

DAMAGES IN AN ACTION FOR WRONGFUL DEATH

The effect of entering into, or of the prospect of entering into, a financially supportive cohabitation relationship, and the effect of the likelihood of divorce or separation on the assessment of damages in a wrongful death claim

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To: The Honourable Rod Welford MP
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report on *Damages in an Action for Wrongful Death*.

The Honourable Justice R G Atkinson
Chairperson

Mr P D T Applegarth SC
Member

Ms A Colvin
Member

Ms H A Douglas
Member

Mr B J Herd
Member

Ms R A Hill
Member

Mr G W O'Grady
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SUMMARY OF RECOMMENDATIONS

CHAPTER 6: THE EFFECT OF A POSSIBLE FUTURE RELATIONSHIP

- 6.1** In a wrongful death claim by a surviving spouse, the possibility that the surviving spouse may form a future relationship of financially beneficial cohabitation¹ should have no effect on the assessment of the surviving spouse's damages. Accordingly, any discount for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation should be abolished.
- 6.2** Legislation should be introduced to implement Recommendation 6.1.²

CHAPTER 7: THE EFFECT OF A SUBSEQUENT RELATIONSHIP OR AN INTENDED RELATIONSHIP

- 7.1** In a wrongful death claim by a surviving spouse, where there is evidence that the surviving spouse has married or formed a de facto relationship subsequent to the death of the deceased, the monetary benefits and/or domestic services received, or expected to be received, by the surviving spouse from that subsequent relationship may be taken into account in the assessment of the surviving spouse's damages.
- 7.2** However, for the purpose of the assessment of the value of any monetary benefits and/or domestic services the surviving spouse is expected to receive from the marriage or de facto relationship, it should not be assumed:
- (a)** that the marriage or de facto relationship would necessarily continue; or
 - (b)** that the surviving spouse would necessarily continue to receive the same monetary benefits and/or domestic services as a result of the marriage or de facto relationship as the surviving spouse had already received as a result of the marriage or de facto relationship.

¹

The term "financially beneficial cohabitation" means either a relationship of marriage or a de facto relationship from which the surviving spouse derives monetary benefits and/or domestic services.

²

See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23A of the *Supreme Court Act 1995* (Qld)).

- 7.3** In a wrongful death claim by a surviving spouse, an intention of the surviving spouse to marry or to form a de facto relationship, subsequent to the death of the deceased, should have no effect on the assessment of the surviving spouse's damages.
- 7.4** In the assessment of a surviving spouse's damages in a wrongful death claim:
- (a) "marriage" means a marriage within the meaning of the *Marriage Act 1961* (Cth); and
 - (b) "de facto relationship" means a de facto relationship within the meaning of the *Acts Interpretation Act 1954* (Qld), section 36.³
- 7.5** Legislation should be introduced to implement Recommendations 7.1 to 7.4.⁴

CHAPTER 8: THE POSSIBILITY OF SEPARATION OR DIVORCE

- 8.1** There should be no legislative change to the common law concerning the effect, on the assessment of damages of a surviving spouse in a wrongful death claim, of the possibility of the relationship between the surviving spouse and the deceased ending in divorce or separation.

CHAPTER 9: CLAIMS MADE ON BEHALF OF A CHILD

- 9.1** In a wrongful death action on behalf of a child of the deceased, the following matters should not be able to be taken into account in the assessment of the child's damages for the loss of monetary benefits and/or domestic services:
- (a) where the deceased and the surviving parent were, immediately before the death of the deceased, married or in a de facto relationship, whether or not that relationship would have continued but for the death of the deceased; or

³

This recommendation does not affect the eligibility of a de facto partner to bring an action pursuant to s 18(2) of the *Supreme Court Act 1995* (Qld).

⁴

See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23A of the *Supreme Court Act 1995* (Qld)).

- (b) where the deceased and the surviving parent had been married or in a de facto relationship, the fact that the relationship had ended prior to the death of the deceased; or**
- (c) the possibility that the surviving parent might marry or form a de facto relationship with another person; or**
- (d) any intention of the surviving parent to marry or to form a de facto relationship with another person; or**
- (e) the fact that the surviving parent is or was married to, or in a de facto relationship with, another person; or**
- (f) any monetary benefits and/or domestic services the child has received, or may receive, from any person other than the deceased.**

9.2 Legislation should be introduced to implement Recommendation 9.1.⁵

⁵

See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23B of the *Supreme Court Act 1995* (Qld)).

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

The terms of reference are:⁶

The Commission is requested to review whether the damages recoverable by the spouse or child of a deceased person in a wrongful death claim should be affected by -

- (a) in the case of a claim by the spouse:
 - (i) the remarriage of the spouse or the spouse's entry into a relationship of financially supportive cohabitation;
 - (ii) the prospects of the spouse's remarriage or of the spouse's entry into a relationship of financially supportive cohabitation; or
 - (iii) the possibility that the relationship between the spouse and the deceased might have ended in divorce or might otherwise have ended; or
- (b) in the case of a claim by the child:
 - (i) the remarriage of the surviving parent or the surviving parent's entry into a relationship of financially supportive cohabitation;
 - (ii) the prospects of the surviving parent's remarriage or of the surviving parent's entry into a relationship of financially supportive cohabitation; or
 - (iii) the possibility that the relationship between the surviving parent and the deceased might have ended in divorce or might otherwise have ended.

2. BACKGROUND

Where one person wrongfully causes the death of another, an action may be brought for the benefit of certain relatives of the deceased.⁷ In a wrongful death action - sometimes referred to as a Lord Campbell's Act action - damages may be claimed on behalf of those relatives for the loss of financial support and the loss of services that they suffer as a result of the death.

⁶ Letter to the Commission from the then Attorney-General, the Hon M Foley MP, dated 5 July 2000.

⁷ *Supreme Court Act 1995* (Qld) ss 17, 18. The nature of the cause of action is explained in detail in Chapter 2 of this Report.

The assessment of damages in a wrongful death claim involves a determination of the pecuniary value of the financial support and services that the deceased would have been expected to provide to the claimants if he or she had not died.⁸ Against this amount must be off-set certain financial advantages accruing to the claimants as a result of the death. Because the damages are paid as a lump sum, an allowance is also made for various contingencies that may have occurred in the future if the deceased had lived - for example, the possibility that, for a number of reasons, the financial support provided by the deceased may have been less than anticipated - or that may take place after the damages have been calculated.

In particular, in a wrongful death action, the assessment of damages may be affected by a number of factors. For example, the fact that a surviving spouse⁹ had formed a relationship of financially supportive cohabitation¹⁰ subsequent to the death of the deceased may be a factor which is taken into account in the assessment of a surviving spouse's damages.

This reference is concerned with the extent to which the factors outlined in the terms of reference should affect the damages recoverable by the surviving spouse or child of a deceased person who brings a wrongful death action under section 18 of the *Supreme Court Act 1995* (Qld). A consideration of the extent to which, on the death of a person, a cause of action vested in the person survives for the benefit of the person's estate is outside the terms of this reference.¹¹

In June 2002, the Commission published an Issues Paper on *Damages in an Action for Wrongful Death*.¹² The purpose of that paper was to provide information to interested people on the issues that the Commission envisaged would need to be addressed in the course of the review. A press release was also issued to coincide with the release of the Issues Paper. In both the Issues Paper and the press release, the Commission sought submissions in relation to issues raised by the terms of reference.

In December 2002, as a result of the High Court's decision in *De Sales v Ingrilli*,¹³ various legal academics, members of the insurance industry, self-insurers and legal

⁸ In Queensland, an eligible claimant in a wrongful death action has no entitlement to compensation for pain and suffering or emotional distress resulting from the death of the deceased. The loss for which damages may be claimed in an action for wrongful death is discussed at pp 6-7 of this Report.

⁹ In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

¹⁰ In this Chapter, the term "cohabitation" means either a relationship of marriage or a de facto relationship.

¹¹ When a person dies, certain causes of action vested in the person survive for the benefit of the deceased person's estate: *Succession Act 1981* (Qld) s 66. Significantly, damages may not be recovered for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life: *Succession Act 1981* (Qld) s 66(2)(a). Further, where the deceased's death has been caused by the act or omission that gives rise to the cause of action, damages must be calculated without reference to future probable earnings of the deceased had the deceased survived: *Succession Act 1981* (Qld) s 66(2)(d)(ii).

¹² Queensland Law Reform Commission, Issues Paper, *Damages in an Action for Wrongful Death* (WP 56, June 2002).

¹³ [2002] HCA 52; (2002) 193 ALR 130. The decision was delivered by the High Court of Australia on 14 November 2002.

groups were invited to make submissions to the Commission in relation to the changes to the common law brought about by that decision. An advertisement was also placed in *The Courier-Mail* seeking further submissions in light of the High Court decision.

3. SUBMISSIONS

Four submissions were received in relation to this reference.¹⁴

The Insurance Council of Australia indicated to the Commission that it held no strong views on the subject of the reference as the issue was not considered to be a major one for insurers.¹⁵

The submissions received by the Commission have been of considerable assistance to it in the preparation of this Report. The Commission appreciates the contribution made by all the respondents.

4. THE STRUCTURE OF THIS REPORT

In this Report, the Commission has examined whether the damages recoverable by the spouse or child of a deceased person in a wrongful death claim should be affected by:

- the prospect of the surviving spouse forming a future relationship of cohabitation; or
- the formation of a relationship of cohabitation by the surviving spouse subsequent to the death of the deceased; or
- the prospect that the relationship between the surviving spouse and the deceased might have ended in separation or divorce.

Chapter 2 of this Report provides an overview of the action for wrongful death.

Chapter 3 discusses the general principles underlying the assessment of compensatory damages.

The factors which are commonly considered by the courts in the assessment of damages in wrongful death actions and recent changes to the law in this area are discussed in Chapter 4.

¹⁴ A list of these respondents is set out in Appendix 1.

¹⁵ Correspondence to the Commission from the Insurance Council of Australia, received 2 July 2003.

The position in other jurisdictions is considered in Chapter 5.

Chapter 6 discusses the effect on the assessment of damages of the possibility that the surviving spouse may form a relationship of financially beneficial cohabitation.

The calculation of damages where the surviving spouse has formed or intends to form a relationship of financially beneficial cohabitation is examined in Chapter 7.

Chapter 8 considers the effect of the prospect of breakdown of the relationship on the assessment of damages of the surviving spouse.

Chapter 9 discusses the effect of the factors identified in the terms of reference on a claim made on behalf of a child of the deceased.

Appendix 2 to this Report contains draft legislation that gives effect to the Commission's recommendations. The Commission wishes to thank the Office of the Queensland Parliamentary Counsel for its assistance in preparing the draft legislation.

CHAPTER 2

THE ACTION FOR WRONGFUL DEATH

1. INTRODUCTION

At common law, the family of a person whose death was caused by the wrongful act of another person was unable to bring an action against the wrongdoer for damages for the loss suffered as a result of the wrongful death. The common law rule, which was formulated in the early nineteenth century,¹⁶ was probably based on a misconstruction of previous English authority.¹⁷ Nonetheless, the rule became firmly established in the United Kingdom¹⁸ and in Australia,¹⁹ with the effect that it was:²⁰

... impossible for a plaintiff to sue a defendant for a wrong committed by the defendant to the plaintiff, when that wrong consists in damage causing the death of a person in the continuance of whose life the plaintiff had an interest.

In the United Kingdom, there was an attempt to remedy this situation by the enactment of *An Act for Compensating the Families of Persons killed by Accidents 1846*, commonly referred to as the *Fatal Accidents Act 1846*.²¹ This Act created a statutory cause of action for the benefit of certain members of a deceased person's family where the death of the deceased was caused by the wrongful act of another person. The relevant United Kingdom provisions are now found in the *Fatal Accidents Act 1976* (UK).

Legislation creating a statutory cause of action for wrongful death also exists in all Australian jurisdictions.²² In Queensland, the relevant provision was originally located in section 12 of the *Common Law Practice Act 1867* (Qld). The current provision is section 17 of the *Supreme Court Act 1995* (Qld), which provides:

¹⁶ *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033 at 1033 per Lord Ellenborough:

In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.

¹⁷ Holdsworth WS, *A History of English Law* (5th ed, 1942) Vol III at 333-336, 676-677.

¹⁸ *Admiralty Commissioners v SS Amerika* [1917] AC 38.

¹⁹ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 615 per Latham CJ and at 622 per McTiernan J.

²⁰ Holdsworth WS, *A History of English Law* (5th ed, 1942) Vol III at 333-334.

²¹ The legislation is also referred to as Lord Campbell's Act.

²² *Civil Law (Wrongs) Act 2002* (ACT); *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act* (NT); *Supreme Court Act 1995* (Qld); *Wrongs Act 1936* (SA); *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic); *Fatal Accidents Act 1959* (WA).

Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime.

The basis of a wrongful death claim is:²³

... for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death ... [and] the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death.

2. THE LOSS FOR WHICH DAMAGES MAY BE CLAIMED

The nature of the loss for which damages may be claimed is not identified in either the original United Kingdom legislation or any of its Australian counterparts.

However, soon after the United Kingdom legislation was passed, it was held that it did not give the specified family members an entitlement to damages for any grief or sorrow they may have suffered because of the death of the deceased.²⁴ The action created by the legislation was therefore restricted to a claim for financial loss resulting from the wrongful death:²⁵

The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss.

The same approach was adopted in Australia, and the legislative provisions in the Australian jurisdictions have also been interpreted as applying only to pecuniary loss incurred by those members of the deceased's family who are entitled to make a claim.²⁶ In most situations, the greatest pecuniary loss is loss of income:²⁷

²³ *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 611 per Lord Wright, referring to Bowen LJ in *The Vera Cruz (No 2)* (1884) 9 PD 96.

²⁴ *Blake v The Midland Railway Company* (1852) 18 QB 93; 118 ER 35 at 41 per Coleridge J.

²⁵ *Taff Vale Railway Company v Jenkins* [1913] AC 1 at 4 per Lord Haldane.

²⁶ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 618 per Latham CJ. However, in the Northern Territory and South Australia, specific provision is made for solatium or non-pecuniary loss: *Compensation (Fatal Injuries) Act* (NT) s 10(3)(f); *Wrongs Act 1936* (SA) s 23A(1). Further, an action may be available for damages for nervous shock or psychiatric injury suffered by the plaintiff which was caused by the negligent act of the defendant: see *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 191 ALR 449 and *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 198 ALR 100.

²⁷ Fleming JG, *The Law of Torts* (9th ed, 1998) at 735.

... the principal source of pecuniary detriment is the loss of the deceased's net earnings, present and future. The basis of calculation is, therefore, the amount of his wages or other income from which must be deducted an estimated amount of what the deceased required for his own personal and living expenses. The value of the dependency thus includes not only expected maintenance but also savings. [notes omitted]

However, pecuniary loss is not restricted to loss of income, but also includes loss of services provided by the deceased.²⁸ The loss of services includes domestic services - "ordinary housekeeping, house maintenance and gardening services and any additional material services, such as hairdressing, dressmaking or teaching, which one spouse may render to the other spouse or to her or his children".²⁹ It has been recognised that:³⁰

Domestic services do in fact have a pecuniary value which is capable of assessment, and ... the deprivation of services is just as much a pecuniary loss as the deprivation of income ...

The amount of compensation to be paid is determined on the basis of actual losses up until the time damages are assessed and of the monetary value of the financial support and domestic services that the deceased could reasonably have been expected to provide in the future.³¹

Wrongful death actions have often been referred to as "dependency claims" and the injury suffered by the surviving family members categorised as "loss of dependency". These descriptions may have been factually accurate in many cases in the past, but the increase in the incidence of two income families has made their use inappropriate in the context of contemporary society. Actual "dependency" is not, and was not, an element of a wrongful death claim. It is not necessary for an eligible family member to have been financially dependent on the deceased in order to succeed in a wrongful death claim:³²

What is required is that the [claimant] should have had a reasonable expectation of benefit. The possession of an independent income - whether from investment or from personal exertion - may mean that there was no real dependency on the deceased's earnings, but does not necessarily mean that the expectation of benefit from the continued existence of the deceased was any the less. [note omitted]

28 *Nguyen v Nguyen* (1990) 169 CLR 245. It is irrelevant to the success of the claim that the claimants do not intend to replace the services provided gratuitously by the deceased at pecuniary cost.

29 *Id* at 256 per Deane J.

30 *Seymour v British Paints (Australia) Pty Ltd* [1967] Qd R 227 at 230 per Gibbs J.

31 In Queensland, damages recoverable in an action for personal injury or economic loss are now subject to statutory limits: *Civil Liability Act 2003* (Qld) Chapter 3, Part 3. This would appear to include an action for wrongful death. Other Australian jurisdictions have taken a similar course and have passed legislation to set statutory limits for damages in relation to actions for wrongful death: *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liability and Damages) Act 2003* (NT); *Wrongs Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

32 Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 500.

3. PERSONS WHO MAY BRING AN ACTION

In Queensland, the wrongful death legislation provides that a claim for damages may be brought by the executor or administrator of the deceased's estate.³³ If there is no executor or administrator, or if no action is brought by the executor or administrator within six months after the death of the deceased, an action may be brought by and in the name of any person for whose benefit such an action could have been commenced.³⁴

Only one action may lie against the defendant in respect of the same subject matter of the complaint,³⁵ although the one action may be for the benefit of a number of claimants. However, the action is not for the benefit of the deceased's family as a class,³⁶ but for each of the named claimants as an individual. A relative whose name has not been included in the claim has no subsequent right of action against the defendant, but may be able to claim against the representative plaintiff.³⁷ Where damages are awarded to a number of claimants these are divided among the parties as determined by the court.³⁸

4. WHEN THE ACTION MUST BE BROUGHT

The action must be commenced within three years from the date of the death of the deceased or the date upon which the cause of action arose.³⁹ However, a claim by or on behalf of a child of the deceased may be made up until three years from the date on which the child attains the age of majority.⁴⁰ In certain circumstances the time for bringing an action may be extended.⁴¹

33 *Supreme Court Act 1995* (Qld) s 18(1).

34 *Supreme Court Act 1995* (Qld) s 21.

35 *Supreme Court Act 1995* (Qld) s 19.

36 *Pym v Great Northern Railway Co* (1863) B & S 396; 122 ER 508. See also *King v Green* [1994] 1 Qd R 389.

37 *Avery v London and North Eastern Railway Company* [1938] AC 606.

38 *Supreme Court Act 1995* (Qld) s 18(1).

39 *Limitation of Actions Act 1974* (Qld) s 11. See also the effect of the *Personal Injuries Proceedings Act 2002* (Qld) s 42(5), (6).

40 *Limitation of Actions Act 1974* (Qld) s 29(2)(c).

41 *Limitation of Actions Act 1974* (Qld) s 31. See also the effect of the *Personal Injuries Proceedings Act 2002* (Qld) s 59 on the period of limitation.

5. PERSONS FOR WHOSE BENEFIT AN ACTION MAY BE BROUGHT

Under the *Supreme Court Act 1995* (Qld), a wrongful death action may be brought for the benefit of the spouse (including certain de facto partners), parent and child of the deceased. The words “spouse”,⁴² “parent” and “child” are defined in the Act in the following terms:

13. In this part -

“**child**” includes -

- (a) son or daughter; and
- (b) grandson or grand daughter; and
- (c) stepson or stepdaughter; and
- (d) a person for whom someone stands in place of a parent.

“**parent**” includes -

- (a) father or mother; and
- (b) grandfather or grandmother; and
- (c) stepfather or stepmother; and
- (d) a person standing in place of a parent.

18(2) ... the spouse of a deceased person includes a de facto partner of the deceased only if the deceased and the de facto partner lived together as a couple on a genuine domestic basis within the meaning of the *Acts Interpretation Act 1954*, section 32DA⁴³ -

- (a) generally -
 - (i) for a continuous period of at least 2 years ending on the deceased’s death; or

⁴²

The definition of “spouse” was amended to include certain de facto partners in 1994: see Queensland Law Reform Commission, Report, *De Facto Relationships: Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death* (R 48, 1994) and *Common Law Practice and Workers’ Compensation Amendment Act 1994* (Qld) s 5, which inserted the amended definition into s 13 of the *Common Law Practice Act 1867* (Qld). The relevant provisions of the *Common Law Practice Act 1867* (Qld) were subsequently transferred to the *Supreme Court Act 1995* (Qld).

In April 2003, the definition of “spouse” included in the *Supreme Court Act 1995* (Qld) s 18(2) was amended by the *Discrimination Law Amendment Act 2002* (Qld) s 83. However, a transitional definition of “spouse” will apply until 1 April 2004: see *Supreme Court Act 1995* (Qld) s 303.

⁴³

See *Acts Interpretation Act 1954* (Qld) s 32DA (Meaning of “de facto partner”), which is set out at pp 61-62 of this Report. Section 32DA provides a definition of “de facto partner” and lists a number of factors that may be relevant in assessing whether or not two persons are living together in a de facto relationship. The definition contained in s 32DA of the *Acts Interpretation Act 1954* (Qld) is intended to be of general application to the existing and future laws of Queensland unless a contrary intention is disclosed in the legislation: Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 2.

- (ii) for a shorter period ending on the deceased's death, if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a clear intention that the relationship be a long term, committed relationship; or
- (b) if the deceased left a dependant who is a child of the relationship - immediately before the deceased's death.
- (3) Subsection (2) applies despite the *Acts Interpretation Act 1954*, section 32DA(6).
- (4) In this section -

“child of the relationship” means a child of the deceased person and the de facto partner, and includes a child born after the death.

“dependant”, of a deceased person, includes a child born after the death happens who would have been wholly or partially dependant on the deceased person's earnings after the child's birth if the person had not died.
[note added]

However, a claim made on behalf of a relative identified by the legislation will not succeed unless the relative is able to show that he or she has suffered a pecuniary loss as a result of the death.⁴⁴ Consequently, although the legislation provides that an action may be brought on behalf of a parent of the deceased,⁴⁵ it may be difficult for a parent to claim damages for the wrongful death of a young child. A claim of this kind will fail unless the parent can show either an actual financial loss or loss of services resulting from the child's death, or a reasonable expectation of a prospective benefit of which the parent has been deprived.⁴⁶ In the case of a very young child this may be impossible to prove.⁴⁷

... the plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. ... He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. ... The whole matter is beset with doubts, contingencies, and uncertainties.

44 See pp 6-7 of this Report.

45 See p 9 of this Report.

46 *Taff Vale Railway Co v Jenkins* [1913] AC 1. See also *McDonald v Hillier* [1967] WAR 65.

47 *Barnett v Cohen* [1921] 2 KB 461 at 472 per McCardie J.

6. THE ELEMENTS OF A WRONGFUL DEATH ACTION

For a wrongful death action to succeed, it must be shown that, firstly, the death of the deceased was caused by the defendant's wrongful act, neglect or default and that, secondly, the deceased, if he or she had not died, would have been able to bring an action against the defendant.

(a) The death must be caused by a wrongful act, neglect or default

(i) Wrongful act, neglect or default

The Queensland provision allows an action to be brought if the death of the deceased was "caused by a wrongful act neglect or default" on the part of the defendant.⁴⁸ These words are not defined in the legislation, although it is provided that a criminal offence can constitute a "wrongful act" for the purposes of a wrongful death action.⁴⁹ It has been observed that the language of the provision is "very general"⁵⁰ and that it "takes its colour from the context".⁵¹ The High Court has held that the wording is broad enough to include not only tortious conduct but also a breach of contract.⁵² However, it would appear that, in Queensland, liability for wrongful death must now be determined in accordance with the *Civil Liability Act 2003* (Qld).⁵³

(ii) Causation

The wrongful death legislation applies only if the death of the deceased was "caused" by the defendant's wrongful act. In most cases, the issue of causation will be decided by the application of the provisions of the *Civil Liability Act 2003* (Qld).⁵⁴ In exceptional circumstances, the common law principles of causation may still apply.⁵⁵

⁴⁸ *Supreme Court Act 1995* (Qld) s 17, which is set out at p 6 of this Report.

⁴⁹ *Ibid.*

⁵⁰ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 619 per Latham CJ.

⁵¹ *Id* at 620 per Rich J.

⁵² *Id* at 619 per Latham CJ. See also Rich J at 620 and McTiernan J at 623.

⁵³ Section 4(1) of the *Civil Liability Act 2003* (Qld) provides that the Act applies to "any civil claim for damages for harm". "Claim" is defined to include a claim for damages based on a liability for personal injury or economic loss, and for a fatal injury, a claim for the deceased's dependants: *Civil Liability Act 2003* (Qld) Schedule 2. "Harm" is defined to include personal injury or economic loss: *Civil Liability Act 2003* (Qld) Schedule 2. The principles for deciding an action based on breach of duty are set out in ss 9 and 10 of the Act.

⁵⁴ *Civil Liability Act 2003* (Qld) s 11.

⁵⁵ *Civil Liability Act 2003* (Qld) s 11(2) and see also Explanatory Notes, *Civil Liability Bill 2002* (Qld) at 7.

(b) The deceased, if he or she had not died, must have been able to bring an action against the defendant

An action for wrongful death cannot be brought under the *Supreme Court Act 1995* (Qld) unless the deceased would have been entitled (if he or she had not died) to bring a civil action prior to his or her death. If the deceased could not have successfully sued the wrongdoer, the claimant has no action under the legislation.⁵⁶ Consequently, if the deceased had previously accepted compensation in settlement of the cause of action, or had recovered damages for his or her personal injuries prior to death, there can be no wrongful death claim under the legislation.⁵⁷ Similarly, if the deceased could not have brought an action against the defendant because the limitation period had expired, the eligible members of the deceased's family will not be able to bring a claim for wrongful death.⁵⁸

If there were contributory negligence on the part of the deceased so that his or her damages would have been reduced, the damages awarded to the claimant in a wrongful death action would also be reduced.⁵⁹

⁵⁶ For example in *Murphy v Culhane* [1977] QB 94 the English Court of Appeal held that, by taking part in a criminal affray, the deceased may have deprived himself of a cause of action, in which case the widow of the deceased could not claim damages for wrongful death.

⁵⁷ *Read v The Great Eastern Railway Company* (1868) LR 3 QB 555; *Brunsdon v Humphrey* (1884) QBD 141.

⁵⁸ *Harding v The Council of the Municipality of Lithgow* (1937) 57 CLR 186 at 196 per Evatt J; *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804.

⁵⁹ *Law Reform Act 1995* (Qld) s 10(5). See also the *Civil Liability Act 2003* (Qld) ss 23, 24.

CHAPTER 3

THE ASSESSMENT OF DAMAGES

1. INTRODUCTION

In a wrongful death action, the eligible relatives of the deceased⁶⁰ can recover damages only for the loss of a “pecuniary benefit or benefit reducible to money value”.⁶¹ The loss for which damages may be claimed is the loss of the deceased’s financial support and the loss of services provided by the deceased prior to his or her death.⁶² It includes both the actual loss of the pecuniary support and services up until the time the damages are calculated and the loss of the pecuniary support and services which the deceased would reasonably have been expected to continue to provide if he or she had not been killed.

The damages awarded to the claimants in a wrongful death action are intended to compensate them for the financial loss suffered as a result of the death of the deceased. Accordingly, an understanding of the process of assessing damages in a wrongful death claim requires a basic knowledge of the general principles underlying the assessment of compensatory damages.

2. COMPENSATORY DAMAGES

(a) The nature of compensatory damages

The purpose of compensatory damages has been described in the following terms:⁶³

The settled principle governing the assessment of compensatory damages ... is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the [wrongful act] had not been committed.

60 See p 9 of this Report for an explanation of who may claim damages in a wrongful death action.

61 *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 611 per Lord Wright.

62 See pp 6-7 of this Report for an explanation of the loss for which damages may be claimed in a wrongful death action.

63 *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ.

