Queensland Parliamentary Library

No More 'Remarriage Discounts' – The Justice and Other Legislation Amendment Bill 2004 (Qld)

In November 2002, the High Court published its decision in De Sales v Ingrilli. *By majority it held that, ordinarily, when the court is assessing the damages of a surviving spouse in an action for wrongful death, the damages should not be reduced on account of the possibility that the surviving spouse may make a beneficial remarriage or enter into a lasting new relationship in the future.* ***Part 24*** *of the* ***Justice and Other Legislation Amendment Bill 2004 (Qld)*** *amends the* Supreme Court Act 1995 *(Qld) to give legislative effect to the High Court decision when Queensland courts are assessing damages in wrongful death cases. The recommendations of the Queensland Law Reform Commission's Report,* Damages in an Action for Wrongful Death, *are also reflected in the amendments.*

Nicolee Dixon

Research Brief No 2004/14

Queensland Parliamentary Library
Research Publications and Resources Section

Ms Karen Sampford, Director (07) 3406 7116
Ms Nicolee Dixon, Senior Parliamentary Research Officer (07) 3406 7409
Ms Renee Giskes, Parliamentary Research Officer (07) 3406 7241

Research Publications are compiled for Members of the Queensland Parliament, for use in parliamentary debates and for related parliamentary purposes. Information in publications is current to the date of publication. Information on legislation, case law, or legal policy issues does not constitute legal advice.

Research Publications on Bills reflect the legislation as introduced and should not be considered complete guides to the legislation. To determine whether a Bill has been enacted, or whether amendments have been made to a Bill during consideration in detail, the Queensland Legislation Annotations, prepared by the Office of the Queensland Parliamentary Counsel, or the Bills Update, produced by the Table Office of the Queensland Parliament, should be consulted. Readers should also refer to the relevant Alert Digest of the Scrutiny of Legislation Committee of the Queensland Parliament.

ISSN 1443-7902
ISBN 0 7345 2896 5
NOVEMBER 2004

Inquiries should be addressed to:
Director, Research Publications & Resources
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Ms Karen Sampford. (Tel: 07 3406 7116)
Email: Karen.Sampford@parliament.qld.gov.au

Information about Research Publications can be found on the Internet at:
http://www.parliament.qld.gov.au/Parlib/Publications/publications.htm

CONTENTS

EXECUTIVE SUMMARY

Historically, it was not possible for a spouse or other family of a person whose death was caused by the negligence of another person to bring an action against that other person for damages for the loss the spouse or family had suffered as a result of the death. In 1846, the UK Parliament passed legislation which became known as 'Lord Campbell's Act'. The legislation confers a statutory cause of action on certain members of the deceased's family where the death was caused by the wrongful act of the defendant. Every Australian jurisdiction has legislation mirrored on Lord Campbell's Act. In Queensland, the relevant provision is found in s 17 of the *Supreme Court Act 1995* (Qld) (**pages 1-2**).

In a wrongful death action, damages are awarded for the loss of expectation that the deceased would have provided the relative with financial support or its equivalent, and services (eg domestic help) for the future. Damages will comprise the actual loss up to the time of the trial and the expected future loss (**pages 2-3**).

Before the High Court's decision in *De Sales v Ingrilli*,[1] the courts assessing damages in a wrongful death action tended to have regard to the possibility that the plaintiff surviving spouse may remarry or form a lasting relationship to the surviving spouse's financial benefit. The possibility was taken into account in reducing the damages awarded to the surviving spouse. Such 'remarriage discount' was made as a separate deduction or it enlarged the amount of the general discount for 'vicissitudes of life' or common contingencies. This created a number of anomalous judgements and caused judges to engage in subjective assessments of the surviving spouse's chances of repartnering (**pages 3-8**).

In November 2002, the High Court gave its decision in *De Sales v Ingrilli*. By majority, it was determined that, ordinarily, in assessing the damages to be awarded under 'wrongful death' legislation, it is not appropriate to reduce the award on the basis that the claimant may remarry or form a long term relationship which results in financial benefit. If there was evidence of a new relationship having been formed up to the trial, or intended to be entered into, by the surviving spouse, then account should be taken of evidence revealing whether it has resulted in financial advantage or disadvantage. However, it cannot be assumed that the advantage would necessarily continue (**pages 8-15**).

The Queensland Law Reform Commission's November 2003 Report, *Damages in an Action for Wrongful Death*, also recommended that no discount should be made in assessing the damages of a surviving spouse for the possibility that they may remarry or form a lasting financially beneficial relationship in the future. It also recommended that if there was evidence that the surviving spouse has actually formed a lasting relationship, when considering future benefits it should not be assumed that such will necessarily continue and the various contingencies must be considered (**pages 15-17**).

---

[1] [2002] HCA 52.

Part 24 of the **Justice and Other Legislation Amendment Bill 2004 (Qld)** amends the *Supreme Court Act 1995* (Qld) to give legislative effect to *De Sales v Ingrilli* when Queensland courts are assessing damages in wrongful death cases. It also implements recommendations of the Queensland Law Reform Commission (**pages 17-19**).

Victoria and the Northern Territory have also legislated to remove the 'remarriage discount'. The situation in other countries varies with the United Kingdom, for example, having abolished the 'remarriage discount' only for widows (**pages 19-23**).

1 INTRODUCTION

In November 2002, the High Court published its decision in *De Sales v Ingrilli.*[2] By majority it held that, ordinarily, when the court is assessing the damages of a surviving spouse in an action for wrongful death, the damages should not be reduced on account of the possibility that the surviving spouse may make a beneficial remarriage or enter into a lasting new relationship. **Part 24** of the **Justice and Other Legislation Amendment Bill 2004 (Qld)** amends the *Supreme Court Act 1995* (Qld) to give legislative effect to the High Court decision when Queensland courts are assessing damages in wrongful death cases. The recommendations of the Queensland Law Reform Commission's Report, *Damages in an Action for Wrongful Death*, are also reflected in the amendments.

2 SOME HISTORY

Historically, it was not possible for the family of a person whose death was caused by the negligence of another person to bring an action against that other person for damages for the loss the family had suffered as a result of the death. This was the situation in both the United Kingdom and Australia. In 1846, the UK Parliament passed the *Act for Compensating the Families of Persons Killed by Accidents 1846*, which became known as 'Lord Campbell's Act' and actions under it as 'Lord Campbell actions'. It has since been superseded by the *Fatal Accidents Act 1976* (UK). The legislation confers a statutory cause of action on certain members of the deceased's family where the death was caused by the wrongful act of the defendant.

