disparity awards were seen by a vast majority of the participants as reserved for the rich. Ninety percent of the participants commented on the high cost of an economic disparity claim. It is a remedy

488 Maintenance is intended as a remedy to provide some short term relief. It is not compensation which s15 is.
suited to those with a considerable relationship property pool. A claimant may win an economic disparity claim but it will be victory in name alone if the compensation only pays for the cost of the claim. Claimant one explained the significance of this problem. Her section 15 award was spent on her considerable legal and accounting costs. For the practitioners the high cost involved in bringing an economic disparity claim is a serious problem. An Auckland solicitor working in a smaller suburban law firm (whose client base consists of middle to lower income couples and not high net worth couples or professional couples) explained the impact of the high costs associated an economic disparity claim:

[SOLAK20] I think of my own practice and … the people that probably should get an award but the costs are prohibitive. In the ideal world it would be more accessible, it would not just be the remedy of the rich … it has been priced out of the market as a remedy.

Problems with the Court system generally: A number of participants spoke of entrenched problems within the Family Court system. A barrister said: “the huge problem is that there is no justice in our Family Court. The system has broken down. It takes just too long to get to court” (BAK5). Some participants said that the Family Court judges were unable to comprehend the complexity of relationship property matters, for example an Auckland barrister asked: “whether they have the ability to hear and decide relationship property matters that can be extremely complex” (BAK5). The barrister felt that the Family Court Bench were “unaware of some basic accounting and banking concepts” (BAK5) and said some of the appointments in the Family Court were “questionable” with the “calibre of some of the Family Court Judges [being] debatable” (BAK5).

Some participants suggested that there should be concurrent jurisdiction with the High Court meaning matters could be dealt with in the High Court at first instance. As a barrister said:

[BAK4] … there would dual jurisdictions you could file in the Family Court as well as the High Court … there is a big hurdle in getting to court and the courts have done … a great disservice it takes too bloody long and women worn out by the process … No one wants to go to the Family Court because of the time it takes, the money that is needed and you are not treated fairly.
Another barrister agreed and thought that the “High Court Judges are more skilled in the area of property because generally speaking the High Court Bench comes from more commercial backgrounds than Family Court Judges” (BAK5).

**Stereotypical roles of men and women and their roles within a marriage are now redundant for many New Zealand families:** A number of the participants felt the stereotypical model of a marriage section 15 seems to be premised on is outdated and no longer stands as an accurate reflection of relationships within New Zealand.

Reflecting on \( X \lor X \), a barrister said:

\[[BAK2] \ldots \text{that the lady had the ability to work \ldots but they said that she did not have to work \ldots this is so unrealistic in this modern world. It is working couples and how many of us have to work all of our children’s childhood \ldots And this is like these people get this special world? And so economic disparity is for the rich and then the rest of us have to give up and go away.}\]

What this means for practitioners is that the conceptual framework/model of a family section 15 has (with the men as breadwinners and women as the caregivers) is not the reality for a large sector of New Zealanders. As such there are difficulties for legal practitioners applying the conceptual model to the matters they deal with. For example many women now work at least part-time because the family unit needs the joint income of both spouses. In such circumstances the question asked by practitioners is: where is the career foregone? If the woman kept her career, or at least retains the ability to develop and maintain a career, then the conceptual framework which the legal profession uses to make sense of calculating the quantum of section 15 awards becomes problematic. If a woman has not given up her career then there is no loss that can be calculated.\(^489\)

In **Moge v Moge** the Supreme Court of Canada observed that the traditional dichotomy of “traditional” versus “modern” model of relationships was not helpful, and held that families outside the traditional model can still have a spouse suffering an economic disadvantage.\(^490\)

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\(^{489}\) This is the first step in the \( X \lor X \) methodology frequently used by the legal professional to calculate the s15 awards.

\(^{490}\) **Moge v Moge** [1992] 3 SCR 813 (S.C).
The problems with the nature of the remedy, a payment taken from one partner’s share of relationship property does not always work: The participants identified that the inflexible nature of section 15 awards means that the application of the provision to real life matters can at times be problematic. Section 15 compensation is limited to the pool of relationship property. Often the only real asset of the couple is the future earning potential of the economically advantaged party. For example one senior barrister spoke of a relationship property matter where the jurisdictional tests of section 15 were clearly established and a compensatory award should have been made. But there was no relationship property from which the award could be made: the only asset was the husband’s earning potential. After the demise of the marriage the husband could continue to focus on his career. The day to day care of the children of the relationship was carried out by the mother. The woman had qualified with a professional degree but the couple had children soon after graduating from university and the decision was made that the man would develop his career and the woman would not work. Such examples were not isolated, with many legal professionals having similar examples of injustices associated with section 15 and enduring economic disparity between couples. It is interesting to consider this within the context of Lord Nicholls’ reasoning when he said it would be “extraordinary” if periodical payments were unavailable for the “purpose of affording compensation to the other party as well as meeting financial needs”.

Lord Nicholls said:

If one party’s earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.

The Supreme Court of Canada also held that spousal support may be ongoing and the clean break principle is something that cannot always be adhered to.

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491 McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618, Lord Nicholls of Birkenhead at [32].
492 Ibid at [32].
In the context of New Zealand property law the absence of capital assets does in fact cancel out the obligation to pay compensation in respect of a continuing economic advantage obtained from a relationship and there is little that can, at least presently, be done about it.

**Small pools of relationship property associated with the frequent use of trusts:** Another problem identified by the group was the frequency which trust structures are used by New Zealand couples. Because property is held in trust it cannot be regarded as relationship property and is therefore not subject to the presumption of equal sharing contained in the Property (Relationships) Act. Practitioners explained the frequency which they have dealt with matters where the jurisdictional thresholds of section 15 were established but there was no relationship property from which section 15 compensation could be paid due to property being held in trusts. This is an issue which has recently been considered by the New Zealand Law Commission.494

It should be noted that this occurrence is not the fault of section 15 but rather an observation relating to the manner that New Zealanders organise their personal affairs more generally and how this impacts on the issue of economic disparity.

**Calculation of the quantum of awards:** The results indicate a divergence of opinion among legal practitioners regarding the calculation of economic disparity awards. The Act is silent regarding the method of calculation and practitioners must make sense of it for themselves. This has proven a difficult task. There are a myriad of problems associated with the issue which have been canvassed throughout this research: for example the inconsistencies found in practitioners’ opinions regarding the basis of awards (is an award based on loss alone or should there be compensation for enhanced earnings?), the high costs associated with a claim, the need for expert evidence, and the uncertainty of the awards.

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Chapter 6

Conclusion

The conclusion that can be drawn is that section 15 has not been an effective solution to the problem of economic disparity on the breakdown of relationships.

A principal reason for the failure of the provision is that the conceptual foundation of the provision is uncertain. It is not clear if section 15 is intended to achieve economic equalisation in the largest sense of the term, or whether it is directed at something less substantive. The ambiguous drafting of the provision offers no clues. Whichever way the issue is approached, quandaries emerge. Parliament has placed a discretionary compensatory provision within a more certain and rule-based property act, namely the Property (Relationships) Act 1976. It is unsurprising that this has created waves of confusion. Section 15 does not seem to be a natural fit within such a statutory framework.

Nor does section 15 seem to function amid the existing doctrines of family law such as the clean break principle, which is intended to enable parties to disentangle themselves from a broken relationship so that their future will not be overshadowed by their past relationship. Section 15 requires a speculative inquiry regarding the likely future income and living standards of a couple, as well as a consideration of the past to determine whether the disparity was because of the division of functions assumed in the relationship. Further, if true economic equalisation between the couple is intended then there may be long-lasting future financial obligations owed by one partner to the economically disadvantaged partner. But section 15 does not provide for this because the compensatory award must come from the relationship property alone. Yet very often there is not enough in the couple’s pool of relationship property to provide a reasonable measure of compensation. Arguably, when this happens, periodic payments from the income of the economically advantaged partner should then be used to remedy the economic disparity. Yet this remedy is not available under section 15.

Confusion abounds from whichever direction the issues are approached. There is a palpable sense that the operation of the section cannot work seamlessly within the existing legal framework on which it has been grafted. Another example of this quandary is the operation of
section 15 within New Zealand’s maintenance rules. The empirical research indicates how difficult it is to understand how the two remedies should work together in practice.

The problems associated with section 15 are multi-layered. For the reasons noted above, a fair measure of the blame could arguably be shouldered by Parliament yet the approach of New Zealand’s courts to the interpretation of the provision could also be considered, in part, responsible for the undesirable situation New Zealand now finds itself in with respect to the problem of economic disparity.

One solicitor felt that while “Parliament opened it up [economic disparity] the courts have closed it down because of the narrow interpretation that they have taken to section 15” (BCH10). Undoubtedly the courts’ approach to economic disparity claims has created an additional layer of problems. Many of these are seen in everyday practice. For example section 15 in practice has created secondary issues (high costs, delays in resolving issues, emotional costs) because it is perceived as a tool used to punish spouses and many uncertainties surround the provision.

Parliament’s intention for the law reform may have been positive but the net effect of the provision is far from positive. A solicitor said “the concept behind the law is perhaps okay but putting it into practice is very hard” (SOLAK17). The QC explained:

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\text{[QC] The advice … I am giving people … is that section 15 has turned out not to have any real teeth … in } X \lor X \text{ she was a highly qualified accountant who became a traditional housewife. There was a pool of relationship property of about } \$13\text{ million and she still only got } \$240,000 \text{ so if she gets that then everyone else only gets 50 cents so it is probably not worth spending the money on it.}
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There is also a feeling that “lawyers in general need to accept that it is an issue … it is a bit woolly and not taken particularly seriously … the judiciary needs to take it more seriously maybe lawyers as well” (SOLAK19). For the participants economic disparity remains an unresolved issue, as a solicitor in a small firm explained:

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\text{[SOLAK20] … economic disparity is an issue, when I think of my own practice and … the people that probably should get an award, but the costs are prohibitive. In the}
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ideal world it would be more accessible. It would not just be the remedy of the rich … it has been priced out of the market as a remedy.

The forensic accountants also perceived problems with New Zealand’s approach to calculating economic disparity awards as an accountant said:

[ACC1] … the way … the courts are interpreting section 15 is in fact totally wrong. On the basis that if the husband is there earning half a million a year and the wife is earning $60,000 … and she might get to $100,000 per year in the next few years … why should the husband be permitted to walk away from the marriage … he is earning half a million dollars per year … This is a very sort of unusual view for a male to have but why should a husband be able to walk out of a marriage like that? … Someone one day should actually run a case along the lines of the difference in incomes. The biggest asset is the future earning capacity. The courts cannot see this. But there is a case for this way of seeing the issue, income has an impact on the living standards.

As the participants’ comments illustrate, if the objective of section 15 is to achieve economic equality, then the section fails. The problems with the judiciary and legal profession’s approach to section 15 are apparent in the hidden benchmarks and beliefs they bring with them that add another dimension to their decisions. This has resulted in a continuation of the common themes of relationship property law. For example whenever there is a discretion it is generally interpreted and exercised in a manner favouring the breadwinner at the expense of the homemaker.495

In the context of Australian Family Jurisprudence there is also well founded documentation regarding this familiar pattern in Family Law. K. Funder “His and Her Divorce” in P. McDonald (Ed.) (1986) Settling Up-Property Income Distribution on Divorce in Australia, Australian Institute of Family Studies at page 240 reported that: “Women generally acknowledged their husband’s contributions, but men were likely to over-look their wives’ earnings, while crediting them with most of homemaking, which both the husband and wife seemed to value less than earning.” The practitioners also acknowledge this pattern – for example BAK4 said – “some men do not see their wife as entitled to it … she was looking after the family, supporting his career – you know doing the whole bit and they have this view that they are not entitled – that somehow or other the income earner – the person who has managed to get all of these things that they have made a far greater contribution to the relationship than what they have”.

