

MLL213
Exam Notes
and Cases

Torts Law

All Topics

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Defences

Topic 1

Damages

Tort Law

Compensatory Damages

Four Fundamental Principles: *Todorovic v Waller* (1980)

1. The objective of a damages award is to place the plaintiff in the position she would have occupied if the tort had not occurred.
2. Once and forever' in a lump sum.
3. Court doesn't care how the plaintiff spends the money, or even if the plaintiff spends the money.
4. The onus lies with the plaintiff to prove the loss or injury.

Once and Forever

- The court must award damages to the plaintiff to compensate the plaintiff for all past and future losses.

Fetter v Beal (1760): The plaintiff cannot later return to the court seeking more damages if her injuries turn out to be far more serious than originally assessed.

Gilchrist v Estate of the Late Sara Alexandra Taylor [2004]: Nor can the defendant later return to the court seeking repayment of part of the damages if the plaintiff's injuries turn out to be far less serious than originally assessed.

Section 28N: Section 28N provides that the court can approve an agreement by the parties to a claim for damages for personal injury to settle that claim by way of a structured settlement.

Questions for the Court to Consider

The rule that the court needs to award damages for all future losses necessarily involves the court in making assessments or predictions about what the personal circumstances of the plaintiff would have been in the future had the tort not been committed.

- Would the plaintiff have, in any event, become sick and so have needed to give up work?
- Would the plaintiff have been promoted or retrained in a different job that would have increased her paid income?
- Would the plaintiff have ceased working for a period of time to travel?

Wynn v NSW Insurance Ministerial Corporation (1995)

- The approach the court adopts is to assess the probability that that future event will occur (on this example that a pre-existing condition would force the plaintiff out of the workplace) and reduces damages by a corresponding amount.
- *So if there is a 70% chance that the plaintiff would have been forced to give up work in any event (**that is, for a reason unconnected with the defendant's negligence**), damages are reduced by 70%; if a 30% chance, damages are reduced by 30% and so on.*

Malec v JC Hutton (1990)

- The High Court rejected the argument that a future event would only be taken into account if it was more probable than not that it would have occurred.
- The court restricted the balance of probabilities test to the question whether past factual events had occurred. It was not to apply to the question of whether a hypothetical event might have occurred in the future.
- Even if there was only a very low, for example 5%, probability that the future event would occur, damages had to be adjusted accordingly. (However unrealistic possibilities (less than 1%) should be ignored.)
- When those probabilities are combined, the chance that the plaintiff would develop a neurotic condition decreases exponentially.
- If, for example, and only by way of illustration, there was a 75 per cent probability of his becoming unemployable by reason of his back condition even if he had not contracted brucellosis and a 75 per cent chance that that unemployability would have caused a similar neurotic condition, there was only a 56.25 per cent chance ($75\% \times 75\%$) that, if he had not contracted brucellosis, he would have developed a similar neurotic condition.

Note: Thus, on this assumed set of facts, the plaintiff's claim for loss of earning capacity would be reduced by 75% to reflect the probability that the plaintiff would have become unemployable and suffered a neurotic illness anyway because of the unconnected back condition. His claim for damages for gratuitous care for his wife (who had to care for him because of his neurotic illness) and pain and suffering related to the neurotic illness would be reduced by approximately 56% to reflect the probability that the back condition would cause the onset of the same neurotic condition.

3. Court Doesn't Care How/If Money is Spent

Skelton v Collins (1966): One consequence of this third rule is that the court will award damages even though the plaintiff will not be able to spend them, for example because the plaintiff is permanently unconscious.

Griffiths v Kerkemeyer (1977): gratuitous home care cases, where the courts have stated that a plaintiff is entitled to the cost of home nursing care even though that home care is being provided for free by a family member.

Gray v Richards [2014]: Where the defendant's tort has impaired the plaintiff's intellectual capacity to manage a lump sum damages award so as to put the plaintiff in need of assistance in managing that sum, the cost of obtaining that assistance is recoverable. The cost of managing the fund is recoverable as the need for this cost is created by the tort. The plaintiff is entitled to recover the full cost of managing the damages award, including the cost of managing the amount awarded for funds management (fund management damages on fund management damages!).

