TRACEY CARVER, QLD

'Wife after death: The assessment of damages for wrongful death'

Messrs Nugawela and Wong occupy a unique position to offer observation and comment on *de Sales v Ingrilli*. However, I respectfully do not agree with all their observations. Their comments focus on text appearing on page 10, under the heading 'No Zero-Sum Approach'. This is clearly prefaced as opinion and indicates the possibility of a flexible interpretation of the majority's judgements in future appropriate cases. This text does not purport to represent the case's ratio, which is clearly stated on page nine under the caption 'High Court Majority'.

Equally, the minority's judgements (including that of Gleeson CJ) were separately identified and not represented as ratio. Reference to both majority and minority reasoning is warranted in any full analysis of a case, especially, as here, where the decision was a close (4:3) majority. This is particularly so in light of current law reform moves in the area.

The author agrees (on pages 8-10) that the majority's reasoning supports a conclusion that there should be no separate or substantial discount for re-partnering prospects, unless on account of actual or intended re-partnering.[1] Even

then such a discount may be applied cautiously given the majority's views at [75] and [158]. However, this was outside the facts of *de Sales*[2] because such an assessment is inherently speculative and is not assisted by reference to a plaintiff's appearance or inclination. Re-partnering prospects are, therefore, subsumed within the discount for general contingencies.

However, there is no clear statement in the majority's judgements that re-partnering prospects can *never* be afforded *any* weight in establishing where in a case the general discount for vicissitudes should be set within the 'standard range' normally allowed by the courts. Their Honours merely state that ordinarily it should be afforded no weight and that the 'amount of the standard adjustment should not be increased by the backdoor'.[3]

What is an 'ordinary' (or average) case is not defined, although presumably *de Sales* was indicative. 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. The assessment of contingencies is a question of fact, to be decided on balance. It is to this extent that Gleeson CJ at [40] (albeit in the minority) is referenced.

In *Dwight v Bouchier*,[4] it was claimed that there was no basis for reducing a contingencies assessment to 10% from the standard 15%, as the respondent's remarriage prospects should have been taken into account. The court referred to the majority in *de Sales*. However, far from concluding that post-*de Sales* one's prospects of re-partnering are always irrelevant to the assessment, the court confirmed the trial judge's approach, assessing the prospects as slim and uncertain as to financial benefit on the facts.

Therefore, I remain of the opinion that *de Sales* will not always preclude a consideration of a claimant's prospects of financially beneficial re-partnering when discounting a damages assessment (albeit now as part of general contingencies). Subsequent judicial consideration arguably supports this, and reinforces my conclusion that the application of *de Sales* requires further clarification via judicial and legislative reform. PL

Tracey Carver is an Associate Lecturer in the Faculty of Law at the Queensland University of Technology
PHONE (07) 3864 4341
EMAIL t.carver@qut.edu.au

Endnotes: **1** Affirmed in *Dyer v Dyno Nobel Asia Pacific Ltd* [2003] NSWSC 198, [67-68]; *Knuckey v Dyno Nobel Asia Pacific Ltd* [2003] NSWSC 212, [58-59]. **2** See p 12 of *Plaintiff* article. **3** Kirby J at [169], [161]; [46], Gaudron, Gummow and Hayne JJ at [46], [83-4]. **4** [2003] NSWCA 3 at [64-8].