The Bar Council

Law reform essay competition 2025: highly commended – Dominic Goodall

Recognising domestic abuse as conduct: Towards a principled and proportionate framework for financial remedies

Introduction

Financial remedies are widely recognised as an area well overdue for reform. Recent years have seen a series of reports, most notably the Law Commission's *Scoping Report on Financial Remedies (2024)*, which provided a comprehensive analysis of the current law and identified a range of potential avenues for change.[1]

Whilst systemic change of financial remedies is clearly needed, this essay focuses on one particularly problematic aspect within divorce proceedings: the extent to which domestic abuse should be regarded as inequitable conduct for the purposes of computing and distributing assets on divorce.

Other areas of family law have evolved to recognise the impact of conduct on the outcome of cases, particularly in children matters involving domestic abuse or coercive control.[2] Yet in financial remedies, the role of conduct remains unsettled and conceptually unclear, leaving this area increasingly out of step with public expectations and broader legal developments.[3]

---

[1] Law Commission, *Financial Remedies on Divorce and Dissolution: A Scoping Report* (Law Com No 417, 2024); "Scoping Report".

[2] Family Procedure Rules 2010, PD 12J, para 2A (recognising the effect of domestic abuse in child welfare decisions).

[3] E Hitchings and C Bryson, *Dividing property and finances on divorce: what happens in cases involving domestic abuse* (University of Bristol, 2024); "Bristol University Report".

To ignore domestic abuse as conduct altogether risks creating incoherency within the family justice system and allows serious wrongdoing to go unacknowledged. At the same time, reform must be approached pragmatically. Any expansion of conduct risks overwhelming already stretched courts with satellite disputes.[4]

Various proposals for reform have been advanced. However, many, whilst well-intentioned, overlook the practical consequences of extending the role of conduct. Reform should strike the right balance by acknowledging the effects of domestic abuse, without opening the floodgates. This requires, first, a clear statutory definition of conduct, as seen in comparative jurisdictions such as Australia[5], and second, a structured but discretionary compensation framework enabling judges to respond proportionately to domestic abuse, without letting it become the dominant prism through which financial remedies outcomes are determined.

The law

The statutory foundation for conduct in financial remedies is found in section 25(2)(g) of the Matrimonial Causes Act 1973. This provision requires the court to consider "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court by inequitable to disregard it".[6] Because the financial remedies jurisdiction is largely uncodified and discretionary, the development of this principle as with other factors in section 25 has been left primarily to the courts.[7]

The threshold for conduct remains exceptionally high. In *Wachtel v Wachtel* the Court of Appeal held that conduct must be "gross and obvious" before it can properly affect the financial award.[8] This stringent standard was affirmed by Baroness Hale in *Miller v Miller; McFarlane v McFarlane*.[9] Another threshold for recognising conduct, sometimes termed the "gasp factor", was described in *S v S*.[10] These principles collectively demonstrate that conduct must be so exceptional, obvious, or extreme, as to make it impossible for the court to ignore.

A structured account of the law concerning conduct was set out by Mostyn J in *OG v AG*. Mostyn J identified four categories of conduct. Firstly, personal misconduct, as

---

[4] Law Commission, *Scoping Report* (n 1) para 9.59.

[5] Ibid para 9.57; see also Family Law Amendment Act 2024 (Australia) Schedule 1 Part 1 Section 3, which amended the Family Law Act 1975 (Australia).

[6] Matrimonial Causes Act 1973, section 25(2)(g).

[7] Law Commission, *Scoping Report* (n 1) para 1.4.

[8] *Wachtel v Wachtel* [1973] Fam 72 at [80].

