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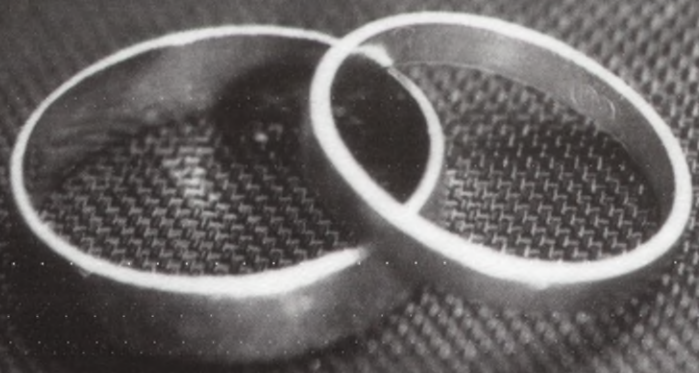
Wife after death: the assessment of damages for wrongful death



Recently, in *De Sales v Ingrilli*[1], the High Court was asked to consider whether, in light of changes in Australian society and the role of women, the practice of discounting the *prima facie* value of a spouse's damages in a wrongful death claim by their prospects of remarrying should continue. In the context of the court's decision, Tracey Carver discusses the rationale behind the 'remarriage discount' and further possible reform.

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In 1846, due to the increase in fatal accidents occurring in the wake of the Industrial Revolution, the *Lord Campbell's Act* (UK) was enacted to compensate the family of a person whose death was caused by another's wrongful act. Section 1 of the Act (now the *Fatal Accidents Act* 1976 (UK)) 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 occurred) have entitled the person injured to maintain an action, the person who would have been liable is liable to an action for damages, notwithstanding the death. The Act therefore provides a deceased's dependant relatives, who have been deprived of a family member's financial support, with a cause of action against the wrongdoer in respect of their loss. Normally, the executor or administrator of the deceased brings the action for the benefit of a limited class of relatives, including the deceased's spouse and children. Similar legislation exists in all Australian jurisdictions.[2]

The 'loss' compensated by the legislation is not defined, but has traditionally been limited to past and future economic loss resulting from the death.[3] This includes loss of income and services with a pecuniary value capable of assessment, provided by the deceased and from which the claimants were expected to benefit. According to Windeyer J in *Parker v The Commonwealth*[4], in assessing damages in a wrongful death claim the following methodology should be observed:

'First, damages are calculated by reference to the pecuniary benefit that could reasonably have been expected from the continuance of the life had death not occurred. ... Second, damages for injury are calculated on a balance of pecuniary gains and losses consequent upon the death.'

The fundamental function of the law of torts, of which the wrongful death legislation forms part, is compensation – to return a plaintiff, as far as money can, to the position they would have been in but for a defendant's wrongful act. In addition, as damages are awarded as a lump sum, and are assessed once and for all by the court, there is no possibility for reassessment or adjustment over time. As a consequence, the assessment of damages for wrongful death is inherently speculative, requiring the court to assess what would have happened to the deceased if they had not been killed (something obviously not verifiable by subsequent events).

HISTORIC TREATMENT OF THE REMARRIAGE DISCOUNT

Given the methodology and principles underpinning the assessment in wrongful death actions and thus to ensure, as far as practicable, a true reflection of a claimant's loss, damages are discounted on account of future ▶

possible (positive and negative) events, called contingencies or vicissitudes of life. This includes factors impacting on the extent of a claimant's dependency upon the deceased such as future premature death (of either the claimant or the deceased), sickness, injury, unemployment, promotion prospects and divorce. Prior to *De Sales v Ingrilli*, a separate discount was also made (where no evidence of actual or intended re-partnering) on account of a surviving partner's prospects of:

- entering another relationship; and thereby
- obtaining a substitute pecuniary benefit to offset their damage.

Whilst depending on the circumstances of the case, the discount range allowed by judges for such prospective re-partnering (encompassing both marital and de facto relationships)[5] was wide, spanning from two per cent in some cases, to 60 per cent in others.[6] Historically, in determining a claimant's 'marriageability', factors such as their appearance, personality, age, education, children, job prospects and courtroom demeanour have been considered relevant.[7] However, whilst on its face exhibiting formalistic equality, in effect, the discount has not always been even handed. As Atkinson J of the Queensland Supreme Court has stated:

'A man who is economically dependent on his wife finds himself in the same position [as a woman whose husband is killed by another's negligence] but in such a case ... a man's physical attractiveness has never, to my knowledge, been considered.'[8]

The High Court in *De Sales*[9] concluded that the 'marriageability' concept was misleading and should not be used as the indicia of a claimant's prospects of financially beneficial re-partnering.

