



Fatal accident CLAIMS AND SUICIDE

By Peter Semmler QC

In all Australian jurisdictions a statutory cause of action is available to certain dependants of a deceased person whose death was caused by the wrongful act of another.¹ This enables them to sue the wrongdoer for damages for losses suffered as a result of the wrongful death of the deceased.

An often overlooked scenario which may give rise to the statutory cause of action is when the deceased dies by his or her own hand. Suicide is no longer regarded as contrary to public policy so as to deny any remedy under the principle of *ex turpi causa non oritur actio*.²

THE CAUSATION PROBLEM

The difficulty in death claims due to suicide very often lies not in proving breach of duty, but rather in establishing causation; that is, was the wrongful act or omission of the defendant a legal *cause* of the death when the most proximal factual cause of which was the act of the deceased? In many cases the deceased's final act constitutes a *novus actus interveniens* so as to break the causal link between the defendant's wrongful act and the death.

As it was put by McHugh J in *Bennett v Minister of Community Welfare*:³

'...the common law concept of commonsense causation accepts that the chain of causation between breach and damage is broken for the purpose of attributing legal responsibility for that damage if there has been an intrusion of "a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic".'

In *AMP v RTA & Another*,⁴ a man who had suffered an injury in the course of his employment with the defendant pursued a claim for damages during the course of which he was cross-examined on an application to extend the limitation period. As a result of the stress of that cross-examination he developed depression and committed suicide eight days later. His widow sued the defendant, *inter alia*, under the *Compensation to Relatives Act 1897* (NSW). She was successful at first instance.

However, in the NSW Court of Appeal it was held that the causal chain between the original tort (the deceased's work accident some years earlier) and the plaintiff's injury was broken. Spigelman CJ expressed the opinion that the deliberate infliction of self-harm should generally be regarded as 'independent and unreasonable' and as a break in the sequence of events that may otherwise constitute a causal chain for the purpose of attributing legal responsibility.⁵

But just because the damage complained of is the immediate result of an intervening act or decision does not necessarily mean that the chain of causation has been broken. As the majority of the High Court said in *Medlin v Government Insurance Commission*:⁶

'...the ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision.'

The suicide has to be regarded as a 'voluntary' act before it will have the effect of severing the causal connection. If the suicide is brought about by a mental illness resulting from the defendant's wrongful act, neglect or default, then it would not be regarded as having the necessary degree of

voluntariness to constitute a *novus actus*.⁷ Thus in *Lisle v Brice*⁸ a motorist who negligently caused minor physical injuries to a man who three years later committed suicide was held liable to pay damages for the support of the deceased's wife and children. The motor vehicle accident had contributed in a material way to the deceased's depression, which in turn led to his suicide.

Suicide does not amount to a *novus actus* where it is the very risk that it is the defendant's duty to guard against. In *March v E & MH Stramare Pty Ltd*,⁹ Mason CJ said at 517-18:

'The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. In some situations a defendant may come under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk... To deny recovery in these situations because the intervening action is deliberate or voluntary would be to deprive the duty of any content.'

In *Reeves v the Commissioner of Police of the Metropolis*¹⁰ the de-facto wife of a prisoner who had committed suicide in police custody successfully sued the Commissioner of Police under the English *Fatal Accidents Act 1976* for negligently causing her partner's death. Because the defendant was aware that the prisoner had made two previous attempts at suicide, the House of Lords held that it was under a duty to take reasonable steps to prevent suicide. Lord Hoffman referred to the case as being one in which "the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being".

In *Da Pos v Mayne Corporation Limited*,¹¹ the plaintiff successfully relied upon the proposition that it was the hospital's duty to guard against the risk of deliberate self-harm in a patient who sought treatment for mental distress. Evidence was adduced to the effect that one of the very risks that competent hospitals should have guarded against, given the symptom profile of the deceased at the time when he presented at the emergency department hearing voices, was the risk of suicide. There was treatment available to the defendant to reduce or eliminate that risk which was not administered. It was successfully contended that, in these circumstances, the content of the duty owed by the hospital to its patient, the deceased Mr Da Pos, required the hospital to take steps to protect him from causing harm to himself.