Every Australian jurisdiction has legislation mirrored on Lord Campbell's Act. In Queensland, the relevant provision is found in s 17 of the *Supreme Court Act 1995*. **Section 17** provides –

> **17.** *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.*

---

[2] [2002] HCA 52; (2002) 212 CLR 338; (2002) 193 ALR 130. The online version found at www.austlii.edu.au will be referred to in this paper. To download, go to http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/2002/52.html?query=title+%28+%22ingrilli%22+%29

Section 18 of the *Supreme Court Act 1995* provides that the action is for the benefit of the spouse, parent and child of the person whose death was caused by the wrongful act and shall be brought by and in the name of the executor or administrator of the person deceased. A 'spouse' includes a de facto partner of the deceased within the meaning of s 32DA of the *Acts Interpretation Act 1954*. The gender of the partner is irrelevant. A 'child' also includes a child of a de-facto relationship. It goes on to state that such damages may be given as the jury[3] may think proportioned to the injury resulting from such death to the parties respectively.

3 NATURE OF WRONGFUL DEATH ACTIONS

The following points can be briefly made about the nature of a wrongful death claim under the legislation:

- the claim is for damages suffered not by the deceased, but by his or her family after the death;
- the term 'injury' has been confined to a pecuniary or economic loss. There is no compensation for grief, sorrow, or bereavement (however, the *Wrongs Act 1936* (SA) and the *Compensation (Fatal Injuries) Act* (NT) allow damages for solatium);[4]
- damages are awarded for the loss of expectation that the deceased would have provided the relative with financial support or its equivalent, and services (eg domestic help) for the future: Damages will consist of the actual loss up to the time of the trial and the expected future loss;[5]

---

[3] Note that **clause 111** of the **Justice and Other Legislation Amendment Bill 2004 (Qld**) proposes to replace the reference to the 'jury' with a reference to the 'court' because jury trials are no longer available for personal injuries actions in Queensland.

[4] *De Sales v Ingrilli* [2002] HCA 52 [10] per Gleeson J, [91] per McHugh J, [126]-[127] per Kirby J. 'Solatium' is a sum of money awarded as compensation for a relative's grief and suffering: *The CCH Macquarie Dictionary of Law* (2nd ed.), Macquarie Library, June 1993, p 160.

[5] *De Sales v Ingrilli* [2002] HCA 52 [91] per McHugh J citing a number of authorities such as *Blake v Midland Railway Co* (1852) 18 QB 93; *Parker v Commonwealth* (1965) 112 CLR 295, 308; *Davies v Taylor* [1974] AC 207.

- in assessing damages, the court must value the chance that each relative had of obtaining financial benefit from the deceased if that person had not been killed;[6]

- the injury does not have to be a loss arising from dependency. It can occur in circumstances where there is no dependency, such as where a couple obtain financial advantage from each other from their separate incomes. Thus, it is not necessary that the relative have been financially dependent on the deceased only that there was a reasonable expectation of benefit;[7]

- only those persons who fall within the defined class of relative in s 18 of the *Supreme Court Act* can benefit out of the claim. That class is quite restricted. There may be other persons, apart from those named in the legislation, who might suffer financial loss as a consequence of the death of a person. For example, the deceased might have been their employer, their benefactor, or business associate.[8]

4 THE ASSESSMENT OF DAMAGES

Calculation of the present value of the benefit that would have been received over time is a matter fraught with difficulty and considerable speculation.

The starting point in determining the surviving spouse's award of damages is for the court to assess what benefits the deceased provided to the family (income and provision of services) up to the time of trial or settlement, and the share of the benefit that each relative would have enjoyed. This usually involves consideration of the income of the deceased at the time of death and to work out how much was used for the benefit of the surviving spouse. There is room for considerable mistakes even in making that determination but this is nothing compared with the scope for error in determining the future expectation of benefit.[9]

The next step is determining the family's (and the surviving spouse's share thereof) anticipated loss of benefits for the future. The court must determine the value of financial support and services that would have been provided for each relative during the deceased's lifetime, and the period for which that would have continued. For example, it might be reasonable to consider that the surviving spouse would

---

6 *De Sales v Ingrilli* [2002] HCA 52 [91] per McHugh J.

7 *De Sales v Ingrilli* [2002] HCA 52 [12] per Gleeson CJ.

8 *De Sales v Ingrilli* [2002] HCA 52 [10] per Gleeson CJ.

9 *De Sales v Ingrilli* [2002] HCA 52 [96] per McHugh J.

have expected to receive a benefit until the deceased's normal age of retirement. Thus, the initial sum calculated is the present value of the spouse's total expected benefit.[10]

However, the law requires that benefits, if any, that accrue to a relative by reason of the deceased's death must be taken into account. The damages are for the balance of gains and losses for the injury sustained by the death. Note, however, that s 23 of the *Supreme Court Act* (and equivalent legislative provisions in other jurisdictions) specifies certain benefits that must not be taken into account in assessing damages in a wrongful death action, and those include insurance payouts, superannuation entitlements, and gratuities.

The court will usually also allow for contingencies or 'vicissitudes of life' that may affect the loss of benefit sustained by a claimant. The court may adjust the award of damages to recognise that there are uncertainties in predicting what will happen in the future. Some events may be quite unlikely to occur or it is impossible to predict with any accuracy that they will occur, while others are more likely to come about or are more able to be specifically calculated in the circumstances of the case.[11] Such an adjustment is a feature of personal injuries actions in general. Certain contingencies might be provided for by a general allowance for the 'vicissitudes of life'. In some jurisdictions there are 'standard' figures for general contingencies or 'vicissitudes of life' (e.g. 15% in New South Wales and 2%-6% in Western Australia) which can be applied to reduce the initial assessment of damages. It is not in every case that damages will be reduced because the circumstances of the particular claimant concerned must be taken into account. The courts have also indicated that, in assessing damages, allowances must be made for future contingencies – both positive and negative.[12]

Examples of contingences to be considered in a wrongful death claim include that at some future point in time, the deceased may have become unemployed or may have fallen ill and been unable to earn any, or the same degree of, income. He or she may have become reliant upon the plaintiff spouse for financial support. On the other hand, the deceased may have been promoted, or the spouse might have died before the deceased. In the current social climate, the couple may have divorced at some later stage had it not been for the death intervening, following

---

10 Note that in most jurisdictions, including Queensland, damages recoverable for personal injury and economic loss are capped and that probably applies to wrongful death claims: see *Civil Liability Act 2003* (Qld), Ch 3 Part 3.

11 *De Sales v Ingrilli* [2002] HCA 52 [14]-[15] per Gleeson CJ, [128]-[130] per Kirby J.

12 See QLRC Report, pp 56-59 citing a number of cases; see also *De Sales v Ingrilli* [2002] HCA 52 [78] per Gaudron, Gummow and Hayne JJ.

which the spouse might have entered into a new relationship with a wealthy person, or, on the other hand, with a person who has little money and few prospects.

