SHOULD THE REGIME BE DISCRETIONARY OR RULES-BASED?

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‘The history of law is many things. But one of them is the story of an unremitting struggle between rules and discretion. The tension between these two approaches to legal problems continues to pervade and perplex the law today. Perhaps nowhere is that tension more pronounced and more troubling than in family law. It is probably impossible to practice family law without wrestling with the imponderable choice between rules and discretion.’ (Carl Schneider, 1993).

‘Most judges who are murdered by dissatisfied customers are killed by irate domestic litigants, not by criminals. The reason is simple: in other litigation, fewer emotional issues are involved; more important, the judge has less discretion.’ (Justice Neely, Canada, writing extra-judicially, 1984).

1. INTRODUCTION

As the opening quotations suggest, the topic which I have been asked to explore is neither easy nor, perhaps, for some participants in the New Zealand colloquium even safe! Before I embark on my task, I would like to reframe the question and to clear some ground.

1.1. REFRAMING THE QUESTION

First, it is important to appreciate that we are not, in fact, confronted with a stark choice: discretion or rules. The question is better framed in terms of the (elusive) search for the right mix of rules and discretion.

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Secondly, even to frame it in those terms obscures the fact that rules and discretion are not the only juristic tools in the box, and that both ‘rules’ and ‘discretion’ come in various formats, with varying degrees of ‘ruleness’ and ‘discretion-ness’. As American scholar Cass Sunstein and many others have extensively catalogued, we have at our disposal an array of legal sources, including: untrammeled discretion, rules, rules with excuses, presumptions, factors, standards, guidelines, principles, and analogies. To that list we might in this context add, or highlight, formulae, as a particular type of – quantitatively expressed – rule. So there is in fact a continuum of more and less rule-like modes in which a legal proposition might be expressed; and there are weaker and stronger forms of discretion, more or less trammeeled by one or other of the tools in the box.

Lastly, we need to bear in mind that there is more than one component to ‘the regime’ that we are examining or that we might wish to create. I deal with spousal maintenance below, and focus here instead on the fact that the current legal framework for the division of capital assets on relationship breakdown in New Zealand itself comprises more than one mode of legal norm: a rule of equal sharing of defined property, subject to exceptions cabined by jurisdictional limits, at least one of which (section 15), once triggered, ultimately turns on the exercise of a judicial discretion to determine the quantum of the departure from equal shares. So whilst one can contemplate essentially rules-based regimes and essentially discretionary financial remedies, it is equally possible – and probably more attractive – to contemplate a mixed scheme that draws on various legal tools.

The question that I shall seek to answer in this chapter is therefore: what is the appropriate mix of rule, discretion and other legal tools on that continuum for a statutory scheme for the division of capital assets on relationship breakdown?

1.2. CLEARING SOME GROUND

Before answering my reframed question, I wish to clear away two other considerations that bear on the overall position: spousal maintenance and eligibility for the scheme.

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4 To adopt and adapt Sunstein’s neologism: (1995), below.
7 Contrast the exceptions in ss. 13 and 14 which demand a contribution-based distribution – but that invites debate about how ‘contributions’ (defined by s. 18) are quantified and appropriately expressed in an award.
8 Defined broadly to include superannuation scheme entitlements etc, as in s 8 PRA 1976.
9 I leave others to consider what, if any, aspects of such a scheme should carry across to the case of a relationship terminated by the death of one or both parties.
1.2.1. **Spousal support**

My task is to discuss property division under a future iteration of the Property (Relationships) Act 1976, an exercise that excludes consideration of periodic spousal support (or ‘maintenance’). Others in this volume will be dealing with that topic. But it is clear – not least to English eyes, which are accustomed to viewing all financial adjustments between the parties (capital and income) ‘in the round’, as part of one overall package deal – that spousal support is a key component. Even if, in a world in which many couples prefer to achieve a clean break, spousal maintenance orders are relatively rare, the *entitlement* to spousal support (paid periodically from income) should form part of the context in which bargains around property division are struck.

Spousal support under the Family Proceedings Act 1980 is currently granted under a model that (i) attempts to set out a rule limiting liability: only where the would-be payee cannot meet all or part of his or her reasonable needs for one or more enumerated reasons; and then further limited by (ii) the rule that, even then, the would-be payee must assume responsibility for meeting his or her own needs within a reasonable time; before (iii) inviting the court to set a quantum of maintenance in the exercise of a broad discretion guided by a checklist of factors.

This model has more in common with the juristic tools deployed in section 15 of the PRA than with any other part of that Act, but evidently differs importantly being grounded in need rather than in compensation for economic disparity. As an ongoing, variable remedy, it avoids the crystal-ball gazing associated with capital provision directed at future economic disparity, albeit at the cost of precluding an immediate clean break. The possibility of capitalising maintenance claims in order to achieve a clean break sooner (at a discount to allow for future contingences and time-use) may often be appealing. At this point maintenance entitlements appear to encroach on the territory of property division, as an additional rationale for the distribution of capital assets at the point of relationship breakdown.

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11 Cf B. Atkin and W. Parker’s well-made criticism of the drafting of these provisions, as amended in 2001: *Relationship Property in New Zealand*, Butterworths, Wellington, 2001, ch 7, esp at 7.2.4.

12 Section 64: there is immediate difficulty in construing several of the items listed in s 64(2) as reasons (as such) for the claimant’s inability to be self-supporting.

13 Section 64A.

14 Section 65, with a further rule automatically terminating maintenance on the inception of a new relationship (s. 70A), responsibility at that point (implicitly) being assumed by the new partner, even though no legal maintenance responsibility arises between de facto, as such (cf ss. 63 and 79).
Whilst we might wish to keep the remedy of spousal support distinct, it is important that we not overlook it as part of the wider package to be reformed as a coherent whole – whether in terms of the substantive principles that underpin its liability rule or its reliance on a discretionary system of quantification.

1.2.2. Eligibility

Others in this volume will be dealing with the important question of eligibility for remedies under the scheme: to which relationships should it apply? But, as has been noted before, this question is connected to the choice of juristic tool (and to the substantive principles that should underpin whatever sort of scheme is created) because of the heterogeneity of contemporary couples. Modern relationships exhibit great diversity in relation to division of functions, degree of economic interdependence, money management practices, attitudes towards the parties’ financial relationship, and so on. Whilst spouses and civil union partners share (at least) the feature that the parties have mutually assented to cloak their relationship with a specific legal status, de facto partners (as a class) have made no equivalent mutual commitment, and are known to be especially diverse.

This all has implications not only for the substantive principles that should apply: for example, is a norm of equal sharing apt for all relationships which it is proposed to include within such a scheme? But also for the mode of legislation: the more diverse the class to whom the scheme must apply, the stronger the case for remedial flexibility and so for a higher degree of discretion in the scheme in order to accommodate that diversity and achieve ‘fair’ outcomes for more rela-

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tionships covered by it. Yet as Canadian scholar Carol Rogerson has put it, ‘Ironically, it is at the very time that family law has come to recognize the diversity of family forms that’, for reasons that will be explored below, ‘the need for rules and standardization has increased’.18

2. RULES ‘VERSUS’ DISCRETION: THE BASICS

As is evident from the voluminous literature, both in the generalist and family law specialist canons, this topic is amongst the oldest of old chestnuts. In the present context, where discretion was the primary mode for law-making in much of the twentieth century, it has been associated with family lawyers’ existential angst about the apparently a-legal nature of their discipline.19 In this section, I shall canvass through some of the key arguments from that literature,20 before turning in the next section to a more considered exploration of what I think are some key determinants for this debate in the contemporary family justice context. The ultimate objective in all this is, modestly, to ‘grope towards some satisfactory mix of discretion or rules’.21