Legislative Reforms

Note: The statutory reform provisions in Part VB and Part VBA of the Wrongs Act do not apply where 'the fault concerned was an intentional act done with intent to cause death or injury or that is sexual assault or other sexual misconduct': ss 28C, 28LC. Accordingly, keep in mind that the reforms in the *Wrongs Act* discussed below will NOT apply to such claims.

Heads of Compensatory Damage

Economic Losses:

1. Hospital and medical expenses; and
2. Loss of earning capacity;

Non-Economic Losses:

1. Pain and suffering
2. Loss of enjoyment of life/loss of amenities; and
3. Loss of expectation of life

Economic Loss

Hospital and Medical Expenses

Sharman v Evans (1977)

- In that case the court refused to order the cost of home care on the basis that it would be unreasonable.
- The court said that home care (usually 3-4 times more expensive than hospital care) will be awarded only where the expense is reasonable in terms of conferring a significant health benefit on the plaintiff.
- This health benefit might be physical or psychiatric, however it will not be enough merely to show that the plaintiff would be happier being cared for at home.
- The plaintiff, in order to recover the cost of home care, must establish that her physical or psychiatric condition will be improved by living at home.

Note: Community attitudes toward home care have changed since the decision in *Sharman v Evans*, and the courts are now much more likely to award damages for home care to enable disabled persons to live independently: see, eg, *Burford v Allan* (1993) 60 SASR 428; *Altmann v Dunning* [1995] 2 VR 1; *Rosecrance v Rosecrance* (1995) 105 NTR 1.

Diamond v Simpson (2003): The plaintiff suffered cerebral palsy as a result of a negligent forceps birth by the defendant medical practitioner. The plaintiff succeeded in recovering damages for the cost of having a home purpose-built for her or modified for her disabilities. However, *the New South Wales Court of Appeal rejected her claim for the costs of modifying her parents' home, as she would no longer be living there. It also rejected her claim for the costs of modifying a holiday house owned by her parents as the house was only used for a few weeks a year.*

Gratuitous Care Services

Kars v Kars (1996): These damages are awarded on the basis of the need of the plaintiff for the care, not the cost to the plaintiff of obtaining that care, and the court does not concern itself with whether or not the plaintiff will reimburse the provider.

- The Court also recognized that the 'vicissitudes of life ... could throw the plaintiff back on others, including commercial care givers, for services no longer provided by the tortfeasor'. The High Court in these cases have emphasized that the award is for the *plaintiff's need for the services*, and also recognised the social reality that the voluntary carer might not always be able or willing to provide the services.

Van Gervan v Fenton: Gratuitous care damages are to be awarded on the basis of the market value of the home nursing care, and not by reference to the income that was lost by the carer.

Wrongs Act: Gratuitous Care Services

The *Wrongs Act* imposes limitations on the ability of plaintiffs to claim for gratuitous care. The Act applies to 'gratuitous attendant care services' defined in s 28B as meaning attendant care services:

- (a) that have or are to be provided by another person to a claimant; and
- (b) for which the claimant has not paid or is not liable to pay;

Note that 'attendant care services' are defined in s 28B as:

- (a) Services of a domestic nature (eg cooks meals, performs housework previously done by the plaintiff, assists with personal grooming).
- (b) Services relating to nursing (eg. provides other nursing or medical care (such as physiotherapy)).
- (c) Services that aim to alleviate the consequences of an injury

Section 28IA(1): Damages for 'gratuitous attendant care services' (that is, gratuitous care damages) must not be awarded unless the court is satisfied that:

- (a) there is (or was) a reasonable need for the services to be provided;
- (b) that need arises or arose solely because of the injury to which the damages relate and
- (c) the services would not have been provided to the claimant 'but for' the injury.

Note: Section 28IA(1) probably merely reflects a common law requirement that there must be a causal link between the wrong and the injury that is claimed, and does not effect a change to the previous common law principles.

Section 28IA(2): Alters the common law by precluding a plaintiff from claiming for gratuitous care where it is minor and falls within what would ordinarily be expected of loved ones. Section 28IA(2) provides that:

Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided—

- (a) for less than 6 hours per week; and
- (b) for less than 6 months.

'And'/'Or'

- The better view is that the conditions are cumulative, so that the preclusion on damages applies only where *both* conditions are satisfied.
- On this view, for example, if the services are to be provided for less than 6 hours a week, but for longer than 6 months, the bar in s 28IA would not apply and gratuitous care damages could be awarded.

