

# THROUGH THE LOOKING GLASS: WRONGFUL DEATH, REMARRIAGE AND AUSTRALIAN LAW REFORM

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Nineteenth Century wives were generally financially dependent upon their husbands and widows expected to remarry to ensure economic survival. In wrongful death actions, a widow's compensable loss was therefore reduced by her prospect of replacing the pecuniary benefit formerly provided by a deceased spouse through remarriage. In November 2002, a modern Australian High Court in *De Sales v Ingrilli* (2002) 212 CLR 338 purported to abolish this "remarriage" discount. However not all considerations of "marriageability" have been excluded from this form of compensation calculation. In the context of the action's historic social development and the rationale underpinning the remarriage discount, this article considers the recent wrongful death jurisprudence and future areas for reform.

## I INTRODUCTION

At common law, a plaintiff's death extinguished their action in tort and any person who suffered loss as a result of the death could not maintain an action in respect of that harm.<sup>1</sup> It was therefore impossible for dependant relatives to claim directly against a wrongdoer, the financial support lost as a result of the deceased's death. Nor – due to the maxim *actio personalis moritur cum persona*<sup>2</sup> – could compensation be recovered indirectly, via an action brought by the deceased's estate for the benefit of the beneficiaries under the deceased's will or upon intestacy.<sup>3</sup> A legal situation existed

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<sup>1</sup> *Baker v Bolton* (1808) 170 ER 1033; *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

<sup>2</sup> A personal right of action dies with the person.

<sup>3</sup> Actions vested in a deceased may now be brought or continued by their estate to enable recovery of pecuniary losses suffered by the victim prior to their death. Some jurisdictions also allow a limited recovery of non-pecuniary harm: *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), pt II; *Succession Act 1981* (Qld), s 66; *Survival of Causes of Action Act 1940* (SA); *Administration and Probate Act 1935* (Tas), s 27; *Administration and Probate Act 1958* (Vic), s 29; *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s 4; *Civil Law (Wrongs) Act 2002* (ACT), pt 2.3; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), pt II.

where, from a defendant's perspective, it was 'cheaper to kill than to maim.'<sup>4</sup> This position, that one who suffered damage due to a wrong causing another's death could not sue the wrongdoer in respect of that harm, had its origin in the relational harm and felony-merger doctrines.<sup>5</sup>

Under the doctrine of felony-merger, where a tortious causation of death also constituted a felony, the civil action was extinguished. The rule championed public interest in the prosecution of criminals above individual rights, and preserved the Crown's entitlement to a felon's chattels and land, which were forfeited upon conviction. This had the further practical effect that, at least whilst rights of forfeiture existed,<sup>6</sup> any civil right of action was futile for lack of assets to compensate the claimant. However, the doctrine's continued use to exclude liability in this context was criticised<sup>7</sup> as affording no justification after 1872 when *Wells v Abrahams*<sup>8</sup> accepted, as long recognised,<sup>9</sup> that civil damages claims were not destroyed but merely suspended pending felony prosecution. In addition, the doctrine could not explain where the conduct complained of was not in this way criminal, and was therefore considered<sup>10</sup> to result from the *actio personalis* maxim's misapplication to situations where the plaintiff (being the deceased's dependant(s) rather than the deceased represented by their estate) was still alive. In 1916, the House of Lords therefore attempted to justify the common law by reference to a doctrine of relational harm.

Relational harm arises where a claimant, as a result of the tortious infliction of injury to a third party, suffers damage due to their relationship with that party. In *Admiralty Commissioners v S.S. Amerika*<sup>11</sup> the House of Lords considered that such claims were based on rights of service of which the claimant had been deprived. The rights of relationship then predominant<sup>12</sup> to which the Court referred were those of "servitium,"<sup>13</sup> a master's right to the services of their servant, and "consortium,"<sup>14</sup> a husband's right to the support, affection, society and services of his wife. However, as a wife's or servant's death extinguished these rights, no resulting claim for their loss

<sup>4</sup> JG Fleming, *The Law of Torts* (LBC Information Services, 9<sup>th</sup> ed, 1998) 729.

<sup>5</sup> See: Law Commission of Canada, *Compensation for Relational Harm* (2002) <<http://www.lcc.gc.ca/en/themes/pr/cpra/vanpraagh/chap03.asp>> at 14 January 2004 (relational harm) and Queensland Law Reform Commission, *De Facto Relationships: Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death*, Report No 48 (1994) 8-9; WS Holdsworth, 'The Origin of the Rule in *Baker v Bolton*' (1916) 32 *Law Quarterly Review* 431; *Higgins v Butcher* (1607) 80 ER 61; *Osborn v Gillett* (1873) LR 8 Exch 88, 96 (felony-merger).

<sup>6</sup> The Crown's entitlement to forfeit existed until 1870: 33 & 34 Vict. c. 23.

<sup>7</sup> Fleming, above n 4.

<sup>8</sup> (1872) LR 7 QB 554.

<sup>9</sup> Perhaps even as early as 1625: *Markham v Cobb* (1625) Latch, 144.

<sup>10</sup> Holdsworth, above n 5, 434-5.

<sup>11</sup> [1917] AC 38, 44-7, 50 (Lord Parker), 54-6 (Lord Sumner).

<sup>12</sup> Both forms of action have been abolished in England: *Administration of Justice Act 1982* (UK), s 2. Loss of consortium actions have been abolished in some Australian jurisdictions: *Law Reform (Marital Consortium) Act 1984* (NSW); *Common Law (Miscellaneous Actions) Act 1986* (Tas), s 3; *Acts Amendment (Actions for Damages) Act 1986*, s 4(1) amending *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s 3; *Civil Law (Wrongs) Act 2002* (ACT), s 218.

<sup>13</sup> *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392.

<sup>14</sup> *Toohy v Hollier* (1955) 92 CLR 618. Whilst ameliorated by legislation in Queensland and South Australia (*Law Reform (Husband and Wife) Act 1968-1989* (Qld), s 3; *Civil Liability Act 1936* (SA), s 65) at common law, a wife had no similar claim: *Best v Samuel Fox* [1952] AC 716.

could then be upheld and consequentially no claim equivalent to the modern wrongful death action was considered able to be maintained.

Meanwhile, the Industrial Revolution and advent of railways during the Nineteenth Century saw an increase in the number of fatal accidents in England. With deaths arising from the operation of new technology, as apposed to violence and murder, the wrongdoer was often wealthy and it was considered unjust that they escape liability for loss caused to a deceased's dependant family members. Such moral considerations<sup>15</sup> and shifting public perception necessitated the rectification of what had become an unacceptable position at common law, and in 1846 English Parliament enacted *An Act for Compensating the Families of Persons Killed by Accidents*,<sup>16</sup> commonly referred to as *Lord Campbell's Act*. Section 1 of the Act (now the *Fatal Accidents Act 1976* (Eng)) provides that where a person's death:

is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable for damages, notwithstanding the death ...

Today, legislation founded upon *Lord Campbell's Act* and mirroring section 1, exists in all Australian jurisdictions<sup>17</sup> to provide a cause of action against wrongdoers for the benefit of the statutorily defined family of a deceased. Commonly known as wrongful death, fatal accident or compensation to relatives claims, such actions perform a: 'clear, but limited, social purpose.'<sup>18</sup> The rights enforced by claimants constitute a new cause of action arising by statute and are not an extension of rights vested in the deceased.<sup>19</sup> As such, the legislation aims not to rectify the deceased's damage, but to compensate those who have been deprived of one upon whom they were financially dependent for the loss of pecuniary support suffered as a result of the death.<sup>20</sup> Consequentially, a widow's prospect of replacing the financial benefit formerly provided by a deceased spouse, through remarriage, would serve to reduce her compensable harm.

In November 2002 the Australian High Court in *De Sales v Ingrilli* ('*De Sales*')<sup>21</sup> was called to determine what, if any, account should be taken, in assessing damages, of the chance of a surviving spouse entering a financially supportive marriage or de facto relationship subsequent to the deceased's death. Once again the wrongful death action's positioning in relation to changed social conditions required evaluation.<sup>22</sup> In the context of the action's historic social development and the rationale underpinning the "remarriage" discount, this article discusses how issues pertaining to

<sup>15</sup> Law Reform Commission of Western Australia, *Report on Fatal Accidents*, Project No 66 (1978) 3; Law Commission of Canada, *Compensation for Relational Harm* (2002) <<http://www.lcc.gc.ca/en/themes/pr/cpra/vanpraagh/chap04.asp>> at 14 January 2004.

<sup>16</sup> 9 & 10 Vict. c. 93.

<sup>17</sup> *Supreme Court Act 1995* (Qld), pt 4, div 5; *Fatal Accidents Act 1959* (WA); *Civil Law (Wrongs) Act 2002* (ACT), pt 3.1; *Civil Liability Act 1936* (SA), pt 5; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic), pt 3.

<sup>18</sup> *De Sales v Ingrilli* (2002) 212 CLR 338, 346 (Gleeson CJ).

<sup>19</sup> *Pym v The Great Northern Railway Company* (1863) 122 ER 508.

<sup>20</sup> *The Vera Cruz (No. 2)* (1884) 9 PD 96, 101.

<sup>21</sup> (2002) 212 CLR 338.

<sup>22</sup> *Ibid* 351, 363, 381, 392-4, 405-6.

“marriageability” are treated in this form of compensation calculation. Recent Australian jurisprudence on this issue is considered, together with further areas for reform.

## II THE LEGAL MATRIX<sup>23</sup>

Whilst legislatively undefined, the loss compensated in wrongful death actions is traditionally limited to the past and future pecuniary benefit that could reasonably be expected from the continuance of the life had death not occurred.<sup>24</sup> This includes loss of income and household or other services (such as child care, hairdressing and teaching), with a monetary value capable of assessment.<sup>25</sup> However in practice, the damages recoverable are subject to statutory limits,<sup>26</sup> and medical and funeral expenses may also be claimable.<sup>27</sup> The construction of the injury compensated as a pecuniary concept is supported by the statutes’ requirement that damages be: apportioned amongst claimants according to shares; and proportionate to the injury resulting from the death.<sup>28</sup>

The financial support and services that the deceased would have provided, for the purpose of compensation, can be simplistically quantified as a function of the following variables:

$$S = f [ ( I \times C ) Y ]$$

Where I = Annual likely pecuniary benefit of net income and services provided by the deceased over time from date of death

<sup>23</sup> Unless otherwise stated, all statutory references are to the jurisdiction’s wrongful death legislation specified at above n 17.

<sup>24</sup> *De Sales* (2002) 212 CLR 338, 346-7, 360-1, 371, 382, 401-2; *Parker v The Commonwealth* (1965) 112 CLR 295, 308; *Franklin v The South Eastern Railway Company* (1858) 3 H & N 211.

<sup>25</sup> Generally assessed at market cost: *Nguyen v Nguyen* (1990) 169 CLR 245, 256. *De Sales v Ingrilli* (2000) 23 WAR 417 (FC), 420, 432-4 provided allowance for the loss of use of a motor vehicle supplied by the deceased’s employer.