[9] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [145]

[10] *S v S (Non-matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 at [46].

outlined above; behaviour so "gross and obvious"; secondly, financial misconduct including dissipation of assets; thirdly, litigation misconduct including failure to comply with orders or dishonest presentation of evidence; and fourthly, evidential conduct, where adverse inferences are drawn from non-disclosure or concealment.[11]

These categories were reaffirmed by Peel J in the recent and controversial case of *Nv J*. Peel J held that "the high bar to conduct claims ... is undisturbed by the recent focus on domestic abuse in society and the family justice system".[12] He also affirmed the approach from *Tsvetkov v Khayrova*, which established a two-stage test for pleading conduct. First, it is incumbent upon the party asserting the conduct to prove the alleged facts, ordinarily at the earliest opportunity; secondly, the court must then consider the extent to which the conduct affects the financial outcome.[13]

N v J therefore appears, at least for the present time, to have closed the door on expanding the scope of conduct to include domestic abuse, a factor that many practitioners and advocacy groups, including Resolution, view as unsatisfactory given the prevalence of domestic abuse in family proceedings.[14]

The problems with the current law

As with the other factors in section 25(2)(g), the interpretation of this subsection remains opaque and inconsistently applied. There is no coherent definition of what amounts to inequitable conduct, leaving judges to exercise wide discretion. This discretion, though designed to achieve fairness in individual cases, has produced a raft of unpredictable outcomes and a perception of arbitrariness.[15]

The problem is compounded by the fact that financial remedies law has diverged sharply from other areas of family law and from public perception. Findings of serious domestic abuse that are determinative in children proceedings are often treated differently in financial claims[16], creating an impression of injustice and inconsistency.

The exclusion of abusive conduct from financial remedies risks portraying economic outcomes for victim-survivors as morally neutral, even where one spouse's actions have clearly contributed to financial inequality. This disconnect is particularly striking

---

[11] *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52 (Mostyn J) at [34]-[39].
[12] *N v J (Financial Remedies: Conduct) [2024]* EWFC 193 (Peel J) at [39(i)].
[13] Ibid, [3] and [37].
[14] Resolution, *Domestic abuse in financial remedy proceedings* (2024) 21.
[15] Law Commission, *Scoping Report (n 1)* paras 9.19-9.21.
[16] Femi Ogunlende, Is the Current Approach to 'Conduct' in Financial Remedy Proceedings in Need of Reform? (Financial Remedies Journal, 22 Nov 2024) https://financialremediesjournal.com/is-the-current-approach-to-conduct-in-financial-remedy-proceedings-in-need-of-reform/ accessed 20 October 2025.

given the obligations imposed by Practice Direction 12J, which requires courts in children proceedings to give special consideration to the impact of domestic abuse on the welfare of the child and the victim-survivor.[17] No such parallel obligations are found in the financial remedies regime.

This inconsistency between the two regimes remains difficult to resolve. There is a concern that broadening the scope of conduct would open the floodgates to acrimonious and costly satellite disputes.[18] The *Scoping Report* notes that some stakeholders had expressed concern that the expansion of the conduct factor could place additional strain on court resources and contribute to delay.[19]

As Femi Ogunlende observes, the origin of the conduct provision in the Matrimonial Causes Act 1973 was to ensure that the court did not "return to a situation in which they would be routinely concerned with hearing the parties' 'mutual recriminations'" as had happened before the passing of the 1973 Act.[20] Yet over time, the instinct to avoid questions of marital fault has invariably produced a judicial gloss, one that has left domestic abuse falling below the high threshold.

This judicial resistance to moral blame is evident in case law. In *HO v TL*, Peel J admonished the parties for making pejorative allegations, observing that "the court's function is not to pick over the bones of the marriage and attribute moral blame."[21] In the pursuit of removing all vestiges of fault and blame from financial remedies, it is arguable that the pendulum has swung too far in the opposite direction. The result is a framework that aspires to fairness but systematically excludes any moral wrongdoing from its calculus unless it has a direct and quantifiable financial consequence, or is so extreme that it shocks the conscience of the court.[22]

Proposals for reform

The *Scoping Report* addressed the issue of conduct in depth, recognising both the conceptual difficulties and need for reform.[23] Various suggestions for reform were put forward, including giving greater recognition to domestic abuse as a form of conduct and developing a clearer statutory or procedural definition of the term.[24] Resolution has specifically called for a Practice Direction setting out the approach the court should take

[17] Family Procedure Rules 2010, PD 12J, para 2A.