In Queensland⁶⁴ and in other jurisdictions,⁶⁵ statutory limits apply in relation to the amount of compensation recoverable in actions for personal injury damages. This would also appear to apply to damages for wrongful death.⁶⁶

The common law requires that compensatory damages be assessed and paid as a once and for all lump sum amount.⁶⁷ Because the damages award is intended to put the plaintiff, by means of a single payment, in a position as near as possible to that which would have existed if the wrongful act had not taken place, the assessment of damages must attempt to predict what the likely future position of the plaintiff would have been if the plaintiff had not suffered the loss or injury in question. In other words, the calculation must not only quantify the damage already suffered by the time the claim is assessed, but also attempt to estimate the extent of losses likely to be experienced in the future.

(b) The allowance for contingencies

In recognition of the inherent difficulties involved in predicting the future, an award of damages is frequently adjusted to make an allowance for the uncertain nature of the task. Generally, this process of adjustment will result in a reduction or discounting of the assessed value of the plaintiff's loss to take account of possible future events, commonly referred to as contingencies or the vicissitudes of life.⁶⁸

Unemployment, ill-health, accidental death, or injury in circumstances which did not produce compensation are realities of life of which substantial and not merely nominal account must be taken. There is no warrant ... for requiring the defendant ... to provide the plaintiff with a certainty and security for life or for some period of it in replacement of the uncertain and unsure situation in which that plaintiff may have been.

However, reduction is not automatic, and the effect of the adjustment will depend on the circumstances of the particular case.⁶⁹

⁶⁴ *Civil Liability Act 2003* (Qld) Chapter 3, Assessment of Damages for Personal Injury.

⁶⁵ See for example *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liability and Damages) Act 2003* (NT); *Wrongs Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

⁶⁶ *Civil Liability Act 2003* (Qld) Chapter 3, Assessment of Damages for Personal Injury. Section 50 of the *Civil Liability Act 2003* (Qld) provides that Chapter 3 of the Act applies only in relation to an award of personal injury damages. "Personal injury damages" include damages that relate to the death of a person: *Civil Liability Act 2003* (Qld) Schedule 2.

⁶⁷ *Fournier v Canadian National Railway Company* [1927] AC 167. See for example *Todorovic v Waller* (1981) 150 CLR 402 at 412 per Gibbs CJ and Wilson J. But see the effect of the *Civil Liability Act 2003* (Qld) Chapter 3, Part 4, which facilitates the making of consent orders for the payment of all or part of an award of damages in the form of periodic payments.

⁶⁸ *Jones v Schiffmann* (1971) 124 CLR 303 at 305 per Barwick CJ.

⁶⁹ *Bresatz v Przibilla* (1962) 108 CLR 541 at 543-544 per Windeyer J (with whom McTiernan J agreed). See also *McCullagh v Lawrence* [1989] 1 Qd R 163 at 168 per Ryan J (with whom Kelly SPJ and Moynihan J agreed).

What it involves depends, not on arithmetic, but on considering what the future might have held for the particular individual concerned. He might have fallen sick from time to time, been away from work and unpaid. He might have become unemployed and unable to get work. He might have been injured in circumstances in which he would receive no compensation from any source. ... Allowance must be made for these "contingencies", or the "vicissitudes of life" as they are glibly called. But this ought not to be done by ignoring the individual case and making some arbitrary subtraction. ... [T]he generalization, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse: all "vicissitudes" are not harmful. ... Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.

(c) Off-setting consequential benefits

In keeping with the principle that compensatory damages are intended to restore the plaintiff to the position he or she would have been in if the wrongful act had not occurred,⁷⁰ the assessment of damages may also take into account certain financial benefits which have accrued to the plaintiff as a result of the wrongful act.⁷¹

3. ASSESSMENT OF DAMAGES IN A WRONGFUL DEATH ACTION

In a wrongful death action, the damages payable to the deceased's family are assessed according to the general principles outlined above for determining compensatory damages.⁷² The process generally involves a two-phase approach. The first phase is to ascertain the value of the actual loss up to the time of trial - or, if the matter is settled, until the settlement agreement is reached - of the deceased's financial support and of the services formerly provided by the deceased. This amount can usually be calculated with a reasonable degree of certainty. However, the second phase, which consists of an attempt to determine the family's anticipated future loss, involves a significant degree of uncertainty.

(a) The allowance for contingencies

As for compensatory damages generally, the assessment of damages in a wrongful death action usually includes an allowance for the contingencies or vicissitudes of life.

70 See pp 13-14 of this Report.

71 The law with respect to the benefits that must be off-set and those that are not required to be taken into account is beyond the terms of this reference. For an explanation see Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) Chapter 8.

72 See pp 13-14 of this Report.

Contingencies which may be taken into account in a wrongful death action include, for example, the possibility that the level of financial support provided by the deceased may have been increased as a result of promotion, or reduced by ill-health, lowered career prospects or a shorter life expectancy for either the deceased or his or her spouse.⁷³

(b) Off-setting consequential benefits

The general rule that the assessment of compensatory damages should take into account any benefit accruing to the plaintiff as a result of the wrongful act of the defendant also applies in a wrongful death action.⁷⁴

The rule ... requiring that, in estimating the pecuniary injury caused by the death of the deceased, the benefits accruing must be considered as well as the benefits lost as a result of the death is no more than a specific application of a principle governing the ascertainment of loss arising from a given occurrence in every case of legal responsibility.

In a wrongful death action, a pecuniary gain or benefit received by a claimant as a result of the death must therefore be off-set against the value of the financial support and/or services which the claimant has lost:⁷⁵

It has long been established that in the assessment of damages ... an account is taken of pecuniary losses and also of pecuniary gains accruing to a particular dependant by reason of the death of a person caused by a wrongful act, neglect or default of a defendant. Any benefit, whatever its source (whether from the defendant or from some other source), provided that it results from the death of the deceased, must be taken into account. What can be awarded under the Act is pecuniary loss, that is, net loss, on a balance of losses and gains ...

Originally, this rule operated to deprive a claimant in a wrongful death action of benefits such as a payment under an insurance policy or a pension to which the claimant became entitled on the death of the deceased. However, in all Australian jurisdictions there is now legislation excluding certain benefits from the rule for the purpose of calculating damages in a wrongful death claim.⁷⁶ In Queensland, the relevant provisions are found in section 23 of the *Supreme Court Act 1995* (Qld).⁷⁷

⁷³ In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

⁷⁴ *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 278 per Dixon J.

⁷⁵ *Id* at 271 per Latham CJ.

⁷⁶ *Civil Law (Wrongs) Act 2002* (ACT) s 26; *Compensation to Relatives Act 1897* (NSW) s 3(3); *Compensation (Fatal Injuries) Act* (NT) s 10(4); *Wrongs Act 1936* (SA) s 20(2aa); *Fatal Accidents Act 1934* (Tas) s 10(1); *Wrongs Act 1958* (Vic) s 19; *Fatal Accidents Act 1959* (WA) s 5(2).

⁷⁷ Prior to its inclusion in the *Supreme Court Act 1995* (Qld) this provision was found in s 15C of the *Common Law Practice Act 1867* (Qld). This provision was considered in a Report of the Queensland Law Reform Commission: *The Assessment of Damages in Personal Injury and Wrongful Death Litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (R 45, 1993).

CHAPTER 4

FACTORS WHICH AFFECT DAMAGES IN A WRONGFUL DEATH ACTION

1. INTRODUCTION

In an effort to do justice between a plaintiff and defendant, in the assessment of damages in a wrongful death action the court has traditionally given consideration to some factors that are not taken into account in other kinds of action. The allowance made for these factors was generally in addition to that made for the general contingencies and vicissitudes of life.

In assessing damages in a wrongful death claim, the court would seek to give credit to the defendant for any financial support and domestic services received, or likely to be received, by the surviving spouse⁷⁸ in place of the support that would have been received from the deceased. If the court determined that a benefit had been, or was likely to be, received by the surviving spouse, then the damages assessed in favour of the surviving spouse would be discounted to account for the benefit or potential benefit.⁷⁹

In its Issues Paper,⁸⁰ published in June 2002, the Commission identified a number of factors commonly considered by the courts in relation to the assessment of a surviving spouse's damages in a wrongful death claim. These factors included:

- the possibility that the surviving spouse might remarry or enter into a de facto relationship and receive a financial benefit from the relationship;⁸¹
- the fact that the surviving spouse had entered into a new relationship of financially beneficial cohabitation;⁸² and
- the possibility that the surviving spouse and the deceased might have separated or divorced but for the death of the deceased.

78 In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

79 However, some payments received by a claimant in a wrongful death action are excluded from the assessment of damages: see *Supreme Court Act 1995* (Qld) s 23.

80 Queensland Law Reform Commission, Issues Paper, *Damages in an Action for Wrongful Death* (WP 56, June 2002).

81 But see the effects of *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 which is discussed in detail at pp 33-36 of this Report.

82 In this Chapter, the term "cohabitation" means either a relationship of marriage or a de facto relationship.

2. RECENT CHANGES TO THE LAW

In November 2002, subsequent to the publication of the Issues Paper,⁸³ the High Court delivered a decision, *De Sales v Ingrilli*,⁸⁴ which changed certain aspects of the common law in relation to the assessment of damages in a wrongful death claim.

In that case, the appellant brought an action in the District Court of Western Australia on behalf of herself and her two children pursuant to the *Fatal Accidents Act 1959* (WA). The husband of the appellant had been killed in an accident in a dam on the respondent's property. The appellant was 27 at the time of the accident and 36 at the time of trial. She had not remarried, although some time after the death of her husband she had engaged in a relationship which lasted three and a half years. In her claim, the appellant stated that she and her children had been totally financially dependent upon the deceased. There was also a small claim for domestic services performed by the deceased. The respondent was held to be liable, although the liability was reduced by one-third based on a finding of contributory negligence against the deceased. In assessing damages, the trial judge made a reduction of 5 per cent for the prospects of remarriage to be deducted only from the share of the award that was apportioned to the deceased's widow.

An appeal and cross-appeal were taken to the Full Court of the Supreme Court of Western Australia,⁸⁵ with both the appellant and the respondent contending that the primary judge had erred in making the deduction of 5 per cent for the prospects of the appellant's remarriage. The majority of the court found that the trial judge's deduction for the prospects of remarriage was very slight and increased the deduction to 20 per cent. In addition, the court imposed a further 5 per cent deduction for general contingencies or the vicissitudes of life,⁸⁶ which applied against both the appellant and the children.⁸⁷

The appellant then appealed to the High Court of Australia on the question of the appropriate discount to be applied in relation to the prospects of remarriage.

In the determination of this case, a majority of the High Court found that, ordinarily, no deduction should be made for the contingency that a surviving spouse might enter into a financially beneficial relationship, whether as a separate deduction, or as

⁸³ Queensland Law Reform Commission, Issues Paper, *Damages in an Action for Wrongful Death* (WP 56, June 2002).

⁸⁴ [2002] HCA 52; (2002) 193 ALR 130.

⁸⁵ *De Sales v Ingrilli* (2002) 23 WAR 417.

⁸⁶ The allowance for contingencies or the vicissitudes of life is discussed at pp 14-15 of this Report.

⁸⁷ *De Sales v Ingrilli* (2002) 23 WAR 417 at 436-438 per Miller J (Parker J agreeing; Wallwork J dissenting).

an item added to the amount otherwise judged to be an appropriate deduction for the vicissitudes of life.⁸⁸

The Court also found, however, that where there is evidence at trial that a new relationship has been formed, or is intended to be formed with an identified person, account may be taken of evidence revealing whether that relationship brings, or will bring, financial advantage or disadvantage to the surviving spouse.⁸⁹ However, in cases where the evidence reveals a financial advantage for the surviving spouse as a result of the new relationship or intended relationship, the Court considered that it would be incorrect to assume that the financial advantage would inevitably continue, as any new relationship would be subject to contingencies and vicissitudes similar to those to which the surviving spouse's former relationship with the deceased was subject.⁹⁰

Whilst the question of discounting damages to account for the possibility that the relationship between the surviving spouse and the deceased might have ended in breakdown was not directly in issue, the majority of the Court would appear to have viewed such a matter as one appropriately included in the discount for general contingencies.⁹¹ Similarly, whilst the assessment of damages in a wrongful death claim made on behalf of a child of the deceased was not specifically considered by the Court, in their joint reasons for judgment, Gaudron, Gummow and Hayne JJ noted that claims by all relatives of the deceased (including the surviving spouse) are subject to many uncertainties and possibilities which defy accurate calculation, and that these uncertainties should simply be reflected as a percentage or lump sum to allow for the estimated value of all those uncertainties.⁹²

88 [2002] HCA 52; (2002) 193 ALR 130 at 141 [46], 149 [76]-[77] per Gaudron, Gummow and Hayne JJ. Kirby J agreed at 172 [161]-[162]. Gleeson CJ at 139 [32]-[33] took the view that, ordinarily, the contingency that a surviving spouse might form a financially beneficial relationship subsequent to the death of the deceased should be treated as part of the vicissitudes of life as a factor of modest significance unless there were unusual or special circumstances which indicated an unusually low or high chance of the formation of such a relationship. In dissenting judgments, McHugh and Callinan JJ rejected the abolition of the discount for the prospects of a surviving spouse remarrying or forming a financially beneficial relationship of cohabitation.

89 Id at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [161]-[162].

90 Id at 148-149 [74]-[76] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [162].

91 Id at 146-147 [68] per Gaudron, Gummow and Hayne JJ.

92 Ibid.

CHAPTER 5

THE POSITION IN OTHER JURISDICTIONS

1. INTRODUCTION

A review of the law as it currently exists in Queensland in relation to the assessment of damages in a wrongful death action may be assisted by a consideration of the way the law has developed, and of proposals that have been made for reform, in other jurisdictions with a common legal background.

The original legislation, creating a statutory cause of action for the benefit of certain members of a deceased person's family where the death of the deceased was caused by the wrongful act of another person, was enacted in the United Kingdom. This legislation was used as a model to provide for wrongful death claims in many Commonwealth countries. It is therefore relevant to have regard to the present situation in not only the United Kingdom, but also countries such as Canada and New Zealand, and in the other Australian States and Territories.

2. THE UNITED KINGDOM

(a) Formation of a subsequent relationship by the surviving spouse

The requirement that, in a wrongful death claim, the damages of a surviving spouse be discounted to allow for the prospects of remarriage⁹³ led one English judge to observe:⁹⁴

... it is said that I must take into account the prospects of this widow remarrying and make a suitable deduction on the basis that she would be supported by her new husband. ...

... Is a judge fitted to assess the chance or chances or wishes of a lady about whom he knows so little and whom he has only encountered for 20 minutes when she was in the witness-box, especially when no one has broached the topic with her? Judges should, I think, act on evidence rather than guesswork. It seems to me that this particular exercise is not only unattractive but is not one for which judges are equipped. ... The fact is that this exercise is a mistake. ... I question whether having decided what she has lost by the death of her husband, any judge is qualified to assess whether or when she is likely to remarry. Supposing she marries a man who is only concerned to spend her money? Is he to be treated as her new support

93 See Chapter 6 of this Report.

94 *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 at 644-645 per Phillimore J. Note, however, that the English Court of Appeal, while expressing some degree of sympathy with Phillimore J's views, disapproved of his approach: *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 at 850-851 per Willmer LJ and at 855-856 per Davies LJ.

in place of her former husband? I venture to suggest it is time judges were relieved of the need to enter into this particular guessing game.

In 1968, the Report of the Committee on Personal Injuries Litigation expressed the view that the law in the United Kingdom in relation to discounting damages in a wrongful death claim for the prospects of remarriage should be changed:⁹⁵

We are well aware ... that representative bodies concerned with the welfare of women are gravely dissatisfied with the present practice ... of forming a judgment as to whether there is a probability that the individual widow will remarry and, if there appears to be such a probability, of forecasting when this may happen. ...

We are unanimous in expressing the definite view that the law should be so changed as to obviate the continuance of the present practice.

The Committee had been established by the Lord High Chancellor in 1966 “to consider the jurisdiction and procedure of the courts in actions for personal injuries”.⁹⁶ However, it was unable to agree upon any proposal within its terms of reference that could be adopted “to achieve by other means the proper assessment of damages attributable to the period of widowhood”.⁹⁷

Although the Committee did not make a specific recommendation for reform, the wrongful death legislation in the United Kingdom was amended in 1971⁹⁸ with the effect that, in a wrongful death claim by the widow of a deceased person, neither the widow’s prospects of remarriage nor her actual remarriage are to be taken into account in the assessment of damages.⁹⁹

Since its introduction, this amendment has itself been the subject of extensive debate. As early as 1973 the English Law Commission commented on “the weight of criticism” against the provision. The main objection to the amendment was the potential for the provision to operate unfairly as between different categories of widow:¹⁰⁰

The young widow who, at the time of the trial has already remarried a wealthier man, gets far higher damages than does the middle-aged widow with four children and but slight prospects of remarriage.

95 *Report of the Committee on Personal Injuries Litigation* (1968) Cmnd 3691 at paras 378-379.

96 *Id* at para 1.

97 *Id* at para 379.

98 *Law Reform (Miscellaneous Provisions) Act 1971* (UK) s 4.

99 The relevant provision is now to be found in s 3(3) of the *Fatal Accidents Act 1976* (UK). In 1982, the definition of “dependant” in s 1(3) was amended by s 3 of the *Administration of Justice Act 1982* (UK) to include certain de facto partners.

100 Law Commission (England), Report, *Report on Personal Injury Litigation - Assessment of Damages* (No 56, 1973) at 67. For a similar view, see also Scottish Law Commission, Report, *Report on the Law Relating to Damages for Injuries Causing Death* (No 31, 1973) at 29.

It was also considered that the provision created a risk that, because neither the fact nor the prospects of a widow's remarriage could be taken into account, a widow would be compensated for a loss which she had not incurred and which was unlikely to occur.¹⁰¹ There was particular criticism of the situation with respect to actual remarriage.¹⁰²

The rationale for also ignoring a remarriage which had actually taken place before damages were assessed was, no doubt, that otherwise the widow would have an incentive to delay her marriage. In our view, this argument does not justify the manifest absurdity of awarding damages for a loss which is known to have ceased.

The 1971 amendment was further criticised on the basis that it differentiated between widows and other claimants. In a claim by a widower for the wrongful death of his wife, for example, the widower's damages may still be reduced to take into account his remarriage or prospects of remarriage. Similarly, in a claim by a child of the deceased,¹⁰³ the remarriage or prospects of remarriage of the surviving parent may be taken into account. This position was seen as not only anomalous, but also as defeating the purpose of the provision - that is, to eliminate the need for a widow to be exposed to the distasteful and potentially distressing assessment of her private life and remarriage prospects:¹⁰⁴

... proof that the children have acquired or are likely to acquire a wealthy stepfather remains relevant, and invites the same kind of investigation and cross-examination that the 1971 Act was designed to avoid.

The English Law Commission recommended that the provision should be extended to apply to claims made by the children of the deceased and also to a claim made by a widower.¹⁰⁵ The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission) also considered that the same approach should be adopted for widows and widowers.¹⁰⁶ The Scottish Law Commission, however, opposed any extension of the amendment and proposed that, even though the amendment had only recently been introduced, it should be re-examined by Parliament, particularly in regard to a widow's actual remarriage.¹⁰⁷

101 Scottish Law Commission, Report, *Report on the Law Relating to Damages for Injuries Causing Death* (No 31, 1973) at 29.

102 Great Britain Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission), *Report* (March 1978) Vol 1 at 94.

103 For a discussion of wrongful death claims by children, see Chapter 9 of this Report.

104 Waddams SM, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984) 47 *Modern Law Review* 437 at 447.

105 Law Commission (England), Report, *Report on Personal Injury Litigation - Assessment of Damages* (No 56, 1973) at 69.

106 Great Britain Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission), *Report* (March 1978) Vol 1 at 94-95.

107 Scottish Law Commission, Report, *Report on the Law Relating to Damages for Injuries Causing Death* (No 31, 1973) at 29.

A subsequent review by the English Law Commission was also critical of the legislation.¹⁰⁸ In addition to the issues outlined above, the Commission pointed to the increasing incidence of de facto relationships and noted the inconsistency of taking into account the prospects of financial support from such a relationship but not taking into account the possibility of remarriage.¹⁰⁹ The Commission recommended that the provision should be repealed and replaced by a new provision to the effect that the fact of a marriage or a financially supportive relationship of cohabitation should be taken into account wherever relevant, but that the prospects of remarriage or a new relationship should not be taken into account unless, by the time the damages are assessed, the claimant is engaged to be married.¹¹⁰

Despite these recommendations, the 1971 provision has not been amended. The law in the United Kingdom therefore remains that, if the widow of a deceased person makes a wrongful death claim, the assessment of her damages cannot take into account either her prospects of remarriage or her actual remarriage.¹¹¹ However, the widow's remarriage or prospects of remarriage remain relevant in a claim by a child of the deceased and, if the claim is brought by the widower of a deceased wife, his prospects of remarriage or actual remarriage must still be taken into account.

(b) The effect of separation or divorce

The Pearson Commission recommended that the possibility that the relationship between the deceased and the surviving spouse would have ended in divorce should not be taken into account, if taking the possibility into account would be to the detriment of the plaintiff.¹¹²

Such a change could theoretically have affected the dependency, but the chances of its taking place cannot be ascertained with any degree of certainty; and the attempt to make a forecast could lead to undesirable inquiries into the nature of the relationship.

However, the English Court of Appeal has held that, since divorce would have affected the length of time for which the surviving spouse would have continued to receive the benefits formerly provided by the deceased, the possibility that the surviving spouse's marriage to the deceased might have ended in divorce must be

108 Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 54-57.

109 Id at 55. In 1982, the definition of "dependant" in s 1(3) of the *Fatal Accidents Act 1976* (UK) was amended by s 3 of the *Administration of Justice Act 1982* (UK) to include certain de facto partners. The English Law Commission seems to have assumed that, in the absence of a specific provision relating to subsequent de facto relationships, the reference in the legislation to prospects of remarriage did not include the prospect of future cohabitation in a de facto relationship. But see p 28 of this Report in relation to the interpretation of a similar provision in the Northern Territory legislation.

110 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 64-65.

111 *Fatal Accidents Act 1976* (UK) s 3(3).

112 Great Britain Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission), *Report* (March 1978) Vol 1 at 96.

taken into account.¹¹³ It is likely that the court would adopt a similar approach towards the possibility of the breakdown of a de facto relationship.

The Law Commission sympathised with the Pearson Commission's concerns:¹¹⁴

To say to a bereaved widow that her damages are to be reduced because of the prospect of divorce from her deceased husband, to whom she was happily married, is unappealing.

However, the Law Commission acknowledged that the fact of divorce would affect the length of time during which, apart from the death of the deceased, the surviving spouse would have continued to benefit from the financial support and services provided by the deceased. It recognised that to ignore clear indications of divorce would therefore be to knowingly overcompensate a surviving spouse.¹¹⁵ The Commission concluded that the prospects of divorce should be taken into account only where the couple were living apart at the time of the death of the deceased, or where one of the couple had commenced divorce, separation or annulment proceedings.¹¹⁶

In relation to de facto partners, the Commission was of the view that there was no equivalent factor that might be used to indicate objectively that there was, at the time of the death of the deceased, an imminent prospect of the relationship breaking down. The Commission therefore recommended that the prospects of breakdown in the relationship between the deceased and his or her surviving de facto partner should not be taken into account.¹¹⁷

The recommendations of the Pearson Commission and the Law Commission have not been implemented.

3. AUSTRALIAN JURISDICTIONS

(a) Recent changes to the common law

In November 2002, the High Court of Australia delivered its decision in *De Sales v Ingrilli*,¹¹⁸ which changed certain aspects of the common law in relation to the assessment of damages in a wrongful death claim.

113 *Owen v Martin* [1992] PIQR Q151.

114 Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 59-60.

115 *Id* at 60.

116 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 65-69.

117 *Id* at 69.

118 [2002] HCA 52; (2002) 193 ALR 130.

A majority of the High Court found that, ordinarily, no deduction should be made for the contingency that a surviving spouse will enter into a financially beneficial relationship, 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.¹¹⁹

The Court also found, however, that where there is evidence at trial that a new relationship has been formed, or is intended to be formed with an identified person, account may be taken of evidence revealing whether that relationship brings, or will bring, financial advantage or disadvantage.¹²⁰ However, in cases where the evidence reveals a financial advantage for the surviving spouse as a result of the new relationship or intended relationship, the Court considered that it would be incorrect to assume that the financial advantage would inevitably continue, given that any new relationship is subject to contingencies and vicissitudes similar to those that might have affected the former relationship.¹²¹

(b) Jurisdictions other than the Northern Territory

(i) The position prior to *De Sales v Ingrilli*

Until the decision of the High Court in *De Sales v Ingrilli*,¹²² the position in all Australian jurisdictions, apart from the Northern Territory, was similar to that in the United Kingdom before the 1971 amendment to the fatal accidents legislation.¹²³

Prior to the decision, the law had been reviewed by the Law Reform Commissions of New South Wales¹²⁴ and Western Australia,¹²⁵ and by the Law Reform Committee of South Australia.¹²⁶

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Id at 141 [46], 149 [76]-[77] per Gaudron, Gummow and Hayne JJ. Kirby J agreed at 172 [161]-[162]. Gleeson CJ at 139 [32]-[33] took the view that, ordinarily, the contingency that a surviving spouse might form a financially beneficial relationship subsequent to the death of the deceased should be treated as part of the vicissitudes of life as a factor of modest significance unless there were unusual or special circumstances which indicated an unusually low or high chance of the formation of such a relationship. McHugh J at 151 [87] and Callinan J at 182 [196] dissented in relation to whether the discount for the prospects of entering into a financially beneficial relationship should be subsumed into the discount for general contingencies.

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Id at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [161]-[162].

121

Id at 148-149 [74]-[76] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [162].

122

[2002] HCA 52; (2002) 193 ALR 130.

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The position in the United Kingdom is discussed at pp 20-24 of this Report.

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New South Wales Law Reform Commission, Working Paper, *Deferred Assessment of Damages for Personal Injuries and Interim Payments during the Period of Postponement of Assessment and on The Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell's Act* (WP 2, 1969).

125

Law Reform Commission of Western Australia, Report, *Report on Fatal Accidents* (Project No 66, 1978).

126

Law Reform Committee of South Australia, Report, *Report Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the Wrongs Act* (R 27, 1972).

The New South Wales Law Reform Commission was of the view that neither the possibility of remarriage nor the actual remarriage of a surviving spouse should be taken into account.¹²⁷ The Commission acknowledged that such an approach might be seen as inconsistent with the theory that damages in a wrongful death action should do no more than compensate for the actual pecuniary loss sustained.¹²⁸ However, in relation to the possibility of remarriage, it considered that this concern was outweighed by the acute “risk of gross injustice” if the court’s assessment of the likelihood of remarriage was incorrect.¹²⁹ In relation to actual remarriage, the Commission observed:¹³⁰

The Commission can see no public interest in saying to the widow that if she remarries before the trial she will get no damages but that if she remarries the day following the trial she will get damages which will not be subject to reduction because of her intention to remarry. The public interest is rather that if she is going to remarry it is better that the law place no obstacle in her path.

The Law Reform Commission of Western Australia, on the other hand, was opposed to the enactment of a provision to the effect that the remarriage, or prospects of remarriage, of a surviving spouse should not be taken into account in the assessment of damages in a wrongful death claim. The Commission considered that such a provision, by creating a situation in which a young widow who had already made a financially advantageous remarriage could receive higher damages than a middle-aged widow with a number of children and slight prospects of remarrying, would operate unfairly. It was therefore of the view that, although assessing the prospects of remarriage may be distasteful to both the surviving spouse and the court, it is necessary if justice is to be done.¹³¹

The members of the Law Reform Committee of South Australia were unable to come to a unanimous decision. The majority recommended that the prospects of remarriage should not be taken into account in the assessment of damages, but that actual remarriage should remain a factor to be considered where there is specific evidence to satisfy the court that the surviving spouse has in fact benefited financially as a result of the remarriage.¹³²

127 New South Wales Law Reform Commission, Working Paper, *Deferred Assessment of Damages for Personal Injuries and Interim Payments during the Period of Postponement of Assessment and on The Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell’s Act* (WP 2, 1969) at 75.