It is in this context that many courts in the past, even the recent past, have turned to consider the prospect of the surviving spouse who is making the claim remarrying or entering into a lasting relationship in circumstances that would improve the spouse's financial position.

5 PROSPECTS OF REMARRIAGE PRIOR TO *DE SALES v INGRILLI*[13]

Before the High Court's decision in *De Sales v Ingrilli* in November 2002, the courts assessing damages in a wrongful death action tended to have regard to the possibility that the plaintiff surviving spouse (the surviving spouse) may remarry or form a lasting relationship to the surviving spouse's financial benefit. The possibility was taken into account in reducing the damages awarded to the surviving spouse as either a separate deduction or as enlarging the amount of the general discount for 'vicissitudes of life' or general contingencies.[14]

One of the arguments often raised to justify the discount of the damages award to account for the possibility of remarriage was that to do otherwise would give the surviving spouse a windfall and to require the defendant to pay for more than what the surviving spouse has lost financially.[15] Damages tend to be assessed in a way that does justice to both the plaintiff and the defendant. It could be argued that it would do a real injustice to a defendant if a surviving spouse's damages were to be assessed as if he or she were never to remarry and be supported on a scale far beyond that provided by the deceased.[16]

There are essentially two questions involved. The first is the likelihood that the surviving spouse will remarry. The second is whether the remarriage is likely to be to the financial advantage of the surviving spouse. Where the surviving spouse has remarried or is intending to remarry, then it is essentially the second question that remains to be answered.

---

13 The term 'remarriage' is used for convenience but it also encompasses a de facto relationship.

14 *Willis v Commonwealth* (1946) 73 CLR 105; *Jones v Schiffmann* (1971) 124 CLR 303.

15 For example, see McHugh J in *De Sales v Ingrilli* [2002] HCA 52 [87].

16 As asserted by Callinan J in *De Sales v Ingrilli* [2002] HCA 52 [186].

5.1 WILL THE SURVIVING SPOUSE REMARRY?

When attempting to assess the prospect that surviving spouse will enter into a lasting relationship in the future, the courts had regard to relevant statistical tables about probability of remarriage and to the particular circumstances of the individual surviving spouse. In determining the latter, the courts considered matters that involved subjective elements. In particular, the court often assessed the surviving spouse's demeanour, personality and other attributes such as age, capacity for marriage and number and age of any children.

In *Elford v FAI General Insurance Company Limited* the Queensland Court of Appeal commented:

> *On the basis of [the statistics], one would expect that a 27 year old widow would be quite likely to remarry. Apart from statistics, it is evident that remarriage of young widows is fairly common.*
>
> *It is true that an individual plaintiff widow might have a very small chance of remarriage, but 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.*[17]

In earlier cases, the courts appeared to place some weight on the female surviving spouse's appearance but this does not appear to feature in more recent cases.[18]

In *De Sales v Ingrilli*, Kirby J observed that in estimating the prospects that the surviving spouse (usually a widow) would find good economic and domestic fortune:

> *it was not uncommon to see widows described by judges as "well groomed, attractive and presentable ... [with] a personable and warm nature" and other such like epithets. On my reading of the cases, such an evaluation of the physical attractiveness is not normally made in the case of male claimants. If the judge considered that the widow was "elderly" or of "unattractive appearance or disposition, or suffers from some disability, or is encumbered with a large number of young children" such comments (except perhaps the last) might usually be left unsaid but with only a small discount for the prospects of remarriage being allowed.*[19]

It was also not unusual for a surviving spouse to be asked about their intentions regarding a future relationship and, on occasions, defendants engaged private investigators to trail the surviving spouse. This, in some cases, might have proved

---

17 [1994] 1 Qd R 258, 259.

18 Queensland Law Reform Commission, *Damages in an Action for Wrongful Death*, Report No 57, November 2003 (QLRC Report), p 38.

19 [2002] HCA 52 [133].

quite traumatic for a plaintiff who might have recently suffered the loss of their partner.[20]

There have also been comments from some judges that the process is distasteful for the judiciary.[21] However, there are many exercises undertaken in personal injuries cases to assess the extent of a plaintiff's loss that might be considered to be unpalatable. For example, the court might be required to hear and assess evidence about the level of a person's sexual impairment as a result of injury.[22]

5.2 WILL THE REMARRIAGE BE FINANCIALLY BENEFICIAL?

Just because a court might assess a surviving spouse's prospects of remarriage to be high, this does not mean that the new union will result in financial advantage to the surviving spouse. If the surviving spouse is a widow, she might marry a work-shy, or extravagant, or unreliable man.[23] It also cannot be determined whether the new relationship will survive and what 'slings and arrows' of fortune will befall it. In *De Sales v Ingrilli*, the unhelpfulness of fixing on a surviving spouse's personality or credentials or some concept of marriageability was noted by some of the justices.[24] It will always be difficult to predict whether a surviving spouse will marry well at some future time and that the benefits of the union will continue.

Of course, in any case involving damages for personal injury or economic loss, there are a great many uncertainties and imponderables. In *De Sales v Ingrilli*, McHugh J noted that it is a difficult task for courts to have to assess the value of the loss of the chance of winning a beauty contest or loss of prize money from training and racing of a horse.[25]

In cases where the surviving spouse *has* remarried or entered into a lasting relationship with an identified person after the deceased's death or intends to do so,

---

[20] QLRC Report, p 39. See also England, The Law Commission, *Claims for Wrongful Death*, Report No 263, November 1999, discussed further below.

[21] See, for example, *De Sales v Ingrilli* [2002] HCA 52 [148]-[149] per Kirby J, [189]-[190] per Callinan J.

[22] *De Sales v Ingrilli* [2002] HCA 52 [189] per Callinan J.

[23] *De Sales v Ingrilli* [2002] HCA 52 [26] per Gleeson CJ.

[24] See, for example, [2002] HCA 52 [73] per Gaudron, Gummow and Hayne JJ.

[25] [2002] HCA 52 [104]. See also Gleeson CJ at [31].

the courts have tended to take any evidence of such into account, including whether or not it is financially beneficial to the spouse.

The social and economic position of a female spouse in 2004 is significantly different to her counterpart when Lord Campbell's Act was passed in the United Kingdom over 150 years ago. No longer is the typical family one with a breadwinner husband and the stay-at-home financially dependent wife. These days, many women have their own careers and have, or are capable of, financial independence. Society now also recognises a wide variety of relationships in addition to marriage, including de facto relationships and same sex couples. There has also been a growth in social welfare during the past century where government assistance is increasingly available to families who lose their means of support through death or injury of the main breadwinner.