2.1. THE BASIC PROS AND CONS

Canadian scholar Rollie Thompson22 provides an excellent overview of the pros and cons of rules and discretion, or as he puts it ‘why rules?’ and ‘why not rules?’, and so I adopt and adapt his catalogue of arguments here to get us up and running:

21 SCHNEIDER, above n. 3, p. 49.
22 Above n. 20, section 1.
2.1.1. Why rules?

Rules help us to decide large numbers of cases in an efficient, consistent and so predictable manner. They give us a more or less rough justice, providing a pretty decent answer for the bulk of cases. To the extent that the answer is imperfect for some cases, that may be tolerable where the issues at stake are relatively minor (in dollar amounts or qualitatively) and/or where the transaction costs of fixing on a more ‘accurate’ answer, customised to the more detailed facts of each case, would be disproportionate for both the system and the parties. By ruling out closely individualised decision-making, rules create a more level playing field for poorer or otherwise more weakly positioned litigants, who are unable to meet higher transaction costs. By creating predictable answers – and by conferring rights and imposing corresponding duties – rules can both facilitate planning by individuals in advance of issues arising and aid settlement in case of dispute. They ensure equal treatment of like cases and preclude discriminatory or otherwise biased decision-making. The y save judges time by removing the need to revisit first principles, and can help bolster the position of judges who find themselves having to take tough or otherwise unpopular decisions pursuant to the rule, leaving the legislator to take the flak from dissatisfied pressure groups or disappointed litigants.

2.1.2. Why not rules – or why discretion?

Discretion gives the legislator a means to make law dealing with areas in which decisions must be made but there is no consensus on what the determinative rule should be or where values are changing quickly such that any rule might quickly become dated. Discretion enables the sort of individualised decision-making that rules cannot provide, which may be felt particularly important for family disputes where the costs of getting the answer wrong could be high and so the transaction costs that will need to be incurred to reach the ‘right’ decision are considered proportionate given the issue at stake. Discretion can thus ensure a better ‘fit’ of decisions to cases, avoid the danger of apparently ‘equal’ treatment in fact failing to respond appropriately to relevant difference in a given case, and give individuals a sense of procedural fairness through having their case properly heard on its merits. Discretion can also avoid the sort of ‘evasion’ that rules may attract if so drafted that they fail to capture some instances of undesirable behaviours or outcomes that nevertheless fall within the mischief at which the rule is directed.
2.2. THE CONTINUUM OF JURISTIC TOOLS

Whilst the respective merits of rules and discretion may be quickly sketched in that way, the lawmaker can in fact draw on a far broader repertoire of juristic techniques. The positioning of a given legal provision on the rules-discretion continuum will determine – and should ideally be determined by – the relative balance of basic pros and cons set out above required to meet the demands of the particular substantive context.

At one extreme end of the spectrum we find Sunstein’s ‘untrammeled discretion’, the decision-maker with a choice apparently unconstrained by any limiting principle, criteria or practical possibility of review.\(^{23}\) Herbert Hart rejected the notion that a choice exercisable by reference to mere personal preference could properly be called a ‘discretion’; for him, the exercise of ‘discretion’ must be founded on some principle deployed by the decision-maker to justify the choice made.\(^{24}\)

It is perhaps this distinction between arbitrary decision-making and the exercise of judgement (or true ‘discretion’) which English judge Holman J was concerned to highlight in making the following remarks in a recent decision\(^ {25} \) under the broad discretionary financial remedies scheme of the Matrimonial Causes Act 1973:

\begin{quote}
‘68. I have reached this decision in the exercise of the judicial discretion which Parliament has imposed upon, and entrusted to, the courts. Of course, on one level the decision is arbitrary. I could have awarded more, or less, and two judges might (and probably would) have reached conclusions which differed to some degree. To that extent any exercise of judicial discretion may be said to be arbitrary…

69. … I, personally, consider that there is nevertheless a distinction between an award which is arbitrary in the true sense, and one which is the product of judicial discretion. An arbitrary result would be one yielded by sticking in a pin, or tossing a coin, or drawing a lot. Judicial discretion is the product of a weighing of all relevant factors and wise,
\end{quote}

\(^{23}\) Compare here the alarmed reaction of Lord Penzance when confronted with an apparently untrammeled matrimonial discretion in the mid-nineteenth century in *Morgan v Morgan* (1869) L.R. 1 P & D 644, quoted by R. ORMROD, above n. 19.

\(^{24}\) H.L.A. HART, ‘Discretion’, a paper drafted in 1956 and published posthumously at (2013) *Harvard Law Review* 127: 652-65. See also ELLMAN, above n. 20, comparing various forms of traffic rule – Rule 1 most closely resembled this untrammeled discretion; cf Rule 2 – which entails the exercise of judgment by the decision-maker by reference to a prescribed standard. See also SCHNEIDER, above n. 3, pp. 61-2, discussing the case of ‘khadi-discretion’.

\(^{25}\) *Robertson v Robertson* [2016] EWHC 613.
considered and informed decision making by an experienced adjudicator after hearing argument. My decision is a discretionary one, but it is not an arbitrary one.

Lawyers are hard-wired to insist on non-arbitrary decision-making and so want a judge’s decision to be defensible in at least one of two ways set out by Hart: first, in terms of the deliberative conditions in which the decision was made (Hart talks here of the decision’s being ‘justified’); and secondly, in terms of our ability to discern from the decision some underlying principle(s) or criterion(a) that the judge has deployed to reach his or her decision and that might in future be expected to be taken into account by another judge tasked with taking a similar decision, in order to ‘justify’ that next decision (Hart talks here of the decision’s being ‘vindicated’ by its outcome).

Where we see this (characteristically common law) process of an accretion of principle from individual decisions, we may have an instance of what Schneider calls a ‘rule-building discretion’. Discretion of that type may be conferred on judges by the legislator in order to deal with one of two problems identified by Hart that justify the deployment of discretion as a juristic tool: relative ignorance of fact (‘RIF’) and relative indeterminacy of aim (‘RIA’).

Relative ignorance of fact is arguably characteristic of many family law contexts in which discretion is deployed. RIF is the problem that leaves the legislator unable ex ante (or ever) to catalogue the full range of relevantly diverse factual circumstances – including, in family law, predictions regarding future facts – in relation to which a decision may have to be taken. Relative indeterminacy of aim is arguably a growing problem for family law policy given the diversity of contemporary family forms and the abandonment of fault-based matrimonial law with no obvious substitute as a founding principle. RIA is the legislator’s more profound difficulty that it may be difficult (practically or politically) to articulate – and achieve consensus upon – the precise policy that a new law is intended to implement, either at all or in a way that is thought likely to stand the test of time (a relevant consideration for a legislator intervening in an area of life that is in flux). In such circumstances, promulgation of a more or less broadly framed standard or objective by reference to which decisions should be made may be as much as the legislator is able to do: for example, to advance the ‘best interests’ of

26 See Ormrod, above n. 19, for an example of this.
28 BAILA, above n. 20, p. 28; DEWAR (1997), above n. 20, p. 320.
29 So we may alternatively witness here the conferral of ‘rule-failure’ discretion: where it is thought that it will be impossible to cast any more concrete legal norm to govern such cases at all and a judge’s decision can only be criticised on the basis of clear irrationality and little useful precedent can be accrued: see ELLMAN, above n. 20, p. 867, 870. See also SUNSTEIN, above n. 5, on the problem of ‘bounded rationality’.
30 See also SUNSTEIN, above n. 5, on the problem of diversity and plurality of values.
the child in making orders for her living arrangements, or to achieve ‘fairness’ between parties in financial orders made on divorce. The promulgated standard is likely to be a compromise position, meaning what the various individuals within the legislature want it to mean, and conferring a ‘rule-compromise’ discretion on the judges. But where it is thought that the judges, with their gradually accumulating experience of this social issue, might be (better) able to identify appropriate principles for future decision-making, we have also the makings – if the judges are prepared to take the bait\(^\text{31}\) – of a rule-building discretion.