THE POSITION POST *DE SALES V INGRILLI*

In *De Sales*, the appellant's husband was killed during a diving accident on 12 August 1990. The respondent was held liable in negligence for the death, however Mr De Sales was found

contributory negligent and was apportioned one-third of the liability on this account.[10] Subsequently, the appellant made a wrongful death claim under the *Fatal Accidents Act* 1959 (WA) on behalf of herself and her two children, seeking damages for the injury sustained as a result of her husband's death. Although not the executor of the deceased's estate as required by section 6(1)(b), the appellant's standing to bring the action was not challenged.

The Western Australian District Court, in assessing damages, made no deduction for general contingencies but reduced the appellant's award by five percent due to her 'chance of obtaining financial support from remarriage.'[11] On appeal, the Supreme Court held that given the appellant's age and credentials, a remarriage discount of 20 per cent was warranted. In addition,[12] a five per cent discount for contingencies was ordered which, unlike the discount for re-partnering prospects, also applied to the proportion of damages allocated to the children.

This decision was challenged in the High Court, where a 4:3 majority (Gaudron, Gummow, Hayne and Kirby JJ) concluded that no deduction should have been made on account of the appellant's prospects of remarriage. However, the Supreme Court's assessment of general contingencies was affirmed.

High Court Majority

In allowing the appeal, the majority held that no deduction should ordinarily be made in wrongful death actions for the *prospects* of the surviving partner remarrying (and by analogy re-partnering), whether as a separate discount or as increasing that generally allowed for the vicissitudes of life. Rather, according to Kirby J, it was:

'...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. The "standard" adjustment should not be increased to re-introduce the "remarriage" discount by the back door'.[13]

The High Court therefore abolished the previously separate discount for the possibility of financially beneficial re-partnering, and instead subsumed it within the general contingencies discount. Gaudron, Gummow and Hayne JJ considered that it was wrong to treat the prospect of remarriage as an item warranting special consideration because:

'Even if the prospects that a surviving spouse would ... enter a new continuing relationship could be assessed (and there will be few cases where that would be possible), 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 to any of those for whose benefit the action is brought. That being so, some financially advantageous relationship must be treated as only one of the 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.'[14]

However, neither the majority nor the minority precluded taking into account evidence of the financial advantage or disadvantage associated with an *actual* or *intended* re-partnering. The court considered that this would occur as a separate and, depending on the facts of the case, potentially substantial discount in addition to that generally allowed for contingencies.[15] That this conclusion, albeit in obiter, is correct is supported by the:

- rule espoused in *Willis v The Commonwealth*[16] that certainty is preferred to speculation in the assessment of damages;
- methodology and principles of compensation and proportionality underlying the assessment of wrongful death damages; and
- illogicality of ignoring a claimant's actual re-partnering before trial, and its subsequent effect on the extent of their dependency upon the deceased, in a society where one cannot legally receive the support of two spouses.

Minority

Whilst differing in the final order made, the minority of the High Court (Gleeson CJ, McHugh and Callinan JJ) concluded that the practice of discounting damages in a wrongful death claim on account of a claimant's remarriage prospects should continue. However, whilst Gleeson CJ favoured treating the prospects of a future financially beneficial re-partnering as part of and (contrary to the majority) adding to general contingencies by a modest amount, the remaining minority preferred to maintain a separate and specific discount.

"...the majority held that no deduction should ordinarily be made in wrongful death actions for the prospects of the surviving partner remarrying..."

Gleeson CJ held the opinion that the fact that the positive and negative contingencies associated with re-partnering cannot be predicted with certainty does not relieve courts of the task of taking them into account as 'these uncertainties are no greater than many that attend the ▶

assessment of other vicissitudes of life'.[17] His Honour also responded to claims that changes in the social and economic independence of women had made a consideration of their re-partnering prospects outmoded, stating:

'The primary contention 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 significantly greater (not lesser) financial loss in consequence of the death of a husband than her counterpart in earlier times.'[18]

Callinan and McHugh JJ's judgments were based on the notions of:

- fairness;
- once and for all assessment; and
- the compensatory function of damages, meaning that awards, in assessing damages proportionate to the injury sustained, were not meant to be punitive.