<sup>26</sup> See (Vic): *Wrongs Act 1958*, ss 19A, 19B, 19C; *Transport Accident Act 1986*, s 93(9); (SA): *Civil Liability Act 1936*, pt 8; (ACT): *Civil Law (Wrongs) Act 2002*, pt 7.1; (NSW): *Motor Accidents Compensation Act 1999*, s 125; *Civil Liability Act 2002*, pt 2; (NT): *Personal Injuries (Liabilities and Damages) Act 2003*, pt 4, s 5; (Qld): *Civil Liability Act 2003*, s 50, ch 3, pt 3; (Tas): *Civil Liability Act 2002*, pt 7; (WA): *Civil Liability Act 2002*, s 3, pt 2. Some claims are abolished entirely: *Motor Accidents (Compensation) Act 1979* (NT), s 5, pt V; *Work Health Act 1986* (NT), ss 52, 62-63, 189; *Workers Rehabilitation and Compensation Act 1986* (SA), s 54. Whilst a detailed discussion of this legislation is outside the ambit of this article, the provisions of the “wrongs,” “civil liability” and “personal injuries” legislation mentioned above were, in part, enacted (and in some instances re-enacted in this form) in response to recommendations made by The Review of Negligence – Final Report (September 2002) (*Ipp Report*). Commissioned in response to the perceived crisis in the insurance industry, the Review considered the ambit of, and quantum of damages awarded in, claims for negligently-caused personal injury or death. In the wrongful death context, some of the more relevant of these provisions (depending on jurisdiction) limit: (a) damages for lost earnings to three times (4.25 times in Tasmania and two times in the Ipp Report) average weekly earnings; and (b) recovery of gratuitous services, and implement recommendations 49, 51, 52 and 55 of the Ipp Report.

<sup>27</sup> Section 5(1) (WA); ss 25(4),(5),(6) (ACT); s 24(2a) (SA); s 3(2) (NSW) (funeral only); s 10(3)(a),(b) (NT); s 10(2) (Tas).

<sup>28</sup> Section 18(1) (Qld); ss 6(2),(4) (WA); ss 25(1),(3) (ACT); ss 24(2),(3) (SA); s 4(1) (NSW); ss 10(1),(2) (NT); s 5 (Tas); s 17(1) (Vic). Also: *De Sales* (2002) 212 CLR 338, 346-7, 359; *Blake v The Midland Railway Co* (1852) 18 QB 93, 109-10.

- C = Percentage contributed to dependants and not retained for the deceased's personal use
- Y = Number of years for which the benefit would have been likely to continue if the deceased had not been killed
- S = Total pecuniary value of support provided

Interest is then awarded on the amount attributable to the period before judgement, and future losses discounted to reflect their present value payable as a lump sum. Notwithstanding that mental suffering, loss of society and other non-pecuniary losses are generally not compensated;<sup>29</sup> some jurisdictions do allow recovery of solatium.<sup>30</sup>

Although only Victorian wrongful death legislation frames the test of eligible claimants in terms of “dependency,”<sup>31</sup> the phrase has historically been used to describe the lost expected pecuniary benefit resulting from the deceased's demise.<sup>32</sup> However “actual” dependency, or domestic economic subordination, is not required. In this way Gleeson CJ in *De Sales* cautioned against using the term as a comprehensive description of the basis of claims, stating:

injury can occur in circumstances in which there is no dependency. For example, it is now common for both parties to a legal or de facto marriage to have salaried or income-producing occupations. Each may expect to obtain financial advantage from the other, even where they are both fully able to support themselves from their own income, and are therefore not “dependent” in any sense.<sup>33</sup>

Whilst the executor or administrator of the deceased's estate normally brings the action on the dependants' behalf,<sup>34</sup> in order to maintain an action one must establish that:

1. The defendant wrongfully “caused”<sup>35</sup> the death through the commission of a tort, crime<sup>36</sup> or breach of contract;<sup>37</sup>
2. The deceased (had they not died) could have successfully maintained an action against the defendant – requiring, for example, a consideration of: liability;<sup>38</sup> contributory negligence;<sup>39</sup> and statutory limitation periods;<sup>40</sup> and

<sup>29</sup> *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 292. However see *Wrongs Act 1958* (Vic), s 23.

<sup>30</sup> Sections 28, 29, 30 (SA); s 10(3)(c),(f) (NT) (also loss of consortium).

<sup>31</sup> *Wrongs Act 1958* (Vic), s 17.

<sup>32</sup> *Dominish v Astill* [1979] 2 NSWLR 368, 379; *Halvorsen Boats Pty Ltd v Robinson* (1993) 31 NSWLR 1, 12.

<sup>33</sup> *De Sales* (2002) 212 CLR 338, 347. Also *Misiani v Welshpool Engineering Pty Ltd* [2003] WASC 263 (unreported, Barker J, 19 December 2003); *Allan v The Commonwealth* (1980) 24 SASR 581, 583.

<sup>34</sup> Sections 18(1), 21 (Qld); ss 6(1)(b), 9 (WA); s 28 (ACT); ss 24(1), 27 (SA); ss 4(1), 6B (NSW); ss 8(2), 13 (NT); ss 5, 8 (Tas); ss 17(1), 18 (Vic).

<sup>35</sup> In the sense described in *March v Stramare* (1991) 171 CLR 506.

<sup>36</sup> Section 17 (Qld); s 4 (WA); s 24 (ACT); s 23 (SA); s 3(1) (NSW); s 7(1) (NT); s 4 (Tas).

<sup>37</sup> *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

<sup>38</sup> *Murphy v Culhane* [1977] QB 94.

<sup>39</sup> In *De Sales v Ingrilli* (2002) 23 WAR 417 (FC), damages were reduced by one third on account of the deceased's own negligence: *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA), ss 3, 4(2). Also: *Law Reform Act 1995* (Qld), s 10(5); *Law Reform*

3. Those on whose behalf the action is brought:
  - a. Fall within the list of “relatives” prescribed by statute;<sup>41</sup> and
  - b. Suffer, as a result of the death, pecuniary loss caused by the demise of one upon whom they were dependent in a familial rather than professional or economic sense.<sup>42</sup>

As an action can only be maintained upon proof of pecuniary damage, nominal damages cannot be awarded.

The legislation’s fundamental function, together with the body of torts law of which it forms part, is compensation<sup>43</sup> – an attempt, as far as money can, to return a claimant to the position they would have been in but for a defendant’s wrongful act. As such there is no warrant for requiring a defendant to provide a claimant with ‘certainty and security for life ... in replacement of the uncertain and unsure situation in which that plaintiff may have been.’<sup>44</sup> This is reflected in the statutory requirement that a dependant’s damages award be “proportionate,” and calculated on a balance of the financial gains and losses consequent upon the death.<sup>45</sup> In addition, as damages are awarded lump sum and assessed once and for all by the court,<sup>46</sup> reassessment or adjustment over time is impossible. Consequentially, the provision of compensation in this area is, by its nature, speculative,<sup>47</sup> requiring courts to assess a deceased’s capacity to provide for dependants had they not been killed. The degree of uncertainty lies in the wide range of possible legitimate opinion about how the future would have unfolded. For example, in relation to loss of future income, the amount of a dependant’s recovery depends upon an assessment of matters such as the deceased’s prospective: health; life expectancy; duration of working life; future income and possibility of promotion or redundancy; personal expenditure; and amount of family contribution.

### *A Contingencies and Financially Beneficial Re-partnering*

Given the difficulty inherent in predicting a dependant’s loss of expectation of a deceased’s future economic support and the unfairness in requiring a defendant to compensate more than a claimant has lost, courts attempt to ensure, as far as practicable,

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(*Contributory Negligence and Apportionment of Liability*) Act 2001 (SA), s 7(4); *Wrongs Act 1954* (Tas), s 4(4); *Compensation (Fatal Injuries) Act 1974* (NT), s 11; *Civil Liability Act 2002* (NSW), s 5T.

<sup>40</sup> *Harding v The Council of the Municipality of Lithgow* (1937) 57 CLR 186.

<sup>41</sup> Sections 13, 18 (Qld); ss 6(1)(a),(c), sch 2 (WA); ss 23, 28(2) (ACT); ss 3, 24(1) (SA); ss 4(1), 7 (NSW); ss 4, 8(2) (NT); ss 3, 5 (Tas); s 17 (Vic).

<sup>42</sup> *Sykes v NE Rly* [1874-1880] All ER 1892.

<sup>43</sup> *De Sales* (2002) 212 CLR 338, 383, 388-9; *Dominish v Astill* [1979] 2 NSWLR 386, 393.

<sup>44</sup> *Jones v Schiffmann* (1971) 124 CLR 303, 306 (Barwick CJ).

<sup>45</sup> *De Sales* (2002) 212 CLR 338, 346-7, 360-1, 371-2, 383; *Parker v The Commonwealth* (1965) 112 CLR 295, 308; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.

<sup>46</sup> *De Sales* (2002) 212 CLR 338, 388, 402; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, 182-3. Now subject to the making of consent orders for periodic payments (based upon a claimant’s lump sum entitlement according to the ordinary rules of damages assessment) under: *Civil Liability Act 2003* (Qld), ch 3, pt 4; *Civil Liability Act 2002* (NSW), pt 2, div 7; *Civil Liability Act 2002* (WA), pt 2, div 4; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), pt 4, div 6; *Wrongs Act 1958* (Vic), pt VC; *Civil Law (Wrongs) Act 2002* (ACT), s 106; *Civil Liability Act 2002* (Tas), pt 5.

<sup>47</sup> *De Sales* (2002) 212 CLR 338, 363-4, 372-5, 388-9. The speculative nature of the particular assessment in *De Sales* was explicitly recognised by Gleeson CJ at 351.

that wrongful death damages awards provide a true reflection of the loss. This is achieved by discounting the amount (identified as “S” above) at common law on account of the possible positive and negative<sup>48</sup> future events, in balance, that may have befallen either the deceased (had they lived) or their dependants. Called the general discount for “contingencies” or “the vicissitudes of life,” it includes factors such as the deceased’s premature: death; sickness; unemployment; promotion; and divorce.<sup>49</sup> Although such events may be similarly unlikely or impossible to accurately predict, accounting for their occurrence is important to the extent that they affect the amount and duration of a claimant’s expected financial dependency. As the discount is a question of fact, its amount varies according to each individual case.<sup>50</sup> However owing to its prophetic nature, the amount, depending on jurisdiction, has become somewhat standardised - being in the order of, two to six percent in Western Australia,<sup>51</sup> and 15 percent in New South Wales,<sup>52</sup> Queensland<sup>53</sup> and the Australian Capital Territory<sup>54</sup> - although it may be adjusted up or down according to individual circumstances.