Hart talks about a discretion conferred with a general aim (such as a ‘fair’ outcome\(^\text{32}\)) creating a ‘general matrix susceptible of different types of filling’.\(^\text{33}\) So the next question for the legislator, moving further along the continuum, is whether it wishes – and is able – to take any steps to limit the judges’ deliberative freedom – to make the matrix more constricting, leaving less room for judge-made filling – and if so, how far to take that exercise.

At a bare minimum, the legislator may wish to provide a checklist of factors to which the judges must have regard (or must ignore).\(^\text{34}\) But as Hart notes, whilst it may be possible to identify ‘distinguishable constituent values or elements’ inherent in the decision-making process that the judge is required to conduct, in the case of a discretion there are ‘no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them’.\(^\text{35}\) So the stipulation of a checklist does not get us very far along the spectrum: to use Rollie Thompson’s suitably domestic metaphor, a judge going through the motions of ticking off checklist items in order to appeal-proof a decision is engaging not in ‘[spousal] support analysis’ but ‘laundry-listing’.\(^\text{36}\) And as the American Law Institute commentary puts it (in the context of recommending a formula for quantification of spousal support):

‘The fact that reasonable judges may differ on a policy choice does not make it beneficial that they should. There is no utility and considerable cost in accommodating varying judicial preferences concerning the minimum tolerable income disparity, or the minimum marital duration at which an award should normally be required. Such variation

\(^{31}\) This is not guaranteed: see concerns expressed about fettering discretion conferred by Parliament by the development of judge-made principles: e.g. Mallet v Mallet (1984) 156 CLR 605, cf Norbis v Norbis (1986) 161 CLR 513 (and see remarks in Hoffman v Hoffman [2014] FamCAFC 92 at [59]); White v White [2001] 1 AC 596 at p. 606 (per Lord Nicholls), cf p 615 (per Lord Cooke). Such judicial reticence may, however, simply stymie the legislator’s intention where the discretion was supposed to be operated by the judges in a rule-building manner.

\(^{32}\) He actually uses the example of a ‘successful dinner party’.

\(^{33}\) Above n. 24, p. 659.

\(^{34}\) For an example of the latter, see UK rules governing discretionary departures from the child support formula: Child Support Maintenance Calculation Regulations 200012, SI 2012.2677, reg 60.

\(^{35}\) Above n. 24, p. 659.

\(^{36}\) Above n. 20, text following n. 172 in the source.
will uncover no adjudicative principle to guide later decisions, but will impose a considerable cost in inconsistency, unpredictability and the perception of adjudicative unfairness as neighboring cases yield different results because of different judges rather than different facts.\footnote{Principles of the Law of Family Dissolution, ALI, Philadelphia, 2000, p. 811.}

So the legislator (or the judges, exercising a rule-building discretion) may feel that it wants (or that they want) not merely to ‘appeal to the judgment of a plurality of impartial spectators’ but rather to endeavour to identify ‘more determinate principles at work’.\footnote{HART, above n. 24, p. 665. For an illustration of disagreement on the issue of how far the judges may themselves adopt the latter approach through a rule-building exercise of discretion, contrast the attitudes of differently constituted benches of the Court of Appeal for England and Wales in B v B [2008] EWCA Civ 543, Robson v Robson [2010] EWCA Civ 1171 on the one hand, and Jones v Jones [2011] EWCA Civ 11, K v L [2011] EWCA Civ 550 on the other hand – the former content with a strong discretion relatively uninhibited by only high-level principle, the latter wishing to develop a more comprehensive set of principles by which to structure the exercise of the discretion.} And so we gradually move further along the continuum away from discretion, deploying more concrete or particularised guidelines, standards, principles and presumptions by reference to which the judges must structure their decisions. This process may ultimately result in the creation of rules, though this may include rules subject to exceptions in prescribed circumstances. Those circumstances may be capable of relatively concrete expression demanding only an exercise of fact-finding by the judge: for example, is this relationship less than three years in duration? If so, divide the property by reference to the parties ‘contributions’ instead.\footnote{Note here the inevitability of some exercise of (implied) discretion in the interpretation and implementation of such ‘rules’: SCHNEIDER, above n. 3 and SUNSTEIN, above n. 5.} Or they may instead be expressed in a more open-textured way, such as a standard, leaving scope for the exercise of some judicial discretion in the process of interpretation and implementation: for example, divide the property equally unless there are ‘extraordinary circumstances’, or divide the property in accordance with the parties’ agreement unless doing so would cause ‘serious injustice’.\footnote{C. ROGERSON, Developing Spousal Support Guidelines in Canada: Beginning the Discussion, Department of Justice, Ontario, 2002, p. 6.}

But the legislator’s (and judges’) ability to move further towards the rules-end of the spectrum depends upon the extent to which the problems of RIF and RIA can be eliminated or their significance minimised. This depends, in the first instance, upon the extent to which it is possible to neutralise concerns about RIF by regarding the finer factual detail of individual cases as insufficiently pressing to be necessarily relevant to the decision to be taken: a willingness to accept a greater degree of ‘average’ rather than ‘individualised’ justice\footnote{C. ROGERSON, Developing Spousal Support Guidelines in Canada: Beginning the Discussion, Department of Justice, Ontario, 2002, p. 6.} in that \textit{factual} sense. And in the second instance, upon the extent to which it is possible for consensus to be
achieved regarding the aims of the law in question, to whatever degree of specification is attainable, in order to eliminate the problem of RIA: a willingness to accept a more tightly specified, homogenously applicable legal norm, and so perhaps to adopt a more average than individualised substantive sense of justice.

3. SOME KEY CONTEMPORARY CONCERNS FOR THE RULES / DISCRETION DEBATE

In this section, I examine more closely three inter-linked core concerns regarding the rules versus discretion debate. These have all featured in the literature to a greater or lesser extent over the last thirty years at least. But they seem to me to have particular force now and so should be uppermost in the policy-maker’s mind in choosing between more or less rule-like juristic tools for a scheme of property division on relationship breakdown. I naturally write from a specifically English standpoint, but expect that these concerns resonate with similar force elsewhere.

3.1. ON WHOM SHOULD THE BURDENS OF LAW-MAKING BE ALLOCATED?

As earlier commentators have noted, rules and discretion (and the intervening points on the continuum to their varying extents) place different burdens on different agents within the system. This is effectively a debate about where to place burdens created by RIF and RIA, discussed above, if those problems cannot be eliminated or minimised.

To the extent that the legislator determines that these problems exist and cannot be eliminated or reduced by devising a more rule-like provision ex ante, and so legislates in discretion mode, costs are shifted to courts and litigants. If the legislator cannot, factually or politically, say that facts a, b, and c alone are relevant (even determinative), then litigants face the burden of proving an array of facts – ‘all of the circumstances of the case’ – in order to try to persuade the judge of the rightness of their cause: that their vision of the child’s future is that which best promotes the child’s welfare, or that their account of the parties’ economic positions points the way to a ‘fair’ division of assets. And judges are faced with the burden of managing all of that information and going back to first principles in order to devise a bespoke solution to the case at hand, one that they feel fits the spirit of whatever loose norm the legislator has prescribed. As Sunstein puts it, this

41 E.g. BALA, above n. 20, GLENDON, above n. 2, SCHNEIDER, above n. 3, SUNSTEIN, above n. 5, DEWAR, above n. 20, ELLMAN, above n. 20, which I have drawn upon in writing this section of the paper.
effectively involves ‘law-making at the point of application’. Put another way, it involves a considerable amount of relatively undirected activity, economically, intellectually and emotionally demanding improv’, by the judges, lawyers and their customers. And of course no one improv’ routine is quite like the ones that came before it or that follow it, which may leave some litigants wondering if their case has been dealt with fairly at all, while other would-be litigants think it may be worth their while to perform before a judge to see if they can get a favourable outcome.