Highlighting to the jury the fact that the deceased had committed suicide within hours of the hospital's failure to provide him with any treatment, the dependants in *Da Pos* argued that the link between the deceased's voluntary act and the omissions of the defendant was established, based on the commonsense test of causation under Australian law.¹²

The dependants in that case also relied upon the well-established principle that to constitute a cause in law an event need only have made a *material contribution* to the outcome. Two or more distinct causes without any one of which the particular damage (in this case the death of the deceased) would not have been sustained can each satisfy the law of negligence's commonsense test of causation.¹³ It was implicit in the jury's verdict for the plaintiff in *Da Pos* that it >>

found both breach and causation established.

'The duty upon doctors and hospitals in certain circumstances to guard against foreseeable risks of injury caused by voluntary acts on the part of patients applies not only to self-harm by the patient but also to harm perpetrated by the patient to others. In *Presland v Hunter Area Health Service & Another*¹⁴ a psychiatric patient who had been discharged from hospital in circumstances which were held by the NSW Supreme Court to constitute a breach of the duty to the patient, went on to murder a third party, yet was awarded substantial damages, including general damages of \$225,000. Relying upon *March*, the Court did not consider that the fact that the plaintiff's acts were 'in a sense intentional and voluntary' prevented recovery in the circumstances.'

DEPENDANTS DAMAGES IN FATAL ACCIDENTS CLAIMS

What damages are recoverable?

The subject of a wrongful death claim under the legislation in each state and/or territory is compensation for 'injury', a word that is not defined in the relevant legislation. It has been interpreted to mean the loss of benefits that the dependants would otherwise have reasonably expected to receive from the deceased had the accident not occurred.¹⁵ The benefits lost include those from the deceased's financial support and services. The recovery of reasonable 'funeral expenses' is also allowed by the fatal accidents legislation in all states and territories except Queensland and Victoria, where the claim for these must be brought by the estate rather than the dependants.

Loss of financial support

In determining the loss of reasonably expected benefits from the deceased's earnings, it is necessary first of all to have available evidence bearing upon the question of what income the deceased would have earned had s/he lived, and over what period. It is then necessary to consider to what extent the dependants would have benefited from that income, and in respect of each dependant, for how long.

The extent of the share of the dependants (assuming there are no other persons who benefit, or are likely to benefit, from the deceased's earnings) can be assessed by attempting an analysis of the way in which the deceased spent or distributed his/her earnings, and deducting from the total earnings the expenditure related exclusively to the deceased, from which the dependants derived no benefit. This would include amounts spent on the deceased's food, clothing, alcohol, grooming and hobbies. This can be a time-consuming and finicky task for lawyers preparing a claim on behalf of the dependants.

A quicker and easier approach, which does not involve a detailed investigation of the minutiae of a family's expenditure, and which is commonly adopted in Australian courts, is to ascertain the level of dependency of the wife and children by reference to tables of dependency percentages for households of various compositions. Such tables are based

upon surveys of household expenditure undertaken by the Australian Bureau of Statistics (ABS).

A table that is commonly used is that set out in the fourth edition of Professor Luntz's *Assessment of Damages for Personal Injury and Death*, at page 501. This is a table prepared by Mr Richard Cumpston of Cumpston Sarjeant Pty Ltd actuaries, and is based upon the ABS Household Expenditure Survey 1998-1999.

Having ascertained the probable income of the deceased and the extent of dependency for a given family unit, it is then necessary to apportion the loss of financial dependency between each of the dependants. This in turn requires an assessment of the probable period of dependency. In the case of children, an assessment needs to be made as to how long they would probably have remained dependent, which in turn requires an evaluation of whether or not they would probably have gone to university, and at what age they would then have become self-supporting.

The loss of the value of the deceased's unpaid services

The dependants are also entitled to claim for their loss of reasonably anticipated services from the deceased, either around the home or as a parent. Such services traditionally include general domestic duties, cleaning, lawn mowing, gardening, car servicing, house maintenance and childcare assistance. The pecuniary value of such lost services to the dependants can be surprisingly great. With proper preparation and presentation, including adducing evidence with some degree of precision as to the amount of time spent by the deceased on childcare and work around the home, this element of the dependants' damages can be very significant indeed. The value of such services can be allowed in the damages even if, following the death of the deceased, such services are performed by other members of the family: *Nguyen v Nguyen*.¹⁶ Importantly, in death claims where there are no statutory restrictions or caps, the lost services are likely to be valued on the same basis that voluntary services are now valued in personal injuries cases, at the commercial rate.¹⁷

In order to maximise the damages recoverable under this head, not only should as much detailed evidence of the services performed by the deceased around the home and for his or her family be adduced, but also evidence of the commercial cost of such services from the date of death until the date of hearing should be put before the court from an agency that provides such domestic and childminding services.