### 1 *Actual or Intended Re-partnering*

Contingencies may take one of two forms.<sup>55</sup> Where remote or impossible to predict with accuracy, vicissitudes are appropriately accounted for within the general discount for contingencies. However where the speculative element of a contingency has, in the circumstances of a particular case, been removed such that it is more likely to occur or is more susceptible to specific calculation, it may be appropriate to apply a separate discount. Examples of contingencies warranting special consideration include a surviving dependant spouse’s: death;<sup>56</sup> actual marital conflict indicating a likely failure of their prior relationship with the deceased;<sup>57</sup> and remarriage. Consequentially, in wrongful death claims arising from the death of a “spouse”<sup>58</sup> courts, when assessing the damages payable to the surviving spouse, take specific account of any subsequent financially beneficial relationship occurring<sup>59</sup> or intended<sup>60</sup> prior to trial. Although the

<sup>48</sup> *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485; *Bresatz v Przibilla* (1962) 108 CLR 541.

<sup>49</sup> *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, 497; *Jones v Schiffman* (1971) 127 CLR 303, 306.

<sup>50</sup> *Kschammer v RN Piper & Sons Pty Ltd* [2003] WASCA 298 (unreported, Malcolm CJ, 3 December 2003) [179].

<sup>51</sup> *Kember v Thackrah* [2000] WASCA 198 (unreported, Malcolm CJ, Kennedy and Murray JJ, 7 August 2000) [13]; *Black v Motor Vehicle Insurance Trust* [1986] WAR 32, 34-5. However, see *Kschammer v RW Piper & Sons Pty Ltd* [2003] WASCA 298 (unreported, Malcolm CJ, 3 December 2003) [194] discussed at below n 193 and accompanying text.

<sup>52</sup> *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485, 497-8.

<sup>53</sup> *Mahoney v Dewinter* (unreported, Supreme Court of Queensland, Court of Appeal, McPherson J, 15 March 1993).

<sup>54</sup> *De Sales* (2002) 212 CLR 338, 379.

<sup>55</sup> *Ibid* 348-9 (Gleeson CJ); PQR Boberg, ‘Deductions From Gross Damages in Actions for Wrongful Death’ (1964) 81 *South African Law Journal* 194, 198-201.

<sup>56</sup> *Voller v Dairy Produce Packers Ltd* [1962] 3 All ER 938.

<sup>57</sup> *McIntosh v Williams* [1972] 2 NSWLR 543.

<sup>58</sup> In this article, “spouse” means either marital or de facto spouse, unless indicated otherwise. In addition, depending upon jurisdiction the term, where relevant, encompasses both heterosexual and homosexual couples: see below n 89 and accompanying text.

<sup>59</sup> *Willis v The Commonwealth* (1946) 73 CLR 105. Both marital and de facto relationships are considered: *AA Tegel Pty Ltd v Madden* [1985] 2 NSWLR 591.

Northern Territory precludes such considerations,<sup>61</sup> the impact of a claimant's actual or intended "re-partnering"<sup>62</sup> on the assessment of wrongful death damages should be considered for the following reasons:

(a) *Preference for certainty over speculation*

Whilst damages are traditionally assessed as at the date of the wrong, there is inevitably a delay between that date and final judgment. Therefore, as any evaluation of the duration and extent of a claimant's dependency is highly speculative, if an event occurs which serves to crystallise a chance relevant to that calculation into a certainty, the assessment should proceed on those facts.<sup>63</sup>

(b) *Compensation as an overarching concept*

Since the damage compensated in wrongful death actions is generally limited to a claimant's pecuniary (not emotional) loss, it would be contrary to the action's compensatory rationale to allow recovery in excess of any loss not recouped by re-partnering. Damages would instead be punitive and result in over-compensation by allowing recovery for a loss of notional dependency otherwise terminated or reduced.<sup>64</sup>

(c) *Preventing illogical outcomes*

Atiyah has opined that to disregard a widow's remarriage in the assessment of damages in a fatal accidents claim would be as sensible as requiring: 'a divorced husband to maintain his wife after she has remarried, or for the State to pay widows' pensions after remarriage.'<sup>65</sup> Whilst *Budget Rent-A-Car Systems Pty Ltd v Van der Kemp* considered it:

difficult to see how a widow suffers pecuniary loss, as the result of her husband's death, when she receives support from her de facto ... [or husband] which replaces the support which she received from her deceased husband. To hold that she does seems ... quite unreal.<sup>66</sup>

In *De Sales* the High Court, in obiter, affirmed<sup>67</sup> that the assessment of a surviving spouse's damages may take into account evidence of the financial advantage or

<sup>60</sup> *Dominish v Astill* [1979] 2 NSWLR 368,393-4; *Mahoney v Dewinter* (unreported, Supreme Court of Queensland, Court of Appeal, McPherson J, 15 March 1993) (proposal and wearing of "unofficial" engagement ring taken into account despite claimant's psychological barrier to remarriage).

<sup>61</sup> Taking into account both actual and prospective de facto or marital relationships is precluded: *Compensation (Fatal Injuries) Act 1974* (NT), s 10(4)(h) (as amended by *Law Reform (Gender, Sexuality and De facto Relationships) Act 2003*, s 62, sch 1, pt 9). The position in Victoria and Queensland has now been modified by the *Wrongs (Remarriage Discount) Act 2004* and the *Justice and Other Legislation Amendment Act 2004* respectively: see below n 176-8 and accompanying text.

<sup>62</sup> In this article, "re-partnering" means either a marital or a de facto relationship.

<sup>63</sup> *Willis v The Commonwealth* (1946) 73 CLR 105, 109.

<sup>64</sup> England, Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission), *Report*, Cmnd 7054 (1978) vol 1, [411]; England, Royal Commission on Personal Injury Litigation – Assessment of Damages, *Report No 56* (1973) [261]; Law Commission, *Claims for Wrongful Death*, Report No 263 (1999) [4.27].

<sup>65</sup> P Cane (ed), *Atiyah's Accidents, Compensation and The Law* (Butterworths, 6<sup>th</sup> ed, 1999) 113.

<sup>66</sup> [1984] 3 NSWLR 303, 311 (McHugh JA).

<sup>67</sup> (2002) 212 CLR 338, 367 (Gaudron, Gummow and Hayne JJ), 396 (Kirby J), 352, 354-5 (Gleeson CJ), 375 (McHugh J), 402-3 (Callinan J).



disadvantage associated with their actual re-partnering subsequent to the deceased's death. In addition, evidence at trial of an intention to re-partner with an identified person<sup>68</sup> may also be considered. The Court concluded that this would occur as a separate, and depending on the facts, potentially substantial discount, in addition to that generally allowed for contingencies. Recently, the Western Australian District Court in *Hewitt v Tonkin*<sup>69</sup> again confirmed that, if there is sufficient evidence, a special discount might be made for the probable financial consequences of a current or likely future relationship, stating that:

Counsel for the plaintiff submitted that it was now clear from *De Sales* ... that no special discount should be made for the contingency of remarriage. However the High Court does concede the possibility of cases where, if the evidence is there to support the argument, some special discount can be made.<sup>70</sup>

However, there was insufficient evidence (the onus of proof being on the defendant)<sup>71</sup> to support the formation by that claimant of a committed relationship, with associated financial benefit, subsequent to the death of her de facto spouse.

## 2 *Prospective Re-partnering*

Prior to *De Sales*, in all Australian jurisdictions other than the Northern Territory,<sup>72</sup> in the absence of any actual or intended relationship, case law also provided for the prima facie value of a surviving partner's damages to be discounted by their propensity for future financially beneficial re-partnering and thereby obtaining a substitute pecuniary benefit to offset their loss.<sup>73</sup> Loosely termed the "remarriage discount," it again took the form of a discount in addition to that for the vicissitudes of life, which was often substantial and accounted for as either a separate deduction<sup>74</sup> or as part of and adding to the amount assessed (on balance) as the general discount for contingencies.<sup>75</sup>

Upon confirmation that wrongful death statute did not enable recovery of that for which the deceased would have sued had the defendant's wrong not ended in death, but gave the persons prescribed by legislation their own substantive right of action,<sup>76</sup> the consideration of a claimant's re-partnering prospects became relevant to the assessment of contingencies.<sup>77</sup> Arguably such discounting is required as, akin to actual re-partnering, to preclude consideration of a claimant's "prospects":

promotes and legalises bigamy in the courtroom. ... [As a widower would therefore potentially, in the future, be] allowed to reap the benefits of the

<sup>68</sup> The possibility of a surviving spouse's future re-partnering with some unidentified person falls within the term "prospective re-partnering."

<sup>69</sup> [2003] WADC 203 (unreported, Fenbury DCJ, 29 September 2003).

<sup>70</sup> Ibid [21] (Fenbury DCJ).

<sup>71</sup> Ibid. See further at below n 175 and accompanying text as to what amounts to sufficient evidence post *De Sales*.

<sup>72</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 10(4)(h).

<sup>73</sup> *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 60; *Carroll v Purcell* (1961) 107 CLR 73.

<sup>74</sup> *Jones v Schiffmann* (1971) 124 CLR 303, 306 (Barwick CJ).

<sup>75</sup> *Mahoney v Dewinter* (unreported, Supreme Court of Queensland, Court of Appeal, McPherson J, 15 March 1993) (55% total discount); *Row v Willtrac Pty Ltd* (unreported, Supreme Court of Queensland, Atkinson J, 6 December 1999) (10% total discount).

<sup>76</sup> *Pym v The Great Northern Railway Company* (1863) 122 ER 508.

<sup>77</sup> Law Reform Committee of South Australia, *Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents Under the Wrongs Act*, Report No 27 (1972) 3.

monetary value of the lives of two wives, one technically alive in terms of her replacement value, the other actually alive and rendering the services of a wife.<sup>78</sup>

Therefore, especially in monogamous societies where one cannot legally receive the support of two spouses, such preclusion would again result in overcompensation inconsistent with the principles upon which courts assess damages in wrongful death claims.

In 1961 the Australian High Court in *Carroll v Purcell* considered that a claimant's propensity to re-partner had: 'so long been regarded as having some value in the assessment of damages in fatal accident cases that it is profitless to debate how far the established rule is justified.'<sup>79</sup> However in *De Sales* the Court was again called to determine what, if any, account should be taken when assessing damages of the chance of a surviving spouse entering a financially supportive marriage or de facto relationship subsequent to the deceased's death. The essence was that societal change necessitated the reconsideration of how far such an "established" rule could be justified in a modern context. 'The caravan [had] moved on.'<sup>80</sup>

### III THE PUSH FOR JUDICIAL REFORM

Judicial decision-making should not only do justice as between the parties to a dispute but also, especially where the content of legal doctrine is in issue, seek to balance the legal certainty achieved through a strict adherence to precedent against the need to maintain the law's contemporary social relevance.<sup>81</sup> As stated by Kirby J in *Garcia v National Australia Bank Ltd*, where the assumptions upon which previous statements of the law are based have changed appellate courts have a duty to:

"restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible" ... on a foundation which is not susceptible to criticism as an historical anachronism or impermissibly discriminatory.<sup>82</sup>

However whilst this statement was affirmed by his Honour in *De Sales*,<sup>83</sup> the divide between legislative and permissible judicial function must also be maintained. Consequentially, Callinan J was of the opinion that courts should be wary of broad submissions about varying social conditions and attitudes, it being: 'the primary responsibility of legislatures to identify change and react by legislating, where appropriate, rather than courts,' especially when such claims are unproved by evidence.<sup>84</sup> For this reason courts should not lightly undermine settled rules of law,

<sup>78</sup> Shields & Giles, 'Remarriage and the Collateral Source Rule' (1969) 36 *Ins Counsel J* 354 in PC Kober, 'The Case of the "Wife After Death:" Reflections on the Admissibility of Evidence of Remarriage Under the Massachusetts Wrongful Death Statute' (1980) 15 *New England Law Review* 227, 233.