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As the then Chief Justice of the Family Court of Australia said: \(^{496}\)

> The nub of the issue then arises as to how we value the different roles played by the parties to the marriage when the financial market places value on one role so much more highly than the other.

The problems exist for all to see. Their existence is undisputable as the participants said: there is “a whole lot of disappointment about how section 15 works in practice” (SOLTAUR22) and “section 15 is just a disappointment” (BAK4).

After researching and documenting the negative effect section 15 has had on the problem of economic disparity the next step involves a consideration of what more can be done to solve the problem. The problem is encapsulated in the observation made by a partner in a law firm when they said:

> [SOLTAUR22] I remember going to a conference and a senior female judge saying ‘we must be able to do this better and easier.’… what the courts are saying … is self-perpetuating. You as lawyers get criticized if the evidence is not there so then you go and get the evidence and then the courts make their decisions based on that [the evidence] so then it continues.

The evidence SOLTAUR22 is referring to is the accounting evidence and projections made regarding the cost to the economically disadvantaged partner of a lost career and their potential future earnings which the \(X v X\) methodology for calculating the compensation due under section 15 is premised on (see chapter 5).

The problems inherent in the provision are exacerbated because of the New Zealand courts’ approach to section 15. These problems are associated with:

- An uncertainty regarding the appropriate conceptual approach that should be taken to the interpretation and application of the provision. Practitioners also discussed the

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problems they face in understanding and applying the jurisdictional tests of section 15.

- The high costs of bringing an economic disparity claim. The participants thought these were as a result of the judiciary and the legal profession deferring to the accounting profession in respect of economic disparity claims: “you have some accountants whose whole approach” to the issue of economic disparity “has dominated the cases” and the approach of such people can “be quite blinkered and very slavish” to formula (SOLTAUR22).

- The slavish approach of the judiciary and the legal profession to the presumption of equal sharing and their interpretation and application of section 15 which rigidly adheres to existing precedents. As barrister, BAK4 said “because the Court of Appeal ... set this formula it ... becomes set in concrete”. There has been a lack of evolution in our approach to the problem of economic disparity. The collective New Zealand legal mindset has “stopped in our tracks [we] have stopped thinking about it” and “we have not evolved”(BAK4).

- The blinkered approach, or formulaic approach, as currently adopted by the legal profession on the basis of the Court of Appeal’s X v X decision means that to date there has been an overall omission of enhanced earnings (or uplift in the careered spouse’s earnings) arguments. Many of the participants (including two out of the three accounting experts interviewed) were explicit in their affirmation that enhancement arguments needed to be considered and acknowledged in the compensation awarded. But the next step is difficult: to move from a conceptual argument to a remedy that has meaning and a framework so that practitioners can apply it to real cases in a simple and cost effective manner.
Suggestions for change

It is patent that section 15 is not working. The result of this research and the body of work completed by others is unequivocal. It is time to accept this and to move forward. Finding a solution to the problem of economic disparity in New Zealand between couples on the breakdown of their relationships requires change.

New Zealand needs a practical, solution based, outlook to solve economic disparity. An examination of the United Kingdom’s approach to resolving matrimonial property issues may be of assistance as a guide to an acceptable alternative approach. The United Kingdom’s Matrimonial Causes Act 1973 gives only limited guidance to the courts regarding how they should exercise their statutory powers. Primary consideration is to be given to the welfare of the children of the relationship and the court must also consider the feasibility of the clean break principle. Beyond this the courts are told that they must have regard to all the circumstances of the case. The United Kingdom judiciary have a solution based focus and consider the wider circumstances of the case. This is an approach that New Zealand should consider following. Arguably the United Kingdom’s approach is more practical than the reasoning of the New Zealand judiciary that, in the context the Court of Appeal and economic disparity claims focuses on the narrow issue of the arbitrary cost of the loss of chance to pursue a career.497

In an ideal world the provisions of the Property (Relationships) Act and section 15 would be a default position for couples when they settle their relationship property on the breakdown of their relationships. It would be the default position because the couple would have negotiated and documented the terms of their agreement, while the relationship was on foot, and in this utopia the agreement would be fair. Society generally would more accepting of contracting between couples and such contracts would frequently be reviewed so that the agreement

497 In the context of decisions involving section 25 of the Matrimonial Causes Act 1973 judges have noted that one of the paramount considerations is to endeavour to stretch what is available to cover the need of each party for a home particularly where young children are involved considering it important not only for the primary care giver to have a home but where possible the other parent should have a home where the children can enjoy contact. See for example the Court of Appeals decision in M v B (Ancillary Proceedings: Lump Sum) [1998] 1 FLR 53 the reasoning of Thorpe LJ. In Cordle v Cordle [2001] EWCA [2002] 1 FLR 207. It is noted that the only universal rule was that the s25(2) criteria were to be applied to all the circumstances of the case (giving first consideration to the welfare of the children) in a way which produced a fair result that avoided discrimination. Again within the judgment of Thorpe LJ there is a focus on the parties’ respective needs and a practical consideration of housing. There was also a discussion of circumstances where it may be appropriate for capital provision to be made enabling a party to re-train for a profession or modernise a skill which due to the marriage may have grown rusty (see [33] of the judgment).
would reflect changing circumstances and the needs of the couple. In this ideal world there would be more honesty and discussion regarding economic sharing between couples within their relationship. It is preferable that these issues are worked through during a relationship rather than dealing with the economic and emotional fall-out when the relationship becomes unstuck. However, this is not an ideal world and for many reasons such a solution may not work. A key reason may be a general reluctance of the public to enter into such agreements. It may be that some form of public awareness campaign is needed to bring the issue into the public consciousness as being an important current social/legal topic. Couples could then appreciate that there can be empowering and positive benefits in documenting their economic relationship. One clear benefit would be that the cost of lawyers and forensic accountants would be reduced if the relationship broke down. There would also be certainty of what each party could expect. This is something that the legal profession could consider assisting with by actively informing clients of section 21 of the Property (Relationships) Act, particularly when one party gives up a career and/or supports their partner’s career development to the detriment of their own future economic security should the relationship unravel.

A further suggestion is that following the reform of an important piece of social legislation such as the Property (Relationships) Act there should be institutional checks to measure the performance of the reformed legislation against the objectives that it sought to achieve. This topic was extra-judicially discussed by the Honourable Chief Justice of Australia, Diana Bryant, who spoke of the need to check the effect of reforms against the intentions envisaged by such legislative reforms. Section 15 of the Property (Relationships) Act is a rather poorly drafted piece of discretionary legislation that does not sit within the existing framework of the Act upon which it was grafted. There has been little in the way of ongoing monitoring regarding whether the legislation achieves its purpose and because of the poor drafting of the provision the question of how to yield this tool has proven problematic. It is acknowledged that it would take a seismic shift to debunk the ideology of fifty-fifty sharing of relationship property that is now entrenched within New Zealand and this may explain

498 This view has been expressed by others for example this was an issue discussed with the economist that I interviewed as part of the contextual study group and Deborah Hollings QC expressed a similar opinion in her paper “Of gold diggers and possums – an examination of the limits of the Property (Relationships) Act” www.lawyers.org/conferences
499 That is if the agreement itself was in place and was not disputed.
why the Court of Appeal has been so conservative in the awards that it has made under section 15. It would be useful if the objectives of section 15 were measured against the results. Presently we have no such check (other than those of research and perhaps the media).

Three options for change are explored:

**Option One (keep section 15 as it is):** Keep section 15 as it stands but the legal profession must adopt a radically different conceptual approach to its interpretation and application. The judiciary must also consider the nature and intent of section 15. This can be gleaned from:

- The purpose and principles of the Property (Relationships) Act 1976;
- Other sections within the Act, for example section 18 (which recognises the encompassing definition of contributions); and
- Parliamentary material.

Importantly the jurisdictional tests need to be read in a manner that is consistent with the spirit and intent of the reform and the Act’s principles. There would also be an acceptance of the economic advantages of partnership and a definite recognition of enhanced earnings within the awards.

Some of the participants considered this a possibility and said that the Court of Appeal “got it wrong” in *X v X*. For example the QC said “*X v X* might be seriously challengeable in the Supreme Court … somewhere along the line there will be a big fat case and it will go to the Supreme Court and … they will look at it much more hardly but I do not think that the Court of Appeal will do it”. Practitioners such as BAK4 thought we needed a “brave judge to effect change,” one that was capable of providing “good quality jurisprudence”. BAK1 felt that this would mean that the judicial reading and interpretation of the jurisdictional tests of section 15 are lowered (moving from the high evidential standard currently required) with a focus on achieving the aim of true equalisation of the economic disparity in the larger sense of the term rather than compensating the claimant for the loss of a career. It would also require the existing straightjacket created by precedent to be cast off in favour of a new liberal interpretation and application of section 15. This would require a robust and liberal approach to economic disparity – essentially requiring a radical shift more akin to the approach of the House of Lords. Whether this is a possibility within New Zealand is questionable – the impetus for the shift would have to come from the Supreme Court.

501 Including the Working Groups and Royal Commissions reports from which s15 and the reform package it is part of was derived.
“even with the way that the law is drafted … we would have seen a much bolder approach and more money” and said there was a possibility that a court may say “we have been applying the tests too rigidly and narrowly and the court may say wake up guys … this is now an area of things that you are not doing right”. 503

The rigid adherence to the clean break principle would also have to be reconsidered with a view to appreciating that at times this principle can operate unfairly since it ultimately favours the party with the future earning capacity to the detriment of the party that has often taken on the role of a care-giver or party offering domestic support within a relationship. The mediator explained how “the clean break principle only ever helps the person with the dough”.

The mediator’s sentiment is reflected in the reasoning of Lord Nicholls in McFarlane v McFarlane when he found that: 504

... the joint decision of the parties to concentrate on the husband’s career in order to fund the family’s lifestyle resulted in the greatest fruits of his endeavours being available towards the end of the marriage and after its breakdown. The spadework for these rewards was carried out over a long period and it would be unfair to take the view that the wife has not contributed to the recent increases in the husband’s earnings after the separation. The wife’s contributions enabled the husband to create a working environment which had produced greater rewards, of which she should have her fair share.

For the legal profession to accept and acknowledge that we have been incorrect in our approach would require a radical change to our collective mindset. It would be a difficult task to effectively re-programme people already set in their ways. For example there would need to be support for the concept that marriage (or civil union or de facto relationship) is a partnership and because of this the individual cannot be favoured over the collective

503 Similar to what happened in Z v Z (1996) 15 FRNZ 88 - when there was obiter comment regarding the correct approach to the interpretation and application of s64 of the Family Proceedings Act 1980 – which relates to maintenance – the Court said “it would appear from counsel’s submissions that the principles enunciated by this Court in Slater v Slater have been either misconstrued or applied with undue rigidity in practice”.

504 McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618, at [85].
partnership.\textsuperscript{505} From such a conceptual approach a different interpretation to section 15 and the Property (Relationships) Act 1976 would flow. It would mean that the focus on an assessment of the financial cost to the economically disadvantaged party of their lost career is discarded. Such an inquiry involves a speculative assessment of the cost of a loss of chance and it is not possible to determine with any real accuracy how successful someone may have been in their career but for different decisions and roles being assumed in a marriage/relationship. Speculating what another’s past may have been or trying to determine on the balance of probabilities how successful one may have been but for a marriage/partnership is subjective and unhelpful. The problems, characteristic of such inquires, were recognised in \textit{Moge v Moge} when the Court considered the use of expert evidence and opined that: \textsuperscript{506}

For most divorcing couples both the cost of obtaining such evidence and the amount of the assets involved are practical considerations which would prohibit or at least discourage its use. Therefore, to require expert evidence as a sine qua non to the recovery of compensation would not be practical for many parties … it would be my hope, therefore, that different alternatives be examined.