Although the services provided for children will normally diminish as they get older, this is not necessarily so in respect of the services provided by one partner to another.¹⁸ It is important also to bear in mind that, just because the deceased also benefited from the services that s/he provided, this does not mean that there needs to be any deduction from their assessed value.¹⁹

While the common law to be applied to the assessment of damages in a fatal accidents claim is as set out above, 'tort reform' and other legislation in various states and territories may cap the amounts recoverable for the loss of expectation of financial support, or for the loss of the deceased's services.²⁰

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Deductions and discounts

In assessing damages in a fatal accidents claim, the court must take into account pecuniary benefits arising as a result of the death.²¹ However, certain benefits are excluded by statute.

All Australian jurisdictions now exclude sums paid or payable under any contract of insurance or by way of superannuation, provident or like fund, or by way of benefit from a friendly society, benefit society or trade union, and any Commonwealth social security benefits payable on death.²²

The benefits derived by the dependants from the estate of the deceased also need generally to be taken into account, with a few statutory exceptions.²³

However, the benefit to the dependants for which credit must be given is not the actual value of the assets received on the distribution of the estate but rather the *accelerated* value of those assets.²⁴ In some jurisdictions the relevant legislation

requires any interest acquired in the family home and its contents consequent upon the death to be excluded from deduction. Under the common law, the deduction to be made in respect of the accelerated receipt of an interest in the matrimonial home is usually minimal, if anything at all, on the basis that in most cases, if the deceased had lived, the surviving partner would have continued to enjoy the use of the house and furniture which he or she has now inherited.²⁵

No deduction is to be made for the earnings of a dependant after the deceased's death, even if the dependant would probably not have worked for money had the deceased not died.²⁶

The possibility of a new, financially supportive relationship

Until recently, in all Australian jurisdictions other than the Northern Territory,²⁷ in the absence of specific evidence of actual or intended re-partnering, a separate discount was also frequently made for the prospects of remarriage or entering into another relationship of pecuniary benefit. Where a widow was young and healthy, more than a nominal discount was required.²⁸ The discount could be very substantial.²⁹ The approach taken by the courts in assessing that discount was criticised,³⁰ particularly the fact that the physical appearance of a female surviving spouse was regarded as potentially relevant,³¹ while the physical appearance of a surviving male spouse was usually not taken into account.³² >>

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In *De Sales v Ingrilli*³³ the High Court held, by majority, that no deduction should ordinarily be made in wrongful death actions for the prospect of the surviving partner remarrying or re-partnering, whether as a separate discount or by increasing the discount generally made for the vicissitudes of life.³⁴ Any discount for the possibility of a new relationship is subsumed within the general deduction for contingencies or vicissitudes.

Thus, the High Court has abolished the previously separate and specific discount for the possibility of a financially beneficial remarriage or re-partnering. However, although the majority in *De Sales* held that the possibility of a new relationship was merely one of the vicissitudes of life, where there is evidence that a surviving spouse has in fact formed a new relationship or intends to do so with an identified person, the court is entitled to consider the financial support that may be derived from that relationship.³⁵

The new approach adopted by the High Court has been commended as being at once just and flexible. The previous approach assumed an unrealistic capacity to predict the likelihood of any individual forming a new financially beneficial relationship. On the other hand, the ability of the court to act upon concrete evidence of likely financial benefit from a new relationship is preserved.³⁶

The abolition of the conventional deduction in wrongful death actions for the possibility of remarriage or re-partnering may well result in significantly larger verdicts for the dependants, particularly in cases where the surviving spouse is a physically attractive young woman. However, if the surviving spouse has entered into a new relationship before the trial that is likely to prove financially supportive, the risk of a significant reduction of the damages remains. Practitioners should be careful to question the surviving spouse about other relationships and to factor a possible discount if appropriate into the evaluation of the likely damages for settlement purposes.

There will probably be greater use by defendants of private investigators to scrutinise the surviving spouse's personal life and to obtain evidence of actual or proposed re-partnering in circumstances where a deduction on that account will no longer ordinarily be made as a result of the decision in *De Sales*.³⁷

In Victoria, the common law change has been extended and embodied in the *Wrongs Act* 1958. A recent amendment to that Act now prevents the application of any discount based on the actual or prospective remarriage or formation of a domestic partnership of surviving spouse or domestic partner or surviving former spouse or domestic partner (*Wrongs (Remarriage Discount) Act* 2003 (Vic), s3, amending the *Wrongs Act* 1958 (Vic), s19). ■

This article is an edited version of Mr Semmler's presentation to the National Conference of the Australian Lawyers Alliance in Melbourne in October 2004.