As claimed by Callinan J:

'Assessments of damages ... are all necessarily imprecise because they have to be predictive about notoriously unpredictable matters, human affairs. In the interests of finality ... the law requires that damages be assessed and paid once and for all, as a lump sum, even though the future ... might falsify the assumptions underpinning it.'[19]

Therefore, it would seem logical and just that a widow or widower claiming compensation for the loss of future financial support should have their award:

'...discounted to reflect any probability – high or low – that the plaintiff will receive support in the future from remarrying ... To hold otherwise is to give the plaintiff a windfall ... and require the defendant to pay the plaintiff more than that person has lost financially.'[20]

CONCLUDING OBSERVATIONS AND FURTHER REFORM

The Australian social condition has, in recent years, undergone drastic change. Growth in the rates of divorce and the social and economic independence of women have made past assumptions about a widow's life-long dependency upon a domestic partner unsupportable. Nor can we assume that any future re-partnering will be beneficial. A second partner may be an invalid, an alcoholic, or unwilling to perform their legal or moral obligation to support.

Therefore, as the possibilities impacting on the assessment and prediction of the remarriage discount are so multifarious, the *prospect* does not automatically deserve to be given separate and/or substantial weight and affect in damages awards, especially of the magnitude afforded to it in the past. Some judgments of Queensland courts in wrongful death claims have already included a claimant's prospects of financially beneficial re-partnering within the vicissitudes of life discount.[21]

Notwithstanding this, the High Court's decision in *De Sales v Ingrilli* highlights the following areas for further articulation and reform.

No Zero-Sum Approach

It would be wrong to consider the verdict of the majority in *De Sales* as meaning that a claimant's *prospects* of future financially beneficial re-partnering should not be given any weight in all cases involving the assessment of damages for wrongful death. There is:

'...a logical problem about an appellate court accepting that a judge may treat the possibility of a beneficial remarriage as one of the vicissitudes of life ... and at the same time, declaring that a judge may not give it any weight'.[22]

Rather, given that there is generally a percentage discount 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. Assessing the appropriate allowance for contingencies is a question of fact in the circumstances of the case. Therefore, the facts in *De Sales* may merely be representative of the average case, where on balance the positive and negative factors relevant to the appellant's prospects of remarriage negated each other, to warrant no change to the discount for general contingencies assessed by the Supreme Court.

How a claimant's prospects of financially beneficial re-partnering should be measured will obviously be a topic for further debate. However, it is possible that statistics may play a more important role in the future. Holding the financial consequences of re-partnering constant (given the uncertain nature of its prediction) it remains that, absent of evidence to the contrary, the age of the widowed is likely to be relevant to their propensity to re-partner, and thus the likelihood of them obtaining some future financial benefit to reduce their loss. Certainly McHugh J in *De Sales* supported this notion, stating 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.'[23]

Factors such as life expectancy, surveys of salaries, age of retirement, and other actuarial computations, are all (similarly to 'remarriage rates') based on group experience, and already form an acceptable frame of reference for the calculation of damages in wrongful death cases.

Redefinition of Contingencies Discount

In *De Sales*, McHugh and Kirby JJ observed[24] that if the remarriage discount were incorporated within the vicissitudes of life, the High Court and/or the legislature would eventually need to consider the disparity in approaches adopted by the state courts to the assessment of general

contingencies. For example, in Western Australia the discount is set in the vicinity of two to six per cent,[25] whilst in New South Wales the norm is 15 per cent (adjusted according to the circumstances of the plaintiff's case).[26]

Judicial Transparency

If the discount for the prospects of financially beneficial re-partnering is subsumed within the discount for general contingencies, transparency in judicial reasoning should dictate that the weight attributed to it be made apparent. This would be in the interests of both legal practitioners (when advising clients and negotiating settlements), and the appellate courts, in that it would sharpen the forensic exercise of the lower courts. This approach would also be in line with that advocated for the assessment of damages in cases such as *Sharman v Evans*[27], being the itemisation of each head of damage and the provision of reasons for the award made, and was supported in *De Sales* by Justices Callinan[28] and Kirby[29].