New Zealand needs to explore alternatives to the current approach founded on expert opinion. The voids of section 15 need to be filled with the guidance of the judiciary. The major void is in respect of how the calculation of the quantum of any compensation should be determined. Yet this is a problem with a solution. A suggestion is that the judiciary could establish percentage bands for the compensatory awards. For example if the jurisdictional tests were met then an award of 5, 10, 15, or 20 percent extra of the relationship property pool could be awarded to the economically disadvantaged spouse \textsuperscript{507} to compensate for the disparity. The degree of the disparity would determine the amount of the award. Over time precedent would be set and this would enable practitioners to establish the likely percentage amount of relationship property a client should be awarded.

\textsuperscript{505} This was something the Court of Appeal considered in \textit{Z v Z} (1996) 15 FRNZ 88. While section 64 of the Family Proceedings Act 1980 was “undoubtedly intended to give effect to the clean break principle and encourage the former spouses to become independent and self-sufficient after the dissolution of the marriage … nothing in the wording of the relevant sections or the scheme of the Act required this objective to be carried through to the point where the provisions operate unfairly or harshly on one or other of the spouses”. \textsuperscript{506} \textit{Moge v Moge} [1992] 3 SCR 813 (S.C).

\textsuperscript{507} This notion has been explored by Mark Henaghan “What can you do about inequality post separation and post division?” in \textit{Relationship Property Intensive- your big (legal) day out!} Conference paper, New Zealand Law Society, Wellington, 2010.
Within such bands there should also be judicial guidance regarding the relevant factors and key indicators that should be taken into consideration when determining where a case would fit. For example a court could consider: 508

- the length of the relationship;
- how many children there are of the relationship;
- the occupational and vocational skills of each spouse/partner;
- the income and liabilities of each spouse/partner;
- the present earning capacity of each spouse/partner;
- their likely future earning capacity;
- the age and health of each spouse/partner;
- the time and resources required to assist a spouse/partner to educate or up-skill themselves and/or enable them to engage in the paid workforce;
- the ability of each spouse/partner to maintain and/or grow their capital assets;
- the capacity of each party to borrow money;
- the future childcare or support burdens of each spouse/partner;
- the contributions (with regard to section 18 Property (Relationships) Act) of each spouse/partner made to the marriage/relationship;
- the organisation of the couples’ financial affairs (including trust and company structures and whether they benefit one to the detriment of the other); and
- the length of time the economically disadvantaged spouse/partner has been out of the paid workforce.

One significant problem with this suggestion is that section 15 compensation must come out of the relationship property pool. If the likely future earnings of one party is the most significant asset of the relationship then there can be no redress of the economic disparity because there are no assets from which to pay the compensation. This feature of New Zealand law should be considered in light of Lord Nicholls’ observation, in *McFarlane v McFarlane*, that. 509

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508 These are factors that are similar to those under section 25 of the Matrimonial Causes Act 1976 see Appendices.

509 *McFarlane v McFarlane* [2006] UKHL 24; (2006) 2 AC 618. It should again be noted that under section 15 awards cannot be in the form of future income and are limited to “property” (defined in section 2 of the Property
If one party’s earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage. [Emphasis added.]

Another problem with this suggestion is that if section 15 remains as presently drafted then the judiciary (and legal profession) retain a wide discretion. The history of the judiciary’s interpretation of matrimonial laws indicates that history has not been kind to the exercise of wide judicial discretions. Further, as evidenced by the results of the empirical research, if uncertain parameters exist regarding relationship property law it creates a broad scope for disagreement not only amongst the judiciary but lawyers and individuals themselves regarding the interpretation of vague provisions. Leaving section 15 as it is means that this wide discretion remains. Yet if the judiciary took a pragmatic approach to solving the problems inherent within section 15 and gave some guidance, within the parameters as suggested above, then there would be direction for all of the legal profession to follow.

The Court of Appeal’s methodology in X v X needs to be set aside because it is speculative, expensive to argue, it excludes career enhancement considerations and it cancels out the opportunity to bring an economic disparity claim to a significant number of New Zealanders because they do not fit the blueprint of a relationship that this decision has established. (This blueprint being a traditional long marriage where the division of functions within the relationship has meant that the wife has given up a career (with a recognisable career path) to care for children, the husband has focused on his career and the couple has accumulated a significant pool of relationship property.)

(Relationships) Act) and because the narrow definition of “relationship property” in section 8 of the Property (Relationships) Act 1976 in New Zealand the “absence of capital assets” means that at times economic disparity can in fact cancel an obligation to pay compensation. This is a policy issue and if the issue is ever to be addressed would require future legislative reform.

The approach as advocated in option one would require a large measure of judicial activism. It would mean a purposive approach to the interpretation and application of the Act and section 15 was adopted. The problem is that the words Parliament has used to express how the provision should work are unclear. For the section to work, rules must be written into the provision. Because Parliament did not do so this task has been left to the judiciary. The problem comes back to the stark fact that section 15 is a discretion grafted onto an existing statutory scheme which operates as a code supported by socially entrenched rules regarding the presumption of equal sharing. Section 15 is out of place within such a statutory scheme and arguably the philosophy underpinning economic disparity claims is not supported by those implementing the provision. New Zealand’s concept of fairness has been centred around fifty-fifty sharing of relationship property since 1976, when the Matrimonial Property Act was enacted. Anything outside of this may, for some, seem unfair or rather unpalatable. It would take a brave judge to move significantly beyond the threshold of equal sharing. This feature of New Zealand law may explain why the judiciary have been so conservative in their interpretation of section 15.

Nevertheless, to a certain extent judicial activism is already present (in fact without it section 15 would not be able to operate). Looking to the section alone does not provide an answer. The employment of any methodology is a means to make sense of the compensation and it is constructed outside of the words of the provision (because the provision is silent regarding the calculation of the compensation). The methodology is not predetermined within the Act; it has been developed by the judiciary. It is an open piece of legislation with strong discretionary elements to it. Section 15 needs to be filled because the internal structure of the provision is not self-supporting and as drafted it cannot stand alone. The words alone do not work without some measure of creativity.

Placing this issue within its wider social and legal context, there is much comment on the negative impact of judicial activism. The contrary view to the inherent negativity of

511 Together with substantial input from the accounting profession.
judicial activism is that some measure of judicial creativity is a natural and vital part of how the three branches of government work.513

Elias CJ’s opinion is that a degree of judicial activism is a reality (and it always has been). When there is an “open” piece of legislation, as section 15 is, the courts can make such legislation work; it is part of the judiciary’s role to do so, as she explained extra-judicially:514

Where law is developed by judicial decisions, the method of the courts is to look for all the help they can get from statutes. The same method may be seen where open textured legislation must necessarily be employed because the legislature cannot envisage all circumstances in which the principles it enacts will fail to be applied. It is all very well for people to hanker for a golden age when statutes were tight and judicial opportunity narrow. There never was such a time, but today at least we have the register of general values and principles which are identified in statutes against which to cross-refer Judge-development.

Undoubtedly there will be other commentators with opposing views who believe it an inappropriate function for the judiciary to usurp their function in such a manner, arguing that such judicial activism and a purposive approach to the interpretation of section 15 would be wrong. Considering it the role of Parliament to review the provision because the judiciary are not policy-makers and the independence of the judiciary must be maintained. Yet perhaps, as Elias CJ has opined, there never was “a golden age” when statutes were “tight and judicial opportunity narrow” and by approaching section 15 with a more realistic and purposive approach the judiciary would in fact be completing the task required of them.

Under this option, career enhancement issues would need to be better considered. Another issue associated with this is that while there are more couples where both parties work outside of the home, it does not follow that there are no longer non-financial contributions made by one party to the other party that enhance the other’s career. Economic disparity claims remain relevant in dual career families. Each case must be considered on its own facts, but it would seem that unless the approach taken to economic disparity claims in New

Zealand changes from the focus on the cost of a loss of opportunity, there is a real risk that the non-financial contributions that enhance one party’s career (in the context of dual career families) will be overlooked, and this is a form of discrimination between the different forms of contributions. The statement is made in light of the recommendation made by a reporting group following an international law conference, held in London in July 2013, on the issue of parentage, equality and gender. On the issue of equality they said:515

Equality

We encourage individual countries to adapt their law and practice relating to post-divorce or post-separation financial remedies to remove any discrimination that treats non-financial contributions to the welfare of the family as having less value and significance than financial contributions.

Option Two (redraft section 15): Another option would be to redraft section 15, with the goal to establish parameters and guide the judiciary in the operation and objective of the law. The amendments must fill some of the voids existing within the section.

The Legislature could specify percentage bands set for the measures of compensation available. It is envisaged that this would be similar to the terms of the percentage bands as examined in respect of option one, this being an award of 5, 10, 15, or 20 percent extra of the relationship property pool should be awarded to the economically disadvantaged partner. The more significant the disparity the more significant the amount of compensation. The bands would give people prior knowledge of where a claim may lie and it would eliminate much of the costs and time involved with economic disparity claims (currently full of expert projections and detailed analysis of the cost to the claimant regarding the loss of a career). It would still allow an element of judicial flexibility in setting the final amount of the award within defined parameters. The Legislature should also give a list of the key indicators of what a court should take into account when considering an award. These should be similar to those noted in option one. This would mean when practitioners advise clients they could decide where the particular facts before them would most likely sit within these bands. If

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bands and a set of key factors/indicators were specified then legal professionals would have an easier task when advising clients because they would not be playing a guessing game which they presently play.\textsuperscript{516} It would mean that the reliance on expert accounting opinion would dissipate and some of the emotional costs to clients could be eliminated.\textsuperscript{517}

The section also needs to be redrafted to reflect the significance of each party’s income and future earning potential. It is acknowledged that this suggestion may be seen as treating an individual’s earning capacity as “property” and it is unlikely that Parliament (or large sections of New Zealand society) would want the law to venture into this domain. Nevertheless it is undisputable that income and the ability to earn future income is a key issue in any consideration of economic disparity. Presently this is, in effect, overlooked because the remedy/compensation is only available from the share of relationship property. There is a problem when there is little in the relationship property pool. Often the key asset of the relationship is earnings of one party and in these circumstances section 15 does not offer any remedy. This approach means section 15 routinely fails the New Zealand public. If there is little relationship property then there is little reason to bring a claim. This can occur when one party leaves the relationship with significant future earning potential that the other party has indirectly contributed to during the course of the relationship.\textsuperscript{518} This is an aspect to economic disparity considered in \textit{McFarlane v McFarlane} where Lord Hope said:\textsuperscript{519}

\textsuperscript{516} For example BAK1 said how hard it is to advise clients regarding economic disparity claims and how: “The man [client] says ‘what is it then?’ and you know you go ‘well on the one hand it is this ... and then on the other it is ... depending on this’ and I can see them thinking ‘I am paying for this. I just want a bloody answer’ especially when you are dealing with men [that are] high earners. They just want a bloody answer: they are thinking ‘who is this bloody lawyer why can he not tell me the answer?’”

\textsuperscript{517} The emotional costs stem from the uncertainties associated with the claim, being the subject of projections made regarding worth in the market place, the view that s15 is a punishment, the uncertainty and vagueness of a potential award means that the party with access to financial resources is better able to fight a claim. (Practitioners explained this means many women do not have the emotional or financial strength to bring a claim or to take a matter through to court. This was also reflected in claimant one’s discussion of what bringing a s15 claim meant for her and how her ex-husband had the financial strength to fight her and there came a time when she gave up the fight due to the high monetary and emotional costs associated with economic disparity claims.)