[18] *N v J [2024] EWFC 184,* [2024] 4 WLR 64 at [38 (ix)].

[19] Law Commission, *Scoping Report* (n 1) paras 9.58-9.62.

[20] Ogunlende (n 16).

[21] *HO v TL (Costs)* [2023] EWFC 216 at [7].

[22] One such example of extremity being *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990.

[23] Law Commission, *Scoping Report* (n 1), chapter 9.

[24] Ibid, paras 9.17-9.25.

where there is evidence or allegations of domestic abuse, to provide clarification that "all forms of domestic abuse can cross the statutory threshold of conduct that is inequitable to disregard".[25] Such a Practice Direction, Resolution states, could also explain how conduct may affect the court's assessment of needs and sharing cases.[26]

The *Bristol University Report* supports the introduction of a Practice Direction and highlights empirical work by Crisp et al, noting the significant financial disadvantage experienced by survivors of domestic abuse.[27] The proposal for a Practice Direction is both sensible and survivor-focussed; however, the proposals do not seem to address the practical consequences of an expansive approach to conduct. Apart from suggesting automatic disclosure of findings of abuse from other proceedings[28], few viable mechanisms are proposed to manage the evidence and procedural challenges that would follow. The *Bristol University Report* also acknowledges that any change in the law requires consideration of the implications for court users, staff and workload, as well as the growing number of divorces resolved outside the court system.[29]

The *Scoping Report* also recognises the difficulty of translating the emotional and physical impact of abuse into a quantifiable financial figure.[30] In some cases, the consequences may be readily identifiable, but in others the assessment will remain an inherently imprecise exercise of judicial discretion. Judges inevitably bring their own biases and assumptions to such evaluations, including differing perceptions of the severity or significance of conduct. It is difficult to see how a court can weigh an isolated yet severe incident of physical violence against a pattern of coercive control sustained over many years.

The *Scoping Report* contains an under-explored but valuable suggestion. One stakeholder proposed that compensation could be awarded to reflect proven conduct."[31] It is surprising that this modest but significant idea did not feature more prominently. Properly developed, a compensation mechanism could provide an equitable means of acknowledging serious wrongdoing without necessarily requiring the courts to forensically calculate each case of domestic abuse in monetary terms.

---

[25] Resolution, (n 14) 31.

[26] Ibid.

[27] Hitchings and Bryson, (n 3) 68.

[28] Resolution, (n 14) 31.

[29] Hitchings and Byson, (n 3) 68-69.

[30] Law Commission, *Scoping Report* (n 1) para 9.50.

[31] Ibid, para 9.101.

Resolution rightly states that "perpetrators should not be able to achieve a better financial outcome because of previous domestic abuse or ongoing abuse."[32] Yet financial remedies must not become so punitive as to be retributive. Conduct should remain in careful tension with the other section 25 factors to ensure that the overall apportionment remains fair, without allowing conduct to become the sole prism through which outcomes are determined.

Reform, therefore, must balance accountability with procedural pragmatism, ensuring that the courts are not overburdened or drawn into prolonged evidential disputes.

An outline for reform – two limbs

Having identified the conceptual and practical shortcomings of the current law, as well as some suggestions for reform, the challenge is to construct a principled yet pragmatic framework that provides a uniform approach without overwhelming the courts. A combined approach is proposed, combining two limbs: first, a statutory definition of conduct, and second a discretionary compensation framework for its application.

The first limb – adopting a statutory definition of conduct

First, the law should adopt a statutory definition of inequitable conduct, modelled on comparative jurisdictions, identifying the categories of conduct capable of consideration under section 25(2)(g).