<sup>79</sup> (1961) 107 CLR 73, 79 (Dixon CJ, Kitto, Taylor and Windeyer JJ).

<sup>80</sup> *De Sales v Ingrilli* (2001) 22(20) Leg Rep SL3 (Kirby J). See also *De Sales* (2002) 212 CLR 338, 351, 363, 381, 392-4, 405-6.

<sup>81</sup> J Stone, *Precedent and Law* (Butterworths, 1985) 110-1; A Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 158.

<sup>82</sup> (1998) 194 CLR 395, 429 (citations omitted).

<sup>83</sup> (2002) 212 CLR 338, 393-5.

<sup>84</sup> *Ibid* 406. Drawing upon similar statements made by his Honour in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 511-3.

rather any changes should also 'fit within the body of previously accepted legal doctrine.'<sup>85</sup>

The wrongful death action's past willingness to judicially or statutorily evolve with changing ideas of justice and community expectation is endemic, both in its historic development and its acceptance of:

- Changed social conceptions of harm, such that psychological aspects of a dependant's loss, although non-pecuniary, are increasingly compensable;<sup>86</sup>
- The formation of subsequent de facto (as well as marital) relationships, when considering whether a dependant's damages should be discounted on account of actual or prospective financially beneficial re-partnering;<sup>87</sup> and
- The inclusion of de facto spouses,<sup>88</sup> and more recently same sex partners,<sup>89</sup> within the definition of "spouse" used to identify eligible dependant claimants. In 1994, the Queensland Moura mine disaster highlighted the need for such legislative reform in that State. Four of the 11 men killed were in de facto relationships,<sup>90</sup> however their partners were not entitled to seek compensation at that time. Section 5 of the *Common Law Practice and Workers' Compensation Amendment Act 1994* (Qld) was subsequently enacted to remedy this defect, at least in relation to heterosexual couples.

However the remarriage discount has often been extensively criticised. In *De Sales*<sup>91</sup> its contemporary significance was challenged on the grounds that an assessment of the prospect:

1. Is speculative and difficult to evaluate;
2. Reflects a disparity in approaches by judges;
3. Is distasteful and demeaning;
4. Has been legislatively abolished in other jurisdictions; and
5. Is doctrinally unsound.

Historically the discount range allowed by judges has differed greatly, spanning from 60 percent in some cases,<sup>92</sup> to two percent in others.<sup>93</sup> Whist, in some instances, this may

<sup>85</sup> *Breen v Williams* (1996) 186 CLR 71, 115.

<sup>86</sup> *Wrongs Act 1958* (Vic), s 23; *Civil Liability Act 1936* (SA), ss 28, 29, 30; *Compensation (Fatal Injuries) Act 1974* (NT), s 10(3)(c), (f).

<sup>87</sup> *AA Tegel Pty Ltd v Madden* [1985] 2 NSWLR 591, 614-5, overruling *Wild v Eves* [1970] 2 NSWLR 326 (which precluded a consideration of de facto partnering) as being out of touch with relationship patterns in contemporary society and discriminatory against those who remarry.

<sup>88</sup> *Supreme Court Act 1995* (Qld), ss 13, 18; *Fatal Accidents Act 1959* (WA), ss 6(1)(a), (c), sch 2; *Civil Law (Wrongs) Act 2002* (ACT), ss 23, 28(2); *Civil Liability Act 1936* (SA), ss 3, 24(i); *Compensation to Relatives Act 1897* (NSW), ss 4(i), 7; *Compensation (Fatal Injuries) Act 1974* (NT), ss 4, 8(2); *Fatal Accidents Act 1934* (Tas), ss 3, 5; *Wrongs Act 1958* (Vic), s 17.

<sup>89</sup> *Discrimination Law Amendment Act 2002* (Qld), s 83; *Acts Amendment (Equality of Status) Act 2003* (WA), s 57; *Law Reform (Gender, Sexuality and De facto Relationships) Act 2003* (NT), s 60, sch 1, pt 8; *Wrongs (Dependants) Act 1982* (Vic), s 4; *Relationships (Consequential Amendments) Act 2003* (Tas), sch 1; *Property (Relationships) Legislation Amendment Act 1999* (NSW), sch 2.3; *Civil Law (Wrongs) Act 2002* (ACT), ss 23, 28(2).

<sup>90</sup> Queensland Law Reform Commission, above n 5, 2, 25.

<sup>91</sup> (2002) 212 CLA 338, 376, 401; Transcript of Proceedings, *De Sales v Ingrilli* (High Court of Australia, BL Nugawela, 17 April 2002).

<sup>92</sup> *Tilbee v Wakefield* (2000) 31 MVR 195.

<sup>93</sup> *Cremona v Roads and Traffic Authority* [2000] NSWSC 556 (unreported, Dowd J, 20 June 2000).

be explained as being the result of differing facts, this justification is not always readily apparent. For example the circumstances of the claimants in *Cremona v Roads and Traffic Authority*<sup>94</sup> and *De Sales* were factually similar. Like Ms De Sales, at the time of trial Ms Cremona was 36 years old and had two similarly aged children (namely 10 and seven years as compared to Ms De Sales' children who were 11 and nine). Both women were financially independent and had no present intention of re-partnering. However in *Cremona* the court valued the claimant's re-partnering prospects as warranting a two percent discount, whilst in *De Sales* the Western Australian Supreme Court<sup>95</sup> applied a 20 percent discount. In addition, in assessing the discount (if any) applicable, courts sometimes accept unconditionally a claimant's assurance that they will never remarry,<sup>96</sup> whilst in other cases, a deduction is made despite such claims. In *Rodda v Boonjie Pty Ltd*,<sup>97</sup> notwithstanding evidence of a widow claimant's disinterest in re-partnering, after being assaulted and robbed by a subsequent de facto partner, a combined discount for general contingencies and re-partnering prospects was assessed in the order of 45 percent. However in *Kuhlewein v Fowke*,<sup>98</sup> although the widower in question had remarried and separated before trial, no deduction for prospective future financially beneficial re-partnering was made. The court instead accepted that the claimant's adamant testimony that he would not re-partner was influenced by the failure of his second marriage.

Therefore additionally, whilst on its face exhibiting the formalistic equality of applying equally to widows and widowers,<sup>99</sup> in practice the remarriage discount has not been even handed.<sup>100</sup> In considering a claimant's "marriageability" factors such as appearance, education, number of children, job prospects and courtroom demeanour, have been regarded as relevant to assessing a woman's re-partnering potential. However, as stated by Kirby J in *De Sales*, 'an evaluation of physical attractiveness is not normally made in the case of male claimants.'<sup>101</sup> Indeed a certain male bias seems ingrained in the action's history. The relational harm doctrine traditionally used to justify the unavailability, prior to legislative intervention, of a dependant's claim at common law – in that it is based upon rights of consortium unavailable to women at law and rights of servitium unlikely to have been exercised by women during that period – to some extent presupposed that women would never have an entitlement to claim as a result of the tortious infliction of another's death, the denial of which required justification.

Further criticism of this method of assessment appears in *Buckley v John Allen & Ford (Oxford) Ltd* where Phillimore J stated:

[Counsel for the defendant says that the claimant] is an attractive woman ... Am I to ask her to put on a bathing dress; because the witness box is calculated to

<sup>94</sup> Ibid.

<sup>95</sup> (2000) 23 WAR 417 (FC), 436-8 (Miller and Parker JJ; Wallwork J dissenting). This judgement was the subject of the High Court appeal.

<sup>96</sup> *McCullagh v Lawrence* [1989] 1 Qd R 163.

<sup>97</sup> (unreported, Supreme Court of Queensland, Byrne J, 27 May 1993).

<sup>98</sup> [2000] QSC 404 (unreported, Mullins J, 10 November 2000) [35-9].

<sup>99</sup> *Herman v Johnston* [1972] WAR 121, 124.

<sup>100</sup> Although it is uncertain how this may (at least in part) reflect the potential that the majority of claims have been brought by women.

<sup>101</sup> (2002) 212 CLR 338, 385. See also Justice R Atkinson, 'Women and Justice: Is There Justice for Women?' (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 75, 80.

disguise the figure? ... Is a judge fitted to assess the chance ... or wishes of a lady about whom he knows so little and whom he has encountered for twenty minutes when she was in the witness box ...? Judges should, I think, act on evidence rather than guesswork. It seems to me that this particular exercise is not only unattractive but also is not one for which judges are equipped.<sup>102</sup>

In the past, surviving partners have been subject to private investigation<sup>103</sup> and intrusive cross-examination on behalf of defendants trying to establish involvement in subsequent relationships, or deterioration of the former relationship with the deceased, as a means of reducing the damages otherwise payable. In *Row v Willtrac Pty Ltd* a widow's cross-examination upon expressed dissatisfaction in her marriage caused such great distress Atkinson J considered that the claimant was:

heavily drugged with valium to help her cope ... What she said while under the effects of drugs, shock and grief cannot be thought to be a reliable insight into the state of her marriage which had so abruptly ended in horrible circumstances ...<sup>104</sup>

In addition, whilst the Northern Territory,<sup>105</sup> England<sup>106</sup> and most American States<sup>107</sup> have abolished taking into account both actual and prospective re-partnering (although the English position applies in relation to widows only), the High Court in *De Sales*<sup>108</sup> did not consider this determinative of the position to be taken.

The Supreme Court in *De Sales* made reference to the claimant's 'age and credentials',<sup>109</sup> in assessing her chance of remarriage. However the High Court confirmed<sup>110</sup> that as Ms De Sales was not present during argument and there was no reason to believe that the bench had seen her, the "credentials" reference could not be taken to refer to the judicial impact of her personality and physical appearance. Notwithstanding this the Court concluded that concepts of "marriageability" were misleading and should not be used as indicia of a dependant's prospects of financially beneficial re-partnering.<sup>111</sup> As such, the case went some way towards challenging the assumptions implicit in the assessment of wrongful death damages in order that their patriarchal foundation, and consequent application, may be exposed. Indeed it is here that the High Court most advanced the argument of those who view the remarriage discount as an outdated tool for assessing compensation.

<sup>102</sup> [1967] 2 QB 637, 644-5.

<sup>103</sup> Law Commission, above n 64, 61.

<sup>104</sup> (unreported, Supreme Court of Queensland, Atkinson J, 6 December 1999) [38].

<sup>105</sup> *Compensation (Fatal Injuries) Act 1974* (NT), s 10(4)(h). See further above n 61.