Alternatively, the legislator may feel able to cut through the thicket of infinitely variable facts and to identify and articulate a clear (and relatively prescriptive) principle by which decisions should be made, in order to produce a more rule-like provision. That exercise is itself likely to be costly (in terms of economic and political resource), and so is more burdensome on the legislator than propounding a less rule-like provision. It is likely to demand more in-depth, upfront scrutiny of social scientific evidence bearing on the subject matter of the proposed law, and careful weighing of the merits and demerits of the varied responses which the legislator could make to it. The end product will in some senses pose less of a burden on courts and litigants: their role will call for much less improv’ – they will have a more prescriptive script to follow, a clearer sense of what lines to deliver. But in another sense, some litigants (and individuals settling their cases privately by reference to the rules) may feel additional burdens – where they consider that the rule jars badly when applied to their case but have no apparent scope to modify its application. So while the transaction costs may be less, the outcome costs may sometimes be higher.

It is here that a choice needs to be made between ‘average’ justice and ‘individualised’ justice. To change the metaphor, how much cost should be borne up front by the legislator to craft a fairly close-fitting rule in order to reduce transaction costs for the customers of that rule, even if some of them are left feeling that the sizing doesn’t quite work for their case’s shape? Alternatively, is the risk of too many customers being left with ill-fitting outcomes such that they and the courts should be afforded more leeway to craft more carefully tailored solutions, albeit at greater cost at the point of application? Is off-the-peg preferable to haute couture? Is the promise of individualised justice for everyone worth the price if some of the would-be customers can only press their noses to the shop window?

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42 Above n. 5, p. 956.
43 ROGERSON, above n. 40.
3.2. FAMILY JUSTICE IN A COLD CLIMATE

That last point leads to my next, very pressing, contemporary concern: how realistic is achievement of bespoke solutions via the exercise of judicial discretion (or the professional judgement of lawyers) given the state of family justice in an age of austerity? Writing in 1993, Carl Schneider remarked that “Efficiency” is not a goal family law has historically valued. It is cold virtue for so warm a subject.”

But while the motivations of family law and family lawyers may be warm, underpinned by ethics of care and welfare-promotion, the context in which family law and lawyers are now required to ply their craft is increasingly hostile.

Cuts to legal aid put even out-of-court legal advice, never mind in-court representation, beyond the reach of many individuals. A system of individualised justice effectively demands access to specialist advisors, negotiators and, in the last resort, judges. If significant numbers cannot access those services, then the aspiration to achieve any sort of justice may become futile. Litigants who, for want of access to professional assistance, attempt to prosecute their cases in person, may struggle to navigate the arcane demands of a discretionary system, where the relevance and significance of various pieces of evidence may be less than clear. The governing norm may on its face, deceptively simply, be one of ‘fairness’ or ‘best interests’, yet without access to the ‘Talmudic body of knowledge’ that has accreted around those open-textured norms, the unsupported litigant will struggle to comprehend what is required. Cuts within the court service itself also make bespoke outcomes less deliverable: expert judges will struggle to find the time to deal adequately with the disordered cases presented by many litigants in person, and non-specialist judges, who often find themselves handling these cases (particularly at the ‘everyday’-end of the asset-value scale), may be little better equipped to deal with the case than the unrepresented litigants before them.

Add to this the fact that family breakdown is now more common than in much of the twentieth century, including that period in which our contemporary welfare-oriented, no-fault discretions were created, and the benefits of efficient disposal of cases by more rule-like provisions become less unattractive. Family breakdown is, sadly, a consumer experience, not the sort of rare incident into which the extensive resources of the family justice intensive care team can be devoted to secure the optimal outcome for each individual patient at whatever cost. Efficiency may not be a warm ambition – but it may be a realistic one in contemporary circumstances. It may be the best we can hope to achieve.

44 Above n. 1, p. 237.
47 See E. HISS and J. MILES, ‘The recognition of money work as a specialty in the family courts by the creation of a national network of financial remedies units (2016) 46 Family Law 13xx on the issue of lack of judicial specialty in dealing with money cases in England and Wales.
3.3. THE PERCEIVED FAILURES OF DISCRETION AND THE DYNAMICS OF SETTLEMENT

Given the practical inaccessibility and so impossibility of individualised justice for the vast bulk of cases, the reality is that family law is a law that is very largely implemented privately (if at all), through settlement activity that may or may not be lawyer-led. It is particularly once we move the resolution of cases from the public space of the court room to the hidden space of private ordering that the deficiencies and dangers of discretion become most apparent.

Discretion arrived in family law to replace the old, status-based system of rules that flowed from the patriarchal and fault-based assumptions of an earlier time. It has noble, welfare-oriented ambitions, designed to create those bespoke outcomes that respond sensitively to the lived realities of the individuals who are subject to them. But there is a longstanding discontent in many quarters with how discretion works in practice: its failure to give judges and lawyers (never mind unrepresented parties) clear road-maps for decision-making, and its inability to confer concrete entitlements on more vulnerable family members, particularly – in this context – on women whose economic opportunities continue to be constrained by caring responsibilities in the home. Without clear rights that they can assert, the economic and emotional transaction costs of attempting to negotiate settlement may simply be perceived by some to be too high. Writing in the Canadian context, Carol Rogerson and Rollie Thompson have more than once drawn attention to concerns that

48 For those without legal representation or in weak bargaining positions, [discretionary] support claims were simply not pursued. Despite a very broad basis for entitlement under the existing law, many spouses did not claim spousal support, being unwilling to engage in the difficult and costly process required.

50 At this point, I would like to draw on a body of literature that examines the dynamics of settlement and negotiation theory. Despite the position set out in my summary of the pros and cons of rules and discretion at 2.1 above, the core literature explored so far contains mixed views on whether discretion or rules are better for achieving settlement. Schneider, for example, has suggested that
'the less certain the result a court would reach, the greater the practical scope for bargaining… We might, for all the usual reasons given for freedom of contract (yet keeping in mind the usual reasons for being cautious about the consequences of that kind of freedom) prefer a discretionary standard which accorded parties that greater freedom while still giving a court the authority to resolve their dispute if they could not do so themselves.'\(^5^1\)

Conversely, a rule, rather than removing scope for disagreement, may simply divert disagreement to issues made newly critical by the rule – for example on the existence or otherwise of some essential fact necessary to trigger a particular outcome (such as the date on which or the purpose for which a given asset was acquired), or on the valuation of a key asset that stands to be shared.

However, it is the parenthetical words in Schneider’s remark that prompt careful study before we comfort ourselves that parties will be enabled by discretion to reach fair settlements. Mnookin and Kornhauser identified five factors that they considered to be important determinants of the outcomes of bargaining:

‘(1) the preferences of the [parties]; (2) the bargaining endowments created by the legal rules that indicate the particular allocation a court will impose if parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcomes if the parties go to court, which is linked to the parties’ attitudes towards risk; (4) transaction costs and the parties’ respective abilities to bear them; and (5) strategic behavior.’\(^5^2\)

Ambiguity surrounding item (2) on that list will exacerbate uncertainty at item (3) – in particular where one or both parties is unable to afford legal advice which might otherwise have reduced the uncertainty to some extent – and that in turn will implicate item (4) in so far as the parties’ ability to deal with the costs of uncertainty are unequal.

Part of the difficulty in achieving fair settlements in such circumstances is the gendered nature of negotiation. Wilkinson-Ryan and Small, in their recent review of empirical studies examining men’s and women’s bargaining behaviours, note that ‘Since gender differences are typically larger when situations are ambiguous, indeterminate legal standards may provide a context in which gender is more likely to matter.’\(^5^3\) As if in direct response to Schneider’s point, they observe:

‘We might assume, for example, that indeterminate rules leave the parties less constrained in their private negotiations and thus better able to maximize their joint welfare.'

