Contributions: an analysis

Michael Kearney SC, Waratah Chambers, Sydney

In search of a coherent theory …

- *Mallett* (1984) FLC 91-507 rejected the idea that there should be starting point of equality or other guidelines of general application in relation to the assessment of contributions.

- a partnership, is it a social construct, is it a status attracting remedial relief, is it ‘the vibe’

In search of appellate guidance …

- Deane J in *Mallett*

It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" of a "codeless myriad of precedent" and a "wilderness of single instances"

- Deane J continues … *It is inevitable and desirable that the need for such consistency should lead the judges of the Family Court to look to what has been said and decided in prior cases for assistance and guidance in determining what is just and appropriate in the differing circumstances of subsequent cases …*

… and that shared experience and accumulated expertise should lead to the emergence of generally accepted concepts of what is prima facie just and appropriate in particular types of cases.

BUT …

Guidelines ?

Mason and Deane JJ say ‘yes’

Brennan J in Norbis says ‘no’

‘YES’ – *Smith & Fields* [2012] FamCA 510 (Murphy J)

- *Wallis & Manning* (2017) FLC 93-759

Anson and Meek (2017) FamCAFC 257

- Murphy J 'Yes'
- Aldridge and Cleary JJ 'No'

… if the aim of consistency is consistency of results, then we would suggest that this aim focuses on mathematical equivalence – in reality to set some kind of norm or range, which, of course, was expressly eschewed in Wallis and the authorities upon which it relies.

but why are we here ?

the submissions before us did not challenge the manner in which Wallis should be approached but we have felt it necessary to express our views which, perhaps, may be of assistance at some stage in the future. As can be seen, we do not wholly embrace the reasoning in that case.

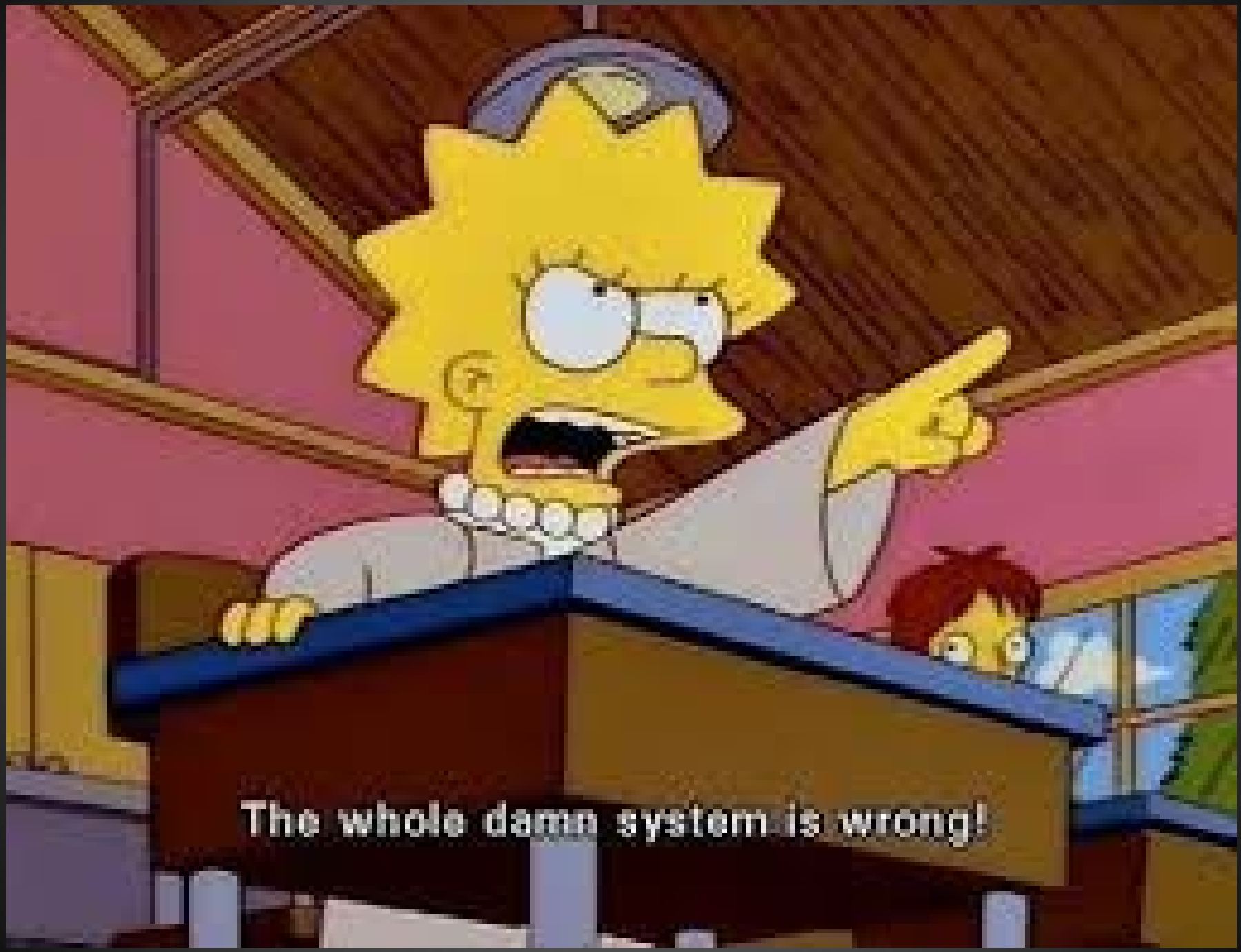
So … ?