<sup>106</sup> *Fatal Accidents Act 1976* (Eng), s 3(3).

<sup>107</sup> Van Knapp (ed), *American Jurisprudence* (Lawyers Co-operative Publishing Company, 2<sup>nd</sup> ed, vol 22A, 1988) para 139, 309, 471-3.

<sup>108</sup> (2002) 212 CLR 338, 376-7, 389, 405.

<sup>109</sup> (2000) 23 WAR 417 (FC), 437.

<sup>110</sup> (2002) 212 CLR 338, 355.

<sup>111</sup> *Ibid* 354-5 (Gleeson CJ), 365 (Gaudron, Gummow and Hayne JJ). However see Callinan J who appears to exhibit a contrary view at 404.

## IV PROSPECTIVE RE-PARTNERING POST DE SALES

*De Sales v Ingrilli* involved a claim brought under the *Fatal Accidents Act 1959* (WA) by Ms De Sales,<sup>112</sup> on behalf of herself and her two children, for injury sustained as a result of her husband's death in a diving accident caused, in part, by the respondent's negligence. The High Court decision involved an appeal in relation to the damages assessed by the Western Australian Supreme Court, which held that in relation to Ms De Sales' chance of obtaining financial support from remarriage, 'for a woman of the appellant's age and credentials a 20 percent deduction would be appropriate.'<sup>113</sup> This increased the discount from five percent awarded at first instance by the District Court.<sup>114</sup> In addition, and contrary to the decision at first instance, a further five percent discount for general contingencies was ordered. This second deduction, unlike the discount for re-partnering prospects, applied to the children as well as Ms De Sales. Consequentially, the grounds of appeal before the High Court were that:

1. The remarriage discount should be abolished; or
2. The Supreme Court erred in increasing the discount from five to 20 percent; or
3. The Court should apply guidelines as to the appropriate discount percentage having regard to modern day realities.

The discount for general contingencies was also challenged.<sup>115</sup>

In allowing the appeal a 4:3 majority (Gaudron, Gummow, Hayne and Kirby JJ) concluded that "ordinarily"<sup>116</sup> no deduction should be made in wrongful death actions for the contingency of a surviving partner remarrying (and by analogy re-partnering), 'whether as a separate deduction, or as an item added to the amount otherwise judged to be an appropriate deduction for the vicissitudes of life,'<sup>117</sup> and that in *De Sales* no discount should have been made. Rather the chance was, according to Kirby J, 'merely another of the many possible vicissitudes ... to be given no more weight than any of the other vicissitudes that go to make up the general discount.'<sup>118</sup> The Supreme Court's assessment of general contingencies was however affirmed,<sup>119</sup> as being within the standard range of two to six percent<sup>120</sup> normally applied in Western Australia.

The High Court majority in *De Sales* therefore abolished the previously separate discount for the possibility of financially beneficial re-partnering, and instead included considerations of prospective re-partnering within the general discount for contingencies.<sup>121</sup> In doing so the Court repositioned the remarriage discount within the accepted two-pronged classification of contingencies discussed previously.<sup>122</sup> Rather than being viewed as a separate identifiable contingency susceptible to specific

<sup>112</sup> That the appellant was not the executor of the deceased's estate as required by s 6(1)(b), and therefore had no standing to bring the proceedings, was not challenged.

<sup>113</sup> *De Sales v Ingrilli* (2000) 23 WAR 417 (FC), 436-8.

<sup>114</sup> *De Sales v Ingrilli* [1999] WADC 80 (unreported, Jackson DCJ, 25 October, 1999) [66], [87].

<sup>115</sup> *De Sales* (2002) 212 CLR 338, 345, 358-9, 368, 370, 381, 400.

<sup>116</sup> See further discussion at below n 146-8 and accompanying text.

<sup>117</sup> *De Sales* (2002) 212 CLR 338, 357, (Gaudron, Gummow and Hayne JJ), 395 (Kirby J).

<sup>118</sup> *Ibid* 397. See also 366 (Gaudron, Gummow and Hayne JJ).

<sup>119</sup> *Ibid* 369, 396.

<sup>120</sup> *Kember v Thackrah* [2000] WASCA 198 (unreported, Malcolm CJ, Kennedy and Murray JJ, 7 August 2000) [13]; *Black v Motor Vehicle Insurance Trust* [1986] WAR 32, 34-5.

<sup>121</sup> (2002) 212 CLR 338, 366-7, 369, 397.

<sup>122</sup> See Boberg, above n 55 and accompanying text.

calculation, it should be considered together with other forms of contingency and an overall discount, taking account of all such possibilities, reached. Several reasons were provided for this conclusion. Whilst acknowledging that a wide range of financial possibilities and future contingencies must be balanced in assessing claims under the wrongful death legislation, Gaudron, Gummow and Hayne JJ considered that it was wrong to treat a dependant claimant's chance of financially beneficial re-partnering as an item warranting separate consideration because:

Why should one of those possibilities ... be considered separately from all others? To consider it separately assumes that it is a contingency whose likelihood of occurrence can be separately assessed with reasonable accuracy, and that the financial consequences ... will ... tend in one direction (financial advantage) ... [However] [e]ven if the prospects that a surviving spouse would ... enter a new continuing relationship could be assessed ... predicting when that would occur is impossible ... But most importantly, it cannot be assumed that any new union will be, or will remain, of financial advantage ... That being so, some financially advantageous ... relationship must be treated as only one of many possible paths that the future may hold ... That others in the past have had damages reduced on this account is not reason enough to continue the error.<sup>123</sup>

Justice Kirby, concurring, paid particular regard to social changes occurring since the discount was first required. These included a growth in:<sup>124</sup>

- Divorce rates;
- Incidence of employment and the social and economic independence of women;
- The availability of social security;
- Social acceptance of single women;
- Mobility between economic classes; and
- The number of judges less likely to base a widow's remarriage prospects upon stereotyped assumptions.

These factors rendered individuals less financially dependant upon domestic partnerships, and less certain of re-partnering with a person of similar economic capacity to the deceased. His Honour also considered the remarriage discount to be: speculative; distasteful; demeaning; exhibiting disparity in amount; and revealing a 'distinctly male perspective.'<sup>125</sup>

However, whilst the possibility of financially beneficial re-partnering was subsumed within general contingencies, it was viewed by the majority as not enlarging the discount generally awarded - the prospect cannot:

be seen as a matter, which under the general heading of "the vicissitudes of life", enlarges the discount which otherwise must be made from the present value of the benefits which the deceased was providing at death ... The discount can be assessed only as a single sum which reflects *all* of the possibilities.<sup>126</sup>

<sup>123</sup> (2002) 212 CLR 338, 365-7. See also 394 (Kirby J).

<sup>124</sup> Ibid 392-3. See also 363 (Gaudron, Gummow and Hayne JJ).

<sup>125</sup> Ibid 394.

<sup>126</sup> Ibid 367 (Gaudron, Gummow and Hayne JJ). See also 397 (Kirby J).

Chief Justice Gleeson (in the minority) also considered that the possibility of financially beneficial re-partnering should “ordinarily” be treated as part of the discount for general contingencies and not subject to special or separate consideration, opining that whilst there are:

many uncertainties that attend the contingency of a financially beneficial remarriage: when it occurs, whether it will last ... and whether it is or continues to be financially advantageous ... these uncertainties are no greater than many that attend the assessment of other “vicissitudes of life.”<sup>127</sup>

However, unlike the majority, his Honour favoured treating the prospect as adding to general contingencies by a modest amount stating:

I have difficulty in understanding how this Court can decide that the possibility of beneficial marriage may be taken into account as one of the general vicissitudes ... and at the same time deny to a trial judge the capacity ... to treat it as increasing the allowance for vicissitudes that would otherwise be made.<sup>128</sup>

Conversely, influenced by principles of: fairness; once and for all assessment; and the compensatory function of damages (meaning that awards, in assessing damages proportionate to the injury sustained, are not meant to be punitive),<sup>129</sup> Callinan and McHugh JJ preferred to maintain the practice of awarding a separate or specific discount.<sup>130</sup> In addition, as the discount should be made by reference to the actual circumstances of the particular case, Callinan J considered the provision of guidelines impractical and not to be introduced.<sup>131</sup>

#### *A Interpreting the Decision*

Social conditions and assumptions about women and marriage have changed drastically since the initial development of the wrongful death action, and incidentally the remarriage discount, in the mid 1800's. Then society was organised such that men were educated and earned income whilst women kept house and children. Until 1870, upon marriage a woman's property and income became her husband's.<sup>132</sup> Therefore, due to the prevailing class structure and lack of formal education,<sup>133</sup> Nineteenth Century wives were generally financially dependent upon their spouse and widows expected to remarry to ensure economic survival. However in modern Australian society:

Old ideas of [a] wife living in a fixed and settled routine, allowed so many pounds a month for the household ... and looking forward to the dowerhouse in widowhood or to some other variant secured to her by marriage settlement, have been jettisoned by the community ... Instead, we are presented with working wives displaying independence in action and in matters of finance, households run almost as joint enterprises ... and, speaking generally, vicissitudes in family

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<sup>127</sup> Ibid 353.

<sup>128</sup> Ibid 356. See also 354-5.

<sup>129</sup> Ibid 370, 375-6, 402-4.

<sup>130</sup> Ibid 378-9, 402, 407.

<sup>131</sup> Ibid 407.

<sup>132</sup> Remedied by the enactment of a series of acts between 1870 and 1893 beginning with the *Married Women's Property Act 1870* (Eng), which was reflected during this time by similar legislation in the Australian Colonies.

<sup>133</sup> M Moore, *Women's Issues Then & Now: A Feminist Overview of the Past 2 Centuries* (3 May 2002) <<http://www.cwrl.utexas.edu/~ulrich/femhist/marriage.shtml>> at 22 April 2004.



life which, in their frequency and magnitude, can bewilder ... those who witness them.<sup>134</sup>

Consequentially, as also reflected in *Knight v Anderson*,<sup>135</sup> past assumptions about the necessity of a woman's life-long financial dependency upon a male domestic partner are today unsupportable. Here the Western Australian Supreme Court rejected an argument that a claimant's pregnancy subsequent to her husband's death falsified testimony that she would never re-partner. It could not be shown that pregnancy alone would increase the likelihood that she would remarry and thereby obtain a degree of financial support to offset the loss claimed in her wrongful death action. However, whilst one can no longer make assumptions, of the magnitude afforded in the past, about the role that an individual can be expected to play in family or economy, and this position has been used to justify previous reformatory decisions of the High Court,<sup>136</sup> in *De Sales Gaudron, Gummow and Hayne JJ* confirmed that it is such 'assumptions of conformity to some unstated norm which underpin the making of a "discount for remarriage."<sup>137</sup>

With the advent of social security, present day dependants are less likely to be destitute upon the death of a breadwinner as in earlier times. Nor are women compelled to marry in order to gain financial security or social acceptance. In addition, one cannot automatically assume that any person's future re-partnering will be beneficial.<sup>138</sup> Youth or conventional "good looks" do not guarantee marriage into enduring or financially supportive unions. A subsequent partner may be an invalid, an alcoholic, or unwilling or unable to perform their legal or moral obligation to support.<sup>139</sup> That being so, when all life's future ups and downs are balanced, it is appropriate to conclude, similarly to the High Court majority in *De Sales*, that the factors impacting on the assessment and prediction of one's potential for financially beneficial re-partnering are so multifarious, that (absent actual or intended re-partnering) the mere prospect does not:

1. Automatically deserve to be given separate or substantial weight and affect in discounting damages awards; or
2. Warrant an increase in the vicissitudes percentage beyond that range already generally allowed as a standard.<sup>140</sup>

The first proposition has been subsequently affirmed by the New South Wales Supreme Court in *Dyer v Dyno Nobel Asia Pacific Ltd* and *Knuckey v Dyno Nobel Asia Pacific Ltd*,<sup>141</sup> and is supported by the fact that the assessment is inherently speculative and is not assisted by reference to a claimant's appearance or inclination. Consideration of a claimant's re-partnering prospects should therefore instead occur as part of the general

<sup>134</sup> *Allan v The Commonwealth* (1980) 24 SASR 581, 583 (Wells J).

