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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

ISSUES PAPER

WP No 56

Queensland Law Reform Commission
June 2002

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You are invited to make comments and submissions on the issues raised in this Issues Paper.

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The Secretary
Queensland Law Reform Commission
PO Box 13312
GEORGE STREET POST SHOP QLD 4003

or by facsimile on: (07) 3247 9045

or by e-mail at: law_reform_commission@jag.qld.gov.au

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Ms J Braddy**

The Commission's premises are located on the 7th Floor, 50 Ann Street, Brisbane.
The postal address is PO Box 13312, George Street Post Shop, Qld 4003.
Telephone (07) 3247 4544. Facsimile (07) 3247 9045
E-mail address: law_reform_commission@jag.qld.gov.au
Internet home page address: <http://www.qlrc.qld.gov.au>

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CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

This reference was given to the Commission in July 2000.¹ The terms of reference are as follows:

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. 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.

¹

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

The assessment of damages in a wrongful death claim involves a determination of the pecuniary value of the support that the deceased would have been expected to provide to the claimants if he or she had not died. 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 an action for the benefit of a surviving spouse,² the estimated value of the loss of financial support and loss of services resulting from the wrongful death may be discounted to take into account a number of factors. Amongst these factors is the possibility that, if the deceased had not died, the relationship between the deceased and the surviving spouse may have ended in divorce or separation and the possibility that the surviving spouse may, after the damages have been paid, enter into a new relationship of financially supportive cohabitation.

The terms of reference set out above include a review of the practice of discounting a surviving spouse's damages for the possibility that the spouse's relationship with the deceased may have come to a premature end or for the prospect that the spouse may enter a new financially supportive relationship. They also call for a consideration of these issues in relation to a claim by a dependent child of the deceased.

3. CALL FOR SUBMISSIONS

The Commission seeks comments and submissions from persons and organisations with an interest in this area. Details on how to make a submission are set out at the beginning of this paper. To assist in making submissions, some possible options and some questions for consideration by respondents are set out at pages 56 to 61 of this Issues Paper.

²

In this Issues Paper, the term "spouse" is used to include a de facto partner. See also the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

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,³ was probably based on a misconstruction of previous English authority.⁴ Nonetheless, the rule became firmly established in the United Kingdom⁵ and in Australia,⁶ with the effect that it was:⁷

... 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*.⁸ 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.⁹ 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:

³ *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033 per Lord Ellenborough at 1033:

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.

⁴ Holdsworth WS, *A History of English Law* (5th ed, 1942) Vol III at 333-336, 676-677.

⁵ *Admiralty Commissioners v SS Amerika* [1917] AC 38.

⁶ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ at 615 and per McTiernan J at 622.

⁷ Holdsworth WS, *A History of English Law* (5th ed, 1942) Vol III at 333-334.

⁸ The legislation is also referred to as *Lord Campbell's Act*.

⁹ *Compensation (Fatal Injuries) Act 1968* (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:¹⁰

... 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.¹¹ The action created by the legislation was therefore restricted to a claim for financial loss resulting from the wrongful death:¹²

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.¹³ In most situations, the greatest pecuniary loss is loss of income:¹⁴

¹⁰ *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 per Lord Wright at 611, referring to Bowen LJ in *The Vera Cruz (No 2)* (1884) 9 PD 96.

¹¹ *Blake v The Midland Railway Company* (1852) 18 QB 93; 118 ER 35 per Coleridge J at 41.

¹² *Taff Vale Railway Company v Jenkins* [1913] AC 1 per Lord Haldane at 4.

¹³ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ at 618. 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).

¹⁴ 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.¹⁵ 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".¹⁶ It has been recognised that:¹⁷

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 support and services that the deceased could reasonably have been expected to provide in the future.

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:¹⁸

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]

15 *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.

16 *Id* per Deane J at 256.

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

18 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.¹⁹ 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.

Only one action may lie against the defendant in respect of the same subject matter of the complaint,²⁰ 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,²¹ 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.²² Where damages are awarded to a number of claimants these are divided among the parties as determined by the court.²³

4. WHEN THE ACTION MUST BE BROUGHT

The action must be commenced within three years from the date of the death of the deceased.²⁴ 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.²⁵ In certain circumstances the time for bringing an action may be extended.²⁶

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

¹⁹ *Supreme Court Act 1995* (Qld) s 18(1).

²⁰ *Supreme Court Act 1995* (Qld) s 19.

²¹ *Pym v Great Northern Railway Co* (1863) B & S 396, 122 ER 508; *King v Green* [1994] 1 Qd R 389.

²² *Avery v London and North Eastern Railway Company* [1938] AC 606.

²³ *Supreme Court Act 1995* (Qld) s 18(1).

²⁴ *Limitation of Actions Act 1974* (Qld) s 11.

²⁵ *Limitation of Actions Act 1974* (Qld) s 29(2)(c).

²⁶ *Limitation of Actions Act 1974* (Qld) s 31.

the deceased. The words “spouse”,²⁷ “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) In this section -

“**spouse**”, of a deceased person, includes a person who, although not legally married to the deceased person, lived with the person as the person’s husband or wife -

- (a) for a continuous period of at least 1 year immediately before the death; or
- (b) if the deceased person left a dependant who is a child of the relationship - immediately before the death.

(3) For subsection (2) -

“**child of the relationship**” means a child of the deceased person and the other person, 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 [sic] on the deceased person’s earnings after the child’s birth if the person had not died.

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

²⁷

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 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).

loss as a result of the death.²⁸ Consequently, although the legislation provides that an action may be brought on behalf of a parent of the deceased,²⁹ 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 pecuniary loss or loss of services resulting from the child's death, or a reasonable expectation of prospective benefit of which the parent has been deprived.³⁰ In the case of a very young child this may be impossible to prove.³¹

... 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.

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 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

(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.³² The words "wrongful act" and "default" are not defined in the legislation. It has been observed that the wording of the provision is "very general"³³ and that it "takes its colour from the context".³⁴

Clearly, the provision applies if the wrongful act constitutes a tort. However, its operation is not limited to situations where the death of the deceased was

²⁸ See pp 4-5 of this Issues Paper.

²⁹ See p 7 of this Issues Paper.

³⁰ *Taff Vale Railway Co v Jenkins* [1913] AC 1.

³¹ *Barnett v Cohen* [1921] 2 KB 461 per McCardie J at 472.

³² *Supreme Court Act 1995* (Qld) s 17.

³³ *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ at 619.

³⁴ *Id* per Rich J at 620.

the result of tortious conduct on the part of the defendant. An attempt to restrict the operation of similar words in the New South Wales legislation in this way was unsuccessful. The parents of the deceased, who had been electrocuted by a faulty light bulb, brought an action for damages against the defendant, the retailer who had sold the light bulb. They alleged that the defendant had impliedly warranted that the light bulb was reasonably fit for the purpose for which their son had used it; that, because the bulb was not in fact reasonably fit for the purpose, the defendant had breached the implied warranty; and that it was this breach of contract that had caused their son's death. The High Court unanimously rejected the defendant's argument that the words "wrongful act neglect or default" did not apply to a breach of contract.³⁵ Latham CJ expressed the view that:³⁶

"Wrongful act" is a term which in a perfectly natural meaning can be applied to breaches of contract as well as to torts.

Similarly, Rich J noted:³⁷

The language of the statute ... is large enough to embrace death arising from either type of default. In *Doe d Dacre v Dacre* Eyre CJ said: "I do not know a larger or looser word than 'default' In its largest and most general sense it seems to mean, failing."

The legislation also provides that a criminal offence can constitute a "wrongful act" for the purposes of a wrongful death action.³⁸

(ii) Causation

The legislation applies only if the death of the deceased was "caused" by the defendant's wrongful act.

Causation, as a legal concept, is a question of fact to be determined as a matter of common sense.³⁹ The test has been described as whether the defendant's conduct "was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it".⁴⁰

35 *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

36 *Id* at 619.

37 *Id* at 620.

38 *Supreme Court Act 1995* (Qld) s 17, which is set out at p 4 of this Issues Paper.

39 *Fitzgerald v Penn* (1954) 91 CLR 268 per Dixon CJ, Fullagar and Kitto JJ at 277; *March v E & M H Stramare (Pty Ltd)* (1991) 171 CLR 506 per Mason CJ (with whom Toohey and Gaudron JJ agreed) at 515.

40 *March v E & M H Stramare (Pty Ltd)* (1991) 171 CLR 506 per Deane J at 522.

However, in an action for negligence, a defendant will not necessarily be liable for the plaintiff's loss, even though, on the application of the common sense test, it can be said that the defendant contributed materially to that loss. Before damages are recoverable the plaintiff must show, in addition to factual causation, that the loss was a reasonably foreseeable consequence of the defendant's conduct.⁴¹

... the term 'reasonably foreseeable' ... marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act.

Judicial opinion has been divided on the issue of whether this element of reasonable foreseeability should be imported into the question of causation in a wrongful death action, which is not based on negligence but is an independent statutory cause of action.⁴²

The Queensland Court of Appeal considered the question in the context of a wrongful death claim brought on behalf of the widow and children of the deceased.⁴³ The deceased had been a passenger in a car accident caused by the negligence of the driver of the other vehicle. Although his physical injuries were relatively minor, he had developed symptoms of depression within a few weeks of the accident, and had been diagnosed with major depression six months later. He committed suicide a little more than three years after the accident. The Court held that it must be shown that the death of the deceased was a reasonably foreseeable consequence of the defendant's negligence.⁴⁴ This decision is in contrast to the approach taken by the Victorian Full Court in a similar case where the majority concluded that, once it was established that the defendant's wrongful act had caused the death of the deceased, it was not necessary to show that the death was a reasonably foreseeable consequence of the defendant's conduct.⁴⁵

(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

⁴¹ *Chapman v Hearse* (1961) 106 CLR 112 per Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ at 122.