Harrison v Melhem (2008, NSW): In that case the Court of Appeal emphasized that s 15(3) did not lay down conditions the plaintiff must satisfy in order to **qualify** for damages; rather it specifies the conditions that will **preclude** the plaintiff from claim damages. On the natural meaning of s 15(3), it specified that the two conditions were cumulative conditions, and as such both conditions must be satisfied before the preclusion would apply. Accordingly, on this view, the plaintiff can overcome one of the two thresholds by showing *either* that the care was provided for more than six months, *or* that it was provided for more than six hours per week. ***This decision was followed in Alcoa Portland v Victorian WorkCover Authority [2007, Vic].***

Note: It is noted that there is no reference in s 28IA(2) to consecutive months (cf s 28ID below), permitting a plaintiff to recover where the care was (or will be) provided for more than 6 months in total, even if not consecutive.

Cap on Gratuitous Care Services

Section 28IB:

- places a cap the amount of gratuitous care damages that can be awarded, by linking them to average weekly earnings of all employees in Victoria.
- If the services are provided or are to be provided for 40 or more hours per week, the amount of damages awarded per week must not exceed the average weekly total earnings of all employees in Victoria.
- According to ABS statistics, as of November 2015 the average weekly total earnings of all employees in Victoria was \$1,073.70.
- If the services are to be provided for less than 40 hours per week the damages are to be pro-rated (an hourly rate of one-fortieth of \$1,073.70, or \$26.84 per hour).

Loss of the Claimant to provide Gratuitous Care for the Claimant's Dependents

CSR LTD v Eddy [2005]: High Court held these damages are not available as a separate award at common law. The court held that the focus must be on the needs of the *plaintiff* not on the needs of third parties. Thus, while the plaintiff can recover a sum as part of non-economic loss for the frustration and anxiety of not being able to continue to care for a loved one, the plaintiff cannot recover as a special item an amount representing the market value of this care. **(LOOK AT WRONGS ACT)**

Section 28ID:

Court may award damages for loss of capacity to provide gratuitous care to dependants:

(1) Despite anything to the contrary at common law, a court may award damages to a claimant for any loss of the claimant's capacity to provide gratuitous care to the claimant's dependants.

Note This section and section 28IE do not apply to certain actions for damages—see section 28IF.

(2) However, a court may only do so if the court is satisfied that—

(a) in the case of any dependants of the kind referred to in paragraph (a) of the definition of ***dependants***—the claimant provided the care to those dependants before the time that the liability in respect of which the claim is made arose; and

(b) the claimant's dependants were not, or will not be, capable of providing the care themselves because of—

(i) their age; or

(ii) their physical or mental incapacity; and

(c) there is a reasonable expectation that, but for the injury to which the damages relate, the gratuitous care would have been provided to the claimant's dependants—

- (i) for at least 6 hours per week; and
- (ii) for a period of at least 6 consecutive months; and
- (d) there will be a need for the care to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

(3) In determining the amount of damages (if any) to be awarded to the claimant for any loss of the claimant's capacity to provide gratuitous care to the claimant's dependants, a court—

- (a) may only award damages for that loss in accordance with this section and section 28IE; and
- (b) must not include in any damages awarded to the claimant for non-economic loss a component that compensates the claimant for the loss of that capacity.

Section 28ID(2):

Four requirements that must be met:

- (a) First, in respect of dependants that were living at the time that the claim arose, the court must be satisfied that the claimant provided care to those dependants before the time at which the liability in respect of which the claim is made arose, and
- (b) Secondly, in the case of all dependents (whether alive when the claim arose or not), the court must be satisfied that the dependants were incapable of having provided, and are incapable of providing in future, the care because of their age or physical or mental incapacity, and
- (c) Thirdly, the court must be satisfied that, but for the injury to which the damages relate, the care would have been provided to the dependants for at least 6 hours per week for at least 6 consecutive months, and
- (d) Fourthly, that there will be a need for the care to be provided for those periods in future, and that need must be reasonable in all the circumstances.

Definition of 'Dependent'

S28A: 'any persons who are wholly, mainly or in part dependent on the claimant at the time of the injury...[including] any unborn children of the claimant (including unborn children derived by adoption or otherwise) at the time that the liability in respect of which the claim is made arises and who is born after that time'.