\(^{51}\) Schneider, above n. 3, p. 77.


But if the empirical data suggests that the parties are not maximizing joint welfare or that there is a systematic imbalance between them (and it does), we might question the value of indeterminate rules and their utility for the normative model.  

If, as the research reviewed by these authors suggest, women in negotiation tend (inter alia) to prioritise relational issues and inter-personal goals rather than individual goals and to behave less competitively in order to maintain a stereotypically acceptable female image, then perversely the very discretionary laws that were designed better to protect women’s interests will have the opposite effect.  

But the problems that undermine the ability of negotiations to produce fair settlements are not only gendered. Craig Martin applies other, gender-neutral, negotiation theory to suggest that negotiation in a discretionary context where the claimant seeks to prise resources from the respondent-owner’s grasp necessarily disadvantages the claimant because of the different ways in which negotiating parties respond to the prospects of gains foregone and of losses. Contrary to what rational choice theory might suggest, it is argued, losing out on the chance of gaining of (say) 10 units and sustaining a loss of 10 units from the individual’s starting point will not be viewed by that individual in the same light: prospect theory suggests that the prospect of a loss will be more robustly fought against than the prospect of an equivalent gain will be fought for, such that the claimant (who is by definition likely to have fewer resources to press a claim than the respondent will have to defend it) will be satisfied with a smaller gain than might otherwise have been achievable (in order to avoid incurring greater transaction costs in the uncertain pursuit of a larger gain) whereas the respondent will fight harder to avoid a larger loss: better to forego a fuller gain than to concede a larger loss.  

What matters, then, is the individual’s starting point and so whether he or she perceives himself or herself to be at risk of incurring a loss (from a position of entitlement) or of merely foregoing a potential gain. Here Martin argues, by reference to the then state of discretionary spousal support law in Canada, that given the infrequent grant of spousal support, its uncertain legal basis and its perception as ‘money “given” to a woman (or the spouse in need) and “taken” from a man (of the spouse with the greater income)’, the claimant will be regarded as starting at zero – she has no clear entitlement to any identifiable sum, so that she can only gain (or forgo a gain) – she has nothing to lose, and so will be prepared to accept

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54 Ibid, at p. 132.
55 Ibid, at p. 125; see also GLENDON, above n. 2, pp. 1170 and 1180.
57 He is writing before the Spousal Support Advisory Guidelines, discussed below, were developed.
58 Above n. 50, p. 154.
whatever she can get. Wherever a discretionary system of property division or spousal support clearly puts the claimant in the position of having to seek provision from what are (by way of starting point) the respondent’s resources, their negotiation will be imbalanced in that way. Only the grant of clearer legal rights to a given share in the resources can level the playing field for private settlement.

And so the debate has come full circle – away from the bad old rules, through our experience of mid-late twentieth century discretion, and out the other side in search of good new rules and more principled outcomes that endow individuals with rights that will better equip them to protect their interests in the course of settling family disputes, in court or – far more likely – out. Such a process of course requires confrontation of Hart’s RIF and RIA problems: to narrow down on which facts are truly pertinent and to fight out the political arguments to achieve sufficient agreement to enact more concrete legal norms. But this is a process that cannot be avoided – family law, as a branch of law, cannot exist without underpinning principles which secure equal and so consistent treatment under that law for those subject to it. As John Eekelaar wrote in 1984 (in the context of child custody disputes):

‘Family law has too long suffered from the myth that, as every case is different, their resolution must be left to the discretion of individual judges. Matters of principle are confronted at every turn. It is time we faced up to them.’

4. DIFFERENT JURISDICTIONS, DIFFERENT JOURNEYS

Yet it seems that our willingness to face up to these issues of principle that necessarily underlie family law varies depending on where we come from and what our experience has been. In this penultimate section, I chart the course of three jurisdictions that have had markedly different experiences with rules and discretion, and, whilst arguably on similar trajectories moving away from open-ended discretion, are currently at very different stages along that trend-line and so deploy quite different legal techniques in this field.

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61 A trend forecast by BALA, above n. 20.
4.1. **ENGLAND & WALES – THE RULE-HATING DISCRETION-PHILES?**

The primary, even sole, determinant of the typical English family lawyer’s response to this debate can be summarised in two words: child support.

Whilst the inception of very broad matrimonial discretion in the nineteenth century initially caused judicial alarm, the judges quickly identified their own limits to fetter the discretion and make its operation a task more suited to a legal mind.\(^{62}\) By the arrival of the Matrimonial Causes Act 1973, in which the current substantive law governing financial remedies on divorce is found,\(^{63}\) they were, in the view of one senior family law judge,\(^{64}\) more acclimatised to their task, and comforted in it (rightly or wrongly\(^{65}\)) by Parliament’s provision of a checklist of factors to which they should have regard. However, it is worth pausing to note changes made in 1984: these repealed the – admittedly impossible – ‘minimal loss’ objective, and introduced new provisions prioritising the welfare of minor children and requiring judges to consider whether a clean break could be achieved.\(^{66}\) This left the legislation without any express overarching objective, a prospect which had divided judicial opinion. The more senior judges (of the Family Division of the High Court,\(^{67}\) who deal with complex or high value cases, and hear occasional appeals from more everyday cases) ‘considered that any satisfactory solution … necessarily involved the court retaining a wide discretion so as to be able to take account of the factual circumstances which present themselves’. Meanwhile, the Registrars (who in practice dealt with the vast bulk of first instance cases) ‘pointed out that it was difficult to find a just solution if there were no guiding principle, and urged that “to remove the guiding light is to allow flexibility to go mad”’.\(^{68}\)

For years, the judges operated the jurisdiction largely as a vehicle for making needs-only provision for the supplicant-claimant from the resources of the owner-spouse. But the House of Lords in *White v White*\(^{69}\) famously changed the law’s direction (at least for higher value cases) by introducing the germ of the sharing principle which took root in *Miller, McFarlane*\(^{70}\) alongside the principles of need

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\(^{62}\) See ORMROD, *above n. 19.\(^{63}\)

\(^{64}\) Matrimonial and Family Proceedings Act 1984, discussed below.

\(^{65}\) See ORMROD, *above n. 19. See also the position taken by the Law Commission in Law Com Nos. 52 and 86.


\(^{67}\) Of which Sir Roger Ormrod (n. 19) was one until 1974.


\(^{69}\) [2001] 1 AC 596.

and compensation as the constituent principles of the (implicit) overarching objective of ‘fairness’. And so English financial remedy law now operates a discretionary system structured (to a greater or lesser extent\(^71\)) by judge-made (rather than legislated) principle, which is nevertheless experienced by the vast majority of parties (whose combined resources do not exceed their joint needs) as a needs-based discretionary system. It has not escaped continuing criticism: for failing adequately to address key points of principle (for example, about the nature and extent of needs-based obligation; and the relationship between the three judge-made principles), for its relative lack of transparency, and concern about the production of inconsistent results on what appears to be a postcode lottery (or even judge-by-judge) basis.\(^72\)

Meanwhile, English law had had an extremely bad experience with the inception of an administratively-, rather than judicially-, operated system of Byzantine child support rules in the original Child Support Act 1991. The scheme has long since been heavily modified to remove the worst of the complexity and streamline the system, not least by now discouraging parents from using the system at all, and just directing them to the simple online calculator (which requires very few inputs) to produce the statutorily mandated sum. However, the horrifying experience of the original child support scheme (exacerbated by IT disasters) completely tarnished the reputation of rules in English family law, such that any suggestion that financial remedies law on divorce might be subjected to a more rule-based system provokes predictable wails of dissent from most quarters. This opposition is based on an assumption, given the local child support experience, that rules and formulae are necessarily ‘rigid’, and so the antithesis of the system of individualised justice that many professional actors within the court-based system imagine that they currently dispense.