128 Ibid.

129 Ibid.

130 Id at 76-77.

131 Law Reform Commission of Western Australia, Report, *Report on Fatal Accidents* (Project No 66, 1978) at 22.

132 Law Reform Committee of South Australia, Report, *Report Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the Wrongs Act* (R 27, 1972) at 6-7.

The members of the minority regarded the prospects of remarriage as being in the same situation as any other contingency - for example, future health, life expectancy, employment and promotion prospects - and expressed the view that it would be undesirable to make a "special arbitrary provision in the case of one of many relevant contingency factors".¹³³

None of these reviews resulted in legislative change to the law.

(ii) The position following *De Sales v Ingrilli*

At present, in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, the assessment of damages in a wrongful death claim by a surviving spouse will be carried out in accordance with the decision in *De Sales v Ingrilli*.¹³⁴

However, legislative change has recently been proposed in Victoria. On 28 October 2003, the *Wrongs (Remarriage Discount) Bill 2003* (Vic) was introduced into the Parliament of Victoria. The purpose of the bill is to prevent a court from applying a separate discount to reduce damages in an action for wrongful death on account of remarriage or the formation of a domestic partnership, or of the prospects of remarriage or the formation of a domestic partnership.¹³⁵ Significantly, the Attorney-General, the Honourable Mr R J Hulls MLA, noted in his second reading speech that the bill does not prevent the court from taking into account the fact that a surviving spouse has formed, or may form, a financially beneficial marriage or domestic relationship, as such factors may simply be included in the general discount for the vicissitudes of life.¹³⁶

...nothing in the bill prevents ... the court from taking into account the fact that the plaintiff has married or may marry a wealthy partner. However, this would simply be one of many factors considered in the context of the vicissitudes of life, given no more or less weight than any of the other general factors which make up the vicissitudes of life.

(c) The Northern Territory

In the Northern Territory, the original position was altered by statute in 1974. The *Compensation (Fatal Injuries) Act* (NT)¹³⁷ now provides that, in the assessment of

¹³³ Id at 11.

¹³⁴ [2002] HCA 52; (2002) 193 ALR 130. The facts of this case are discussed at p 18 of this Report.

¹³⁵ *Wrongs (Remarriage Discount) Bill 2003* (Vic).

¹³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 2003 at 1295.

Note, the allowance for contingencies or the vicissitudes of life is discussed at pp 14-15 of this Report.

¹³⁷ The *Compensation (Fatal Injuries) Act* (NT) comprises the *Compensation (Fatal Injuries) Ordinance 1974* as subsequently amended.

damages in a wrongful death claim, no reduction is to be made on account of “the remarriage or prospects of remarriage of the surviving spouse, or a surviving former spouse”.¹³⁸

A spouse includes a de facto partner.¹³⁹ Although the Act refers only to “remarriage or the prospects of remarriage” of the surviving spouse, it has been held that the court must, in the assessment of damages, also ignore “both the possibility of a de facto relationship and the existence of such relationship if it has already occurred”, since any other interpretation of the provision would lead to a result that would be “both capricious and irrational”.¹⁴⁰

However, the Northern Territory legislation does not affect the position in relation to discounting for the prospect that the relationship between the deceased and the surviving spouse may have ended in separation or divorce.¹⁴¹ Accordingly, the damages in a wrongful death action may be reduced to take into account the possibility that the relationship between the deceased and the surviving spouse may have ended in any event.¹⁴²

The Northern Territory wrongful death legislation does not generally apply if the death of the deceased was the result of a motor vehicle accident¹⁴³ or a workplace

¹³⁸ *Compensation (Fatal Injuries) Act* (NT) s 10(4)(h). Note, on 15 October 2003, a bill was introduced in the Northern Territory Parliament which proposes an amendment to this section: see *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT) s 64 and Schedule 1, Part 8. The proposed amendment provides that no reduction is to be made on account of “the marriage or entry into a de facto relationship, or the prospects of doing so, of a surviving spouse or de facto partner or a surviving former spouse or de facto partner.” The *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT) Part 4, Division 1-2 proposes a new definition of “de facto” for inclusion in the *De Facto Relationships Act* (NT) and a new definition of “spouse” for inclusion in the *Interpretation Act* (NT). Upon commencement, these new definitions will apply to the *Compensation (Fatal Injuries) Act* (NT). The amendments are intended to remove distinctions based on a person’s gender, sexuality or de facto relationship with another person and to provide greater equality of treatment for all citizens of the Territory: The Hon Dr Peter Toyne MLA, 15 October 2003, *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT), Text of Second Reading Speech, [Internet], Available from: <<http://notes.nt.gov.au/dcm/legislat/Acts.nsf/8951faff2d9faeaa692565610018f15c?OpenView&Start=1&Count=300&Expand=10#10>> [Accessed 23 October 2003].

¹³⁹ The Act provides that a person who, although not legally married to the deceased person, was, immediately before the death of the deceased person, living with the deceased person as wife or husband, as the case may be, on a bona fide domestic basis is to be treated as the wife or husband, as the case may be, of the deceased person: *Compensation (Fatal Injuries) Act* (NT) s 4(3)(c)(i). Note, on 15 October 2003, a bill was introduced in the Northern Territory Parliament which proposes the repeal of this section: see *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT) s 64 and Schedule 1, Part 8. The *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT) Part 4, Division 1-2 proposes a new definition of “spouse” for inclusion in the *Interpretation Act* (NT) and a new definition of “de facto” for inclusion in the *De Facto Relationships Act* (NT). Upon commencement, these new definitions will apply to the *Compensation (Fatal Injuries) Act* (NT). The amendments are intended to remove distinctions based on a person’s gender, sexuality or de facto relationship with another person and to provide greater equality of treatment for all citizens of the Territory: The Hon Dr Peter Toyne MLA, 15 October 2003, *Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003* (NT), Text of Second Reading Speech, [Internet], Available from: <<http://notes.nt.gov.au/dcm/legislat/Acts.nsf/8951faff2d9faeaa692565610018f15c?OpenView&Start=1&Count=300&Expand=10#10>> [Accessed 23 October 2003].

¹⁴⁰ *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535 at 545 per Woodward, Neaves and Beaumont JJ.

¹⁴¹ See Chapter 8 of this Report for further discussion.

¹⁴² See for example *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535 at 543 per Woodward, Neaves and Beaumont JJ.

¹⁴³ *Compensation (Fatal Injuries) Act* (NT) s 5(2), *Motor Accidents (Compensation) Act* (NT) s 5(1).

accident.¹⁴⁴ In these situations, the wrongful death action has been subsumed into the statutory schemes governing compensation for personal injuries caused by a motor vehicle accident or a workplace accident. Under the scheme for motor vehicle accidents, the surviving spouse and dependent children of a deceased person whose death results from or is materially contributed to by injuries sustained in a motor vehicle accident are entitled to a combined lump sum amount equal to average weekly earnings for a period of three years.¹⁴⁵ In addition, each dependent child is entitled to an amount per week equal to 10 per cent of average weekly earnings at the time the payment is made.¹⁴⁶ However, the total additional amount for dependent children is not to exceed the average weekly wage, and where there are more than ten dependent children, the average weekly wage is to be divided amongst them in equal shares.¹⁴⁷ Similar provisions apply under the statutory scheme governing compensation for personal injuries caused in workplace accidents.¹⁴⁸

4. NEW ZEALAND

In New Zealand, the *Deaths by Accidents Compensation Act 1952* (NZ) creates a statutory cause of action for wrongful death,¹⁴⁹ enabling the dependants of a deceased person to claim damages for the loss of financial support and/or services formerly provided by the deceased. The possibility that the spouse of the deceased may remarry is able to be taken into account in the assessment of damages.¹⁵⁰ If the surviving spouse has actually remarried, the claim is not necessarily defeated but, depending on the circumstances of the particular case, the remarriage may affect the amount of compensation to which the surviving spouse is entitled for the period after the remarriage.¹⁵¹

144 See *Work Health Act* (NT) ss 52, 189 which provide that an action for damages may not be brought against an employer or another worker employed by the employer, or the Nominal Insurer, by a dependant of a worker in respect of the death of the worker unless the cause of action in respect of the death of the person arose before 1 January 1987.

145 *Motor Accidents (Compensation) Act* (NT) s 22. This section specifies the proportions in which the spouse and any dependent children are entitled to share in this amount.

146 *Motor Accidents (Compensation) Act* (NT) s 23(1).

147 *Motor Accidents (Compensation) Act* (NT) s 23(2).

148 *Work Health Act* (NT) ss 62, 63. Amendments made in 2002 to s 62 entitle the surviving spouse and dependent children of a deceased person, whose death resulted from or is materially contributed to by injuries sustained in the course of employment, to a combined lump sum amount equal to average weekly earnings for a period of five years.

149 *Deaths by Accidents Compensation Act 1952* (NZ) s 4.

150 *LeBagge v Buses Ltd* [1958] NZLR 630.

151 *Petersen v Claney* [1970] NZLR 69 at 80 per Moller J.

However, the effect of the wrongful death legislation in New Zealand is significantly curtailed by the operation of a statutory accident compensation scheme.¹⁵² If the death of the deceased resulted from a personal injury which is covered by the scheme, there is no other avenue of redress and proceedings may not be brought under the wrongful death legislation.¹⁵³

5. CANADA

Wrongful death legislation based on Lord Campbell's Act has been enacted in all the Canadian provinces except Quebec.¹⁵⁴

Generally, the remarriage or prospect of remarriage of a surviving spouse is to be taken into account in the assessment of damages.¹⁵⁵ The possibility of a future relationship of financially supportive cohabitation may also be taken into account.¹⁵⁶ However, provided that a trial judge gives appropriate consideration to the issue of the formation of a new relationship, an appeal court is unlikely to disturb the discount applied by the trial judge, even where the discount is very low or non-existent.¹⁵⁷ The surviving spouse's damages may also be reduced because of the likelihood that, if not for the death of the deceased, the deceased and the surviving spouse would have divorced.¹⁵⁸

Only one province has legislated to change the general rule. In Prince Edward Island, the assessment of damages in any wrongful death claim is not to take into account the probability that a dependant of the deceased may marry or the effect of such a probability on any other dependant.¹⁵⁹ The Prince Edward Island legislation has been criticised on the grounds that, by ignoring the effect on a surviving

152 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ).

153 *Deaths by Accidents Compensation Act 1952* (NZ) s 4(4); *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 317, 321.

154 *Fatal Accidents Act*, RSA 2000, c F-8; *Family Compensation Act*, RSBC 1996, c 126; *Fatal Accidents Act*, CCSM 1987, c F-50; *Consolidation of Fatal Accidents Act*, RSNWT 1988, c F-3; *Fatal Accidents Act*, RSNB 1973, c F-7; *Fatal Accidents Act*, RSNL 1990, c F-6; *Consolidation of Fatal Accidents Act*, RSNWT 1988, c F-3, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Fatal Injuries Act*, RSNS 1989, c 163; *Family Law Act*, RSO 1990, c F-3; *Fatal Accidents Act*, RSPEI 1988, c F-5; *Fatal Accidents Act*, RSS 1978, c F-11; *Fatal Accidents Act*, RSY 2002, c 86.

155 See for example Waddams SM, *The Law of Damages* (Looseleaf edition, 2002) note 200 at 6-30 and the cases cited therein.

156 See for example *Hildebrand v Butler* (1979) 11 BCLR 234 (SC); *Comeau v Marsman* (1981) 47 NSR (2d) 550 (SCTD). In some provinces a wrongful death claim may be made by a same sex partner: see for example *Family Law Act*, RSO 1990, c F-3, s 61(1); *Family Compensation Act*, RSBC 1996, c 126, ss 1(b) (definition of "spouse"), 3(1).

157 See for example *Keizer v Hanna* [1978] 2 SCR 342 at 359-360.

158 *Brooks v Stefura* [1998] 9 WWR 312.

159 *Fatal Accidents Act*, RSPEI 1988, c F-5, s 7(1)(a).

spouse's loss of an actual or probable new financially beneficial relationship of cohabitation, it leads to anomalous results:¹⁶⁰

A young claimant, for example, whose spouse is wrongfully killed and who actually remarries a wealthier person before trial, will recover damages in respect of the late spouse's lifetime earnings and, in addition, will enjoy the support of the second spouse. An older claimant, whose need is much greater and whose prospects of remarriage are low, will recover far less.

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Waddams SM, *The Law of Damages* (Looseleaf edition, 2002) at 6-32.

CHAPTER 6

THE EFFECT OF A POSSIBLE FUTURE RELATIONSHIP

1. INTRODUCTION

Prior to the decision of the High Court in *De Sales v Ingrilli*¹⁶¹ in late 2002, the assessment of a surviving spouse's¹⁶² damages in a wrongful death claim would ordinarily have taken into account the extent to which the loss suffered by the surviving spouse was likely to be affected by the possibility that he or she would form a relationship of financially supportive cohabitation¹⁶³ some time in the future.¹⁶⁴ In taking this possibility into account, the court would estimate the likelihood of the future formation of a financially supportive relationship of cohabitation and off-set that possible future benefit against the loss of support caused by the wrongful death of the deceased.¹⁶⁵ The allowance for the possibility of future benefit was accounted for either as a separate deduction¹⁶⁶ or as part of the general discount for the contingencies or vicissitudes of life.¹⁶⁷

The inherent uncertainty about what the future might hold for a surviving spouse made it impossible to calculate the damages in a wrongful death claim with mathematical precision. The courts frequently remarked on the difficulty of the assessment process and, in particular, of determining the allowance to be made for

¹⁶¹ [2002] HCA 52; (2002) 193 ALR 130.

¹⁶² In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

¹⁶³ In this Chapter, the term "cohabitation" means either a relationship of marriage or a de facto relationship.

¹⁶⁴ This rule was abolished by a majority of the High Court in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130.

¹⁶⁵ Note, in Australia, some earlier judicial statements appeared to attribute a different basis to the practice of discounting for the possibility of remarriage, referring instead to the surviving spouse's "revived capacity to marry" after the death of the deceased. This view considered that it was not the likelihood that the surviving spouse would remarry that was relevant, rather it was suggested that the freedom to marry was of itself a benefit accruing from the deceased's death: see *Jones v Schiffmann* (1971) 124 CLR 303 at 306 per Barwick CJ. This approach valued the freedom to marry as a benefit resulting from the death of the deceased, which would then be off-set against the loss of financial support caused by the death. There were a number of problems with this approach, including that it was inconsistent with other aspects of the assessment of damages in wrongful death actions. It was also inconsistent with changing social conditions, particularly those pertaining to de facto relationships and divorce.

For further discussion on this point see *Dominish v Astill* [1979] 2 NSWLR 368 at 379-386 per Samuels JA and Queensland Law Reform Commission, Issues Paper, *Damages in an Action for Wrongful Death* (WP 56, June 2002) at 17-20.

¹⁶⁶ See for example *Yorston v Hansen's Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992); *Jones v Schiffmann* (1971) 124 CLR 303.

¹⁶⁷ See for example *Mahoney v Dewinter* (Unreported, Queensland Court of Appeal No 182 of 1992, Fitzgerald P and McPherson JA, 15 March 1993); *Rodda v Boonjie Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993); *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1996, Williams J, 6 June 1997); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

the possibility that a surviving spouse would, at some time, enter into a future financially beneficial relationship of cohabitation.¹⁶⁸

In the absence of a standard formula, the courts, by reference to the facts of each case, attempted to calculate a rate of discount which would neither unduly disadvantage the surviving spouse nor do an injustice to the defendant by requiring the defendant to pay an amount that would, if the monetary support and domestic services formerly provided by the deceased were replaced by a new relationship, exceed the surviving spouse's actual pecuniary loss.¹⁶⁹

2. THE EFFECT OF *DE SALES V INGRILLI*

As noted earlier in this Report, the High Court decision in *De Sales v Ingrilli*¹⁷⁰ changed the common law in relation to the assessment of damages in a wrongful death claim. A majority of the High Court found that, ordinarily, in a claim of this type, the discount for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation should no longer apply, either as a separate discount or as a matter which enlarged the discount for the vicissitudes of life.¹⁷¹

¹⁶⁸ See for example *Dominish v Astill* [1979] 2 NSWLR 368 at 391 per Samuels JA; *Jones v Schiffmann* (1971) 124 CLR 303 at 308 per Menzies J; *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 at 644-645 per Phillimore J; *Horton v Byrne* [1957] St R Qd 1 at 8 per Dixon CJ, McTiernan, Webb and Taylor JJ; *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 614-615 per Viscount Simon; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 617 per Lord Wright.

¹⁶⁹ In *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130, Kirby J commented at 169 [150] on the inconsistency of approach displayed by individual judges in calculating the rate of discount:

... regard must be had to the very great disparities that appear in the calculations to which individual judges come when estimating the discount that should be allowed for the prospect of re-partnering. In some cases, judges have suggested that too great a weight must not be given to this factor and that the normal allowance should be moderated. In one recent case of this type a discount of only 2% was provided. In another, the discount for all contingencies including the "prospects of remarriage" was 10%. In this Court, Menzies J in *Jones v Schiffmann* favoured a discount that was equivalent to 17%. Discounts of 20% have not been uncommon in State courts. In a case where the judge considered the plaintiff "personable and warm", the discount allowed was 50%. In another case, where the trial judge had allowed only 20% for all contingencies, the Full Court of the Supreme Court of Western Australia increased the discount to 60%. In *Willis v The Commonwealth*, where the widow's remarriage within a short time of the death of her husband was actually proved, the discount was equivalent to 100%. In contrast, in a recent case involving a widower, the judge came to the view that there were no prospects of remarriage and therefore made no deduction. [notes omitted]

¹⁷⁰ [2002] HCA 52; (2002) 193 ALR 130. The facts of this case are discussed at p 18 of this Report.

¹⁷¹ Id at 141 [46] and 149 [79] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [161] and 173 [166].

Note, the majority distinguished between accounting for the possibility of a surviving spouse forming a future relationship of financially supportive cohabitation and the fact that a surviving spouse has actually formed a subsequent relationship of financially supportive cohabitation, or intends to form such a relationship with an identified person. The practice of discounting damages of a surviving spouse to take into account the effect of an actual or intended relationship of financially beneficial cohabitation formed subsequent to the death of the deceased is discussed in Chapter 7 of this Report.

In their joint reasons for judgment, Gaudron, Gummow and Hayne JJ expressed concerns about the speculative and uncertain nature of assessing the discount for the possibility of a surviving spouse forming a future financially beneficial relationship.¹⁷² Their Honours observed that a court would rarely be able to determine with any accuracy whether an individual would form a close and enduring attachment to another or when that might occur, and that, even if such difficulties were overcome, the financial consequences of the relationship would be even more speculative:¹⁷³

It is, therefore, wrong to treat the prospect of remarriage or the prospect of forming some new continuing relationship as a separate item for which some identified discount must be made from whatever calculation is made of the present value of future benefits that would have flowed from the deceased to the relatives. Even if the prospects that a surviving spouse would remarry or 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, and predicting some likely outer limit of time by which it would probably have occurred is only slightly less difficult. 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 marriage or relationship must be treated as only one of many possible paths that the future may hold. It is wrong to single it out for special and separate allowance. That others in the past have had damages reduced on this account is not reason enough to continue the error.

Nor can the prospect of remarrying or forming a new relationship properly 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 assessment of that discount is not easy. It must reflect not only the fact that the future may have been better than the past but also the fact that it may not. It is wrong to fasten upon *one* of the myriad possible paths that life may take and say that, on account of *that* possibility, it is right to enlarge the discount that must be made. The discount can be assessed only as a single sum which reflects *all* of the possibilities. [original emphasis]

Gaudron, Gummow and Hayne JJ therefore considered that the lack of accuracy inherent in assessing the discount denied “the validity of looking separately at some ‘discount for remarriage’ over and above whatever discount is made for the ‘vicissitudes of life’”.¹⁷⁴

Kirby J concurred with the views of Gaudron, Gummow and Hayne JJ:¹⁷⁵

¹⁷² [2002] HCA 52; (2002) 193 ALR 130 at 147-149 [72]-[77].

¹⁷³ Id at 149 [76]-[77] per Gaudron, Gummow and Hayne JJ. See also their Honours’ comments at 148 [73]-[74].
Note, Gleeson CJ at 138 [28] expressed a similar view:

Where there has been no remarriage, and no particular marriage is in prospect, there is a double contingency involved: (1) the likelihood of a claimant’s remarriage; (2) the likelihood of pecuniary benefit from that remarriage.

¹⁷⁴ [2002] HCA 52; (2002) 193 ALR 130 at 148 [75].

¹⁷⁵ Id at 172 [161].

... the present approach having been shown to be unjust, unpredictable, anomalous and discriminatory, the time has come for re-expression of the law on the discount for domestic re-partnering. I therefore agree with the joint reasons that, in a wrongful death case, ordinarily, no deduction should be made on account that a surviving spouse or domestic partner will remarry or form a new domestic relationship of economic significance. [note omitted]

Kirby J later noted that the decision of the Court effectively abolished the discount for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation.¹⁷⁶

...what was formerly the discount for “the prospects of remarriage” does not apply ... What has been known as the discount for the prospects of remarriage is therefore no longer part of the law.

The remaining members of the Court dissented from the view of the majority on this issue.

Gleeson CJ considered that the possibility of a surviving spouse forming a future relationship of financially supportive cohabitation should ordinarily be treated as part of the discount for the vicissitudes of life, and that allowance should be made for the contingency of a future financially beneficial relationship, as a factor of modest significance, in the same way as allowance is made for other contingencies.¹⁷⁷ However, his Honour the Chief Justice expressed the view that a separate discount should be made in cases where it is possible to predict with greater certainty the likelihood of the surviving spouse forming a future financially beneficial relationship.¹⁷⁸ Gleeson CJ was critical of the view of the majority:¹⁷⁹

There is a logical problem about an appellate court accepting that a judge may treat the possibility of beneficial remarriage as one of the vicissitudes of life, to be taken into account with other contingencies, and at the same time, declaring that a judge may not give it any weight. 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 or contingencies, and at the same time deny to a trial judge the capacity, as a matter of factual judgment in a particular case, to treat it as increasing the allowance for vicissitudes that would otherwise be made. If it ought to be left out of account altogether, that is one thing. If it may be taken into account, that is another. Once that point is reached, the question becomes one of factual judgment in the particular case.

McHugh and Callinan JJ expressed the view that the discount for the possibility of future formation of a financially beneficial relationship of cohabitation should apply.

176 Id at 173 [166].

177 Id at 139 [32], 140 [37].

178 Id at 139 [33], 140 [37].

179 Id at 140 [40].

McHugh J considered that it was fair and reasonable that damages awarded to a surviving spouse should reflect any possible benefit accruing in the future:¹⁸⁰

It is logical and it is just that a widow or widower who claims compensation for the future loss of financial support from a deceased person should give credit for any financial support that has replaced the support that that person would have received from the deceased. And it is logical and it is just that the damages awarded should also be discounted to reflect any probability - high or low - that the plaintiff will receive support in the future from remarrying or entering into a de facto relationship. To hold otherwise is to give the plaintiff a windfall - in many cases a substantial windfall - and to require the defendant to pay the plaintiff more than that person has lost financially. I also think that there is no advantage - and some danger - in subsuming the discount for future support under the head of general contingencies. Because the appropriate discount must vary considerably depending on the age of the widow or widower, the general contingencies percentage would have to be varied in each case. If the variation is done properly, subsuming the discount under general contingencies will be of no practical value.

Callinan J considered that the assessment of the discount for the possibility that the surviving spouse may form a financially beneficial relationship of cohabitation was no more speculative than the assessment of any other contingency, and that the risk of unfairness to the defendant was too great to justify ignoring the possibility of the formation of a financially advantageous remarriage or de facto relationship by the surviving spouse.¹⁸¹

Assessments of damages for both personal injury and loss of support are all necessarily imprecise because they have to be predictive about notoriously unpredictable matters, human affairs. In the interests of finality, not only in this field, but also in many others, the law requires that damages be assessed and paid once and for all, as a lump sum, even though the future, if the assessment were to await it, might falsify the assumptions underpinning it. Imponderables abound. They are certainly not confined to prospects of remarriage. ...

... It would, however, be to do a real injustice to a defendant to assess a widow's or widower's damage as if she or he would not remarry, even though it was the fact that a prospective spouse had the capacity to, and would be likely to support the surviving former dependent on a scale far beyond that provided before the death of the deceased. As best it can be, the likelihood of the occurrence of the various contingencies of life, will be assessed by reference to the evidence of the circumstances.

3. ISSUES FOR CONSIDERATION

Consideration of the law in relation to the discount for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation raises the following issues:

180 Id at 151 [87].

181 Id at 178-179 [185]-[186].

- In a wrongful death action, should the possibility that the surviving spouse may form a future relationship of financially beneficial cohabitation be able to be taken into account in the assessment of the surviving spouse's damages?
- If such a possibility is able to be taken into account, how is the possibility to be accounted for:
 - (a) as a separate discount; or
 - (b) as part of the general discount for the vicissitudes of life; or
 - (c) calculated by reference to a standard discount table?

(a) Should the possibility be able to be taken into account?

At common law, the damages of a surviving spouse may no longer be discounted for the possibility of the formation of a future relationship of financially advantageous cohabitation.¹⁸² The question of whether or not such a possibility should be able to be taken into account in the assessment of damages of a surviving spouse raises a number of issues for consideration.

(i) Demeaning and intrusive inquiries

It has been said that the practice of trying to determine whether a surviving spouse is likely to enter a future relationship is demeaning to the surviving spouse.¹⁸³ In the past, the assessment of such a possibility frequently involved an evaluation of the surviving spouse's personal attributes.

The age of the surviving spouse, for example, was often regarded as being relevant to assessing the prospects of remarriage.¹⁸⁴ Generally speaking, the younger the surviving spouse, the greater the likelihood that a significant discount would be made. A judge of the High Court of Australia observed that:¹⁸⁵

In a case such as the present one in which the widow was still young and had no physical incapacity for marriage it would not be correct ... to make no allowance or only a nominal allowance for her capacity to marry.

Similarly, the Queensland Court of Appeal expressed the view that "one would expect that a 27 year old widow would be quite likely to remarry".¹⁸⁶

182 *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130.

183 *Public Trustee v Paniens* (1971) 1 SASR 297 at 300 per Zelling J; *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [32].

184 See for example *Jones v Schiffmann* (1971) 124 CLR 303 at 306 per Barwick CJ.

185 *Jones v Schiffmann* (1971) 124 CLR 303 at 316 per Walsh J.

186 *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258 at 259 per Pincus, Davies JJA and Thomas J.

The appearance of the surviving spouse was also regarded as relevant to the prospects of a new relationship, particularly where the surviving spouse was female.¹⁸⁷ In a 1961 Queensland case, the court said that “the question of what allowance is to be made because of prospects of re-marriage of a widow must necessarily depend on the impact of her appearance and personality upon the trial judge”.¹⁸⁸ However, more recent cases in the Queensland Supreme Court have tended to move away from addressing the question of the appearance of a female surviving spouse.¹⁸⁹ For reasons that were not articulated by the courts, the appearance of a male surviving spouse was not usually taken into account in considering the likelihood of the surviving spouse forming a new relationship.¹⁹⁰

The emphasis placed in some cases on the appearance of the deceased’s widow has been described as “treating women like cattle to be appraised”.¹⁹¹ Underlying the application of the discount was a stereotypical assumption that a good-looking woman was more likely to enter into a permanent relationship than a less attractive one. To the extent that less importance was placed on the issue of the surviving spouse’s appearance when the surviving spouse was male, the practice of scrutinising a female claimant’s appearance was also discriminatory.