In *De Sales v Ingrilli*, Gaudron, Gummow and Hayne JJ noted that courts cannot any longer make assumptions about the role that an individual can be expected to play in the family and in the economy, *yet it is assumptions of conformity to some unstated norm which underpin the making of a "discount for remarriage"*.[26] Kirby J said that the legitimacy and feasibility of the inquiry that trial judges were expected to perform in these types of cases was not challenged until the present instance; it was simply assumed to be proper and necessary. However, the social assumptions upon which it depended have dramatically changed.

On the other hand, Callinan J warned that broad submissions about change should be accompanied by evidence such as that provided by statistical tables to show the extent of change. His Honour said that courts should be wary of such claims, leaving it to the legislature to identify change and legislate where appropriate.[27]

6 HIGH COURT DECISION IN DE SALES v INGRILLI

In November 2002, the High Court gave its decision in *De Sales v Ingrilli*.[28] By majority, it was determined that, ordinarily, in assessing the damages to be awarded under 'wrongful death' legislation, it is not appropriate to reduce the award on the basis that the claimant may remarry or form a long term relationship which results in financial benefit. It should not be a matter for separate discount or an item added to the general discount for 'vicissitudes of life'. The possibility of such financially beneficial repartnering was a contingency just like any other event

---

[26] [2002] HCA 52 [65].

[27] [2002] HCA 52 [191]-[192].

[28] [2002] HCA 52.

and should be just one of the items falling within the standard discount for 'vicissitudes of life'. If there was evidence at trial of a new relationship formed, or intended to be entered into, by the surviving spouse, then if the evidence also indicates financial advantage to the surviving spouse arising out of the new relationship, that needs to be taken into account. However, it cannot be assumed that the advantage would necessarily continue.

6.1 THE FACTS AND GROUNDS OF APPEAL

The appellant, Mrs De Sales, was 27 years old when her 31 year old husband was killed in an accident on the respondent's property in circumstances caused by the negligence of the respondent and the contributory negligence of the deceased husband (the deceased). At that time, Mr and Mrs De Sales had been married for over five years and had two children. The deceased was a practising accountant and tax agent and was employed as a financial controller and company secretary at the time of death. Mrs De Sales worked in the home full-time after the birth of her second child. At the time of her husband's death, she and the children were totally dependent upon the deceased for financial support. At the time of trial in 1999, Mrs De Sales was 36 and the children were aged 12 and 9. After the accident, Mrs De Sales commenced working full-time in a number of occupations. At the time of trial, she had not remarried but had been involved in one relationship for over three years. She had no plans to remarry but had not decided against the prospect. Her intention was to support her children's education until they graduated from university and to then travel and study in Europe.

Mrs De Sales brought an action in the District Court of Western Australia under the *Fatal Accidents Act 1959* (WA), claiming damages on behalf of herself and her children for injury sustained by them as a result of the death. The respondent was found to have been negligent but his liability was reduced by one third due to the deceased's contributory negligence. Then the need for assessment of damages arose. In doing so, the trial judge awarded (before taking the deceased's contributory negligence into account in assessing damages) an amount of $95,000 to the appellant's daughter, and $101,592 to the son. In assessing damages to be awarded to Mrs De Sales, he deducted 5% for the chance that she would obtain support from remarriage. No discount was applied in respect of general contingencies/'vicissitudes of life'. The total award to Mrs De Sales was $617,787.

Mrs De Sales appealed to the Full Court of the Supreme Court of Western Australia, one of the grounds being that the trial judge was in error in applying the 5% discount for the prospect of remarriage (the remarriage discount).[29] The

---

[29] *De Sales v Ingrilli* (2002) 23 WAR 417.

respondent, in a cross-appeal, argued that the trial judge should have applied a higher remarriage discount than 5%. The Full Court, by majority, increased the remarriage discount to 20% and also found that a 5% discount should be applied for general contingences, thus resulting in a 25% reduction in the amount of the initial damages award. Miller J, with whom Parker J agreed, observed that *for a woman of the appellant's age and credentials, a 20 per cent deduction would be appropriate*.[30]

Liability was not in issue before the High Court. The main grounds of appeal to the High Court were –

- that the lower courts had made an error in applying any remarriage discount and that such a discount should be abolished;
- alternatively, that the remarriage discount should not have been increased from 5% to 20%.

6.2 MAJORITY JUDGEMENTS

In a joint judgement, **Gaudron, Gummow, and Hayne JJ** held:

> *Ordinarily… no separate allowance should be made for the possibility, even probability, that a new relationship will be formed. That is because it cannot be said, even on the balance of probabilities, whether, having regard to the whole of the period which must be considered, that relationship would be to the financial advantage or disadvantage of those relatives of the deceased for whose benefit the action is brought.*[31]

Their Honours referred to a 70 year old judgement in the United States District Court where it was said:

> *If we should enter upon an inquiry as to the relative merits of the new husband as a provider, coupled with his age, employment, condition of health, and other incidental elements concerning him, unavoidably we should embark upon a realm of speculation and be led into a sea of impossible calculations.*[32]

The joint judgement pointed out that the critical thing was not that the inquiry was hard but that it was one which did not lead to a useful answer because the future is uncertain. Life's uncertainties will include things like: what if the deceased had not continued to have the same earning capacity; what if the deceased had become

---

30 *De Sales v Ingrilli* (2002) 23 WAR 417, 437.

31 [2002] HCA 52 [79].

32 *The City of Rome* 48 F 2d 333, 343 (1930).

ill and had to have been cared for by relatives or supported by them? What if the marriage or de facto relationship had not endured? Will the surviving spouse remarry or enter into a continuing relationship which has financial consequences for the spouse and children? All such possibilities may have to be reflected in an assessment of present value of the pecuniary loss suffered by all the relatives, not just a surviving spouse.

In trying to assess a sum of damages that will represent, at the date of judgement, the present value of the benefits that would have been received over time had they not been lost as a result of wrongful death, a balance must be struck of *all* the gains and losses that have been and may be suffered. There is no basis for fixing upon some to the exclusion of others.[33] All that can be done is to select a percentage or a lump sum to allow for an estimated value of those possibilities which may or may not have eventuated if the deceased had lived and those which may or may not occur in the future. While statistics might help, they do not take into account individual cases and characteristics.[34]

Their Honours pointed out that if one possibility (e.g. remarriage) is considered separately from all others, it assumes that it is a contingency whose likelihood of occurrence can be separately assessed with reasonable accuracy and that the financial consequences of its happening will, more probably than not, tend in one direction (financial advantage) rather than the other. Again, statistics provide little useful guidance about the time by which it is more probable than not formation of a lasting new relationship will occur. Nor is the inquiry assisted by fastening upon some superficial characteristics such as "appearance", "personality" or "credentials" and having the court base on those characteristics some estimate of "marriageability". [35]

The justices also thought that even if the difficulties of predicting that a surviving spouse will form a new lasting relationship are overcome, the financial consequences that will follow from it are even less predictable. Among such 'vicissitudes' are all the hazards and benefits that may befall a person or a couple during life – whether the union being considered is that of the deceased and the surviving spouse or the surviving spouse and the new partner. They include death, divorce, separation, unemployment, illness, failed business ventures, redundancy, bad investments or, on the other hand, a new lucrative career opportunity for one

---

33 [2002] HCA 52 [79].