Notes: 1 NSW: *Compensation to Relatives Act* 1897, Vic: *Wrong Act* 1958, Qld: *Supreme Court Act* 1995, SA: *Civil Liability Act* 1936, WA: *Fatal Accidents Act* 1959, Tas: *Fatal*

Accidents Act 1934, NT: *Compensation (Fatal Injury) Act* 1974, ACT: *Civil Law (Wrongs) Act* 2002. 2 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360(HL); *Pallister v Waikato Hospital Board* (1975) 2 NZLR 725(CA). 3 (1992) 176 CLR 408 (at 428). 4 (2001) Aust Torts Reports 81-619. 5 AMP at [30]. 6 (1995) 182 CLR 1 at 6-7. 7 See, for example, *Haber v Walker* [1963] VR 339; *NSW Insurance Ministerial Corp v Myers* (1995) 21 MVR 295; *Lisle v Brice* [2002] 2 Qd R 168. 8 [2002] 2 Qd R 168. 9 (1991) 171 CLR 506. 10 [2000] 1 AC 360. 11 NSWSC No. 20244 of 2001, decided by a jury on 29 April 2004. 12 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. 13 *Medlin* at 6-7 and 9. 14 [2003] NSWSC 754 (19 August 2003). 15 Gleeson CJ in *De Sales v Ingrilli* at [11]. 16 (1990) 169 CLR 245 at 265. 17 *Nguyen* at 265; *Van Gervan v Fenton* (1992) 175 CLR 327; *Targett v Targett* (1999) 9 TasR 234; *Nicol v Rabbit* (2000) 31 MVR 416(QldCA); *Misiani v Welshpool Engineering Pty Ltd* [2003] WASC 263. 18 *Roads & Traffic Authority of NSW v Jelfs* [2000], Aust Torts Reps 81-583 (NSWCA). 19 See Luntz, *Assessment of Damages for Personal Injury and Death*, 4th Edition [9.3.11]. 20 See, for example, ss12(1)(c) and 15(3)-(6) of the *Civil Liability Act* 2002 (NSW). 21 *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 277. 22 See generally Luntz [9.5.1-11]. 23 For example s 10(4)(g) of the *Compensation (Fatal Injuries) Act* excludes 'any other gain or benefits that have accrued or may accrue to the deceased person's estate or to any person for whose benefit an action is brought consequent upon the death of the deceased person'. Practitioners should consult the relevant fatal accidents legislation in their own state or territory to ascertain any relevant statutory exclusions. 24 *Zordan v Metropolitan (Perth) Passenger Transport Trust* [1963] ALR 513. 25 See *Horton v Byrne* (1956) 30 ALJ 583 at 584; and *Zordan*. 26 *Carroll v Purcell* (1961) 107 CLR 73. 27 The possibility of remarriage was abolished in the Northern Territory by s10(4)(h) of the *Compensation (Fatal Injuries) Act* 1974 (NT). 28 *Jones v Schiffman* (1971) 124 CLR 303. 29 In *Tilbee v Wakefield* (2000) 31 MVR 195 the trial judge's discount of 20% was increased to 60% by the Full Court of the Supreme Court of WA. 30 See, for example, Zelling J in *Public Trustee v Paniens* [1971] 1 SASR 297 at 300 – appraising a widow's personal appearance was regarded as 'treating women like cattle'; see also *Goodburn v Thomas Cotton Ltd* [1968] 1QB 845 at 850 per Willmer LJ. 31 *Jones v Schiffman* (1971) 124 CLR 303 at 306 per Barwick CJ. 32 See the Queensland Law Reform Commission, n4, p22. 33 (2002) 212 CLR 338. 34 At [46] per Gaudron, Gummow and Hayne JJ; [161] per Kirby J. 35 *De Sales* at [33] per Gleeson CJ; at [78] per Gaudron, Gummow and Hayne JJ; at [162] per Kirby J. 36 James Sippe: 'Discounting damages in an action for wrongful death brought by a surviving spouse', (2004) 12 Tort L Rev 98 at 110. 37 A point made in 'Evidence of Re-partnering and Wrongful Death Law Reform in Australia', Tracey Carver, ATLA *International Practice Section Bulletin*, Volume 8, no. 2, Winter 2003.

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