\textsuperscript{518} There may be potential to argue that if an employment contract is considered separate “property”, then under section 9A(2) of the Property (Relationships) Act if the other party has contributed to the increase in value of the separate property through their contributions and actions during the relationship (for example support, or the payment of professional fees, study costs, travel associated with a career or study), the increase in value of the separate property is divided between the parties according to their contribution. See also Mark Henaghan and Nicola Peart in “Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality” in Bigwood, R (ed) \textit{The Permanent New Zealand Court of Appeal, Essays on the First 50 Years} (Hart Publishing, Oxford, 2009) at page 105 where they examine how the issue of whether an employment contract (which gives a bundle of rights) could possibly be treated as matrimonial property.

\textsuperscript{519} \textit{McFarlane v McFarlane} [2006] UKHL 24; (2006) 2 AC 618, at [120].
... why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up, as her share of the bargain that they entered into when that choice was made, out of earnings that he is able to generate when she cannot be compensated for this out of capital.

Earnings are important for a person to be able to maintain their capital base. For this reason the section should be redrafted to permit periodic payments from the economically advantaged party’s earnings.

The strict adherence to the clean break principle also needs to be rethought. The section should allow for the deferment of the relationship property settlement. For example rather than selling the family home to settle the relationship property the economically advantaged partner’s share of relationship property could be retained in the family home for a number of years (with the movement in the value of the property being apportioned between both parties). Such an approach would enable an economically disadvantaged party to provide a secure home for their children. If the economically advantaged party has an income they could borrow money to purchase another property, while retaining a share of capital in the family home. It is suggested that such an approach would be consistent with section 26 of the Property (Relationships) Act that directs the court to have regard to the interests of the dependent children of the relationship. Under section 26 the court may, if it considers it just, make an order settling the relationship property or any part of that property for the benefit of the children of the relationship. It is interesting to note how this is a routine consideration within the United Kingdom. An individuals’ share in the home could be used as security for

520 The QC spent some time discussing the merits of such an approach.
521 Section 26A of the Property (Relationships) Act 1976 does already permit some flexibility and the postponement of sharing. It is suggested that this provision could be better utilised when considering the division of relationship property.
522 Often the family home is the only material asset of the couple.
523 This was something that the psychologist felt was important. She explained that if the family home is not sold then it is “absolutely much better”. If the family home is sold the psychologist spoke of the hardship on the children she deals with – this issue overlaps with relocation for people in Auckland (because of the high cost of real estate) if they do not get a settlement that actually enables them to live and remain in Auckland then what was a relationship property dispute becomes a relocation dispute – as they are forced to leave Auckland to move to cheaper areas of New Zealand where they can purchase a home from the proceeds of the relationship property settlement.
524 By way of example see the United Kingdom’s Court of Appeal decision of Elliot v Elliot [2001] 1 FCR 477 that considered a charge secured on the family home in favour of the husband that was redeemable upon the
such circumstances as losing their job or becoming sick.\textsuperscript{526} Such orders could be reviewed should circumstances change, for example should a party lose their job or become sick.\textsuperscript{526} Such an approach would be consistent with the reasoning of the House of Lords in \textit{McFarlane v McFarlane} where they acknowledged that the clean break principle has the advantage of certainty but it may be a principle that is better suited to times past because it:\textsuperscript{527}

... runs the risk of becoming outdated as social conditions change and the reasoning behind it no longer fits in with the modern concept of fairness ... [the] principle translated into rules can operate harshly in some cases, particularly where the resources consist largely of income rather than capital.

The reported experiences of New Zealand practitioners working in the field of relationship property (commented on in chapter 5) suggest that, where couples’ resources consist largely of income rather than capital, the clean break principle and section 15 harshly and create an injustice because the economic disparity remains un-remedied. Rethinking the clean break principle and section 15 in light of the social conditions faced by New Zealanders would be a step in the right direction and may deliver a sense of fairness that many practitioners were clear is presently lacking in New Zealand relationship property law. It is interesting to consider how the lower courts in the United Kingdom have considered the issue of the clean break principle following \textit{McFarlane v McFarlane}. In the United Kingdom the courts are required to consider the clean break principle but there is no express guidance regarding how to. Yet the United Kingdom judiciary adopt a practical solution-based approach to resolving matrimonial property matters. It is also evident that they believe cases must be decided on a case-by-case basis.\textsuperscript{528}

\textsuperscript{525} This suggestion is not without its problems. There is a risk that the family home may be at risk if it is encumbered by a mortgage in this manner and the party does not keep up their mortgage payments. Nevertheless it seems it would be an improvement on the status quo.

\textsuperscript{526} This could deal with the “contingencies of life” the Court of Appeal referred to in \textit{M v B} [2006] 3 NZLR 660, at 202. It is also something attached the orders made in the United Kingdom see note 503 above.

\textsuperscript{527} \textit{McFarlane v McFarlane} [2006] UKHL 24; (2006) 2 AC 618, at [115].

\textsuperscript{528} For example in \textit{M D v D} [2009] 1 FLR 810 which was a marriage of a relatively short duration (4 and half years – with no children) between a couple where the wife was considerably younger than the husband (18 years difference). The Judge at [41] considered the clean break principle and referred to the decision of \textit{Scallon v Scallon} [1990] 1 FLR 194 at [201] which held that an aim of the clean break principle has been to “ensure that where there are short-term marriages, one party should not get a meal ticket for life upon the dissolution of
Enhanced earnings are a key element to any economic disability claim: it is not the just economic disadvantages but also economic advantages that any section 15 analysis should be considering. Any law reform needs to address this issue. In McFarlane v McFarlane the Court found the main family asset was the husband’s substantial earning power which was generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband work and career. The House of Lords held that the wife was entitled to share in the husband’s earnings on the principles of both “sharing the fruits of the matrimonial partnership” and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all. Importantly the House of Lords felt that the fact that the wife might have wanted to devote herself to family and home is neither here nor there, concluding that most breadwinners want to go on breadwinning. The fact that they enjoy their work does not disentitle them to a proper share in the fruits of their labours. The Court felt that the decisions made in the marriage had enduring effects that continued post divorce. The arrangement was seen to have been of benefit to the husband in that he could focus on developing and maintaining his career and this meant that the wife had an entitlement to continuing compensation because there was not enough matrimonial property to fairly compensate her for the enduring benefit that the arrangement gave to the husband.

Another aspect to the judgment worthy of note is the patent sentiment expressed by the House of Lords that the husband and wife each contributed in different ways to the marriage and “on the correct non-discriminatory approach” such contributions are equal and are of central importance. The opinion of the Court was that financial contributions to a relationship are not to be given any more weight or significance than non-financial for to do so would amount to discrimination. At this juncture in the research this aspect of the House of Lords’ reasoning seems at odds with the approach of the New Zealand Court of Appeal where little

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530 McFarlane v McFarlane [2006] UKHL 24; (2006) 2 AC 618, at [154].
531 Ibid.
weight has been given to the indirect contributions of the wives in $X v X$ and $M v B$ that led to the enhancement of their husband’s careers.

Section 18 of the Act specifies what a contribution is. It is suggested that in any law reform this provision is linked with section 15. In practice the significance of section 18 is often overlooked. Practitioners need their attention drawn to section 18 when they consider a relationship property problem. It is important that practitioners, forensic accountants, and the judiciary recognise section 15 is not about loss of career alone – the door to an economic disparity claim should not be shut for all of those without an existing career path. By linking section 15 and section 18 the economic advantages and career enhancement aspects of a claim would then be more likely to be considered.

When interpreting section 15 the principles and purpose of the Act should be at the forefront of one’s mind. Presently the approach of some practitioners and the judiciary to the task of interpreting the jurisdictional tests of section 15 is rigid and niggardly. Because they have such an approach the law’s reach and application to cases is unduly restricted. Matters are seen as not meeting the jurisdictional tests of section 15 when they would if a different conceptual approach to the tests were to be taken. A different conceptual approach would also have a flow-on effect to the high evidential standards demanded by the courts (and by the legal profession) it would be likely that these standards were relaxed.

If those interpreting the provision were directed to the principles and purposes of the Act whenever section 15 was considered then the results of their interpretation and application of section 15 would be different. For example the principles are to guide the achievement of the purpose of the Act and they state that men and women have equal status and their equality should be maintained and enhanced (section 1(N)(a)), all forms of contribution to the partnership are treated as equal (section 1(N)(b)), a just division of relationship property has regard to the economic advantages and disadvantages arising from the ending of the relationship (section 1(N)(c)), relationship property questions should be resolved as inexpensively, simply, and speedily as is consistent with justice (section 1(N)(d)). These directives need to be returned to within determinations made under section 15 – practitioners and the court must ask themselves whether their determinations measure against the directives given by Parliament. It is envisaged that this would be similar to the manner that the United Kingdom judiciary, after exercising the discretions under section 25(2) of the
Matrimonial Causes Act, refer back to the overarching principle of “fairness” in all the circumstances of the case.\textsuperscript{532}

**Option Three (repeal section 15):** The third option is to repeal section 15, replacing it with a wide reaching open discretion. A number of practitioners thought this would be the answer to the problem of economic disparity.\textsuperscript{533} The reform of the economic disparity provisions would need to be part of a more encompassing law reform. Practitioners expressed a view captured by the words of BAK4 who said that the whole “family law tool-kit needs repairing”. There was a sentiment amongst some of the participants that there are widespread and “systemic failings within the whole of New Zealand family law system” (BAK4) and the time has come for the “piece-meal legislation” to be replaced by one statute so that there would be one clear set of rules to act as a code for family law matters. The suggestion is that the whole family law framework is re-examined for example maintenance and economic disparity claims should be dealt with within the same statute.

The view of some of the participants in the research was that if the presumption of equal sharing was moved away from then the legal profession would have to really think: reconsidering concepts behind our approach to relationship property settlements. Many practitioners thought New Zealand should look to Australia or the United Kingdom for examples of how the law reform may look. The idea is to move from a structured economic disparity provision and replace it with a much broader discretion taking into account the existing principles of the Act. For this to work there would need to be a widespread acceptance that to solve economic disparity the focus of inquiry and remedy must be on achieving economic equality between the parties rather than merely compensating a claimant for the amount of a proven loss (the career foregone). As appealing as this option is, history\textsuperscript{534} and the mindset of the Court of Appeal\textsuperscript{535} suggests that a wide discretion may not


\textsuperscript{533} For examples see Figure 5.43

\textsuperscript{534} Despite a statutory presumption that monetary contributions were not of greater value than non-monetary contributions money talked in the Court of Appeal and discretions are more often than not exercised by the New Zealand judiciary in favour of the property acquiring spouse.

\textsuperscript{535} It was mentioned by a number of practitioners that the Court of Appeal was timid (for example BAK4 and BAK1) and it would take a decision of the Supreme Court to change the judiciary’s conceptual approach to economic disparity claims (the QC thought this – see Figure 5.43).
work to effectively solve economic disparity in New Zealand. Barrister Anita Chan indentified the problem when she said:\(^{536}\)

The approach taken by the New Zealand courts can be seen as outrageously conservative when compared with the approach taken by the House of Lords in Miller/McFarlane.

It is important to note that the House of Lords approach is now no longer unique and that the lower courts have also taken a robust approach to the issue of economic disparity and the departure from equal sharing of property.\(^{537}\) The approach of the United Kingdom’s judiciary is succinctly summed up in \textit{A v L (Departure from Equal Sharing)} when Moor J said:\(^{538}\)

The law in relation to financial remedy cases, as set out in the MCA [Matrimonial Causes Act] is, of course the same for everyone, whether rich or poor. Following \textit{White v White} ... the obligation in all cases is to be fair but, insofar if there is to be a departure from equality, there has to be good reason for doing so.