- *Where does this difference of appellate decisions leave the trial judge at first instance? Although I find the reasoning of the plurality in Anson persuasive in many respects, the use of comparable cases is a practice long entrenched in the exercise of the s.79 discretion. Moreover, Wallis is a unanimous decision of the Full Court, while Anson is decision by a majority. The weight of authority appears to support the use of comparable cases in the assessment of contributions.*

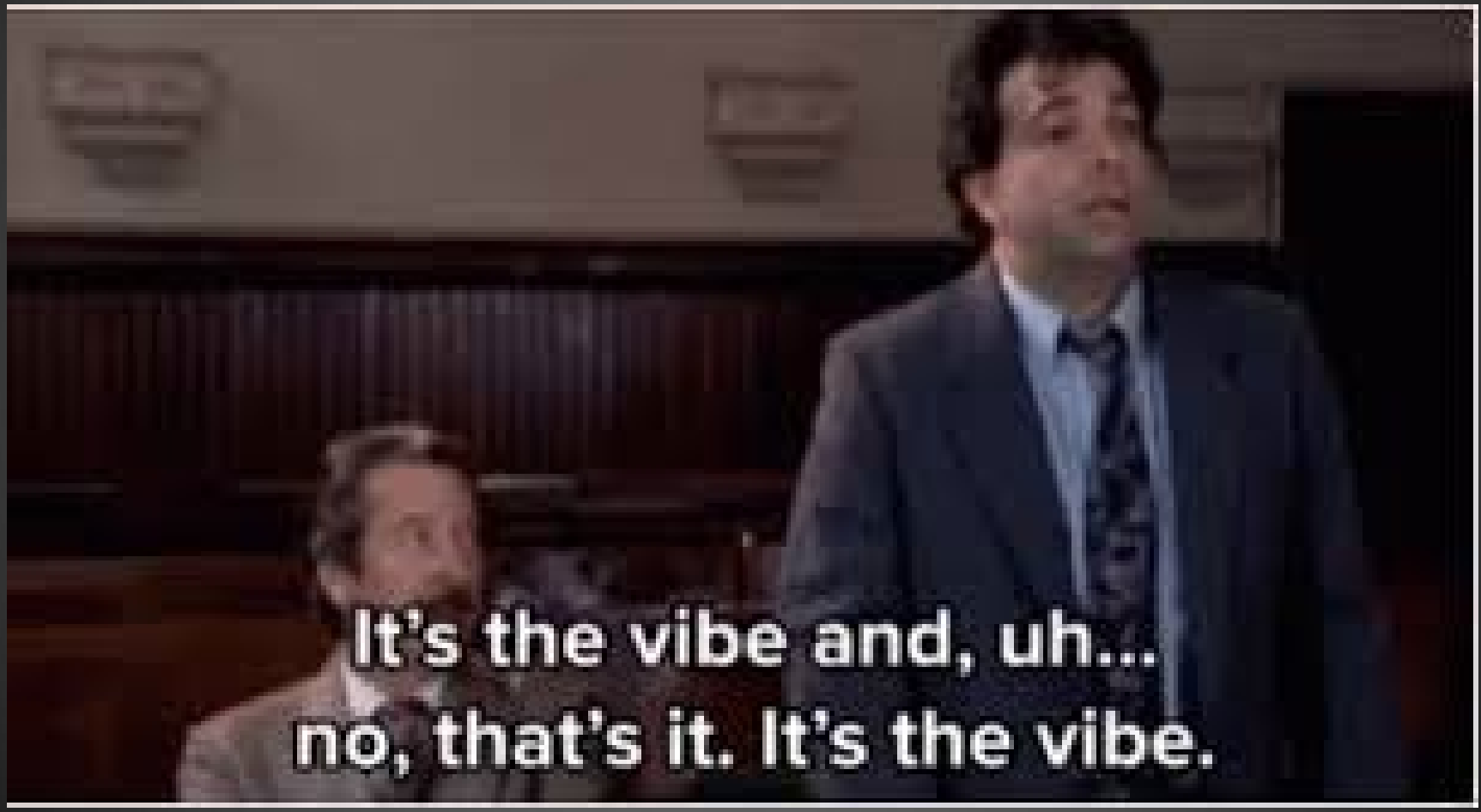
The problem

(with apologies to Patrick Parkinson)

- *for practitioners* who base their advice upon one or more appellate decisions only to find that that the appeal court ignores those precedents in favour of another, irreconcilable version of the law.
- *for trial judges* who look in vain for principles of quantification from appellate decisions and find it difficult to anticipate when, and for what reason, their judgments might be overturned..


The whole damn system is wrong!

Some recent examples



Initial contributions …

- 27 year marriage; 3 adult children
- interests valued at some $11.3million
- no section 75(2) issues
- sole relevant issue was as to the weight to be given to an initial contribution

- husband had an unencumbered interest in 3 blocks of farming land: not valued

- 1998 agreement with co-owner resulting in:
  - Sale of one block by co-owner
  - Sale of one block by husband
  - Husband applied $215,000 received on the sale to
    - purchase 50% interest in remaining block ($105,000)
    - Balance to the family expenses

- at trial, and after a rezoning, the remaining block valued $10.35m or some 90% of pool

The result?

- husband sought 70% and wife sought equality
- trial judge = 66% to the husband
  (differential of 32% or some $3.2million)