Amaca v Novek [2009]: The courts have interpreted the definition of dependants in s 28A as not being limited to persons who the plaintiff was *legally obliged* to support (such as a child), and has been held to extend, for example, to child minding services provided by a grandparent to a grandchild.

Section 28IE:

- Provides caps on the amount of damages for loss of ability to care that can be provided.
- It provides that damages for the loss of ability to provide gratuitous care to dependants, if rendered for 40 or more hours per week, must not exceed the average weekly total earnings of all employees in Victoria (at present \$1,073.70).
- If the services are to be provided for less than 40 hours per week the damages are to be pro-rated (an hourly rate of one-fortieth of \$1,073.70, or \$26.84 per hour).

Loss of Earning Capacity

- The court will compensate the plaintiff for past loss of income, that is, income lost between the date of the accident and the date of the trial. This loss can be estimated with some certainty and will usually be awarded as a sum of special damages.
- The courts will also award damages for the loss of capacity to earn income into the future.

Formula

- The first component in assessing damages for future loss of earning capacity is the plaintiff's 'pre-accident' or 'without injury' earnings, multiplied by the number of weeks or months the plaintiff would have been expected to work had he or she not been injured (this will include any 'lost years' as discussed below).
- Where a plaintiff was fully exercising their earning capacity prior to the accident, pre-injury earnings will be the starting point. From the 'without injury' earnings is then deducted the 'post-accident' or 'with injury' earnings – this represents the earning capacity of the plaintiff following the accident.
- This difference is the amount that is generally used as the basis for the award of loss of earning capacity damages, subject to deductions for saved expenses and expenses for vicissitudes of life.

Adjustments to Damages

1. The amount is adjusted to take into account the tax that the plaintiff would have had to pay on that amount: s 28A of the *Wrongs Act*.
2. The amount is reduced by the amount of any items of expenditure that the plaintiff has been saved because she can no longer work, or can no longer work full time.

Wynn v NSW Insurance: Expenses which merely provided the plaintiff with the *opportunity to work* (at any job), such as child care expenses or paid housekeeping, are not to be deducted as they are optional, private expenses.

3. The amount is adjusted to take into account the normal vicissitudes of life (sickness, accident, unemployment and industrial disputes) as well as any personal circumstances of the plaintiff that might impact upon the future loss of earnings... The discount is often in the range of 5-20% but could be much more where the plaintiff has a pre-existing medical condition or in a job which has a high risk of accident or disease (Wynn).

Further Notes

Skelton v Collins (1966): The plaintiff is to be awarded loss of earning capacity over the full period that she would have been expected to work prior to the accident. Where the defendant's negligence has shortened the plaintiff's life expectancy, the plaintiff is awarded loss of earning capacity for the 'lost years' (this is because the damages is not for 'loss of income' but for loss of *capacity* to earn the income).

Sharman v Evans: The courts will deduct an amount which the plaintiff would have spent on herself for items such as clothes and food during the lost years, to represent the reality that she will no longer need to expend those items.

Bradburn v Great Western Rwy (1874): A benefit only operates to reduce damages where it directly results from the tortious conduct.

Cap on Damages for Loss of Earning Capacity (s28F)

Section 28F: Caps the amount that can be awarded for lost earning capacity to three times the average weekly total earnings of all employees in Victoria.

Discount to Present Value

- The sum awarded for future economic losses (future medical expenses and loss of earning capacity) is discounted to bring it back to its present value.
- This discount rate is applied to take into account the fact that the plaintiff receives the money now, not at some time in the future, and so can invest the money and earn interest.
- The discount rate is set at 3% at common law, however the *Wrongs Act* has now set a **5% discount rate (s 28I) for negligently caused personal injuries**. Thus, the damages award will be discounted by **3% if the injury was caused intentionally or was a sexual assault (in which case the Wrongs Act reforms will not apply)**. However, if the injury was caused **negligently**, the 5% discount rate will be appropriate.

Non-Economic Losses

The *Wrongs Act* defines non-economic loss as meaning:

- 1) Pain and suffering
- 2) Loss of amenities of life
- 3) Loss of enjoyment of life (ss 28B, 28LB)

Pain and Suffering

- Under this head of damage the plaintiff is to be compensated for any past or ongoing physical pain as well as the psychological consequences of the disability (for example, anger, frustration and anxiety about the injuries).