The Scoping Report highlights that jurisdictions including Australia have recognised specific forms of misconduct as relevant to property division.[33] The Family Law Amendment Act 2024 (Australia), which came into effect in June 2025, expressly includes economic or financial abuse within the statutory definition of "family violence."[34] Although at the time of writing, no reported judgments have yet interpreted the provisions, it illustrates that recognising forms of abuse in legal systems operating a largely discretionary framework for financial remedies is achievable.

In the context of England and Wales, a statutory definition should extend to domestic abuse, provided it is evidenced (as set out below). Such a definition would eliminate

[32] Resolution, (n 14) 30.

[33] Law Commission, *Scoping Report* (n 1) para 9.57, see also n 5 introducing recognition of economic and financial abuse within property settlements.

[34] Ibid, para 9.57.

the current uncertainty about whether domestic abuse properly falls within section 25(2)(g), bringing greater coherence and certainty to the law.

The second limb – a discretionary compensation framework

The second limb of the proposed reform is the introduction of a discretionary compensation framework for inequitable conduct that cannot readily be quantified in monetary terms. In such cases, judges should be empowered to apply a modest deduction of the net marital assets, where domestic abuse has been proven.

The second limb draws inspiration from the Abuse Redress Measure and framework soon to be adopted by the Church of England for survivors of abuse within the Church.[35] When operational, that scheme will compensate survivors with a baseline payment, with a sliding scale uplift in recognition of aggravated harm or additional suffering.[36] By adopting a similar model in the financial remedies context, the courts should be empowered to apply a baseline deduction with a modest uplift in cases of extreme severity of domestic abuse.

To preserve procedural efficiency, no separate fact-finding hearings should be permitted solely for this purpose. Instead, courts should rely on established evidence such as findings of fact in parallel children proceedings where domestic abuse has been proven[37] and criminal convictions.[38]

This proposal also aligns with the two-stage approach articulated in *Tsvetkov v Khayrova*, requiring first that the party alleging conduct prove the underlying facts, and secondly that the court assess the impact of that conduct in light of the section 25 factors.[39]

Cases involving financially quantifiable conduct such as reckless dissipation or deliberate non-disclosure should remain within the existing framework, as these cases lend themselves better to direct financial adjustment rather than discretionary compensation.

---

[35] Church of England, Abuse Redress Measure (GS2325A) (General Synod, June 2024) https://www.churchofengland.org/sites/default/files/2024-06/gs-2325a-abuse-redress-measure.pdf accessed 22 October 2025. See Section 9 for determination of award of redress.

[36] Andrew Lord, 'How abuse redress schemes can empower survivors' (Leigh Day Blog, 29 September 2025) https://www.leighday.co.uk/news/blog/2025-blogs/how-abuse-redress-schemes-can-empower-survivors/, accessed 22 October 2025.

[37] Resolution, (n 14) 31.

[38] Law Commission, *Scoping Report* (n 1), paras 9.72-9.79.

[39] *Tsvetkov v Khayrova* [2023] EWFC 130, [2024] 1 FLR 937 at [43] to [47].

Addressing the evidential gap

The Scoping Report acknowledged the difficulties in proving domestic abuse and noted that its stakeholders were divided in their views on the evidence that would be required to prove that domestic abuse had occurred.[40]

A difficulty arises that there is a risk of excluding victim-survivors who, through fear, stigma or lack of access to justice, never sought to complain about the abuse before initiating divorce proceedings. Research has demonstrated that the majority of survivors of domestic abuse do not report to the police[41], and that findings of fact are ordered in only a small fraction of children proceedings.[42] In practice, therefore, many people who have suffered domestic abuse could remain without recognition.

This is an uncomfortable truth but not an insurmountable one. Whilst formal findings should ordinarily form the basis for conduct adjustments, the court should retain discretion to consider other reliable evidence. It should be possible to include cautions, Domestic Abuse Protection Notices / Orders, and evidence of non-molestation or occupation orders. The compensation framework must remain discretionary; however, guidance will need to be provided to ensure that there is consistency in judicial operation. The courts would have to undertake scrutiny of such documents quickly and forensically before exercising discretion, thereby preserving the ability of those victim-survivors to seek redress who, for legitimate reasons, were unable to seek it earlier, and preserving the ability of the court to decline to award compensation in cases where concerns arise about the reliability or authenticity of the evidence relied upon.