⁴² *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ at 618.

⁴³ *Lisle v Brice & Anor* (2001) 34 MVR 206.

⁴⁴ Id per Williams JA (with whom McMurdo P and Thomas JA agreed) at 217-218.

⁴⁵ *Haber v Walker* [1963] VR 339 per Lowe and Smith JJ, Hudson J dissenting. See also Balkin RP & Davis JLR, *The Law of Torts* (2nd ed, 1996) at 377 where the decision in *Haber v Walker* is described as "clearly correct".

successfully sued the wrongdoer, the claimant has no action under the legislation.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹

⁴⁶ 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.

⁴⁷ *Read v The Great Eastern Railway Company* (1868) LR 3 QB 555.

⁴⁸ *Harding v The Council of the Municipality of Lithgow* (1937) 57 CLR 186 per Evatt J at 196; *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804.

⁴⁹ *Law Reform Act 1995* (Qld) s 10(5).

CHAPTER 3

THE ASSESSMENT OF DAMAGES

1. INTRODUCTION

In a wrongful death action, the eligible relatives of the deceased⁵⁰ can recover damages only for the loss of a “pecuniary benefit or benefit reducible to money value”.⁵¹ 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.⁵² It includes both the actual loss of support and services up until the time the damages are calculated and the loss of the 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 is to off-set the loss or injury suffered by the plaintiff.⁵³

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.

The common law requires that compensatory damages be assessed and paid as a once and for all lump sum amount.⁵⁴ Because the damages award is intended to put

⁵⁰ See pp 6-8 of this Issues Paper for an explanation of who can claim damages in a wrongful death action.

⁵¹ *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 per Lord Wright at 611.

⁵² See pp 4-5 of this Issues Paper for an explanation of the loss for which damages can be claimed in a wrongful death action.

⁵³ *Haines v Bendall* (1991) 172 CLR 60 per Mason CJ, Dawson, Toohey and Gaudron JJ at 63.

⁵⁴ *Fournier v Canadian National Railway Company* [1927] AC 16. See for example *Todorovic v Waller* (1981) 150 CLR 402 per Gibbs CJ and Wilson J at 412.

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 made, 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 the contingencies or vicissitudes of life.⁵⁵

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.⁵⁶

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

⁵⁵ *Jones v Schiffmann* (1971) 124 CLR 303 per Barwick CJ at 305.

⁵⁶ *Bresatz v Przibilla* (1962) 108 CLR 541 per Windeyer J (with whom Dixon CJ and McTiernan J agreed) at 543-544. See also *McCullagh v Lawrence* [1989] 1 Qd R 163 per Ryan J at 168.

occurred,⁵⁷ 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.⁵⁸

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. 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.

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.⁵⁹ In the case of a claim by a surviving spouse there may have been the possibility that, were it not for the death of the deceased, the relationship would not have lasted, but would have ended in separation or divorce.

(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.⁶⁰

⁵⁷ See p 12 of this Issues Paper.

⁵⁸ 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.

⁵⁹ In this Issues Paper, the term "spouse" is used to include a de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

⁶⁰ *Public Trustee v Zoanetti* (1945) 70 CLR 266 per Dixon J at 278.

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:⁶¹

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.⁶² In Queensland, the relevant provisions are found in section 23 of the *Supreme Court Act 1995* (Qld).⁶³

61 Id per Latham CJ at 271.

62 *Compensation (Fatal Injuries) Act 1968* (ACT) s 10(4); *Compensation to Relatives Act 1897* (NSW) s 3(3); *Compensation (Fatal Injuries) Act 1974* (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).

63 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

DISCOUNTING DAMAGES IN A WRONGFUL DEATH ACTION

1. INTRODUCTION

In the previous chapter the basic principles underlying the assessment of compensatory damages were explained, including the practice of adjusting the amount of the damages to be awarded to take into account the uncertainty of future “contingencies” or “vicissitudes of life”, or to off-set against the plaintiff’s loss a pecuniary advantage resulting from the wrongful act in question.⁶⁴

In a wrongful death claim, consideration is given to some contingencies that are not taken into account in other kinds of action. The allowance made for these contingencies may be in addition to that made for the general contingencies and vicissitudes of life. In a claim brought on behalf of the surviving spouse⁶⁵ of the deceased, the factors that may be held to be relevant to the assessment of damages include:

- the possibility that the surviving spouse might enter into a new relationship of financially supportive cohabitation;
- the fact that, at the time when the claim is made, the surviving spouse has been or is in a new relationship of financially supportive cohabitation;
- the possibility that the level of support derived from a new relationship may be less than that formerly provided by the deceased, or that entry into a new relationship may have an adverse effect on the surviving spouse’s financial situation;
- the possibility that, were it not for the death of the deceased, the relationship between the surviving spouse and the deceased may have ended in divorce or separation; and
- the possibility that, where the surviving spouse has entered a new relationship of financially supportive cohabitation, that relationship might end in divorce or separation.

64 See pp 13-15 of this Issues Paper.

65 In this Issues Paper, the term “spouse” includes a de facto partner. See the definition of “spouse” in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

The surviving spouse's damages may be discounted to allow for the prospect of a new relationship or, where the surviving spouse is in fact in a new relationship, may be reduced to allow for any financial benefit derived by the surviving spouse from that relationship. They may also, depending on the circumstances of the particular case, be discounted to take into account the possibility that financial support or services provided by the deceased might have ceased because the relationship between the deceased and the surviving spouse might have ended in separation or divorce.

2. THE POSSIBILITY OF A NEW RELATIONSHIP

The injury for which a surviving spouse is entitled to compensation in a wrongful death claim is the loss of the financial support and/or services that the deceased would have been expected to provide if he or she had not died.⁶⁶ The assessment of the surviving spouse's damages may therefore take into account the extent to which that loss is likely to be affected by the prospect of the surviving spouse forming a new relationship which involves the provision of financial support and/or services.⁶⁷

(a) The theoretical basis for discounting for the prospect of a new relationship

Over forty years ago, the High Court commented in relation to the prospect of remarriage by a surviving spouse.⁶⁸

This, for what it is worth in any particular case, has so long been regarded as having some value in the assessment of damages in fatal accident cases that it is profitless to debate how far the established rule is justified.

It has been observed that:⁶⁹

The theoretical justifications for taking remarriage into account differ and are not free from difficulties. [notes omitted]

Initially, the basis for discounting damages in a wrongful death claim for the prospect of remarriage was consistent with the general approach taken by the courts towards the nature of the loss for which the wrongful death action provided a remedy - that is,

⁶⁶ See pp 4-5 of this Issues Paper.

⁶⁷ This rule, which applies in Queensland and all other Australian jurisdictions except the Northern Territory, was the subject of a recent appeal to the High Court: *De Sales v Ingrilli* (HCA P57/2001, 17 April 2002). The position in the Northern Territory is explained at pp 38-40 of this Issues Paper.

⁶⁸ *Carroll v Purcell* (1961) 107 CLR 73 per Dixon CJ, Kitto, Taylor and Windeyer JJ at 79.

⁶⁹ Luntz H, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 540.

that the claim was restricted to financial loss resulting from the death of the deceased.⁷⁰

... the widow might have again married and thus ceased to be dependent ...

However, in Australia, there are statements to be found in some High Court decisions which appear to attribute a different basis to the practice of discounting for the prospect of remarriage. These judgments, which refer to the surviving spouse's "revived capacity to marry" after the death of the deceased, appear to consider that it is not the likelihood that the surviving spouse will remarry that is a relevant factor to be taken into account. Rather, they suggest that the freedom to remarry is of itself a benefit accruing from the deceased's death.⁷¹

In the case of the widowed plaintiff, the capacity to remarry is of value. ... But the question is not, in my respectful opinion, whether by the exercise of the capacity to marry the widow is likely to obtain financial improvement or security: or in particular, that the widow is likely to replace, in whole or in part the financial support she had of her deceased husband. ... It is not ... a question as to whether the widow is likely to remarry and, if so, with what financial success. ... The question ... is what is the value to this widowed plaintiff of her freedom to marry.

A similar view has also been expressed in relation to a claim by a husband for the wrongful death of his wife.⁷²

The prospect of remarriage has always been regarded in claims under Lord Campbell's Act as providing a gain to the husband in the form of a revival of the capacity to marry. It is something which he would not have had, if his wife had not died.

This approach values the freedom to marry as a benefit resulting from the death of the deceased, which must be off-set against the loss of financial support caused by the death.

From a legal perspective, there are a number of problems with the "revived capacity to marry" approach to discounting the damages of a surviving spouse in a wrongful death claim.

Its application has, in the past, led to an anomalous result. The wrongful death of a spouse was held not to have "revived" the capacity of the surviving spouse to cohabit with another person, since that capacity, in contrast to the capacity to marry, had always existed despite the original marriage.⁷³

⁷⁰ *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 per Lord Wright at 617. See pp 4-5 of this Issues Paper in relation to the loss for which damages may be claimed in a wrongful death action.

⁷¹ *Jones v Schiffmann* (1971) 124 CLR 303 per Barwick CJ at 306.

