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**CAUSATION IN SECTION 15 OF THE PROPERTY
(RELATIONSHIPS) ACT 1976
Analysing the New Zealand Supreme Court’s “Working
Assumption”: Is it Really Working?**

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Abstract

Scott v Williams concerned s 15 of the Property (Relationships) Act 1976. In situations of significant economic disparity post-separation, s 15 empowers courts to depart from the default rule of equal division of relationship property to compensate the disadvantaged partner. Causation is one of the jurisdictional hurdles. Only disparity "because of" the division of functions (DOF) is compensable. Thus far, courts have adopted a strict causation approach by placing a costly and often unattainable evidential burden on claimants. Consequently, compensation has been beyond reach for deserving claimants. Responding to this disquiet, Scott's majority propounded a "working assumption" of causation in relationships conducted along traditional lines, where one party assumes primary responsibility for domestic duties and the other for income-earning. In such situations, Scott's majority would assume causation at jurisdiction and attribute the entire disparity to the DOF when determining the quantum award. This essay concludes that the working assumption is a positive development in terms of jurisdiction. However, unlike the majority, it argues that striking the correct balance between s 15's "because of" wording and broad policy rationale, requires an apportionment of causes at quantum. Furthermore, the "traditional lines" and "non-career partner" terminology creates unnecessary confusion and should be eschewed.

Key words

Property (Relationships) Act 1976—Economic Disparity—*Scott v Williams*—Causation—Quantum

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I Introduction

Recently, the New Zealand Supreme Court in *Scott v Williams*¹ considered s 15 of the Property (Relationships) Act 1976 (PRA)² for the first time. All five judges delivered judgments on s 15.

The PRA's default rule of equal division of relationship property was progressive when introduced.³ However, it soon became appreciated that this basis of "formal equality had failed somewhere, and that ... substantive equality ought to be considered".⁴ Section 15, enacted in the PRA's 2001 reform, reflects this.⁵ It empowers courts to depart from equal division if satisfied that:⁶

after the ... relationship ends, [B's] income and living standards ... are likely to be significantly higher than [A's] *because of* the effects of the division of functions [(DOF)] within the ... relationship while the parties were living together.

A two-step analysis is required: jurisdiction (*when* an award can be made); and quantum (*how much* to award). One of the jurisdictional hurdles is causation. Only disparity *because of* the DOF is compensable. The DOF need not be the principal cause,⁷ or even a real and substantive cause.⁸ All jurisdiction requires is "a clear causal link";⁹ that the DOF is *a* cause of the disparity.¹⁰ Nevertheless, many courts have adopted a strict

1 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507.

2 See Appendix One below.

3 See generally Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 3.

4 *M v B* [2006] 3 NZLR 660 (CA) at [215].

5 Property (Relationships) Amendment Act 2001, s 17.

6 Property (Relationships) Act 1976, s 15(1) (emphasis added).

7 *M v B*, above n 4, at [201].

8 Atkin, above n 3, at 110.

9 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [108].

10 Atkin, above n 3, at 110.

approach to causation.¹¹ Consequent difficulties in establishing causation were identified as a key reason¹² for widespread disappointment that s 15 “has not lived up to expectations”.¹³

Responding to this disquiet *Scott*'s majority on causation (Arnold and Glazebrook JJ and Elias CJ) shifted from this strict approach and propounded a “working assumption” of causation in certain circumstances. This dictum was obiter as jurisdiction was conceded before the Supreme Court¹⁴ but it will be highly persuasive.¹⁵ Furthermore, causation is intertwined with quantum; an issue squarely before the Court.

Unfortunately, the judgments leave many unanswered questions. This essay proposes some answers while critically analysing whether the assumption is a positive development. It concludes that the assumption is a positive development in respect of the *jurisdictional* causation hurdle but argues that striking the correct balance between s 15's strict “because of” wording and broad policy rationale requires an apportionment of causes when determining compensable disparity at *quantum*. In this latter respect, it differs from *Scott*'s majority. It also suggests that *Scott*'s “traditional lines” and “non-career partner” terminology should be eschewed. Therefore it argues for the proposition that, where A undertakes primary responsibility for domestic duties and B for income-earning, there is an assumption that a causal link between the DOF and disparity exists. This is sufficient to satisfy the jurisdictional hurdle. The strength of this assumed causal link, as against other causes, should be apportioned and reflected in the quantum awarded.

11 Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [18.60]; and *Scott v Williams*, above n 1, at [442] per William Young J.

12 Law Commission, above n 11, at [19.23].

13 *Scott v Williams*, above n 1, at [279] per Arnold J.

14 At [159] per Glazebrook J.

15 Atkin, above n 3, at 121.

This essay does not analyse all of s 15's elements, resolve problems created by its conceptual inconsistencies¹⁶ and inadequate legislative process,¹⁷ or comment on all aspects of *Scott*. Its specific focus is the working assumption. By unpacking the assumption and working through its rough edges, it aims to help readers understand this judicial innovation and suggests how it could be improved.

It must be noted that the New Zealand Law Commission (NZLC) is currently undertaking a PRA reform project.¹⁸ Its Issues Paper, published two months before *Scott*, proposed three s 15 reform options.¹⁹ Two options recommended repealing s 15.²⁰ However, until and unless legislative reform occurs, s 15 remains and *Scott* will have significant implications for such cases whether litigated or negotiated in the shadow of the law.

Furthermore, the NZLC's reform "Option 1" was to lower s 15's jurisdictional hurdles by, inter alia, replacing causation with a "rebuttable presumptive entitlement to compensation if there was financial inequality and a [DOF]".²¹ As currently worded, s 15 requires causation. Unlike the NZLC, which is free to propose legislative reform, it would have been inappropriate for the Supreme Court to discard this requirement. However, *Scott*'s assumption and Option 1's presumptive entitlement are derived from similar concerns²² and perform similar roles.²³ The NZLC is "looking with interest" at the assumption and its final recommendation may well align with *Scott*.²⁴

16 See Bill Atkin "Economic disparity – how did we end up with it? Has it been worth it?" (2007) 5 NZFLJ 299; and Joanna Miles "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] NZ Law Review 535.

17 See Ashley Varney "Divorcing Rhetoric from Reality: A Law Reform and Policy Perspective on Section 15 of the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, Victoria University of Wellington, 2017).

18 Law Commission "Review of the Property (Relationships) Act 1976" <www.lawcom.govt.nz/our-projects>.

19 Law Commission, above n 11, at [19.5].

20 At [19.5(b)] and [19.5(c)].

21 At [19.5(a)].

22 *Scott v Williams*, above n 1, at [290]–[291] per Arnold J.

23 At [380] per O'Regan J and [445] per William Young J. See also Part II(B) below.

24 Stephanie Ambler "*Scott v Williams* Case Law Update" (paper presented to the Auckland District Law Society Relationship Property: Lessons to be Learnt from Two Cases Webinar, May 2018) at 19.

II Deciphering the Working Assumption

A Majority

1 When does it arise?

The majority agreed that a rebuttable assumption of causation arose in certain circumstances. What these circumstances are is unclear. There is support in all three judgments that causation is assumed if there was (1) significant disparity; and (2) a DOF.²⁵ However, the real tenor of Arnold J's judgment was his repeated reference to role-divisions "along traditional lines" when formulating the assumption.²⁶ On this formulation, causation is assumed if there was (1) significant disparity; (2) a DOF; and (3) the DOF was along traditional lines. This distinction is worth grappling with as the question of what qualifies as "traditional" can create confusion.²⁷

Despite the uncertainty, it is likely *Scott's* assumption will be interpreted as requiring a relationship conducted along traditional lines ("traditional DOF relationship"). Arnold J provided the assumption's fullest exposition and his reasoning emphasised this requirement.²⁸ Glazebrook J²⁹ and Elias CJ³⁰ also provide some support for this formulation. Furthermore, in expressing their disagreement, the minority conceptualised the assumption as arising in traditional DOF relationships.³¹ Thus it is important to understand what constitutes "traditional lines".

25 *Scott v Williams*, above n 1, at [203], n 290 and [264] per Glazebrook J, [291] per Arnold J and [345] and [356] per Elias CJ.