Within matrimonial property decisions in the interests of being “fair” it is evident that the United Kingdom judiciary consider all the circumstances of the case. This means that wide ranging factors are considered including, where possible, the housing needs of both husband and wife,\(^{539}\) (where possible) giving effect to the clean break principle\(^{540}\), the welfare of the children, the level and nature of the debts of the parties, “buttressing the ability” of a party to return to paid work,\(^{541}\) and the future potential inheritance of a wife\(^{542}\).


\(^{537}\) As an example see the decision of the Family Division in \textit{A v L (Departure from Equality: Needs)} [2012] EWHC 3150 (Fam), 1 FLR 985 where the court upheld a 70/30 division of the property. This division of the relationship property indicates how conservative the New Zealand courts have been in the awards they have made to date. There was a clear focus on the needs of both the husband and wife within the judgment at [50].


\(^{539}\) For example Thorpe LJ said: “Homes are of fundamental importance and there is nothing more awful than homelessness. So in the ordinary case the court’s first concern will be to provide a home for the primary carer and the children (whose welfare is the first consideration). Of course in many cases the satisfaction of that need may absorb all that is immediately available. But as in this case, where there is sufficient to go beyond that the court’s concern will be the means for an absent parent to re-house.” in \textit{Cordle v Cordle} [2001] EWCA [2002] 1 FLR 207 at [33].

\(^{540}\) \textit{A v L (Departure from Equality: Needs)} [2012] 1 FLR 985 [62].


\(^{542}\) \textit{S v S [Ancillary Relief: Importance of FDR]} [2008] 1 FLR 944, where it was held that a Family Court judge was wrong to “ring fence” possible inheritance.
Yet it is questionable whether such an open discretion could work in New Zealand. The collective mindset of New Zealand’s legal profession and the manner discretions have historically been operated by the judiciary indicates such discretion may fail. A radical overhaul of the conceptual approach taken to matters relating to economic disparity would be needed in conjunction with such a law reform. The required move from an “outrageously conservative” mindset and approach to a robust and liberal approach to solving economic disparity is unlikely. The fear is without firm parameters the legal professionals would lapse back into a conservative approach. New Zealand has had a legal framework that sees most relationship property matters as relatively easily resolved because there is a presumption of equal sharing and it could take generations to change this collective mindset. Change of this magnitude must come from Parliament and be supported by the judiciary. In light of practitioners’ comments regarding the inherent timidity of our Court of Appeal and Family Court Judges this is unlikely. If there was a radical overhaul of the whole of the New Zealand family law tool kit which replaced the presumption of equal sharing to a more open ended discretion, amongst other significant reforms, this would require a large measure of political pressure and also judicial activism to make the provision work. It is unlikely that such reform would occur in the near future.

**Suggestion**

If option one, as suggested, is explored there is a problem because it is uncertain whether a test case will come before the courts in the near future and through to the Supreme Court so that such a change in conceptual approach can be made. It is questionable if there will be a claimant with the legal representation needed to take this through so that a clear judicial directive can be given. The hope is that there will be one soon so that the theory can be tested.

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544 This opinion is based on New Zealand’s legal history, the current case law and the results of the empirical research.

545 The feeling of practitioners was that the Supreme Court Bench would need to decide an economic disparity case before the approach to economic disparity claims would change. For their influence to be felt a case would have to be taken through the Court system to the Supreme Court – this is involves a time and money and a suitable claimant prepared to undertake such a process.
Another problem with option one is that it will require a significant level of judicial activism and this is not something which is without problems. Yet as Elias CJ has said, extra-judicially, it is “all very well for people to hanker for a golden age when statutes were tight and judicial opportunity narrow.” In the context of economic disparity claims New Zealand does not have a tight and prescriptive statute. Without the judiciary reading rules and methods for calculating the quantum of the compensation into the provision, the provision cannot work, for these matters are not dealt with in section 15. For this reason a good measure of judicial realism is required so that there can be an acceptance of the task that has been handed to the judiciary by Parliament. Only then can the provision and the Act begin to work in a more effective manner than it currently is. This would require precedents to be set aside with the view that greater judicial creativity is needed which is grounded in giving effect to the purpose and the principles of the Act. Deborah Hollings has also opined that:

Section 15 should enable lawyers to problem solve creatively around the interests and needs of the family they are dealing with. The flexibility in this section reflects the complexity of the world in which we now live.

Exploring option one could assist in the achievement of a principle of the rule of law that citizens should be able to know the law, because by adopting the suggested framework it would be relatively easy to provide an indication of the likely band of compensation an award may fall within. It would also mean that economic disparity claims were opened up to more people because the costs associated with bringing a claim would be reduced by removing the need for such extensive expert evidence.

The recent decision of the full Employment Court is an example of statutory interpretation that gives effect to the purpose of an Act. The case involved a claim that female caregivers

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547 Deborah Hollings QC said “Section 15 is a complex provision and its drafting causes some major statutory interpretation questions”, in “Of gold diggers and possums—an examination of the limits of the Property (Relationships) Act” www.lawyers.org/conferences page 7.
548 Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited NZEmpC 157 ARC 63/12. Note this judgment provides excellent contextual background to the systematic undervaluing of “care work” and the discrimination against care work which is predominantly done by women and seen as “women’s work and has traditionally been unpaid work”(Pay Equity Task Force Pay Equity: A New Approach to a Fundamental Right (Minister of Justice and Attorney-General of Canada, J2-191/2003e, 2004 at [27]).
were being paid a lower rate of pay than would be the case if caregiving of the aged were not so substantially female dominated. The decision involved a consideration of the scope of section 3 of the Equal Pay Act 1972.\textsuperscript{549} The Court was asked by the defendant to adopt a narrow approach to the interpretation of the Act.\textsuperscript{550} Yet the Court, after considering the purpose of the Act, held that if an isolated and narrow interpretation of the section were adopted then it would “render the statutory” purpose of the legislation “meaningless”.\textsuperscript{551} Further, the Court said that the section:\textsuperscript{552}

It must be interpreted consistently with those purposes. We struggle to see how the effects of gender discrimination on women’s rates on pay can be removed and prevented if a narrow interpretation of the provision is adopted. It would mean that any current, historic and/or structural gender discrimination entrenched within a particular female dominated industry would simply be perpetuated.

Arguably if one were to apply the Employment Court’s conceptual reasoning to section 15 and economic disparity claims then the impact of section 15 would be very different.\textsuperscript{553}

Perhaps it is wrong to think that section 15 could work. The drafting of the provision may be too significant a hurdle to overcome and the legal professional may not think a different approach to the interpretation of section 15 is in fact what is required.\textsuperscript{554} If this is the case then section 15 would need to be redrafted and so too should the whole family law package so that there was a more consistent and coherent piece of legislation. It is thought that economic disparity cannot be addressed in isolation. For example as the results of the research indicate there is an interplay between economic disparity claims and maintenance. The issue of maintenance and how much should be paid is another issue where there is a

\textsuperscript{549} Section 3 of the Equal Pay Act 1972 sets out the criteria to be applied in determining whether an element of differentiation in remuneration based on sex exists.

\textsuperscript{550} Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited NZEmpC 157 ARC 63/12 at [17-21].

\textsuperscript{551} Ibid at [33].

\textsuperscript{552} Ibid at [40].

\textsuperscript{553} At the very least M v B would have been decided differently in that Deborah Hollings QC’s argument would have been accepted and the narrow interpretation of Mark Vickerman would have been rejected and no doubt a greater amount of section 15 compensation would have been awarded to the wife. See chapter 3.

\textsuperscript{554} Although the results of the empirical research suggest that the majority of practitioners do in fact think we can do better with section 15 than we are.
divergence of opinions and a wide spread of results regarding how much an award should be for. 555

There is also an important cost-versus-benefit analysis that should be considered within any reform process. Economic disparity claims may not be something of significance to all New Zealanders. So the question then is why dismantle a system that, it could be argued, works tolerably well for the majority of New Zealanders? The presumption of equal sharing of relationship property is generally easy to implement and is relatively well understood by the majority of New Zealanders so that most relationship property matters are resolved relatively inexpensively and without complications.

At the end of this research process my sentiment is that we can do better with what we have. Section 15 is not ideal but it remains a tool that could be better utilised than it presently is.

555 See chapters 4 and 5.
Epilogue

As the research process was drawing to an end a letter was emailed to me by a woman going through a divorce. This woman, through her legal counsel, found out about her rights in respect of an economic disparity claim and about this research.\textsuperscript{556} As a result she felt compelled to write a letter to me because she believes that change needs to happen.

6 May 2013

To whom it may concern

I am writing this letter to hopefully assist in simplifying the law regarding section 15. With the hope of it being financially accessible for future individuals whom find themselves in my situation.

I understand I am eligible or qualify to use section 15 in my divorce settlement. Due to having a career which was on a comparable salary to my ex-husband’s at the time I left the workforce (through mutual agreement), to raise our family.

I now find myself in a position that to re-skill in my field, I would be looking at one year of retraining, followed by several years at least of working in the industry to bring my income back up to the level it was before I left work.

It is also my understanding that the cost to fight section 15 has so far only been successfully achieved by lawyer’s arguing their own case, or the very wealthy whom have the funds to argue through the court system. However upon arriving at an agreed amount through the courts, that amount then has to be halved between the two parties. Once again raising the question of being financially viable.

In conclusion I have chosen not to use section 15 in my divorce settlement, due to the current law being too undefined. Resulting in the law being financially unavailable for individual's in my situation.

\textsuperscript{556} The person who emailed the letter agreed to the letter being included in the research.
Currently I feel this law is only available for the privileged few. And this is wrong.

The majority of the participants said we can do better than what we are with economic disparity claims. Undoubtedly, much of the blame for the problems inherent within economic disparity claims can be placed at the door of Parliament in respect of allowing such a poorly thought about and drafted provision into law. Yet, it is unlikely that Parliament will effect change in the near future. Reforming a significant piece of social legislation like section 15 or the whole of the legislation which forms the New Zealand family law package would bring about much social and political debate. History has shown that this takes time and is in all probability unlikely to be perceived as being a pressing concern of the current National-led coalition Government.

While option one, as suggested, will not mean that justice is always achieved it would mean that a remedy to the economic disparity felt on the breakdown of a relationship is likely to be more readily and widely available to the New Zealand public. It would also mean that there would be fewer lawyers and barristers attempting to answer questions which as a leading New Zealand Queens Counsel said are like answering the “impossible” attempting to make sense of an “almost parallel universe [formed] of sliding door evidence”.

The woman’s letter, when read in the context of the reason for the law reform, illustrates the quandary. In the context of the imminent law reform Margaret Wilson said:557

At times it is difficult to realise and understand the distress that many women and their dependent children experience when they have performed the role and function of spouse to their husband ... when they are most in need of some reciprocity in terms of the partnership agreement they thought they had entered into the women frequently find themselves with very limited earning capacity because they have, in effect, sacrificed the development of their own skills in the marketplace to enable their husbands to earn more.