Skelton v Collins: Damages under this head are entirely subjective, so that the permanently unconscious plaintiff will not receive an award

Loss of Enjoyment of Life (Loss of Amenities)

- Designed to compensate the plaintiff for any continuing disability or disfigurement that curtails the plaintiff's enjoyment of life, at least so far as money can do.
- It will include loss of capacity to engage in hobbies or recreational activities such as sport, and being deprived of the enjoyment of engaging in normal human activities, such as work, friendships, marriage and childbearing.
- Damages for loss of enjoyment of life are largely assessed from the subjective perspective of the plaintiff, and are designed to compensate the plaintiff for mental distress and feelings of frustration as a result of being unable to participate in activities or otherwise having their enjoyment of life curtailed.

Skelton v Collins: Because damages under this head are largely assessed from the subjective perspective of the plaintiff, the more active the plaintiff was before the accident, the greater the damages that will be awarded under this head (paraphrased).

Loss of Expectation of Life

- Where the plaintiff's life is shortened by the defendant's negligence, the plaintiff will be awarded damages as consolation for the fact of the lost years. Even where the plaintiff is conscious, damages under this head are usually only a modest sum (*Sharman v Evans*), say around \$10,000 to \$20,000. The award does not vary depending on the victim's age or amount of years lost.

Sharman v Evans (1977): As the plaintiff's hospital and medical expenses were to be assessed on the basis of a lifetime substantially spent in hospital, the plaintiff's damages for loss of enjoyment of life needed to be increased to take into account this institutional lifestyle. However the plaintiff's damages for loss of earning capacity needed to be reduced to take into account the fact the plaintiff would not need to spend money on food and accommodation, as she would have been required to do prior to the accident.

Caps the Thresholds for Non-Economic Loss

Note: The caps and thresholds in the *Wrongs Act* discussed below do not apply where ‘the fault concerned was an intentional act done with intent to cause death or injury or that is sexual assault or other sexual misconduct’: ss 28C, 28LC.

Section 28G: Provides for a cap of \$577,050,

Section 28LE: A person can only recover non-economic loss where the plaintiff has sustained a “significant injury”.

Section 28LF: An injury is a significant injury where:

- (a) the injury satisfies the threshold level in s 28LB (see below);
- (b) the injury is loss of a foetus; or
- (c) the injury is psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or
- (d) the injury is loss of a breast.

Section 28LB defines the threshold level as being:

- (a) in the case of injury (other than psychiatric injury or spinal injury), impairment of more than 5 per cent;
- (b) in the case of psychiatric injury, impairment of 10 per cent or more;
- (c) in the case of spinal injury, impairment of 5 per cent or more.

Note: The result is that in the case of physical injuries (other than spinal injuries, loss of a foetus or loss of a breast) the plaintiff must establish an impairment of **more than 5%** to recover economic loss. In the case of spinal injuries, the plaintiff must establish an impairment of **5% or more** to recover economic loss.

Psychiatric Injury: Amended the threshold level for recovering non-economic losses for a psychiatric injury to **10% or more**.

Section 28LJ: In determining the extent of impairment, any psychiatric injury arising as a consequence of physical injury (that is, secondary psychiatric injury) is to be ignored.

Examples of Thresholds Reachable/Unreachable

Some examples of impairments that would not reach the threshold under the new regime (and therefore non-economic loss would not be available) are:

Small scar on hand:	3%
Bruising to shoulder with minor loss of motion:	4%
Fracture of kneecap with complete recovery:	3%
Loss of taste:	3%
Loss of big toe:	5%
Loss of little finger:	5%
Loss of sense of smell:	3%

Examples of impairments that would meet the threshold are:

Sprained wrist with minor loss of motion:	6%
Sprained ankle with moderate loss of motion:	6%
Mild partial loss of sensation in mid-forearm	6%
Soft tissue back injury:	12%
Use of ankle brace:	15%
Moderate dislocation of shoulder:	15%
Loss of sight in one eye	28%
Loss of one arm	60%
Quadriplegic who needs a ventilator to breathe	100%

Exemplary Damages

Lamb v Cotogno: Exemplary damages are not compensatory but are designed to punish the tortfeasor and to deter the tortfeasor and others from engaging in like conduct. They will only be awarded in exceptional cases, where the defendant has acted in 'conscious and contumelious disregard for the plaintiff's rights'.