26 At [293]–[294], [311] and [314] per Arnold J.

27 At [382] per O'Regan J; and Atkin, above n 3, at 111. See also Part VI below.

28 See for example *Scott v Williams*, above n 1, at [293]–[294], [311] and [314] per Arnold J.

29 At [203], n 290 and [204], n 292 per Glazebrook J citing [293] and [307]–[323] per Arnold J.

30 At [356] per Elias CJ agreeing with Arnold J's broad causation approach.

31 At [385] per O'Regan J and [444] per William Young J.

2 *Traditional lines*

This requirement does not require a traditional type of relationship (heterosexual marriage). Rather, it requires a traditional DOF.³² *Scott* interprets a traditional DOF as “one party ... assuming the primary responsibility for home-making and child-care ... and the other assuming responsibility for income-earning”.³³ Past cases adopted similar interpretations.³⁴ This requirement's parameters are analysed in Part VI.

3 *A legal presumption*

The “working assumption” terminology was likely used as a synonym for a legal presumption. *Scott*'s language of rebutting,³⁵ negating³⁶ and displacing³⁷ the assumption is evocative of other legal contexts containing rebuttable presumptions.³⁸ Glazebrook J further reinforced this by using the terms interchangeably.³⁹ Creating a rebuttable presumption has implications for matters of proof. Part V(C) explores these implications.

B Minority

Analysing O'Regan and William Young JJ's dissents require understanding the assumption's two-fold relevance to jurisdiction (assuming causation to satisfy the jurisdictional hurdle); and quantum (the *extent* of causation assumed in determining compensable disparity).

32 At [293] per Arnold J.

33 At [282] per Arnold J, [264] per Glazebrook J and [331] per Elias CJ agreeing with [264] per Glazebrook J.

34 See for example *CRH v GDH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [1]; and *Jack v Jack* [2014] NZHC 1495 at [52].

35 *Scott v Williams*, above n 1, at [264] per Glazebrook J.

36 At [293] and [324] per Arnold J.

37 At [323] per Arnold J.

38 Atkin, above n 3, at 111.

39 *Scott v Williams*, above n 1, at [204] and [204], n 293 per Glazebrook J.

As discussed below, the impetus for the majority's assumption and the NZLC's Option 1 was the strict causation approach, which undermined s 15's spirit.⁴⁰ Like the majority and NZLC, one senses O'Regan J was not particularly pleased with the pre-*Scott* direction of causation.⁴¹ In fact, he believed Option 1 provided a "good case for reform".⁴² However for him, the solution was legislative reform removing the "because of" wording rather than a judge-made assumption.⁴³ He considered assumptions "contrary to [s 15's] current ['because of'] wording".⁴⁴ William Young J indicated similar disapproval.⁴⁵

The minority's more vociferous critique concerned the assumption's relevance to quantum. The starting point of the Supreme Court's new disparity-based quantum methodology,⁴⁶ is "the extent of the disparity resulting from the [DOF]".⁴⁷ The majority believed that where the assumption was not displaced, "the [*entire*] disparity should be attribut[ed] to the [DOF]" ("no-apportionment approach").⁴⁸ The minority considered this contrary to s 15's wording that only disparity caused by the DOF is compensable.⁴⁹ As later discussed, this essay agrees with the minority's apportionment reasoning.⁵⁰

III The Working Assumption's Validity

Arnold J validated his assumption of causation based on three underlying assumptions.⁵¹ He said it should be assumed that a traditional DOF "(a) was for the benefit of both

40 See Parts IV–V below.

41 See at [380]–[381] per O'Regan J.

42 At [380] per O'Regan J.

43 At [380] per O'Regan J.

44 At [382] per O'Regan J.

45 At [446] per William Young J.

46 See Appendix Two below.

47 At [326(a)] per Arnold J.

48 At [326(a)], n 420 per Arnold J, [204] and [264] per Glazebrook J and [331] per Elias CJ agreeing with [264] per Glazebrook J. See also at [444(c)] per William Young J conceptualising no-apportionment as the majority's approach.

49 At [384]–[385] per O'Regan J and [446] and [449]–[450] per William Young J.

50 See Part V(B) below.

51 At [311] per Arnold J.

parties; (b) restricted [A's] income-earning ability; and (c) enhanced [B's] earning ability".⁵²

Assumption (a) endorses what is sometimes called *X v X [Economic disparity]*'s "presumption of causation".⁵³ Strictly speaking, this simply presumes the DOF was a mutual choice.⁵⁴ Through assumptions (b) and (c) *Scott* goes further than *X v X* and assumes the causation hurdle itself is satisfied. Assumptions (b) and (c) reflect the common bases for s 15 claims, before *Scott*, founded on A's restricted (or diminished) income-earning ability, and/or B's enhanced income-earning ability, because of the DOF.⁵⁵

Arnold J noted that assumptions (b) and (c) reflect international research.⁵⁶ It is beyond this essay's scope to comprehensively explore the socio-economic evidence-based justifications of assumptions (b) and (c). International research on post-separation disparity is extensive.⁵⁷ A brief discussion is sufficient drawing primarily on the NZLC's⁵⁸ and Green's⁵⁹ recent and extensive analyses of these socio-economic trends. Arnold J utilised both analyses.⁶⁰

52 At [311] per Arnold J.

53 Mark Henaghan and others *Family Law in New Zealand* (18th ed, LexisNexis, Wellington, 2017) at 1106.

54 At 1106.

55 *Scott v Williams*, above n 1, at [290] per Arnold J.

56 At [311]–[313] per Arnold J.

57 See for example Hans-Jürgen Andreß and others "The Economic Consequences of Partnership Dissolution – A Comparative Analysis of Panel Studies from Belgium, Germany, Great Britain, Italy, and Sweden" (2006) 22 *Eur Sociol Rev* 533 as cited in Law Commission *Relationships and Families in Contemporary New Zealand: He Hononga Tangata, He Hononga Whānau I Aotearoa O Nāianeī* (NZLC SP22, 2017) at 60, n 399; David de Vaus and others *The economic consequences of divorce in six OECD countries* (Australian Institute of Family Studies, Research Report No 31, 2015); AR Poortman "Sex differences in the economic consequences of separation: A panel study of the Netherlands" (2000) 16 *Eur Sociol Rev* 367 as cited in MJ Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (PhD thesis, Auckland University of Technology, 2017) at 70; and PJ Smock "Gender and the short-run economic consequences of marital disruption" (1994) 73 *Social Forces* 243.

58 Law Commission, above n 57.

Internationally, and in New Zealand, women take longer than men to recover economically post-separation.⁶¹ International studies identify the traditional DOF between paid and unpaid work as contributing to this disparity⁶² with one study concluding that “hours worked per week prior to separation can explain approximately 41 [per cent]” of the gender pay-gap post-separation.⁶³ Additionally extensive socio-economic research suggests that marriage enhances male earning capacity.⁶⁴ The reason for this is that these men “are able to [earn more] by specialis[ing] in making money” without being burdened by domestic duties undertaken by their wives.⁶⁵ In New Zealand, despite increasing female workforce participation, men still spend significantly more time than women in paid employment, while women spend almost twice as much time than men on domestic work.⁶⁶ Thus to the extent that these international studies can be transposed in a New Zealand context, the statistics suggest assumptions (b) and (c) are valid.

One could criticise relying on this research as it primarily speaks in the context of a heterosexual marriage with a housewife and breadwinning husband. After all, s 15 does not preclude claims from male, de facto or civil union partners. However, this research remains applicable because New Zealand’s society is still such that most s 15 cases have involved, and in the foreseeable future will continue to involve, female claimants in heterosexual marriages.⁶⁷

Economists have also doubted the usefulness of blanket statistics as “their high degree of aggregation [can] hid[e] large differences in the experiences of individual divorced men

59 Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013).

60 *Scott v Williams*, above n 1, at [312] per Arnold J.