<sup>135</sup> (1997) 17 WAR 85 (Malcolm CJ, Murray and Heenan JJ).

<sup>136</sup> For example, to extend the equitable "presumption of advancement" to the relationship between a mother and her adult child – 'In so far as the presumption ... derives from an obligation of support ... the "egalitarian nature of modern Australian society, including as between the sexes" [*Brown v Brown* (1993) 31 NSWLR 582, 600] demands no less: *Nelson v Nelson* (1995) 184 CLR 538, 586 (Toohey J). See also 601 (McHugh J).

<sup>137</sup> (2002) 212 CLR 338, 363.

<sup>138</sup> *Gillies v Hunter Douglas Pty Ltd* [1963] QWN 31.

<sup>139</sup> *Hollebone v Greenwood* [1968] 71 SR(NSW) 424, 430.

<sup>140</sup> See above n 51-4 and accompanying text.

<sup>141</sup> [2003] NSWSC 198 (unreported, Mathews AJ, 27 March 2003) [67-8]; [2003] NSWSC 212 (unreported, Mathews AJ, 27 March 2003) [58-9] respectively.

discount for contingencies. However concerning the second point, Kirby J in *De Sales* noted that the High Court's decision effectively abolished the remarriage discount stating 'what was formerly the discount for "the prospects of remarriage" does not apply ... [and] ... is therefore no longer part of the law.'<sup>142</sup> Consequentially, the Queensland Law Reform Commission has subsequently noted that:

The law as stated in *De Sales v Ingrilli* ... is that the possibility that a surviving spouse may form a relationship of financially supportive cohabitation should have no effect on the assessment of damages of the surviving spouse.<sup>143</sup>

Notwithstanding this, it would be wrong to interpret the majority judgements as meaning that a claimant's prospects of future financially beneficial re-partnering can now never be afforded any weight in all cases involving the assessment of wrongful death damages, albeit now as part of the general contingencies discount. Certainly there is no clear statement to this effect by Gaudron, Gummow, Hayne and Kirby JJ. Rather their Honours state that "ordinarily":

1. No "separate" allowance should be made; and
2. The amount of the "standard" adjustment [for vicissitudes] should not be increased to re-introduce the "remarriage" discount by the back door.'<sup>144</sup>

Furthermore if, according to the majority, the possibility of prospective re-partnering is now included within the assessment of general contingencies, it would be absurd to conclude that it is always to be given no weight.<sup>145</sup> Assessment of the contingencies discount is a question of fact to be decided on balance. Therefore, given that there is generally a percentage range within which contingencies are assessed, an individual claimant's re-partnering prospects should, all other vicissitudes aside, be properly seen as assisting the determination of where in that range the discount should fall.

The High Court majority did not conclusively define the "ordinary case" in relation to a claimant's re-partnering potential – although presumably *De Sales* was indicative - other than by contrast to when the financial advantage or disadvantage associated with an actual or intended re-partnering may be separately accounted for.<sup>146</sup> Chief Justice Gleeson<sup>147</sup> similarly defined the term by contrast to where it is possible to predict, with some degree of certainty, the likelihood of financially beneficial re-partnering and a separate consideration of the discount is warranted – such as: actual or intended re-partnering; or circumstances (for example religion) suggesting almost no chance of remarriage. His Honour also stated that the possibility of a claimant re-partnering to pecuniary advantage should 'ordinarily be treated as one of the "vicissitudes of life,"'<sup>148</sup> except where separate treatment is required procedurally. For example as in *De Sales* where the re-partnering discount was only applied to the compensation awarded to one of the claimants (Ms De Sales).

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<sup>142</sup> (2002) 212 CLR 338, 396-7.

<sup>143</sup> Queensland Law Reform Commission, *Damages in an action for wrongful death*, Report No 57 (2003) 67, n 320.

<sup>144</sup> *De Sales* (2002) 212 CLR 338, 396-7 (Kirby J). See also 367 (Gaudron, Gummow and Hayne JJ).

<sup>145</sup> Ibid 356 where this view is supported by Gleeson CJ.

<sup>146</sup> Ibid 365-7, 367-8, 395.

<sup>147</sup> Ibid 354-5.

<sup>148</sup> Ibid 354.

Critics of the remarriage discount do not deny its logical relevance to the assessment of a wrongful death claimant's pecuniary loss.<sup>149</sup> Their objections instead appear broadly directed towards the difficulty of making an accurate appraisal of a widowed spouse's re-partnering prospects, and its distasteful and demeaning nature. However, contingency allowances of this type are not confined to fatal injury cases, being also inseparable from an assessment of damages in personal injury claims similarly founded upon principles of: compensation; lump sum; once and for all assessment; and a balancing of gains and losses.<sup>150</sup> The assessment of a claimant's chance of financially beneficial re-partnering is no different in principle from the task facing any judge where, in a personal injuries action, one must gaze into the future and assess the probable changes in a claimant's chance of recovery or future earning prospects. In both instances mathematical precision is impossible.

Most modern day fatal accident claims, especially those arising out of road accident or work related deaths, involve insured defendants. The costs of claims are therefore borne either by the uninsured defendant personally or the general body of policyholders, who participate in or profit from the risk-creating activity, in the form of increased premiums. No doubt any costs borne by defendants arising from their commercial or business related activities will be further passed on to the consumer public in the form of increased prices for the associated goods and services. It is preferable that wrongdoers and those obtaining the benefit of services or the activity in question pay through increased insurance premiums and prices, than society at large - if dependant spouses are compensated too little (or not at all) and are thus thrown back on the state for support by means of social welfare payments. Placing responsibility on the enterprise liable for the wrongdoing also ensures a greater probability of modification of future behaviour. Nevertheless whilst the claimant's loss is often prominent at trial, fairness is denied if in the assessment of damages the defendant's position is ignored.<sup>151</sup> Compensatory damages awards are not meant to be punitive, however as Gleeson CJ opined in *De Sales*:

The consequence of making no allowance for the contingency of remarriage ... must be to increase ... the amount to which the appellant is entitled. The primary argument of the appellant, if correct, means that, by reason of changes in the role and status of women, and their increasing independence, a modern widow will be taken to have suffered a significantly greater ... financial loss in consequence of the death of a husband than her counterpart in earlier times.<sup>152</sup>

There is also economic incentive for the provision of fair compensation to ensure that risk-creating activities operate at efficient levels and that the affordability of insurance<sup>153</sup> is not further prejudiced by excessive damages awards. However, it is only through a consideration of a claimant spouse's re-partnering prospects that this can be achieved.

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<sup>149</sup> Law Reform Committee of South Australia, above n 77, 8.

<sup>150</sup> For example, the deduction of outgoings necessarily incurred in connection with employment from the amount awarded on account of economic loss in personal injury actions, on the basis that those costs will not be incurred in the future if the plaintiff is no longer working: *Sharman v Evans* (1977) 138 CLR 563, 577.

<sup>151</sup> *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649, 657.

<sup>152</sup> (2002) 212 CLR 338, 351-2.

<sup>153</sup> *Ibid* 406 (Callinan J).

Pertaining to the inquiry's distasteful and demeaning nature, in *De Sales Kirby J* apparently distinguishes cases where topics of a "distasteful nature," such as the formation of future relationships or impairment of sexual function, are evaluated for the purpose of "awarding" damages, from those where evaluation is required in order to "discount" damages.<sup>154</sup> However surely such an investigation would be equally intrusive whether made, for example: in a personal injuries action where a claimant seeks damages for loss of ability to enjoy personal relationships as part of damages for loss of amenities;<sup>155</sup> or for the purpose of ascertaining the potential to form future relationships in the context of discounting a fatal accident damages award on the basis of reduced dependency. In each case the court must consider intimate details of the claimant's life and weigh possible conflicting argument. Both claimants would surely prefer that the incident, which brought them to court, had never happened. Nevertheless both have chosen to bring a claim in respect of their loss.

Indeed many aspects of wrongful death compensation may be demeaning. In *Price v Girle*<sup>156</sup> a remarried plaintiff claimed *Lord Campbell's Act* damages for loss of the service of his deceased wife, on the basis that his younger second wife was not as good a manager and housekeeper as the first, nor as helpful to him in his political career. The claimant had no qualms about advancing this argument for his benefit, although it reflected adversely upon his current wife. The argument was rejected however due to lack of evidence of the second wife's inferior potential. In *Mahoney v Dewinter*,<sup>157</sup> no doubt observations concerning the deceased's vulnerability to prosecution, fraudulent receipt of employment benefits, driver's licence disqualification and obesity, leading to the conclusion that he would not have worked until retirement and had a below average life expectancy, were necessary to the court's compensation assessment, albeit hurtful to his memory. Similarly in *Franco v Woolfe* in assessing a claimant's re-partnering prospects the Ontario High Court concluded that considering:

the man and his rather unbending attitudes ... What right-thinking woman would take on such a task? Carl Franco alone would be a challenge to any marriage counsellor ... Even assuming some woman naïve enough were persuaded to marry ... I think she would soon give up.<sup>158</sup>

If the critics' claims were taken to their natural limit, they would provide a basis for arguing that the law should revert to its common law position and statutory fatal injury claims should be abandoned – however no such claim is made. Notwithstanding, the above analysis does support the argument that whilst a claimant's re-partnering prospects do not deserve to be given separate or substantial weight and affect in discounting damages awards, especially of the magnitude afforded in the past, there is no ground in principle or policy for singling out this factor for special exclusion from the assessment of the vicissitudes which may otherwise impact upon a claimant's damages award. Courts should not ignore anything likely to affect quantification of loss. Additionally, considering potential re-partnering as part of the discount for general contingencies and attributing to the possibility a more modest significance in

<sup>154</sup> Ibid 390-1.

<sup>155</sup> *Sharman v Evans* (1977) 138 CLR 563, 584-5, 587-8.

<sup>156</sup> [1966] QWN50.