Damages Awards – Deceased Plaintiffs

Where the victim of the tort has died, there are two possible causes of action that can be taken by the estate or dependants (either in the alternative or in combination):

1. The estate can bring a claim under survival of actions provisions to recover economic losses incurred by the victim between the date of the accident and the date of the death, and/or
2. If the victim had dependants, the dependants can sue under wrongful death legislation for loss of financial support and loss of domestic services in the period after the death.

Claims by the Estate – Survival of Actions

Section 29 (Administration and Probate Act 1958):

- The cause of action can be continued or commenced by the executor of the estate after the death of the victim.
- This applies both where the victim died as a result of the tort and where he/she died for unrelated reasons.
- Under this legislation, where the victim has died as a result of the tort, the estate can recover: funeral costs, the loss of income/earning capacity between the accident and the death, and the hospital and medical expenses incurred between the accident and the death.
- Gratuitous care (between the accident and the date of the death) is also recoverable, subject to the statutory thresholds and caps discussed above.
- Non-economic loss is not recoverable where the deceased died as a result of the tort.

Claims by the Dependents of the Deceased

If the victim had dependants, the dependants can bring an action under the *Wrongs Act* 1958 (Vic) for the loss of the support that the dependants reasonably expected to obtain from the deceased. Pursuant to s 16 of the *Wrongs Act* 1958 (Vic) dependants must demonstrate that:

1. The deceased's death was caused by the tortious conduct – as to which see *Haber v Walker* [1963] VR 339 (supplement), and
2. had he or she lived, the deceased would have been entitled to maintain an action (ie a tort such as battery and/or negligence must be established) and
3. the deceased could have recovered damages on such an action (ie the action would not have been time barred or prevented by a defence such as voluntary assumption of risk (see this defence in topic 10).

Haber v Walker: it is not necessary to show that the suicide was reasonably foreseeable; on their Honours' view that test under the legislation is merely one of causation (**persuasive judgment**).

Assessment of Damages on a Wrongful Death Claim

The dependants can claim damages for loss of financial support and loss of domestic support. Please read the principles in Mendelson, keeping in mind in particular the following points:

1. The action is that of the dependants, not the deceased's. The dependants sue for *their* loss, namely loss of financial support, not the deceased's loss. Though of course the courts must work out the deceased's loss of earning capacity in order to determine the financial support lost by the dependants, this is the only the starting point as ultimately the enquiry is how much of those earnings would have been used to support the dependent. Pursuant to s 28F of the *Wrongs* the courts should now disregard the *claimant's* lost income to the extent that his/her gross income exceeded (or would but for the injury have exceeded) an amount that is three times the amount of average weekly earnings at the date of the award: s 28F. See the discussion below regarding the operation of this cap.
2. Loss of services provided in the home by, example, a spouse or parent is a compensable loss: *Nguyen v Nguyen* (1990) 169 CLR, provided they were being provided for at least 6 hours per week and had been provided for at least 6 consecutive months before the death: s 19A *Wrongs Act*. Damages for the loss of services (if rendered for 40 or more hours per week awarded per week must not exceed the average weekly earnings of state workers. If the services were provided for less than 40 hours per week the damages are to be pro-rated: s 19B.
3. The legislation does not permit an award of a solatium to compensate the family members for the grief or emotional distress arising from the death of a loved one.

De Sales v Ingrilli [2002]: However the Full Court of the Western Australian Supreme Court increased the discount to 20% as the claimant was very attractive, and deemed to have good prospects of re-marrying. The claimant appealed to the High Court, which reinstated the 5%. The Court held that the prospect that the claimant will remarry is highly speculative and should not give rise to a separate discount or enlarge the discount the court would otherwise apply for the negative vicissitudes of life. (*s 19(2) Wrongs Act, which was inserted in 2003 by the Wrongs (Remarriage Discount) Act 2003 (Vic). Section 19(2) provides that no separate reduction should be made for re-marriage or re-partnering, or for the prospect of that occurring.*)

Baker v Bolton (1808): a person cannot recover damages for the death of another. The surviving spouses could claim as dependants under the Lord Campbell's Act (which has been enacted in Victoria in the *Wrongs Act*) however an employer's entitlements are governed by common law, and common law did not permit such a claim. (*reinforced by the High Court in Barclay v Penberthy [2012]*).