The rationale

The intention of this reform is not to reintroduce fault through the back door of financial provision, but to ensure that conduct is treated fairly where it has materially affected one party's financial position or has caused a party injustice. The proposed

---

[40] Law Commission, *Scoping Report* (n 1) para 9.72.

[41] Office for National Statistics, Domestic abuse victim characteristics, England and Wales: year ending March 2024 – characteristics of victims of domestic abuse based on findings from the Crime Survey for England and Wales and police recorded crime (November 2024) https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2024, accessed 22 October 2025.

[42] Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases (June 2020) 90-93, https://assets.publishing.service.gov.uk/media/5ef3dcade90e075c4e144bfd/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf, accessed 22 October 2025.

framework recognises the deleterious impact of abuse whilst preventing the courts from becoming mired in protracted factual disputes.

Concerns that such reform would undermine the no-fault divorce regime are misplaced. The proposal does not revisit the reasons for marital breakdown, but instead addresses the post-divorce consequence of domestic abuse. Just as the current law adjusts for reckless dissipation of assets or deliberate non-disclosure, so too should it recognise serious abuse that has a tangible bearing on fairness and justice.

In practical terms, in needs cases, this reform would ensure that proven domestic abuse is taken into account in the overall financial settlement, acknowledging harm, and making a positive difference to future financial circumstances of a victim-survivor in their journey towards independent living. In sharing cases, a discretionary compensation framework is admittedly a blunt instrument; a small deduction may appear negligible or tokenistic, yet in cases where the financial consequence of conduct is not readily quantifiable, an arbitrary figure is necessary to maintain proportionality, whilst signalling that domestic abuse is being acknowledged in the overall financial award.

Anita Mehta and Olivia Piercy have argued that viewing domestic abuse as a scale, "with physical violence at the extreme end, and emotional abuse at the lesser end" is outdated and problematic.[43] Yet any attempt to put a monetary figure on domestic abuse inevitably requires a value judgment as to the severity of the conduct and its impact on the fairness of the financial outcome. The current approach tends to assume that victims and survivors must be financially worse off as a result of domestic abuse; however, that is not necessarily the case, and the victim-survivor could be in a stronger financial position than the other spouse. A compensation framework will need to be capable of acknowledging degrees of severity and the long-term impact upon the victim-survivor without reverting to a hierarchy that privileges physical harm over psychological or economic harm.

Conclusion

The current treatment of domestic abuse within financial remedies is unclear, inconsistent, and ostensibly out of step with other areas of family law. The rigid and narrow scope of conduct under section 25(2)(g) of the Matrimonial Causes Act 1973 and its case law excludes all but the most extreme wrongdoing, largely disregarding

[43] A Mehta and O Piercy, "Is it time to consign the 'gasp' factor to the history books?" (Financial Remedies Journal, 18 October 2023), https://financialremediesjournal.com/is-it-time-to-consign-the-gasp-factor-to-the-history-books/, accessed 22 October 2025.

conduct that is not readily quantifiable in financial terms. It is, in many ways, the product of judicial caution and a desire to avoid reopening the door to fault.

Moderate reform, anchored in a new statutory definition of conduct and proportionate compensation would restore coherence to this area of law whilst protecting the court from prolonged satellite disputes. Such reform would not reintroduce fault into divorce, but would ensure that serious misconduct is recognised where it materially affects fairness and justice.

Ultimately, the goal is to make financial remedies more principled and transparent: capable of recognising the harm caused by domestic abuse. The law must evolve to reflect the modern realities of abuse within marital relationships, but it must do so with restraint. Conduct should inform financial remedies, without eclipsing the other factors that underpin fairness. Above all, we owe it to victim-survivors to ensure that fairness in financial remedies no longer demands such a high bar in the face of wrongdoing.