<sup>157</sup> (unreported, Supreme Court of Queensland, Court of Appeal, McPherson J, 15 March 1993).

<sup>158</sup> (1974) 52 DLR (3d) 355, 360 (Haines J).

determining where, in the “standard range”<sup>159</sup> normally allowed, the discount should fall, is likely to expose a claimant to less intrusive investigation and cross-examination. Furthermore if, in a wrongful death claim, a claimant’s prospect of future divorce or separation is treated as forming part of the general contingencies that might have affected their level of dependency upon the deceased,<sup>160</sup> why should not one’s re-partnering prospects? Prospective divorce or separation is similarly distasteful and uncertain as to occurrence and future financial benefit in terms of maintenance orders made pursuant to the *Family Law Act 1975* (Cth) or the legislation governing de facto relationships.<sup>161</sup> Therefore, whilst assessing one’s re-partnering prospects may be distasteful to both spouse and court, much will depend on the attitude of the individual judge, and it is necessary if justice be done.

### B *Subsequent Judicial Consideration*

Whilst the Queensland Law Reform Commission has confirmed the post-*De Sales*: ‘confusion about whether or not the discount [for re-partnering prospects] is to be treated as a contingency which does not enlarge the general discount for the vicissitudes of life,’<sup>162</sup> in *Dwight v Bouchier*<sup>163</sup> the New South Wales Court of Appeal referred to the High Court majority. There it was argued, in a wrongful death claim, that there was no basis for reducing an assessment of general contingencies to 10 percent (from the standard 15 percent), as the respondent’s remarriage prospects should have been taken into account. However, far from concluding that post-*De Sales* one’s re-partnering prospects are always irrelevant to the assessment, the Court confirmed the trial judge’s approach, assessing the prospects as relatively slim and uncertain as to financial benefit on the facts.

The Western Australian District Court has also expressed a similar view. In *Hewitt v Tonkin*, Fenbury DCJ considered it clear from *De Sales* that no special discount should be made for the contingency of remarriage. Nevertheless, his Honour stated that:

The plaintiff is a young woman with two children by different fathers. She may or may not form a relationship in the future. Quite frankly I think that it is likely ... at some time. However nobody knows whether it will be beneficial or not and how long it will last. In my view there is no sufficient evidence for the Court ... to make any special discount for remarriage ... beyond the general discount for vicissitudes of life.<sup>164</sup>

Consequentially, it was considered that in these circumstances the appropriate discount for contingencies would be the maximum six percent standard discount allowable in

<sup>159</sup> See above n 51-4 and accompanying text.

<sup>160</sup> *Rodda v Boonjie Pty Ltd* (unreported, Supreme Court of Queensland, Byrne J, 27 May 1993); *Goldsworthy v District Council of Port Macdonnell* (1992) 57 SASR 473. This was accepted in obiter by the High Court in *De Sales*, (2002) 212 CLR 338, 349, 355 (Gleeson CJ), 363-4, 366 (Gaudron, Gummow and Hayne JJ), 374 (McHugh J).

<sup>161</sup> Currently: *Domestic Relationships Act 1994* (ACT), s 19; *Property (Relationships) Act 1984* (NSW), s 27; *Relationships Act 2003* (Tas), s 36; *De Facto Relationships Act 1991* (NT), s 26; *Family Court Act 1997* (WA), s 205ZC. In addition, a de facto spouse’s enforceable rights to financial support are more limited: *De Sales*, (2002) 212 CLR 338, 353, 367, 407.

<sup>162</sup> Queensland Law Reform Commission, above n 143, 54.

<sup>163</sup> [2003] NSWCA 3, (unreported, Mason P, Stein and Heydon JJA, 6 February 2003) [64-8].

<sup>164</sup> [2003] WADC 203 (unreported, Fenbury DCJ, 29 September 2003) [27-8].

that State. In *Mickelberg v Aerodata Holdings* whilst no deduction was claimed for any prospect of remarriage, the court confirmed that a majority of four to three<sup>165</sup> in *De Sales* held that there should be no separate discount on this account. However O'Brien DCJ opined that: 'such a discount could be taken into account as one of a number of general vicissitudes of life,'<sup>166</sup> which his Honour then proceeded to assess with reference to the respective ages of the deceased and the applicant at the time of death.

Therefore how a claimant's financially beneficial re-partnering prospects should or may be measured, as part of general contingencies, is likely to be the topic of further debate. However both *Hewitt* and *Mickelberg* suggest that the claimant's age is likely to be a relevant factor. In 1971 a person widowed at 18 years of age was considered to have a 54 percent chance of remarrying (and with the inclusion of de facto relationships, arguably an even greater chance of re-partnering), whilst one widowed at 55 years had only a nine percent likelihood of ultimately remarrying.<sup>167</sup> In this light *De Sales* can be seen, not as supporting the contention that post-*De Sales* a claimant's prospects of financially beneficial re-partnering are irrelevant to the assessment of wrongful death damages, but rather inferring that on the facts of that case the balance of possible positive and negative factors relevant to an estimation of the claimant's prospects were so multifarious that they operated in the minds of the majority to negate each other. Therefore when combined with the other vicissitudes they warranted no change to the discount for general contingencies assessed by the Supreme Court<sup>168</sup> which was:

within the standard range and makes appropriate allowance for the various contingencies, including the prospect of the appellant's entering into a permanent relationship which is to her financial benefit.<sup>169</sup>

For Ms De Sales was aged 36 at the time of trial, and as stated in *Cremona v Roads and Traffic Authority* in connection with the relationship between a claimant's age and their propensity to re-partner - 'the plaintiff is now 36 and if I may delicately say is neither young or old.'<sup>170</sup> According to Cruise, a 36-year-old widow has a 51 percent chance of ultimately remarrying,<sup>171</sup> and is therefore just as likely (practically) not to remarry. Indeed, post-*De Sales* it may be that the claimant's age is the only individual characteristic remaining most relevant to the estimation – given the randomness inherent in other facets going towards the formation of future personal relationships. Statistics aside, commonsense also prescribes that young widows and widowers are more likely to re-partner, albeit with mixed financial benefit. However holding the financial consequence of re-partnering constant (given its multifarious nature), it remains that the age of the widowed is useful in determining their propensity to re-

<sup>165</sup> Gaudron, Gummow, Hayne and Kirby JJ (Gleeson CJ ("ordinarily" not subject to separate consideration), Callinan and McHugh JJ dissenting).

<sup>166</sup> (2003) 31 SR (WA) 351, 354.

<sup>167</sup> KM Cruise, 'Present Value and Remarriage Rate Tables' (1971) 45 *Australian Law Journal* 15, 160-1. See also *Elford v FAI General Insurance Co Ltd* [1994] 1 Qd R 258.

<sup>168</sup> *De Sales v Ingrilli* (2000) 23 WAR 417 (FC).

<sup>169</sup> *De Sales* (2002) 212 CLR 338, 369 (Gaudron, Gummow and Hayne JJ).

<sup>170</sup> *Cremona v Road and Traffic Authority* [2000] NSWSC 556 (unreported, Dowd J, 20 June 2000) [64]. Chief Justice Gleeson (in the minority) also confirmed that there was nothing special about Ms De Sales' age: *De Sales* (2002) 212 CLR 338,355.

<sup>171</sup> Cruise, above n 167, 161. However see *De Sales* (2002) 212 CLR 338, where whilst McHugh J (at 376-9) and Callinan J (at 405-7) favoured the use of statistics in evaluating a claimant's re-partnering potential, at least as a starting point in light of the circumstances of the case, Gleeson CJ (at 353), Gaudron, Gummow and Hayne JJ (at 364-5) and Kirby J (at 393-4) were more cautious.

partner and consequentially their likelihood of obtaining “some” financial benefit to offset their loss. Support for this notion can be found in the judgements of Gaudron, Gummow and Hayne JJ in *De Sales*.<sup>172</sup> Justice McHugh (dissenting) also opined that:

If the support discount were subsumed under the head of general contingencies, the percentage ... would have to be adjusted on a case-by-case basis ... If the variation is done properly, it would move in accordance with the age and circumstances of the widow or widower.<sup>173</sup>

## V REFORM: ACTUAL AND RECOMMENDED

Interpreted with reference to the above argument, the High Court’s approach to the remarriage discount in *De Sales v Ingrilli* is both just and flexible. On the one hand it recognises that, in modern times, applying a separate and substantial discount to a wrongful death claimant’s damages assessment on account of their propensity to re-partner is to erroneously assume that its likelihood of occurrence and continued financial benefit can be reasonably predicted – either at all or by reference to the claimant’s personality or appearance. However on the other hand, it acknowledges the continued, albeit more limited, importance of one’s propensity in affording a consideration of weight when determining, in the circumstances of the case, an appropriate discount for general contingencies. A more just assessment of compensation, in line with societal change, thereby ensues which adequately balances claimant, defendant and community interests. Consequently, the decision also highlights, as areas in need of further articulation and reform, the significance to be afforded to: actual re-partnering in wrongful death actions; and actual or prospective re-partnering in other actions similarly seeking compensation for loss of support. Additionally, the subsumption of the remarriage discount within general vicissitudes will require, in light of the disparity in approaches adopted between judgements and between jurisdictions, a redefinition or reassessment of the standard contingencies discount and a greater need for judicial transparency.

### A *Weight Attributable to Actual Re-partnering*

The assessment of the financial benefit pertaining to a claimant’s actual or intended re-partnering differs from an assessment of one’s future re-partnering prospects. As one moves along the spectrum from actual towards intended and prospective re-partnering, the certainty of the relationship’s formation decreases. Even an intended re-partnering is contingent upon the relationship’s actual formation. However in all cases, the certainty of the relationship’s financial benefit is speculative although perhaps most so with prospective future relationships. Without evidence of the specific relationship there is no way of knowing whether it will be of benefit to the claimant. Even if the initial financial benefits of a new relationship were known, it would be wrong to assume that they will necessarily continue in their current form or, in the case of an intended re-partnering, that the benefits will come to fruition.

Therefore, the concerns expressed by the majority in *De Sales*, in relation to the difficulty inherent in predicting the financial benefit pertaining to prospective relationships - including an estimation of the future economic features of that

<sup>172</sup> (2002) 212 CLR 338, 365.

<sup>173</sup> *Ibid* 379. See also 370.

relationship, its duration and risks of supervening unemployment, illness or death - also apply to the case of actual or intended relationships.<sup>174</sup> This was recognised by Gleeson CJ<sup>175</sup> who opined that such claims may be subject to separate consideration only where the evidence is “sufficiently concrete” to allow a special discount to be made. Consequentially, the weight traditionally afforded to claims of actual or intended re-partnering in reducing an assessment of wrongful death damages, may also become the subject of greater scrutiny. In Victoria this has already occurred.