61 Law Commission, above n 57, at 60.

62 At 60.

63 Fletcher, above n 57, at 70 citing Poortman, above n 57.

64 Green, above n 59, at 298.

65 At 76 (footnote omitted).

66 Law Commission, above n 57, at 44.

67 See generally at 44 and 60. For ease of reference, this essay refers to A as female and B as male.

and women".⁶⁸ However, these concerns do not invalidate the working assumption. A presumption's function is to "reflec[t] what is regarded as most convenient in terms of bringing an issue to proof".⁶⁹ Its contents "reflect what was probably [likely] in the circumstances prevailing at the time of [its] articulation"⁷⁰ and it simply allows courts to "draw a particular inference from a particular fact, ... unless ... disproved".⁷¹ Given s 15 only requires the DOF be *a* cause, rather than a principal, or real and substantive cause, the socio-economic research indicates that the assumption is not unfounded. In the usual traditional DOF relationship, some causal link is likely with the DOF restricting A's, and/or enhancing B's, income-earning capacity. If specific relationships deviate from this likely position, the assumption can be rebutted. However in the usual situation, the assumption removes A's need to positively prove causation, which has hitherto proved difficult. As explored below, to the extent that this puts compensation within reach for deserving claimants, the assumption is a positive development.⁷²

Furthermore, validating the working assumption based on underlying assumptions of *restricted* (or diminished), and *enhanced*, earning capacity may appear incongruous given the Supreme Court criticised the "diminution" and "enhancement" categories at quantum.⁷³ The criticism was that these categories lead to awards compensating A's loss, or redistributing B's enhancement, without compensating for *relative disparity* as s 15 requires.⁷⁴ However in validating what underlies the assumption of *causation*, this essay, like the majority, uses the "restricted" and "enhancement" terminology.⁷⁵ This provides a useful mechanism to understand *why* causation can be assumed as disparity caused by the

68 Susan St John "Income expectations of men and women after separation" (paper presented to the Family Law Conference, Wellington, October 1995) at 23 as cited in Atkin, above n 3, at 101.

69 CEF Rickett "The Classification of Trusts" (1999) 18 NZULR 305 at 316.

70 At 316.

71 Courtenay Ilbert in *Encyclopaedia Britannica* (11th ed, 1910) vol 10 Evidence at 15 as cited in Nicholas Rescher *Presumption and the Practices of Tentative Cognition* (Cambridge University Press, Cambridge, 2006) at 2.

72 See Parts IV–V(A)(1) below.

73 *Scott v Williams*, above n 1, at [347]–[352] and [357]–[358] per Elias CJ. See also at [197] and [204] per Glazebrook J, [293]–[294], [323] and [326] per Arnold J and [385] per O'Regan J.

74 At [347] per Elias CJ.

75 See at [203] per Glazebrook J, [311] per Arnold J and [345] per Elias CJ.

DOF is necessarily because the DOF restricted A's earning capacity and/or enhanced B's. Because the socio-economic research confirms that traditional DOF relationships do have this effect, jurisdictional causation can safely be assumed. It is simply quantum that no longer turns on precise diminution or enhancement amounts.

IV The Impetus for the Working Assumption

Before *Scott*, "a few cases" took a broad approach to causation using reasoning similar to *Scott*'s majority.⁷⁶ However, a strict approach was "usually" adopted⁷⁷ imposing a high evidential burden on A by emphasising a "but for" causal link⁷⁸ and "requir[ing hard] evidence of [A's] loss of earning ability ... or enhancement of ... B's earning capacity".⁷⁹

Commentators,⁸⁰ policy advisers⁸¹ and practitioners⁸² have criticised this overly restrictive approach. The NZLC identified difficulties in establishing causation as a "key issue undermining [s 15's] effectiveness",⁸³ estimating that 20 per cent of cases failed at causation.⁸⁴ Garland's earlier review of 60 cases found 48.3 per cent failing this hurdle.⁸⁵ These statistics may partly be explained by unmeritorious cases where disparities were caused by non-function related causes. However, analysis of past case law suggests that *deserving* claimants have been barred by the strict, "unrealistically narrow approach".⁸⁶ These cases provide the impetus for the assumption.

76 Law Commission, above n 11, at [18.60].

77 *Scott v Williams*, above n 1, at [442] per William Young J.

78 *M v B*, above n 4, at [201] per William Young P.

79 Law Commission, above n 11, at [18.60].

80 See Nicola Peart (ed) *Brookers Family Law – Family Property* (looseleaf ed, Thomson Reuters) at [PR15.01]; and Fae Garland "Section 15 Property (Relationships) Act 1976: Compensation, Substantive Equality and Empirical Realities" [2014] NZ L Rev 355 at 363–367.

81 See Law Commission, above n 11, at [18.69] and [19.23].

82 See Green, above n 59, at 83, n 267.

83 Law Commission, above n 11, at [19.23].

84 At [18.44].

85 Garland, above n 80, at 359.

86 *Scott v Williams*, above n 1, at [307] per Arnold J.

As a general criticism, the strict approach incentivises speculative, costly and unedifying evidence to be led.⁸⁷ This essay identifies and explores two specific categories that illustrate these general issues and pose policy issues of their own. As later argued, the assumption's ability to provide a solution makes it a positive development.⁸⁸

A First Problematic Category

The strict approach is problematic where A "ha[s no] serious career prospects at all" either because: (1) A's work before the DOF was low-skilled; or (2) the DOF occurred before A had the chance to begin a career.⁸⁹ In Garland's review, 37.93 per cent of unsuccessful causation cases stumbled on this point.⁹⁰

The difficulty arises from A's high evidential burden under the strict approach. Courts have required "*detailed* evidence about the availability of positions ... which [A] was unable, for a function based reason, to attain".⁹¹ Many claims fail because of "a paucity of evidence about [likely] career paths [and] current opportunities".⁹² However, such evidence is inherently speculative and involves guesswork.⁹³ Even claimants with prior careers face difficulties in accurately predicting their hypothetical "but for" position on a career pay-scale but experts can be employed to make educated guesses. For such claimants this evidential burden is costly but at least attainable. For claimants without prior careers, or with low-skilled jobs, the evidential burden is likely unattainable as even experts cannot predict "but for" career paths in such situations.

87 At [309]–[310] per Arnold J.

88 See Part IV(C) below.

89 Atkin, above n 3, at 119.

90 Garland, above n 80, at 365. See also Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 280, n 54.

91 *Walker v Walker* [2006] NZFLR 768 (HC) at [116] (emphasis added).

92 At [115]. See also Law Commission, above n 11, at [18.66], n 93 for examples of cases failing at causation due to a lack of evidence of an alternative career.

93 *Scott v Williams*, above n 1, at [309] per Arnold J; and Green, above n 59, at 331.

Where A's prior work was low-skilled, the tendency is for low income-earning capacity post-separation to "be attributed to [A's] lack of skill, training or ... ambition" instead of the DOF.⁹⁴ In *PEL v FFB*,⁹⁵ PEL was university educated but her pre-relationship work was low-skilled. Because she "ha[d] not developed prior to [the DOF] even the beginning phases of a career", the court lacked "confidence [to] establish a but for income".⁹⁶

Additionally, in these situations the strict approach's emphasis on a "hard"⁹⁷ causal link incentivises B to lead unedifying evidence minimising A's skills.⁹⁸ B argues that this lack of skill was responsible for A's low income-earning capacity rather than the DOF.⁹⁹ For example, PEL argued she would have been an associate professor absent the DOF.¹⁰⁰ In response, FFB engaged expert evidence pointing to PEL's "grades, lack of work experience and zero publications" to argue that "she [could not] have got through [even] the first hurdle of obtaining entry into a Masters programme" which was a prerequisite for associate professorship.¹⁰¹ Such invidious inquiries exacerbate existing tensions in a break-up context and are "antithetical to important [PRA] values".¹⁰²

PEL also illustrates the problematic 'all or nothing' mentality created by strict causation. As later discussed, strict causation goes hand in hand with *X v X*'s quantum methodology that quantifies compensation based on the differential between A's actual and "but for" income.¹⁰³ If "but for" income determines compensation, A is incentivised to pitch her "but for" income as high as possible and sometimes unrealistically so. In trying for it 'all', A often ends up with 'nothing' even though 'something' was deserved. For

94 Garland, above n 80, at 365 citing *Douglas v Douglas* [2013] NZHC 3022, [2014] NZFLR 235.

95 *PEL v FFB* [2012] NZFC 9534. Unusual circumstances meant the parties' living standards were not disparate despite FFB's significantly higher income. For this essay's causation focus, let us assume significant disparity was established.