⁷² *Nguyen v Nguyen* (1990) 169 CLR 245 per Dawson, Toohey and McHugh JJ at 265-266.

⁷³ *Wild v Eves* [1970] 2 NSW 326 per Jacobs and Moffitt JJA at 327.

... (the) death of a husband simply does not revive a capacity as distinct from an opportunity to cohabit with another man. That capacity always existed. ... In short, there is no revived capacity to cohabit as there is a revived capacity to remarry, and that test of capacity is the one which has been laid down.

Accordingly, the fact of the surviving spouse's subsequent cohabitation with another partner was not taken into account in determining her entitlement to damages, except to the extent that it was relevant to the issue of the prospect that she may have remarried in the future.⁷⁴ The fact that a surviving spouse has actually remarried is, however, a factor to be considered in the assessment of damages in a wrongful death action.⁷⁵ The application of the "revived capacity to marry" approach therefore created, purely on the basis of the difference in their legal status, a distinction between the assessment of damages for a surviving spouse who had remarried and the assessment of damages for a surviving spouse who had merely entered into a relationship of cohabitation.⁷⁶

Moreover, the theory that the discount for the possibility of remarriage represents a deduction for a benefit gained as a result of the death of the deceased does not satisfactorily explain some other aspects of the assessment of damages in wrongful death claims. For example, although damages paid to a surviving spouse must take into account any support from a subsequent marriage,⁷⁷ the reason for deducting the value of the support can hardly be said to be that the support is a gain accruing from the death of the deceased. Nor does the theory justify the requirement that a surviving spouse's damages be reduced, where relevant, to take into account the surviving spouse's state of health and the possibility of his or her premature death.⁷⁸

The "revived capacity to marry" approach is also inconsistent with contemporary social conditions. Community attitudes to divorce and to de facto relationships have changed significantly over the last few decades. Divorce law reform has made it possible for the capacity to remarry to be revived, without the stigma previously associated with divorce, other than by the death of one party to a marriage. Further, Australian couples are increasingly choosing to live in de facto relationships rather than to enter into formal marriages.⁷⁹ The rise in the number of de facto relationships makes it increasingly likely that the surviving "spouse" of a person who

74 *Ibid.*

75 See pp 23-25 of this Issues Paper.

76 Note, however, that this decision was overruled in *Tegel (AA) Pty Ltd v Madden* (1985) 2 NSWLR 591 and, in the calculation of damages in a wrongful death claim by a surviving spouse, any financial support derived by the surviving spouse from a subsequent de facto relationship must now be off-set against the loss of support caused by the wrongful death. See p 24 of this Issues Paper.

77 See for example *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J, where no claim was made for the period between the date of the surviving spouse's remarriage and the date of his separation from his second wife for the loss of domestic services formerly provided by the deceased.

78 *Williamson v John I Thornycroft & Co Ltd* [1940] 2 KB 658 per du Parcq LJ at 660.

79 In 1997, 756,000 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 2002* at 100.

has been wrongfully killed will be a de facto partner who has never, in fact, lost the capacity to marry.

It would appear that the effect that a new relationship may have on the extent of a surviving spouse's loss of the financial support and services formerly provided by the deceased provides a more satisfactory explanation for the practice of discounting damages in a wrongful death action for the prospect of remarriage or entry into a new relationship of financially supportive cohabitation.⁸⁰ This approach provides a philosophical basis for the way matters such as not only the prospect of entry into a new relationship, but also the fact of a new relationship and the life expectancy of a surviving spouse, are treated in the assessment of damages in a wrongful death claim.

(b) Application of the discount

The inherent uncertainty about what the future might otherwise have held for the claimant makes it impossible to calculate the damages in a wrongful death claim with mathematical precision. Courts have frequently remarked on the difficulty of the assessment process and, in particular, of determining the allowance to be made for the prospect that a surviving spouse will, at some time, enter into a new relationship:⁸¹

The assessment of damages, whether by a judge or a jury, does sometimes, of necessity, involve what is guess work rather than estimation. ...

There is, I think, no way of calculating the extent to which the damages recoverable by a widow in a Lord Campbells Act claim should be affected by her prospects of marrying again. ... The extent to which the prospects of a particular widow marrying again will reduce the damages recoverable by her is not ... a matter which can be governed by rules, even by imprecise rules. It is a matter for the judgment of the assessor in the circumstances of the particular case.

In the absence of a standard formula, courts look at the facts of each case to try to arrive at a rate of discount which neither unduly disadvantages the surviving spouse nor does an injustice to the defendant by requiring the defendant to pay an amount that may, if the financial support and services formerly provided by the deceased are replaced by a new relationship, exceed the surviving spouse's actual pecuniary loss.⁸²

Despite the acknowledged difficulty in determining an appropriate discount, it has been held that any allowance made should be more than purely nominal.⁸³ Although

⁸⁰ *Dominish v Astill* [1979] 2 NSWLR 368 per Samuels JA at 383-386.

⁸¹ *Jones v Schiffmann* (1971) 124 CLR 303 per Menzies J at 308.

⁸² Damages in a wrongful death claim are compensatory in nature, intended to put the plaintiff in a position as near as possible to that which would have existed if the wrongful act had not taken place. See p 12 of this Issues Paper.

⁸³ *Jones v Schiffmann* (1971) 124 CLR 303 per Walsh J at 316.

sometimes a separate calculation is made in relation to the discount for the prospect of entry into a new relationship,⁸⁴ in Queensland there appears to be a growing tendency among trial judges to incorporate the discount into the general discount for the contingencies or vicissitudes of life.⁸⁵ This possibility was also discussed in a recent appeal to the High Court in a wrongful death claim.⁸⁶

Factors which may be taken into account in considering the application of the discount are outlined below.

(i) Personal attributes

The age of the surviving spouse is usually regarded as relevant to the prospects of remarriage.⁸⁷ Generally speaking, the younger the surviving spouse, the greater the likelihood that a significant discount will be made. A judge of the High Court observed that:⁸⁸

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 has expressed the view that “one would expect that a 27 year old widow would be quite likely to remarry”.⁸⁹

The appearance of the surviving spouse is also sometimes regarded as relevant to the prospects of remarriage, particularly where the surviving spouse is female.⁹⁰ 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”.⁹¹ However, in recent cases in the Queensland Supreme Court, there appears to be a trend away from

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

85 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 1997, Williams J, 6 June 1997); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

86 *De Sales v Ingrilli* (HCA P57/2001, 17 April 2002).

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

88 *Id* per Walsh J at 316.

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

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

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

addressing the question of the appearance of a female surviving spouse.⁹² For reasons that have not been articulated by the courts, the appearance of a male surviving spouse is not usually taken into account in considering the likelihood of remarriage.⁹³

Various other personal attributes of the surviving spouse - such as intelligence,⁹⁴ independence,⁹⁵ qualifications and experience,⁹⁶ self-discipline and determination⁹⁷ - may also be taken into account.

(ii) Children

Courts seem generally ready to accept that a surviving spouse - whether male or female - with young children is unlikely to remarry in the foreseeable future. This may be because the surviving spouse is reluctant to remarry while the children are still living at home,⁹⁸ because there is conflict between a subsequent partner and a child of the deceased⁹⁹ or because the presence of young children may be seen as a deterrent to a prospective partner unwilling to assume the responsibility of raising them.¹⁰⁰

(iii) The intentions of the plaintiff

Not infrequently, the surviving spouse of a person who has been wrongfully killed may give evidence in a wrongful death claim that he or she has no

⁹² 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.

⁹³ *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1997, Williams J, 6 June 1997); *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

⁹⁴ *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).

⁹⁵ *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.

⁹⁶ *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.

⁹⁷ *Yorston v Hansen's Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992).

⁹⁸ *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1997, Williams J, 6 June 1997).

⁹⁹ *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J.

¹⁰⁰ *Yorston v Hansen's Maintenance and Construction Pty Ltd* (Unreported, Queensland Supreme Court No 661 of 1989, White J, 6 August 1992).

intention of ever remarrying. The effect of such an assertion depends on the circumstances of the particular case. Sometimes it is accepted unconditionally, with the effect that there is little or no discount for the prospect of remarriage.¹⁰¹ This is particularly so where there has been a failed relationship subsequently to the death of the deceased spouse.¹⁰² In other cases it may be treated with more scepticism.¹⁰³

(iv) The “honeypot” effect

It has sometimes been suggested that the surviving spouse’s prospects of remarriage may be increased by a sizeable award of damages.¹⁰⁴ In the 1950s one Queensland judge referred to a surviving spouse’s damages as a “dowry”.¹⁰⁵ More recently, the Queensland Court of Appeal expressed the view that:¹⁰⁶

... 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.

However, none of the judgments in the decided cases suggests that there was evidence that a surviving spouse to whom damages are paid in compensation for the wrongful death of the deceased partner is, as a result of the award, more likely to form a new relationship of financially supportive cohabitation.

3. THE EXISTENCE OF A NEW RELATIONSHIP

It is not unusual for the hearing of a wrongful death claim to take place several years after the death of the deceased. In some cases, the surviving spouse is in a new relationship of financially supportive cohabitation when the claim is brought. If a surviving spouse has already remarried or has entered into a relationship of financially supportive cohabitation when the wrongful death claim is made, considerations other than those referred to above arise. The prospect that the

¹⁰¹ *McCullagh v Lawrence* [1989] 1 Qd R 163; *Ross v Milzewski* (Unreported, Queensland Supreme Court No 10 of 1997, Williams J, 6 June 1997); *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

¹⁰² *Rodda v Boonjie 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.