In response to *De Sales*, Victorian Parliament passed the *Wrongs (Remarriage Discount) Act 2004*, amending section 19 of the *Wrongs Act 1958* (Vic) to preclude courts, when assessing damages, from taking into account as a separate discount both: a claimant’s actual remarriage or new domestic partnership; and prospects of remarriage or new domestic partnership. However courts are not prevented from taking into account actual or prospective re-partnering as part of the general discount awarded for the vicissitudes of life.<sup>176</sup> Although expressed to reflect the common law as set out in *De Sales*,<sup>177</sup> the legislation extends, in that State, the ambit of the High Court’s decision (in obiter) in relation to actual re-partnering. Rather than being viewed as a separate identifiable contingency susceptible to specific calculation, the Act recognises that the financial benefit pertaining to actual re-partnering is impossible to accurately predict and should therefore be considered together with other general vicissitudes. Whilst the uncertainties inherent in the economic benefit to be derived from actual relationships may be thought to be less than that pertaining to intended or prospective relationships, this legislation, by reducing the weight traditionally afforded to evidence of actual re-partnering, represents welcome post-*De Sales* reform reflective of commonsense.

Conversely, in November 2003, the Queensland Law Reform Commission<sup>178</sup> recommended the introduction of legislation preventing the financial benefits received from prospective or intended future relationships from being taken into account “in any manner” in wrongful death claims. With respect, whilst a consideration of actual re-partnering is not precluded, this seems, unlike the Victorian legislation, an illogical compromise – both out of tune with the action’s compensatory function and, it is argued, the ratio decidendi of the *De Sales* decision. Furthermore, such a result:

- Provides renewed incentive for defendants, wishing to reduce their liability, to actively attempt to obtain evidence of actual re-partnering – resulting in the increased private investigation and intrusive cross-examination of claimants;
- Places a premium on delaying wrongful death claim hearings, with a consequent negative impact on the administration of justice;
- Encourages the delayed social adjustment of the widowed through the provision of a disincentive to resume enduring private relationships;
- In effect, allows a claimant to, tell the court that they have not yet married their millionaire because they have been legally advised not to;<sup>179</sup> and

<sup>174</sup> *De Sales* (2002) 212 CLR 338, 366-7 (Gaudron, Gummow and Hayne JJ), 394-5 (Kirby J). Affirmed by Queensland Law Reform Commission, above n 143, 80.

<sup>175</sup> *De Sales* (2002) 212 CLR 338, 354.

<sup>176</sup> Victoria, Parliamentary Debates, Legislative Assembly, 28 October 2003, 1294 (Robert Hulls).

<sup>177</sup> *Ibid.*

<sup>178</sup> Queensland Law Reform Commission, above n 143, 55, 80.

<sup>179</sup> Law Reform Committee of South Australia, above n 77, 9.



- Is inconsistent with the treatment of a claimant's prospects of divorce at common law, which treatment the Commission supports.<sup>180</sup>

The Queensland Law Reform Commission's recommendations have been implemented, with retrospective effect, via section 114 of the *Justice and Legislation Amendment Act 2004* (Qld), which inserts sections 23A, 23B, 23C and 23D into the *Supreme Court Act 1995* (Qld).

### B *Compensation for Loss of Support*

If post-*De Sales* no (or a reduced) account is to be taken of a surviving partner's actual or prospective re-partnering in spousal wrongful death claims due to the speculative nature of the exercise, it is difficult to see why a reconsideration of the weight afforded to the formation of relationships should not also occur in relation to other plaintiffs. For example in:

- Wrongful death actions where a parent successfully claims for loss of an unmarried child's financial support, the possibility of the child marrying is traditionally taken into account to reduce the pecuniary value of the parent's dependency;<sup>181</sup>
- The case of plaintiffs whose damages for severe personal injury are influenced by their likelihood of marriage - here the damages assessment takes into account the plaintiff's loss of an actual or prospective future spouse's financial support as a result of the wrong. This may occur either as a separate head of damage, or as part of the vicissitudes of life leading to a lesser deduction in the assessment of lost income,<sup>182</sup> and, similarly to wrongful death actions, requires an assessment of future dependency; and
- The assessment of *Griffiths v Kerkemeyer*<sup>183</sup> damages. Based upon the claimant's need for future domestic assistance, the award has recently<sup>184</sup> been discounted to reflect the claimant's prospects of forming a future relationship, and the likelihood of that relationship enduring such that services may be provided by one's spouse or partner as part of the normal household sharing of tasks, which therefore could not be compensated under this head.<sup>185</sup>

### C *Redefinition of Contingencies Discount*

In relation to general contingencies, in New South Wales it has been stated that: 'why there should be any conventional discount, and why it should be 15 percent regardless

<sup>180</sup> Queensland Law Reform Commission, above n 143, 92. See above n 160 and accompanying text for the common law position.

<sup>181</sup> Queensland Law Reform Commission, *In Relation to an Examination of the Provisions of the Fatal Accidents Acts With a View to Elimination of Anomalies*, Report No 9 (1971) 3.

<sup>182</sup> As deductions are not made for time absent whilst child bearing and alike, which may have occurred had the plaintiff married. See *Hines v Commonwealth* (1995) ATR 81-338; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608; *Commercial Union Assurance Company of Australia v Pelosi* (unreported, Supreme Court of New South Wales, Court of Appeal, Kirby P, Handley and Sheller JJA, 2 February 1996).

<sup>183</sup> (1977) 139 CLR 161.

<sup>184</sup> *Finch v Rogers* [2004] NSWSC 39 (unreported, Kirby J, 13 February 2004) [235-53].

<sup>185</sup> Domestic services undertaken as part of the ordinary give-and-take of marriage are not services necessary to attend to the accident caused needs of a plaintiff, unless the injuries preclude the provision of countervailing services: *Van Gervan v Fenton* (1992) 175 CLR 327, 343-4 (Deane and Dawson JJ).

of the infinite variety of chances which may befall an injured person has never adequately been debated.<sup>186</sup> Is a person on the New South Wales Clapham Omnibus more likely to have a “bad life” than say one in Western Australia? In *De Sales* McHugh, Callinan and Kirby JJ observed<sup>187</sup> that if the remarriage discount was incorporated within the vicissitudes of life, the High Court, and/or the legislature, would eventually need to consider the disparity in approaches<sup>188</sup> adopted by the various state courts to the assessment of vicissitudes. Their Honours also considered that the five percent total deduction for contingencies awarded, acceptable in Western Australia, was unreasonably low:

It means that, despite all the assumptions and uncertainties in assessing the loss of the chance of dependency over a thirty-four year period, the figure placed on the value of the chance ... has a 95 per cent confidence level of being correct.<sup>189</sup>

This issue has subsequently arisen for consideration in Western Australia in *Hewitt v Tonkin*<sup>190</sup> where, drawing upon the statements made by their Honours in *De Sales*, the defendant argued that the quantum of the general contingencies discount should be increased to at least 15 percent (in line with New South Wales) from the standard two to six percent.<sup>191</sup> However whilst sympathising with the defendant, the District Court held itself unable to discount an award by more than six percent without sufficient actuarial evidence, which was absent in the materials before it. However in *Misiani v Welshpool Engineering Pty Ltd*<sup>192</sup> it was successfully submitted that post-*De Sales* the “standard” Western Australian discount should not apply when assessing vicissitudes. Instead the Court followed its prior decision in *Kschammer v RW Piper & Sons Pty Ltd* where Malcolm CJ opined that: ‘the appropriate level of discount for contingencies to apply to the end figure calculated for future earnings would be not more than 10 percent.’<sup>193</sup> Consequentially the Western Australian Supreme Court appears to have now increased its standard rate of discount for general contingencies to 10 percent.

Justice Kirby also opined in *De Sales* that the case did not address whether, or the way in which, the discount for financially beneficial re-partnering could be subsumed into the discount for general contingencies in those Australian jurisdictions that do not have a “standard” discount.<sup>194</sup>

#### D *Judicial Transparency*

If prospective financially beneficial re-partnering is included within the discount for general contingencies the weight attributed to it on the facts should be made apparent.<sup>195</sup> This would facilitate:

- The courts’ appellate function;

<sup>186</sup> *Moran v McMahon* (1985) 3 NSWLR 700, 706 (Kirby P).

<sup>187</sup> (2002) 212 CLR 338, 374, 379-80 (McHugh J), 407-8 (Callinan J), 395-6 (Kirby J).

<sup>188</sup> See above n 51-4 and accompanying text.

<sup>189</sup> *De Sales*, (2002) 212 CLR 338, 379 (McHugh J).

<sup>190</sup> [2003] WADC 203 (unreported Fenbury DCJ, 29 September 2003).

<sup>191</sup> *Kember v Thackrah* [2000] WASCA 198 (unreported, Malcolm CJ, Kennedy and Murray JJ, 7 August 2000) [13].

<sup>192</sup> [2003] WASC 263 (unreported, Barker J, 19 December 2003) [315-21].

<sup>193</sup> [2003] WASC 298 (unreported, Malcolm CJ, 3 December 2003) [194].

<sup>194</sup> (2002) 212 CLR 338, 397-8.

<sup>195</sup> *Ibid* 397 (Kirby J), 370, 379 (McHugh J), 407 (Callinan J).

- The prevention of impulsive decisions concerning a claimant's "marriageability;"
- Legal practitioners, both when advising clients and brokering settlements; and
- The preferred approach to compensation assessment advocated by the High Court,<sup>196</sup> being the itemisation of each head of damage and the provision of reasons for awards made.

## VI CONCLUSION

In *De Sales v Ingrilli* the High Court's attempt to ensure that the assessment of damages in wrongful death actions continues to fully recognise and reflect contemporary social realities, is admirable. The doctrinal assumption of the need to make a separate and significant remarriage discount on account of a widow's re-partnering prospects is questionable in a modern society changed from a time when almost any probability of re-partnering would be of benefit. In addition, by rejecting the utility of references to a claimant's appearance and personality, the decision goes some way towards ensuring that the indirect discrimination of women is no longer perpetuated through outdated determinants of one's "marriageability" and stereotypical assumptions about marriage and financial dependency. However, whilst abolishing the remarriage discount, it is wrong to conclude that the High Court has excluded all consideration of a claimant's marriageability from this form of compensation calculation. Unless and until affected by legislation (such as that now existing in the Northern Territory, Victoria and Queensland), the decision does not prevent a separate consideration of a claimant's actual or intended re-partnering, and one's potential for financially beneficial re-partnering also remains relevant, albeit now attracting a reduced significance as merely assisting in the determination of an appropriate discount for general contingencies.

Therefore what at first glance appears to be a decision that pours water upon the consideration of a claimant's re-partnering prospects, in discounting their wrongful death damages award, can instead be perceived as a decision leaving considerable uncertainty and requiring further judicial and/or legislative clarification. In order to ensure consistency in the law, the decision arguably requires a reconsideration of the treatment given to evidence of re-partnering in the assessment of compensation generally, and a revision of the assessment of general contingencies across jurisdictions. Another topic of further debate is likely to be how, as part of a court's assessment of general contingencies, a claimant's prospects of future financially beneficial re-partnering should or may be measured subsequent to *De Sales* - although it is argued that claimant age should be a relevant consideration. Consequently it would seem that the courts' work has just begun.

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<sup>196</sup> *Sharman v Evans* (1977) 138 CLR 563, 571-2.