96 At [70(c)].

97 *Scott v Williams*, above n 1, at [384] per O'Regan J.

98 At [310] per Arnold J.

99 At [309] per Arnold J.

100 *PEL v FFB*, above n 95, at [65].

101 At [67].

102 *Scott v Williams*, above n 1, at [310] per Arnold J.

103 See Part V(A)(2) below.

example, PEL argued that "but for" the DOF she would have been an associate professor; no doubt with the motivation of maximising her "but for" income. Based on her argument, the question became: did the DOF cause PEL's lost opportunity to become an associate professor? The Court unhesitatingly answered negatively given her inadequate qualifications for the role. That answer is not criticised. However, it was not the right question. The jurisdictional question should be whether *a* causal link between the DOF and disparity exists. In undertaking full-time domestic duties while FFB worked full-time, surely PEL's earning capacity was restricted to some extent, or at least FFB's was enhanced. This may not explain the entire disparity but jurisdictional causation does not require the DOF to be the sole or principal cause. Common sense and socio-economic research indicate that it explains at least some of the disparity, which is sufficient to say that *a* causal link, and hence jurisdiction, exists. Rejecting the possibility of any causal link, and hence any compensation, due to an evidentially unsubstantiated "but for" income denies PEL her deserved compensation for even that small amount of disparity attributable to the DOF. The assumption coupled with *Scott's* disparity-based quantum approach eschews the "but for" argument's relevance, making this problematic 'all or nothing' approach less likely.

CRH v GDH illustrates the strict approach's problematic application when A had no career before the DOF.¹⁰⁴ The parties married when CRH fell pregnant aged 16. They had three children. During the 34-year marriage, CRH was a "career wife" and GDH the "breadwinner throughout".¹⁰⁵ CRH failed at causation, *inter alia*,¹⁰⁶ because:¹⁰⁷

104 *CRH v GDH*, above n 34.

105 At [1].

106 CRH filed proceedings 13 years after separation. The Court suggested that by then the DOF's effects were a spent force and CRH's earning capacity was caused by her personal post-separation decision not to seek full-time employment or training. Nevertheless, the Court's reasoning indicates causation would have failed independent of the timing issue, making this case a useful illustration of the strict approach's problematic application.

107 At [49].

[s]he had never developed a career in her teenage years because she had insufficient time. It [was] therefore very difficult for her to show that there [was] a detrimental effect on a career development because she did not have one in which to develop.

For claimants like CRH, the strict approach requiring evidence of a "but for" income works an injustice.¹⁰⁸ *Nathan v Nathan* said a lack of pre-relationship "qualifications or employment history ... does not disqualify" A's claim.¹⁰⁹ However, it is difficult to see A succeeding under strict causation. There is no "but for" abandoned career to point to and courts have been unwilling "to speculate" in such circumstances.¹¹⁰ Thus a lack of pre-relationship employment is disqualifying in reality, albeit not legally.

Arnold J said it was undisputable that claimants like CRH deserve compensation.¹¹¹ This is correct given *Nathan's* dictum. Additionally, the legislative history suggests s 15 sought to ameliorate this type of mischief.¹¹² For example, the 1988 Royal Commission on Social Policy lamented that "[t]he loss of, *or failure to gain*, a career [was] not compensable" before s 15.¹¹³ Yet the strict approach deprives such claimants. Furthermore, the strict approach's reluctance to find causation in enhancement claims, discussed below, exacerbates such claimants' vulnerabilities.¹¹⁴

B Second Problematic Category

Commentators have criticised courts for overlooking enhancement claims.¹¹⁵ Analysis of past cases indicates that the rarity of successful enhancement claims is largely attributable to a reluctance to find causation, and quantification difficulties.¹¹⁶

108 See especially *Scott v Williams*, above n 1, at [307] per Arnold J.

109 *Nathan v Nathan* [2004] NZFLR 942 (FC) at [100].

110 *LD MCL v JP MCL* FC Christchurch FAM-2007-009-504, 28 November 2008 at [59].

111 *Scott v Williams*, above n 1, at [307] per Arnold J.

112 Green, above n 59, at 205.

113 Ivor Richardson and others *Report of the Royal Commission on Social Policy: Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (Government Printer, April 1988) vol 4 at 219 (emphasis added).

114 See Part IV(B) below.

115 See Mark Henaghan "What can you do about inequality post separation and post division?" (paper presented to New Zealand Law Society Relationship Property Intensive – your big (legal) day out!, August

That one's innate talent, qualifications and work ethic help determine earning capacity is uncontroversial. Rather, A argues that B's ability to develop talent, receive qualifications and possess such a work ethic is because A's domestic role "freed" B to do so.¹¹⁷ However, under the strict approach the tendency is to view B's natural attributes alone as explaining the disparity¹¹⁸ absent "factual evidence of [the] degree or amount [of enhancement]"¹¹⁹ or "some comparative evidence ... to enable [B's] earnings pattern to be assessed against ... other[s in similar professions]".¹²⁰ Adducing such evidence often requires costly expert witnesses to substitute numerical values for A's non-financial contributions. Even then, success is not guaranteed as even experts struggle to find foundations for their figures. For example, in *Scott* an expert gave evidence that the DOF enhanced Williams' annual income by \$50,000 but accepted in cross-examination that this was merely a "judgement".¹²¹ The High Court¹²² and Court of Appeal¹²³ rejected causation on the enhancement claim due to this lack of evidential foundation.

This is problematic because research and common sense indicate that by undertaking domestic duties, A frees B to specialise in money making.¹²⁴ However, absent evidence of the degree or amount of enhancement, A's role is characterised as "merely permissive"

2010) 89 at 101; Green, above n 59, at 309; Mark Henaghan and Nicola Peart "Relationship Property Appeals in the New Zealand Court of Appeal 1958–2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 99 at 101; and Susannah Shaw "Disparity in *Jack v Jack*: Judicial Overreach or a Just Result at Long Last?" (2014) 45 VUWLR 535 at 537, nn 11, 12 and 13.

116 Law Commission, above n 11, at [18.52]; and *Scott v Williams*, above n 1, at [203] per Glazebrook J.

117 Law Commission, above n 11, at [18.55].

118 Varney, above n 17, at 15.

119 *P v R FC Auckland* FAM-2004-004-3234, 30 November 2006 at [47].

120 *P v P* [2005] NZFLR 689 (HC) at [61].

121 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 [*Scott v Williams* (CA judgment)] at [109].

122 *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 [*Williams v Scott* (HC judgment)] at [167].

123 *Scott v Williams* (CA judgment), above n 121, at [109].

124 See Part III above.

rather than "truly causative".¹²⁵ This is so even where A undertook day-to-day childcare, while B worked long hours, took unscheduled trips and spent 70 days a year overseas.¹²⁶ Similarly in *CRH*, GDH's earning capacity was attributed to the "very long hours" he worked.¹²⁷ When one remembers that the parties married young when CRH fell pregnant, consequently having two more children, then surely at least part of the reason *why* GDH could work long hours was because CRH undertook childcare. This is especially pertinent as both parties entered the relationship with no qualifications. GDH undertook an apprenticeship *during* the marriage, working as an electrician thereafter.¹²⁸ Ostensibly CRH could have completed the same apprenticeship, done the same work and had a similar earning capacity if she did not have to undertake full-time domestic duties.

Additionally, "problematic dicta" concerning the "nanny argument" have emerged from the "but for" test's application.¹²⁹ The "but for" focus allows the argument that the DOF did not cause B's enhanced earning capacity because "but for" A undertaking domestic duties, B would still have devoted as much time and effort towards his career because a nanny would have been employed to undertake domestic duties.¹³⁰ This approach is flawed. It degrades A's contribution to that of a substitute service, thus flouting the PRA's "bedrock" equality of contribution principle.¹³¹ It favours "individualism", attributing B's high earning capacity *solely* to B's individual character¹³² consequently undermining the PRA's underlying premise of relationships being joint enterprises.¹³³ Additionally, focusing on what *could* have occurred is misplaced given *X v X*'s well-settled presumption of mutual decision-making.¹³⁴ Perhaps a nanny could have been employed. However for whatever reason, in traditional DOF relationships, the parties

125 *DJE v TIAE* [2012] NZFC 830 at [140].