Thus was the recent experience of the Law Commission for England and Wales when it tentatively suggested a more formulaic approach to spousal support.\(^73\) It is interesting to survey the responses received by the Commission to its consultation questions:

Do consultees agree with our central argument that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis that explains what has to be paid by way of spousal support, and for how long?

If consultees favour a principled reform of spousal support, should it take the form of:

\(^{71}\) Different compositions of the Court of Appeal have different views of how far it is proper or desirable to cabin the discretion with those principles: see n. 38 above.

\(^{72}\) See Law Com CP 198, Parts 2 and 3.

\(^{73}\) In the course of its project on Matrimonial Property, Needs and Agreements: CP 208 (2012), and Law Com Report No. 343 (2014).
(1) a reformed discretionary approach; or
(2) a formulaic calculation?

The Commission reported that consultees’ views of the latter question were split almost entirely along professional lines: between judges and practitioners (who largely favoured discretion, some defending the current law) and academics and others (who largely favoured exploration of the formulaic option).74

The most robust defence of discretion – in its current manifestation – was again made by the Judges of the Family Division.75 They entirely rejected the Commission’s view that the current law is ‘based … upon a mix of mutually inconsistent principles’ and that there are currently ‘multiple justification, which generate inconsistent results’. Rather, the judges felt that the law ‘is principled and is adequately certain’, whilst enabling individualised justice to be done. They drew support for their view that the law is ‘sufficiently certain and properly understood’ from the fact that about 95% of financial remedy cases brought to court are in fact settled, either prior to proceedings being launched or during the course of contested proceedings, such parties seeking a consent order reflecting the terms of their agreement to make it fully binding. But, given the discussion above, we should not be comforted by the mere fact of settlement without knowing in rather more detail how those settlements are being reached and what parties are settling for and why.76 With respect, the High Court is not the vantage point from which to evaluate the operation of the law on the ground, not least for the now more than two-thirds of divorces in England & Wales in relation to which no financial remedy order, by consent or otherwise, is obtained at all.77 The majority of divorcing couples are operating entirely off radar: we simply do not know what settlements, if any, they are reaching, and how far they reflect the loose ‘entitlements’ conferred by this essentially discretionary scheme.78

74 Law Com No. 343, from para. 3.135.
75 The full set of responses can be accessed online at: http://www.lawcom.gov.uk/wp-content/uploads/2015/04/cp208_matrimonial_property_responses.pdf; the response of the Family Division judges starts on page 234. It is interesting to note a nuanced contrast in the opinions of these senior judges and the slightly less robust view of the Association of District Judges, the successors of the Registrars: they were no longer as concerned about the absence of legislated overarching principle, but saw a need for additional guidance to ensure consistency of approach whilst still permitting uninhibited pursuit of individualised justice: from p 270.
77 See official data cited by Hess and Miles, above n. 47.
The response of the Family Law Bar Association seemed similarly affected by the vantage point of its members, who get nowhere near most cases. But once we reach the responses of the solicitors, who see rather more of the battlefield and are closer to the clients’ perspective, we are given a rather different view. Whilst discretion is clearly preferred to formulae (which it is said ‘would create ‘arbitrary and harsh’ outcomes and remove room for manoeuvre in negotiations’), there is a feeling that ‘the current law on spousal support is not a sustainable policy choice for the future’ and that the lack of principle (as they see it, contra the judges’ view) ‘can increase legal costs and the unnecessary use of limited court resources’ and encourage domestic forum-shopping; ‘can create unrealistic expectations for divorcing couples and can render the law inaccessible and uncertain, particularly for self-represented parties’. The latter, in particular, may be disadvantaged by the absence of expectation management provided to client-parties by their lawyers, who – equipped with the requisite ‘Talmudic knowledge’ – can often provide the client with some indication of the range of reasonable outcomes for their case. And, arguably most crucially, in the view of one local law society, ‘judicial discretion (whether reformed or not) is only available to the privileged few’.

The Law Commission was not dissuaded by these mixed responses from its diagnosis of the problems in the current law. For the immediate future, it recommended that the operation of the existing discretion be rendered more transparent, and any inconsistency in its exercise by judges be alleviated, by the provision by an authoritative body of (non-binding) guidance to litigants in person and judges/lawyers respectively. As to formulae, the Commission was encouraged by more positive responses from those who had attended events late in the consultation period during which the Canadian system, discussed below, was examined. That exercise made clear to those consultees that the English child support experience is not representative of all formula-based systems, and that the problems of rigidity and harsh outcomes can be avoided by intelligent and flexible system design.

However, prospects of any such scheme being devised for England and Wales seem remote, so for the time being we persist with our familiar discretionary

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79 N. 75, from p. 387.
80 Ibid, Resolution, the specialist family law solicitors’ organisation, p. 476.
81 Ibid, p. 473.
83 See HITCHINGS, MILES and WOODWARD, above n. 76, and other empirical studies.
85 See Law Com No. 343 from para. 2.44.
87 Ibid, from para. 3.121.
scheme, which—depending on judicial preferences—may over time become increasingly structured by the development of further judicial principles. To that extent, English law might be thought to be moving—by judicial activity—closer to Scots law, to which I turn next.

4.2. SCOTLAND – THE ROUGH AND READY BUT PRINCIPLED JUSTICE BRIGADE?

North of the border, despite sharing the UK-wide child support horror story, the overall picture—and attitude towards the rules/discretion discussion—is completely different, as is evident from the distinctive Scottish statutes that govern financial remedies on divorce and on breakdown of cohabiting relationships. These create not a broad discretion but expressly legislated frameworks of principles within which the judge must grant any remedy.

Scots law governing financial provision on divorce knew a fully discretionary regime only between the mid-1960s and mid-1980s. Legislation in 1964 had moved the law away from gendered, capital-only provision made (as if the guilty spouse had died!) in accordance with the fixed rights of Scots succession law, instead allowing both income and capital provision a broad discretionary basis. From 1976, ‘guilty’ spouses were permitted to seek relief, a minimal reform to recognise the new no-fault basis of divorce law. But in that same year, the Scottish Law Commission was already consulting on further reform, concerned about the lack of any stated objective for or principles underlying the exercise of the discretion. This, it considered, entailed the ‘abdication of all collective responsibility in favour of the conscience of the single judge’, and the resulting lack of transparency and consistency in awards would make it more difficult for lawyers to advise and for parties to settle cases amicably; instead, it was said, a discretionary scheme ‘is calculated to increase animosity and bitterness’.

And so, in the same year that the English Law Commission was making the recommendations that from 1984 rendered English law arguably even more discretionary, their Scottish counterparts were advocating the reforms enacted in the Family Law (Scotland) Act 1985, which remains in force today. The principled model of this Act in turn formed the basis from which the Commission later made

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88 Succession (Scotland) Act 1964, s. 26.
89 Divorce (Scotland) Act 1976.
92 Ibid.
93 LAW COM, above n. 68.
recommendations for more limited financial provision between cohabitants,\textsuperscript{94} enacted in the Family Law (Scotland) Act 2006.\textsuperscript{95}

The 1985 Act commands the judge to make ‘such order, if any, as is (a) justified by the principles set out in section 9 of this Act; and (b) reasonable having regard to the resources of the parties’.\textsuperscript{96} Those principles, each supported by its own supplementary rules/checklists, require: (1) the ‘fair’ sharing of the net value of matrimonial property, which ordinarily entails equal sharing unless prescribed special circumstances obtain; (2) that ‘fair account’ be taken of ‘any economic advantage derived by either person from contributions of the other’ and of ‘any economic disadvantage suffered by either person in the interests of the other person or of the family’; (3) ‘fair’ sharing of the economic burden of child care following divorce; (4) reasonable transitional support (for up to three years) to facilitate adjustment where substantial financial dependency has arisen during the marriage; and (5) provision relieving hardship for a reasonable period (with no cut-off) where one party ‘seems likely to suffer serious financial hardship as a result of the divorce’.\textsuperscript{97}