Weight Attributable to Actual and De Facto Re-Partnering

As the concerns expressed by the majority in *De Sales* in relation to the uncertainty inherent in predicting the financial benefit pertaining to *prospective* re-partnering apply equally in the case of *actual* re-partnering, the weight traditionally afforded to such claims in reducing damages awarded should also be limited. In addition, in assessing any discount to be made on account of a claimant's actual or intended 'de facto' re-partnering, the courts should take into consideration the fact that a de facto spouse's legislatively enforceable right to financial support from their partner, through maintenance and property division, is more limited than the rights existing within a marital relationship[30]. In some states, apart from any common law rights, such entitlements are non-existent.

Social Effects

The abandonment by the High Court of a separate discount for re-partnering *prospects* would appear to place renewed incentive on defendants, wishing to reduce their liability through a more 'substantial' discounting, to obtain evidence of *actual* re-partnering or engagement. The outcome is a potential for the increased private investigation of claimants and the postponement of the social re-adjustment achieved through their resumption of private relationships.

Defining Relationships

Given the social effects discussed above, we may see in the context of wrongful death claims and the assessment of a claimant's dependency an increase in litigation defining the limits of when relationships are either sufficiently *actual* or *intended*, or have broken down. In defining a relationship, particularly in the context of a de facto relationship, should its:

- existence be defined similarly to that used in the context of property adjustment legislation such as the *Property Law Act* 1974 (Qld)?
- demise be governed by tests of 'irretrievable breakdown' akin to those in the *Family Law Act* 1975 (Cth)?
- formation include a stage of 'intention' similar to an engagement prior to marriage?

This issue of 'definition' is currently subject to debate as part of the Queensland Law Reform Commission inquiry 'Damages in an Action for Wrongful Death'.[31]

Therefore, whilst the High Court in *De Sales v Ingrilli* made an admirable start, it would seem that further judicial and legislative reform is necessary to ensure that the effect of re-partnering on the assessment of damages in wrongful death claims fully recognises contemporary social realities. PL

ENDNOTES:

1 [2002] 77 ALJR 99; [2002] HCA 52.

2 *Supreme Court Act* 1995 (Qld), Pt 4 Div 5; *Fatal Accidents Act* 1959 (WA); *Compensation (Fatal Injuries) Act* 1968 (ACT); *Wrongs Act* 1936 (SA), Pt 2; *Compensation to Relatives Act* 1897 (NSW); *Compensation (Fatal Injuries) Act* 1974 (NT); *Fatal Accidents Act* 1934 (Tas); *Wrongs Act* 1958 (Vic), Pt 3.

3 *Pym v Great Northern Railway Co* [1863] 4 B & S 396; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.

4 [1965] 112 CLR 295, 308.

5 *AA Tegel Pty Ltd v Madden* [1985] 2 NSWLR 591.

6 See respectively *Cremona v RTA* [2000] NSWSC 556; *Tilbee v Wakefield* [2000] 31 MVR 195.

7 *Jones v Schiffmann* [1971] 124 CLR 303.

8 Justice RG Atkinson, 'Women and Justice: Is There Justice for Women?' (Paper presented at the Inaugural National Women's Conference, Canberra, 27 August 2001).

9 At [34-35], [73], [133].

10 *Ingrilli v De Sales* [1998] WASCA 283.

11 *De Sales v Ingrilli* [1999] WADC 80 (Unreported, HH Jackson DCJ, 25 October 1999), [66], [87].

12 *De Sales v Ingrilli* [2000] 23 WAR 417, 436-437 (Miller and Parker JJ, Wallwork J dissenting).

13 At [169].

14 At [76].

15 see at [78-79] (Gaudron, Gummow and Hayne JJ); [166] (Kirby J); [25], [27] (Gleeson CJ); [37] (McHugh J); [186] (Callinan J).

16 [1946] 73 CLR 105.

17 At [31]).

18 At [24].

19 At [185].

20 At [87], (McHugh J).

21 See, for example, *Mahoney v Dewinter*, Unreported, Supreme Court of Queensland, Court of Appeal, McPherson J, 15 March 1993.

22 At [39], (Gleeson CJ).

23 At [113].

24 At [115], [163-164].

25 *Kember v Thackrah* [2000] WASCA 198.

26 *Wynn v NSW Insurance Ministerial Corporation* [1995] 184 CLR 485.

27 [1977] 138 CLR 563.

28 At [196].

29 At [168].

30 At [31], [78], [194].

31 WP No 56, (2002).