126 *P v R*, above n 119, at [47] and [50].

127 *CRH v GDH*, above n 34, at [51].

128 At [1].

129 Shaw, above n 115, at 538.

130 See *M v B*, above n 4, at [201]; and *JES v JBC* [2007] NZFLR 472 (HC) at [32].

131 See Property (Relationships) Act, ss 1M(b), 1N(b) and 18(2); and *Scott v Williams*, above n 1, at [310] and [324] per Arnold J.

132 Green, above n 59, at 309.

133 Henaghan, above n 115, at 101.

134 *Jack v Jack*, above n 34, at [51].

chose not to employ a nanny instead deciding A would undertake such work.¹³⁵ The focus must be on the relationship's realities and its actual consequences.

C Solution

Under *Scott* causation would be assumed, subject to rebuttal, in traditional DOF relationships such as *CRH*¹³⁶ and *PEL*. In fact, because *Scott* discards "diminution" and "enhancement" awards at quantum, the two problematic categories aforementioned are eliminated altogether.¹³⁷ *Scott*'s new quantum methodology and assumption rely on each other for workability.¹³⁸ Because separate awards are no longer made for diminution and enhancement, separate causative inquiries into diminution and enhancement are unnecessary. It is no longer harder for claimants without prior careers, or with low-skilled jobs, or for enhancement claims to be established. Rather, in traditional DOF relationships common sense and socio-economic research allow a sensible assumption that the DOF restricted A's, and enhanced B's earning capacity and hence that a causal link between the DOF and disparity exists. Consequently, a single award compensating this disparity can be made.

Although not every case employed the strict approach in the aforementioned scenarios,¹³⁹ it has been the common approach.¹⁴⁰ The assumption eliminates the potential for inconsistency and better achieves s 15's policy rationale by ensuring an unrealistically strict approach does not deprive deserving claimants.

135 Shaw, above n 115, at 539.

136 Rebuttal may be successful due to reasons discussed at n 106.

137 *Scott v Williams*, above n 1, at [323] per Arnold J.

138 See Part V(A)(2) below.

139 See for example *H v H* HC Nelson CIV-2006-442-313, 20 October 2006 at [25].

140 Law Commission, above n 11, at [18.60].

V Striking the Correct Balance

Green explained the causation dilemma as:¹⁴¹

the inherent difficulty ... in achieving the correct balance between being unduly restrictive, rarely finding ... disparity was as a result of the [DOF], to lowering the ... bar so that the causation test is effectively meaningless.

For the reasons discussed below, amalgamating the majority's jurisdictional reasoning and the minority's apportionment reasoning best strikes this balance.

A Jurisdiction

In terms of jurisdiction, Green's statement reflects the choice between the strict approach and the broad assumption approach. The assumption's ability to resolve issues caused by the strict approach as discussed in Part IV(C), alongside the further reasons discussed below, make the majority's working assumption the better choice at jurisdiction.

1 Purpose of causation: text v policy

Resolving the dilemma requires analysing why the causation requirement exists. The difficulty is that its purpose is unclear with incongruity between s 15's text and policy rationale.¹⁴²

The strict "but for" requirement is certainly an available, if not the most obvious, interpretation of s 15's "because of" wording.¹⁴³ However in causation law, the "but for" test's key limitation is its potential non-application where multiple sufficient causes

141 Green, above n 59, at 55. See also *Scott v Williams*, above n 1, at [384] per O'Regan J.

142 Green, above n 59, at 205.

143 At 205.

exist.¹⁴⁴ In s 15 cases, multiple causes are almost invariably at play making a "but for" test unworkable. After all, a "person's income does not come down to any one thing but ... depends on multiple factors including luck, talent [and the DOF]".¹⁴⁵ Indeed this is recognised in cases propounding the "but for" test as it is well-settled that the DOF need not be the sole cause.¹⁴⁶ Consider a situation where "disparity is due in equal measure to [the DOF] and [B's] innate skills".¹⁴⁷ Jurisdiction should exist; A is entitled to *some* compensation as there is *a* causal link between the DOF and disparity. However, "it is not true of either cause that but for its occurrence, [a disparity] would not have transpired", making neither the DOF nor B's innate talent a factual cause under the "but for" test.¹⁴⁸

Furthermore, as discussed, the strict approach leads to outcomes antithetical to s 15's policy rationale.¹⁴⁹ For example, a *CRH*-type claimant has no obvious "but for" career path to point to.¹⁵⁰ Yet various legislative materials recognised the lack of a career option as "a significant economic handicap" requiring rectification via s 15.¹⁵¹ Additionally, a "but for" approach justifies the nanny argument.¹⁵² Yet such arguments are unedifying, contrary to the equality of contribution principle and misplaced given the unattractive proposition of courts substituting retrospective judgments of how relationships should have been structured.¹⁵³

Therefore, although s 15's text points to a "but for" test, theoretically it is unworkable where multiple sufficient causes exist. Practically, its implementation creates results

144 See Steven Yannoulidis "Causation in the Law of Negligence" (2001) 27(2) Mon LR 319 at 320; and David Jackson "Some Thoughts on Causation and Loss of a Valuable Commercial Opportunity" (paper presented to TC Beirne School of Law Current Legal Issues Seminar 2: Causation and Loss of Opportunity, Queensland, July 2017) at [25]–[26] and [30]–[31].

145 Green, above n 59, at 55.

146 *M v B*, above n 4, at [201].

147 *Scott v Williams*, above n 1, at [446] per William Young J.

148 Yannoulidis, above n 144, at 320.

149 See Part IV above.

150 *Scott v Williams*, above n 1, at [307] per Arnold J.

151 Green, above n 59, at 205.

152 *M v B*, above n 4, at [201].

153 *Scott v Williams*, above n 1, at [324] per Arnold J.

contrary to the PRA's spirit. Yet the judiciary cannot ignore the causation requirement. Such change is for Parliament.

However, arguably what courts can, and ought to do, in the context of *social*, non-technical legislation¹⁵⁴ is discussed in Elias CJ's extra-judicial comments.¹⁵⁵ She "quer[ie]d whether in social legislation ... it is appropriate for courts ... to refine too much on the terms of the statute",¹⁵⁶ and urged courts to "conscientious[ly] use ... powers [granted by] Parliament" to make the legislation work as a whole and "in the spirit intended".¹⁵⁷ *Scott's* majority has responded to this request. Assuming causation in traditional DOF relationships prevents the unedifying and costly inquiries required by the strict approach and the injustices of depriving enhancement and *CRH*-type claimants. Consequently, it upholds the equal contribution principle and the principle that PRA disputes "should be resolved as inexpensively, simply, and speedily as is consistent with justice".¹⁵⁸ Importantly, it does so without rendering the causation requirement meaningless. On this approach, one could view s 15 as "ensur[ing] awards are made if there is a [DOF] and resulting economic disparity".¹⁵⁹ The causation requirement's purpose might simply be to weed out exceptional cases where the relationship *in no way* affected the disparity such as a case where B's \$50,000 inheritance directly explains a \$50,000 disparity.¹⁶⁰ In such situations, the assumption would be rebutted. As later discussed, this essay's preference for apportionment further ensures the causation requirement remains meaningful.¹⁶¹

154 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 605.