Various other personal attributes of the surviving spouse - such as intelligence,¹⁹² independence,¹⁹³ qualifications and experience,¹⁹⁴ self-

187 See for example *Jones v Schiffmann* (1971) 124 CLR 303 at 306 per Barwick CJ; *Hatton v Stringer* [1955] St R Qd 584 at 589 per Philp J; *K M Crow v Sunstate Shopfitters Pty Ltd* (Unreported, Queensland Supreme Court No 1741 of 1989, Thomas J, 28 July 1992).

188 *Keane v Smith and Halse* [1961] QWN 17 at 23 per Stable J (with whom Matthews and Wanstall JJ agreed).

189 See for example *White v Mt Isa Mines Ltd* (Unreported, Queensland Supreme Court No 6 of 1991, Williams J, 17 February 1993); *Mahoney v Dewinter* (Unreported, Queensland Court of Appeal No 182 of 1992, Fitzgerald P and McPherson JA, 15 March 1993); *Rodda v Boonjie Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J. The appearance of the female surviving spouse was not identified as a relevant consideration in any of these cases. But see also *Yorston v Hansen’s Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992), where the trial judge described the 30 year old surviving spouse as “well-groomed and attractive” and observed:

In this jurisdiction it is necessary to make personal observations of the widow in a manner which may be considered distasteful but it is a necessary aspect of a loss of dependency claim.

190 *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1996, Williams J, 6 June 1997); *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

191 *Public Trustee v Paniens* (1971) 1 SASR 297 at 300 per Zelling J.

192 *Lyons v Woods* (Unreported, Queensland District Court No 42 of 1990, Trafford-Walker DCJ, 17 October 1990); *Yorston v Hansen’s Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992).

193 *Rodda v Boonjie Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

194 *Yorston v Hansen’s Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

discipline and determination¹⁹⁵ - were also taken into account by the courts in determining the possible “marriageability” of a surviving spouse. Some judicial statements even suggested that the receipt of a sizeable award of damages by the surviving spouse in compensation for the wrongful death of the deceased might increase the prospects of the surviving spouse forming a new relationship.¹⁹⁶

More recently, in *De Sales v Ingrilli*,¹⁹⁷ Gaudron, Gummow and Hayne JJ commented that the speculative nature of the assessment of the discount is “never assisted by fastening upon some superficial characteristics labelled as ‘appearance’, ‘personality’, ‘credentials’ or the like and having the judge or jury base on those characteristics some estimate of ‘marriageability’”.¹⁹⁸ Gleeson CJ also took the view that there was no sound basis for relying on concepts of “marriageability”.¹⁹⁹

Prior to the abolition of the discount, in addition to being subjected to an assessment in relation to his or her personal attributes, a surviving spouse may have been subjected to attempts by the defence to gather evidence about his or her personal life to try to establish involvement in a relationship as a means of reducing or minimising the damages to be paid by the defendant. These attempts often involved the use of a private investigator.²⁰⁰

The use of surveillance or private detectives might transform a well founded civil action for dependency losses into a process of “dirt digging” simply in order that the defendant’s liability might be reduced.

In this regard, the surviving spouse was often forced to endure cross-examination of a highly personal nature. Questions about the possible existence of a subsequent relationship are likely to be distressing or offensive to someone who has already suffered the death of his or her spouse.²⁰¹

¹⁹⁵ *Yorston v Hansen’s Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992).

¹⁹⁶ See for example *Hatton v Stringer* [1955] St R Qd 584 at 589 per Philp J; *Lamb v Southern Tablelands County Council* (1988) Aust Torts Reports ¶180-220 at 68,204 per Campbell J; *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258. In the 1950s one Queensland judge referred to a surviving spouse’s damages as a “dowry”: see *Hatton v Stringer* [1955] St R Qd 584 at 589 per Philp J. More recently, in *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258 at 259, the Queensland Court of Appeal (per Pincus, Davies JJA and Thomas J) expressed the view that:

... it can hardly be that widows receiving awards of damages are peculiarly unlikely to remarry; one would be inclined to suspect the existence of the contrary tendency.

¹⁹⁷ [2002] HCA 52; (2002) 193 ALR 130.

¹⁹⁸ Id at 148 [73].

¹⁹⁹ Id at 139 [34]. But see the comments of Callinan J at 179-180 [188]-[190].

²⁰⁰ Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 61.

²⁰¹ See for example *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [38].

In the United Kingdom, where legislation was introduced in 1971 to prevent the remarriage or prospects of remarriage of a widow being taken into account in the assessment of the widow's damages in a wrongful death claim, the English Law Commission suggested that the alleged problem of distressing and distasteful enquiries might have been overstated.²⁰² The Commission therefore sought information about what would be the likely effect of repealing the 1971 provision. The submissions received by the Commission in response to that inquiry highlighted concerns about the use of private detectives and video evidence, as well as about "the possibility of humiliating cross-examinations and comments by defence counsel".²⁰³

(ii) Speculation

Prior to the High Court decision in *De Sales v Ingrilli*²⁰⁴ and the comments made in that case by the majority with respect to the speculative nature of the discount,²⁰⁵ other judicial commentary had suggested that it was impossible to predict with any degree of accuracy the likelihood that a surviving spouse would form a future relationship of financially beneficial cohabitation.²⁰⁶

A judge seeing a widow for a few hours seated behind her counsel, and seeing and hearing her for a shorter period whilst giving evidence of the financial aspects of family life, and being cross-examined thereon, is expected to make an assessment of her as a candidate for further matrimony, perhaps fortified by some expression of her present intentions and some surrounding circumstance. On the type of evidence generally available, a judge who believed that his estimate had any real value would be deluding himself.

Indeed, the possibility that a surviving spouse might remarry in financially advantageous circumstances has been regarded as being incapable of calculation in the majority of cases.²⁰⁷

However, a wrongful death claim is not the only situation in which a court is required to speculate about the future. Courts frequently have to take into account the uncertainty of what may lie ahead. It has been suggested that

202 Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 57.

203 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 61.

204 [2002] HCA 52; (2002) 193 ALR 130.

205 *Id* at 147-149 [72]-[77] per Gaudron, Gumow and Hayne JJ. See also Kirby J at 169 [151], 171-172 [158]-[159], and 174 [169].

206 *Dominish v Astill* [1979] 2 NSWLR 368 at 377 per Reynolds JA. See also *Jones v Schiffmann* (1971) 124 CLR 303 at 308 per Menzies J; *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 at 644-645 per Phillimore J; *Horton v Byrne* [1957] St R Qd 1 at 8 per Dixon CJ, McTiernan, Webb and Taylor JJ; *Nance v British Columbia Electric Railway Company Ltd* [1951] AC 601 at 614-615 per Viscount Simon; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 617 per Lord Wright.

207 *Nance v British Columbia Electric Railway Company Ltd* [1951] AC 601 at 615 per Viscount Simon. See also *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 138 [30] per Gleeson CJ and at 146-147 [68] per Gaudron, Gummow and Hayne JJ and at 172 [159] per Kirby J.

the task of assessing the possibility of a surviving spouse forming a future relationship is not significantly more speculative than other assessments which courts routinely make - for example, in determining the appropriate level of compensation for injuries to a small child:²⁰⁸

As far as difficulty is concerned, it seems to us to be of the same character as a great many other conjectural questions which a judge must answer before he can arrive at a just solution to a claim, and we can see no ground in principle or in policy for singling out the factor of remarriage for special exemption.

In *De Sales v Ingrilli*,²⁰⁹ Gleeson CJ noted the uncertainty inherent in assessing the possibility of a surviving spouse forming a future financially beneficial relationship, but took the view that this uncertainty was no more significant than the uncertainty which is central to the question of assessing any contingency.²¹⁰ McHugh J commented that the task of valuing the possibility of future support was no more difficult than valuing the loss of a chance, a matter regularly assessed by courts.²¹¹

(iii) The risks of under or overcompensation

Adequate compensation for the loss of the monetary support and domestic services previously provided by the deceased is the primary object in a wrongful death claim.²¹² The discount for the possibility that a surviving spouse might form a financially beneficial relationship of cohabitation was formerly applied and justified in an effort to avoid overcompensation of the surviving spouse.²¹³ However, if the damages paid to the surviving spouse are discounted to take into account the possibility that a pecuniary benefit might be derived from a future relationship, then it is likely that the surviving spouse will be undercompensated if such a relationship does not in fact eventuate, or if any subsequent relationship has an adverse impact on the surviving spouse's financial situation. Undercompensation may result in the

²⁰⁸ Law Reform Committee of South Australia, Report, *Report Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the Wrongs Act* (R 27, 1972) at 9 (Minority Report). See also *Dominish v Astill* [1979] 2 NSWLR 368 at 391 per Samuels JA.

²⁰⁹ [2002] HCA 52; (2002) 193 ALR 130.

²¹⁰ *Id* at 138 [31]. See also Gaudron, Gummow and Hayne JJ at 146 [68].

²¹¹ *Id* at 156 [104]. See also comments by Callinan J at 178-179 [185]-[187].

²¹² The loss for which damages may be claimed in an action for wrongful death is discussed at pp 6-7 of this Report.

In its submission to the Commission, the Australian Plaintiff Lawyers Association expressed the view that, as a claimant in a wrongful death action in Queensland may not be compensated for the pain and suffering and emotional distress that arises from the death of the deceased, such a claimant will generally be under-compensated as the true nature of the loss sustained by the claimant is not recognised at law: Submission 4.

Note, in the Northern Territory and South Australia, a claimant in an action for wrongful death may claim solatium or non-pecuniary loss: *Compensation (Fatal Injuries) Act* (NT) s 10(3)(f); *Wrongs Act 1936* (SA) ss 23A-23C.

²¹³ This view was approved by McHugh J in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 151 [87] and 155 [101]. See also comments by Callinan J at 178 [186].

surviving spouse suffering financial hardship. The general community also bears a cost if the surviving spouse is ultimately forced to rely on social security payments because of the inadequacy of the compensation received.

(iv) Artificial behaviour

Not infrequently, the surviving spouse of a person who had been wrongfully killed gave evidence in a wrongful death claim that he or she had no intention of ever remarrying. The effect of such an assertion would depend on the circumstances of the particular case. Sometimes, the evidence would be accepted unconditionally, with the effect that there was little or no discount for the possibility of forming a future relationship of cohabitation.²¹⁴ This was particularly so where there had been a failed relationship subsequent to the death of the deceased spouse.²¹⁵ In other cases it was treated with more scepticism.²¹⁶

The need for the surviving spouse to provide evidence of his or her intentions regarding the possible formation of a future relationship of cohabitation was criticised on the basis that a surviving spouse might have been discouraged from resuming a normal lifestyle or might have felt it necessary to resort to qualification and concealment in the conduct of his or her personal affairs so as not to diminish the amount of compensation to which he or she would otherwise have been entitled.²¹⁷

One of the factors ... which the court must take into account, in diminution of the damages which would otherwise be awarded, is the possibility that the bereaved spouse will remarry. ... Under the present law the court must assess what the prospects are as to remarriage. ...

...

... the widow is discouraged from turning her back on the past, so far as her grief permits, and making what may be perfectly proper and desirable social adjustments. She is likely to be advised by her solicitor that if, pending the trial, she were to form any friendship which might be thought to indicate a possibility of her remarriage, the result may well be that this friendship will come to the knowledge of the insurer and be used at the trial as an argument for the reduction of damages which would otherwise be awarded.

²¹⁴ *McCullagh v Lawrence* [1989] 1 Qd R 163; *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1996, Williams J, 6 June 1997); *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

²¹⁵ *Rodda v Boonjje Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993); *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

²¹⁶ *White v Mt Isa Mines Ltd* (Unreported, Queensland Supreme Court No 6 of 1991, Williams J, 17 February 1993); *Mahoney v Dewinter* (Unreported, Queensland Court of Appeal No 182 of 1992, Fitzgerald P and McPherson JA, 15 March 1993).

²¹⁷ New South Wales Law Reform Commission, Working Paper, *Deferred Assessment of Damages for Personal Injuries and Interim Payments during the Period of Postponement of Assessment and on The Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell's Act* (WP 2, 1969) at 73-74.

(v) The practice is distasteful for the judge

Many judges have described the need to make a finding about the possibility that the surviving spouse will form a future relationship of financially supportive cohabitation as distasteful, unpleasant and/or offensive:²¹⁸

Am I to ask her to put on a bathing dress; because the witness box is calculated to disguise the figure? ... It seems to me that this particular exercise is not only unattractive but is not one for which judges are equipped. Am I to label the lady to her face as attractive or unattractive?

In *De Sales v Ingrilli*,²¹⁹ Callinan J took a different view:²²⁰

The exercise of looking closely to aspects of the personal life of a dependent should not be regarded as distasteful. The courts are concerned daily with intimate matters and relationships. The Family Court in particular, even today, is sometimes required to delve into these, in cases in which, for example, the interests of children are under consideration. Disabled plaintiffs whose sexual activities have been impaired give evidence in chief and are liable to be cross-examined about the extent of the impairment, and its effect upon their personal lives. The disfigurement of injured persons has frequently to be described in judgments and evaluated in monetary terms. Judges have to make judgments based upon the evidence. There are far more distasteful tasks than of assessing prospects of remarriage or of another relationship that have to be undertaken by judges: for example, the task of dealing with cases in the criminal jurisdiction concerning the most debased of human conduct; on occasions, of sentencing persons to terms of imprisonment in circumstances in which the sentence will cause great distress and deprivation to the family of the offender; of applying a law of which the judge strongly disapproves; and of having to find that a party has lied. That a judge might find a task distasteful is not a reason for the judge not to do it.

There are also situations, other than wrongful death actions, in which it may be necessary for the court to make an assessment of a person's prospects of forming a future relationship of cohabitation. For example, such an assessment might occur in a personal injuries action in which a plaintiff seeks damages for the loss of the ability to enjoy the amenities of life, including the loss of the ability to enjoy a relationship of cohabitation. In such cases, the court will consider whether the plaintiff's injuries have affected his or her prospects of forming such a relationship.²²¹ In order for the claim to succeed, it will be necessary for the plaintiff to disclose intimate details of his or her life for consideration by the court.

²¹⁸ *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 at 645 per Phillimore J. See also *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 at 850-851 per Willmer LJ; *Public Trustee v Paniens* (1971) 1 SASR 297 at 300 per Zelling J; *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [32].

²¹⁹ [2002] HCA 52; (2002) 193 ALR 130.

²²⁰ *Id* at 180 [189].

²²¹ *Dominish v Astill* [1979] 2 NSWLR 368 at 390-391 per Samuels JA.

In *De Sales v Ingrilli*,²²² Kirby J appeared to draw a distinction between those cases where the chance of forming a future relationship was evaluated for the purpose of awarding damages, and those cases where the chance was evaluated for the purpose of discounting damages.²²³

... it is one thing to scrutinise evidence about such subjects where a current claim is made about them. It is quite another to subject an individual to distress, humiliation, investigation and “dirt digging” where the person involved may be vulnerable and quite uncertain about present and future personal relationships. [note omitted]

(vi) The practice is based on outmoded concepts, assumptions and stereotypes

The original wrongful death legislation was enacted in the United Kingdom in 1846. Its introduction was a response to the increased rate of accidental death which occurred in the aftermath of the Industrial Revolution. Typically, in the mid-nineteenth century, the victim of a fatal accident was a male breadwinner with a financially dependent wife and children, for whom it was necessary to provide after his death.

More than one hundred and fifty years later, there have been dramatic changes in the nature of domestic relationships, in employment trends and in accepted social norms.²²⁴

... we are presented with working wives displaying independence in action and in matters of finance, households run almost as joint enterprises by two equally contributing partners in the workforce, marriages that are almost indistinguishable from temporary liaisons, liaisons that are almost indistinguishable from marriages, and, speaking generally, vicissitudes in family life which, in their frequency and magnitude, can bewilder, not only a particular family under review, but also those who witness them.

There are now greater recognition and social acceptance of a broader range of personal relationships. Marriage is no longer the only acceptable form of domestic relationship.²²⁵ Many people, including same sex couples, are recognised as cohabiting as de facto partners.²²⁶

222 [2002] HCA 52; (2002) 193 ALR 130.

223 Id at 168-169 [148].

224 *Allan v The Commonwealth* (1980) 24 SASR 581 at 583.

225 In 1997, 756,500 people lived in de facto marriages and de facto partners represented over 9% of all persons living in couple relationships: Australian Bureau of Statistics, *Year Book Australia 2003* at 135. These figures do not include same sex relationships.

226 For example, *Acts Interpretation Act 1954* (Qld) ss 32DA, 36. The *Acts Interpretation Act 1954* (Qld) was amended by the *Discrimination Law Amendment Act 2002* (Qld) to include definitions of “de facto partner”, “de facto relationship” and “spouse” which include same sex unions: see *Discrimination Law Amendment Act 2002* (Qld) Part 2, Amendment of Acts Interpretation Act 1954. The *Discrimination Law Amendment Act 2002* (Qld) amended a range of Queensland laws to ensure, where possible, that de facto partners (whether of the opposite or same gender) have rights and obligations consistent with those of married spouses. The amendments commenced on 1 April 2003.

The Australian Bureau of Statistics has noted the change in social attitudes and living arrangements in recent history:²²⁷

A gradual change in social attitudes since World War II has seen an increase in de facto partnering. Registered marriage is no longer seen as a prerequisite for living together or for having children. Individuals may choose to live together before, or instead of, registering a marriage and to have children outside a registered marriage. Legal and government systems are increasingly recognising, and taking into account, such living arrangements.

The concept of the family group has broadened. The incidence of single parent families has increased²²⁸ and future projections forecast a gradual trend away from two-parent families and a continued increase in single parent families.²²⁹

The notion of “dependency” has also changed. Whereas, in the past, most wrongful death claims involved consideration of the widow’s remarriage, it can no longer be assumed that the surviving spouse of a person who has been wrongfully killed will be a dependent widow. The availability of financial assistance through government benefits has resulted in reduced economic pressure and greater independence for individuals and families. Further, more women are now active participants in the workforce.²³⁰ Many women have successful careers and contribute as much as, if not more than, their partners to the combined household income. Conversely, more men are becoming actively involved in what have been traditionally regarded as female areas such as home-making and child-rearing.

The social conditions which prevailed when wrongful death legislation was introduced no longer apply. In *De Sales v Ingrilli*,²³¹ Gaudron, Gummow and

227 Australian Bureau of Statistics, *Australian Social Trends 1995*, “Family - Family Formation: Trends in de facto partnering”.

228 Between 1986 and 1996, the number of one-parent families increased by almost 50%. During the same period of time, one-parent families increased as a proportion of all families with dependent children from 15% to 19%: Australian Bureau of Statistics, *Australian Social Trends 1997*, “Family - Living Arrangements: One-parent families”. In 2001, one-parent families comprised 15.5% of all families occupying private dwellings: Australian Bureau of Statistics, *2001 Census Basic Community Profile and Snapshot*, “Families and Households”, 2001.

229 In *Household and Family Projections 1996-2021*, Australia, 3236.0, 1999, the Australian Bureau of Statistics noted:

The number of children of any age living in two-parent families is projected to decline, from 4.8 million in 1996 to between 4.1 and 4.7 million in 2021. This decline is associated with declining fertility and with the increasing tendency for children to live in one-parent families. In contrast, the number of children living with one parent is projected to remain the same as in 1996 at 1.1 million, or to increase to 1.9 million by 2021.

...

Of all family types, couple families with children are projected to increase slowly over the period 1996-2021, reflecting a gradual trend away from this type of family. In contrast, one-parent families are projected to increase between 30% and 66% over the 25-year period.

230 Between 1992 and 2002, the percentage of females as a proportion of the total labour force increased from 41.9% to 44%: Australian Bureau of Statistics, *Australian Social Trends 2003*, “Work: National Summary Tables”.

231 [2002] HCA 52; (2002) 193 ALR 130.

Hayne JJ made this observation.²³²

Very great changes occurred during the last half of the twentieth century in the nature and durability of family relationships, in the labour market, and in the expectations that individual members of society have for themselves and about others - economically, socially, domestically, culturally, emotionally. Even if once it were the case, no longer can a court make any assumption about the role that an individual can be expected to play in the family or in the economy. Yet it is assumptions of conformity to some unstated norm which underpin the making of a “discount for remarriage”.

(vii) The practice may operate unfairly against women

It has been suggested that there are some areas of law which, although expressed in gender neutral terms, operate in a way that places women at a disadvantage.²³³ The application of the discount for the possibility of forming a future relationship of financially beneficial cohabitation may have been such a situation.

The decided cases dealing with the application of the discount seem to have largely concerned surviving spouses who are female. The reason for this may simply be that, in the past, the majority of wrongful death claims have been made by women and there have been relatively few claims by surviving male spouses.

On the other hand, it may also be that the discount was more readily applied when the surviving spouse was female. For example, in the past, matrimony was often the only way for women to secure their future. There may have been an assumption that, despite her stated intentions not to do so, a female surviving spouse was likely to attempt to ensure her financial security by entering a future relationship of financially beneficial cohabitation. In contrast, a male surviving spouse who said he had no intention of entering a new relationship may have been more likely to have had his evidence accepted and therefore less likely to have had his damages discounted.

However, the number of claims that do not settle before trial is relatively small. Consequently, the decided cases, including those brought by surviving male spouses, may not provide a sufficient basis to reach a settled conclusion about the possibility that the former practice of applying a discount involved an element of gender bias.

232

Id at 146 [65]. See also comments by Kirby J at 170-171 [152]-[155].

233

See for example Graycar R and Morgan J, *The Hidden Gender of Law* (2nd ed, 2002). See also Hunter R, “Border Protection in Laws’s Empire: Feminist Explorations of Access to Justice” (2002) 11 *Griffith Law Review* 263.

(viii) Submissions

Four submissions were received in relation to the question of whether or not damages should be discounted for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation.²³⁴

WorkCover Queensland was opposed to the practice of discounting damages for the possibility of a future relationship.²³⁵ The respondent considered that the type of inquiry necessary to determine the relevant possibility was too intrusive and demeaning to the surviving spouse and that, because the exercise was highly speculative, it may result in the surviving spouse being unnecessarily penalised.²³⁶

The Australian Plaintiff Lawyers Association submitted that the possibility that a surviving spouse might form a relationship of financially supportive cohabitation should be irrelevant to the assessment of damages in wrongful death actions.²³⁷ The Association expressed the view that if this possibility were taken into account in the assessment of damages of a surviving spouse, he or she would be subjected to demeaning inquiries and investigation by the defendant. The Association considered that the past financial dependency of the surviving spouse and the prospective earning capacity of the deceased were the only factors which should be taken into account in the assessment of damages for wrongful death. Further, the Association submitted that, as damages awards in wrongful death cases are generally not substantial, the possibility of a small windfall to a surviving spouse would be of little consequence.

One respondent was of the view that a discount should apply for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation, to avoid the prospect of overcompensation to the surviving spouse and unfairness to the defendant.²³⁸ This respondent submitted that the discount should form part of the general discount for contingencies, but should be explicitly accounted for in the assessment of damages. The submission proposed that the weight attributed to this possibility as part of the vicissitudes should be assessed on the basis of statistical data.²³⁹

234 Submissions 1, 2, 3 and 4. In correspondence to the Commission received on 2 July 2003, the Insurance Council of Australia advised that it held no strong views on the subject of the reference as the issue was not considered to be a major one for insurers.

235 Submission 3. WorkCover Queensland, which is a statutory body, is the major workers' compensation insurer in Queensland.

236 This submission is significant in that it is effectively a submission against interest as WorkCover Queensland has a financial interest in the outcome of such cases.

237 Submission 4.

238 Submission 2.

239 Ibid.

Another respondent was not opposed to the application of a discount, on the basis that simply eliminating the discount would result in overcompensation of the surviving spouse.²⁴⁰ However, this respondent considered the traditional method of assessment of the discount to be crude, speculative, and demeaning to the surviving spouse. In the respondent's view, the calculation of the discount by means of a standard discount table would be a fairer and more efficient method of assessment.²⁴¹

(b) How to account for the possibility?

If, notwithstanding the decision of the High Court in *De Sales v Ingrilli*,²⁴² the application of a discount were to be re-introduced for the possibility that a surviving spouse might enter a financially beneficial relationship of cohabitation, consideration would have to be given to the most appropriate way of taking that possibility into account.

(i) Accounting for the possibility as a separate deduction

Prior to *De Sales v Ingrilli*,²⁴³ the allowance for the possibility was sometimes accounted for as a separate deduction.²⁴⁴ In *De Sales v Ingrilli*²⁴⁵ the majority of the Court found that no separate discount should apply for the possibility that a surviving spouse would form a future relationship of financially beneficial cohabitation.²⁴⁶ However, McHugh and Callinan JJ were of the view that the discount should apply and that the discount should be calculated as a separate deduction.²⁴⁷ Gleeson CJ also supported the application of a separate discount where there were special circumstances.²⁴⁸

WorkCover Queensland was opposed to the application of a discount for the possibility that a surviving spouse may form a future relationship of financially supportive cohabitation.²⁴⁹ However, WorkCover Queensland also submitted that, where an adjustment to an award of damages was appropriate, then the

240 Submission 1.

241 See pp 50-54 of this Report regarding the calculation of the discount by means of a standard discount table.

242 [2002] HCA 52; (2002) 193 ALR 130.

243 Ibid.

244 *Yorkston v Hansen's Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992); *Jones v Schiffmann* (1971) 124 CLR 303.

245 [2002] HCA 52; (2002) 193 ALR 130.

246 Id at 141 [46] and 149 [76]-[77] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [161].

247 Id at 151 [87] per McHugh J and at 182 [195]-[196] per Callinan J.

248 Id at 140 [36]-[38].

249 Submission 3.

actual percentage of the adjustment should be identified to allow the adjustment to be examinable on appeal.

(ii) Accounting for the possibility as part of the general discount for contingencies/vicissitudes of life

In some recent Queensland wrongful death cases,²⁵⁰ trial judges have incorporated the discount for the possibility of a surviving spouse forming a future financially beneficial relationship of cohabitation into the overall discount for the vicissitudes of life.²⁵¹ However, in *De Sales v Ingrilli*,²⁵² the majority of the High Court held that the prospect of a surviving spouse entering such a relationship could not properly be regarded as a matter which enlarges the general discount for the vicissitudes of life.²⁵³ Gleeson CJ, on the other hand, expressed the view that the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation should ordinarily be included as part of the general discount for contingencies as a factor of modest significance, unless there were special circumstances which would warrant a separate discount.²⁵⁴

Inclusion of the discount as part of the deduction for the vicissitudes of life may go some way to circumventing the problem of double discounting which might occur if a deduction is made for vicissitudes, and the already discounted sum is then further discounted for the possibility of the formation of a future relationship.

However, subsuming the discount for the possibility of forming a future relationship into the deduction for the vicissitudes of life would mean that the discounting process would no longer be transparent.²⁵⁵ This would make the reasoning of the court inscrutable in relation to the application of the discount and might render the decision more difficult to review, as the weight attributed to the possibility of a surviving spouse forming a future relationship of

²⁵⁰ Note, the decisions in question were all delivered prior to the High Court decision in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130.

²⁵¹ See for example *Mahoney v Dewinter* (Unreported, Queensland Court of Appeal No 182 of 1992, Fitzgerald P and McPherson JA, 15 March 1993); *Rodda v Boonjje Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993); *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1996, Williams J, 6 June 1997); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

²⁵² [2002] HCA 52; (2002) 193 ALR 130.

²⁵³ *Id* at 141 [46], 149 [76]-[77] per Gaudron, Gummow and Hayne JJ. Kirby J agreed at 174 [167]-[169].