A team of empirical researchers recently concluded that the 1985 Act was ‘built to last’.\textsuperscript{98} Their ‘overwhelming finding’ was one of satisfaction with the current law, with no desire for substantial reform and caution even about tinkering with it. Both legal practitioners and judges felt that the law works well, offering the right balance between certainty and flexibility – by contrast with the broad discretion of English law, invoked by several respondents as an example of how not to regulate this aspect of family law.\textsuperscript{99} While the principles are felt to provide a clear substantive framework within which the decision must be taken, the varied tools for effecting the required asset transfers provide considerable flexibility and scope for creativity.\textsuperscript{100} In the view of one judge interviewed by the researchers, the five principles strike the right balance because they are:

‘nice and high level… not micro-managed… but at the same time it’s not palm tree justice where the judge can do what he sees fit in all the circumstances. … People have

\textsuperscript{94} SCOTS LAW COM, above n. 17.
\textsuperscript{96} Family Law (Scotland) Act 1985, s. 8(2).
\textsuperscript{97} Ibid, ss. 9-11.
\textsuperscript{98} J. MAIR, E. MORDAUNT and F. WASOFF, Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce, Glasgow, 2016: \url{http://eprints.gla.ac.uk/117617/}
\textsuperscript{99} Ibid, from p. 155
\textsuperscript{100} Ibid, from p. 96, though the Act only allows periodical payments to be used to give effect to the last three principles: see 1985 Act, ss. 13-14, unhelpfully depriving the Scots of a tool that could usefully help mitigate concerns about the difficulties of predicting the future for the purposes of economic disadvantage claims.
pegs to hang their arguments on... and therefore people generally will know where they are.'

The point about micro-management is an interesting one for the New Zealand perspective, particularly in relation to section 15 of the PRA 1976. Where the New Zealand case law, responding to the various jurisdictional limits drafted into section 15, has adopted a rather pernickety, quasi-formulaic approach, Scots case law and legal practice – in so far as it deploys the economic advantage/disadvantage principle – deploys a broad brush, doubtless aided by less prescriptive statutory drafting.

However, as in New Zealand, it seems that the economic advantage/disadvantage principle has been somewhat under-used on divorce. There is a perception that it is hard successfully to obtain a departure from equal sharing on that basis (the ‘fair’ sharing of property under that principle adequately addressing the disadvantage), that it is complex to argue, not easy to prove and quantify given its crystal-ball gazing aspect (save in the case of forgone professional careers with clear pay-scale progression) and inhibited by a conservative professional and judicial approach.

But the economic advantage/disadvantage principle may be undergoing a small renaissance thanks to its centrality to the scheme applicable between cohabitants on separation. Cohabitants’ financial settlements are governed only by a version of that and the economic burden of childcare principles, and so the applicant starts not with a half-share of relationship property, but only with what he or she owns. This has necessarily required legal professionals and judges to give the principle rather closer attention than it has received in the matrimonial context, and the Supreme Court decision in Gow v Grant has clearly signalled that a broad approach should be taken both to interpretation of the jurisdictional limits inherent in the principle’s drafting and to the quantification of awards under it.

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101 Ibid, p. 120.
102 Ibid, from p. 64.
103 Respondents were critical of the decision in Coyle v Coyle 2004 Fam LR 2 for foreclosing arguments under this principle. But the judge declined to make an additional award under it because the substantial recent increase in value of the assets allocated to the wife under the first principle (for which purpose matrimonial property is ordinarily valued at the date of separation) meant that, viewed in the round, the wife was enjoying a significantly more valuable award than the first principle alone would have allowed her. Lady Coyle’s judgment is otherwise notable for its broad-brush approach to quantification of economic disadvantage, in preference to use of actuarial tables of the sort used for personal injury awards in tort law.
104 Ibid, from p. 72, discussing the Family Law (Scotland) Act 2006.
106 An encouragement perhaps taken rather too far in Whigham v Owen [2013] CSOH 29, where the judge paints not so much with a broad brush as with a roller! Cf suggestions by some research respondents that the more technical (clumsy?) drafting of the economic advantage/disadvantage principle in the 2006 Act encourages a more forensic approach: Mair et al, above n. 98, p. 73.
So, Scotland, a small jurisdiction with a close-knit legal community, seems very largely content with its lot. But it is questionable whether the Scots have embraced the full potential of their legislative scheme, particularly as a means of achieving greater substantive economic equality in cases of economic advantage and disadvantage. There seems to be a reluctance to move out of the equal sharing harbour into the choppier waters of economic disparity, perhaps rightly conscious of the loss of certainty that that will entail. The question is how, if at all, that important substantive issue can be dealt with, particularly when – as in the Scottish legislation – the option of using periodical payments to deal with that head of claim is not available, and broader discretion is considered alien.

4.3. CANADA – THE RULE-FRIENDLY DISCRETION-PHOBES?

Lastly, I come to Canada, whose financial remedy laws share some features with New Zealand but diverge in other respects. The first thing to note is Canada’s unusually happy experience with child support rules, which have from the outset been administered by judges rather than by faceless bureaucrats. Unlike England & Wales, Canada is not suffering from national post-traumatic stress disorder brought on by a rules-based maelstrom, leaving it better able to take a measured view about the potential of more rule-like systems to help achieve a balance of certainty and fairness on divorce – and to conclude that ‘average’ rather than ‘individualised’ justice may be at least tolerable and practical. Rather, Canada’s pointedly unhappy experience has been with discretion, and perhaps crucially – unlike in England & Wales – academics, practitioners and judges alike were united in their protest against it.

Canadian law, like New Zealand law, treats property division – governed by the relevant provincial or territorial statute – separately from spousal support on divorce, governed by the federal Divorce Act 1985. Like other common law jurisdictions, Canada’s first forays into property distribution on divorce entailed discretionary systems of equitable distribution. But typical concerns about the operation of judicial discretion in this arena led each of the provinces and territories from the late 1980s onwards to legislate more explicitly for equal sharing of matrimonial property, permitting departure from equal sharing on more or less tightly circumscribed grounds. Meanwhile, spousal support under the federal legislation remains a matter for judicial discretion, framed by four, familiar objectives.

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107 Noted by ROGERSON, above n. 40, p. 6.
108 Ibid.
111 R.S.C. 1985, c.3 (2nd Supp.), s. 15.2. Cf provincial and territorial statutes dealing with spousal support on separation.
112 See generally BALA, above n. 20.
set out in s.15(6) of the 1985 Act: to recognise any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; to apportion between the spouses any financial consequences of child care going beyond any obligation for child support; to relieve any economic hardship arising from the breakdown of the marriage; and, as far as possible, to promote economic self-sufficiency within a reasonable period.

This was a considerable advance on the much more broadly framed predecessor Divorce Act 1968, which – typically of many of the first no-fault divorce era statutes – contained no principles or even a checklist to guide the judge’s decision. But matters took an unhappy turn thanks to the cumulative impact of three Supreme Court of Canada decisions: Pelech v Pelech,114 Moge v Moge115 and – most problematically – Bracklow v Bracklow.116 These decisions between them introduced a plethora of mutually inconsistent theories of spousal support – clean break, compensatory and non-compensatory – which left the law floundering in a state of abject ‘rulelessness’.117 It was impossible to identify precisely whether, when and why spousal support liability would arise in any given case, and – in particular, the Supreme Court providing scant guidance on this issue – to quantify awards and determine their duration pursuant to those theories.