34 [2002] HCA 52 [67]-[72].

35 [2002] HCA 52 [72]-[73].

party. In addition, right from the beginning, the surviving spouse might not be well provided for financially.[36]

According to their Honours, the fact that courts in the past have applied a remarriage discount as a separate item is no reason to continue the error. It would also not be correct to regard prospects of remarriage or a new relationship as a matter calling for an enlarging of the 'vicissitudes of life' discount. The discount must reflect *all* possible 'vicissitudes'.[37]

However, the joint judgement observed that if there was evidence that a new relationship had been formed up to the trial or is intended to be established, account should be taken of evidence revealing whether it has resulted in financial advantage or disadvantage. It would be wrong to assume, however, that the financial consequences, as stated, would inevitably continue. Ordinarily, apart from those situations, no separate allowance should be made for the possibility of a new relationship being formed.

As a result, Gaudron, Gummow and Hayne JJ held that the Full Court's allowance of a 5% discount for the 'vicissitudes of life' was within the standard range for Western Australia and made appropriate allowance for various contingencies including remarriage or a new relationship to the appellant's financial benefit. However, there should have been no separate or further remarriage discount.

Kirby J agreed with Gaudron, Gummow, and Hayne JJ in a separate judgement. His Honour noted the traditional approach inherited from English cases of applying a remarriage discount was one that had, until the case now under consideration, always assumed to be proper and necessary. Kirby J considered the various judicial complaints about the remarriage discount, such as the fact that applying it involved uncertainty and speculation and that it was 'distasteful'. His Honour agreed that the types of inquiries made of a vulnerable spouse plaintiff could be distressing and humiliating. In addition, there were very great disparities in the discounts made by individual judges for the prospect of remarriage.[38]

His Honour listed a number of changed social circumstances (e.g. increasing incidence of divorce; reduced stigma about single women; greater number of women who work; increased life expectancy with the increased chance one partner will place an economic burden on the other partner or the family through illness etc.) that make the foundations of the assumptions about remarriage or repartnering

---

36 [2002] HCA 52 [74].

37 [2002] HCA 52 [76]-[77].

38 [2002] HCA 52 [139]-[151].

to economic advantage more problematic today. In addition, remarriage tables have become unreliable.[39]

Kirby J observed that it was insufficient to abandon past law merely because it requires a measure of speculation. Many damages claims involve a realm of uncertainties and imponderables. Nor should the status quo be departed from because law reform bodies had proposed abandoning the discount. However, in the case of the remarriage discount:

> *The issue having been squarely presented for decision and argued in this appeal and the present approach having been shown to be unjust, unpredictable, anomalous and discriminatory, the time has come for re-expression of the law on the discount for domestic re-partnering. I therefore agree with the joint reasons that, in a wrongful death case, ordinarily, no deduction should be made on account that a surviving spouse or domestic partner will remarry or form a new domestic relationship of economic significance.*[40]

His Honour also said that even where there is proof of a new relationship, this has to be considered in light of all of the circumstances of the case and all contingencies have to be taken into account.[41]

6.3 MINORITY JUDGEMENTS

Gleeson CJ agreed with the orders proposed in the joint judgement but took the view that ordinarily, allowance (but only a modest one) should be made for the possibility of a financially beneficial remarriage as part of the discount for the 'vicissitudes of life' in the same way as allowance is made for the contingency of premature death, unemployment or financial ruin. It is a chance that cannot usually be predicted with any degree of certainty but which, in the population as a whole, is not a chance that can be disregarded as insignificant. However, if there are special or unusual circumstances to indicate an unusually high or low chance of remarriage, a separate and substantial assessment of a remarriage discount may be warranted, such as where a person has actually remarried to his or her benefit before trial (which was not the case here).[42]

Gleeson J's declination to overturn the remarriage discount was based on His Honour's view that by reason of the changing role and status of women and

---

39 [2002] HCA 52 [152]-[154].

40 [2002] HCA 52 [152]-[155].

41 [2002] HCA 52 [161]-[162].

42 [2002] HCA 52 [32], [36]-[37].

increasing independence, a modern widow will be seen as suffering a significantly greater (not lesser) financial loss in consequence of the death of a husband than her counterpart in earlier times.[43] That is because if the discount was not made, the amount to which the spouse is entitled is commensurately greater. Gleeson J would have allowed a remarriage discount of 5%.

McHugh J did not find a case for overturning the remarriage discount. His Honour observed that statistics provided by the Australia Bureau of Statistics showed that 62.2% of widows aged 27 (Mrs De Sales' age at the time of the husband's death) will remarry. If the courts ignore such a figure, which disregards de facto relationships, and abolish the remarriage discount, they would be overcompensating the surviving spouse in a great majority of cases. While the task of valuing the chance of future financial support is difficult, it was no more so than trying to value many other lost chances that courts are often required to value. The actions of the United Kingdom and the Northern Territory in abolishing the discount were no reason for the High Court to do so. McHugh J also put some faith in the availability of reliable statistical data concerning remarriage.[44] In addition, His Honour did not believe that the remarriage discount should be subsumed under the rubric of general contingencies.[45] His Honour agreed with the assessment of the Full Court that the damages be reduced by 25% (including a 20% remarriage discount).

Callinan J also refused to abolish the remarriage discount. His Honour stated that none of the reasons in support of judicial abolition were persuasive so long as it was clearly understood that the discount is not to be made for the possible remarriage itself but for the financial benefits that could reasonably be expected to flow from it.[46] In making the assessment, statistics are only a starting point and should only be considered in light of the evidence in the case as to the more important factors of disposition, inclination to remarry and opportunity to do so, as well as its likely financial advantages. The discount, if to be made, must be made separately and specifically and not as part of the general discount for contingencies.[47] Unlike McHugh, although he also considered that a 5% discount was too little, the discount was a matter for the trial judge who appeared not to

---

43 [2002] HCA 52 [24].

44 [2002] HCA 52 [104]-[112].

45 [2002] HCA 52 [113]-[115].

46 [2002] HCA 52 [184].

47 [2002] HCA 52 [193]-[196].

have made any errors of law in making the assessment.[48] He would have remitted the matter to the Full Court for further consideration.