²⁵⁴ *Id* at 139 [32]-[33].

²⁵⁵ *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 151 [87] and 159 [113] per McHugh J. See also Callinan J at 182 [196]. At 174 [167], Kirby J particularly expressed concerns about “whether the possibility of hypothetical re-partnering should be treated as subsumed within the ‘standard’ discount, where it exists, for what are called the general contingencies or the ‘vicissitudes’ of life.” Kirby J drew a distinction between those jurisdictions which have a judicial practice of allowing a standard discount for the vicissitudes of life and those jurisdictions which do not. In the latter case, his Honour considered that there was significant risk in combining the discount for the vicissitudes with the discount for the possibility of forming a future relationship of financially beneficial cohabitation as this would lead to a reduction in transparency and result in an unreviewable deduction: see 174 [168]-[170].

financially beneficial cohabitation would become a mystery factor in the calculation of the vicissitudes. Further, subsuming the discount into the deduction for the vicissitudes of life might result in a less individual and rigorous approach to the calculation of the discount,²⁵⁶ impede the development of the law and hinder the settlement of claims.²⁵⁷ On the other hand, no other contingency is generally separated out for special treatment or individual calculation.

WorkCover Queensland submitted that, where an adjustment to an award of damages was appropriate, then the actual percentage of the adjustment should be identified to allow the adjustment to be examinable on appeal.²⁵⁸

Another respondent was of the view that the discount for the possibility of a surviving spouse forming a future financially beneficial relationship should form part of the discount for the vicissitudes of life, but suggested that the weight attributed to this possibility should be made explicit based on the need for legal reasoning to be transparent.²⁵⁹

(iii) Accounting for the possibility by reference to a standard rate of discount

Calculation of the discount for the possibility of the surviving spouse forming a future relationship of financially beneficial cohabitation by reference to a standard rate would mean that the rate of the discount would be fixed to a sliding scale according to, for example, the age of the surviving spouse.

A Canadian commentator has proposed that, in wrongful death claims, the rate of discount for the possibility of forming a future relationship should be determined solely according to the age of the surviving spouse, since a younger surviving spouse is more likely than an older one to enter into a new relationship of financially supportive cohabitation.²⁶⁰ This suggestion is based on the view that:²⁶¹

Possible future relationships are so many and varied and the financial consequences inside or outside marriage so uncertain that the court will ... be justified in disregarding almost all the claimant's individual circumstances. Inquiry into the claimant's personal attractions or actual relationships with other persons should ... be ruled out on the ground that the uncertainty and

256 [2002] HCA 52; (2002) 193 ALR 130 at 159 [113] per McHugh J.

257 Id at 182 [196] per Callinan J.

258 Submission 3.

259 Submission 2.

260 Waddams SM, *The Law of Damages* (Looseleaf edition, 2001) at 6-35.

261 Id at 6-34, 6-35.

instability of sexual relationships is such that this information is of marginal evidential value ...

On a number of occasions, courts, including the Queensland Court of Appeal, have advocated the use of statistics in wrongful death claims to assist them in assessing a surviving spouse's likelihood of entering a new relationship.²⁶² In *De Sales v Ingrilli*,²⁶³ McHugh J was strongly supportive of the use of statistics to assist in determining this possibility.²⁶⁴

The ready availability of reliable and extensive statistics touching on the issue of future support probably makes the task of determining the prospect of support from remarriage easier now than it has ever been. Reliable statistics are available that show the probable chance of a widow at any age remarrying. Reliable statistics are also available that show the number of people living in de facto relationships. Unless there is some definite reason for concluding that those statistics do not apply to a widow (or widower), they should be regarded as indicating the probability that the particular plaintiff will remarry or enter into a de facto relationship. In the case of the individual plaintiff, using the statistics may be over- or under-inclusive. But overall they will provide a more reliable guide to the chance of remarriage than the tribunal of fact assessing that chance by determining the attractiveness of the plaintiff or accepting the usually sincere claims of widows or widowers that they will never remarry.

...

Using descriptive or inferential statistics cannot ensure an accurate assessment of damages in any particular case. But in determining future probabilities, there is as of now no better way. In the long run, using descriptive and inferential statistics will prove more accurate in determining wrongful death cases than relying on the intuitions of judges and juries based on their impressions of plaintiffs and their assumptions of what people like the plaintiff are likely to do. No modern society or government could continue to exist in its present form without using statistical data and the conclusions that are reached by applying statistical and probability theory to that data. I see no reason why courts should not invoke the aid of such powerful predictive tools, whenever it is feasible to do so.

One respondent strongly supported the use of a standard discount rate on the basis that:²⁶⁵

²⁶² See for example *Dominish v Astill* [1979] 2 NSWLR 368 at 390 per Samuels JA; *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258 at 259.

²⁶³ [2002] HCA 52; (2002) 193 ALR 130.

²⁶⁴ Id at 157-158 [108] and [110]. Callinan J, at 181 [192], also supported the use of "relevant, reasonably contemporary, duly proved or admitted and sufficiently refined, properly compiled tables as at least a starting point for a consideration of the prospects of remarriage, or another permanent or enduring relationship." However, at 182 [193], Callinan J emphasised the point that "statistics can only be a starting point [and] should only be considered in light of the evidence in the case"

²⁶⁵ Submission 1. However, another respondent supported the use of statistics to determine a claimant's prospects of forming a relationship of cohabitation: Submission 2.

- it would remove the need for investigation into the personal life of a surviving spouse;
- it would be efficient and simple to use;
- it would be fairer than embarking on a speculative exercise; and
- the rate could be adjusted by Parliament or executive government and would therefore be open to community and professional input.

This respondent submitted that, as the future is uncertain, “there is nothing wrong with using the best statistical evidence as a compromise”.²⁶⁶

Actuarial statistics are routinely used to assess life expectancy - it is hard to see why one's future health and survival prospects are uniquely less tender than the prospects of forming a future co-habitational dependency ...

However, the use of statistics is not without difficulty. Although the Australian Bureau of Statistics compiles information on the rates of remarriage of widows and widowers,²⁶⁷ the available material leaves a number of important questions unanswered in the context of a wrongful death claim. First, it does not differentiate according to the cause of the spouse's death. It may be that there is a variation in the likelihood of surviving spouses forming future relationships where different causes of death are concerned. For example, the surviving spouse of a person who has died after a long illness may have had a greater opportunity to come to terms with and accept the situation, and therefore be better prepared to make the social adjustments involved in entering a new relationship than would a person whose spouse died a sudden, unexpected accidental death caused by another person's wrongful act. Secondly, it includes only those widows and widowers who formally remarry and gives no indication as to the incidence of subsequent de facto relationships after the death of a former spouse. Thirdly, it gives no indication as to whether, or to what extent, the future relationship will provide the benefits that the surviving spouse would have expected to receive from the deceased.

Apart from the issue of the availability of reliable and meaningful data, the use of statistics raises another question, namely, whether a determination about such a personal issue should be made on the basis of generalities.²⁶⁸

I was told by the actuary who gave evidence that about one-third of the women who become widows at the age of forty remarry at some time. This piece of information seems to me interesting but not very helpful. So much depends on matters peculiar to the person and her circumstances, on various factors both emotional and material.

266 Submission 1.

267 Australian Bureau of Statistics, *Marriages and Divorces, Australia 2001*, 3310.0, 2001 at Tables 2.6, 2.14, 2.15 and 2.21.

268 *Parker v The Commonwealth* (1965) 112 CLR 295 at 311 per Windeyer J.

Similarly, in *De Sales v Ingrill*²⁶⁹ Gaudron, Gummow and Hayne JJ raised concerns about the lack of individuality inherent in the use of statistics:²⁷⁰

Statistics may throw some light on some of the questions we have mentioned. They may tell their reader what is the average life expectancy of a person of a certain age. They may reveal how frequent is remarriage among people of a certain age. But great care must be exercised in their use. What are the characteristics reflected in the statistics? Are those relevant to the present inquiry? Why can it be assumed that the individual will conform to the average? To apply a statistical average to an individual case assumes that the case has all the characteristics which, blended together, create the statistic.

Kirby J also expressed doubts about the use of statistical tables to determine the uncertainties in life:²⁷¹

... estimates must ... be adjusted not simply by reference to any table of averages but having regard to the peculiarities of the personalities of those involved. Life expectancy, viewed alone, may be fairly calculated by reference to statistical tables. However, the endurance of personal relationships is prone to the unpredictable vicissitudes of human personality, desire and fortune.

On the other hand, McHugh J was of the view that, “[i]n this particular area of the law, the search for highly individualised justice borders on delusional”.²⁷²

Certainly the use of a standard discount rate would avoid the need for demeaning and distasteful inquiries into the personal life of the surviving spouse and the element of speculation would be eliminated. This approach is also superficially attractive in that, by applying a standard rate of discount, it appears to promote consistency as amongst surviving spouses of the same age. However, it would rely on an arbitrary standard - for example, the statistical probability of entry into a new relationship at a particular age - without reference to the stated intentions or circumstances of a particular surviving spouse, or the financial support and/or domestic services to be derived from that relationship. There would also be the problem of striking appropriate rates of discount.

In the United Kingdom, respondents to the English Law Commission’s consultation paper on wrongful death claims were strongly opposed to the use of statistics for the purpose of assessing marriage prospects.²⁷³

269 [2002] HCA 52; (2002) 193 ALR 130.

270 *Id* at 147 [70].

271 *Id* at 171 [158].

272 *Id* at 158 [110].

273 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 61.

The use of statistics was ... condemned as “tasteless” and “insensitive” in this context. There was a real strength of feeling that the assessment of a matter as personal and private as the likelihood of marriage by reference to statistics is entirely inappropriate.

The Commission concluded that:²⁷⁴

... there is no acceptable means of assessing a person’s prospects of marriage, other than where there is clear, objective evidence on which one can base that assessment.

4. THE COMMISSION’S VIEW

(a) Should the possibility be able to be taken into account?

The Commission is of the view that, in the assessment of damages of a surviving spouse in a wrongful death claim, taking account of the possibility that the surviving spouse may form a relationship of financially beneficial cohabitation is a highly speculative exercise, and that the inquiries necessary to determine such a possibility are intrusive and demeaning to a surviving spouse. The Commission is also of the view that the practice of discounting for the possibility of a future relationship of cohabitation is based on outdated assumptions about the nature of domestic and family relationships. The Commission considers that these matters outweigh the greatest argument in support of the discount, that is, the risk of overcompensation to the surviving spouse and consequential injustice to the defendant.

The Commission is therefore of the view that, in the assessment of damages of a surviving spouse in a wrongful death claim, no account should be taken of the possibility of the surviving spouse forming a future relationship of financially beneficial cohabitation.

To avoid confusion about whether or not the discount is to be treated as a contingency which does not enlarge the general discount for the vicissitudes of life,²⁷⁵ the Commission considers it desirable that the discount for the possibility of a

²⁷⁴ Id at 62.

²⁷⁵ In this regard, see the comments of Gleeson CJ in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 140 [40]. See also Kirby J at 174 [167]-[169]:

The only remaining question is whether the possibility of hypothetical re-partnering should be treated as subsumed within the “standard” discount, where it exists, for what are called the general contingencies or the “vicissitudes” of life.

There is a practical risk in taking this course. Unless care were observed there could be a reduction in the transparency of the process of calculation. This appears to have occurred in Queensland, where a practice seems to have emerged of giving a single percentage figure as a total discount, combining therein a discount for general contingencies and one for the prospects of re-partnering. Such an approach could produce an effectively unreviewable deduction. It would represent one step forward and two steps back. It is not a course that I could favour.

On the other hand, in many parts of Australia, there is a judicial practice of allowing a standard discount for all of the unquantifiable contingencies that may occur in the future. Relevant to this

surviving spouse forming a future relationship of financially beneficial cohabitation be formally abolished by legislation.

(b) How to account for the possibility?

As the recommendation of the Commission is that the discount be abolished, the issue of calculation of the discount is irrelevant.

5. RECOMMENDATIONS

The Commission recommends that:

6.1 In a wrongful death claim by a surviving spouse, the possibility that the surviving spouse may form a future relationship of financially beneficial cohabitation²⁷⁶ should have no effect on the assessment of the surviving spouse's damages. Accordingly, any discount for the possibility of a surviving spouse forming a future relationship of financially beneficial cohabitation should be abolished.

6.2 Legislation should be introduced to implement Recommendation 6.1.²⁷⁷

case, Western Australia is one of them. Such discounts themselves present problems of principle. However, I acknowledge that some such discount is normally appropriate to avoid overcompensation resulting from the mechanical application of multiplication tables to a present loss. To the extent that the economic advantages or disadvantages of hypothetical re-partnering are relevant to the calculation of the "injury resulting from death" they should now be taken as included in the "standard" adjustment for imponderable future considerations. But no attempt should be made by the judge to evaluate more accurately the possibility or probability of such an outcome. Courts should not pretend to such an unattainable standard of predictive certainty. Re-partnering is merely another of the many possible vicissitudes of life, namely that the claimant may enter an economically beneficial or detrimental relationship after the trial. It is therefore 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. [notes omitted]

²⁷⁶ The term "financially beneficial cohabitation" means either a relationship of marriage or a de facto relationship from which the surviving spouse derives monetary benefits and/or domestic services.

²⁷⁷ See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23A of the *Supreme Court Act 1995* (Qld)).

CHAPTER 7

THE EFFECT OF A SUBSEQUENT RELATIONSHIP OR AN INTENDED RELATIONSHIP

1. INTRODUCTION

The hearing of a wrongful death claim may take place several years after the death of the deceased. In some cases, the surviving spouse²⁷⁸ may be in a subsequent relationship of financially supportive cohabitation²⁷⁹ when the claim is determined. In these circumstances, the court will take into account the fact of the subsequent relationship when assessing damages payable to the surviving spouse.²⁸⁰

Originally, it was only the remarriage of a surviving spouse that was relevant to the assessment of damages in a wrongful death claim, and damages were not reduced to off-set the benefit of any monetary support and domestic services derived from a subsequent *de facto* relationship.²⁸¹ However, it is now accepted that it is the nature of the relationship, and not its formal status, that is important, and a financially supportive *de facto* relationship will also be taken into account:²⁸²

... the courts have recognised that community attitudes to *de facto* relationships have changed and that they have become much more common. Lord Campbell's Act is designed to protect against loss of financial support, not the status of marriage, and there has been no loss where the support has been replaced. To maintain the law as previously stated would discriminate against marriage. [notes omitted]

The existence of a subsequent relationship does not mean, however, that all uncertainty or speculation is eliminated. The assessment of the damages to be paid involves an estimation of the effect of the subsequent relationship on the loss of financial support and/or services suffered by the surviving spouse as a result of the deceased's death. Courts in both the United Kingdom and Australia have rejected the argument that, when a surviving spouse remarries or enters into a subsequent relationship of financially supportive cohabitation, the former dependency on the deceased has been displaced and the loss resulting from the death of the deceased

278 In this Chapter, the term "spouse" includes an eligible *de facto* partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

279 In this Chapter, the term "cohabitation" means either a relationship of marriage or a *de facto* relationship.

280 See *Willis v The Commonwealth* (1946) 73 CLR 105. The position differs in the Northern Territory: see pp 27-29 of this Report.

281 *Wild v Eves* [1970] 2 NSW 326 per Jacobs and Moffitt JJA.

282 Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 543. See also *AA Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591.

has been terminated.²⁸³ It therefore cannot be assumed that the benefit which the surviving spouse had expected to receive from the deceased has been effectively replaced by any support provided by the subsequent relationship.²⁸⁴

It does not necessarily follow that if a widow remarries, so far as dependency is concerned, her right to financial support from those who killed her husband necessarily comes to an end.

The assessment of damages must be made in the light of the facts of the subsequent relationship:²⁸⁵

... it is not the fact of remarriage, but the quality of the support to be derived from the new spouse, that is relevant to the assessment of damages.

Even where the level of support derived from the subsequent relationship is equal to or greater than that given to the plaintiff by the deceased, allowance must still be made for possible future contingencies.²⁸⁶

All the ups and downs of life must be allowed for. The second husband may be an invalid or may turn out to be an alcoholic. He may be perfectly able to work but unwilling to perform his obligation, whether it be legal or moral, to support his wife and step-children properly. He may die shortly after the remarriage or there may be separation and divorce ...

2. THE EFFECT OF *DE SALES V INGRILLI*

The central question in *De Sales v Ingrilli*²⁸⁷ was whether or not a surviving spouse's damages should be discounted to take into account the possibility of a future financially beneficial relationship of cohabitation.²⁸⁸ In determining this issue, the High Court also considered the calculation of damages payable to a surviving spouse in circumstances where the surviving spouse had in fact entered a financially beneficial relationship of cohabitation subsequent to the death of the deceased.

The High Court confirmed that the assessment of damages payable to a surviving spouse may take into account the effect of a relationship of cohabitation formed subsequent to the death of the deceased. The Court went on to hold that, where a

283 *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845; *Hollebone v Greenwood* [1968] 3 NSW 710.

284 *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 at 854 per Davies LJ. See also *Lloyd v Wilson Bros Timber Cartage Pty Ltd* (Unreported, New South Wales Supreme Court No 22862 of 1986, Simpson J, 1 May 1995); *Barnard v Towill* (1998) 72 SASR 27; *AA Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591.

285 Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 541.

286 *Hollebone v Greenwood* [1968] 3 NSW 710 at 714 per Sugerman AP.

287 [2002] HCA 52; (2002) 193 ALR 130. The facts of this case are discussed at p 18 of this Report.

288 The effect of the High Court's decision regarding the practice of discounting damages of a surviving spouse for the possibility of a future financially beneficial relationship is discussed in Chapter 6 of this Report.

surviving spouse intends to form a subsequent relationship of cohabitation with an identified person, the effect of that relationship may also be taken into account in the assessment of damages.²⁸⁹

The Court held that, where there is evidence at trial that a surviving spouse has formed a subsequent relationship of cohabitation, or that a surviving spouse intends to form such a relationship with an identified person, evidence of whether that subsequent or intended relationship brings financial advantage or disadvantage to the surviving spouse may be taken into account.²⁹⁰ However, the Court also held that, notwithstanding that regard may be had to evidence of the probable financial advantage or disadvantage of the relationship, “it would be wrong to assume that the financial consequences revealed in evidence will inevitably continue”.²⁹¹ In this respect, Gaudron, Gummow and Hayne JJ took the view that assumptions about the subsequent relationship would be unsafe because the future of relationships is uncertain:²⁹²

Any new union, which is formed after the termination of the union which underlies a claim made pursuant to a wrongful death statute modelled on Lord Campbell’s Act, is as exposed to precisely the same kinds of hazard and danger as was the earlier union. It, too, may end in death, separation or divorce. The financial advantages and disadvantages to one partner will change throughout the continuance of the union as the careers and ambitions of the partners change both with and against their will. Those, who today are receiving income from personal exertion, may, tomorrow, cease doing so for any number of reasons. Those who are employed may have the employment terminated. Those who are self-employed may fall ill, or the venture in which they are engaged may fail. Those who receive income from investments may invest unwisely or unprofitably. Those who are now not employed outside the house may later forge a new career either because they want to or because they feel they

289 *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 173 [166].

290 *Id* at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [161]-[162].

At 149 [78], Gaudron, Gummow and Hayne JJ were critical of the approach taken in some jurisdictions of the United States where evidence of remarriage or entry into a financially beneficial relationship is inadmissible and irrelevant for the purpose of assessment of damages. In this regard, see also the comments of Kirby J at 165-166 [135]-[137]. Legislation in the United Kingdom, discussed at pp 20-23 of this Report, and the Northern Territory, discussed at pp 27-29 of this Report, prescribes a contrary approach to that taken by the majority in *De Sales v Ingrilli*.

Gleeson CJ at 139 [33] also took the view that a separate discount should not be applied in the absence of concrete evidence of a financial benefit to the surviving spouse from a subsequent relationship or intended relationship with an identified person:

... it may be arguable that actual remarriage, to a person who offers no financial benefit, effectively precludes the chance of a financially beneficial remarriage. In other cases, a defendant may be able to show special circumstances which suggest that the chances of the plaintiff’s loss being reduced by a financially beneficial remarriage are notably higher. Such circumstances include where a person has actually remarried, to his or her pecuniary advantage, before the trial. In these circumstances, there may be concrete evidence which suggests that part or all of the plaintiff’s loss will be replaced by benefits received from their new spouse. Similarly, there may be special circumstances where a person is engaged to be married or living in a de facto relationship, and that relationship is or will be financially beneficial. In such circumstances, the evidence may be less strong than in the case of actual remarriage, but may still be sufficiently concrete to allow a special discount to be made. [note omitted]

291 *Id* at 149 [78] per Gaudron, Gummow and Hayne JJ.

292 *Id* at 148 [75].

should or must do so. And so the examples can be multiplied. *Yet if these possibilities are taken into account in assessing the vicissitudes to which the former union was subject (and they must) to ignore them when considering a new union, by assuming that the new union would be destined to survive and prosper, would be to shut one's eyes to reality.* [emphasis added]

The majority of the Court cautioned against placing too much weight on the financial consequences of the subsequent or intended relationship revealed in evidence at the time of trial.²⁹³ Evidence of any financial advantage derived from a subsequent or intended relationship should not be regarded as providing an accurate prediction of the future financial position of the surviving spouse. This is because the subsequent relationship may be subject to all the contingencies and vicissitudes of life experienced in any relationship. Therefore, it would be inappropriate for a court to find that, because a surviving spouse was deriving monetary support and/or domestic services from a subsequent relationship, or would derive monetary support and/or domestic services from a relationship that he or she intended to form with an identified person, that situation was sufficient to show that such benefits would certainly continue into the future.

The fact of a subsequent financially beneficial relationship must be:²⁹⁴

... considered in light of all the circumstances of the case. ... Notwithstanding the fact that the level of economic benefit is found to be greater than that provided by the previous relationship, other contingencies have to be taken into account just as they are in determining any amount of damages relating to the future.

3. ISSUES FOR CONSIDERATION

At issue is whether the fact that a surviving spouse has formed, or intends to form, a relationship of financially supportive cohabitation - be it marriage or a de facto relationship - should affect the assessment of the surviving spouse's damages. This raises the following questions:

- What constitutes a marriage?
- What constitutes a de facto relationship?
- What constitutes an intention to marry, or to form a de facto relationship with, an identified person?

²⁹³ Id at 149 [75] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [162].

²⁹⁴ Id at 172 [162] per Kirby J.

- Where the surviving spouse has remarried or formed a de facto relationship, should the monetary support and/or domestic services provided by that relationship be able to be taken into account in the assessment of the surviving spouse's damages in a wrongful death claim?
- Where the surviving spouse intends to marry or to form a de facto relationship with an identified person, should the monetary support and/or domestic services provided, or that may be provided, by the intended relationship be able to be taken into account in the assessment of the surviving spouse's damages in a wrongful death claim?
- If the monetary support and/or domestic services provided by a subsequent relationship or an intended relationship with an identified person are able to be taken into account, how are the monetary support and/or domestic services to be accounted for?

(a) What constitutes a marriage?

In Australia, the requirements for a valid marriage are regulated by the *Marriage Act 1961* (Cth).²⁹⁵

Two submissions received by the Commission addressed the issue of what constituted a marriage in the context of assessing the damages of a surviving spouse in a wrongful death action.²⁹⁶

WorkCover Queensland suggested that the provisions of the *Marriage Act 1961* (Cth) should be used as criteria to indicate a valid marriage by a surviving spouse to another person.²⁹⁷

Another respondent submitted that the following, slightly broader, definition be inserted into the *Supreme Court Act 1995* (Qld) for the purpose of wrongful death actions:²⁹⁸

Marriage means:

- (a) the union of a man and a woman to the exclusion of all others voluntarily entered into for life, which is recognised as valid under the *Marriage Act 1961* (Cth); or

²⁹⁵ This Act provides for the solemnisation of marriages in Australia and recognition of overseas marriages. Marriage is generally described as the union of a man and woman to the exclusion of all others, voluntarily entered into for life: see *Marriage Act 1961* (Cth) s 46(1). See also *Hyde v Hyde & Woodmansee* (1866) LR 11 P & D 130.

²⁹⁶ Submissions 2 and 3.

²⁹⁷ Submission 3. WorkCover Queensland, which is a statutory body, is the major workers' compensation insurer in Queensland.

²⁹⁸ Submission 2.

- (b) any other union deemed by legislation to be a marriage for the purposes of this Act.

This respondent suggested the use of a wider definition on the basis that future Australian legislation may recognise other unions - for example, Aboriginal customary marriages, or same sex partnerships - as marriages.

(b) What constitutes a de facto relationship?

Unlike marriage, a person may enter a de facto relationship without any legal formalities. As a result, de facto relationships may be found to exist in a broad range of circumstances. In some cases, it will not be easy to identify whether or not a surviving spouse has formed a de facto relationship. This raises the question of whether there should be a statutory definition for the purpose of determining whether the surviving spouse has in fact entered a subsequent de facto relationship.

(i) Existing definitions

Section 32DA of the *Acts Interpretation Act 1954* (Qld) provides a definition of “de facto partner” and lists a number of factors that may be relevant in assessing whether or not two persons are living together in a de facto relationship:

32DA Meaning of “de facto partner”

- (1) In an Act, a reference to a “de facto partner” is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.
- (2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances -
 - (a) the nature and extent of their common residence;
 - (b) the length of their relationship;
 - (c) whether or not a sexual relationship exists or existed;
 - (d) the degree of financial dependence or interdependence, and any arrangement for financial support;
 - (e) their ownership, use and acquisition of property;
 - (f) the degree of mutual commitment to a shared life, including the care and support of each other;
 - (g) the care and support of children;
 - (h) the performance of household tasks;

- (i) the reputation and public aspects of their relationship.
- (3) No particular finding in relation to any circumstances is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.
- (4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.
- (5) For subsection (1) -
 - (a) the gender of the persons is not relevant; and
 - (b) a person is related by family to another person if the person and the other person would be within a prohibited relationship within the meaning of the *Marriage Act 1961* (Cwlth), section 23B, if they were parties to a marriage to which that section applies.²⁹⁹
- (6) In an Act enacted before the commencement of this section, a reference to a spouse includes a reference to a de facto partner as defined in this section unless the Act expressly provides to the contrary. [note added]

Section 36 of the *Acts Interpretation Act 1954* (Qld) defines “de facto partner”, “de facto relationship” and “spouse” as follows:³⁰⁰

“**de facto partner**” see section 32DA

“**de facto relationship**” means the relationship existing between 2 persons as a couple because each is the de facto partner of the other.

“**spouse**” includes a de facto partner.

These definitions are of general application to the existing and future laws of Queensland unless the Act or subordinate legislation in question discloses a contrary intention.³⁰¹ The general principle is that a particular right or benefit is conferred on a de facto partner by virtue of the existence of a relationship of cohabitation and not because of its particular length.³⁰²

299 See *Marriage Act 1961* (Cth) s 23B (Grounds on which marriages are void).

300 These definitions were inserted by the *Discrimination Law Amendment Act 2002* (Qld): see *Discrimination Law Amendment Act 2002* (Qld) Part 2, Amendment of Acts Interpretation Act 1954 (Qld). The *Discrimination Law Amendment Act 2002* (Qld) amended a range of Queensland laws to ensure, where possible, that de facto partners (whether of the opposite or same gender) have rights and obligations consistent with those of married spouses: Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 1. The amendments commenced on 1 April 2003.

301 *Acts Interpretation Act 1954* (Qld) ss 2, 4. See also Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 2.

302 Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 3. Obligations may also be conferred by virtue of the existence of a de facto relationship.

A broad range of relationships is encompassed by the definitions of “de facto partner” and “de facto relationship” contained in the *Acts Interpretation Act 1954* (Qld). The adoption of these definitions to determine what constitutes a de facto relationship for the purpose of the assessment of a surviving spouse’s damages in a wrongful death claim would ensure a wide and flexible approach to the question. Further, as the definitions are of general legislative application in Queensland,³⁰³ their adoption would promote consistency, certainty and reduce discrimination in determining the existence of a de facto relationship.