- Full Court = 53% to the husband
  (differential of 32% or $542,035)
- *Jabour* [2019] FamCAFC 78

Why?

- TJ error in seeking a nexus between the property and contributions
- revisit *Williams* (2007) FamCA 313; overstated importance of increase in value at separation
- TJ error in weighing contribution of property against other contributions rather than weighing as part of all contributions
- so plainly unreasonable so as to infer error

Another recent example

- 15 year marriage; 3 children, plus 1 of a prior relationship of husband
- interests with value of $775,000
- husband brought home to the relationship (no evidence as to value) which was sold after 10 years for $635,000, applied to further home
- contribution assessment?

- 65% to husband on account of greater initial contributions

  (differential 30% or $232,500)

- appeal dismissed

- *Danvers* [2017] FamCAFC 265

Post-separation

- agreement that contributions to separation equal
- separation August 2006; trial June 2015; judgment December 2017
- increase in husband's superannuation post-separation by $1million: no evidence as to the reason for the increase

The result ?

- trial result – 55% to husband on account of post-separation increase in superannuation

  (differential 10% = $1million)

- appeal dismissed

- *Pates* [2018] FamCAFC 171

Another example

- 14 years de facto relationship; 3 children under 12 years
- interests of $7.6million including some $2.2million accumulated by husband post-separation after providing significant financial support of wife and children
- equal contributions to separation
- husband earned some $2million per annum
- contribution finding?

- equality because:
  - husband earnings capacity was developed during the relationship
  - whilst husband had been ‘diligent in the pursuit of income’ no adjustment required