7 QUEENSLAND LAW REFORM COMMISSION

In July 2000, the then Attorney-General, the Hon M Foley MP, requested the Queensland Law Reform Commission (QLRC) to review (among other things) whether the damages recoverable by a spouse or child in a wrongful death claim should be affected by remarriage or entry into a financially supportive relationship, or the prospect of such. An Issues Paper, *Damages in an Action for Wrongful Death*, was published in June 2002, prior to the High Court's decision in *De Sales v Ingrilli*. Following the High Court's decision altering the common law, further submissions were sought. In November 2003, the QLRC published its Report, *Damages in an Action for Wrongful Death* (the QLRC Report) and annexed a draft Bill that gave effect to its recommendations.[49]

7.1 EFFECT OF A POSSIBLE FUTURE BENEFICIAL RELATIONSHIP

The QLRC Report considered that the issues the Commission had to consider for Queensland was whether the possibility that the surviving spouse may form a future relationship of financially beneficial cohabitation should be taken into account in the assessment of damages. If so, should the possibility be accounted for as a separate discount, or part of the general 'vicissitudes of life' discount, or calculated by reference to a standard discount table?

The QLRC formed the view that taking account of the possibility that the surviving spouse may form a lasting financially beneficial relationship was a highly speculative exercise and that the inquiries necessary to determine it were intrusive and demeaning to the surviving spouse. It also considered that the practice of discounting for such possibility was based on outdated assumptions. These matters, the QLRC believed, outweighed the argument that abolishing the discount risks overcompensation to the surviving spouse and injustice to the defendant.

---

[48] [2002] HCA 52 [197].

[49] The chapters (chs 8 and 9) of the Report dealing with the effects of divorce etc. on the assessment of damages claimed by the surviving spouse and the effect of all of the factors considered in the Report on the assessment of damages claimed by the child of the deceased will not be considered in any detail here.

It was recommended that in a wrongful death claim by a surviving spouse, the possibility that the surviving spouse may form a future financially beneficial relationship should have no effect on the assessment of damages.

The QLRC went on to recommend that, to avoid confusion, the remarriage discount should be abolished by legislation. Thus, the means of accounting for the possibility (either as a separate deduction or as part of the general discount for 'vicissitudes of life') was irrelevant.[50]

In *De Sales v Ingrilli*, the four majority justices abolished the remarriage discount and found that no separate discount should apply. Their Honours also found that the possibility of the surviving spouse forming a future financially beneficial relationship was not a matter which should enlarge the standard discount for the 'vicissitudes of life'. The general discount for 'vicissitudes of life' must reflect all of the possibilities of life, good and bad. It allows for all the contingencies of life, including the possibility of forming a lasting financially beneficial relationship.[51]

The QLRC noted that inclusion of the remarriage discount as part of the deduction for 'vicissitudes of life' would tend to mean that the discounting process is less transparent and not as amendable to judicial review. This point was made by some of the justices in *De Sales v Ingrilli*.[52] The QLRC also considered that subsuming the discount in this way might result in a less individual and rigorous approach to calculation of the discount, impede the development of the law, and hinder settlements of claims.[53]

7.2 Effect of an Actual Subsequent Relationship or an Intended Relationship

In *De Sales v Ingrilli*, the appellant had not entered into a subsequent lasting relationship nor did she have the intention of doing so in the foreseeable future. However, in considering whether or not the remarriage discount ought to be abolished in respect of the possibility of a surviving spouse forming a future lasting

---

50 QLRC Report, pp 54-55; recommendations 6.1 and 6.2.

51 [2002] HCA 52 [46], [76]-[77] per Gaudron, Gummow and Hayne JJ, [161], [167]-[169] per Kirby J.

52 See, for example, [2002] HCA 52 [113] per McHugh J, [168]-[170] per Kirby J.

53 QLRC Report, pp 49-50. For the reasons given at pp 52-54, the Commission also rejected accounting for the possibility of forming a future financially beneficial relationship by reference to a standard discount table. Those include the difficulties associated with the use of statistics, including lack of individual approach in particular cases.

relationship, the Court also had regard to the situation where a spouse has, in fact, formed such a relationship by the time of the trial.

The majority justices noted that if there was evidence of a new relationship having been formed, account must be taken of evidence revealing whether it brings with it financial advantage or disadvantage. However, it should not be assumed that the financial consequences revealed will inevitably continue. Subsequent relationships are exposed to the same kinds of fortune and misfortune as the earlier union such as death, separation or divorce and changes in financial circumstances. Because of the unpredictability of the future, the majority justices thought that a surviving spouse's remarriage etc. to their financial advantage should be considered but not be seen as a prediction of a surviving spouse's future financial position.[54]

Thus, the QLRC was of the view that where there is evidence that the surviving spouse *has actually* formed a lasting relationship, any monetary benefits should be taken into account in assessing damages. The amount of benefit received up to the date of trial can be calculated fairly accurately. However, when considering future benefits, it should not be assumed that they will necessarily continue and the contingencies (e.g. will the relationship endure? Will it continue to provide a benefit to the spouse?) must be considered taken into account. Not to take the existence of the relationship into account would give rise to the chance that the surviving spouse might receive compensation for a loss that has not been incurred.

However, in the case of a surviving spouse *intending* to remarry or form a lasting relationship with an identified person, the Commission could not reach a unanimous decision on whether this should be taken into account in assessing damages. The majority view was that such an intention should have no effect on the assessment of damages.[55]

8 AMENDMENTS TO THE SUPREME COURT ACT 1995

The QLRC Report annexed a draft amendment Bill as an Appendix to give effect to its recommendations. The amendments to the *Supreme Court Act 1995* (Qld) proposed by the Justice and Other Legislation Amendment Bill 2004 (Qld) adopt that draft legislation.

Part 24 of the Bill proposes to amend the *Supreme Court Act 1995*. Only those changes relevant to the wrongful death claims are considered here. **Proposed new**

---

[54] [2002] HCA 52 [75]-[78] per Gaudron, Gummow and Hayne JJ. See also Kirby J at [162] and Gleeson CJ at [33].

[55] QLRC Report, pp 78-81; recommendations 7.1-7.5.

sections 23A to **23D** seek to implement the QLRC Report recommendations discussed above: **cl 114**.

The **proposed new s 23A** prevents the court from taking into account, in a claim for financial benefits lost as a result of a wrongful death, any financial benefits that the spouse may receive as a result of a new relationship that the spouse may enter into after the assessment, even if the spouse intends to enter into the new relationship. The effect is to abolish the remarriage discount for the possibility that the surviving spouse will form a future lasting relationship or even has the intention of doing so.

A 'financial benefit' means either or both monetary or other material benefits having a monetary value.

A 'relationship' is a marriage or a de facto relationship within the meaning of s 36 of the *Acts Interpretation Act* 1954.