It is not a requirement of section 32DA of the *Acts Interpretation Act 1954* (Qld) that a couple evidence an intention that the relationship is to be a continuing and committed one.³⁰⁴ However, in an action for wrongful death, before the damages of a surviving spouse could be reduced to take into account benefits expected to be received from a subsequent relationship, the court would have to consider whether or not the relationship, and the financial benefits and domestic services derived from the relationship, were likely to continue.

A narrower definition of “de facto partner” is included in the definition of “spouse” in section 18(2) of the *Supreme Court Act 1995* (Qld).³⁰⁵

- (2) ... the spouse of a deceased person includes a de facto partner of the deceased only if the deceased and the de facto partner lived together as a couple on a genuine domestic basis within the meaning of the *Acts Interpretation Act 1954*, section 32DA -
 - (a) generally -
 - (i) for a continuous period of at least 2 years ending on the deceased’s death; or
 - (ii) for a shorter period ending on the deceased’s death, if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a clear intention that the relationship be a long term, committed relationship; or
 - (b) if the deceased left a dependant who is a child of the relationship - immediately before the deceased’s death.

303 Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 2.

304 Section 32DA of the *Acts Interpretation Act 1954* (Qld) states that the factors identified in s 32DA(2)(a)-(i) may be taken into account in deciding whether two persons are living together as a couple on a genuine domestic basis. These factors include “the degree of mutual commitment to a shared life, including the care and support of each other”: *Acts Interpretation Act 1954* (Qld) s 32DA(2)(f). However, s 32DA(3) states that no particular finding is necessary in relation to any of the factors listed in s 32DA(2) in deciding whether or not two persons have formed a de facto relationship.

305 The definition of “spouse” included in the *Supreme Court Act 1995* (Qld) s 18(2) (Actions How Brought) was recently amended by the *Discrimination Law Amendment Act 2002* (Qld) s 83.

- (3) Subsection (2) applies despite the *Acts Interpretation Act 1954*, section 32DA(6).

As the purpose of section 18(2) of the *Supreme Court Act 1995* (Qld) is to limit who may bring a wrongful death claim, the definition of “de facto partner” used in the section is narrower than the general definition of “de facto partner” contained in section 32DA of the *Acts Interpretation Act 1954* (Qld).³⁰⁶ This was a deliberate policy decision by the Parliament on the basis that an action for wrongful death may have the effect of conferring a financial benefit on the surviving spouse.³⁰⁷

... where an Act confers a potentially large financial reward or obligation ... a minimum two year cohabitation period applies for de facto partners to be eligible for large financial benefits or obligations. This gives de facto partners and their families certainty as to when they are eligible for such benefits consistently across the statute book. Also, it seems just that where a large financial benefit is to be awarded to a person due to their status as a de facto partner, there should be some evidence of the partner’s intention to have a continuing committed relationship.

If the de facto relationship between the deceased and the surviving spouse does not fulfil the minimum cohabitation period required by section 18(2)(a)(i), the surviving spouse may not be eligible to bring a wrongful death claim. However, the provision lists two other ways to establish eligibility, that is, where there is a child of the relationship, or where there is evidence that the de facto partners intended the relationship to be a long term and committed one. These additional means of establishing a de facto partnership to determine eligibility to commence a wrongful death action were included to accommodate concerns about reducing the rights of citizens where the facts of the case warrant acceptance of the claim.³⁰⁸

(ii) Submissions

Three submissions received by the Commission addressed the questions of what constitutes a de facto relationship and whether there is a need to develop criteria to indicate the formation of a subsequent de facto relationship.³⁰⁹

WorkCover Queensland³¹⁰ indicated that any criteria developed to indicate the formation of a de facto relationship should be consistent with the definitions of

306 The definition of “de facto partner” contained in the *Acts Interpretation Act 1954* (Qld) is set out at pp 61-62 of this Report.

307 Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 3.

308 Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) at 3-4.

309 Submissions 2, 3 and 4.

310 Submission 3.

“de facto partner”,³¹¹ “de facto relationship”,³¹² and “spouse”³¹³ contained in the *Acts Interpretation Act 1954* (Qld).

Another respondent³¹⁴ referred to the legislative requirements contained in section 18(2) of the *Supreme Court Act 1995* (Qld), which are used to determine the existence of a de facto relationship as a basis for establishing a person’s eligibility to bring an action for wrongful death.³¹⁵ Specifically, this respondent queried whether it might be preferable, on the basis of equality of treatment, to use the same test to determine the formation of a de facto relationship by the surviving spouse subsequent to the death of the deceased.

Whilst it may be superficially attractive to use the eligibility criteria contained in section 18(2) of the *Supreme Court Act 1995* (Qld) as a basis for finding whether or not a surviving spouse has formed a de facto relationship subsequent to the death of the deceased, this approach is not without difficulty. The question of eligibility to bring a wrongful death claim is a different issue to that of whether or not the surviving spouse has formed a de facto relationship subsequent to the death of the deceased.

Adoption of the definition of “de facto partner” included in section 18(2) of the *Supreme Court Act 1995* (Qld) could produce anomalous results as to when a relationship may be taken into account in the assessment of damages and in regard to the nature of the support which could be taken into account. Where a couple had been living together for less than two years and there was no child of the relationship, unless a court found that the parties had evidenced an intention to form a long term, committed relationship, support derived by a surviving spouse from the subsequent relationship during the period of cohabitation would be excluded from the calculation of the damages on the basis that there was no de facto relationship established under section 18(2). Conversely, where there was a child of a subsequent relationship, the relationship would fall within the provisions of section 18(2) and the damages of the surviving spouse might be reduced to take into account the support received from the relationship regardless of the length of the relationship or whether or not the parties intended to form a long term, committed relationship.

The Australian Plaintiff Lawyers Association submitted that any attempt to define a relationship of cohabitation would be unhelpful because of the myriad

311 *Acts Interpretation Act 1954* (Qld) ss 32DA, 36.

312 *Acts Interpretation Act 1954* (Qld) s 36.

313 *Acts Interpretation Act 1954* (Qld) s 36.

314 Submission 2.

315 The definition of “de facto partner” contained in the *Supreme Court Act 1995* (Qld) s 18(2) differs from the definition of “de facto partner” contained in the *Acts Interpretation Act 1954* (Qld) s 32DA. The definition of “de facto partner” contained in the *Acts Interpretation Act 1954* (Qld) is set out at pp 61-62 of this Report. The definition of “de facto partner” contained in the *Supreme Court Act 1995* (Qld) is set out at pp 63-64 of this Report.

of possibilities that changing community standards might produce.³¹⁶ People may commingle finances and assets without necessarily forming a de facto relationship. Further, two people may live together but without the intention of forming a continuing and committed relationship. In its submission to the Commission, the Association provided an example to demonstrate that the identification of a relationship of cohabitation may be a complex question which may require an analysis of the quality of the relationship between the surviving spouse and the other person:

The female partner dies. The male partner moves in with a male friend. He alleges the relationship is platonic. The defence allege the relationship is a sexual relationship and the couple are effectively a same sex couple. ... [The surviving spouse and the male friend] share the rent and expenses.

... Does the fact that a surviving spouse is sharing rent with another single person make the relationship a sufficient "relationship" to set off a financial benefit? The fact of a financial benefit may spring solely from the existence of the relationship as sharing tenants. Does a Judge discount the claim for financial dependency on the basis that it is likely that a surviving spouse will share premises with another? Or does that relationship not qualify? Is the defence entitled to cross-examine the claimant and the housemate as to the extent of their emotional and physical relationship?

The Association was opposed to a relationship of cohabitation being relevant to the assessment of damages in a wrongful death claim.

(c) What constitutes an intention to marry, or to form a de facto relationship with, an identified person?

In *De Sales v Ingrilli*,³¹⁷ the majority of the High Court confirmed that the assessment of damages of a surviving spouse may take into account the effect of a relationship of cohabitation formed subsequent to the death of the deceased. The Court went on to hold that, where a surviving spouse intends to form a subsequent relationship of cohabitation with an identified person, damages may take into account the effect of that intended relationship.³¹⁸

A finding that a surviving spouse intends to form a relationship of cohabitation with an identified person must be based on the evidence at the time of trial.³¹⁹ The mere possibility that a surviving spouse might form a relationship of cohabitation at some

316 Submission 4.

317 [2002] HCA 52; (2002) 193 ALR 130.

318 Id at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 173 [166].

319 Ibid.

time in the future is not, however, a basis for finding that a surviving spouse intends to form a relationship of cohabitation with an identified person.³²⁰

In some situations, it may be difficult to determine whether or not a surviving spouse intends to form a relationship of cohabitation with an identified person. This raises the question of whether it would be desirable to develop legislative criteria to assist in identifying the existence of such an intention.

On the one hand, it is arguable that, before a finding could be made that a surviving spouse intends to form a relationship of cohabitation with an identified person, these factors, at least, must be present:

- both the surviving spouse and the identified person have an intention to form a continuing and committed relationship of cohabitation with each other;
- the intention to form such a relationship has been communicated and agreed between the parties; and
- the intention of the parties to form such a relationship has a substantial prospect of being realised.

It is acknowledged that the use of legislative criteria may place certain limitations on the nature and/or type of relationship that may be taken into account in the assessment of damages of a surviving spouse. However, without clear and objective indicia upon which to base a finding as to what constitutes an intention to form a relationship of cohabitation with an identified person, some uncertainty might arise in relation to the circumstances in which a surviving spouse would be found to have formed the requisite intention. Further, the use of such criteria might result in greater consistency in judicial decision-making.

On the other hand, as the question of intention is fundamentally one which needs to be considered in light of the facts and circumstances of each individual case, legislative criteria may not necessarily be a useful aid in determining what constitutes an intended relationship. Whilst the intention to form a relationship of cohabitation may not be as easily proved as an actual relationship, intention is a fact that may be the subject of evidence. Courts are regularly required to reach conclusions about the intentions of parties to litigation in a variety of situations.

Leaving the issue of what constitutes an intention to form a relationship of cohabitation as a question of fact to be determined on a case by case basis acknowledges the broad range of circumstances in which an intended relationship might be established on the evidence. However, it also brings with it the risk that proof of an intention to form a relationship may, over time, be subject to differing judicial interpretations, which could widen the circumstances in which a finding might be made that a surviving spouse intends to form a relationship of cohabitation with

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The law as stated in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 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. See the discussion of that issue and the recommendation of this Commission in Chapter 6 of this Report.

an identified person.³²¹ Further, the determination of whether a surviving spouse intends to form such a relationship may depend too much upon the individual views and experience of judges or jury members,³²² which may result in inconsistent decision-making.³²³

In its submission to the Commission, the Australian Plaintiff Lawyers Association commented that any attempt to define an intention to form a relationship of cohabitation would be unhelpful because of the myriad of possibilities that changing community standards might produce.³²⁴ The Association was opposed to an intention to form such a relationship being relevant to the assessment of damages in a wrongful death claim.

(i) Intention to marry

WorkCover Queensland expressed the view that the relevant intention to form a relationship with an identified person should not be defined, and that such questions should be left to the discretion of the court.³²⁵ The respondent submitted that evidence regarding “intention” could take the form of either a positive or negative statement made by the surviving spouse and the identified person, but that evidence of “intention” should not involve speculation or inquiries of a demeaning or intrusive nature.

Another respondent suggested that an intention to marry should be established by:³²⁶

- written evidence of the existence of an agreement to marry;³²⁷
- the gift of an engagement ring by one party to another in contemplation of their marriage,³²⁸ or

321 Ibid.

322 The incidence of juries in civil trials has diminished as a result of recent legislative changes: see *Civil Liability Act 2003* (Qld) ss 73, 77.

323 Similarly, Kirby J in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 169-170 [151] expressed concerns about judicial inconsistency in the determination of the discount for the possibility of a surviving spouse forming a relationship of financially supportive cohabitation:

It might be argued that these variations merely demonstrate the infinite variety of circumstances proved in, or inferred from, the evidence of a particular case. However, another explanation may be that the estimation depends upon imponderable factors, that it relies too much on considerations of the personalities and attitudes of the judges or juries, typically after a very short encounter with the plaintiff, when they engage in the re-partnering “guessing game”. [note omitted]

324 Submission 4.

325 Submission 3A.

326 Submission 2.

327 *Family Law Act 1996* (UK) s 44(1).

328 *Family Law Act 1996* (UK) s 44(2)(a).

- a ceremony, entered into by the parties in the presence of one or more witnesses.³²⁹

This respondent suggested that, as these criteria were recommended for use in connection with the United Kingdom's wrongful death legislation,³³⁰ they would arguably be fit for use in Australia.

Whilst the "engagement" of a surviving spouse to another person would generally indicate an intention to form a subsequent relationship of cohabitation, the circumstances surrounding the engagement might be such as to raise doubts about the intention of the surviving spouse.³³¹ Alternatively, a surviving spouse may intend to remarry, but there may be no evidence of an "engagement" which accords with the criteria described above.

(ii) Intention to form a de facto relationship

The English Law Commission has expressed the view that, whilst engagement might provide a clear indication that a couple intends to marry, there is no similar factor which would indicate that a couple is likely to form a de facto relationship.³³²

Two respondents submitted that criteria should not be developed to determine what constitutes the intention to form a de facto relationship.³³³

WorkCover Queensland expressed the view that the relevant intention to form a relationship with an identified person should not be defined, and that such questions should be left to the discretion of the court.³³⁴ The respondent submitted that evidence regarding "intention" could take the form of either a positive or negative statement made by the surviving spouse and the identified person, but that evidence of "intention" should not involve speculation or inquiries of a demeaning or intrusive nature.

Another respondent submitted that whether or not a surviving spouse intends to form a de facto relationship with an identified person is a question of fact to be determined on the circumstances of the individual case.³³⁵

329 *Family Law Act 1996* (UK) s 44(2)(b).

330 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 62.

331 See for example *Mahoney v Dewinter* (Unreported, Queensland Court of Appeal No 182 of 1992, Fitzgerald P and McPherson JA, 15 March 1993) where the surviving spouse had received a proposal of marriage and an "unofficial" engagement ring but declined the proposal due to a psychological impediment.

332 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 64.

333 Submissions 2 and 3A.

334 Submission 3A.

335 Submission 2.

(d) Should the monetary support and/or domestic services provided by a relationship of cohabitation, or an intended relationship with an identified person, be able to be taken into account?

In the assessment of a surviving spouse's damages for wrongful death, the law currently permits account to be taken of evidence that a surviving spouse has formed, or intends to form, a subsequent relationship of cohabitation.³³⁶

However, this does not mean that evidence showing the existence of a subsequent relationship, or an intention to form a relationship with an identified person, will necessarily affect the surviving spouse's damages. The mere fact of a relationship, or an intention to form a relationship, is itself insufficient to warrant the reduction of the damages of a surviving spouse.

Before the damages payable to a surviving spouse could be affected, there would need to be clear evidence that the subsequent relationship, or intended relationship, would result in a financial advantage, or a probable financial advantage, to the surviving spouse.³³⁷

Even in cases where a financial advantage was revealed in evidence, it could not be assumed that such an advantage would continue,³³⁸ since an expected benefit may not arise or may be short lived.³³⁹

The question of whether or not the monetary support and/or domestic services derived from a relationship of cohabitation, or an intended relationship with an identified person, should be able to be taken into account in the assessment of a surviving spouse's damages raises a number of issues. These issues are discussed below.

(i) Speculation

Even where a surviving spouse has formed a relationship of cohabitation which is revealed to bring financial support and services, the calculation of the future benefit expected to be received by the surviving spouse from the relationship is uncertain and may therefore be subject to error. In *De Sales v Ingrilli*,³⁴⁰ the majority of the court acknowledged the inherent uncertainty in the calculation of damages in wrongful death claims and found that, whilst account may be taken of evidence of the financial advantage, "it would be wrong to assume that the financial consequences revealed in evidence

³³⁶ *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 173 [166].

³³⁷ *Id* at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [159].

³³⁸ *Id* at 149 [78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at 172 [162].

³³⁹ *Id* at 148 [74]-[75] per Gaudron, Gummow and Hayne JJ.

³⁴⁰ [2002] HCA 52; (2002) 193 ALR 130.

[would] inevitably continue”.³⁴¹ In this way, the Court sought to minimise the weight which would be placed on evidence of the surviving spouse’s current situation to justify an assessment of the surviving spouse’s future financial situation.

Where it has been established on the evidence that a surviving spouse intends to form a relationship of cohabitation with an identified person, and that the intended relationship brings with it probable financial support and services, the calculation of the future benefit expected to be received from the relationship by the surviving spouse is not only speculative but also contingent upon the intended relationship becoming an actual relationship of cohabitation.

(ii) **Demeaning and intrusive inquiries**

Where a relationship of cohabitation is clearly established on the evidence, there is a reduced need for intrusive investigations into the surviving spouse’s life and the surviving spouse is less likely to be subjected to demeaning and distressing inquiries about the existence of the relationship. However, where the existence of a relationship of cohabitation or the intention to form such a relationship with an identified person is in issue, the surviving spouse may be subjected to demeaning investigations and inquiries regarding his or her personal life.³⁴² Questions about his or her personal life are likely to be distressing to a surviving spouse who has already suffered the death of his or her spouse.³⁴³

If the pecuniary advantage resulting from a relationship is in issue, the surviving spouse may be subjected to intrusive investigation and cross-examination by the defendant in an effort to expose the level of support provided by the new relationship.

The scope for evidence to be called about the formation of a relationship of cohabitation, its potential longevity, and its financial consequences, or the intention to form such a relationship and its probable financial consequences, permits questions to be asked and inquiries to be made about the surviving spouse’s personal life. However, such inquiries may be considered an inevitable aspect of adjudicating a person’s claim for compensation.

341 Id at 149 [78] per Gaudron, Gummow and Hayne JJ.

342 In *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 168-169 [148]-[149], Kirby J noted judicial criticism of the distasteful inquiry and assessment to which a surviving spouse may be subject in a wrongful death claim. Kirby J appeared to draw a distinction between those cases where the chance of forming a future relationship was evaluated for the purpose of awarding damages, and those cases where the chance was evaluated for the purpose of discounting damages:

... it is one thing to scrutinise evidence about such subjects where a current claim is made about them. It is quite another to subject an individual to distress, humiliation, investigation and “dirt digging” where the person involved may be vulnerable and quite uncertain about present and future personal relationships. [note omitted]

343 See for example *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [38].

The Australian Plaintiff Lawyers Association expressed the view that the process of exposing a surviving spouse to cross-examination about the emotional and pecuniary value of a new relationship is “barbaric”.³⁴⁴ The Association submitted that the fact that a relationship or intended relationship is relevant to the assessment of damages of a surviving spouse encourages inappropriate investigative conduct on the part of defendants.³⁴⁵

On a practical level, investigators are still hiding outside the houses of surviving partners, trying to identify people entering and leaving in an attempt to prove a “new relationship”.

(iii) Artificial behaviour

To the extent that the assessment of damages of a surviving spouse may be affected by the fact that he or she has entered, or intends to enter, a relationship of financially beneficial cohabitation, a surviving spouse may delay forming a relationship of cohabitation until after the litigation has been concluded so as to maximise the amount of compensation received. A surviving spouse may be discouraged from resuming a normal lifestyle,³⁴⁶ or may feel it necessary to resort to qualification and concealment in the conduct of his or her personal affairs, so as not to diminish the amount of compensation to which he or she would otherwise be entitled.³⁴⁷

If only an established relationship of financially beneficial cohabitation were taken into account in the assessment of damages, and no regard were had to the intention of a surviving spouse to form a relationship of financially beneficial cohabitation with an identified person, it may increase the prospect of a surviving spouse strategically arranging his or her personal life to maximise damages.

(iv) The risks of under or overcompensation

Disregard of the pecuniary consequences of the formation of a relationship of cohabitation, or the intention to form such a relationship with an identified person, carries with it a risk of overcompensation of the surviving spouse and

344 Submission 4.

345 Ibid.

346 New South Wales Law Reform Commission, Working Paper, *Deferred Assessment of Damages for Personal Injuries and Interim Payment during the Period of Postponement of Assessment and on The Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell's Act* (WP 2, 1969) at 73-74.

347 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 63.

injustice to the defendant.³⁴⁸

It is possible that the loss of financial support and services suffered by a surviving spouse, which is the basis of the wrongful death claim, may be partly or wholly replaced by benefits derived from a subsequent relationship of cohabitation, or from a relationship that the surviving spouse intends to form with an identified person. Failure to take into account any monetary support and domestic services received, or expected to be received, by the surviving spouse from the relationship is inconsistent with the principle of compensatory damages.³⁴⁹

To disregard such a relevant and incontrovertible factor as actual remarriage means that the [surviving spouse] is indisputably being overcompensated.

A number of law reform bodies have recommended that, because of the risk of overcompensation, the actual remarriage of the spouse should not be overlooked in relation to the assessment of damages in a wrongful death claim.³⁵⁰

Taking into account in the assessment of a surviving spouse's damages the formation of a subsequent financially beneficial relationship of cohabitation, or the fact that a surviving spouse intends to form such a relationship with an identified person, substantially diminishes the risk of overcompensation.

However, if the damages paid to the surviving spouse are reduced to take into account the financial support and services that are expected to be derived from the relationship of cohabitation, or the intended relationship, then it is likely that the surviving spouse will be undercompensated if such financial consequences do not in fact eventuate, or if there are other adverse financial consequences which result from the relationship or intended relationship.

Undercompensation may result in the surviving spouse suffering financial hardship. The general community also bears a cost if the surviving spouse is ultimately forced to rely on social security payments because of the inadequacy of the compensation awarded to the surviving spouse.

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The loss for which damages may be claimed in an action for wrongful death is discussed at pp 6-7 of this Report.

In its submission to the Commission, the Australian Plaintiff Lawyers Association expressed the view that, as a claimant in a wrongful death action in Queensland may not be compensated for the pain and suffering and emotional distress that arises from the death of the deceased, such a claimant will generally be under-compensated as the true nature of the loss sustained by the claimant is not recognised at law: Submission 4.

Note, in the Northern Territory and South Australia, a claimant in an action for wrongful death may claim solatium or non-pecuniary loss: *Compensation (Fatal Injuries) Act* (NT) s 10(3)(f); *Wrongs Act 1936* (SA) ss 23A-23C.

349

Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 57.

350

Law Reform Committee of South Australia, Report, *Report Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the Wrongs Act* (R 27, 1972) at 6-7 (Majority Report); Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 64-65. The latter report recommended (at 64) that the prospects of remarriage should be taken into account only if, at the time of trial, the surviving spouse is actually engaged to be married.

The law in the United Kingdom,³⁵¹ some American jurisdictions,³⁵² and the Northern Territory³⁵³ makes remarriage or entry into a subsequent financially beneficial relationship of cohabitation irrelevant for the purpose of assessment of damages.³⁵⁴

(v) Inconsistencies in the awards of damages

Taking into account an established relationship of financially beneficial cohabitation, but precluding evidence of an intention to form such a relationship, might result in anomalous and inconsistent awards of damages.

If there was evidence to show that a surviving spouse had married the week before trial in financially advantageous circumstances, evidence of any financial support and services derived from the new relationship might be relied upon in the assessment of the surviving spouse's damages. However, if evidence of an intention to form such a relationship was irrelevant for the purposes of assessment of damages, the fact that a surviving spouse was engaged with plans to marry immediately following the trial, in financially advantageous circumstances, would be unable to be taken into account.

To depart from the law as stated in *De Sales v Ingrilli*³⁵⁵ may therefore create unjustifiable anomalies and inconsistencies in the assessment of damages.

Taking into account the pecuniary effects of a relationship of cohabitation, or of a relationship that a surviving spouse intends to form with an identified person, gives a surviving spouse less scope to artificially arrange his or her personal life with a view to maximising compensation and also minimises inconsistencies in the determination of damages.³⁵⁶

351 *Fatal Accidents Act 1976* (UK) s 3(3). As explained at pp 20-23 of this Report, the law in the United Kingdom is that a widow's damages cannot be discounted for remarriage or the prospects of remarriage. The discount is still applicable to damages payable to widowers.

352 For example, see the authorities referred to in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 per Gaudron, Gummow and Hayne JJ at 149 [78] and per Kirby J at 165-166 [135]-[137].

353 *Compensation (Fatal Injuries) Act* (NT) s 10(4)(h). The law as it applies in the Northern Territory is discussed at pp 27-29 of this Report. The Northern Territory wrongful death legislation has limited operation as it does not generally apply if the death of the deceased was the result of a motor vehicle accident or a workplace accident: see *Compensation (Fatal Injuries) Act* (NT) s 5(2), *Motor Accidents (Compensation) Act* (NT) s 5(1) and *Work Health Act* (NT) ss 52, 189.

354 However, in all Australian jurisdictions, with the exception of the Northern Territory, the assessment of damages of a surviving spouse may take into account the effect of a subsequent financially beneficial relationship of cohabitation, or an intended relationship with an identified person. The law in the Northern Territory is discussed at pp 27-29 of this Report. Legislative change has recently been proposed in Victoria: see p 27 of this Report.

355 [2002] HCA 52; (2002) 193 ALR 130.

356 See also comments in support of this view made by the English Law Commission: Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 63.

(vi) Submissions

Four submissions addressed the issue of whether the financial consequences of an actual or intended relationship of cohabitation should be able to be taken into account.³⁵⁷

Three respondents³⁵⁸ submitted that the fact that a surviving spouse had formed a relationship of financially beneficial cohabitation should be able to be taken into account in the assessment of damages of a surviving spouse. Two of these respondents³⁵⁹ expressed the view that, where the surviving spouse was in a subsequent relationship of cohabitation, the pecuniary effects of the relationship could be assessed with some certainty. However, one respondent particularly acknowledged the uncertainty inherent in the calculation of future benefits.³⁶⁰

Two respondents³⁶¹ also submitted that having regard to the pecuniary effects of such a relationship in the assessment of damages of a surviving spouse minimised the risk of overcompensation to the surviving spouse.

In relation to the intention of a surviving spouse to form a relationship of cohabitation with an identified person, WorkCover Queensland submitted that, if the intention to form a relationship of financially beneficial cohabitation with an identified person could be clearly determined without the need for inquiries of a demeaning and/or intrusive nature, then such an intention should be able to be considered in the assessment of the surviving spouse's damages.³⁶² WorkCover Queensland expressed the view that, as an intention to form a relationship is clearly not the same as the existence of an actual relationship, the intention to form a relationship should not carry the same weight as if the surviving spouse had actually remarried or was in an established de facto relationship. In the view of the respondent, in taking into account an intention to form a relationship, all relevant circumstances would need to be considered, including, but not limited to, the date the intended cohabitation is to commence.

Another respondent submitted that the intention of a surviving spouse to form a relationship of financially beneficial cohabitation with an identified person

357 Submissions 1, 2, 3 and 4. In correspondence to the Commission received on 2 July 2003, the Insurance Council of Australia advised that it held no strong views on the subject of the reference as the issue was not considered to be a major one for insurers.

358 Submissions 1, 2, and 3.

359 Submissions 2 and 3.

360 Submission 2.

361 Submissions 1 and 2.

362 Submission 3A.

should be relevant to the assessment of a surviving spouse's damages.³⁶³ This respondent suggested that to ignore evidence of an intended relationship was illogical and would risk overcompensation of the surviving spouse. However, the respondent acknowledged the uncertainty inherent in predicting the future benefits of a relationship.