The law was reformed but an effective remedy to the economic disparity and problems that Margaret Wilson referred to remain despite the reform. The Legislature passed an ambiguous and poorly drafted provision into law and then placed it within a statutory scheme where it appears incongruous. The misguided approach of the legal profession to the interpretation and application of section 15 compounds the problems. Eleven years after the law came into being the economic distress for many remains. The time has come to do better with what we have. The hope is that this research will mean that the issue of economic disparity is re-examined and the Courts will in turn adopt an approach to their interpretation and application of section 15 that is in keeping with the spirit and intent of the law reform. In a perfect world such an approach would then have a flow-on effect to the legal advice that couples receive when they settle their relationship property outside of the courtroom. The result would be a legal landscape where section 15 is no longer a remedy available only for the “privileged few” but a simple and cost effective solution to the problem of economic disparity that is available to more New Zealanders.
Appendices

1. Ethics Committee Consent (includes the information sheets regarding the interviews and the online survey)
2. The interview questions
3. The online questions
4. United Kingdom law
5. Australian law
6. New Zealand maintenance provisions
Appendix one: Ethics Committee consent
HUMAN ETHICS APPLICATION: CATEGORY B

(Departmental Approval)

Brief Summary:

Application: Being an application regarding an online survey concerning the impact in New Zealand of the economic disparity provisions contained in s15 Property (Relationships) Act 1976. The information collected from the survey will form part of a doctoral thesis.

The application relates to a Human Ethics Application: category B (requiring Law Department Approval) – there will be no publication of personal information or other complicating factors.

The Applicant: Claire Green (PhD candidate), Department of Law.

Supervisor: Professor Mark Henaghan (Dean of the Department of Law*).

Attachments:

- Human Ethics Application – Category B (Department of Law approval)
- Copy of the survey (online survey and interview questions)
- Letter/email of invitation to intended participants
- Information sheet for participation in research (one for the online survey and another for the interviews)
- Consent form (one for the online survey and another for the interviews)

*The application to be considered by a senior member of the Law Department because the Head of the Department is the principal supervisor of the research project

The completed form, together with copies of any Information Sheet, Consent Form and any recruitment advertisement for participants, should be forwarded to the Manager Academic Committees or the Academic Committees Assistant, Registry, as soon as the proposal has been considered and signed at departmental level. Forms can be sent hardcopy to Academic Committees, Room G23 or G24, Ground Floor, Clocktower Building, or scanned and emailed to gary.witte@otago.ac.nz.
HUMAN ETHICS APPLICATION: CATEGORY B
(Departmental Approval)

1. University of Otago staff member responsible for project:
   Professor Mark Henaghan

2. Department:
   Law

3. Contact details of staff member responsible:
   Professor Mark Henaghan
   Telephone: 03 479 8856
   Email: mark.henaghan@otago.ac.nz

4. Title of project:
   Economic Disparity between couples on divorce: exploring the impact of section 15 Property
   (Relationships) Act 1976

5. Indicate type of project and names of other investigators and students:

   Staff Research    Names [ ]

   Student Research  X  Claire Green
                      [ ]  PhD

   External Research/Names [ ]
   Collaboration     Not applicable
                      [ ]  Not applicable
6. When will recruitment and data collection commence?

December 2011

When will data collection be completed?

May 2012

7. **Brief description in lay terms of the aim of the project, and outline of research questions:**

The purpose of the project is to explore the day to day impact of s15 of the Property (Relationships) Act 1976 (s15) on the vexed problem of economic disparity between spouses and partners in the event of divorce (or the breakdown of another marital type relationship).

Section 15 of the Property (Relationships) Act 1976 (s15) was introduced in 2001 to remedy future economic disparity on the breakdown of a marital type relationship. In the decade since this provisions introduction into New Zealand law it has created more problems than it has solved – both for lawyers and the judiciary. The difficulties are such that applications to the courts under the provision seem to be rarely made. A certain amount can be understood by considering the case law and by reviewing the relevant background literature – yet there is more to the issue than what this information alone can show us. There are out of court settlements (in relation to the sharing of relationship property) in the event of divorce or separation, which we never see. The project aims to address the following research questions:

- What has the impact of s15 been?
- What role, if any, is s15 playing in the out of court settlements (of relationship property) of spouses or partners when they separate?
- How is s15 being read and applied by those who advise, represent and apply the law in relation to relationship property disputes on a day to day basis?

To complete my research, into the impact of s15, I need to do an empirical study to ascertain the experience of lawyers and the judiciary in their understanding of and dealings with s15. To do this I intend to conduct two studies.

**Quantitative Study:** The first is an online quantitative study of a selection of New Zealand lawyers, barristers and judges. For your reference a copy of the proposed survey is attached to this application. (Please note there is one survey for the judiciary and one for practitioners. The differences between the two surveys are slight and are required because not all of the questions asked are relevant to both lawyers/barristers and judges.)

It is intended that the online survey will provide valuable information regarding the legal profession's experience of s15 and the impact of this provision in out of court settlements throughout New Zealand – this being particularly important when we consider that most divorces or separations are settled out of court. The survey of the judiciary will help us to better understand New Zealand judges' experiences of s15 and their perception of the impact of s15.
Qualitative Study: The second stage of my research is a qualitative study, of around 15-20 participants residing throughout New Zealand. These participants would be taken from a cross section of lawyers and judges from the larger quantitative study. This study group would be comprised of:

- lawyers/barristers who deal primarily with high value/income relationship property disputes;
- lawyers/barristers who deal primarily with middle income/value relationship property disputes;
- lawyers who deal with low income and low value relationship property disputes; and
- judges (the group of judges comprising 80% Family Court and 20% High Court).

The aim of this qualitative research is to gain a deeper understanding and awareness of lawyers, barristers and judges' perspectives concerning the impact of s15 on the ongoing problem of economic disparity upon divorce and separation.

This study would be carried out by meeting with the participants and talking with them, in an interview format, about their concerns and experiences of s15. The basis of the interviews would be a discussion regarding two case studies that I would have sent to them prior to our interview. I would ask questions concerning the case studies. These questions would relate to how they would read and interpret the facts of the case studies and how, on the basis of the particular facts, they would think a s15 case would be decided. (For your reference a copy of the case studies and the proposed questions relating to the case studies are attached to this application.) The interviews are an extension of the questions asked within the online questionnaire (the quantitative research).

8. Brief description of the method.

Who the participants would be:

Online Quantitative Study: It is intended that there will be around 100 participants drawn from New Zealand's legal profession, in the study (the participants including judges, barristers and solicitors). These individuals will not be vulnerable in any way.

The criteria for inclusion and exclusion in the study will involve the individual's experience of relationship property matters. They must be a judge, barrister or a lawyer with experience of relevance to the area of research: having a working knowledge of relationship property law. The aim is to select a group of participants with at least 3 years experience in relationship property law and have dealt with at least one matter involving s15.

Qualitative Study: It is intended that there would be around 15-20 participants in the qualitative study. They would be members of the judiciary, barristers and lawyers, drawn from the larger quantitative study. (See point 7 above for details.)

9. Please disclose and discuss any potential problems:
There are no foreseeable problems.

Applicant's Signature: ..................................................[Signature]

(Professor Mark Henaghan)

Signature of Head of Department: ..................................................

Name of Signatory (please print): ..................................................

Date: 12th December 2011

Departmental approval: I have read this application and believe it to be scientifically and ethically sound. I approve the research design. The Research proposed in this application is compatible with the University of Otago policies and I give my consent for the application to be forwarded to the University of Otago Human Ethics Committee.

[Signature]

*Professor, Faculty of Law – in place of Professor Henaghan, Dean, who is the signatory.
Information Sheet For Participation in Research

(An online research survey into the impact of s15 Property (Relationships) Act 1976)

Name of the Researcher: Claire Green

(Under the supervision of the Dean of Law, Professor Mark Henaghan)

Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.

Reason for the project: The reason for this research project is to understand how the economic disparity provision contained in s15 Property (Relationships) Act 1976 is working in practice. This work forms part of my doctoral research, undertaken in the Law Faculty at the University of Otago under the supervision of the Dean of Law, Professor Mark Henaghan.

The aim of the project: The aim of the project is to obtain information about how the economic disparity provision (s15 Property (Relationships) Act 1976), is being read and applied by those who advise and represent people involved in relationship property cases and out of court settlements.

The type of participants sought: It is intended that there will be around 100 participants with experience in dealing with relationship property matters. These participants will be drawn from New Zealand’s legal profession (being a selection of lawyers, barristers and judges). The information that the participants provide will assist with our understanding of the day to day operation of the law relating to relationship property with a particular focus on the impact of the economic disparity provisions contained in the 2001 law reform.

What the project involves: The research involves professionals, who are involved in relationship property matters in the course of their law practice, answering an online questionnaire regarding relationship property (with a particular focus on economic disparity). If you agree to participate in the research, you will be asked some questions about the law in regard to relationship property law and s15. (You will not be asked about specific details in cases you have dealt with.)

The length of the questionnaire: The questionnaire will take about 10 minutes to complete.

Participants can change their minds and withdraw from the project at anytime: You are free not to answer any particular question(s), or to withdraw entirely from the project. You may withdraw at any time, even after you have completed the questionnaire, and all the information you have provided will be discarded.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

The type of information collected and the storage of the information: Your anonymity is protected at every stage by this process.* As required by the university’s research policy any raw data on
which the results of the project depend will be retained in secure storage for five years, after which it will be destroyed.

You will be identified only by your profession (solicitor, barrister, Queens Counsel, Judge etc), the province you practice in (because this research is being carried out across New Zealand), your age and gender, and an indication of the extent of your relationship property law experience.

This consent form will not be linked to the questionnaire: it will be kept in a secure location, separate from the completed questionnaires and will be destroyed when the thesis is submitted.

What the information will be used for: The data gathered from the completed questionnaires will be used in my doctoral thesis (which will be available in the University of Otago Library), and may later appear as part of a book or journal article. I may wish to quote directly from the questionnaire – should you have left comments.

Departmental Approval: This research has been reviewed and approved by the Department of Law, University of Otago.

If participants have any questions: If you have any questions about the project, either now or in the future, please feel free to contact either:-

Claire Green and/or Professor Mark Henaghan
Department of Law
University Telephone Number 03 479 8857 University Telephone Number 03 479 8857
Email Address: claire.green@otago.ac.nz Email Address: mark.henaghan@otago.ac.n

This study has been approved by the Department stated above. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479-8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Data Security
The information gathered will not be personal identifying data. The data will be stored on a password protected Windows 2003 Server machine. The data is NOT accessible by a web relative path. The server machine is protected with anti-Virus (SOPHOS) and anti-spyware software (Windows Defender). Windows updates set are installed automatically. Physically all data including servers will be housed in an alarmed building with swipe card access.
Consent Form for Participation in Research

(An online research survey into the impact of s15 Property (Relationships) Act 1976)

I have read the information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

3. Raw data on which the results of the project depend will be retained in secure storage for five years and then destroyed thereafter;

4. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) and every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.......................................................... ..............................
(Signature of participant)  (Date)

If you would like a copy of the thesis emailed to you upon its completion please provide the email address you would like the document sent to.

Email Address:
Information Sheet For Participation in Research

(Interviews regarding the impact of s15 Property (Relationships) Act 1976)

**Name of the Researcher:** Claire Green

(Under the supervision of the Dean of Law, Professor Mark Henaghan)

*Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you and we thank you for considering our request.*

**Reason for the project:** The reason for this research project is to understand how the economic disparity provision contained in s15 Property (Relationships) Act 1976 is working in practice. This work forms part of my doctoral research, undertaken in the Law Faculty at the University of Otago under the supervision of the Dean of Law, Professor Mark Henaghan.

**The aim of the project:** The aim of the project is to obtain information about how the economic disparity provision (s15 Property (Relationships) Act 1976), is being read and applied by those who advise, decide and represent people involved in relationship property cases and out of court settlements.

**The type of participants sought:** It is intended that there will be around 15 – 20 participants with experience in dealing with relationship property matters. These participants will be drawn from New Zealand’s legal profession (being a selection of lawyers, barristers and judges). The information that the participants provide will assist with our understanding of the day to day operation of the law relating to relationship property with a particular focus on the impact of the economic disparity provisions contained in the 2001 law reform.