A 'spouse' includes the de facto partner of the deceased only if within the meaning of s 18(2) of the *Supreme Court Act* (see above).

However, if the spouse *has* entered into the new relationship since the deceased person's death, the court may take into account any financial benefits that the spouse has received and is likely to receive as a result. This will apply even if the new relationship ends before the assessment.

In considering what financial benefits the spouse is likely to receive as a result of the new relationship the court *must not* assume:

- that the new relationship will necessarily continue; or
- that the spouse will necessarily continue to receive the same financial benefits as he or she has already received as a result of the new relationship.

Proposed new s 23B applies in situations where the court is assessing damages in a wrongful death claim in relation to financial benefits lost by a **child** of the deceased person.

In this context, Chapter 9 of the QLRC Report considered a number of situations in which the child of the deceased might find himself or herself. The child's parent might be the surviving spouse of the deceased or the child's parent may not be the surviving spouse of the deceased. The QLRC took the view that the child's claim must be considered independently of the status of the relationship, if any, between the surviving parent and the deceased or of the relationship between the parent and any other person.

In cases where the parent is also the surviving spouse of the deceased, the Commission thought that the possibility that the surviving parent might form a future relationship of financial benefit should have no effect on the assessment of

the child's damages (given it had determined that such possibility should have no effect on the damages of the surviving spouse himself or herself). Where the parent has entered into another relationship or intends to do so, the deceased would, had he or she lived, have always had an obligation to financially support the child. Thus, the fact that a new relationship has been, or is intended to be formed should have no relevance in assessing the child's damages. Even if the relationship between the deceased and the parent would have broken down but for the death, the deceased's obligation to support the child would have continued. Thus, this consideration should not impact upon the assessment of the child's damages.[56]

The QLRC's recommendations will be adopted by the **proposed new s 23B** which provides that assessment of the child's damages is not affected by whether the relationship between the deceased and the child's parent would have continued if not for the death; or by whether the relationship ended before the death. The court must not take into account any financial benefits the child has or may receive from any person, including any benefits the child has or may receive as a result of a new relationship that the child's parent may enter into or has entered into.

Note that **proposed new s 23C** will provide that the above new provisions do not limit other matters that the court must or may take into account or must or may not take into account in assessing damages.

The above provisions will apply where the court is assessing damages in a wrongful death proceeding after the commencement of the proposed new provisions and it does not matter when the proceedings were started: **proposed new s 23D**.

9 OTHER JURISDICTIONS

9.1 VICTORIA

On 28 April 2004, the *Wrongs (Remarriage Discount) Act 2004* (Vic) came into operation, amending s 17 of the *Wrongs Act 1958*. The legislation now provides that, in assessing damages for wrongful death, the court may not make a separate deduction on account of the surviving spouse's remarriage or formation of a domestic relationship or the prospects of doing so. The extension of the prohibition to all domestic relationships applies regardless of the sex of the new partner.

---

[56] QLRC Report, pp 99-101, recommendations 9.1-9.2.

When introducing the legislation into Parliament, the Victorian Attorney-General said that the new provisions were consistent with Victorian and federal discrimination law which clearly states that it is inappropriate to discriminate against a person based on a number of characteristics, including appearance or their sex. When courts were assessing the prospects of a surviving spouse remarrying in wrongful death claims they would often form their opinion on the basis of the surviving spouse's age, appearance and demeanour.[57]

9.2 NORTHERN TERRITORY

Since 1974, the *Compensation (Fatal Injuries) Act* (NT) has provided that the court is not to take account of a remarriage of the surviving spouse or the prospects of remarriage when assessing damages in a wrongful death action. While only 'remarriage' was specified, there was judicial authority for the view that a de facto relationship or the possibility of forming one was also to be disregarded.[58] However, amendments to the Act in 2003 now ensures that that the courts must disregard a de facto relationship or the prospects of entering into one in assessing damages of the surviving spouse. The changes also recognise same sex relationships.

9.3 OTHER AUSTRALIAN JURISDICTIONS

Assessment of damages to be awarded to a surviving spouse or child of the deceased in a wrongful death action under **Western Australia's** *Fatal Accidents Act 1959*, the New South Wales *Compensation to Relatives Act 1897*, Part 5 of the **South Australian** *Civil Liability 1936* (SA), the **Tasmanian** *Fatal Accidents Act 1934*, and Chapter 3 of the **Australian Capital Territory's** *Civil Law (Wrongs) Act 2002* will now need to be carried out in accordance with the High Court's findings in *De Sales v Ingrilli*. There does not appear to have been any action towards reforming the statute law in these jurisdictions to reflect that decision.

The approach to assessment of damages under the **New South Wales** *Compensation to Relatives Act 1897* was criticised by the NSW Law Reform Commission as long ago as 1969 in a Working Paper which stated:

---

[57] Hon R J Hulls MLA, Attorney-General, Wrongs (Remarriage Discount) Bill 2004, Second Reading Speech, *Victorian Parliament Debates*, Legislative Assembly, 28 October 2003, pp 1294-1296.

[58] Note that the NT situation is complicated somewhat by the existence of statutory schemes for motor accidents and work accidents.

> *The Commission tentatively considers that remarriage of a bereaved spouse should be made an irrelevant consideration for any purpose in the assessment of damages.*[59]

Earlier, it noted that:

> *It may be argued in opposition to this view that the making of remarriage or the possibility of remarriage an irrelevant consideration would be inconsistent with the theoretical basis of claims for damages under the Act, namely that … they should do no more than compensate the dependants for the actual pecuniary loss sustained. The Commission considers that there are at least two replies to such an argument. The first is that in respect of the factor of possible remarriage the courts, in most cases, cannot do more than guess. … The risk of gross injustice is acute. … The second answer is that the verdicts given by juries are a clear indication that the present law does not accord with the conscience of the community. It may be thought to be generally true that a law which offends the sense of decency and fair play of the community is ripe for reconsideration. The present New South Wales Act was taken from the* Fatal Accidents Act 1846 *of the United Kingdom (Lord Campbell's Act). Times have changed.*

The Commission also considered that actual remarriage should be an irrelevant factor in assessment of damages.

Despite these views, there have been no moves yet in NSW to change the legislation to reflect the views of the Commission.

The **Western Australian** legislation was considered by its Law Reform Commission in 1978 in a Report that was opposed to changing the status quo:

> *The Commission has concluded that a provision to the effect that the remarriage or prospects of remarriage of a surviving spouse should be disregarded in assessing damages would operate unfairly and should not be introduced. Assessing the prospects of remarriage may be distasteful both to the spouse and the court, but seems necessary if justice is to be done.* [60]

In taking this view, it referred to observations by the English and Scottish Law Commission, regarding the abolition of the remarriage discount in those jurisdictions, that not to apply a remarriage discount could operate to the benefit of young widows who had already made financially beneficial new relationships as against other older widows whose prospects were not so high.