The resulting experience of spousal support cases created a perception that the law was ‘excessively discretionary, creating an unacceptable degree of uncertainty and unpredictability’, with the result that individual judges’ ‘subjective perceptions of fair outcomes play[ed] a large role in determining spousal support ultimately ordered’ and lawyers struggled to predict case outcomes, which in turn impeded efficient settlement of cases. And, as was noted earlier, parties who lacked access to legal advice or who were in weak bargaining positions were failing to pursue support claims at all. All in all, ‘the uncertainty and unpredictability … cast doubt upon the fairness of the outcomes, thus undermining the legitimacy of the spousal support obligation’.118

The response was the monumental project led by Professors Carol Rogerson and Rollie Thompson,119 under the aegis of the Department of Justice, to create the (non-binding) Canadian Spousal Support Advisory Guidelines (‘SSAG’) in order to facilitate decision-making about the appropriate quantum and duration of

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113 See BALA, above n. 20, from p. 24.
118 ROGERSON, above n. 40, p. 5.
support payments. The SSAG presuppose that a positive decision has already been made about the claimant’s entitlement to support (and so the respondent’s liability to pay). The guidelines are based on extensive research to identify patterns in a range of case-types across Canada, converted into a suite of mathematical formulae for both with- and without-child support cases. The basic components of the (more straightforward) without-child support formula are income disparity and duration of marriage; the various with-child support formulae are more complex, incorporating (amongst other things) child support, associated tax deductions and welfare benefits. The SSAG were first published in 2008, subject to periodic reviews and revision by their architects since, and their use has been approved by several provincial Courts of Appeal. It is important to appreciate that the guidelines are quite different in their form from typical child support formulae. Where the latter will produce a single number, which the payor is obligated to pay, the former instead operate in a more nuanced and flexible way. They produce a range of figures, for both quantum and duration of support payments, from within which the judge (or parties) then settle on an amount appropriate for their case, given its particular features; the resulting liability can also be capitalised (‘restructured’) to permit a clean break. Their proper (quite sophisticated) operation depends (at least in the case of the more complex with-child-support formulae) on the use of software and the availability of legal advice to pitch the final award amount appropriately.

Guidelines avoid the need (beyond the initial decision that some support liability exists) to establish precise causation and measures of economic disadvantage or need in response to which the support is being required. Instead, they adopt proxy measures for those often unprovable, immeasurable items, and an immediately quantified way of expressing underlying principles (of income-sharing, of unravelling the merger of the parties’ lives over time, of differential loss of the marital standard of living, or whatever principle is adopted), avoiding the head-scratching (and costs) that necessarily flow from any endeavour to identify and calculate these de novo on an individualised basis in each case. They may therefore be said transparently to provide a quantitatively rather than qualitatively expressed guide to the acceptable range of ‘fair’ outcomes for each individual case. This in turn may ‘encourage both spouses that the scope for argument is fairly well defined and that fairness can in some way be quantified’, aiding settlement.

The current guidelines are available here: www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-lfdpae.html

See RODERSON, above n. 119, p. 259-60.
While English and Scots lawyers can generally convert their qualitatively expressed laws into a range of numbers, that process is self-evidently less transparent than in the Canadian scheme.
Response of solicitor and mediator Julia Thackray to the English Law Commission’s recent consultation: p. 587.
And, bearing in mind the negotiation theory literature discussed above, the guidelines may particularly help support the claimant in those negotiations: ‘Rather than the payor starting from zero (or as close to zero as possible), the payor is now informed of a “range”, as is the recipient’.124

The Canadian guidelines unashamedly deliver ‘average’ rather than ‘individualised’ justice. But as Ira Ellman, who was to become principal architect of the American Law Institute’s spousal support formula in the Principles of the Law of Family Dissolution,125 argued in his seminal article on alimony, ‘Even crude approximations of theoretically defensible criteria are probably better than intuitive estimates of what is “fair” under a system lacking established principles of “fairness” in the first place.’126 While acknowledging various problems being encountered in the use of the guidelines – not least their relative inaccessibility to unrepresented parties – Carol Rogerson concludes in her recent review that ‘in this highly-contested area of family law, the greater consistency and predictability of outcomes ultimately leads to greater fairness and legitimacy for the substantive remedy itself’.127

5. WHERE NEXT FOR NEW ZEALAND: ‘O, CANADA!’?

And so the flow of my argument reaches its natural conclusion: I think the best future for New Zealand lies in something akin to the Canadian scheme. In what follows, I will unavoidably encroach briefly on Mark Henaghan and John Caldwell’s assignments.

Like Canada, New Zealand started its no-fault life with a fairly broad discretion in the Matrimonial Property Act 1963, but was unhappy with the conservativism with which judges exercised their discretion,128 and so moved away from discretion in its Matrimonial Property Act 1976. Properly recognising the inadequacy of equal sharing of capital under the original 1976 Act, it sought to provide a means of securing greater substantive economic equality through the introduction of section 15 in 2001. But has been discomfited by the experience of trying to operate the discretion inherent in that section.
It is not part of my brief here to identify the substantive basis on which economic resources should be distributed on divorce, merely to identify the vehicle(s) that should be used to give effect to whatever rationales are selected. But the Principles set out in section 1N(a) to (c) of the 1976 seem to me to express the right essential ideas: a basic principle of equal sharing modified by a recognition that true equality requires a form of substantive economic equality that shares the economic burdens created by the relationship and its demise, as well as its capital gains. The Principle enshrined in section 1N(d) rightly acknowledges that the virtue of justice needs to be counterbalanced with the virtues of speed, simplicity and low cost. But the current law is failing to achieve that balance: substantive economic equality is proving too difficult to operationalise by way of judicial discretion. Some new mechanism is needed.

Inevitably, the nettle of average, rather than individualised, justice must be grasped. In my view, the current problems are best resolved with a continuing rule of equal sharing of relationship property (subject perhaps to its other current exceptions), combined with a rule-like, but flexible, scheme (as exemplified by the Canadian guidelines) to achieve some version of substantive economic equality, the basis of which would need to be articulated to the extent felt adequate to identify broadly the types of case in which equal sharing should be departed for on that basis. The latter element would replace section 15 and bring what is now the Family Proceedings Act 1980 jurisdiction within one overall statutory scheme for economic adjustment (capital and income). The numbers produced via the equal sharing rule and the guidelines for substantive economic equality would then be implemented using a remedially flexible response, i.e. a comprehensive toolkit of court orders for the transfer (and temporary use) of capital and income resources. Judges and parties could then devise whatever practical divvying of re-


\[130\] The minority report of the Parliamentary Select Committee on the then Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25, 109-3, p. 44 seem to have been prescient as regards section 15: 'The Government has got it wrong because letting judges decide property division on a case-by-case basis means there will be no certainty any more. Different judges will make different assessments giving different reasons.'

\[131\] I.e. the equivalent of the prior, 'liability' stage which the Canadian SSAG do not deal with. Note that the American Law Institute’s recommended formulae explicitly operate simply in response to the fact of the relationship (and its duration/presence of children), pragmatically without requiring proof of any specific loss or causation of loss: for an overview, see J. Miles, 'Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976' [2003] New Zealand Law Review 535, from p. 542.

\[132\] In particular, by granting occupation rights over the former family home which may defer sale and division of proceeds to a later date, e.g. for the benefit of children of the family.
sources to transfer the required quantum best suited their circumstances. Flexibility in that practical arena is more important, desirable and far more tolerable than flexibility (to the point of inconsistency) in establishing and quantifying liability.

Devising a guidelines scheme analogous to the SSAG for New Zealand would be no small task, particularly in the absence of a similarly large pool of practice, particularly reported court orders, on which to draw in undertaking that exercise. It would require a determination to eliminate Hart’s problems of RIF and RIA that drive the law-maker towards discretion by accepting a far narrower range of relevant facts and settling on an agreed formula through which those facts would then point towards a clearly quantifiable answer (or rather, range of answers). But if they can devise a scheme for the nearly 10 million square kilometres and over 36 million people of Canada, conducting a similar exercise across the 268,000 square km and 4.7 million Kiwis must be feasible.