¹⁰³ *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).

¹⁰⁴ *Hatton v Stringer* [1955] St R Qd 584 per Philp J at 589; *Lamb v Southern Tablelands County Council* (1988) Aust Torts Reports ¶180-220 per Campbell J at 68,204; *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258.

¹⁰⁵ *Hatton v Stringer* [1955] St R Qd 584 per Philp J at 589.

¹⁰⁶ *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258 per Pincus, Davies JJA and Thomas J at 259.

surviving spouse might enter into such a relationship has been replaced by the reality of the situation and account must be taken of the fact of the new relationship:¹⁰⁷

... where facts are available they are to be preferred to prophecies.

Initially, 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 pecuniary support derived from a subsequent *de facto* relationship.¹⁰⁸ 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.¹⁰⁹

... 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 fact of a new relationship does not mean, however, that all speculation is eliminated. The assessment of the damages to be paid involves an estimation, not of the likelihood of entry into a financially supportive relationship, but of the effect of the new 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 new relationship of financially supportive cohabitation, the former dependency on the deceased has been displaced and the loss resulting from the death of the deceased has been terminated.¹¹⁰ It therefore cannot be assumed that the benefit which the surviving spouse had expected to receive from the deceased has been effectively replaced by the support provided by the new relationship:¹¹¹

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.

¹⁰⁷ *National Provincial Bank, Limited v Bradberry* [1943] Ch 35 per Uthwatt J at 45. See also *Willis v The Commonwealth* (1946) 73 CLR 105. The fact of a new relationship must be taken into account in Queensland and in all other Australian jurisdictions except the Northern Territory. The position in the Northern Territory is explained at pp 38-40 of this Issues Paper.

¹⁰⁸ *Wild v Eves* [1970] 2 NSWLR 326 per Jacobs and Moffitt JJA.

¹⁰⁹ 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.

¹¹⁰ *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845; *Hollebone v Greenwood* [1968] 3 NSWLR 710.

¹¹¹ *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 per Davies LJ at 854.

The assessment of damages must be made in the light of the facts of the new relationship:¹¹²

... 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.

The surviving spouse's damages will not be reduced where the new relationship provides a level of support which is less than that formerly provided by the deceased.¹¹³ Even where the level of support derived from the new relationship is equal to or greater than that given to the plaintiff by the deceased, allowance must still be made for possible future contingencies.¹¹⁴

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 ...

4. THE EFFECT OF DIVORCE OR SEPARATION

(a) The relationship between the deceased and the surviving spouse

(i) The fact of separation or divorce

The assessment of damages in a wrongful death claim by a surviving spouse will take into account the fact that the deceased and the surviving spouse were separated or divorced or were intending to separate or divorce:¹¹⁵

If, at the date of death, it appeared that the wife had proposed to divorce the husband and to remarry, that would clearly be taken into account in determining the value of the benefits which the widow would have derived from the husband, had he not been killed: it would have affected the period during which she would have received those benefits.

Where, at the time of the death of the deceased, the financial support and services previously provided to the surviving spouse by the deceased had been terminated as a result of separation or divorce, in order to succeed in a wrongful death claim the surviving spouse will have to show that there was a reasonable expectation of reconciliation:¹¹⁶

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

113 *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.

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

115 *Dominish v Astill* [1979] 2 NSWLR 368 per Mahoney JA at 393.

116 *Davies v Taylor* [1974] AC 207 per Lord Simon of Glaisdale at 220. See also *Smith v Mackrill* [1979] Qd R 404.

If the (surviving spouse) showed any substantial (ie not merely fanciful) possibility of a resumption of co-habitation she was entitled to compensation for being deprived of that possibility. The damages would, of course, be scaled down from those payable to a dependent spouse of a stable union, according as the possibility became progressively more remote.

(ii) The possibility of separation or divorce

The possibility that the relationship between a deceased and a surviving spouse might, were it not for the death of the deceased, have ended in separation or divorce may be a relevant factor in the assessment of the surviving spouse's damages in a wrongful death claim and may result in a reduction of the spouse's entitlement.¹¹⁷

(b) The relationship between a surviving spouse and a subsequent partner

If, when a wrongful death claim is made, the surviving spouse has begun a new relationship of financially supportive cohabitation, the possibility that this relationship might end and that the surviving spouse might be deprived of any pecuniary benefit it involves, may be taken into account in the assessment of the surviving spouse's damages.¹¹⁸

If the subsequent relationship has already terminated, the extent of the surviving spouse's dependency on the deceased will be reduced by any pecuniary support accruing to the surviving spouse during the time the subsequent relationship existed.¹¹⁹ The failure of a subsequent relationship may also be regarded as lending credibility to the surviving spouse's stated intention not to remarry in the future.¹²⁰

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

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

119 *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

120 *Kuhlewein v Fowke* [2000] QSC 404 (10 November 2000), Mullins J.

CHAPTER 5

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, 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".¹²¹

At present, if a wrongful death claim is made by the surviving spouse of a deceased person,¹²² the surviving spouse's damages may be discounted to allow for the prospect that he or she may remarry or enter into a new relationship of financially supportive cohabitation.¹²³ If, at the time when damages are assessed, the surviving spouse has already remarried or entered into such a relationship, the fact of the marriage or relationship may be taken into account in determining the amount of compensation to be paid to the surviving spouse.¹²⁴ The fact that, at the time of the deceased's death, the deceased and the surviving spouse had separated or divorced may also be relevant.¹²⁵

The practice of considering these factors in the assessment of the surviving spouse's damages raises the question of their effect on a claim made on behalf of a child of the deceased.

2. THE EXISTING LAW

(a) The existence of a new relationship

Although the existence of a new relationship may be taken into account in a wrongful death claim made by a surviving spouse, the assessment of damages is made in the light of the circumstances of the new relationship. Consideration may still be given

¹²¹ *Supreme Court Act 1995* (Qld) s 13, which is set out at p 7 of this Issues Paper.

¹²² In this Issues Paper, the term "spouse" includes a de facto partner. See the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

¹²³ See pp 17-23 of this Issues Paper.

¹²⁴ See pp 23-25 of this Issues Paper.

¹²⁵ See pp 25-26 of this Issues Paper.

to contingencies that have the potential to affect the level of support derived from that relationship.¹²⁶

Where a claim is made on behalf of the children of the deceased and, at the time damages are assessed, the surviving parent has remarried or entered into a relationship of supportive cohabitation, the existence of the relationship will be a relevant consideration in the assessment of the children's damages.¹²⁷ However, although the circumstances of the new relationship will be taken into account, they will not necessarily be determinative of the amount of compensation to be paid to the children.¹²⁸

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.

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.¹²⁹

... 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 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.¹³⁰

¹²⁶ See pp 24-25 of this Issues Paper.

¹²⁷ *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* s 3(3). However, this restriction does not apply to a claim by a child of the deceased, so that 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 34 of this Issues Paper.

¹²⁸ *Mead v Clarke Chapman & Co Ltd* [1956] 1 WLR 76 per Singleton LJ at 82. 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* s 1(1); *Matrimonial Proceedings (Magistrates' Courts) Act 1960* 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 the *Family Law Act 1975* (Cth) ss 66D, 66M provides 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.

¹²⁹ *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 per Willmer LJ at 852-853.

¹³⁰ *Willis v Commonwealth of Australia* (1946) 48 WALR 88 per Dwyer CJ at 92.

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.¹³¹ The benefit from a step-parent must be regarded as less certain than that to be expected from a parent.¹³²

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.¹³³

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.¹³⁴

(b) The possibility of a new relationship

Where the surviving spouse has not, at the time the damages are assessed, remarried or entered into a financially supportive relationship of cohabitation, then the prospect of a new relationship, although a factor which may lead to the discounting of the surviving spouse's damages,¹³⁵ 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.¹³⁶

131 *Hay v Hughes* [1975] QB 790 per Lord Edmund-Davies at 806-807.

132 *Gillies v Hunter Douglas Pty Ltd* [1963] QWN 31; *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December, 1999), Atkinson J.

133 *Hollebone v Greenwood* [1968] 3 NSW 710 per Sugerman AP at 714. See also *Willis v Commonwealth of Australia* (1946) 48 WALR 88 per Dwyer CJ at 92; *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845.

134 *Reincke v Gray* [1964] 1 WLR 832 per Sellers LJ at 836.

135 See pp 17-23 of this Issues Paper.

136 *De Sales v Ingrilli* (2000) 23 WAR 417 per Miller J at 436.

In addition to the uncertainty about the extent of the support that a child might receive from a new 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. The surviving spouse's damages may therefore be discounted to allow for the possibility that, during this period, the loss of the benefits that the deceased would have been expected to provide may be reduced to some extent by benefits derived from a new relationship.

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 new relationship of the surviving parent is likely to be considerably shorter than it is for a surviving spouse.

In Queensland, where there appears to be a growing tendency amongst trial judges to incorporate into the general discount for the contingencies or vicissitudes of life the discount to a surviving spouse's damages in a wrongful death claim for the prospect of remarriage,¹³⁷ children's damages in such claims are not usually discounted for contingencies.¹³⁸

3. THE EFFECT OF DIVORCE OR SEPARATION

(a) The relationship between the deceased and the surviving spouse

Although the damages paid to a surviving spouse may be discounted because of the likelihood that the relationship between the surviving spouse and the deceased

¹³⁷ See p 52 of this Issues Paper.