155 Sian Elias "Separate Property – *Rose v Rose*" (speech to Family Court Conference, Wellington, August 2011).

156 At 3.

157 At 16.

158 Property (Relationships) Act, s 1N(d).

159 Law Commission, above n 11, at [18.66].

160 See *Scott v Williams*, above n 1, at [323] per Arnold J. See also Part V(C) below.

161 See Part V(B) below.

2 *Practical workability*

Not only is this “common-sense, non-technical view of causation”¹⁶² more attractive in policy terms, it is justifiable and practically workable given the Supreme Court’s new quantum methodology. Section 15 does not prescribe a methodology. Until *X v X*, judicial approaches had “not exactly been a model of clarity”.¹⁶³ *X v X*’s Court of Appeal propounded a methodology premised on the differential between A’s “but for” and actual income.¹⁶⁴ Despite warnings that it was not a rote formula,¹⁶⁵ it “led to a settled period” where many subsequent cases,¹⁶⁶ including *Scott*’s lower court judgments, employed the methodology.¹⁶⁷

The Supreme Court shifted the focus away from *X v X*’s “but for” emphasis towards a starting point quantum emphasis on relative *disparity*. Even though s 15 compensates post-separation *disparity*, under *X v X* nothing turns on B’s earning capacity and calculations occur “irrespective of the disparity”.¹⁶⁸ Thus, *X v X*’s compensation for detriment or advantage was correctly criticised as “misconceived”.¹⁶⁹

This shift in focus at quantum is directly relevant to the correct causation approach.¹⁷⁰ Strict causation and *X v X*’s quantum methodology makes sense together.¹⁷¹ As *X v X* compensates A’s inability to reach her “but for” income, it is understandable why courts guided by this methodology, required strict “but for” evidence of the extent of loss of earning capacity at causation. However, if we are prepared to reject *X v X*’s methodology then strict causation creates an unnecessary level of analysis and must also be rejected.

162 See similarly *Moge v Moge* [1992] 3 SCR 813 at [115].

163 *M v B*, above n 4, at [271].

164 *X v X* [*Economic disparity*], above n 9, at [180] per O’Regan and Ellen France JJ.

165 At [175] per O’Regan and Ellen France JJ.

166 Atkin, above n 3, at 127; and *Scott v Williams*, above n 1, at [350] per Elias CJ.

167 *Williams v Scott* [2014] NZFC 7616 at [323]–[344]; and *Williams v Scott* (HC judgment), above n 122, at [158]–[166].

168 Atkin, above n 3, at 119.

169 *Scott v Williams*, above n 1, at [347] per Elias CJ. See also Atkin, above n 3, at 119.

170 *Scott v Williams*, above n 1, at [291] and [293] per Arnold J.

171 At [292] per Arnold J.

There is no need to place this significant, potentially unattainable evidential burden on A if detriment to A is no longer what is compensated. Rather, we can sensibly assume causation in traditional DOF relationships without precise inquiries into the extent of A's loss. Given the jurisdictional hurdle simply requires *a* causal link, assuming that there is *enough* of a causal nexus for A to clear the jurisdictional hurdle is justifiable.¹⁷² It reflects research and hence the likely situation while avoiding the evidential, and now unnecessary, "difficult[ies of] of show[ing] loss in the individual case".¹⁷³

B Apportionment

However, this essay argues that the above arguments are most justifiable as a matter of jurisdiction, if apportionment is undertaken at quantum. Here, it departs from the majority and agrees with *Scott's* minority. *Scott's* quantum methodology requires "identifying the extent of the disparity resulting from the [DOF]".¹⁷⁴ If the assumption applies at jurisdiction, the majority's no-apportionment approach attributes the *entire* disparity to the DOF at quantum.¹⁷⁵

This essay's proposal amalgamates the majority's jurisdictional reasoning and the minority's quantum (apportionment) reasoning ("amalgamated approach"). This amalgamation best strikes the correct balance, ensuring s 15's "because of" wording is not unduly restrictive, while also ensuring it is not rendered meaningless. As discussed, because jurisdiction only requires *a* causal link, jurisdictional causation can safely be assumed in traditional DOF relationships.¹⁷⁶ The strength of that assumed causal link and the existence of other causes are jurisdictionally irrelevant because the DOF need not be the sole, principal, or even real and substantive cause. Provided the other jurisdictional hurdles are satisfied, *a* causal link entitles A to *some* compensation. However when determining quantum, the existence of multiple causes is highly relevant. "[R]elative

172 See similarly Carol Rogerson "The Causal Connection Test in Spousal Support Law" (1989) 8 Can J Fam L 95 at 132.

173 See similarly Miles, above n 16, at 543.

174 *Scott v Williams*, above n 1, at [326(a)] per Arnold J.

175 At [326(a)], n 420 per Arnold J.

176 See Part V(A)(2) above.

causal responsibility must be determined"¹⁷⁷ as only disparity *because of* the DOF is compensable and not disparity *per se*.¹⁷⁸ By ignoring other causal factors, the majority's approach of attributing the entire disparity to the DOF risks overcompensation contrary to the statutory wording.

A potential criticism of apportionment relates to difficulties in determining the proportion of disparity caused by the DOF compared to other non-compensable causes. A structured method for making this assessment may well be by reference to each party's "but for" income. This would provide a precise indication of the extent of disparity demonstrably referable to the DOF.¹⁷⁹ However, such an exercise would require the same type of speculative and costly expert evidence that the assumption seeks to ameliorate, making the assumption's benefits seem illusory. The only difference would be that this evidential requirement is postponed from causation to quantum.

However, apportionment need not follow such technically precise methods. As O'Regan J noted: "a broad [apportionment] approach ... is appropriate".¹⁸⁰ Where multiple causes exist.¹⁸¹

[it is un]necessary ... to adduce expert evidence of the extent to which [A's domestic] role ... enhanced [B's] future income and living standards [or restricted A's]. The judge ... need[s] to make a broad assessment taking into account the qualifications and career stage of the partners when the relationship began and when [it] ended, the period for which the functions were divided, what, in broad terms, the respective functions were and any other relevant matters.

Despite creating additional analysis, apportionment should not be ignored "if a just result is the aim".¹⁸² Contrary to Arnold J's comments, apportionment is not "incapable of

177 Miles, above n 90, at 295; *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [166]; and Atkin, above n 3, at 123.

178 *Scott v Williams*, above n 1, at [384] per O'Regan J.

179 See generally at [294] per Arnold J.

180 At [386] per O'Regan J.

181 At [386] per O'Regan J (footnote omitted).

rational resolution".¹⁸³ Judges are capable of, and experienced in, making such assessments similar to those undertaken in contributory negligence.¹⁸⁴ In fact, certain aspects of Arnold J's judgment are evocative of apportionment. He conceded that personal characteristics could sometimes provide a "*partial* explanation" of disparity and if so, "it may be that *only part* of the disparity can fairly be said to result from the [DOF]".¹⁸⁵ His subsequent no-apportionment approach is inconsistent with these pronouncements.

C *Rebuttal*

The amalgamated approach is further justified as it provides a better solution to the problematic implications created by the assumption's rebuttable nature. The corollary of the assumption being a rebuttable presumption¹⁸⁶ is that it imports a reverse burden on B for rebuttal.¹⁸⁷ Whether B's burden is evidential or legal is unclear. A legal burden would be problematic, "fit[ting] uncomfortably [with this] legislative regime" that simply requires courts "to be satisfied about a state of events which ... exists".¹⁸⁸ It would also appear incongruous given the well-settled position that A bears no legal burden.¹⁸⁹ In fact, Arnold J cited *X v X* which disclaimed a legal burden on "*any party*".¹⁹⁰ Yet, the majority's language "suggests [the burden] is more than evidential"¹⁹¹ with "little room [allowed] for rebuttal".¹⁹²

182 Atkin, above n 3, at 123.

183 *Scott v Williams*, above n 1, at [324] per Arnold J and [449]–[450] per William Young J.

184 At [450] per William Young J.

185 At [325] per Arnold J (emphasis added).

186 See Part II(A)(3) above.

187 See similarly Henaghan and others, above n 53, at 1106.

188 *M v B*, above n 4, at [39].

189 *Scott v Williams*, above n 1, at [292] per Arnold J.

190 *X v X [Economic disparity]*, above n 9, at [96] as cited in *Scott v Williams*, above n 1, at [292], n 374 per Arnold J.

191 See similarly Atkin, above n 3, at 111.

192 See similarly Henaghan and others, above n 53, at 1106.

Even an evidential burden would attract criticism. Given the issue with the strict approach was A's high evidential burden it would be ironic for the working assumption solution to remove that difficulty for A by importing it to B. Put this way, all the assumption does is shift causation from something A tried to establish to something B tries to knock down.