**What the project involves:** If you agree to participate in the research, I would send you two short case studies prior to meeting with you. It is intended that you would read the case studies and then I would arrange to meet with you (or talk with you on the telephone). I would ask you some general background questions including questions regarding your experience of relationship property law and then I would ask you some specific questions in relation to the case studies you would have reviewed. The questions would relate to how you would interpret the case studies and how you would apply s15 to their facts. It is important that you are aware that you will not be asked about specific details in cases you have dealt with, nor I am collecting personal information from you (other than non-identifying material such as your job (i.e. barrister, judge, solicitor), the location in which you practice and your gender).

**The length of the interview:** The interview will take about 20 minutes.
Participants can change their minds and withdraw from the project at anytime: You are free not to answer any particular question(s), or to withdraw entirely from the project. You may withdraw at any time, even after the interview, and all the information you have provided will be discarded.

Please be aware that you may decide not to take part in the project without any disadvantage to yourself of any kind.

The type of information collected and the storage of the information: Your anonymity is protected at every stage by this process.* The interview will be audio recorded, notes will be taken from the audio recording. Upon completion of the notes the audio recording will be destroyed. As required by the university's research policy any raw data on which the results of the project depend will be retained in secure storage for five years, after which it will be destroyed.

You will be identified only by your profession (solicitor, barrister, Queens Counsel, Judge etc), the province you practice in (because this research is being carried out across New Zealand), your age and gender, and an indication of the extent of your relationship property law experience.

This consent form will not be linked to the information gathered in the interview: it will be kept in a secure location, separate from the completed questionnaires and will be destroyed when the thesis is submitted.

What the information will be used for: The data gathered from the interviews will be used in my doctoral thesis (which will be available in the University of Otago Library), and may later appear as part of a book or journal article. I may wish to quote directly from the interviews.

Departmental Approval: This research has been reviewed and approved by the Department of Law, University of Otago.

If participants have any questions: If you have any questions about the project, either now or in the future, please feel free to contact either:-

Claire Green and/or Professor Mark Henaghan
Department of Law
University Telephone Number 03 479 8857 University Telephone Number 03 479 8857
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This study has been approved by the Department stated above. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479-8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

*Data Security
The Information gathered will not be personal identifying data. The data will be stored on a password protected Windows 2003 Server machine. The data is NOT accessible by a web relative path. The server machine is protected with anti-virus (SOPHOS) and anti-spyware software (Windows Defender). Windows updates set are installed automatically. Physically all data including servers will be housed in an alarmed building with swipe card access.
Consent Form for Participation in Research
(Interviews regarding the impact of s15 Property (Relationships) Act 1976)

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

3. Raw data on which the results of the project depend will be retained in secure storage for five years and destroyed thereafter;

4. The interviews will be audio recorded (from the audio recording notes will be made and upon completion of the notes the audio recording will be destroyed);

5. The results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand) and every attempt will be made to preserve my anonymity.

I agree to take part in this project.

.......................................................................................... ..............................................
(Signature of participant) (Date)

If you would like a copy of the thesis emailed to you upon its completion please provide the email address you would like the document sent to.

Email Address:
Appendix two: The interview questions*

1. Preliminaries

Experience of relationship property:

- How many years have you been in practice?
- How many relationship property cases/matters, roughly, do you deal with each year?
- Name the city, or nearest town, in which you practice.
- Identify the position the interviewee holds i.e.

  Sole practitioner  
  Solicitor in a small legal practice (less than 6 lawyers)  
  Solicitor in a medium sized legal practice (greater than 12 lawyers and less than 20)  
  Solicitor in a large legal practice (larger than 20 lawyers)  
  Barrister  
  Judge

2. Vignettes

Case One

The pool of relationship property: Valued at 3 million dollars.  
The marriage: The marriage lasted 18 years. The couple met while at university (where they were both excellent students). They lived together for 3 years before their marriage. There are 3 children of the marriage – aged at 10, 12 and 15. The mother has the ongoing daily care of the children.  
The wife: Aged 43 years. The wife was an associate in a large commercial law firm. She gave up her career, over 12 years ago, after the birth of their second child to focus solely on bringing up their children and supporting her husband. Prior to giving up her career she earned considerably more money than her husband. Within the last year she has commenced working part-time (school hours around the children’s needs) in a small general practice earning $40,000 gross per annum.  
The husband: Aged 45 years. The husband is a top earning equity partner in a large accountancy firm – his earnings over the last 3 years have substantially increased – last year he earned $1.4 million gross.

Questions

- After the equal sharing of the relationship property do you think that there is going to be a significant disparity between their respective income and living standards?

  On a scale of 1 to 10, with 1 being of very little significance and 10 being of great significance, where would you place the level of significance of this disparity?
• If you thought there was a significant disparity in their income and living standards, how likely do you think that this disparity was a result of the division of functions in the relationship?

On a scale of 1 to 10, with 1 being very unlikely and 10 being without a doubt, where would you place the likelihood of this disparity being a result of the division of functions in the relationship?

• Comment on what other factors may have caused the disparity?

• In your opinion is it “just” to make a compensatory payment to the wife?

On a scale of 1 to 10, with 1 being unimportant and 10 being extremely important, how important do you think it is to make a compensatory payment to the wife?

• What factors influenced your decision? Again, rank these on scale of 1 to 10 of relevance.

  ▪ The economic advantages obtained by the wife resulting from the husband’s contributions to the relationship and the relationship more generally.
  ▪ The economic advantages obtained by the husband resulting from the wife’s contributions to the relationship and the relationship more generally.
  ▪ The economic disadvantages incurred by the husband resulting from the relationship.
  ▪ The economic disadvantages incurred by the wife resulting from the relationship.
  ▪ The likely future earning capacity of the wife?
  ▪ The likely future earning capacity of the husband?
  ▪ The wife’s ongoing care of the children.
  ▪ The length of the marriage/relationship?

• If you thought it was just to make a compensatory award how much would you award?

Less than 5% of the total relationship property pool (less than $150,000):
Greater than 5% of the total relationship property pool (greater than $150,000):
Greater than 10% of the total relationship property pool (greater than $300,000):
Greater than 15% of the total relationship property pool (greater than $450,000):
Greater than 20% of the relationship property pool (greater than $600,000).

• Can you comment on what you think a court might award?
• Do you think that the wife’s choice not to pursue her career is (or should) be a relevant factor in considering any s15 award?

• Should an award of maintenance be made?

• If you answered yes:
  Why

  How much should the award be?

  For how long?

Case Two

The pool of relationship property: Valued at $200,000.
The relationship: The de-facto relationship lasted 6.5 years. Both have been married before. There is one child of the relationship (aged 3 years) with severe health and behavioural issues. The mother has the ongoing care of the child – she also has three children from previous relationships that she has going daily-care of.
The woman: Aged 36 years. The woman has no qualifications – her skill base is limited – the only work she can get is part-time nanny work, earning $15 per hour. She is currently on the Domestic Purposes Benefit.
The man: Aged 40 years. The man is a fisherman – doing seasonal work – which pays, on average $65,000 per annum (gross).

Questions

• After the equal sharing of the relationship property do you think that there is going to be a significant disparity between their respective income and living standards?

  On a scale of 1 to 10, with 1 being of very little significance and 10 being of great significance, where would you place the level of significance of this disparity?

• If you thought there was a significant disparity in their income and living standards, how likely do you think that this disparity was a result of the division of functions in the relationship?

  On a scale of 1 to 10, with 1 being very unlikely and 10 being without a doubt, where would you place the likelihood of this disparity being a result of the division of functions in the relationship?

• Could you comment on what other factors may have caused the disparity?

• In your opinion is it “just” to make a compensatory payment to the woman?

  On a scale of 1 to 10, with 1 being unimportant and 10 being extremely important, how important do you think it is to make a compensatory payment to the woman?
What factors influenced your decision? *Again, please rank these on scale of 1 to 10.*

- The economic advantages obtained by the woman resulting from the man’s contributions to the relationship and the relationship more generally.
- The economic advantages obtained by the man resulting from the woman’s contributions to the relationship and the relationship more generally.
- The economic disadvantages incurred by the man resulting from the relationship.
- The economic disadvantages incurred by the woman resulting from the relationship.
- The likely future earning capacity of the woman?
- The likely future earning capacity of the man?
- The woman’s ongoing care of the child.
- The length of the relationship?

If you thought it was just to make a compensatory award how much would you award?

**Less than 5% of the total relationship property pool (less than $10,000):**

**Greater than 5% of the total relationship property pool (greater than $10,000):**

**Greater than 10% of the total relationship property pool (greater than $20,000):**

**Greater than 15% of the total relationship property pool (greater than $30,000):**

Should an award of maintenance be made?

If you answered yes:

Why

How much should the award be?

3. **General Discussion points**

- What are the main problems with advising a client about the possibility of a s15 claim?

- What is your opinion of the following methodology as adopted by the majority in X v X for calculating the quantum of s15 awards?

  i) **Calculation of the projected figure:** being the difference between Mrs X’s actual income and the ‘but for’ income figures (the amount that Mrs X would have
been earning ‘but for’ her time out of the workforce). Calculating a figure representing the present value of the cumulative difference between the future after-tax income which Mrs X could have been expected to earn but for her role in within the relationship and the after tax income which she was projected to earn if she works to the full extent of her future income earning capacity.

Remembering that the period of economic disparity (i.e. how long it would take to reach the level she would have been if she had not ceased paid work) was determined to be 18 years (i.e. until Mrs X was 60 years old).

ii) *Deduct the allowances for the variables relating to a general contingent discount – being allowances made for the non-collection of future income:* then appropriate allowances are made to reflect the time value of money and the chances of non-collection of future income- because of reduced time in the workforce for various reasons including ill health, re-partnering, change in personal priorities or early retirement.

iii) *Deduct a further contingency amount for the uncertainty of the “but for” income:*

iv) *The final step of an overall assessment*

Assessing whether the outcome is just – does it fairly meet the objective of $15 in the circumstances of cases?

- Do you have an opinion on the theory of “halving” the award – as adopted, by the majority, in *X v X*? If so please explain.

- In a perfect world what would you like to see done about economic disparity between couples on divorce?

*These questions were modified for the Judge.*
Appendix three: The online questions

Within a yearly period approximately how often are legal proceedings in relation to relationship property matters commenced?

In the context of a relationship property matter, how often do you advise clients about the economic disparity provisions contained in section 15 of the Property (Relationships) Act?

Based on your experience indicate the types of people that the economic disparity provisions are commonly of relevance and importance to:

- high net worth people;
- high earning professionals;
- middle income earners;
- low income earners;
- all of the categories.

Based on your experience indicate the people that section 15 is more commonly used by:

- married people;
- people in de-facto partnerships;
- people in civil unions;
- same sex couples;
- the provision is used by all the people in these categories.

Based on your experience what has been the impact of section 15 in cases you have settled out of court?

- it has made no substantive change;
- 1-3% more of the relationship property has been awarded;
- 4-5% more of the relationship property has been awarded;
- 6-7% more of the relationship property has been awarded;
- 8-9% more of the relationship property has been awarded;
- above 10% of the relationship property has been awarded.

Based on your experience what has been the impact of section 15 in cases that have gone to court?

- no substantive change has been made to the awards;
- 1-3% more of the relationship property has been awarded;
- 4-5% more of the relationship property has been awarded;
- 6-7% more of the relationship property has been awarded; and
- above 10% of the relationship property has been awarded.

In out-of-court settlements involving section 15 how do you determine the amount that should be awarded?

- A formula for calculating the award similar to that specified in X v X;
- I determine the amount based on what you consider to be a fair amount founded on a percentage of the relationship property;
- I refer it to expert valuers;
- I use other methods to determine the awards.