¹³⁸ 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 1997, Williams J, 6 June 1997); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J. 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 a separate discount was made for the possibility of the surviving spouse's remarriage and was applied to the total amount of damages before the damages were apportioned between the surviving spouse and the children of the deceased.

would have ended in separation or divorce,¹³⁹ a claim by a child of the deceased will generally not be discounted for such a contingency.

If the deceased and the surviving spouse 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.¹⁴⁰ The 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.¹⁴¹ 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 that to discount a child's damages on the basis that the relationship between the deceased and surviving spouse had broken down, or was likely to break down, and that the deceased would not have continued to pay maintenance for the child, is unduly favourable to the wrongdoer responsible for the death of the deceased.¹⁴²

(b) The relationship between the surviving spouse and a subsequent partner

Given that, as a general rule, the damages for a child claimant in a wrongful death action are not discounted to take into account the possibility that the surviving spouse of the deceased might remarry or form a new relationship of financially supportive cohabitation,¹⁴³ it would seem unlikely that the possible breakdown of the surviving spouse's subsequent relationship would have any impact on the amount of the child's compensation. This is the more so since, under the *Family Law Act 1975* (Cth), the legal duty of a step-parent¹⁴⁴ to maintain a child is secondary to that of the parents and arises only if the court so orders.¹⁴⁵

139 See p 26 of this Issues Paper.

140 *Child Support (Assessment) Act 1989* (Cth); *Family Law Act 1975* (Cth).

141 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*: s 60D (definition of "step-parent").

142 See for example the comments of Mullighan J in *Goldsworthy v District Council of Port MacDonnell* (1992) 57 SASR 473 at 489-490.

143 See pp 29-30 of this Issues Paper.

144 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").

145 *Family Law Act 1975* (Cth) ss 66D, 66M.

CHAPTER 6

THE POSITION IN OTHER JURISDICTIONS

1. INTRODUCTION

A review of the law as it currently exists in Queensland 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 allowing certain relatives of a person who died as the result of the wrongful act of another person to claim damages for the wrongful death of the deceased 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) Remarriage

The requirement that, in a wrongful death claim, the damages of a surviving spouse be discounted to allow for the prospect of remarriage¹⁴⁶ led one English judge to observe:¹⁴⁷

... 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

146 See Chapter 4 of this Issues Paper.

147 *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 per Phillimore J at 644-645. 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 per Willmer LJ at 850-851 and per Davies LJ at 855-856.

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 prospect of remarriage should be changed:¹⁴⁸

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”.¹⁴⁹ 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”.¹⁵⁰

Although the Committee did not make a specific recommendation for reform, the wrongful death legislation in the United Kingdom was amended in 1971¹⁵¹ 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.¹⁵²

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:¹⁵³

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.

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

149 *Id* at para 1.

150 *Id* at para 379.

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

152 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.

153 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 prospect 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.¹⁵⁴ There was particular criticism of the situation with respect to actual remarriage.¹⁵⁵

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,¹⁵⁶ 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:¹⁵⁷

... 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

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

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

156 For a discussion of wrongful death claims by children, see Chapter 5 of this Issues Paper.

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

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

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

160 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.¹⁶¹ 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 prospect of financial support from such a relationship but not taking into account the possibility of remarriage.¹⁶² 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 prospect 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.¹⁶³

Despite these recommendations, the 1971 provision has not been amended. The law in the United Kingdom therefore remains that, if the widow (including a de facto partner) 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.¹⁶⁴ 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) 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.¹⁶⁵

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

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

162 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 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 39 of this Issues Paper in relation to the interpretation of a similar provision in the Northern Territory legislation.

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

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

165 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.¹⁶⁶ 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:¹⁶⁷

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.¹⁶⁸ The Commission concluded that the prospect 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.¹⁶⁹

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 prospect of breakdown in the relationship between the deceased and his or her surviving de facto partner should not be taken into account.¹⁷⁰

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

3. AUSTRALIAN JURISDICTIONS

(a) Jurisdictions other than the Northern Territory

In all Australian jurisdictions apart from the Northern Territory, the position remains much as it was in the United Kingdom prior to the 1971 amendment to the fatal accidents legislation.¹⁷¹

¹⁶⁶ *Owen v Martin* [1992] PIQR Q151.

¹⁶⁷ Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 59-60.

¹⁶⁸ *Id* at 60.

¹⁶⁹ Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 65-68.

¹⁷⁰ *Id* at 69.

¹⁷¹ The position in the United Kingdom is described at pp 32-36 of this Issues Paper. For the law in Australian jurisdictions other than the Northern Territory, see Chapter 4 of this Issues Paper.

The existing law has been reviewed by the Law Reform Commissions of New South Wales¹⁷² and Western Australia,¹⁷³ and by the Law Reform Committee of South Australia.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ In relation to actual remarriage, the Commission observed:¹⁷⁸

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 spouse and the court, it is necessary if justice is to be done.¹⁷⁹

The members of the Law Reform Committee of South Australia were unable to come to a unanimous conclusion. The majority recommended that the prospect of

172 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).

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

174 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).

175 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.

176 *Ibid.*

177 *Ibid.*

178 *Id* at 76-77.

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

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.¹⁸⁰ The members of the minority, however, viewed the majority's recommendation as "a very unhappy compromise".¹⁸¹

... it will simply allow our hypothetical widow to tell the court that she has not yet married her millionaire, because her lawyer has advised her not to, but that she proposes to do so as soon as judgment has been entered in her favour and the time for appeal has expired.

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".¹⁸²

None of these reviews has resulted in legislative change to the law. Accordingly, in all Australian jurisdictions apart from the Northern Territory, the assessment of damages in a wrongful death claim by a surviving spouse involves consideration of the entry, or the prospects of entry, by the surviving spouse into a financially supportive relationship of cohabitation,¹⁸³ and of the likelihood that the relationship between the surviving spouse and the deceased may have ended in divorce or separation.¹⁸⁴

(b) The Northern Territory

In the Northern Territory, the original position was altered by statute in 1974. The *Compensation (Fatal Injuries) Act (NT)*¹⁸⁵ now provides that, in the assessment of 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".¹⁸⁶

180 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.

181 *Id* at 9-10.

182 *Id* at 11.

183 See pp 17-25 of this Issues Paper.

184 See pp 25-26 of this Issues Paper.

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

186 *Compensation (Fatal Injuries) Act (NT)* s 10(4)(h). This section has not been amended since the introduction of the legislation in 1974.

A spouse includes a de facto partner.¹⁸⁷ 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”.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰

The Northern Territory wrongful death legislation does not generally apply if the death of the deceased was the result of a motor vehicle accident¹⁹¹ or a workplace accident.¹⁹² 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 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.¹⁹³ In addition, each dependent child is entitled to an amount per week equal to 10% of average weekly earnings at the time the payment is made.¹⁹⁴ 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

187 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)(ii)*.

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

189 See p 26 of this Issues Paper.

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

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

192 See *Work Health Act (NT) ss 52, 189*, which provide that an action for damages may not be brought against an 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.

193 *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.

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

equal shares.¹⁹⁵ Similar provisions apply under the statutory scheme governing compensation for personal injuries caused in workplace accidents.¹⁹⁶

4. NEW ZEALAND

In New Zealand, the *Deaths by Accidents Compensation Act 1952* creates a statutory cause of action for wrongful death,¹⁹⁷ enabling the dependants of a deceased person to claim damages for the loss of support and/or services formerly provided by the deceased. The factors relevant to the assessment of damages in a wrongful death claim are similar to those in Australian jurisdictions other than the Northern Territory.¹⁹⁸ The possibility that the spouse of the deceased may remarry is taken into account.¹⁹⁹ 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.²⁰⁰

However, the effect of the wrongful death legislation in New Zealand is significantly curtailed by the operation of a statutory accident compensation scheme.²⁰¹ 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.²⁰²

5. CANADA

Wrongful death legislation based on Lord Campbell's Act has been enacted in all the Canadian provinces except Quebec.²⁰³

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

196 *Work Health Act* (NT) ss 62, 63.

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

198 The Northern Territory legislation is discussed at pp 38-40 of this Issues Paper.

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

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

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

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

203 *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 1986, c 64.

Generally, the remarriage or prospect of remarriage of a surviving spouse is to be taken into account in the assessment of damages.²⁰⁴ The possibility of a future relationship of financially supportive cohabitation may also be taken into account.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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 probability on any other dependant.²⁰⁸ The Prince Edward Island legislation has been criticised on the grounds that, by ignoring the effect on a surviving spouse's loss of an actual or probable new relationship of dependency, it leads to anomalous results.²⁰⁹

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.

204 See for example Waddams SM, *The Law of Damages* (Looseleaf edition, 2001) note 200 at 6-30 and the cases cited therein.

205 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).

206 See for example *Keizer v Hanna* [1978] 2 SCR 342 at 359-360, 82 DLR (3d) 449 at 454.

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

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

209 Waddams SM, *The Law of Damages* (Looseleaf edition, 2001) at 6-32.

CHAPTER 7

ISSUES FOR CONSIDERATION

1. INTRODUCTION

The terms of the present reference require the Commission to review the practice of taking into account, in the assessment of damages in a wrongful death claim, the remarriage or prospects of remarriage of the surviving spouse²¹⁰ of the deceased, or the surviving spouse's entry or prospects of entry into a new relationship of financially supportive cohabitation. They also require the Commission to consider the relevance of the breakdown, or the possibility of the breakdown, of the relationship between the deceased and the surviving spouse and the effect, if any, that the surviving spouse's entry or prospects of entry into a new relationship, or the breakdown or prospects of breakdown of the surviving spouse's relationship with the deceased, should have on a claim by a child of the deceased.²¹¹

The preceding chapters of this Issues Paper have explained the relevant general principles for the assessment of damages²¹² and the nature of the action for wrongful death.²¹³ They have discussed the law currently applied in Queensland in wrongful death claims by the surviving spouse²¹⁴ and a child²¹⁵ of the deceased, as well as the law and proposals for reform in other comparable jurisdictions.²¹⁶

This chapter highlights issues raised by the terms of reference and seeks responses to questions the Commission believes need to be answered before it can recommend what changes, if any, should be made to the present law.