However, this shift is justifiable as it better reflects the usual reality in traditional DOF relationships. After all, before *Scott*, courts essentially worked from a different presumption: that no causal link existed absent strict evidence of the DOF's impact on earning capacity.¹⁹³ In a choice between presumptions, *Scott's* assumption (or presumption) is the better choice. The alternative presumption is less attractive in that it unrealistically "presume[s] a model of [relationships] in which [partners] make independent economic choices and are hence responsible for their own economic positions", rather than acting in the interests of their joint enterprise.¹⁹⁴

More problematically, the assumption's rebuttable nature casts doubts on its avowed purpose to remove speculative, unedifying and costly evidence previously led. O'Regan J validly queried whether it would truly "reduce the extent to which evidence is adduced by [B]", noting that one would "expect[t] that attempts will be made to [rebut the assumption]".¹⁹⁵

The majority may respond to O'Regan J by noting that the high threshold dissuades frivolous rebuttal as only "*compelling*"¹⁹⁶ evidence of causes "clearly independent of the [DOF]" suffice.¹⁹⁷ However, the majority's no-apportionment approach makes it unclear how strongly B will be dissuaded. The no-apportionment approach incentivises B to try his utmost to rebut the assumption with the type of strong, yet costly and potentially unedifying, evidence envisaged. If not, B will have to compensate for the *entire* disparity.

193 *Scott v Williams*, above n 1, at [383] per O'Regan J.

194 Rogerson, above n 172, at 122.

195 *Scott v Williams*, above n 1, at [382] per O'Regan J.

196 At [294] and [323] per Arnold J (emphasis added).

197 At [204], n 293 per Glazebrook J and [324] per Arnold J.

Conversely under the amalgamated approach, a prudent solicitor could advise B against rebuttal unless something truly independent of the DOF exists that provides a *complete* explanation for the disparity. A debilitating illness suffered by A, a large inheritance received by B, or situations where significant disparity exists but is lesser than the disparity when the relationship began might provide these complete explanations.¹⁹⁸ Adducing evidence of causes providing *partial* explanations of the disparity is futile because jurisdiction is still established provided the DOF has *a* causal effect. B need not fear that he may be forced to overcompensate for the entire disparity where other causal factors exist, because courts will apportion the causes to determine a fair starting point compensable disparity.¹⁹⁹ Or more simply, a solicitor may advise B that the assumption "sends a clear signal" that in traditional DOF relationships, A is entitled to *some* compensation.²⁰⁰ Therefore B's efforts are best spent focusing on negotiating a fair quantum settlement thus avoiding the time, money and stress consumed by litigation.

VI Framing the Working Assumption

A remaining issue is whether the majority correctly framed the assumption as arising in relationships conducted along traditional lines. Given "traditional lines" is likely to mean role-divisions where A undertakes primary responsibility for home-making and childcare and B for income-earning,²⁰¹ this essay agrees with the majority's idea of *when* the assumption should arise. However, the "traditional lines" and "non-career partner" terminology creates unnecessary confusion. We should simply say that, subject to rebuttal, in relationships where A has undertaken *primary* responsibility for domestic duties and B for income-earning, causation is assumed ("primary responsibility notion"). This framing is justified when the alternatives are considered.

198 At [213] per Glazebrook J and [323] per Arnold J.

199 See Part V(B) above.

200 See similarly Law Commission, above n 11, at [19.24].

201 See Part II(A)(2) above.

One alternative is to look to different types of relationships – heterosexual or homosexual marriages, de facto relationships, or civil unions – and consider whether the assumption should arise in any, or all, of these relationships. However, such categorisation tells us nothing about the DOF nor how it relates to disparity. Provided a relevant role-division exists, the type of relationship is irrelevant especially given that, alongside s 15, the PRA's extension to such relationships was the 2001 reform's headline.²⁰² Thus, the "traditional lines" terminology should be eschewed. Although the majority was focusing on traditional role-divisions, that language can create misconceptions that the assumption only arises in the 'traditional' heterosexual marriage with a breadwinning husband and housewife.

Another alternative is to consider the different role-divisions undertaken by New Zealand couples and consider whether the assumption should arise in any, or all, of those situations. Based on 2016 data of couples with dependent children, three statistical categories emerge:²⁰³

- "Unemployed/full-time" (33 per cent): A does not undertake paid work. B works full-time.
- "Part-time/full-time" (22 per cent): A works part-time. B works full-time.
- "Full-time/full-time" (45 percent): A works full-time. B works full-time.

Again framing the assumption as against these statistical categories is unhelpful. For example, although causation was conceded in *Scott*, it was accepted to be a traditional DOF relationship.²⁰⁴ Scott was the primary caregiver and often worked part-time. Williams worked full-time throughout. This might incline us to say that the assumption arises in part-time/full-time relationships. But that misses the point. The reason *why* the assumption would arise is not by virtue of it being a part-time/full-time relationship but because Scott worked part-time so that she could undertake primary responsibility for

202 Green, above n 59, at 10.

203 Law Commission, above n 57, at 39.

204 *Scott v Williams*, above n 1, at [299] per Arnold J.

domestic duties which restricted her income-earning capacity and freed Williams to enhance his.

This point is most pertinently illustrated when considering full-time/full-time relationships. Statistically, this is the most common role-division.²⁰⁵ However, statistical categorisations are over-simplistic for causation purposes. Querying whether the assumption should arise in full-time/full-time relationships is not the right question to ask. An instinctive answer is that it should not arise. Arguing that A "freed" B to focus on his career seems unconvincing given A, like B, worked full-time. Similarly, one might query how A's earning capacity was restricted if she too continued full-time work. This thinking has influenced past cases where claimants who worked full-time have found establishing causation difficult.²⁰⁶

However, instinctive answers hide the various permutations within these statistical categories. A full-time/full-time relationship could be one where both parties continued "to enjoy full careers unimpeded, or at least equally impeded by domestic responsibilities".²⁰⁷ In such situations, it is difficult to argue the assumption should arise. But full-time/full-time relationships could also be ones where A has a "double burden" by working full-time and also undertaking "a far greater proportion of domestic functions" than B.²⁰⁸ In such situations, A does free B to specialise in money-making. It may not be to the same extent as if A did not work at all, but still more so than if the parties equally shared domestic duties. Similarly, A could have worked full-time but sacrificed her lucrative, yet inflexible career, with inconsistent hours, in favour of a less lucrative, 9-5 job to ensure she could undertake childcare at night. Meanwhile, B continued in the same lucrative, yet inflexible career, often away for whole days at a time.²⁰⁹ In such situations, the DOF has restricted A's income-earning capacity as it is easy to get left behind in

205 Law Commission, above n 57, at 39.

206 See for example *JA v SNA [Economic disparity]* [2008] NZFLR 297 (HC); Varney, above n 17, at 42; and Heidi Gray "Inequality in Equal Division: Embracing a Canadian Approach to Remedy Economic Inequality Upon Relationship Breakdown" (LLB (Hons) Dissertation, University of Otago, 2009) at 14.

207 Rogerson, above n 172, at 122.

208 Varney, above n 17, at 42.

209 This scenario is loosely based on *Monks v Monks* [2006] NZFLR 161 (HC).

professional careers after protracted absences.²¹⁰ It also allowed B to continue to cultivate his earning capacity in a lucrative field unburdened by domestic duties.

What this analysis illustrates is that the focus ought to be on whether A undertook primary responsibility for domestic activities allowing B to focus on career tasks unimpeded, or less impeded than if A did not undertake these domestic responsibilities. Focusing on whether A was unemployed, worked part-time, or full-time is unhelpful. To take the full-time/full-time example: a proposition that the assumption arises in *all* full-time/full-time relationships is overbroad as that includes situations where both parties worked full-time, unimpeded, or equally impeded by domestic activities such that no causality between the DOF and disparity exists. However, to say it *never* arises in full-time/full-time relationships fails to reflect that in many such relationships A may, “declin[e] a promotion, refus[e] a transfer ... or otherwise curtai[l] employment opportunities” in the interests of the family, thereby suffering disadvantage while enhancing B’s earning capacity.²¹¹

A misplaced focus can lead to the type of unattractive reasoning seen in *JA v SNA [Economic disparity]* where both parties entered the relationship as trainee teachers and worked full-time throughout.²¹² At separation, SNA was a principal while JA was still a teacher earning considerably less.²¹³ Since child-rearing and economic sacrifices are stereotypically expected from mothers, the DOF’s detrimental impact on JA’s earning capacity was rejected.²¹⁴ The High Court accepted the Family Court’s reasoning²¹⁵ that it was “*inevitable* [JA] would play a larger part in the children’s lives”²¹⁶ and that “[*l*ike many other women, she juggled her career aspirations with competing calls on her

210 See for example Nicole Ashby “Absent from the Top – A critical analysis of women’s underrepresentation in New Zealand’s legal profession” [2017] NZWLJ 80 at 87.

