BRIAN NUGAWELA AND KEVIN WONG, WA

Re: *Plaintiff* (56) April 2003 pp6 –12

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In the above article examining the High Court decision in *de Sales v Ingrilli*,[1] the learned author at page 10 suggests that a claimant's prospects of forming a future financially beneficial re-partnering must always be taken into account, even where there is no established plan to re-partner or actual re-partnering, citing (at footnote 22) the minority view of Gleeson CJ.

The learned author then postulates that 'the facts in *de Sales* may merely be representative of the average case, where on balance the positive and negative factors relevant to the appellant's prospects of remarriage negated each other, to warrant no change to the discount for general contingencies assessed by the Supreme Court'.

We are, respectfully, not in entire agreement with this analysis of the High Court's decision. When extracting *ratio decidenda*, the views of the minority are disregarded, no matter how powerfully expressed or how eminent the minority judges may be.[2]

In our view, a reading of the majority's reasons favours the conclusion that:

- There should be no separate discount for the possibility or even probability that a new relationship will be formed.[3]
- The prospect of re-partnering is not a matter that can properly be used to enlarge the discount for contingencies.[4] The standard discount for general contingencies should not be increased to reintroduce the 'remarriage discount by the back door'.[5]
- The exception, permitting a discount to be applied, is where there has been an actual financially advantageous re-partnering, or the looming prospect of such re-partnering (for instance, actual plans for re-partnering established on the evidence).[6] Any such possible discount must, however, be applied cautiously, having due regard to the specific evidence.

It follows that we also do not entirely agree with the learned author's consequential conclusions (on page 10) concerning how 'a claimant's prospects of financially beneficial re-partnering should be measured' in the future. In this respect, we reflect upon the majority's reasons concerning the limited utility of statistics, the artificiality of resorting to factors such as age, personality or appearance, and, ultimately, the observed futility of the speculative exercise.

Finally, there is another interesting post-*de Sales* decision from the New South Wales Court of Appeal, namely, *Dwight v Bouchier & Ors*.[7]

We sincerely thank you for the opportunity to offer our views. PL

Brian Nugawela of Burswood, Western Australia appeared as counsel for the appellant. **Kevin Wong** of Friedman Lurie Singh in Perth was the instructing solicitor.

Endnotes: **1** [2002] 77 ALJR 99; [20020 HCA 52. **2** See for example *Garcia v National Australia Bank* (1998) 194 CLR 395 at 417-18 per Kirby J. **3** Gaudron, Gummow and Hayne JJ at [46], [76], [79], Kirby J at [161]. **4** Gaudron, Gummow and Hayne JJ at [46], [77]. **5** Kirby J at [169]. **6** Gaudron, Gummow and Hayne JJ at [78], [79], Kirby J at [162]. **7** [2003] NSWCA 3 - see especially Stein JA at [64]-[68], with whom Mason P and Heydon JA agreed.