2. ISSUES ARISING FROM THE APPLICATION OF THE DISCOUNT

The practice of taking into account the fact that a surviving spouse has entered, or the prospect that he or she might in the future enter, a new relationship of financially

210 In this Issues Paper the term "spouse" is used to include a de facto partner. See also the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

211 The full terms of reference are set out on p 1 of this Issues Paper.

212 See Chapter 3 of this Issues Paper.

213 See Chapter 2 of this Issues Paper.

214 See Chapter 4 of this Issues Paper.

215 See Chapter 5 of this Issues Paper.

216 See Chapter 6 of this Issues Paper.

supportive cohabitation is an attempt to minimise the possibility that the eligible members of the deceased's family might be compensated for a pecuniary loss that they have not suffered or that might not occur.²¹⁷ Where relevant, the possibility of divorce or of the breakdown of the relationship between the deceased and the surviving spouse is also taken into account in order to avoid overcompensation of the surviving spouse.²¹⁸

To a large extent, the need to allow for these contingencies derives from the fact that, since the damages in a wrongful death action are compensatory in nature, they must be calculated on a once and for all basis at the time the claim is made and paid as a lump sum.²¹⁹ This requirement means that damages must be assessed in circumstances of uncertainty about what the future holds. However, the wider questions of whether the compensatory principle should continue to apply in claims of this kind and of how damages should be paid are outside the terms of the present reference.

Avoiding either over or undercompensation is difficult. The practice of discounting the damages for the factors outlined above is one that, particularly in the light of contemporary social conditions, gives rise to a number of issues.

(a) Discounting for the prospect of a new relationship

(i) The practice is demeaning to the surviving spouse

It has been said that the practice of trying to determine whether a surviving spouse is likely to enter a new relationship is demeaning to the surviving spouse.²²⁰

The attempt frequently involves an assessment of the surviving spouse's personal attributes.²²¹ For example, in a recent case, one member of the court referred to the "age and credentials" of the deceased's widow.²²²

Where the surviving spouse is female, the assessment of her attributes often involves a reference to her appearance. The emphasis placed in some cases on the appearance of the deceased's widow has been described as "treating

217 See Chapter 4 of this Issues Paper for a discussion of the application of the discount for remarriage.

218 See pp 25-26 of this Issues Paper for a discussion of the effect of the possibility of divorce.

219 See pp 12-13 of this Issues Paper.

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

221 See pp 21-22 of this Issues Paper.

222 *De Sales v Ingrilli* (2000) 23 WAR 417 per Miller J at 437. There has been an appeal to the High Court from the decision of the Full Court of the Supreme Court of Western Australia in this case: *De Sales v Ingrilli* (P57/2001, 17 April 2002).

women like cattle to be appraised”.²²³ Underlying the application of the discount is a stereotypical assumption that a good-looking woman is more likely to enter into a permanent relationship than a less attractive one. To the extent that less importance seems to be placed on the issue of the surviving spouse’s appearance when the surviving spouse is male,²²⁴ the practice of scrutinising a female claimant’s appearance is also discriminatory.

In addition, a surviving spouse, whether male or female, is likely to be subjected to attempts by the defence to gather evidence about his or her personal life to try to establish involvement in a new relationship. These attempts may involve the use of a private investigator.²²⁵

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.

They may also involve cross-examination of a highly personal nature. Even when sensitively handled, 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.

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.²²⁶ The Commission therefore sought information about what respondents considered would be the likely effect of repealing the 1971 provision. Submissions 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”.²²⁷

(ii) The practice is distasteful for the judge

Some judges have expressed their distaste, usually in cases involving a claim by the female spouse of a male deceased, at the need to make a finding about the likelihood that the surviving spouse will remarry or enter a new relationship of financially supportive cohabitation.²²⁸

²²³ *Public Trustee v Paniene* [1971] 1 SASR 297 per Zelling J at 300.

²²⁴ See pp 21-22 of this Issues Paper.

²²⁵ Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 61.

²²⁶ Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 57.

²²⁷ Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 61.

²²⁸ *Buckley v John Allen & Ford (Oxford) Ltd* [1967] 2 QB 637 per Phillimore J at 645. See also *Goodburn v Thomas Cotton Ltd* [1968] 1 QB 845 per Willmer LJ at 850-851; *Public Trustee v Paniene* [1971] 1 SASR 297 per Zelling J at 300; *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J at [32].

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?

However, there are other situations in which it may be necessary for the court to make an assessment of a person's prospects of marriage. For example, a plaintiff who is claiming for personal injuries may seek compensation for loss of amenities - that is, the ability to enjoy the normal activities and functions of life, including a relationship of cohabitation. It may therefore be necessary, in assessing the plaintiff's damages, for the court to determine whether the plaintiff's injuries have affected his or her prospects of forming such a relationship.²²⁹

(iii) The discount is based on speculation

It has been suggested that it is impossible to predict with any degree of accuracy the likelihood that the surviving spouse of a person who has been wrongfully killed will form another relationship of financially supportive cohabitation.²³⁰

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.

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 the task of assessing the prospects of a surviving spouse's remarriage 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:²³¹

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.

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

230 *Id* per Reynolds JA at 377.

231 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 per Samuels JA at 391.

A Canadian commentator has proposed that, in wrongful death claims, the rate of discount for the prospect of a new 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.²³² This suggestion is based on the view that, in today's world:²³³

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 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 in wrongful death claims of statistics to assist them in assessing a surviving spouse's prospects of remarrying.²³⁴

However, the use of statistics is itself not without difficulty. Although the Australian Bureau of Statistics compiles information on the rates of remarriage of widows and widowers,²³⁵ 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 new 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 new 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

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

233 Id at 6-34, 6-35.

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

235 Australian Bureau of Statistics, *Marriages and Divorces, Australia 2000*, 3310.0, 2000 at Tables 2.6, 2.14, 2.15 and 2.20.

such a personal issue should be made on the basis of generalities.²³⁶

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.

Factors that may be relevant to the likelihood of the surviving spouse's forming a new relationship or remarrying include, in addition to the spouse's age and the existence of children of the spouse's relationship with the deceased, the spouse's personal background and attitudes.

In the United Kingdom, respondents to the English Law Commission's consultation paper on wrongful death were strongly opposed to the use of statistics for the purpose of assessing marriage prospects:²³⁷

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.²³⁸

... 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.

(iv) 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 a hundred and fifty years later, there have been dramatic changes in the nature of domestic relationships, in employment trends and in accepted social norms:²³⁹

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

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

238 *Id* at 62.

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

... 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.

The social conditions which prevailed when wrongful death legislation was introduced no longer apply.

The nature of the family group has undergone a major transformation. Marriage between a heterosexual couple is no longer the only acceptable form of domestic relationship. Many couples, including same sex partners, cohabit in a de facto relationship.²⁴⁰

The notion of “dependency” has also changed. The number of two-income families has increased as more women participate in the workforce on either a full or a part time basis. 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 traditional female areas such as home-making and child-rearing.

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 continued application of the discount for the prospect of remarriage could therefore be said to be based on an underlying stereotypical assumption that is no longer valid.

The need to reconsider the practice in the light of contemporary social conditions was a relevant factor in the High Court’s recent decision to grant special leave to appeal in a case involving the application of the discount.²⁴¹

(v) **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.²⁴² The application of the discount for the prospect of remarriage may be such a situation.

240

In 1997, 756,000 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 2002* at 100. These figures do not include same sex relationships.

241

De Sales v Ingrassia (HCA P100/2000, 24 October, 2001). The appeal was heard on 17 April 2002: HCA P57/2001.

242

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”, Griffith University Professorial Lecture, 23 May 2002, at 2-3.

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

However, the number of claims that do not settle before trial is relatively small. The decided cases, including those brought by surviving male spouses, may not provide a sufficient basis to reach a conclusion about the possibility of gender bias in the application of the discount.

(b) Taking a new relationship into account

(i) Remarriage

If the surviving spouse of a person who has been wrongfully killed has remarried when a wrongful death claim is made, the existing law requires the fact of the remarriage to be taken into account in Queensland and in all other Australian jurisdictions apart from the Northern Territory.²⁴³ The Northern Territory legislation provides that no reduction is to be made in the assessment of damages in a wrongful death claim on account of the remarriage of the surviving spouse.²⁴⁴ In the United Kingdom, the remarriage of a widow cannot be taken into account in the assessment of her damages.²⁴⁵

Some proposals for reform have suggested that, while the prospects of the remarriage of a surviving spouse should be ignored for the purposes of the assessment of damages in a wrongful death claim, the actual remarriage of

243 See pp 23-25 of this Issues Paper.

244 *Compensation (Fatal Injuries) Act* (NT) s 10(4)(h). However, the Territory wrongful death legislation does not apply where the death was the result of a motor vehicle accident or a workplace accident. In these situations, the right to bring an action for damages has been subsumed into a statutory compensation scheme. See pp 39-40 of this Issues Paper.