Contrast *Fields & Smith* [2015] FamCAFC 57

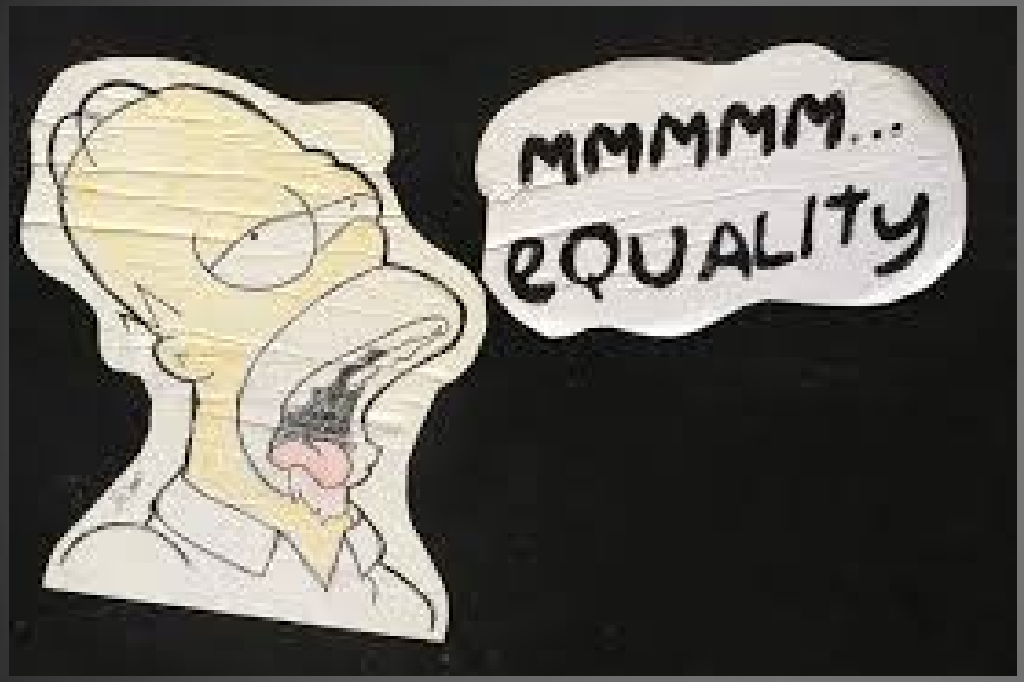
that there may be some relevance to a circumstances in which it can be demonstrated that *'new assets have been acquired or existing assets improved or conserved due to efforts of one party rather than another' …* at [102, 192]

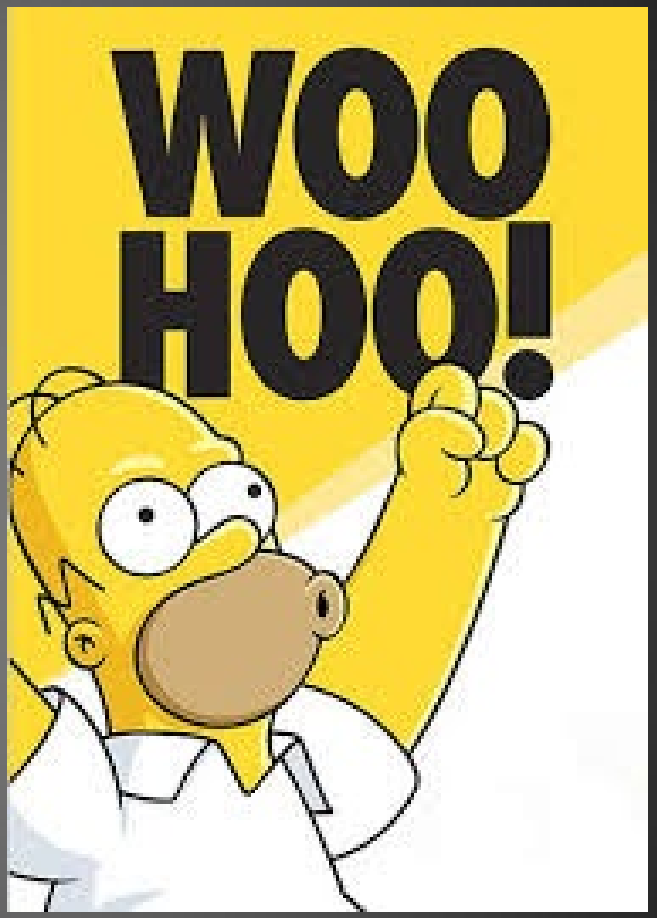
The solution

- ALRC recommendations:

11. Specify the steps and simplify the list of matters to be taken in account

12. The FLA should be amended to include a presumption of equality of contributions during the relationship … unless a statutory exception


MMMMM...
EQUALITY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HOO!

13. Provide the relevant date for the valuation of interests to be the date of separation *unless the interests of justice require otherwise*

16. presume that superannuation accumulated during a relationship is to be split equally

19. Include a statutory tort providing remedies for family violence equivalent to the common law