211 *Moge v Moge*, above n 162, at [82].

212 *JA v SNA [Economic disparity]*, above n 206, at [3].

213 At [3].

214 Varney, above n 17, at 42; and Gray, above n 206, at 14.

215 *JA v SNA [Economic disparity]*, above n 206, at [14].

216 At [12] (emphasis added).

time".²¹⁷ Economic advantage to SNA was also ignored. To that extent, *Scott's* "non-career partner" terminology should be eschewed, as it prevents the assumption arising in a *JA*-type situation where A had a career but undertook primary domestic responsibility to her disadvantage and B's advantage.

This primary responsibility notion does not create evidential difficulties, or require A to positively prove that she undertook primary responsibility for domestic duties. The approach is summarised below:²¹⁸

[A]n exact tally of debits and credits for each day of the [relationship is not required]. ... 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. ... [I]t will suffice if the parties tell the [court] in a general way what each did. That will allow the [court] very quickly to get an accurate picture of the sacrifices, contributions and advantages relevant to determining compensation[.]

The court can then assess whether A undertook primary responsibility for domestic duties. If so, causation is assumed, subject to rebuttal, and apportionment at quantum.

Some residual injustices in terms of relativity may remain. An assumption framed to focus on the primary responsibility notion assumes causation in situations where A undertook no paid work and was fully devoted to domestic activities, in situations where A split time between the two and even in situations where A worked full-time but still undertook a greater proportion of domestic duties. The causal link is *prima facie* strongest in the first situation and weakest in the last. If the amalgamated approach is adopted, the apportionment exercise will ensure these differences are recognised when courts determine compensable disparity. *Prima facie*, in the first situation a high proportion, if not all, of the disparity will be apportioned to the DOF. In the last situation, perhaps only a small proportion of the disparity will be apportioned to the DOF given the disadvantage

217 At [13] citing *SNA v JA* FC Hamilton FAM-2003-019-588, 29 March 2007 at [94] (emphasis added).

218 *Moge v Moge*, above n 162, at [116].

to A, or advantage to B, is less pronounced than unemployed/full-time situations where A devoted all her time to domestic duties.

Another uncertainty is whether the assumption only arises in long-duration relationships, with children and which were entered into early in adult life. These factors are mentioned throughout *Scott's* judgments, no doubt influenced by Scott and Williams' 26-year two-child relationship.²¹⁹ William Young J's conceptualisation of the majority's assumption includes long-duration relationships as a prerequisite.²²⁰ Glazebrook J and Elias CJ tend to emphasise this factor,²²¹ albeit expressing broad support with Arnold J's reasoning.²²² Arnold J does not consider it a prerequisite. For him a long-duration relationship with children and entered into early in adult life, simply means the assumption would be particularly strong, and rebuttal would be highly unusual, compared to shorter-duration, childless relationships entered later in life.²²³

It is understandable why long-duration relationships could be singled out because "the longer the [relationship], the greater the probability of economic integration between the [partners]" in their joint enterprise.²²⁴ However to avoid disputes as to what qualifies as sufficiently long, and given Arnold J provided the assumption's fullest exposition, it is safe to assume causation whatever the relationship's length. Similarly, a childless relationship entered later in life should not in itself disentitle a claimant from the assumption's benefits. Provided primary responsibility for other domestic duties was undertaken the assumption should still arise. However, the lesser the childcare duties or the shorter the relationship, the easier it will be for B to rebut the assumption completely or to argue for greater apportionment on the amalgamated approach. Similarly in relationships entered later in life, which are becoming increasingly common,²²⁵ B is more able to whittle down the assumed causal link by arguing that he entered the relationship

219 *Scott v Williams*, above n 1, at [6] per Glazebrook J.

220 At [444] per William Young J.

221 At [204] per Glazebrook J and [345] per Elias CJ.

222 At [203] and [205] per Glazebrook J and [356] per Elias CJ.

223 At [323] per Arnold J.

224 Rogerson, above n 172, at 114.

225 Law Commission, above n 57, at 15.

having already established the high earning capacity he continues to boast of post-separation.²²⁶

The incredible diversity among relationships makes it difficult to set adequately specific prerequisites to capture relationships where the assumption should arise, while excluding those where it should not. The better approach is to set more general, fundamental requirements leaving rebuttal and apportionment exercises to ensure the strength of the causal link is fairly reflected at quantum. This is also justified because *Scott* does not discuss what occurs if the assumption does not arise. Is A not to have a claim? Or is the strict approach to be applied? That would be incongruous given the strong criticism of the strict approach's speculative, costly and unedifying evidential burden. The more claimants that are able to utilise the assumption's benefits of removing this evidential burden, the better. A broad assumption formulation, with a single prerequisite of A undertaking primary responsibility for domestic duties and B for income-earning, facilitates this outcome without losing its justifiable, theoretical peg. After all, research and common sense indicate that where A undertakes primary responsibility for domestic duties and B for income-earning, the assumption is not unfounded.²²⁷ The relationship's length, when it was entered into and other relevant factors simply enhance or reduce the strength of the assumed causal link.

VII Conclusion

Section 15's laudable rationale has not translated into practical success. A strict, and now unnecessary, causation approach has been a key barrier. Thus *Scott's* working assumption, which eschews the strict causation approach, is a positive development in terms of satisfying jurisdiction. However, *Scott's* majority was wrong to reject apportionment at quantum as it risks overcompensating A for disparity not attributable to the DOF contrary to the statutory wording. Adopting this essay's amalgamated approach better assists in striking the correct balance between s 15's broad policy rationale and

226 See *Scott v Williams*, above n 1, at [325] per Arnold J.

227 See Part III above.

stricter "because of" wording. Furthermore, *Scott's* "traditional lines" and "non-career partner" terminology should be avoided in framing the assumption.

Thus, the ideal proposition is: At jurisdiction, causation is assumed in relationships where A has undertaken primary responsibility for domestic duties and B for income-earning regardless of whether A also undertook paid employment. If truly independent causes provide a complete explanation for the disparity, the assumption will be rebutted. Otherwise, the existence of other causes in addition to the DOF, will be appropriately reflected through a broad apportionment exercise at quantum.

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IX Appendices

A Appendix One: Section 15 of the Property (Relationships) Act 1976

Court may make orders to redress economic disparities

15 Court may award lump sum payments or order transfer of property

(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 one spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects 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 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.

(4) This section overrides sections 11 to 14A.

B Appendix Two: Supreme Court's Disparity-Based Quantum Methodology

(a) Identifying the extent of the disparity resulting from the division of functions within the relationship presumably most easily done by reference to likely annual income over a period of years, given the close link between income and living standards). [To be clear,

where the working assumptions are not displaced, the whole of the disparity should be attributable to the division of functions within the relationship.]

(b) Considering for how long the disparity should be compensated. It should not be assumed that this period will be the same as the potential working life of either partner. This is because:^[1]

(i) in the ordinary course, the non-career partner will be expected to undertake income-earning activities; and

(ii) the career partner's personal autonomy must be recognised – he or she must be left with the ability to move on with his or her life.^[2]

It will be relevant in this context to consider how long it might take the non-career partner to re-train or up-skill, which will be affected by matters such as whether or not he or she has responsibility for the daily care of minor or dependent children of the relationship.^[3]

(c) Applying the necessary discounts to cover the contingencies of life (perhaps by reference to a New Zealand version of the Ogden Tables) and taxation.

(d) Calculating a present value for the annual figures thus derived to 15 identify a particular sum.^[4]

(e) Halving that sum, which is necessary to avoid simply transferring the^[5] full disparity on to the career partner.

(footnotes omitted).

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