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

the spouse should not.²⁴⁶ Failure to take the fact of remarriage into account has been said to be inconsistent with the principle of compensatory damages:²⁴⁷

To disregard such a relevant and incontrovertible factor as actual remarriage means that the plaintiff is indisputably being overcompensated.

The fact that the surviving spouse has actually remarried disposes of three of the arguments against taking into account the prospects of remarriage. First, since there is no need for intrusive investigations or distressing cross-examination, the surviving spouse is not demeaned. Secondly, the judge does not have to undertake the “distasteful” task of assessing the likelihood that the surviving spouse will remarry or enter into a new relationship. Thirdly, the element of speculation is removed.

However, the idea of taking account of actual remarriage but not the prospects of remarriage has been described as “illogical”²⁴⁸ and “a very unhappy compromise”.²⁴⁹ The main objection to the proposal is the scope that it creates for the surviving spouse to delay remarrying or entering into a relationship of financially supportive cohabitation until after the damages have been assessed so as to maximise the amount of compensation received.

(ii) A new relationship of financially supportive cohabitation

In the assessment of damages in a wrongful death claim, an established de facto relationship is generally treated in the same way as a marriage.²⁵⁰ However, although some of the objections to taking account of the prospects of remarriage do not apply when the surviving spouse has actually remarried, they may still be relevant to the process of determining the existence of a de facto relationship.

For example, the surviving spouse may be subject to investigation and cross-examination that are intrusive and distressing.

²⁴⁶ 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.

²⁴⁷ Law Commission (England), Consultation Paper, *Claims for Wrongful Death* (No 148, 1997) at 57.

²⁴⁸ 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 7 (Majority Report).

²⁴⁹ 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).

²⁵⁰ See for example the definition of “spouse” in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper. See also *AA Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591; *Australian Telecommunications Commission v Parsons* (1985) 59 ALR 535.

(iii) The effect on social adjustment

It is in the best interests of a surviving spouse, and arguably in the public interest, that, when he or she feels ready to do so, the surviving spouse is able to move on with his or her life. At some point this may involve entry into a new relationship of cohabitation. However, if the surviving spouse's wrongful death claim has not been finalised, the surviving spouse may be discouraged from resuming a normal lifestyle because of the risk that the damages in the wrongful death claim will be reduced because of a new relationship.

(iv) The risks of under or overcompensation

It is obviously important that, when a person wrongfully causes the death of another person, the surviving spouse and children of the deceased are adequately compensated for the loss of financial support and services previously provided by the deceased.

If the damages paid to the surviving spouse are discounted to take into account the possibility that pecuniary benefit might be derived from a new relationship of financially supportive cohabitation, there is a risk 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 mean that the surviving spouse and children of the deceased experience considerable financial hardship. There will also be a cost to the general community if, because of the inadequacy of the compensation, the surviving spouse is ultimately forced to rely on social security payments.

However, where the lost financial support and services have been, or are likely to be, replaced in whole or in part as a result of a subsequent relationship entered into by the surviving spouse after the death of the deceased, failure to take the effect of the new relationship into account may lead to overcompensation.

In many cases, the source of compensation is an insurance policy. Insurance has long been recognised as an effective means of distributing the losses arising from the risks inherent in modern living conditions - for example, motor vehicle accidents and workplace injuries.

In recent times, concerns have been expressed about the continued ability of the insurance industry to meet increasing claims and about the cost to the community as a result of rising premiums.

While these problems are outside the scope of the present reference, any consideration of change to the existing system of discounting damages to take into account vicissitudes of life - such as, in a wrongful death claim, the prospects of the remarriage of, or entry into a new relationship by, the

surviving spouse - must give recognition to the impact such changes may have on a cost which is ultimately borne by the community at large.

(v) Incorporating the discount for remarriage into the general discount for vicissitudes

In recent Queensland wrongful death cases, trial judges have tended to incorporate the discount for the prospect of the surviving spouse's remarriage or entry into a new relationship of supportive cohabitation into the overall discount for the vicissitudes of life.²⁵¹ A suggestion to this effect was also canvassed in argument in a recent appeal to the High Court in a wrongful death case.²⁵²

The risk with this approach, however, is that if no specific discount is allocated to the prospect of remarriage or a new relationship, as opposed to other contingencies, the process of discounting becomes less transparent and it may become difficult to determine the weight placed by the trial judge on the possibility of a new relationship.

(c) Taking divorce or separation into account

(i) The prospect of the breakdown of the relationship

Taking into account in the assessment of damages in a wrongful death claim the prospect that the relationship between the deceased and the surviving spouse would have broken down raises issues similar to those considered above in relation to the prospect of the surviving spouse's entry into a new relationship.

It is likely to expose the surviving spouse to intrusive investigation and distasteful questioning and, where there is no obvious indication of a 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.

The use of statistics is also problematic in this context. Although figures²⁵³ are available in relation to divorce rates:²⁵⁴

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 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 1997, Williams J, 6 June 1997); *Row v Willtrac Pty Ltd* [1999] QSC 359 (6 December 1999), Atkinson J. The discount for the vicissitudes of life is discussed at p 13 of this Issues Paper.

252 *De Sales v Ingrilli* (HCA P57/2001, 17 April 2002).

253 Australian Bureau of Statistics, *Marriages and Divorces, Australia 2000*, 3310.0, 2000 at Tables 3.1, 3.3, 3.4, 3.8, 3.18 and 3.19.

254 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, while it may be possible to find data about the statistical likelihood of the breakdown of a marriage, the position is more uncertain with respect to a de facto relationship. The lack of accurate information about de facto relationships makes it impossible to treat the determination of 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".²⁵⁵ 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.²⁵⁶

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.

The Commission concluded that the prospect of divorce between the deceased and the surviving spouse should not generally be taken into account in the assessment of damages.²⁵⁷

However, where it is clear that, apart from the death of the deceased, the relationship between the deceased and the surviving spouse would have ended in separation or divorce and that the level of support provided by the deceased to the surviving spouse would have been affected, failure to take the breakdown of the relationship into account could lead to overcompensation of the surviving spouse. The question therefore arises as to the circumstances in which the likelihood of the breakdown of the relationship between the deceased and the surviving spouse should be treated as a relevant factor in the assessment of damages in a wrongful death claim.

255 *Ibid.*

256 Law Commission (England), Report, *Claims for Wrongful Death* (No 263, 1999) at 66.

257 *Ibid.*

The English Law Commission considered that the test should be the existence of “clear, objective indicia of a deterioration in the claimant’s relationship with the deceased”.²⁵⁸ It recommended that the prospect of marital breakdown should not be taken into account unless there was evidence that, for example, the couple were no longer living together at the time of the death of the deceased, or that either the deceased or the surviving spouse had commenced divorce, separation or annulment proceedings.²⁵⁹

However, with respect to the breakdown of a de facto relationship, the Commission considered itself unable to identify any sufficiently clear and objective factor which would indicate that there was a real prospect of the relationship ending. It therefore recommended that the prospect of the breakdown of a de facto relationship should not be taken into account.²⁶⁰

(ii) The fact of the breakdown of the relationship

If the relationship between the deceased and the surviving spouse had in fact broken down at the time of the death of the deceased, the objections outlined above to taking the prospect of a breakdown into account do not apply. The element of speculation is removed, and there is no need for intrusive or distasteful questioning of the surviving spouse.

Further, it has been pointed out that it is not the actual breakdown of the relationship that is relevant to the assessment of damages in a wrongful death claim, but rather the effect of the breakdown, if any, on the financial benefits provided by the deceased to the surviving spouse.²⁶¹

If, at the time of the deceased’s death, financial arrangements between the deceased and the surviving spouse were such that the deceased was continuing to provide financial benefits to the surviving spouse, it would be the extent of that financial support rather than the fact of the breakdown of the relationship that would be relevant to the assessment of damages. If, on the other hand, there were no ongoing financial contributions to the surviving spouse by the deceased, the surviving spouse would have no basis on which to make a wrongful death claim.

258 Id at 67.

259 Id at 68.

260 Id at 69.

261 Id, note 55 at 65.

(d) Claims by children of the deceased

The issue of the remarriage or prospects of remarriage of, or the entry or prospects of entry into a new relationship by, the surviving spouse of a person who has been wrongfully killed sometimes arises in the course of a wrongful death claim by a child of the deceased and the surviving spouse.

The answer to the question of whether or not the remarriage or prospects of remarriage of the surviving spouse should be taken into account in the assessment of the child's damages will depend in part on the view taken of the issue in relation to the assessment of the surviving spouse's damages. It would be inconsistent if remarriage or the prospect of remarriage of, or the entry or prospects of entry into a new relationship by, the surviving spouse were not to be taken into account in the assessment of the surviving spouse's damages but were to be taken into account in a claim by the child. To the extent that the surviving spouse's prospects of remarriage or of entry into a new relationship remained relevant in a claim by the child, the issues identified at pages 27 to 30 of this Issues Paper would remain unresolved. This is the situation under the current legislation in the United Kingdom,²⁶² which has been extensively criticised.²⁶³

There is also the fact, recognised by the courts, that the new partner of the surviving spouse may not be able or willing to provide the same level of support as was previously given by the deceased.²⁶⁴

3. OPTIONS FOR CONSIDERATION

As outlined in Chapter 6 of this Issues Paper, in a number of comparable jurisdictions there have been legislative changes or recommendations for change to the law with respect to the discounting of damages in a wrongful death claim to allow for the remarriage or prospect of remarriage of the surviving spouse. A review of the position in those jurisdictions, together with a consideration of the issues discussed in this chapter, suggests a number of possible options for the law in Queensland in the future. The following list of options is included only as a guide for respondents and is not intended to be exhaustive.