Do you perceive any problems within the economic disparity provisions?

If you do are the problems associated with:

- meeting the jurisdictional tests of section 15;
- determining whether there is a significant disparity of income and living standards;
- determining if the cause of the disparity of income and living standards was a result of the division of functions in the relationship;
- determining the appropriate amount of compensation;
- the vagueness of the section;
- when the economically disadvantaged person has not had a career.

Can you comment on other problems you have found within section 15 and economic disparity claims?

Do you perceive any differences between male and female views regarding the economic disparity provisions?

Have you any additional comments or experiences you would like to make or share in respect of relationship property and the issue of economic disparity?
Appendix four: United Kingdom law

Section 25 of the Matrimonial Causes Act 1973

Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 and 24A.

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 [F47, 24A or 24B] above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24 [F48, 24A or 24B] above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.
Appendix five: Australian law

Australian law*

The Australian system for dividing the matrimonial assets on divorce is a ‘separate’ property regime. On separation, the starting point when dividing property is that each spouse retains ownership of the property legally theirs. This is, however, only a starting point. Under the financial provisions of the Family Law Act 1975, the Family Court has the discretionary power to alter parties’ property interests on marriage breakdown if it is satisfied that, in all the circumstances, it is just and equitable to make the order. Exercising this power requires the court to consider the parties’ respective contributions to the property and other factors including their future needs. Where spousal support is sought in addition to a property order, it becomes the final stage in the process.

More specifically, when dividing the property the court is directed to take account of the financial and non-financial contributions made to the property and to the welfare of the family. Non-financial contributions in particular include any labour that may have increased the value of the property as well as contributions made to the welfare of the family through unpaid work at home and care of the children (Family Law Act section 79(4)).

Having determined the respective shares of property based on these contributions, the court is then directed to make an adjustment to take account of other factors including the future needs of each of the parties. The estimation of future need is based on factors or circumstances of a broadly financial nature such as the age and health of the parties, employment prospects and financial resources, responsibility for the care of children post-separation and divorce, the duration of the marriage and the extent to which it has affected the future earning capacity of the parties. In all there are fifteen largely prospective factors for consideration covering what each party is likely to need and what each is able to pay to support the other (the factors are set out in Family Law Act section 75(2)).

Section 79(4): Types of contribution

Section 79(4)(a) – (c) sets out the matters to be considered with respect to the parties’ contributions.

The main types of contributions that are taken into account are:

- direct financial contributions to the acquisition of any property of the parties or either or them (for example, paying part of the deposit on a house);
- direct financial contributions to the conservation or improvement of any property of the parties or either or them (for example, repairs and renovations to the structure of the house);
- indirect financial contribution to acquisition, conservation or improvement of any property of the parties or either or them (for example, one party pays the bills which enables the other to pay the mortgage);
- non-financial contributions (for example, wife carries out homemaking...
duties which enables the husband to concentrate on business activities); and
• contributions made to the welfare of the family (for example, homemaking and parenting).

The court exercises its discretion as to the weight that is to be given to the various contributions of the parties, in determining an adjustment, if any in the property settlement.

The following may also be relevant to the consideration of contributions:

• short marriages;
• gifts;
• lottery winnings;
• contributions after separation;
• special skills;
• waste;
• significant pre-marriage or post-separation contributions; and
• small asset pool.

**Future needs: Section 75(2)**

Section 75(2) requires that the future needs of the parties also be considered, including:

• age and state of health of each party;
• income, property and financial resources of each party;
• whether a party has the care of a child under 18;
• commitment necessary for a party to support himself or herself;
• responsibility to care for another person;
• eligibility of a party to receive a pension or allowance form the government or from a superannuation fund inside or outside of Australia;
• a standard of living that is reasonable in all the circumstances;
• extent to which maintenance will increase a party’s earning capacity by enabling a person to undertake a course of training;
• extent to which a party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
• duration of the marriage and the extent to which it has affected the earning capacity of the party who seeks maintenance;
• the need to protect a party who wants to continue his or her role as parent;
• financial circumstances relating to the cohabitation with another person;
• any child support payable;
• the terms of any financial agreement binding on the parties;
• any other fact or circumstance.
The court has discretion as to how much weight is placed on each relevant factor. Finally, section 79(2) requires the court to be satisfied that, in all the circumstances of the case, it is just and equitable to make the order.

Appendix six: Maintenance

Family Proceedings Act 1980

64 Maintenance after marriage or civil union dissolved or de facto relationship ends

(1) Subject to section 64A, after the dissolution of a marriage or civil union or, in the case of a de facto relationship, after the de facto partners cease to live together, each spouse, civil union partner, or de facto partner is liable to maintain the other spouse, civil union partner, or de facto partner to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, civil union partner, or de facto partner, where the other spouse, civil union partner, or de facto partner cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1) are as follows:

(a) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners lived together:

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:

(iii) any other relevant circumstances:

(b) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) the de facto partners ceased to live together:

(c) the standard of living of the spouses, civil union partners, or de facto partners while they lived together:

(d) the undertaking by a spouse, civil union partner, or de facto partner of a reasonable period of education or training designed to increase the earning capacity of that spouse, civil union partner, or de facto partner or to reduce or eliminate the need of that spouse, civil union partner, or de facto partner for maintenance from the other spouse, civil union partner, or de facto partner if it would be unfair, in all the
circumstances, for the reasonable needs of the spouse, civil union partner, or de facto partner undertaking that education or training to be met immediately by that spouse, civil union partner, or de facto partner—

(i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that spouse, civil union partner, or de facto partner; or

(ii) because that spouse, civil union partner, or de facto partner has previously maintained or contributed to the maintenance of the other spouse, civil union partner, or de facto partner during a period of education or training.

(2) For the purposes of subsection (2)(a)(i), if the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

(3) Except as provided in this section and section 64A,—

(a) neither party to a marriage or civil union is liable to maintain the other party after the dissolution of the marriage or civil union:

(b) neither party to a de facto relationship is liable to maintain the other de facto partner after the de facto partners cease to live together.

64A Spouses, civil union partners, or de facto partners must assume responsibility for own needs within reasonable time

(1) If a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together,—

(a) each spouse, civil union partner, or de facto partner must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs; and

(b) on the expiry of that period of time, neither spouse, civil union partner, or de facto partner is liable to maintain the other under section 64.

(2) Regardless of subsection (1), if a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together, one spouse, civil union partner, or de facto partner (party A) is liable to maintain the other spouse, civil union partner, or de facto partner (party B) under section 64, to the extent that such maintenance is necessary to meet the
reasonable needs of party B if, having regard to the matters referred to in subsection (3),—

(a) it is unreasonable to require party B to do without maintenance from party A; and

(b) it is reasonable to require party A to provide maintenance to party B.

(3) The matters referred to in subsection (2) are as follows:

(a) the ages of the spouses, civil union partners, or de facto partners;

(b) the duration of the marriage or civil union or de facto relationship;

(c) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners were living together;

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner;

(iii) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) after the de facto partners ceased to live together;

(iv) any other relevant circumstances.

(4) If the marriage or civil union was immediately preceded by a de facto relationship between the husband and wife,—

(a) for the purposes of subsection (3)(b), the de facto relationship must be treated as if it were part of the marriage or civil union; and

(b) for the purposes of subsection (3)(c)(i), the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

65 Assessment of maintenance payable to spouse, civil union partner, or de facto partner

(1) This section sets out the matters that a court must have regard to in determining the amount payable,—

(a) in the case of a marriage or civil union, by one spouse or civil union partner for the maintenance of the other spouse or civil union partner (whether during the marriage or civil union or after its dissolution);

(b) in the case of a de facto relationship, by one de facto partner for the maintenance of the other de facto partner after the de facto partners cease to live together.

(2) The matters that the court must have regard to are as follows:

(a) the means of each spouse, civil union partner, or de facto partner, including—

(i) potential earning capacity;

(ii) means derived from any division of property between the spouses or de facto partners under the Property (Relationships) Act 1976:
(b) the reasonable needs of each spouse, civil union partner, or de facto partner:
(c) the fact that the spouse, civil union partner, or de facto partner by whom maintenance is payable is supporting any other person:
(d) the financial and other responsibilities of each spouse, civil union partner, or de facto partner:
(e) any other circumstances that make one spouse, civil union partner, or de facto partner liable to maintain the other.

(3) In considering the potential earning capacity of each spouse, civil union partner, or de facto partner under subsection (2)(a)(i), the court must have regard to the effects of the division of functions within the marriage or civil union or the de facto relationship while the spouses, civil union partners, or de facto partners were living together.

(4) For the purposes of subsection (3), where the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

(5) In considering the reasonable needs of each spouse, civil union partner, or de facto partner under subsection (2)(b), the court may have regard to the standard of living of the spouses, civil union partners, or de facto partners while they were living together.

66 Relevance of conduct to maintenance of spouses, civil union partners, or de facto partners

(1) The court may have regard to the matters set out in subsection (2) in considering,—

(a) in the case of a marriage or civil union, the liability of one spouse or civil union partner to maintain the other spouse or civil union partner, and the amount of the maintenance, whether during the marriage or civil union or after its dissolution:
(b) in the case of a de facto relationship, the liability of one de facto partner to maintain the other de facto partner, and the amount of the maintenance, after the de facto partners cease to live together.

(2) The matters referred to in subsection (1) are as follows:

(a) conduct of the spouse, civil union partner, or de facto partner seeking to be maintained that amounts to a device to prolong his or her inability to meet his or her reasonable needs:
(b) misconduct of the spouse, civil union partner, or de facto partner seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other spouse, civil union partner, or de facto partner to pay maintenance.

68 Power of Family Court to make maintenance order in favour of either spouse or civil union partner

Every application under section 67 shall be heard and determined in a Family Court.

69 Maintenance order in favour of either spouse or civil union partner
(1) On hearing an application under section 67 a Family Court may, subject to section 61, make any 1 or more of the following orders:
   (a) an order directing the respondent to pay, for such period as the court thinks fit (but not exceeding the joint lives of the parties), such periodical sum towards the future maintenance of the applicant as the court thinks fit:
   (b) an order directing the respondent to pay such lump sum towards the future maintenance of the applicant as the court thinks fit:
   (c) an order directing the respondent to pay such lump sum towards the past maintenance of the applicant as the court thinks fit.
(2) An order under paragraph (b) or paragraph (c) of subsection (1) for the payment of a lump sum may provide that the sum shall be payable—
   (a) at a future date specified in the order; or
   (b) by instalments specified in the order; or
   (c) on such terms and conditions as the court specifies in the order.
(3) Subject to any agreement by the parties to the contrary, an order made under subsection (1)(a) or (b), and every order made under section 99 varying or extending such an order, shall cease to have effect if the party in whose favour it is made marries or enters into a civil union.

70 Order for maintenance after marriage or civil union dissolved or de facto relationship ends
(1) A Family Court may make an order under subsection (2)—
   (a) on or at any time after the making of an order dissolving a marriage or civil union:
   (b) at any time after a de facto relationship ends.
(2) The court may do the following under this section:
   (a) order either party to the proceedings, or the personal representative of either party, to pay to the other party for such term as the court thinks fit (but not exceeding the life of the other party) such periodical sum towards the maintenance of the other party as the court thinks fit:
   (b) make any other order referred to in section 69(1), either instead of or in addition to an order under paragraph (a).
(3) Section 69(2) applies to an order under this section for the payment of a lump sum.
(4) In this section, a reference to an order dissolving a marriage or civil union includes a reference to a decree or order or legislative enactment recognised in New Zealand by virtue of section 44, as if that decree or order or legislative enactment were an order of a court of competent jurisdiction in New Zealand.
(5) This section is subject to sections 61, 70A, 70B, and 71.