The Australian Plaintiff Lawyers Association submitted that the fact that a surviving spouse had formed, or was intending to form, a relationship of financially beneficial cohabitation should be irrelevant to the assessment of damages in wrongful death actions.³⁶⁴ The Association expressed concerns that, if such factors were able to be taken into account in the assessment of damages of a surviving spouse, he or she would be subjected to demeaning inquiries and investigation by the defendant. The Association considered that the past financial dependency of the surviving spouse and the prospective earning capacity of the deceased were the only factors which should be taken into account in the assessment of damages for wrongful death. Further, the Association submitted that, as damages awards in wrongful death cases are generally not substantial, the possibility of a small windfall to a surviving spouse would be of little consequence.

(e) How to account for the monetary support and/or domestic services provided by a subsequent relationship, or an intended relationship with an identified person?

The process of off-setting benefits accruing to the claimant as a result of the wrongful act against the loss suffered by the claimant accords with the principle that compensatory damages are intended to restore the claimant to the position that he or she would have been in if the wrongful act had not occurred.³⁶⁵ Therefore, in the assessment of damages in a wrongful death claim, any benefits received and any future benefits expected to be received by the surviving spouse from an actual or intended relationship of cohabitation, are offset against the loss suffered by the surviving spouse.³⁶⁶

Where there is evidence to show that a surviving spouse has formed a subsequent relationship of cohabitation, or intends to form such a relationship with an identified person, the amount of any benefit received by the surviving spouse up until the time the damages are assessed could be calculated with reasonable accuracy. However, the continuation of such a benefit will be uncertain.

363 Submission 2.

364 Submission 4.

365 For a discussion about the assessment of compensatory damages see Chapter 3 of this Report.

366 However, certain benefits are excluded for the purpose of calculating damages in a wrongful death claim: *Supreme Court Act 1995* (Qld) s 23.

The allowance made for future benefits is based on the individual facts of the case. However, the uncertainties inherent in the calculation of the anticipated future benefit mean that allowance must be made for contingencies. Where the surviving spouse has formed a subsequent relationship of cohabitation by the date of trial, the allowance made for any future benefits will involve an assessment of “the chances of the [relationship of cohabitation] surviving and of the [surviving spouse] continuing to receive support from it and at what level.”³⁶⁷ In the case of an intended relationship, any future benefit will also be contingent upon the intended relationship becoming an actual relationship of cohabitation.

It will therefore be difficult to accurately predict the extent to which the anticipated benefit should be taken into account. The difficulty of calculating a future benefit was noted by Gaudron, Gummow and Hayne JJ in *De Sales v Ingrilli*:³⁶⁸

Who is to say that the new relationship will endure, and that, if it endures, it will provide financial advantage to the person who is now the surviving spouse? And if it is a financially beneficial relationship at its outset, who is to say what events will intervene thereafter? Will the new spouse or partner suffer some catastrophe and the person who is now the surviving spouse then have to care and provide for the new partner, the children of the first union, any children brought by the new partner to the new union, and any children born of the new union? Who can say?

However, the uncertainties which must be considered in the prediction of the future benefits of a subsequent relationship of cohabitation are not necessarily greater than the uncertainties to be taken into account in the assessment of the value of the benefit that the deceased could reasonably have been expected to provide to the surviving spouse in the future had the deceased lived:³⁶⁹

To assess the pecuniary loss that the death has caused the relatives, it is necessary to take account of what may have happened in the future had the death not occurred and, as well, to take account of what may happen to the relatives in the future even though the death has occurred. These predictions, about the “vicissitudes of life”, are “very much a matter of speculation”. It follows that the pecuniary loss that has resulted from death cannot be calculated with accuracy. The best that can be done is to assess a sum which will, *as far as the limits implicit in the task will permit*, represent the value of that loss, assessed at the date of judgment.

...

... Because the assessment [of the economic loss resulting from the deceased's death] requires estimation and judgment rather than calculation, seldom, if ever, will it be right to express the result as if it were correct to the nearest dollar. That falsely asserts a degree of accuracy in the assessment that is impossible. All that can be done is to select a percentage or lump sum to allow for the estimated value of those possibilities which may or may not have eventuated if the deceased had lived and those which may or may not eventuate in the future. [original emphasis, note omitted]

367 Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 541.

368 [2002] HCA 52; (2002) 193 ALR 130 at 148 [74].

369 *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 146-147 [66] and [68] per Gaudron, Gummow and Hayne JJ.

The assessment of a separate amount to account for any future benefit expected to be received by the surviving spouse from the subsequent or intended relationship would ensure that the assessment is transparent and reviewable. However, the calculation of an assessment which neither unduly disadvantages the surviving spouse nor does an injustice to the defendant, remains a significant issue:³⁷⁰

In the end, all that can be said is that the future is uncertain. The value of what is lost as a result of the wrongful death must strike a balance of all the gains and losses that have been and may thereafter be suffered.

WorkCover Queensland submitted that, where an adjustment to an award of damages was appropriate, the actual adjustment should be identified to allow the adjustment to be examinable on appeal.³⁷¹

4. THE COMMISSION'S VIEW

(a) The effect on the assessment of a surviving spouse's damages of a subsequent marriage or de facto relationship

The Commission is of the view that, in a wrongful death claim by a surviving spouse, where there is evidence that the surviving spouse has actually married or formed a de facto relationship subsequent to the death of the deceased, any monetary support and domestic services resulting from that relationship should be able to be taken into account in the assessment of the surviving spouse's damages.

The Commission considers that, in such cases, the monetary support and/or domestic services already derived from the relationship of cohabitation would be largely ascertainable at the time of the assessment of damages. However, the Commission acknowledges that, as any future benefit expected to be received from the relationship is uncertain, it should not be assumed that the financial support and services received from the relationship would necessarily continue into the future.³⁷² Accordingly, when the monetary support and domestic services received, or the future benefits expected to be received, from an actual relationship are calculated, other contingencies must be considered and taken into account.

The Commission acknowledges that this approach may provide an incentive for a surviving spouse to delay entering into a relationship of cohabitation until after the conclusion of litigation so as to maximise the amount of compensation awarded. However, the Commission considers that to not take into account the fact that a surviving spouse has formed a subsequent relationship of cohabitation, which brings

370 Id at 150 [79] per Gaudron, Gummow and Hayne JJ.

371 Submission 3.

372 This is consistent with the view of the majority of the High Court in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130.

monetary and/or domestic support to the surviving spouse, would be inconsistent with the policy underlying the assessment of compensatory damages, and would give rise to the possibility that a surviving spouse might receive compensation for a financial loss that did not occur.

In relation to the issue of what constitutes a marriage, the Commission is satisfied that, as the law relating to marriage is governed by Commonwealth statute,³⁷³ there is no need to develop criteria to determine whether or not a surviving spouse has remarried.

In relation to the issue of what constitutes a de facto relationship, the Commission is of the view that, as the *Acts Interpretation Act 1954* (Qld) defines “de facto partner”,³⁷⁴ “spouse”³⁷⁵ and “de facto relationship”,³⁷⁶ there is no need to develop criteria to determine whether a surviving spouse has formed a de facto relationship subsequent to the death of the deceased. Because the definitions contained in the *Acts Interpretation Act 1954* (Qld) are intended to be of general application, the Commission considers that the adoption of these definitions promotes consistency and certainty for litigants in wrongful death actions. For the reasons set out on page 65 of this Report, the Commission does not consider the application of the definition contained in section 18 of the *Supreme Court Act 1995* (Qld) to be appropriate in this context.

(b) The effect on the assessment of a surviving spouse’s damages of an intention to marry or to form a de facto relationship with an identified person subsequent to the death of the deceased

The Commission members have been unable to reach a unanimous decision on the issue of whether an intention by the surviving spouse to marry or to form a de facto relationship with an identified person, subsequent to the death of the deceased, should be able to be taken into account in the assessment of a surviving spouse’s damages.

The majority of members are of the view that, in a wrongful death claim by a surviving spouse, an intention by the surviving spouse to form a relationship of cohabitation should have no effect on the assessment of a surviving spouse’s damages. The majority of Commission members consider that this decision would reduce the need for speculation and inquiry into the personal life of the surviving spouse, and would encourage certainty, simplicity and consistency in the conduct of wrongful death claims.

373 *Marriage Act 1961* (Cth).

374 *Acts Interpretation Act 1954* (Qld) ss 32DA, 36. These definitions are set out in full at pp 61-62 of this Report.

375 *Acts Interpretation Act 1954* (Qld) s 36.

376 *Acts Interpretation Act 1954* (Qld) s 36.

As a consequence of this view, the question of what constitutes an intention to marry, or to form a de facto relationship, does not need to be determined.

Two members, Mr Applegarth SC and Ms Hill, dissent from the majority view. These members consider that, if an established relationship of financially beneficial cohabitation could be taken into account, but evidence of an intention to form such a relationship with an identified person could not, it may result in anomalous and inconsistent awards of damages.

5. RECOMMENDATIONS

The Commission recommends that:

- 7.1 In a wrongful death claim by a surviving spouse, where there is evidence that the surviving spouse has married or formed a de facto relationship subsequent to the death of the deceased, the monetary benefits and/or domestic services received, or expected to be received, by the surviving spouse from that subsequent relationship may be taken into account in the assessment of the surviving spouse's damages.
- 7.2 However, for the purpose of the assessment of the value of any monetary benefits and/or domestic services the surviving spouse is expected to receive from the marriage or de facto relationship, it should not be assumed:
 - (a) that the marriage or de facto relationship would necessarily continue; or
 - (b) that the surviving spouse would necessarily continue to receive the same monetary benefits and/or domestic services as a result of the marriage or de facto relationship as the surviving spouse had already received as a result of the marriage or de facto relationship.
- 7.3 In a wrongful death claim by a surviving spouse, an intention of the surviving spouse to marry or to form a de facto relationship, subsequent to the death of the deceased, should have no effect on the assessment of the surviving spouse's damages.
- 7.4 In the assessment of a surviving spouse's damages in a wrongful death claim:
 - (a) "marriage" means a marriage within the meaning of the *Marriage Act 1961* (Cth); and

(b) “de facto relationship” means a de facto relationship within the meaning of the *Acts Interpretation Act 1954* (Qld), section 36.³⁷⁷

7.5 Legislation should be introduced to implement Recommendations 7.1 to 7.4.³⁷⁸

377

This recommendation does not affect the eligibility of a de facto partner to bring an action pursuant to s 18(2) of the *Supreme Court Act 1995* (Qld).

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See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23A of the *Supreme Court Act 1995* (Qld)).

CHAPTER 8

THE POSSIBILITY OF SEPARATION OR DIVORCE

1. INTRODUCTION

In a wrongful death claim, the amount of compensation able to be claimed by a surviving spouse³⁷⁹ is based on the actual loss of monetary support and domestic services suffered up until the time the damages are assessed and on the pecuniary value of the support and services that the deceased could reasonably have been expected to provide in the future had he or she not been killed.³⁸⁰

The fact that, at the time of the death of the deceased, the surviving spouse and the deceased had separated or were intending to divorce is a matter which could adversely affect the amount of compensation able to be claimed by the surviving spouse.³⁸¹ This is because the separation or divorce of the deceased and the surviving spouse would likely result in the deceased providing a reduced level of financial support and services to the surviving spouse.

However, the possibility that the relationship between the deceased and the surviving spouse might have ended in separation or divorce were it not for the death of the deceased has been acknowledged, not as a matter which affects the amount of compensation able to be claimed by the surviving spouse, but as a contingency for which allowance may be made in the assessment of the surviving spouse's damages.

In *Rodda v Boonjje Pty Ltd*,³⁸² Byrne J considered the possibility that the relationship between the surviving spouse and the deceased might not have endured as merely one of the contingencies that might affect the level of support provided by the deceased.³⁸³

379 In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

380 The loss for which damages may be claimed is discussed at pp 6-7 of this Report.

381 See Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999), note 55 at 65. The right of a surviving spouse to commence an action for wrongful death pursuant to the *Supreme Court Act 1995* (Qld) is limited to a "spouse" as defined in s 18 of that Act. This definition does not extend to divorced spouses. Similarly, where a de facto relationship has ended in separation, the former de facto partner is no longer a "spouse" within the terms of the definition and therefore has no right to commence an action for wrongful death. It is acknowledged that, where a marriage has ended in divorce, or a de facto relationship in separation, the financial support and benefits that were formerly provided through that relationship might continue to be available through maintenance payments by one party to the other. However, the fact that a financial benefit might still be received by the former spouse after the relationship has ended does not render the former spouse eligible to bring a claim for wrongful death.

382 *Rodda v Boonjje Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993).

383 *Ibid.*

The relationship [between the deceased and the surviving spouse] might not have lasted, although their time together was happy. If there had been a parting, her dependency might not have ceased with the relationship. Depending upon many circumstances, including the duration of their cohabitation, Court orders might have included periodic maintenance or a property settlement. ... As to when, if at all, it might have ended, and with what financial consequences for [the surviving spouse], are in the realm of conjecture.

Consequently, the possibility that the relationship between the surviving spouse and the deceased might have ended was not calculated as a separate discount, but was taken into account as part of the general discount for contingencies.³⁸⁴

However, where evidence showed that the relationship between the surviving spouse and the deceased was very likely to fail and the financial consequences of the breakdown of the relationship were more susceptible to calculation, a separate discount has been applied for the contingency of the relationship ending.³⁸⁵

2. THE EFFECT OF *DE SALES V INGRILLI*

In *De Sales v Ingrilli*,³⁸⁶ in obiter dictum, the majority of the Court considered the way in which vicissitudes, including whether the relationship between the surviving spouse and the deceased would have endured but for the death of the deceased, are assessed in wrongful death cases.

The majority of the Court considered the possibility of breakdown of the relationship between the surviving spouse and the deceased, in the absence of evidence indicating that the relationship between the surviving spouse and the deceased would not have endured, as simply one of the many contingencies to be taken into account in a wrongful death claim.³⁸⁷

In their joint reasons for judgment, Gaudron, Gummow and Hayne JJ observed that there is a myriad of possibilities that may or may not affect a claimant in a wrongful death action.³⁸⁸ Their Honours considered that, as the various contingencies to which a relationship may be subject generally defy accurate calculation, a single

384 Ibid.

385 *McIntosh v Williams* [1979] 2 NSWLR 543.

386 [2002] HCA 52; (2002) 193 ALR 130. The facts of this case are discussed at p 18 of this Report.

387 Id at 146-147 [68] and [72] per Gaudron, Gummow and Hayne JJ. Whilst the latter paragraph questioned the prudence of making a separate deduction for the possibility of a surviving spouse forming a relationship subsequent to the death of the deceased, the comments are germane to the general treatment of contingencies in wrongful death actions. See also Gleeson CJ at 140 [36]. At 171 [158] Kirby J acknowledged that "the endurance of personal relationships is prone to the unpredictable vicissitudes of human personality, desire and fortune."

388 Id at 146-147 [68] and [72].

percentage or a lump sum would better account for all such possibilities, without the need to single out one of those possibilities for individual assessment.³⁸⁹

Gleeson CJ expressed the view that, where a contingency is relatively remote or is impossible to predict with any accuracy, then it can appropriately be accounted for in the general discount for contingencies. However, his Honour the Chief Justice also considered that, where a contingency is more likely to occur and more susceptible to specific calculation in the circumstances of a particular case, it may be appropriate to apply a separate discount for the specific contingency.³⁹⁰

Courts take account of ... contingencies in two ways. Certain contingencies may be provided for by way of a general allowance for the “vicissitudes of life”. Such contingencies may be relatively unlikely to occur, or their occurrence may be impossible to predict with any accuracy. Other contingencies may be more likely to occur, and more susceptible to specific calculation in the circumstances of a particular case. In these circumstances, ... it may be appropriate to apply a special discount for the specific contingency in question.

...

An example of a case in which a large, and separate, discount was made for particular contingencies is the decision of the Court of Appeal of New South Wales in *McIntosh v Williams*.³⁹¹ That was a widow’s claim under the *Compensation to Relatives Act 1897* (NSW). The evidence showed that the marriage was very likely to fail. The deceased had a long-standing relationship with another woman, with whom he had a child. The Court of Appeal addressed the contingencies of divorce and remarriage separately from general vicissitudes, and made a discount of 50% on account of those matters.

Gleeson CJ observed:³⁹²

A court may treat the chance that a plaintiff might have become separated or divorced from the deceased as one of the general contingencies covered by the discount for the “vicissitudes of life”. Despite the fact that divorce is now a common occurrence in our society, it is difficult to predict with accuracy in any particular case. Only where there is concrete evidence of marital difficulty or estrangement will there be an assessment of the specific likelihood of divorce in a particular case.

3. ISSUES FOR CONSIDERATION

At issue is whether the possibility of the relationship between the surviving spouse and the deceased ending in separation or divorce should affect the assessment of the surviving spouse’s damages in a wrongful death claim.

389 Id at 146-147 [68].

390 Id at 134-135 [15]-[16].

391 [1979] 2 NSWLR 543.

392 [2002] HCA 52; (2002) 193 ALR 130 at 140 [36].

Further, if such a possibility is able to be taken into account, should the possibility be accounted for:

- (a) as a separate discount; or
- (b) as part of the general discount for the vicissitudes of life; or
- (c) calculated by reference to a standard discount table?

(a) Should the possibility be able to be taken into account?

In the assessment of damages in a wrongful death claim, the consideration of the possibility that the relationship between the deceased and the surviving spouse would not have endured raises issues similar to those considered in relation to whether damages should be discounted to account for the possibility that a surviving spouse might form a future relationship of financially supportive cohabitation.³⁹³

To account for the possible breakdown of the relationship as anything other than a modest factor in the general discount for the vicissitudes of life is likely to expose the surviving spouse to intrusive investigation and distasteful questioning and, where there is no obvious indication of deterioration in the relationship, puts the court in the invidious situation of having to speculate about the prospect that a seemingly happy relationship would fail. Further, because the possibility of the relationship between the surviving spouse and the deceased breaking down is uncertain, it is difficult to assess the chance of the breakdown occurring with any accuracy. Therefore, if the possible breakdown of the relationship were to be taken into account in the absence of evidence that the relationship would not have endured, undercompensation of the surviving spouse might result.

The English Law Commission was of the view that accounting for the possibility of separation or divorce in wrongful death actions was unappealing, particularly when a couple had been happily married at the time of the death of the deceased. Further, the Commission acknowledged the uncertainty inherent in assessing such a contingency and the distasteful inquiries which would generally have to be undertaken to enable such an assessment to be made.³⁹⁴

However, the Commission took the view that to not take the breakdown of the relationship into account where there was “objective and incontrovertible indicia that a particular couple were likely to divorce”³⁹⁵ would be to knowingly overcompensate a surviving spouse. The Commission considered that an assessment of the prospect of the breakdown of the relationship should rely on clear, objective evidence which indicated the likelihood of the breakdown of the relationship, but that individual incidents or events, or even an extended period of difficulty, could not be

³⁹³ For a discussion about discounting damages for the possibility of the formation of a future relationship, see Chapter 6 of this Report.

³⁹⁴ Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 65.

³⁹⁵ Id at 65-66.

regarded as clear evidence of breakdown.³⁹⁶ Similarly, where a couple had recommenced living together and resolved their difficulties, a past period of separation could not be regarded as clear evidence of breakdown of the relationship.³⁹⁷

The Commission recommended that, where the deceased and the surviving spouse were married, the possibility of the breakdown of the relationship should not generally be taken into account in the assessment of damages, unless the couple were no longer living together, or divorce or similar proceedings had been commenced.³⁹⁸

However, with respect to the breakdown of a de facto relationship, the Commission considered itself unable to identify any sufficiently clear and objective factors which would indicate that there was a real prospect of the relationship ending. It therefore recommended that the possibility of the breakdown of a de facto relationship should not be taken into account in the assessment of damages for wrongful death.³⁹⁹

(i) Submissions

Four submissions addressing this issue were received by the Commission.⁴⁰⁰

WorkCover Queensland was opposed to taking into account the possibility of breakdown of the relationship between the surviving spouse and the deceased.⁴⁰¹ This submission expressed the view that the inquiries necessary for the assessment of such a possibility are too intrusive and demeaning to the surviving spouse, and that the discount is speculative and may result in the surviving spouse being undercompensated.

However, WorkCover Queensland considered that, where it is a fact that the relationship had broken down or where there is unequivocal evidence that the couple intended to sever or not resume the relationship, then such facts should be able to be taken into account in the assessment of damages. The respondent submitted that in such circumstances the effect of breakdown of the relationship would be able to be calculated with reasonable accuracy.

396 Id at 67-68.

397 Ibid.

398 Ibid.

399 Id at 69.

400 Submissions 1, 2, 3 and 4. In correspondence to the Commission received on 2 July 2003, the Insurance Council of Australia advised that it held no strong views on the subject of the reference as the issue was not considered to be a major one for insurers.

401 Submission 3. WorkCover Queensland, which is a statutory body, is the major workers' compensation insurer in Queensland. This submission is significant in that it is effectively a submission against interest as WorkCover Queensland has a financial interest in the outcome of such cases.

The Australian Plaintiff Lawyers Association submitted that the possibility that the relationship between the surviving spouse and the deceased might have ended in separation or divorce should be irrelevant to the assessment of damages in wrongful death actions.⁴⁰² The Association expressed the view that, if this possibility were taken into account in the assessment of damages of a surviving spouse, he or she would be subjected to demeaning inquiries. The Association considered that the past financial dependency of the surviving spouse and the prospective earning capacity of the deceased were the only factors which should be taken into account in the assessment of damages for wrongful death. The Association took the view that, if a relationship was unlikely to succeed, the instability of the relationship would often be mirrored in the degree of financial dependency of the surviving spouse, which would protect defendants from unfair awards of damages. Further, the Association submitted that, as damages awards in wrongful death cases are generally not substantial, the possibility of a small windfall to the surviving spouse would be of little consequence.

Another respondent supported the practice of discounting damages for the possibility of the breakdown of the relationship between the surviving spouse and the deceased.⁴⁰³ This respondent submitted that any factor which could affect the dependency of the surviving spouse should be taken into account to avoid overcompensation.

(b) How to account for the possibility?

(i) Accounting for the possibility as a separate deduction

Whilst the possibility that the relationship between the deceased and the surviving spouse might have ended in separation or divorce were it not for the death of the deceased has been accounted for separately in the assessment of a surviving spouse's damages,⁴⁰⁴ it is more often acknowledged as one of the contingencies which form part of the deduction for the vicissitudes of life.⁴⁰⁵

The application of a separate discount for the possibility that the relationship between the surviving spouse and the deceased might, were it not for the

402 Submission 4.

403 Submission 2.

404 *McIntosh v Williams* [1979] 2 NSWLR 543.

405 *Rodda v Boonjje Pty Ltd* (Unreported, Queensland Supreme Court No 677 of 1987, Byrne J, 27 May 1993). See also *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 146-147 [68] and [72] per Gaudron, Gummow and Hayne JJ. Whilst the latter paragraph questioned the prudence of making a separate deduction for the possibility of a surviving spouse forming a relationship subsequent to the death of the deceased, the comments are germane to the general treatment of contingencies in wrongful death actions.

death of the deceased, have ended in divorce or separation, would mean that the assessment of the discount is transparent and reviewable.

However, the assessment of an appropriate rate of discount which neither unduly disadvantages the surviving spouse nor does an injustice to the defendant, remains a significant issue. In *De Sales v Ingrilli*,⁴⁰⁶ Gaudron, Gummow and Hayne JJ observed that, while the application of a separate discount may give rise to the implication that a contingency or possibility was capable of being assessed with reasonable accuracy,⁴⁰⁷ the various possibilities to which a relationship may be subject generally defy accurate calculation.⁴⁰⁸

WorkCover Queensland submitted that, where an adjustment to an award of damages was appropriate, the actual percentage of the adjustment should be identified to allow the adjustment to be examinable on appeal.⁴⁰⁹

(ii) Accounting for the possibility as part of the general discount for contingencies/vicissitudes of life

The possibility that the relationship between the deceased and the surviving spouse might have ended in separation or divorce were it not for the death of the deceased is acknowledged as one of the contingencies which form part of the deduction for the vicissitudes of life.⁴¹⁰

In *De Sales v Ingrilli*,⁴¹¹ Gaudron, Gummow and Hayne JJ acknowledged the myriad of possibilities which may be relevant to the assessment of damages in a wrongful death claim, including the possibility of the breakdown of the relationship between the surviving spouse and the deceased, and the difficulties in calculating such unpredictable and uncertain events with any accuracy.⁴¹² Therefore, their Honours considered that a single percentage or

406 [2002] HCA 52; (2002) 193 ALR 130.

407 Id at 146-147 [68] and [72] per Gaudron, Gummow and Hayne JJ. Whilst the latter paragraph questioned the prudence of making a separate deduction for the possibility of a surviving spouse forming a relationship subsequent to the death of the deceased, the comments are germane to the general treatment of contingencies in wrongful death actions. See also Gleeson CJ at 134-135 [15] where his Honour, the Chief Justice, considered that it may be appropriate to apply a separate discount in cases where a contingency is more likely to occur and therefore more susceptible to specific calculation in the circumstances of a particular case.

408 Id at 146-147 [68] per Gaudron, Gummow and Hayne JJ.

409 Submission 3.

410 See n 405 of this Report. But see *McIntosh v Williams* [1979] 2 NSWLR 543.

411 [2002] HCA 52; (2002) 193 ALR 130.

412 Id at 146-147 [68] and [72] per Gaudron, Gummow and Hayne JJ. Whilst the latter paragraph questioned the prudence of making a separate deduction for the possibility of a surviving spouse forming a relationship subsequent to the death of the deceased, the comments are germane to the general treatment of contingencies in wrongful death actions.

a lump sum should account for all such possibilities.⁴¹³

However, including the possibility that the relationship between the surviving spouse and the deceased would not have endured in the deduction for the vicissitudes of life means that the discounting process would no longer be transparent. This makes the reasoning of the court inscrutable in relation to the weight attributed to the possibility and may render the decision of the court more difficult to review.

One respondent considered that the possibility of breakdown of the relationship should be accounted for in the allowance made for the vicissitudes of life.⁴¹⁴ This respondent submitted that the weight attributed to this possibility as part of the vicissitudes of life should be assessed on the basis of statistical data, subject to rebuttal where an individual can show a particularly high or low prospect of breakdown of the relationship.

WorkCover Queensland submitted that, where an adjustment to an award of damages was appropriate, the actual percentage of the adjustment should be identified to allow the adjustment to be examinable on appeal.⁴¹⁵

(iii) Accounting for the possibility by reference to a standard rate of discount

Accounting for the possibility of breakdown of the relationship between the surviving spouse and the deceased by reference to a standard discount rate would mean that the rate of discount would be fixed on a sliding scale according to, for example, the length of the relationship.

This option is superficially attractive in that, by applying a standard rate of discount, it appears to promote consistency in the application of the discount. The use of a standard discount rate would also remove the need for demeaning and distasteful inquiries into the surviving spouse's personal life. Further, the element of speculation inherent in the assessment of such a contingency would be obviated by recourse to a standard rate.

However, the use of a standard discount rate is not without its own difficulties. It would rely on an arbitrary standard - for example, the statistical probability of breakdown of a relationship at a particular time - without reference to the stated intentions or circumstances of the relationship between the deceased and the surviving spouse. There would also be the problem of striking appropriate rates of discount.

413 Id at 146-147 [68] per Gaudron, Gummow and Hayne JJ. See also comments at 148 [75] where their Honours observed that any new relationship may be subject to precisely the same contingencies as the earlier union including "separation or divorce".

414 Submission 2.

415 Submission 3.

The use of statistics raises questions about the availability of reliable and meaningful data and whether a determination about such a personal issue should be made on the basis of generalities.

Although there are statistics available in relation to divorce rates,⁴¹⁶ the position is more uncertain with respect to a de facto relationship. The lack of accurate information about de facto relationships would make it impossible to treat the likelihood of the breakdown of a de facto relationship in the same way as the likelihood of divorce.