²⁶² *Fatal Accidents Act 1976* (UK) s 3(3).

²⁶³ See pp 33-35 of this Issues Paper.

²⁶⁴ See pp 28-29 of this Issues Paper.

(a) Option 1**There should be no change to the present law in Queensland.**

This would mean that, in a wrongful death claim by the surviving spouse and children of a person who had been wrongfully killed, the fact or prospect of remarriage or of entry into a new relationship of financially supportive cohabitation by the surviving spouse would continue to be relevant to the surviving spouse's damages, as would the fact or prospect of separation or divorce between the deceased and the surviving spouse and the prospect that any future relationship entered into by the surviving spouse might fail. The circumstances of a new relationship would continue to be able to be taken into account in assessing compensation for the deceased's children.²⁶⁵

As noted earlier in this chapter, the existing law has been criticised on the grounds that application of the discount for the prospect of a surviving spouse's entry into a subsequent relationship of financially supportive cohabitation is speculative, demeaning to the surviving spouse and distasteful to the judge. Further, the social conditions which led to the introduction of the discount are no longer applicable. It may also be that the application of the discount unfairly disadvantages female surviving spouses.

(b) Option 2**The law should be amended so that only the fact of a new relationship or, where relevant, of the failure of a relationship should be taken into account.**

Under this option, only the fact, as opposed to the prospect of a new relationship or the failure of a relationship, would be a relevant consideration in the assessment of damages. While this option overcomes some of the criticisms of the practice of discounting for the prospect of a new relationship or of the failure of a relationship,²⁶⁶ it may result in overcompensation of the surviving spouse if, for example, the relationship between the deceased and the surviving spouse would, if not for the death of the deceased, have been likely to come to an end or if the surviving spouse, after the damages are assessed, enters a new financially supportive relationship. It may also have the effect of encouraging the surviving spouse to delay remarrying or entering into a new relationship of financially supportive cohabitation until after the compensation has been paid.

²⁶⁵ Claims made on behalf of the children of a person who has been wrongfully killed are discussed in Chapter 5 of this Issues Paper.

²⁶⁶ See pp 43-49 and 52-54 of this Issues Paper.

(c) Option 3

The law should be amended so that neither the fact nor the prospect of a new relationship should be taken into account.

This option has the advantage of applying a consistent approach to both the fact and the prospect of a new relationship. It would therefore avoid the argument that a surviving spouse might delay entering into a new relationship for fear that his or her entitlement to compensation might be reduced. It would also avoid the risk of delaying the surviving spouse's social readjustment.

However, it creates the potential, in a case where the surviving spouse has entered a new relationship from which he or she derives a level of support equal to or greater than that formerly provided by the deceased, to compensate the surviving spouse for a loss which has not in fact occurred. This situation would be inconsistent with the compensatory principle of assessment of damages. It may be unfair to a defendant, and may impose an unjustifiable cost on the community as a whole.

This option would not change the existing law with respect to the relevance of the breakdown of a relationship.

(d) Option 4

The law should be amended so that:

- **neither the fact nor the prospect of a new relationship should be taken into account; and**
- **neither the fact nor the prospect of the failure of a relationship should be taken into account.**

The comments in relation to Option 3 above would also apply to this option. However, Option 4 extends further than Option 3 in that it would also preclude consideration being given to the fact or possibility of the breakdown of a relationship.

In the case of the relationship between the deceased and the surviving spouse, ignoring the fact or the possibility of the breakdown of the relationship could result in overcompensation of the surviving spouse if the breakdown would have shortened the period for which the surviving spouse would have continued to receive support and services from the deceased. In the case of a subsequent relationship of financially supportive cohabitation entered into by the surviving spouse, the surviving spouse would not be disadvantaged if neither the possibility nor the fact of the breakdown of the relationship were taken into account. Since the surviving spouse's damages would not have been discounted for the possibility or fact of the new relationship, the surviving spouse would not be at risk of undercompensation if there were no allowance for the fact or possibility of the failure of the new relationship.

(e) Option 5

The prospect of a new relationship or of the breakdown of a relationship should continue to be taken into account, but as part of the general discount for contingencies.

Because this option would still require consideration to be given to the application of the discount, it would be open to the criticisms made of the present practice of discounting for the prospect of a new relationship of financially supportive cohabitation. However, it would avoid the process of double discounting which sometimes occurs if a discount is made for the general contingencies of life and the already discounted sum is then further discounted for the prospect of a new relationship.

(f) Option 6

The prospect of a new relationship should continue to be taken into account by means of a standard rate of discount.

Under this option, an allowance would continue to be made for the prospect that a surviving spouse might enter a new relationship of financially supportive cohabitation. However, the need for demeaning and distasteful enquiries into the surviving spouse's personal life and the existing element of speculation would be obviated by recourse to a standard rate of discount. The rate of discount could be fixed on a sliding scale according to, for example, the age of the surviving spouse.

This option removes some of the objections to the existing law. It 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 is not without its own difficulties. 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. There would also be the problem of striking appropriate rates of discount.

4. CALL FOR SUBMISSIONS

In order to assist in the formulation of its recommendations, the Commission invites interested individuals and organisations to respond to any or all of the following questions. Respondents are also welcome to comment on the options outlined above or on any other issues relevant to the terms of reference. Information on how to make a submission is set out at the beginning of this Issues Paper. It would be helpful if respondents explained the reasons for their answers to the questions.

The terms of reference are set out at page 1 of this Issues Paper. Respondents are reminded that wider questions such as the right to claim compensation for wrongful death, the loss for which compensation is available in a wrongful death claim, the compensatory nature of damages in a wrongful death claim and the method of payment of damages, and more general questions involving liability at common law for negligence are outside the current terms of reference.

- 1. Should the prospect that the surviving spouse²⁶⁷ of a person who has been wrongfully killed might enter into a new relationship of financially supportive cohabitation (whether a formal marriage or a de facto relationship) continue to be taken into account in the assessment of the surviving spouse's damages in a wrongful death claim?**
- 2. If yes to (1), on what basis should the determination about the prospects of entry into a new relationship be made?**
- 3. Should the fact that the surviving spouse of a person who has been wrongfully killed has entered into a new relationship of financially supportive cohabitation continue to be taken into account in the assessment of the surviving spouse's damages in a wrongful death claim?**
- 4. Should the prospect that the marriage between a person who has been wrongfully killed and the person's surviving spouse might have ended in separation or divorce be taken into consideration in the assessment of the surviving spouse's damages in a wrongful death claim?**
- 5. If yes to (4), should there be a need to establish particular criteria indicating the prospect of the breakdown of the relationship and, if so, what factors would be sufficient?**
- 6. Should the prospect that a de facto relationship between a person who has been wrongfully killed and the person's surviving partner might have broken down be taken into consideration in the assessment of the surviving partner's damages in a wrongful death claim?**
- 7. If yes to (6), should there be a need to establish particular criteria indicating the prospect of the breakdown of the relationship and, if so, what factors would be sufficient?**

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In this Issues Paper the term "spouse" is used to include a de facto partner. See also the definition of "spouse" in s 18 of the *Supreme Court Act 1995* (Qld), which is set out at p 7 of this Issues Paper.

8. **Should the fact that the marriage between a person who has been wrongfully killed and the surviving spouse had broken down be taken into account in the assessment of the surviving spouse's damages in a wrongful death claim? If so, what factors would be sufficient to establish the breakdown of the marriage?**
9. **Should the fact that a de facto relationship between a person who has been wrongfully killed and the surviving partner had broken down be taken into account in the assessment of the surviving partner's damages in a wrongful death claim? If so, what factors would be sufficient to establish the breakdown of the relationship?**
10. **Should any of the following be taken into account in the assessment of the damages of a child of a person who has been wrongfully killed and a surviving spouse:**
 - **the prospect of the entry of the surviving spouse into a new relationship of financially supportive cohabitation;**
 - **the entry of the surviving spouse into a new relationship of financially supportive cohabitation;**
 - **the prospect that the marriage between the deceased and the surviving spouse would have ended in divorce or separation;**
 - **the prospect that the de facto relationship between the deceased and the surviving spouse would have broken down;**
 - **the fact that the marriage between the deceased and the surviving spouse had ended in divorce or separation;**
 - **the fact that the de facto relationship between the deceased and the surviving spouse had broken down?**
11. **Does the practice of discounting damages in a wrongful death action for the prospects of remarriage of the surviving spouse operate unfairly against women?**
12. **If the practice is to continue of discounting damages in a wrongful death claim for the prospect of remarriage of the surviving spouse or for the prospect that the deceased and the surviving spouse might have separated or divorced, to what extent, if at all, should statistics be used to determine the rate of discount? If reliance is to be placed on statistical information, what information should be used?**

- 13. If the practice is to continue of discounting damages in a wrongful death claim for the prospect of remarriage of the surviving spouse, should the discount be incorporated into the general discount for contingencies?**
- 14. If the practice is to continue of discounting damages in a wrongful death claim for the prospect of remarriage of the surviving spouse, should there be a standard rate of discount fixed according to:**
 - the age of the surviving spouse;**
 - some other factor?**