---

[59] New South Wales Law Reform Commission, *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*, Working Paper 2, 1969, p 75.

[60] Law Reform Commission of Western Australia, *Report on Fatal Accidents*, Project No 66, 1978, para 3.49.

The majority view of the **South Australian** Law Reform Committee in 1972 was that prospects of remarriage should not be taken into account in assessing damages but the court was entitled to consider evidence of an actual remarriage resulting in financial benefit to the surviving spouse.[61] The minority view was similar to that of the majority in *De Sales v Ingrilli* – that the possibility of remarriage was the same as any other contingency and should be taken into account in the same way when assessing damages.

9.4 UNITED KINGDOM

The *Fatal Accidents Act 1976* (UK) was amended in 1971 to prevent courts from taking into account a widow's remarriage or prospects of remarriage when assessing a widow's damages in a wrongful death claim. This was to overcome concerns that inquiries into a widow's remarriage prospects were distasteful and distressing.[62] The same provision applies in Scotland. Note that it applies only to widows. A widower's damages will be affected by his remarriage or the possibility of such and, in a claim by a child of the deceased, remarriage or the possibility of remarriage of the surviving parent must be considered. The court will also have regard to the prospect that the relationship between the deceased and the surviving spouse may have broken down before the death of the deceased.

The provision has been criticised by both the English and Scottish Law Commissions. In 1973, the English Law Commission found the differentiation between widows and other plaintiffs to be anomalous and also argued that it would tend to overcompensate a young widow who has already remarried to her financial benefit as against an older widow who might have only a slight possibility of remarrying.[63] However, a further Law Commission Report in 1999 recommended that the legislation should be expanded to include a widower's remarriage prospects. It also recommended that it should continue to exclude consideration of a widow's/widower's prospects of remarriage or entering into a financially supportive cohabitation in its assessment of damages unless there is evidence that

---

61 Law Reform Committee of South Australia, *Report Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the* Wrongs Act, Report No 27, 1972.

62 England, The Law Commission, *Claims for Wrongful Death*, Report No 263, November 1999, paragraph 4.31.

63 England, The Law Commission, *Personal Injury Litigation – Assessment of Damages*, Report No 56, 1973, paragraph 247. The Law Commission of Scotland was also critical in its *Report on the law Relating to Damages for Injuries Causing Death*, Report No 31, 1973. See also the Great Britain Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission), Report, March 1978, p 29.

she or he is married or engaged to be married at the time of trial or has entered into a financially supportive cohabitation.[64]

The recommendations of the Law Commission have not been implemented by the UK Parliament to date and the law remains that the remarriage discount is abolished but only insofar as a widow's damages are concerned.

9.5 UNITED STATES

Most United States legislatures adopted wrongful death legislation similar to that in Australia and the UK. For well over a century, most US courts have not applied the remarriage discount in assessing damages, either for actual remarriage or for the prospects of such.[65]

9.6 NEW ZEALAND

The *Deaths by Accidents Compensation Act 1952* (NZ) allows wrongful death actions to be brought for the benefit of the wife or husband and the parents and children of the deceased. There is no mention of whether or not remarriage or prospects of such are to be taken into account when damages are assessed. It appears, however, that prospects of remarriage can be considered by the court.[66] Note that the no-fault statutory compensation scheme operating under the *Injury Prevention, Rehabilitation and Compensation Act 2001*(NZ) will apply in the place of other personal injuries legislation, including the *Deaths by Accidents Compensation Act*, in many situations.[67]

---

64 The Law Commission, *Claims for Wrongful Death*, paragraph 4.53.

65 See discussion of the position in the United States by Kirby J in *De Sales v Ingrilli* [2002] HCA 52 [135]-136].

66 See QLRC, Report No 57, p 29, citing *LeBagge v Buses Ltd* [1958] NZLR 630.

67 The *Prevention, Rehabilitation and Compensation Act 2001*(NZ) provides for funeral grants, survivors' grants, and weekly compensation for the spouse, children and other dependants of a deceased claimant.

RECENT PARLIAMENTARY LIBRARY RESEARCH PUBLICATIONS 2004

RESEARCH BRIEFS

RBR2004/01	*An Ageless Australian Workforce*	Mar 2004
RBR2004/02	*The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Act*	Mar 2004
RBR2004/03	*Carbon Commodities on Leasehold Land under the Natural Resources and Other Legislation Amendment Bill 2004 (Qld)*	Apr 2004
RBR2004/04	*The Value of Grey Tourism: Maximising the Benefits for Queensland*	Apr 2004
RBR2004/05	*Rapid Adjudication of Payment Disputes under the Building and Construction Industry Payments Bill 2004 (Qld)*	Apr 2004
RBR2004/06	*An End to Broadscale Clearing by 2006 under the Vegetation Management and Other Legislation Amendment Bill 2004 (Qld)*	Apr 2004
RBR2004/07	*Injurious Affection: The position in Queensland after Marshall and under the Integrated Planning Act 1997 (Qld)*	May 2004
RBR2004/08	*Suicide in Queensland: An Update on Recent Trends and Strategies*	Aug 2004
RBR2004/09	*Home Schooling*	Aug 2004
RBR2004/10	*Childhood Obesity*	Sept 2004
RBR2004/11	*Fluoride in our Water? The Fluoridation of Public Water Supplies Amendment Bill 2004 (Qld)*	Sept 2004
RBR2004/12	*Incorporated Limited Partnerships: A New Business Structure for Venture Capital Investors under the Partnership and Other Acts Amendment Bill 2004 (Qld)*	Sept 2004
RBR2004/13	*High Court upholds validity of Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*	Nov 2004
RBR2004/14	*No More 'Remarriage Discount' – The Justice and Other Legislation Amendment Bill 2004 (Qld)*	Nov 2004

Research Papers are available as PDF files:

- *to members of the general public the full text of Research briefs is now available on the parliamentary web site, URL, http://www.parliament.qld.gov.au/Parlib/Publications/publications.htm*
- *http://www.parliament.qld.gov.au/Library/Query.exe* – e-Documents & e-Articles – Quick display of Library's research publications

A Subject Index to Research Publications is available at the following site: http://www.parliament.qld.gov.au/Parlib/Publications/bysubject.htm
Parliamentary Library - Research Publications & Resources Telephone (07) 3406 7108
Orders may be sent to Carissa Griggs, carissa.griggs@parliament.qld.gov.au

This Publication:

RBR 2004/14 ***No More 'Remarriage Discount' – The Justice and Other Legislation Amendment Bill 2004 (Qld)*** **(QPL, November 2004)**