In any event, there remains the question of whether it is appropriate to discount the amount of a surviving spouse's compensation "on the basis of a statistical presumption that he or she would have become divorced from his or her deceased spouse".⁴¹⁷ In the United Kingdom, respondents to the English Law Commission's consultation paper on wrongful death were strongly opposed to the use of statistics to assess the likelihood of divorce between the deceased and the surviving spouse.⁴¹⁸

The use of the actuarial approach in this context was criticised as "repugnant", "socially" and "politically unacceptable" and "very distasteful". These criticisms reflect the same strength of feeling, that it is thoroughly insensitive to make judgements about intimate aspects of people's personal lives on the basis of statistics, that we have seen in relation to marriage.

In *De Sales v Ingrilli*,⁴¹⁹ Gaudron, Gummow and Hayne JJ raised concerns about the lack of individuality inherent in the use of statistics:⁴²⁰

Statistics may throw some light on some of the questions we have mentioned. They may tell their reader what is the average life expectancy of a person of a certain age. They may reveal how frequent is remarriage among people of a certain age. But great care must be exercised in their use. What are the characteristics reflected in the statistics? Are those relevant to the present inquiry? Why can it be assumed that the individual will conform to the average? To apply a statistical average to an individual case assumes that the case has all the characteristics which, blended together, create the statistic.

Statistical probabilities may hold little relevance when considered in light of individual circumstances:⁴²¹

416 Australian Bureau of Statistics, *Marriages and Divorces, Australia 2001*, 3310.0, 2001 at Tables 3.1, 3.3-3.8, 3.18 and 3.19.

417 Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 60.

418 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 66.

419 [2002] HCA 52; (2002) 193 ALR 130.

420 *Id* at 147 [70].

421 Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 60.

... the application of actuarial probabilities will not be appropriate in all cases. It may be that clear and incontrovertible evidence shows that divorce was far more likely than the statistics may indicate. ... Conversely, the statistical chance of divorce might be unrealistically high, for example because a couple may be shown to have had particularly devout religious beliefs.

However, in *De Sales v Ingrilli*,⁴²² McHugh J was strongly supportive of the use of statistics to assist in assessing the likelihood of a contingency occurring:⁴²³

Using descriptive or inferential statistics cannot ensure an accurate assessment of damages in any particular case. But in determining future probabilities, there is as of now no better way. In the long run, using descriptive and inferential statistics will prove more accurate in determining wrongful death cases than relying on the intuitions of judges and juries based on their impressions of plaintiffs and their assumptions of what people like the plaintiff are likely to do. No modern society or government could continue to exist in its present form without using statistical data and the conclusions that are reached by applying statistical and probability theory to that data. I see no reason why courts should not invoke the aid of such powerful predictive tools, whenever it is feasible to do so. In this particular area of the law, the search for highly individualised justice borders on delusional.

Only one respondent supported the use of a standard discount rate on the basis that:⁴²⁴

- it would remove the need for investigation into the personal life of a surviving spouse;
- it would be efficient and simple to use;
- it would be fairer than embarking on a speculative exercise; and
- the rate could be adjusted by Parliament or executive government and would therefore be open to community and professional input.

However, this respondent acknowledged that the lack of sophisticated statistical data would be a limiting factor in the use of a standard discount rate.

422 [2002] HCA 52; (2002) 193 ALR 130.

423 Id at 158 [110]. But see Callinan J at 182 [193] where his Honour emphasised the point that "statistics can only be a starting point [and] should only be considered in the light of the evidence in the case."

424 Submission 1. However, another respondent supported the use of statistics to determine the contingency of breakdown of the relationship between the surviving spouse and the deceased: Submission 2.

4. THE COMMISSION'S VIEW

The Commission is of the view that there should be no change to the common law concerning the effect, on the assessment of a surviving spouse's damages in a wrongful death claim, of the possibility of the relationship between the surviving spouse and the deceased ending in divorce or separation.

5. RECOMMENDATIONS

The Commission recommends that:

- 8.1 There should be no legislative change to the common law concerning the effect, on the assessment of damages of a surviving spouse in a wrongful death claim, of the possibility of the relationship between the surviving spouse and the deceased ending in divorce or separation.**

CHAPTER 9

CLAIMS MADE ON BEHALF OF A CHILD

1. INTRODUCTION

The relatives who may claim compensation for the wrongful death of a deceased person include, in addition to the deceased's spouse,⁴²⁵ a child of the deceased. In the Queensland wrongful death legislation, "child" is defined to include a son or daughter, a grandson or granddaughter, a stepson or stepdaughter and a person for whom someone stands in place of a parent.⁴²⁶

The situation may sometimes occur where, although the deceased is survived by a child, the other parent of that child (the surviving parent) does not qualify as a "spouse" within the meaning of section 18 of the *Supreme Court Act 1995* (Qld). The surviving parent may, for example, be the deceased's former spouse. Alternatively, it may be that the surviving parent was never in a relationship with the deceased that was sufficient to constitute the person as the deceased's spouse. However, the fact that the child's surviving parent may not be eligible to benefit from a wrongful death claim brought in respect of the deceased's death does not affect the child's eligibility to benefit from such an action.

As discussed earlier in this Report, in a wrongful death claim, the damages of a surviving spouse may be affected by a number of factors including the fact that, at the time of the assessment of damages, the surviving spouse had entered into a relationship of financially supportive cohabitation,⁴²⁷ or intended to form such a relationship with an identified person.⁴²⁸ The fact that, at the time of the deceased's death, the deceased and the surviving spouse had separated or were planning to divorce may also be relevant.⁴²⁹ However, the damages of a surviving spouse may no longer be discounted to allow for the possibility that he or she may enter a future relationship of financially supportive cohabitation.⁴³⁰

425 In this Chapter, the term "spouse" includes an eligible de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at pp 9-10 of this Report.

426 *Supreme Court Act 1995* (Qld) s 13, which is set out at p 9 of this Report.

427 In this Chapter, the term "cohabitation" means either a relationship of marriage or a de facto relationship.

428 *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130. See also Chapter 7 of this Report.

429 See Chapter 8 of this Report. The right to commence an action for wrongful death pursuant to the *Supreme Court Act 1995* (Qld) s 18 does not extend to divorced spouses. Similarly, where a de facto relationship has ended in separation, the former de facto partner has no right to commence an action for wrongful death pursuant to the *Supreme Court Act 1995* (Qld) s 18. However, such matters do not alter the eligibility of a child of the deceased to bring an action for damages for wrongful death.

430 *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130. See also the recommendation of this Commission in Chapter 6 of this Report at p 55.

Consideration of these factors raises the question of their effect on a claim made on behalf of a child of a deceased.

2. WHERE THE SURVIVING PARENT IS ALSO THE SURVIVING SPOUSE OF THE DECEASED

(a) A subsequent relationship or an intended relationship

Where a surviving spouse has formed a relationship of financially supportive cohabitation subsequent to the death of the deceased, or intends to form such a relationship with an identified person, the surviving spouse's damages may take into account the monetary benefits and/or domestic services which result from that relationship.⁴³¹

Where a claim has been made on behalf of a child of the deceased and, at the time damages are assessed, the surviving parent has remarried or entered into a subsequent de facto relationship, the existence of the relationship has been regarded as a relevant consideration in the assessment of the child's damages.⁴³² However, although the circumstances of the subsequent relationship may be taken into account, they will not necessarily be determinative of the amount of compensation to be paid to the child:⁴³³

One does not know what the future will bring. One hopes that the step-father will continue to be fond of his step-child and to treat her well, and that she will go short of nothing in so far as he can provide it; but there are many things to be considered, and it is not right ... that a child of this age should be cut off from any possibility of damages against a wrongdoer because she has been treated well up to the date of trial. There might be a large family in years to come. The step-father might be pressed for money. He might not be able to look after this child as well as her own father could have done.

⁴³¹ *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 149 [78] per Gaudron, Gummow and Hayne JJ, and at 172 [161]-[162] and 173 [166] per Kirby J. See also Chapter 7 of this Report.

⁴³² *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76. In England, neither the actual remarriage of a widow nor her prospects of remarriage are to be taken into account in the assessment of her damages in a wrongful death claim: *Fatal Accidents Act 1976* (UK) s 3(3). However, this restriction does not apply to a claim by a child of the deceased. As a result, the widow's remarriage or prospects of remarriage remain relevant to the assessment of the child's damages. The English Law Commission has recommended that the restriction on consideration of remarriage or possible remarriage by a widow should be extended to claims by the deceased's children: see p 22 of this Report.

⁴³³ *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76 at 82 per Singleton LJ. Note, however, that this case was decided before the enactment in 1958 in the United Kingdom of legislation requiring a step-parent who accepts a child into the family to maintain and educate the child: *Matrimonial Proceedings (Children) Act 1958* (UK) s 1(1); *Matrimonial Proceedings (Magistrates' Courts) Act 1960* (UK) s 16. But see also *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 and *Hay v Hughes* [1975] QB 790, both of which cases were decided after the introduction of the legislation.

In Australia, ss 66D and 66M of the *Family Law Act 1975* (Cth) provide for the imposition on a step-parent of a duty to maintain a stepchild. But see also the comments of Dwyer CJ in *Willis v Commonwealth of Australia* (1946) 48 WALR 88 at 92 and of Sugerman AP in *Hollebone v Greenwood* [1968] 3 NSW 710 at 714 to the effect that the question of dependency is not answered by pointing merely to the legal obligations of a step-parent to maintain a stepchild.

It is generally recognised that children of a deceased person may not always benefit from a relationship between their surviving parent and a step-parent:⁴³⁴

... while it is true to say that, if the plaintiff re-married, her re-marriage would in all probability for practical purposes terminate her dependency, the same result would not necessarily follow in the case of the children. On the contrary, one can conceive of circumstances in which the plaintiff's re-marriage might actually have an adverse effect on the children's financial future.

Even where the new partner has the capacity to match the financial support and services formerly provided by the deceased, children - particularly children of tender years - who are unable to provide for themselves, are likely to be more vulnerable than a surviving spouse:⁴³⁵

The children, however, are not in the same position as their mother; they have lost a parent who would normally have maintained them until they attained wage-earning ability.

The child might not be fully accepted by the step-parent, or the step-parent might not be willing to treat the child as well as the deceased would have done.⁴³⁶ The benefit from a step-parent must be regarded as less certain than that to be expected from a parent.⁴³⁷

Accordingly, a wrongful death claim by a child of the deceased may succeed where the surviving parent has remarried, notwithstanding the existence of any legal obligation on a step-parent to maintain a stepchild:⁴³⁸

When a widow remarries, or is likely to remarry, the question for the purpose of assessing damages under [a wrongful death claim] is whether and to what extent she and the dependent children are likely to be as well off in a pecuniary sense as a result of the remarriage as they were under their dependency upon their deceased husband and father. This question is not answered by pointing merely to the legal obligations to maintain which flow from the remarriage and stating that they will now stand in the place of the dependency which has been lost.

However, although an allowance may be made for the possibility that a step-parent might not provide for a stepchild as well as the deceased parent would have done, the child cannot recover for something that the deceased would probably not have been able to provide or for a loss that, in the circumstances of the surviving spouse's new relationship, is greater than the child could reasonably be expected to suffer.⁴³⁹

434 *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 at 852-853 per Willmer LJ.

435 *Willis v Commonwealth of Australia* (1946) 48 WALR 88 at 92 per Dwyer CJ.

436 *Hay v Hughes* [1975] QB 790 at 806-807 per Lord Edmund-Davies.

437 *Gillies v Hunter Douglas Pty Ltd* [1963] QWN 31; *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [34].

438 *Hollebone v Greenwood* [1968] 3 NSW 710 at 714 per Sugerman AP. See also *Willis v Commonwealth of Australia* (1946) 48 WALR 88 at 92 per Dwyer CJ.

439 *Reincke v Gray* [1964] 1 WLR 832 at 836 per Sellers LJ.

(b) The possibility of a future relationship

As noted earlier, damages of a surviving spouse may no longer be discounted to allow for the mere possibility that the surviving spouse may form a financially beneficial relationship of cohabitation in the future.⁴⁴⁰

Where the surviving spouse has not, at the time the damages are assessed, remarried or entered into a de facto relationship the prospect of a new relationship will not generally impact on a claim by a child of the deceased. It is considered inappropriate to discount a child's damages for the contingency that the child's surviving parent might remarry or form a new financially supportive relationship.⁴⁴¹

In addition to the uncertainty about the extent of the support that a child might receive from a future relationship, there is a significant difference in the situations of the surviving spouse and of any children of the relationship between the surviving spouse and the deceased. Although, in both cases, the damages are calculated according to the length of time the benefits formerly provided by the deceased would have been expected to continue, the period for which the surviving spouse would have been expected to receive the benefits is likely to be considerably longer than the period which is applicable for the children of the relationship. In the case of the surviving spouse, the period may, depending on the ages of the deceased and the surviving spouse at the time of the deceased's death, be one of several decades.

However, in the case of a child claimant, the length of time for which the child will be entitled to compensation will extend only until such time as the child could reasonably be expected to become self-supporting. In some cases this may be until the child reaches the age of majority, while in others there may be an allowance for the child to undertake tertiary studies. In any event, the period during which the extent of the loss of benefits formerly provided by the deceased may be affected by benefits resulting from a future relationship of the surviving parent is likely to be considerably shorter than it is for a surviving spouse.

(c) Breakdown of the relationship

A claim by a child of the deceased will generally not be affected by the fact that the surviving spouse and the deceased were planning to separate or divorce, or had separated or divorced. The separation or divorce of the parents would not affect the child's eligibility to bring a claim.⁴⁴²

⁴⁴⁰ *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130. See also Chapter 6 of this Report.

⁴⁴¹ *De Sales v Ingrilli* (2000) 23 WAR 417 at 436 per Miller J. See also the comments of Gleeson CJ in *De Sales v Ingrilli* [2002] HCA 52; (2002) 193 ALR 130 at 140 [38].

⁴⁴² The right to commence an action for wrongful death pursuant to the *Supreme Court Act 1995* (Qld) s 18 does not extend to divorced spouses. Similarly, where a de facto relationship has ended in separation, the former de facto partner has no right to commence an action for wrongful death pursuant to the *Supreme Court Act 1995* (Qld) s 18. However, such matters do not alter the eligibility of a child of the deceased to bring an action for damages for wrongful death.

The deceased, as a parent of a child of the relationship, would nevertheless have had a continuing obligation to maintain the child despite the breakdown of the parental relationship.⁴⁴³ That obligation would have applied whether or not the deceased and the surviving spouse had been formally married, and would have continued even if the surviving spouse had remarried or formed another relationship.⁴⁴⁴ As a result of the death of the deceased, the obligation to maintain the child can no longer be met by the deceased. It would therefore seem unduly favourable to the wrongdoer responsible for the death of the deceased to discount a child's damages on the basis that the deceased and surviving spouse had separated or were planning to divorce, and that the deceased would not have continued to pay maintenance for the child.⁴⁴⁵

3. WHERE THE SURVIVING PARENT IS NOT A SPOUSE OF THE DECEASED

A surviving parent who is not a spouse of the deceased within the terms of section 18 of the *Supreme Court Act 1995* (Qld) would not be eligible to bring a claim for damages for the wrongful death of the deceased. This does not affect the eligibility of a child of the deceased to bring such a claim for damages. The deceased, as a parent of a child, would have had a continuing obligation to maintain the child⁴⁴⁶ regardless of whether or not there was any relationship between the deceased and the surviving parent, or whether or not there was any relationship between the surviving parent and another person (whether formed before or after the death of the deceased).⁴⁴⁷ However, it would appear that the child cannot recover for something that the deceased would probably not have been able to provide or for a loss that is greater than the child could reasonably be expected to suffer.⁴⁴⁸

443 *Child Support (Assessment) Act 1989* (Cth); *Family Law Act 1975* (Cth).

444 Under the *Family Law Act 1975* (Cth), for example, the parents of a child have the primary duty to maintain the child (s 66C(1)) and any legal duty of a step-parent is secondary to that of the parents, and arises only by virtue of a court order (ss 66D, 66M). A person who is a de facto partner of the surviving spouse is not a "step-parent" for the purposes of the *Family Law Act 1975* (Cth): s 60D (definition of "step-parent").

445 See for example the comments of Mullighan J in *Goldsworthy v District Council of Port MacDonnell* (1992) 57 SASR 473 at 489-490.

446 See note 443 of this Report.

447 See note 444 of this Report.

448 *Reincke v Gray* [1964] 1 WLR 832 at 836 per Sellers LJ.

4. SUBMISSIONS

Three submissions were received in relation to the assessment of damages in a wrongful death claim by a child of the deceased.⁴⁴⁹

Both WorkCover Queensland⁴⁵⁰ and the Australian Plaintiff Lawyers Association⁴⁵¹ considered that the fact that a surviving spouse might form, intends to form, or had formed a relationship of financially beneficial cohabitation, should be irrelevant to the assessment of damages of a child of the deceased in a wrongful death claim. These respondents also considered the breakdown of the relationship between the surviving spouse and the deceased irrelevant to the assessment of damages of a child of the deceased in a wrongful death claim. Both WorkCover Queensland and the Australian Plaintiff Lawyers Association noted that a parent's obligation to financially support his or her child continues whether or not there was at any time a relationship between the deceased and the surviving parent of the child, and whether or not there was at any time a relationship between the surviving parent of the child and another person.⁴⁵²

A third respondent submitted that the possibility of the surviving spouse forming a future relationship of financially supportive cohabitation, or the breakdown of the relationship between the surviving spouse and the deceased should have no impact on the assessment of damages of a child of the deceased.⁴⁵³ However, this respondent was of the view that the fact that a surviving spouse had formed, or intends to form, a relationship of financially supportive cohabitation subsequent to the death of the deceased, was a relevant consideration in the assessment of a child's damages. Nevertheless, this respondent acknowledged the limited legal obligations of a step-parent to maintain a child of the deceased and suggested that, for a defendant to escape liability for damages to a child of the deceased, the defendant should bear the onus of proving that the child would not suffer damage as a result of the death of the parent.

449 Submissions 2, 3 and 4. In a letter to the Commission received on 2 July 2003, the Insurance Council of Australia advised that it held no strong views on the subject of the reference as the issue was not considered to be a major one for insurers.

450 Submission 3. WorkCover Queensland, which is a statutory body, is the major workers' compensation insurer in Queensland. This submission is significant in that it is effectively a submission against interest as WorkCover Queensland has a financial interest in the outcome of such cases.

451 Submission 4.

452 Submissions 3 and 4. See also *Child Support (Assessment) Act 1989* (Cth).

453 Submission 2.

5. THE COMMISSION'S VIEW

In the view of the Commission, a claim on behalf of a child of the deceased should be considered independently of the status of the relationship, if any, between the surviving parent and the deceased or of the relationship or the possibility of a relationship between the surviving parent and any other person. Further, the Commission is of the view that, in a claim on behalf of a child of the deceased for damages for wrongful death, any monetary benefits and/or domestic services the child has received, or may receive, from any person other than the deceased, should be irrelevant to the assessment of the child's damages.

(a) Where the surviving parent is also the surviving spouse of the deceased

(i) The possibility of a future relationship

The Commission is of the view that, in a wrongful death claim by a child of the deceased, the possibility that the child's surviving parent might form a future relationship of financially supportive cohabitation should have no effect on the assessment of damages. As the Commission has recommended that this possibility should have no effect on the assessment of a surviving spouse's damages,⁴⁵⁴ it would be unfair and inappropriate for the possibility of such a relationship to be able to be taken into account in a claim for damages made on behalf of a child of the deceased.

(ii) A subsequent relationship or an intended relationship

The Commission notes that the deceased would have had a continuing obligation to maintain the child⁴⁵⁵ even if the surviving parent had married or formed a relationship with another person.⁴⁵⁶ The Commission is therefore of the view that the fact that a surviving parent has formed a relationship of financially supportive cohabitation subsequent to the death of the deceased, or intends to form such a relationship with an identified person, should have no relevance to the assessment of damages of a child of the deceased in a wrongful death action.

454 See p 55 of this Report.

455 *Child Support (Assessment) Act 1989* (Cth); *Family Law Act 1975* (Cth).

456 Under the *Family Law Act 1975* (Cth), for example, the parents of a child have the primary duty to maintain the child (s 66C(1)) and any legal duty of a step-parent is secondary to that of the parents, and arises only by virtue of a court order (ss 66D, 66M). A person who is a de facto partner of the surviving spouse is not a "step-parent" for the purposes of the *Family Law Act 1975* (Cth): s 60D (definition of "step-parent").

(iii) Breakdown of the relationship

The Commission notes that the question of whether the relationship between the deceased and the surviving parent would have continued but for the death of the deceased is irrelevant to the assessment of a child's damages. Even if the deceased and the surviving parent were planning to separate or divorce, or had separated or divorced, the deceased, as a parent of a child of the relationship, would nevertheless have had a continuing obligation to maintain the child despite the breakdown in the parental relationship.⁴⁵⁷ The obligation would have applied whether or not the deceased and the surviving parent had been formally married.⁴⁵⁸ For these reasons, the Commission considers that the fact that the deceased and the surviving parent were planning to separate or divorce, or had separated or divorced, should have no effect on the damages awarded to a child of the deceased in a wrongful death claim.

(b) Where the surviving parent is not a spouse of the deceased

As explained previously, a surviving parent of a child of the deceased may be either a former spouse of the deceased or may never have been in a relationship with the deceased that was sufficient to constitute the person as the deceased's spouse.⁴⁵⁹ In either case, the Commission is of the view that the status of the relationship, if any, between the surviving parent and the deceased should be irrelevant for the purpose of assessing the damages of the child.

Similarly, the Commission considers that the existence, or possible existence, of a relationship or of an intended relationship between the surviving parent and any other person should have no effect on the assessment of a child's damages in a wrongful death claim.

457 *Child Support (Assessment) Act 1989* (Cth); *Family Law Act 1975* (Cth).

458 Under the *Family Law Act 1975* (Cth), for example, the parents of a child have the primary duty to maintain the child (s 66C(1)) and any legal duty of a step-parent is secondary to that of the parents, and arises only by virtue of a court order (ss 66D, 66M).

459 See p 93 of this Report.

6. RECOMMENDATIONS

The Commission recommends that:

- 9.1 In a wrongful death action on behalf of a child of the deceased, the following matters should not be able to be taken into account in the assessment of the child's damages for the loss of monetary benefits and/or domestic services:**
- (a) where the deceased and the surviving parent were, immediately before the death of the deceased, married or in a de facto relationship, whether or not that relationship would have continued but for the death of the deceased; or**
 - (b) where the deceased and the surviving parent had been married or in a de facto relationship, the fact that the relationship had ended prior to the death of the deceased; or**
 - (c) the possibility that the surviving parent might marry or form a de facto relationship with another person; or**
 - (d) any intention of the surviving parent to marry or to form a de facto relationship with another person; or**
 - (e) the fact that the surviving parent is or was married to, or in a de facto relationship with, another person; or**
 - (f) any monetary benefits and/or domestic services the child has received, or may receive, from any person other than the deceased.**
- 9.2 Legislation should be introduced to implement Recommendation 9.1.⁴⁶⁰**

460

See clause 3 of the draft legislation set out in Appendix 2 to this Report (proposed s 23B of the *Supreme Court Act 1995* (Qld)).

APPENDIX 1

LIST OF RESPONDENTS TO THE ISSUES PAPER

Submission 1	Orr, Mr G
Submission 2	Carver, Ms T
Submission 3	WorkCover Queensland
Submission 3A	WorkCover Queensland
Submission 4	Australian Plaintiff Lawyers Association

APPENDIX 2

DRAFT SUPREME COURT (DAMAGES FOR WRONGFUL DEATH) AMENDMENT BILL 2003

This Appendix contains a draft bill, prepared by the Office of the Queensland Parliamentary Counsel, which implements the recommendations made by the Commission in Chapters 6, 7 and 9 of this Report. As the recommendation made in Chapter 8 does not involve a change to the existing law, the draft bill does not include a provision to give effect to that recommendation.

Queensland



**SUPREME COURT (DAMAGES FOR
WRONGFUL DEATH) AMENDMENT
BILL 2003**

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2003

A BILL

FOR

An Act to amend the *Supreme Court Act 1995* to provide for particular matters affecting the damages recoverable for the benefit of a spouse or child of a deceased person in a wrongful death proceeding, and for other purposes

*Supreme Court (Damages for Wrongful Death)
Amendment Bill 2003*

The Parliament of Queensland enacts—

1 Short title

This Act may be cited as the *Supreme Court (Damages for Wrongful Death) Amendment Act 2003*.

2 Act amended

This Act amends the *Supreme Court Act 1995*.

3 Insertion of new ss 23A–23D

Part 4, division 5, after section 23—

insert—

‘23A Damages for spouse’s benefit in wrongful death proceeding

‘(1) This section applies if, in a proceeding under this division, a court is assessing damages in relation to financial benefits lost by a spouse of the deceased person as a result of the death.

‘(2) The court must not take into account any financial benefits the spouse may receive as a result of a new relationship the spouse may enter after the assessment.

‘(3) Subsection (2) applies even if the spouse intends to enter a new relationship.

‘(4) However, if the spouse has entered a new relationship since the death of the deceased person, the court may take into account any financial benefits the spouse has received, and any financial benefits the spouse is likely to receive, as a result of the new relationship.

‘(5) Subsection (4) applies even if the new relationship ends before the assessment.

‘(6) In considering what are the financial benefits the spouse is likely to receive as a result of the new relationship, the court must not assume—

- (a) that the new relationship will necessarily continue; or

Draft

*Supreme Court (Damages for Wrongful Death)
Amendment Bill 2003*

- (b) that the spouse will necessarily continue to receive the same financial benefits as a result of the new relationship as the spouse has already received as a result of the new relationship.

‘(7) In this section—

“**financial benefits**” means either or both of the following—

- (a) monetary benefits;
- (b) other material benefits having a monetary value, including, for example, domestic services.

“**relationship**” means—

- (a) a marriage; or
- (b) a de facto relationship within the meaning of the *Acts Interpretation Act 1954*, section 36.

“**spouse**”, of a deceased person, includes a de facto partner of the deceased person only if section 18(2) is satisfied in relation to the de facto partner.

‘**23B Damages for child’s benefit in wrongful death proceeding**

‘(1) This section applies if—

- (a) in a proceeding under this division, a court is assessing damages in relation to financial benefits lost by a child of the deceased person as a result of the death; and
- (b) the deceased person predeceases another parent of the child (the “**surviving parent**”).

‘(2) If there was a relationship between the deceased person and the surviving parent immediately before the death of the deceased person, it is irrelevant to the assessment whether or not the relationship would have continued but for the death.

‘(3) If there was a relationship between the deceased person and the surviving parent that ended before the death of the deceased person, the fact that the relationship ended before the death is irrelevant to the assessment.

‘(4) In assessing damages, the court must not take into account any financial benefits the child has received, or may receive, from any person

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*Supreme Court (Damages for Wrongful Death)
Amendment Bill 2003*

other than the deceased person, including any financial benefits the child has received, or may receive, as a result of—

- (a) a new relationship the surviving parent may enter after the assessment; or
- (b) a new relationship entered by the surviving parent since the death of the deceased person.

‘(5) In this section—

“**financial benefits**” see section 23A.

“**relationship**” see section 23A.

‘23C Sections 23A and 23B do not limit

‘Sections 23A and 23B apply without limiting—

- (a) the other matters the court must or may take into account in assessing damages; or
- (b) the other matters the court must not or may not take into account in assessing damages.

Note—

Section 23 sets out particular sums and gratuities that must not be taken into account in assessing damages.

‘23D Transitional provision for Supreme Court (Damages for Wrongful Death) Amendment Act 2003

‘(1) Sections 23A and 23B apply if, after the commencement of this section, the court assesses damages in a proceeding under this division in relation to a person’s death.

‘(2) It does not matter whether the proceeding was started before the commencement of this section.’.